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Case Number 175,2023D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY DAVIS,	)	
	)	
Defendant—Below,	)	
Appellant	)	
	)	
v.	)	No. 175, 2023
	)	
	)	
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff—Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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DATE: October 26, 2023

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NATURE AND STAGE OF PROCEEDINGS

a. Case Nos. 2007007688 & 2007007351

Anthony Davis was arrested on July 16, 2020 (A1, A11), and on August 30, 2021, indicted on Drug Dealing fentanyl, cocaine, and methamphetamine; Possession of cocaine and methamphetamine; and various traffic offences. A20—22. A motion to suppress was filed on April 29, 2022 (A3, D.I.#8; A12, D.I.#17), and responded to the by the State on February 1, 2023 (A5, D.I.#39). The motion was heard and denied on February 3, 2023. A6, D.I. #38; A15, D.I.#37. Davis was tried before a jury on March 6 and 7, 2023, and convicted of Drug Dealing (fentanyl) and the traffic offences but acquitted of all other charges. A8, D.I.#57; A17, D.I.#53.

b. Case No. 2101001980

Davis was arrested on January 6, 2021 (A272), and on May 24, 2021, indicted on Drug Dealing cocaine and fentanyl; Possession of cocaine; and Resisting Arrest. A281—282. A motion to suppress was filed on January 23, 2023 (A277, D.I.#46), and heard and denied on February 3, 2023. A278, D.I.#50. Davis was tried before a jury on March 14 and 15, 2023. The Resisting Arrest charge was dismissed before trial and Davis was convicted of all three drug dealing offenses. A279, D.I. #60

c. Sentencing and Notice of Appeal

On April 28, 2023, Defendant was sentenced to 24 years at Level V, suspended after 1 year, followed by probation. Exhibit A. Trial counsel timely filed a joint notice of appeal on May 22, 2023. This is Davis's Opening Brief.

SUMMARY OF ARGUMENT

1. For good reason, this Court has explicitly held that drug courier profiling testimony is admissible to show substantive guilt at trial. Nonetheless, in each of the two trials being appealed, the State called a witness to do exactly that, and during closing, explicitly relied on that impermissible testimony as proof of Davis' substantive guilt. Despite being directly contrary to this Court's precedent, the trial judge permitted this highly prejudicial and minimally probative (if probative at all) testimony, and in doing so, violated Mr. Davis's due process rights, and committed plain error. This Court must reverse.

STATEMENT OF FACTS

a. Trial # 1: Cases 2007007688 & 2007007351

Officer Christopher Nikituk[1]

Officer Nikituk is a New Castle County Police Department (NCCPD) officer who, on July 16, 2020, was conducting proactive patrol on Philadelphia Pike. A47. Officer Nikituk observed a car driven by Mr. Davis change lanes while using a turn signal, but allegedly not before the requisite 300 feet. A48—49. During the resulting traffic stop, Officer Nikituk observed a "tear-off baggie," which he claimed is used for drugs. A52. Mr. Davis was then asked to step out of the car. A63. Officer Nikituk searched Mr. Davis's buttocks area where he found a sandwich bag containing 55 bags of what he suspected to be heroin. A66. Officer Nikituk described the bags as having blue wax with "final destination" stamped in black. A69. An additional bag of suspected heroin, and $457 were located during a search of Mr. Davis and the car. A69—72.

Officer Jason Short

Officer Short, also an NCCPD officer, met officer Nikituk to assist in the traffic stop. A89. After the discovery of the drugs, Officer Short placed Mr. Davis in his vehicle and informed Mr. Davis that he would confirm the vehicle was empty

[1] Officer Nikituk's body camera video was admitted as State's Exhibit 1 (A32), and then later "revoked." A43.

beforehand. A27, A91—92; State Exhibit 2. The next day, Officer Short found a black bag in an empty ammunition can in the back of his car. A95. Inside the bag, he found 45 baggies of suspected heroin, stamped "final destination." A96—97, A102.

The bags were not fingerprinted or tested for DNA. A112—13. However, Officer Short claimed that, normally, nobody other than him accesses his vehicle, and that, on July 16, 2020, nobody had been in the back of his vehicle prior to Mr. Davis. A91.

Nicole Gerlach

Nicole Gerlach is a forensic analytical chemist at the Division of Forensic Science (DFS). A117. She testified about her training and experience (A118—120) and explained how drug testing is coordinated and facilitated between her office, and the police. A120. She was involved in testing the seized substances in this case and prepared a report. A128. According to her report and testimony, the seized substances were 6.953 grams of cocaine, 6.6738 grams of methamphetamine, and 1.22 grams of fentanyl. A130—37. Apparently, what law enforcement had suspected to be heroin, was mostly fentanyl. A135—40.

Detective Jeffrey Silvers

Det. Silvers is a member of the Wilmington Police Department, not NCCPD. A176. His knowledge of the facts comes from other officers' reports. A180. Det.

Silvers told the jury that he had been an officer for over 25 years, 18 of which have been in the Drug and Organized Crime Division but claimed that his involvement in this case was *not* in his capacity as a police officer. A176, A180. He testified that he has been involved in thousands of drug investigations, which make up 98% of his work. A177. He further claimed that he interacts with drug purchasers and sellers daily and tries to stay up on "the current trends of what's going on, what is being sold and how it's being sold, the prices of different drugs." A178.

When asked by the prosecutor to "tell the jury about cocaine," Det. Silvers took the opportunity to inform the jury that "crack cocaine is a drug that is highly addictive, fairly inexpensive, and used by quite a few people." A182. He testified that the crack cocaine possessed by Mr. Davis, if sold in units of a tenth of a gram, would go for almost $700. A182. He also testified that cocaine is typically packaged in "very small plastic containers." A183. As to the fentanyl, he testified that 1.21 grams, if sold in single dose units of .07 grams, would be approximately $1,500. A185. And as to the methamphetamine, he conceded that he was less familiar, but believed a .1-gram bag goes for approximately $10. A186. At no point did he explain why this pricing information was relevant.

Det. Silvers explained why bags have stamps:

> *Stamps are used, it's almost like a brand. When these drugs hit the street there's a name stamped to them, they are looking to get people to want to purchase that stamp. It's so a lot of the users on the street know, hey, that is the*

> *newest stamp out, that is the really good stuff, that's the really bad stuff. So they will actually go out seeking specific stamps as a brand in order to get that drug to use.* A183.

And how many bags are in a bundle:

> *Bundles are usually packaged. If a buyer is going to buy a larger amount, sometimes they'll buy up to a bundle, bundles typically are 13 bags. I don't know why or where they came up with 13 bags, but it's typically 13 bags in a bundle. You can get a better price if you buy a bundle*. A184.

And, when shown a photo of the crack cocaine packaging, Det. Silvers added a racial dimension to the case, stating:

> *In the city we call them Dominican knots because typically Dominican drug dealers use this packaging style, sandwich bag, put whatever amount they are going to sell in the corner of that bag, they'll twist it off and tie it in a knot*. A187.

Det. Silvers was shown a property receipt for the $457 seized in the investigation and stated that "multiple denominations and high numbers of those denominations" is "very common for people that are selling drugs." A188. He provided no testimony as to whether or not it was also very common for people who were not selling drugs.

Finally, Det. Silvers testified that, based on his "personal opinion," Mr. Davis intended to sell the drugs. A188. When asked to explain that conclusion, he made no mention of packaging, "Dominican Knots," or stamps, and instead relied entirely on

the weight of the drugs. A189. He also – as he had previously done with the cocaine – warned the jury that even one bag of Fentanyl can kill a person. A189.

b. Trial 2: Case 2101001980[2]

Officer Antonio Delisi[3]

On January 6, 2021, Officer Delisi of the NCCPD, lawfully stopped a Toyota Camry which Mr. Davis was driving. A287—91. During a search of the car and Mr. Davis's person Officer Delisi found "a couple hundred dollars," and a bag of drugs in a hidden compartment underneath the center console. A291—93. He believed that a screwdriver found in the back of the car would have been used to access the compartment. A296—300. He found no personal use paraphernalia. A304.

Officer Joseph Mihalyi

Officer Mihalyi of the NCCPD was charged with collecting the evidence in this case. A310. He testified that the vehicle was a rental, a 2021 model and looked like a new vehicle. A358—59. However, he conceded that he had "no idea how long" the rental company had the car, or how many people had used it before Mr. Davis. A317.

In the bag found in the compartment were 13 bags of what police believed to be fentanyl, and 46 bags of what police believed to be crack cocaine. A315. Once

[2] The transcripts for this trial are mislabeled as Case No. 2007007351. A283.
[3] Officer Delisi's body camera video was admitted as State's Exhibit 3. A14.

they got back to the station, and reviewed the evidence, they found an additional 84 bags of suspected fentanyl, for a total of 97 bags. A343—44. Officer Mihalyi testified that the cash taken from Mr. Davis totaled $490. A48.

Officer Mihalyi did not find any personal use paraphernalia. A331. The bags were tested for latent fingerprints and DNA, but neither was found. A347. The screwdriver was not processed for fingerprints or DNA. A354.

Police also seized a cell phone from the car and conducted an extraction. A331. Over objection, the State introduced seven text message exchanges found within the extraction. A336. In one message, a contact asks, "how many for 20?" and the unidentified operator of the seized phone replied "two." A337, A494—95. In a second exchange, two days before the investigation, the operator messaged a contact "I'm around if you need anything," the contact responds, "thanks, but I'm broke …" A339, A496—97. A third exchange, three days before the investigation, suggests the operator met with a contact in person. A498—99. In a fourth exchange, operator messaged a contact "call me, I've got 45 … where you at?" and the contact – who is the same contact as in the third exchange – responded "same place." A342, A500—01. In a fifth exchange, five days before Mr. Davis's arrest, the operator messaged "I'm around if you need anything." A344, A502—03. In a sixth exchange, also five days before the incident, the operator received a message "how long will it take you to get her 100," and replied, "15 minutes." A345, A504—05. Finally, in a

seventh exchange, six days before the investigation, a contact messages the operator "I need a DUV hard," the operator replied "at store," and the contact replies "you really coming?" A347, A506—07.

Officer Mihalyi conceded that he does not know who operator was, or suggest it could be inferred from what he did know. A356.

Dena Lientz

Dena Lientz is forensic chemist at DFS and possesses the corresponding training and experience. 365—68. She testified about the process by which DFS receives, stores, and tests evidence, with a particular emphasis on how they ensure accuracy. A370—76. Ms. Lientz was the proponent and authenticator of the lab report in this case. A380. According to the report, the recovered drugs were 9.263 grams of crack cocaine, and 3.94 grams of fentanyl. A508—11.

Bethany Netta

Bethany Netta is a DNA analyst at DFS who possesses the corresponding training and experience. A392—93. She testified about DNA in general, DNA transfer, the process of DNA analysis, and procedures used to ensure accurate analysis, in particular, chain of custody procedures. A394—402. She emphasized that gloves are changed, and workstations are cleaned in between testings to avoid cross-contamination. A411. Ms. Netta analyzed the evidence in this case and wrote

a report. A402—03; States Exhibit 28. According to her analysis, a DNA profile matching Mr. Davis's was found on the bags. A406.

Detective Jeffrey Silvers

As in the first trial, Det. Silvers testified without any firsthand knowledge of this case. A424. He told the jury that he had conducted thousands of drug investigations before this one, and (this time) that such investigations form 99% of his work. A422. As in the first case, he warned the jury "Fentanyl is a very, very highly addictive drug that is many times more potent than heroin" (A427—28) and cocaine is, similarly, "a highly addictive drug that is used by people every day." A426. He described methods of packaging cocaine (A426) and fentanyl (A428) but did not suggest how packaging might distinguish between a dealer, and a user who had purchased the drugs as packaged. He explained why certain packaging is stamped, but again, did not explain how stamps were relevant to distinguishing between a user and dealer. A429.

Det. Silvers testified that, generally, "a seller is going to have a larger quantity. A buyer is going to have a smaller quantity." A423—24. He testified that the amount of cocaine found in this case, if it were to be sold in units .1 grams, would be approximately $900. A427. He estimated that the fentanyl seized in this case had a street value of approximately $600. A430. He was asked about the screwdriver and explained that hiding places like the one in this case are "not uncommon for people

transporting drugs around" in a car. A431. Det. Silvers also testified that the text messages were consistent with drug dealing. A432—35. He testified that the currency found was a "common variety of denominations that" a person selling drugs would have. A437. As in the first trial, Det. Silvers did not even suggest that the "variety of denominations" was not just as, if not more common, for people who were *not* selling drugs. He testified that there was no personal use paraphernalia (A437), and ultimately that "[t]his case is very consistent with drug dealing." A438—39.

I. THE TRIAL COURTS COMMITTED PLAIN ERROR AND VIOLATED DAVIS'S DUE PROCESS RIGHTS BY PERMITTING INADMISSIBLE AND HIGHLY PREJUDICIAL DRUG COURIER PROFILING TESTIMONY AS SUBSTANTIVE EVIDENCE OF GUILT, IN DIRECT CONTRADICTION OF THIS COURT'S PROHIBITION ON THE SAME.

Question Presented

Whether the trial courts committed plain error and violated Mr. Davis's due process right to a fair trial by permitting the State to elicit inadmissible drug courier profile testimony as substantive proof of Mr. Davis's guilt?[4]

Standard and Scope of Review

When impermissibly prejudicial testimony is not objected to, this Court reviews for plain error.[5] Constitutional violations are reviewed *de novo*.[6]

Argument

In each of the two trials on appeal, police discovered drugs on or around Mr. Davis during a search conducted during a traffic stop. In each case, the State argued Mr. Davis was transporting the drugs for their eventual sale, as opposed to possessing them in the car for personal use. In support of this theory, in each case, the State called Det. Silvers, who was not involved in either investigation, not a

[4] *See* Del. Supr. Ct. R. 8.
[5] *Czech v. State*, 945 A.2d 1088, 1097 (Del. 2008).
[6] *Dahl v. State*, 926 A.2d 1077, 1081 (Del. 2007).

member of the investigating police department, and had no firsthand knowledge of any of Mr. Davis's conduct. A190—206; A421—39. As a purported expert, Det. Silvers testified about his extensive prior experience in investigating drug crimes, and that based on his experience, and characteristics allegedly displayed by Mr. Davis and the drugs and money he allegedly possessed, Det. Silvers concluded that Mr. Davis intended to sell the drugs being transported in his car. A176—77, A180 (Trial 1); A422 (Trial 2). As described below, drug courier profile testimony is highly prejudicial, unreliable, and inadmissible for the purpose it was used here: establishing substantive guilt. This Court must reverse.

a. ***For good reason, this Court's long-standing precedent prohibits drug courier profile "expert testimony" like that provided by Detective Silvers.***

A "'drug courier profile,' [is] a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics,"[7] which, in 2001, this Court held "may not be admitted during a criminal trial as substantive evidence of guilt."[8] Thus, for more than 20 years, this Court has recognized the inherent prejudice of such testimony. In doing so, it relied on numerous federal jurisdictions which held the same, and noted that their "*ratio*

[7] *Reid v. Georgia*, 448 U.S. 438, 440 (1980).
[8] *Johnson v. State*, 813 A.2d 161, 166 (Del. 2001). This type of profile testimony is, however, admissible for other purposes, such as justifying a seizure. *Jarvis v. State*, 600 A.2d 38, 42 n. 3 (Del. 1991). However, even when put forth for the limited purpose of justifying a stop (as opposed to substantive guilt), this Court was divided. *Quarles v. State*, 696 A.2d 1334, 1343 (Veasey, C.J., dissenting, Del. 1997).

decidendi," which appears to be two-fold, were persuasive. Those jurisdictions reason that (1) "[d]rug courier profiles … [are] inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers,"[9] and (2) [e]very defendant has a right to be tried based on the evidence *against him or her*, not on the techniques utilized by law enforcement officers in investigating criminal activity" in general.[10] There is also a third, but related reason: this testimony is unfairly prejudicial when – as is the case with Det. Silvers' testimony – the purported expertise comes from experience *investigating others'* (alleged) crimes, because such expertise cannot be effectively impeached or cross-examined.[11]

b. ***Det. Silvers' testimony exemplified that drug courier testimony elicited as substantive evidence of guilt is highly prejudicial and minimally probative.***

i. **Det. Silvers' testimony is unfairly unimpeachable.**

Det. Silvers' testimony effectively usurped the jury's role as fact finders by suggesting that the overwhelming number of drug investigations Det. Silvers had

[9] *United States v. Williams*, 957 F.2d 1238, 1242 (5th Cir. 1992).
[10] *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) (emphasis added); *State v. Escalante*, 425 P.3d 1078 (Ariz. 2018) (rejecting profile as substantive evidence of guilt because risk defendant will be convicted not for what he did but for what others, whose conduct form basis of the profile, have done.)
[11] J. Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?,* 79 TUL. L. REV. 1, 30 (2004) ("[T]he practical result is that the [experience-based expert] witness is immunized against effective cross-examination.") (internal citations omitted).

conducted evinced an established ability to identify drug dealers.[12] Theoretically, the most direct way to impeach such testimony would be to challenge his investigations in those other cases. But conducting mini-trials on each of thousands of incidents is obviously not practical; and, since the State does not supply any information about those cases (A512—519), or the ones in which Det. Silvers' misidentified drug crimes, it is not even possible for a defense expert to provide an alternative opinion for the jury. This leaves the jury with an unrebutted impression that Det. Silvers had *accurately* differentiated between suspects couriering drugs for sale, and for personal use, throughout his decades long career. But that suggestion is unfounded when it comes to completely unverifiable casework, like Det. Silvers'.[13] "Forcing a defendant to face such an irrebuttable inference, based on information that has no proven validity, denies him the opportunity to mount a defense."[14]

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[12] *See State v. Williams*, 525 N.W.2d 538, 548 (Minn. 1994) ("The jury is asked to infer from the fact that the defendant shares some of the characteristics of these third persons that he shares their guilt of drug smuggling").

[13] J. Mnookin, et al., *The Need for Research Culture in the Forensic Sciences*, 58 U.C.L.A. L. REV. 725, 745, 749 (2010) ("[c]asework is not research … Unlike planned research, casework does not permit the development of careful controls, defined independent variables, or structured and directed focus. Also, and critically, in casework, ground truth is not known and cannot simply be inferred by a conviction, a confession, or the consensus judgment of experts."); *see McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 151 (1999) ("[a]n expert's opinion is only as valid as the bases and reasons for that opinion"); D.R.E. 702(b) (requiring testimony to be "based on sufficient facts or data").

[14] M. Kadish, *The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box*, 46 AM. U.L. REV. 747, 789 (1997).

ii. **Profiling testimony, like Det. Silvers' is unreliable.**

When it comes to purported expert testimony like Det. Silvers', "[t]he trial judge must determine that the expert's methodology and ultimate conclusion are reliable based on the methods and procedures of science, rather than subjective belief or speculation."[15] In these cases, Det. Silvers' expertise was primarily established by his experience investigating drug crimes as a WPD officer. His testimony begins by inundating the jury with his thousands of drug investigations, daily interactions with drug dealers and purchasers, and assertion that 98% (A177), or a week later 99% (A422), of his work being focused on the same.

Extensive experience in *investigating* drug crimes makes a police officer, like Det. Silvers, an expert in the pertinent *investigative techniques* (and thus equipped to provide helpful testimony at a suppression hearing).[16] But, an *investigative technique* is meaningfully distinct from a jury's determination as to whether a particular individual was actually couriering drugs for the purpose of distribution, and in fact, that distinction is at the heart of many jurisdictions' restrictions on profiling evidence at trial.[17] Factual determinations at suppression hearings are

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[15] *Rivera v. State*, 7 A.3d 961, 971–72 (Del. 2010).
[16] *See Jarvis v. State*, 600 A.2d 38, 42 n. 3 (Del. 1991).
[17] *United States v. Small*, 74 F.3d 1276, 1283 (D.C. Cir. 1996) ("drug-courier profile evidence was relevant only to the officers' probable cause and not to Small's guilt.") *United States v. Carter*, 901 F.2d 683, 684 (8th Cir. 1990) ("Drug courier profiles are investigative tools, not evidence of guilt."); *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) ("nothing more than the introduction of the

generally issued "through the eyes of a reasonable, trained police officer in the same or similar circumstances;[18] so, the difference between using such evidence at trial and at a suppression hearing is not just the quantitative difference in evidentiary burden, but also – and more importantly – that a jury assesses the evidence through a qualitatively different lens: their own.

The inadequacy of untested experience based "expertise" is also seen in other contexts, for example in *Kleiss v. Cassida*, an Illinois appellate court affirmed a trial court decision to exclude testimony that the plaintiffs' crops were damaged by defendants' herbicide use because it was only supported by the expert's "20 to 30 years' experience."[19] Extensive as Det. Silvers' investigative experience may be, it is incongruent with the purpose for which the trial court permitted it to be used (substantive guilt).

Using a profile, like that of a drug courier, as an *investigative* tool – no matter how many times – does nothing to suggest it is an *accurate* tool. Unlike a methodology whose reliability is established through testing with control groups (or other verifying techniques), the reliability of drug courier profiles has never been established. Rather, their *un*reliability was established in a 2018 survey of scientific

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investigative techniques of law enforcement officers"); *People v. Martinez*, 12 Cal. Rptr. 2d 838, 840 (Ct. App. 1992) (same).

[18] *Jones v. State*, 745 A.2d 856, 861 (Del. 1999).

[19] *Kleiss v. Cassida*, 696 N.E.2d 1271, 1277 (Ill. App. Ct. 1998).

research on profiling from 1976 to 2016 which found no evidence that profilers are any "better than bartenders" at predicting the traits and features of offenders.[20] Another study showed that the conclusions of "expert" profilers (i.e., teachers of profiling) are no more accurate than those of undergraduate students "drawn from several general psychology classes" and who are "naive to both personality profiling and criminal investigations."[21] Legal scholarship has, similarly concluded that "the government has never demonstrated the validity of any profile as a predictor of who is violating the law."[22] Ultimately, profiling testimony like Det. Silvers' lacks any "compelling scientific evidence that it is reliable, valid, or useful."[23]

Likewise, Det. Silvers identified no methodology by which he, or other profilers, decide what is and is not an indicator of drug dealing.[24] There is no accepted list of potential factors, no indication of how much weight is given to any

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[20] B. Fox and D. Farrington, *What Have We Learned From Offender Profiling? A Systemic Review and Meta-Analysis of 40 Years of Research*, Amer. Psych. Assoc., 144 PSYCHOL. BULL. 1247, 1247—48 (2018), *available* at https://www.researchgate.net/publication/32934107.

[21] A. Pinizzotto and N. Finkel, *Criminal Personality Profiling, An Outcome and Process Study*, 14 LAW & HUM. BEHAV. 215, 219, 224—25 (1990), *available* at https://psycnet.apa.org/record/1990-28564-001.

[22] A. Poulin, *The Investigation Narrative: An Argument for Limiting Prosecution Evidence*, 101 IOWA L. REV. 683, 728 (2016).

[23] B. Snook, et al., *The Criminal Profiling Illusion: What's Behind the Smoke and Mirrors?*, 35 CRIM. JUST. & BEHAV. 1257 (2008).

[24] Poulin, *supra* note 22 at 728 ("The problem with profile evidence is that it rests solely on the anecdotal impressions of law enforcement rather than reliable and testable methodology.")

one factor, and no discernable rule as to how many factors are necessary to issue a particular conclusion. One of the scholarly sources this Court relied on in *Johnson* described the issue as follows:

> *Many varied characteristics have emerged over the years. Because police officers are not required to apply any one particular set of characteristics, any conduct inevitably will fit some version of "the" profile. Consequently, when testimony eventually is presented on the defendant's specific conduct, it also, inevitably, will fit the profile.*[25]

The absence of any methodological structure leaves Det. Silvers' testimony as somewhat of a free-for-all in which the State elicits highly prejudicial statements under the cover of latitude afforded to "traditional" experts "to incorporate into the methodology source material normally relied upon in the expert's field."[26] The most blatant, but certainly not the only examples of this, were Det. Silvers' numerous warnings to the jury about the (undisputed, but irrelevant) dangerousness and addictiveness of the fentanyl and cocaine the State accused Mr. Davis of distributing. A182; A189; A426—28. Given the unfortunate prevalence of overdose deaths,[27] this testimony was likely triggering for some jurors, and certainly irrelevant to all of them.

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[25] Kadish, *supra* note 14 at 788–89 (1997); *see Johnson* 813 A.2d at nn. 10 and 12.
[26] *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1187 (Del. 2000) ("an expert is afforded latitude under Rule 703").
[27] According to the American Addiction Centers, 54% of people know someone who has died of an overdose, 31% have a friend, and 12.4% have a family member. *Available at* https://americanaddictioncenters.org/blog/degrees-of-separation.

c. ***The trial court committed plain error.***

Delaware Rules of Evidence 702 and 703 requires a trial judge to act as a "gatekeeper" and to screen scientific, technical, or specialized opinion evidence in order to exclude from consideration such evidence as it finds to be unreliable as a matter of law.[28] Expert testimony which "undermine[s] the fundamental fairness of the entire trial," like Det. Silvers', violates a defendant's due process rights.[29]

Purported expert testimony is extremely impactful on a jury.[30] This is especially so when it comes from a police officer. [31] And even more when it goes to the central, and ultimate issue of the case.[32] None of these concerns make such testimony inherently impermissible, but they do compel a judge to engage in their gatekeeping duties with maximum scrutiny. Here, given the clear precedent prohibiting drug courier profile testimony, and the extreme prejudice which resulted from its admission, this Court should reverse all of Mr. Davis' convictions.

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[28] *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 498 (Del. 2000).
[29] *Lee v. Houtzdale SCI,* 798 F.3d 159, 162 (3d Cir.2015) (flawed arson forensics).
[30] *See United States v. Smith*, 869 F.2d 348, 352 (7th Cir. 1989) ("tendency of testimony on scientific techniques to mislead the jury relates to the fact that, because of the apparent objectivity of opinions with a scientific basis, the jury may cloak such evidence in an aura of mystic infallibility") (quotation omitted).
[31] *See Norman v. State*, 968 A.2d 27, 31 (Del. 2009) ("Police officers are respected authority figures whose opinions are likely to be given weight even if they are not qualified as experts.")
[32] Appellant recognizes that our rules of evidence permit testimony as to the ultimate issue. D.R.E. 704. However, when such testimony is impermissible for other reasons, as was the case here, it is extremely prejudicial.

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

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DATED: October 26, 2023