EFiled: Feb 20 2025 10:10AM EST
Filing ID 75676893
Case Number 298,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN STEVENS, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 298, 2024

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorney for Appellant

DATE: February 20, 2025

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Court Rules, Constitutional Rules, and Statutes

I. THE TRIAL JUDGE CONTRAVENED A CLEAR MANDATE FROM THIS COURT AND ERRED AS A MATTER OF LAW BY APPLYING THE WRONG FOUNDATIONAL ADMISSIBILITY STANDARD TO LIQUID CHROMATOGRAPH TANDEM MASS SPECTROMETER BLOOD INTOXICANT TESTING RESULTS.

Stevens argued during trial (A167, A180, A194), in his post-trial motion (A293—99), and once again in his Opening Brief (at 10—12), that the trial court cannot introduction of the calibration test documentation produced by the LC-MS/MS ("Calibration Documentation") is a foundational requirement to introducing the results of the blood test. The trial court held during trial (Ex. C), and again after trial (Ex. B.), that the introduction of the Calibration Documentation was not a foundational requirement; and, without evidence that the machine was not calibrated properly, testimony that it was calibrated properly satisfies the foundational requirement to establish the machine was properly calibrated.

The essential facts in this appeal are undisputed:

- Proper calibration is essential to the reliability of *both* Intoxylizer *and* LC-MS/MS results. A173—74 (describing need LC-MS/MS calibration); Op. Br. at 10—11 (describing importance of calibration). And an LC-MS/MS is more susceptible to calibration problems than an Intoxylizer.[1] Op. Br. at n. 13.

[1] Calibration of the Intoxylizer is required, approximately, every five weeks. *State v. Vickers*, 2010 WL 2299001, at *4 (Del. Com. June 9, 2010) ("the machine is calibrated once per month"); *State v. Loveless*, 2014 WL 3032354, at *1 (Del. Com. Mar. 14, 2014) ("every four to six weeks"). On the other hand, an LC-MS/MS has a "daily calibration requirement." A173—74; A201.

- An LC-MS/MS conducts various internal tests and produces Calibration Documentation *which is necessary* to determine if the device is properly calibrated. Answer at 18—22 (describing Fox's, Ellis', and Smith's testimony about Calibration Documentation)

- Trial Counsel's discovery request included "[r]eports of any and all forensic, scientific…tests with respect to this case or related investigation… any other test …related to any evidence …in the subject criminal action." B2—B3. Trial counsel did not *specifically* identify the Calibration Documentation in his discovery request.

- The State did not produce the Calibration Documentation in discovery or introduce it at trial (neither in front of the jury, nor outside their presence). Answer at 26—27 and n.17.

- Three State expert witnesses testified that the LC-MS/MS was properly calibrated in accordance with applicable standards. Answer at 18—22.

Much of the legal backdrop, is also undisputed.

- Introducing the Calibration Documentation is a foundational requirement to admit *Intoxylizer* results.[2] Ex. B to Op. Br. at 2.

- The trial court rejected *McConnel*'s applicability, not based on any distinction between Intoxylizers and LC-MS/MS but based on

[2] *McCoy v. State*, 89 A.3d 477 (Del. 2014) ("It is well-established in Delaware that the prerequisite to introducing the result of an intoxilyzer test into evidence is to present the certifications of the State Chemist.") (citing *McConnell v. State*, 1994 WL 43751 (Del. Feb. 3, 1994)); *Cedeno v. State*, 2023 WL 6323598, at *2 (Del. Super. Ct. Sept. 27, 2023) ("the foundational requirements of … Intoxilyzer [results include] … a 'Certification Sheet.'"). As explained by Chief Judge Smalls, "certified calibration records" contain, amongst other things, copies of the data produced by the calibration test conducted by the Intoxylizer. *Vickers*, 2010 WL 2299001, at *6 ("When the operator conducts a calibration test… [the] Intoxilyzer Card …data is transferred onto the calibration certification sheet.")

misreading that decision as only requiring Calibration Documentation when there is evidence of a calibration problem.[3]

- Neither party has found a case in which any Delaware court addressed whether the introduction of Calibration Documentation is a foundational requirement to admit LC-MS/MS test results.

- 21 *Del.C.* §4177(h) applies to blood tests (like those conducted using an LC-MS/MS), but not breath tests (like those conducted using an Intoxylizer). Answer at nn. 39—40.

Standard and Scope of Review

Based on the above, the question before this Court is not one impacted by the discretion trial judges enjoy in making evidentiary rulings; but rather, the purely legal question of what rule is the trial court was required to apply; in particular: is the introduction Calibration Documentation of an LC-MS/MS a foundational requirement of introducing LC-MS/MS test results?

Purely legal questions like this are reviewed *de novo.* The State's argument that this claim implicates an evidentiary ruling and is therefore reviewed for an abuse of discretion (Answer at 13), misses the nuance: a claim which asserts a trial court applied the wrong legal rule, even if that rule relates to evidence, is distinct from one which asserts that the trial court abused its discretion in applying the right rule.[4]

---

[3] *See McConnell*, 1994 WL 43751. Although the State asserts that the trial court did not misread *McConnel*, it makes no attempt to support that assertion, and instead provides a third reading of *McConnel* which neither the trial court, nor Stevens advanced below. Compare Answer at 32—33 *with* Ex. B to Op. Br. at 3.

[4] *Anderson v. State*, 21 A.3d 52, 57 (Del. 2011) ("We review *de novo* the Court of

Argument

The Answer makes two arguments in support of affirming the trial court's decision to admit LC-MS/MS results without Calibration Documentation: **(1)** although there is a requirement to introduce Calibration Documentation (as recognized in *McConnel*), it only applies to one specific brand name– Intoxylizer – of one type of testing device – a breathalyzer ; and **(2)** even if the Calibration Documentation requirement applied generally to intoxicant testing devices, §4177(h)'s adoption created an alternative means of admitting LC-MS/MS results without Calibration Documentation.

a. ***Calibration Documentation plays an analogous role in the reliability of LC-MS/MS and Intoxylizer results; therefore, since Calibration Documentation is foundational for an Intoxylizer's results, so too for LC-MS/MS'.***

Not every factual distinction is a basis to distinguish prior precedent. The question is whether the distinction is such that applying the prior case's rule in the pending case would deviate from rule's *ratio decidendi*.[5] Relevant here, the reason Calibration Documentation is a foundational requirement in Intoxylizer cases is that

---

Common Pleas' formulation and application of legal principles"); *United States v. Brooks*, 723 Fed. Appx. 671, 680 (11th Cir. 2018) (reviewing district court's "interpretation" of rules of evidence *de novo*); *United States v. Torres*, 794 F.3d 1053, 1059 (9th Cir. 2015) (same); *United States v. Rogers*, 587 F.3d 816, 819 (7th Cir. 2009) (same) *United States v. Phoeun Lang*, 672 F.3d 17, 23 (1st Cir. 2012) (same); *United States v. Pope*, 467 F.3d 912, 915–16 (5th Cir. 2006) (same).

[5] *See e.g. Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1289 (Del. 1982) (determining precedent's applicability based on whether "ratio decidendi in [the prior case] applies with equal force [in the present circumstances]").

trial courts can only admit reliable scientific opinions, and it is the Intoxylizer's "calibration tests …[which demonstrate that the] device in issue was operating properly."[6] Calibration testimony and certification, on the other hand, *necessarily* rely on and are secondary to Calibration Documentation. Thus, the Calibration Documentation requirement as to Intoxylizers, has less to do with Intoxylizers *per se*, than broader evidentiary rules that equally apply to LC-MS/MS calibration (and, obviously, other brands of breathalyzers): (1) like the Best Evidence Rule (DRE 1002), this requirement recognizes that primary sources necessarily have advantages over secondary sources, i.e. testimony about those sources; and (2) a trial court is necessarily prevented from determining if calibration "testimony is based on 'sufficient facts or data,'" – one of the "*foundational determination[s]* to which subsection D.R.E. 702[] refers"[7] – if the facts or data upon which the testimony is based, are not provided to the court.

Trial counsel correctly argued that this rule applies to LC-MS/MS results. As argued in the Op. Br. (at 11), "the trial court suggested [during trial], and the prosecutor did not dispute that [*McConnell*] is equally applicable to LC-MS/MS results." A153. The Answer (at 29) makes the conclusory claim that the record does not support this contention but, tellingly, makes no attempt to ground that claim in

[6] *Best v. State*, 328 A.2d 141, 142 (Del. 1974). *McConnel* relies on *Best*.
[7] *Perry v. Berkley*, 996 A.2d 1262, 1270 (Del. 2010) ("If an expert's proposed testimony is not based upon 'sufficient facts or data,' the[y] must be disqualified.").

the record statements at issue, which, again, plainly indicate that the trial court agreed with the underlying premise of trial counsel's objection:

> The Court: *You didn't respond to [trial counsel's] argument, that the* [LC-MS/MS] *machine is like an Intoxilyzer. It produces -- it runs its own self-analysis. The Intoxilyzer produces a strip with the unknowns. This one does, too, but it is not present. So, why not?* A152—53.

The State's position that *McConnel* is "inapposite" because it involved an Intoxylizers fails to identify any meaningful difference between the role calibration plays in the reliability of each device, or in the necessity of relying on Calibration Documentation to establish proper calibration. Answer at 32—33.

Next, the Answer's reliance on the presumption of reliability (Answer at 28) and attempt to distinguish this case from *McConnel* based on the testimonial evidence (Answer at 26—27; 33—34) and the discovery request, all present the same fallacy: assuming the consequence. Answer at 24, 28, and 30. If Calibration Documentation is a foundational requirement, then the results should not have been admitted, regardless of the reliability of the testimony or the specificity of the discovery request.[8] And, as applied in *McConnel*, the presumption of reliability acts to combat challenges as to the reliability of Calibration Documentation, but it cannot take the place of the records themselves.[9]

---

[8] *See Clawson v. State*, 867 A.2d 187, 191—92 (Del. 2005) (explaining that objections to foundational requirements are properly raised at trial for the first time).
[9] *McConnell*, 1994 WL 43751.

Finally, recognizing Calibration Documentation as a foundational element to introducing LC-MS/MS results is sound policy. **Firstly**, Calibration Documentation is produced as part of standard procedures; thus, this requirement increases the reliability of the evidence without draining any State resources.[10] This is especially so given that "the State Chemist is not required to personally authenticate the certification.[11] **Secondly**, a rule requiring Calibration Documentation aligns with broadly applicable rules of evidence geared towards maximizing reliability of in court testimony. *Supra* p.5. And **finally**, given that once a qualifying report is introduced into evidence, §4177(h) enables the State to rely on a series of presumptions which are nearly dispositive in a DUI, the importance of the trial judge's gatekeeping role is at its max, and a strict requirement designed to ensure reliability *as a foundation* is a necessary safeguard. And when it comes to reliability, there is no question that proper calibration, is essential.

The point here is *not* that there was anything particularly unreliable about these chemists' representations; but rather, that a foundational requirement which increases consistency and reliability without imposing any meaningful burden on the proponent of what is often case dispositive evidence, is the right rule.[12]

---

[10] This case is illustrative: Calibration Documentation was *in the court room*. A203.
[11] *McCoy*, 89 A.3d 477 ("familiarity with the procedures in which the records were created, [] is all that is necessary to be a qualified witness.")
[12] *See United States v. Sheppard*, 2021 WL 1700356 (W.D. Ky. Apr. 29, 2021); *infra* nn. 21—28 and accompanying text.

i. *Santiago v. State* reflects a pre-*Daubert approach* to admissibility

The State's argument below (A304), and to this Court (Answer at n.33) suggests that, regardless of the foundational requirements of Intoxylizer results, LC-MS/MS results are governed by *State v. Santiago's* rule: "where an expert gave his opinion based on a test he performed, he only needed to show it is reasonably relied upon by experts in the field."[13] A304.

This reading misses the legal-historical context in which *Santiago* was decided. *Santiago* is best understood as reflecting Delaware courts' approach to expert testimony during a period after departing from strict adherence to *Frye*, but prior to abandoning it for the current *Daubert/Kumho Tire* based framework.[14] Thus, in Judge (former justice) Quillen's detailed review of the development of Delaware courts' approach to expert testimony in *Minner v. Am. Mortgage & Guar. Co.*, *Santiago* is cited as an example of Delaware's *pre-Daubert* approach to expert testimony.[15] Post-*Daubert*, however, our courts place an increased emphasis on

---

[13] *Santiago v. State*, 510 A.2d 488, 490 (Del. 1986).

[14] *Id.* at 489 ("*Frye* 'general acceptance' test *is not the sole test* for judging the admissibility of expert testimony … in Delaware.") (emphasis added).

[15] *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826, 840 (Del. Super. Ct. 2000) ("*prior* to *Daubert* ... an expert needed 'only to show that any test used as a basis for his opinion [was] reasonably relied upon by experts in his field.'") (emphasis added) (citing *Santiago*, 510 A.2d at 489). It's true that the Delaware Rules of Evidence adopted in 1980 and the Federal Rules adopted in 1976 preceded *Santiago* and had already parted with *Frye*, but in practice, "until *Daubert*, the *Frye* test remained alive and well notwithstanding" those rules. *Crowhorn v. Boyle*, 793 A.2d 422, 428 (Del. Super. Ct. 2002).

judicial gate-keeping, and a heightened requirement to establish the reliability of the testimony on basis beyond the proponent's credentials,[16] in part by looking at the underlying data – like Calibration Records – relied on by a given expert.[17]

Next, *Santiago* applies this rule to a gas-chromatograph based on a distinction it draws between the police officer "lay" witnesses which introduce Intoxylizer results, and the "expert" chemists who sponsor other blood-alcohol evidence.[18] But this distinction, too, is anachronistic:[19] post-*Kumho Tire*, both are experts.[20] And

---

[16] *Minner*, 791 A.2d at 840–41 ("The admissibility standards for expert testimony generally changed with … *Daubert*… [in which SCOTUS] decided that the *Frye* test was superseded by the adoption of the Federal Rules… [and] required that scientific expert testimony had to be not only relevant but also reliable… [and] focus[ed] on the Trial Judge's responsibility as a gatekeeper on reliability. Relevance takes on an added qualitative dimension, one that involves the Trial Judge deeper into fact finding as to the threshold decision on the admission of evidence. Courts are not just to let the opinion of the credentialed expert into evidence for what it is worth and leave its evaluation to the jury…").

[17] *Tumlinson v. Advanced Micro Devices, Inc*., 81 A.3d 1264, 1270 (Del. 2013) ("the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable.").

[18] *Santiago*, 510 A.2d at 489–90 ("all of those cases involved scientific processes to be used and testified to by a lay person with no understanding of how the equipment functions. Under those circumstances, the State had to lay a foundation showing the accuracy of the result obtained.")

[19] *Minner*, 791 A.2d at 842—43 (describing split in approach to non-scientific expert testimony which existed until SCOTUS decided *Kumho Tire*, which "explicitly stated that the 'evidentiary rationale that underlay the Court's basic *Daubert* gatekeeping determination [is not] limited to scientific knowledge.'") (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999).

[20] *See e.g. Mooney v. Shahan*, 2001 WL 1079040, at *1 (Del. Super. Ct. Aug. 24, 2001) (qualifying police operator of Intoxylizer as expert) , *aff'd*, 788 A.2d 131 (Del. 2001); *State v. Bell*, 2015 WL 1880591, at *4 (Del. Com. Apr. 23, 2015) (same).

both are completely beholden to the Calibration Documentation when testifying to the device's calibration.

ii. *United States v. Sheppard* is persuasive precedent.

As noted above, neither party has found a Delaware case on point. That being said, this issue was addressed by the United States District Court in the Western District of Kentucky in *United States v. Sheppard*.[21] *Sheppard* involved the prosecution of an alleged drug dealer for causing the death of a drug user by allegedly distributing a designer synthetic opioid known as U-4.[22] Prior to trial, Sheppard moved to exclude expert testimony regarding LC-MS/MS blood tests of the deceased.[23] Like Stevens, Sheppard did not dispute the experts' "qualifications nor the relevance of the expert testimony and corresponding documentary evidence."[24] Instead, like Stevens, he argued that the LC-MS/MS results could not be admitted without "the calibration data, or the quality control data," which had been misplaced.[25]

---

[21] *United States v. Sheppard*, 2021 WL 1700356 (W.D. Ky. Apr. 29, 2021).
[22] *Id.* at 1
[23] *Id.* at 1—2.
[24] *Id.*
[25] *Id.* at 3. To the degree this factual distinction is meaningful, it supports Stevens' position. There is an argument for leeway when documentation is lost (without evidence of bad faith), but not when – as in our case – the documentation is available, and the prosecutor makes a strategic decision not to introduce it. A202—03.

As the State did in Stevens' trial, the *Sheppard* prosecutors were prepared to call numerous expert witnesses to testify about the testing procedure, calibration, and results,[26] including that "[t]he samples did get tested, and … reported," "calibration and quality control measures in accordance with the lab's standard operating procedures would have to have been performed for the results to be reported," and that "the absent documentation does not render the testing unreliable because the data's unavailability does not mean that the standard procedures for calibration and quality control were not performed [because]…[t]he testing was also subject to an internal peer-review process and would not have been reported if the standard procedure was not followed."[27]

In rejecting the government's admissibility argument, and granting the motion to exclude, the *Sheppard* Court explained that because the underlying data was absent, the testimony about that data was inadequate to establish that the LC-MS/MS produced reliable results.[28] This Court should do the same.

[26] *Id.* at 2.
[27] *Id.* at 3—4.
[28] *Id.* at 5.

d. This Court should reject the State's §4177(h)(1) argument, because (i) the prerequisites to relying on (h)(1) were not satisfied, and (ii) even if they were, (h)(1) has no impact on foundational admissibility requirements.

Separately, the State argues that even if the introduction of Calibration Documentation is generally a foundational requirement to introducing LC-MS/MS results, 21 *Del.C.* §4177(h)(1) provides a statutory exception to that general rule which permitted the admission of the results in this case. This alternative ground for affirming is wrong in two regards: **(i)** §4177(h)(1)'s statutorily imposed prerequisites were not satisfied; and **(ii)** §4177(h)(1) is not an admissibility provision; so, even if it applied, it would not have the effect presumed by the State.[29]

i. *The State has not satisfied §4177(h)(1)'s prerequisites.*

Pursuant to §4177(h)(2), "[a]ny report introduced under paragraph (h)(1) of this section *must*" contain three (enumerated) features. Nonetheless, the State argued to the trial court, and again to this Court, that (h)(1)'s only requirement is a signature from the pertinent expert, which it asserts is Jessica Smith. A303; Answer at 37. Neither below, nor in this Court, has the State alleged compliance with (h)(2) or addressed how (h)(2) compliance is anything but a prerequisite to (h)(1).

The sole case the State relied on for its (h)(1) argument below, *Santiago v. State*[30] (A303—04), preceded the adoption of §4177(h)(1) and thus, has little

[29] For convenience, the pertinent §4177(h) text is *attached* as Exhibit A hereto.
[30] *Santiago v. State*, 510 A.2d 488, 489 (Del. 1986).

conceivable relevance. And in this Court, the State has replaced *Santiago* with two cases which *affirmatively contradict the State's reading* of the statute. Answer n.42. *Durbin v. Shahan*[31] is a Court of Common Pleas (CCP) decision affirming a probable cause determination by the Division of Motor Vehicles (DMV). *Durbin* applies Stevens' reading of the statute and makes clear that, in addition to the signature mentioned in (h)(1), there are three additional "statutory requirements set forth in 21 *Del. C.* §4177(h)(2)… for foundational purposes." *Doran v. Shahan*, a second CCP review of a DMV hearing, also applies Stevens' reading of the statute.[32] And finally, even if either of these cases had applied (h)(1) without satisfying (h)(2), they are procedurally distinguishable as reviews of DMV hearings, in which the rules of evidence do not strictly apply.[33]

Because the State has not even *alleged* compliance with the applicable provisions, this Court –like the trial court– need not address this argument. But, should this Court address the merits, it should find that this record cannot establish compliance with the §4177(h)(1)—(2):

- **(h)(1)**'s requirement that the report be "signed by the …[expert] *who performed the test or tests as to its nature*," was not satisfied because the

[31] *Durbin v. Shahan*, 2001 WL 34075378, at *3—4 (Del. C.P. Dec. 20, 2001).
[32] *Doran v. Shahan*, 2003 WL 23112340, at *4 (Del. C.P. May 12, 2003) ("[t]he statutory requirements … are found in 21 *Del. C.* §4177(h)(1) and (2)").
[33] *Malascalza v. Cohan*, 2011 WL 704369, at n.2 (Del. Com. Feb. 17, 2011) (citing cases).

report is signed by Smith. A134—35. Smith's expertise is not challenged herein, but she was not the expert "*who performed the test*;" she was the expert who reviewed the work of the chemist who performed the test.

- **(h)(2)(b)**'s requirement that the report "[s]tate that the person *made an analysis of the blood* under the procedures approved by [DFS], or the [DSP]," was not satisfied because the certification indicates that Smith *prepared the report* under approved procedures, not that the underlying "*analysis of the blood*," was conducted in accordance with approved procedures. A135.

- And finally, the report does not "[s]tate that requirement that the blood, in that person's opinion, contains the resulting alcohol concentration or the presence or concentration of any drug within the meaning of this section" as required by **(h)(2)(c)**. A134—35.

ii. §*4177(h)(1) is not an admissibility provision.*

The Answer also misses the mark by presuming – again without any explanation – that (h)(1) is an admissibility provision. (h)(1)'s plain meaning does not support that reading.[34] Although its introductory clause – "[f]or the purpose of introducing evidence" – might lead the reader to expect an admissibility provision;

[34] *Spielberg v. State*, 558 A.2d 291, 293 (Del.1989) ("Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls.")

that expectation is not born out in the remainder of (h)(1)'s text, which instead of identifying *admissibility criteria*, describes the *evidentiary impact* (four evidentiary presumptions listed in (h)(1)a.—d.) of an admitted report:

A second indicator that (h)(1) is not an admissibility provision is that nowhere does (h)(1) use the word "admissibility," any form of that word, any synonym, or otherwise indicate that a report is admissible when the statutory criteria are met.[35] This feature of (h)(1) is notably contrasted[36] by the explicit "admissibility" language in admissibility provisions elsewhere in Title 21,[37] including provisions in the same statute, §4177(g),[38] and even in the same subsection, §4177(h)(3).[39]

While §4177(h)'s purpose appears to be to reduce the burden on State expert witnesses whose presence might otherwise be required to establish the inferences

---

[35] *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust, ex. rel. Christiana Bank,* 28 A.3d 1059, 1070 (Del.2011) ("We also ascribe a purpose to the General Assembly's use of particular statutory language and construe it against surplusage.")

[36] *Zambrana v. State*, 118 A.3d 773, 779 n. 35 (Del. 2015) ("The expression of one thing indicates the exclusion of another."); *Zhurbin v. State,* 104 A.3d 108, 113 (Del. 2014) ("We must read each section in light of all others."); *Richardson v. Bd. of Cosmetology & Barbering of State*, 69 A.3d 353, 357 (Del. 2013) (statutes that deal with same subject matter are considered together to discern their meaning).

[37] *See e.g.* §4203(e) ("The fact that such reports have been so made shall be admissible in evidence"); §4513(j)(1) ("A certificate alleging that a violation … occurred and that the requirements under subsections (d) and (f) of this section have been met …is … [a]dmissible…"); §4802(i) ("nor shall failure to wear or use an occupant protection system be admissible as evidence").

[38] §4177(g)(1) ("Evidence obtained through a preliminary screening test … shall be admissible in any proceeding to determine whether probable cause existed").

[39] §4177(h)(3) ("the chain of physical custody or control of evidence defined in this section which is necessary *to admit* such evidence…") .

enumerated in (h)(1)a.—d, and chain of custody addressed in (h)(3). Relieving State prosecutors of the "burden" to provide trial courts with documentation they possess reduces reliability without advancing this resource management goal whatsoever.

e. *The error was not harmless.*

The introduction of the LC-MS/MS results was not harmless. As the Answer recognizes (at 40), without the results, this case was largely a credibility battle, and to that end, it fails to explain why a reasonable jury would not have found that the State failed to meet its burden beyond a reasonable doubt. In particular, without the results, Stevens' explanation for his demeanor – that he was *severely* sleep deprived (multiple days) (B2 at 5:00—5:15) – was reasonably possible. Additionally given the agreement that Stevens was not drunk (A87), the field tests did not reliably indicate any intoxication (A112—115), and the experts were not permitted to testify that his "symptoms" [droopy eyes…] were consistent with drug-based intoxication (A194—97) (or unexplained by his *undisputed* claim to have not slept in three days) – without the LC-MS/MS results, the evidence is consistent with drug-based intoxication but cannot establish that conclusion beyond a reasonable doubt. In fact, the prosecutor recognized that, rather than establishing guilt beyond a reasonable doubt, without the report, the remaining evidence only showed that "it was possible or likely that the defendant was driving under the influence of drugs."A21

The LC-MS/MS report was the only direct evidence that Stevens had consumed an intoxicating drug. There was no drug paraphernalia found. No drugs found. No drug use observed. And no statements that suggested drug-based intoxication. But, because of the test, the State was permitted, in its first statement to the jury, and in the first lines of his closing argument, to say that there was Fentanyl in Stevens' system. A21; A237.

CONCLUSION

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

Respectfully submitted,

/s/ Elliot Margules
Elliot Margules [#6056]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: February 20, 2025