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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| **DJAVON HOLLAND,** | ) | |
| | ) | |
| Defendant-Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 44, 2016 |
| | ) | |
| | ) | |
| **STATE OF DELAWARE**, | ) | |
| | ) | |
| Plaintiff-Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# STATE'S ANSWERING BRIEF

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Dated: September 1, 2016

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## NATURE AND STAGE OF THE PROCEEDINGS

On April 11, 2014, Djavon P. Holland ("Holland") was arrested in connection with a home invasion. (A1, D.I. 1). On July 21, 2014, a New Castle County grand jury charged Holland by indictment with Home Invasion, two counts of Assault First Degree, Assault Second Degree, Aggravated Menacing, five counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), Wearing a Disguise During the Commission of a Felony, Possession of a Firearm by a Person Prohibited ("PFBPP"), Possession of Ammunition by a Person Prohibited ("PABPP"), and Criminal Mischief. (A17). The case proceeded to jury trial in January 2015.[1] (A4, D.I. 21). The morning trial began, after a proffer by defense counsel and colloquy with Holland, the Superior Court granted Holland's request to represent himself, and appointed his counsel as stand-by counsel. (A44-49). On January 29, 2015, the jury acquitted Holland on the two Assault First Degree charges and associated PFDCF charges, and could not reach a verdict on the remaining counts. (A4, D.I. 21). The Superior Court granted a mistrial on the counts for which the jury was undecided. (A277-78).

On March 2, 2015, the grand jury issued another indictment, charging Holland with Home Invasion, three counts of Robbery First Degree, Assault Second Degree, five counts of PFDCF, Wearing a Disguise During the

[1] Before trial began, the PFBPP and PABPP charges were severed. (A4, D.I. 21). The State entered a *nolle prosequi* on these charges at sentencing. (A630).

Commission of a Felony, PFBPP, PABPP, and Criminal Mischief. (A282). A second attorney entered his appearance for Holland and filed a motion to dismiss certain counts of the indictment. (A5, D.I. 28; A7, D.I. 37). The Superior Court denied the motion to dismiss, as well as Holland's counseled and then *pro se* motion to reargue that denial. (A7, D.I. 37; A9, D.I. 50, 51, 61; A425-26).

The morning the second trial began, after Holland's execution of a Waiver of Counsel form, a proffer by defense counsel, and a colloquy with Holland, the Superior Court granted Holland's request to represent himself, and appointed his counsel as stand-by counsel. (A9, D.I. 53; A10, D.I. 59; A418-21, B1). The jury found Holland guilty of Home Invasion, two counts of Attempted Robbery First Degree (victims - Ms. Grier and Mr. Moore), Assault Second Degree (victim - Ms. Grier), four counts of PFDCF, and Criminal Mischief, and not guilty of the remaining charges. (A10, D.I. 59). On January 15, 2016, the Superior Court sentenced Holland to a total of 32 years at Level V incarceration, suspended after 24 years for 6 months of Level IV (DOC Discretion) and 2 years at Level III probation. (Ex. B to Op. Brf.).

At Holland's request, the Superior Court re-appointed counsel to represent him on appeal. (A10, D.I. 62; A11, D.I. 65). On January 29, 2016, counsel filed a timely notice of appeal. (Filing ID 58496437). After substitution of counsel, Holland filed an opening brief. (Filing IDs 58768060 & 59337984).

## SUMMARY OF THE ARGUMENT

I. Denied. The trial court properly interpreted 11 *Del. C.* § 208(1)(a) and found it did not bar the prosecution for any of the counts in the reindictment. The Superior Court did not abuse its discretion by denying his motion to dismiss. By failing to fairly present his vindictive prosecution and collateral estoppel claims below, Holland waived review here. And, in any event, the Superior Court did not commit error, plain or otherwise.

II. Denied. The trial court properly permitted Holland to exercise his right to self-representation because he knowingly, voluntarily and intelligently waived his right to counsel and he understood the risks associated with proceeding to trial *pro se*. The trial court's determination, made after a thorough colloquy and written waiver, was proper.

III. Denied. The trial court did not commit plain error in failing to *sua sponte* grant a mistrial because Holland became aware mid-trial of a supplemental DNA report that the State had provided to counsel six months earlier. At the first trial, Holland cross-examined the DNA expert regarding DNA science. The supplemental report only added comparison of additional known reference samples to the DNA recovered from evidence at the crime scene. After reviewing the report and discussing it with stand-by counsel, Holland consented to its admission.

## STATEMENT OF FACTS

At around 9 p.m. on April 8, 2014, 62-year-old Vanessa Grier and her grown sons, Semaj Deshields and Nemesis ("Ron") Moore, were in their apartment located at 1533 New Jersey Avenue, Apt. 3, at the Hampton Walk complex in New Castle County. (A435, 463, 500). The apartment was one of two located on the second floor of a two-story building. (A438-39). Ms. Grier and Mr. Deshields were watching *The Big Bang Theory* in the living room; Mr. Moore was in his bedroom playing video games. (A436, 463-64, 500).

Suddenly, Holland noisily ran up the stairs and, with a loud bang, kicked the door to the apartment, causing a large bang. (A435, 447, 463, 488, 500). With a second kick, the door-frame broke, and Holland entered the living room. (A463, 500). Holland pointed a gun at Ms. Grier's head, stating: "Give me the money." (A463, 501, 506). Mr. Moore, who had heard the loud bang of the door being kicked in, ran from his bedroom into the living room. (A435, 464, 501). When he saw Holland standing over his mother with a gun to her head, Mr. Moore jumped over the couch to attack Holland. (A435, 464, 501). Ms. Grier fell off the couch and crawled to the kitchen. (A435, 465, 501).

Holland swung at Mr. Moore as he was coming over the couch. (A435). Mr. Moore grabbed Holland's shirt as Mr. Moore fell, but Holland's momentum pulled the two back up. (A435). Mr. Moore pushed Holland against the door.

(A435, 464). The two struggled as Holland held the gun up in the air. (A435). Mr. Moore yelled for his brother, "Help me!" (A435). Mr. Deshields arrived by Mr. Moore's side to assist. (A435, 471). As Mr. Moore and Holland continued to struggle, Holland said, "You think it's a game?" (A436, 464). Holland was then able to get his arm down to Mr. Moore's chest and fired two shots. (A435, 465). One bullet struck Mr. Moore in the right upper chest and traveled across his chest lodging under his left arm. (A438, 493-94). The other bullet "whizzed past" Mr. Moore's hair and struck Mr. Deshields in the ring finger. (A435, 466-67). Neither Mr. Moore nor Mr. Deshields initially realized that they had been shot, and Mr. Moore and Holland continued to struggle. (A436, 465, 466-67, 502).

Holland and Mr. Moore fell into the dining room. (A436). Holland had the gun in his hand when they fell, but lost it at some point. (A436-37, 445). Mr. Deshields picked the gun up and tried to shoot Holland, but it was jammed, so Mr. Deshields began striking Holland with the gun. (A460, 465, 471, 510). Mr. Deshields then dropped the gun, which ended up under the couch, and then eventually on the couch. (A465, 469, 503).

Mr. Moore told his brother his arm was getting weaker and that he needed help. (A436, 465). Mr. Deshields grabbed a four-foot vase stand and began striking Holland. (A436, 465, 469, 510). Mr. Deshields also struck Holland with the piece of doorframe that had broken off when Holland had kicked the door in.

(A468, 469, 470). Because of the continuing struggle between Mr. Moore and Holland, Mr. Deshields struck both men. (A436, 510).

Ms. Grier yelled at Mr. Deshields to stop because he was hitting his brother as well as Holland, and brought a large butcher knife out of the kitchen and began stabbing Holland. (A465, 502, 508, 510). Holland eventually stopped struggling. (A437). Mr. Moore then asked Mr. Deshields, "You got him?" and got up from the dining room floor and went to sit in the living room. (A437, 465). Mr. Deshields first stood on Holland's ankles and then used the dining room table to pin Holland into the corner of the dining room. (A452, 459, 466, 503).

During the incident, multiple 911 calls were made both by Ms. Grier, with whom the line to 911 remained open for about 9 minutes, and Mildred Cruz, the woman in the next apartment. (A489, 502-03). Ms. Cruz had heard someone running upstairs, followed by a loud boom. (A488). She put her children on the floor in the back bedroom and then returned to her living room. (A488). She heard a struggle and Ms. Grier yelling for help. (*Id.*). She looked through the peephole and saw that the victims' door had been broken open. (*Id.*). Ms. Cruz also heard glass breaking, bangs which she later concluded had been gunshots, and more struggling. (A489). She opened her door and saw Ms. Grier standing in her apartment holding a knife in one hand and a phone in the other. (A489). Ms. Cruz also saw that Mr. Moore had been shot in the chest. (*Id.*).

Ashli Adkins, one of the downstairs neighbors, also heard running up the stairs, followed by a loud boom and then commotion. (A447). She heard Ms. Grier yelling, "Call 911, call 911!" (*Id.*). When she asked, "what's wrong," Ms. Grier responded that her son had been shot. (*Id.*). Ms. Adkins put her kids under the bed and then went back to the door and yelled up the stairs to check if everything was "OK." (A447). When she was again asked to call 911, Ms. Adkins asked, "Is he still here?" and was told "Yes;" Ms. Adkins froze and did not call 911. (*Id.*). But, when she saw flashing lights and flashlights a few minutes later, Ms. Adkins ran outside and waved the police to the building. (A447, A451, 459).

As the police came up the stairs, Ms. Cruz directed them to the victims' apartment. (A451, 459). When the police entered the victims' apartment, they saw Mr. Moore sitting on the couch with a gunshot wound to his chest, Ms. Grier, who had suffered a broken finger, sitting on the other couch next to Holland's gun, and Mr. Deshields holding the dining room table over Holland, who was on the ground moaning with a large amount of blood in the chest area. (A451-52, 454, 459-60, 509). The knife was near Mr. Deshields. (A454-55, 461). The doorjamb was broken, with the strikeplate laying on the ground. A glass table in the living room was broken, and the dining room had furniture tipped over and there was blood on the floor, table, chairs and walls. (A451-55, 459-62; 473-82). The police investigation revealed that: the handgun Holland had used had been reported stolen

from Maryland, in which state he resided (A551); in Holland's car, located near the victims' apartment, were paper targets containing bullet holes (A535-36); in Holland's cell phone were records of texts revealing that his checking account had been overdrawn, that he was trying to get $1,500 for his girlfriend, and that there had been a series of phone calls and texts between Holland and "Shells" on April 7th apparently about the intended robbery. The texts stated: that "it's a go;" then a text from "Shells" to Holland stating that "tomorrow might be better. That way you [c]ould [c]atch the order [c]oming;" and then there were further calls and texts between the two in the hours leading up to the April 8th robbery (A548-51). There had been no contact between Holland's cell phone and the cell phones the police obtained from Mr. Moore, Ms. Grier and Mr. Deshields. (A546).

## I. The Superior Court properly denied Holland's motion to dismiss.

### Question Presented

Whether the Superior Court properly interpreted 11 *Del. C.* § 208 and denied Holland's motion to dismiss; whether Holland's failure to fairly present his due process claim below waives review here; and whether the jury's acquittal on two counts of Assault First Degree and accompanying PFDCF charges, but inability to reach a verdict on the remaining counts, collaterally estopped the State from proceeding with Attempted Robbery First Degree and accompanying PFDCF charges.

### Standard and Scope of Review

"Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[2] In that instance, the Court reviews for plain error.[3] The doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.[4]

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[2] Del. Supr. Ct. R. 8.

[3] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[4] *Id.* (citing *Bromwell v. State*, 427 A.2d 884, 893 n. 12 (Del. 1981)).

This Court reviews the Superior Court's denial of a motion to dismiss for abuse of discretion.[5] Questions of law, such as the construction of a statute, are reviewed *de novo*.[6]

## Merits of the Argument

### The Superior Court correctly denied Holland's claim that certain counts[7] of the reindictment were barred by 11 *Del. C.* § 208.

Holland argues that the Superior Court's erroneous interpretation of 11 *Del. C.* § 208(1)(a) led the court to incorrectly deny his motion to dismiss the charges of Home Invasion, three counts of Attempted Robbery First Degree and the accompanying PFDCF charges. (Op. Brf. 11-16). Holland is mistaken. The Superior Court correctly interpreted section 208 and found section 208(1)(b) permitted the prosecution for the Attempted Robbery First Degree counts, and the accompanying PFDCF charges.[8]

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[5] *Smith v. State*, 2001 WL 1006207 (Del. Aug. 7, 2001).

[6] *Fountain v. State*, 139 A.3d 837, 840 (Del. 2016).

[7] Holland first argues that the court erred in failing to dismiss Counts I through VIII (Op. Brf. 12), but then limits the error to Counts III through VI. (Op. Brf. 16).

[8] *See State v. Holland*, No. 1404005828A, Cooch, R.J. (Del. Super. Aug. 25, 2015) (Letter Order) (hereinafter "Order") (A395).

*Statutory construction*

The rules of statutory construction are well settled.[9] They are "designed to ascertain and give effect to the intent of the legislators, as expressed in the statute."[10] The Court must first determine whether the provision at issue is ambiguous.[11] If it is unambiguous, no statutory construction is required, and the Court must give the words in the statute their plain meaning.[12] "A statute is ambiguous only if it is reasonably susceptible to different interpretations, or 'if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature.'"[13] "When confronting an ambiguous statute, a court should construe it 'in a way that will promote its apparent purpose and harmonize [it] with other statutes within the statutory scheme.'"[14] "As this Court has frequently said in other cases, [the General Assembly's] intent must prevail

[9] *Dewey Beach Enterprises, Inc. v. Board of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010).

[10] *Id.* (quoting *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1151 (Del. 2010)).

[11] *Id.*

[12] *Id.*; *Dennis v. State*, 41 A.3d 391, 393 (Del. 2012) (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985)).

[13] *Insurance Com'r of State of Delaware v. Sun Life Assur. Co. of Canada (U.S.)*, 21 A.3d 15, 20 (Del. 2011) (quoting *Dir. of Revenue v. CNA Holdings, Inc.*, 818 A.2d 953, 957 (Del. 2003) and *Chase Alexa*, 991 A.2d at 1151).

[14] *Id.* (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).

even though in doing so we must give an interpretation not consistent with the strict letter of the statute."[15]

*The Superior Court's reading of section 208(1)(a) was correct.*

Section 208 provides, in pertinent part:

> Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a former prosecution in a court having jurisdiction over the subject matter of the second prosecution under the following circumstances:
>
> (1) The former prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in § 207 of this title and the subsequent prosecution is for:
>
> a. Any offense of which the defendant could have been convicted on the first prosecution; or
>
> b. The same conduct, unless:
>
> 1. The offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil; or
>
> 2. The second offense was not consummated when the former trial began.[16]

Holland contends that "[a]ny offense on which the defendant could have been convicted on the first prosecution" means any offense for which the defendant could have been indicted. However, the Superior Court properly turned to the Commentary to the Criminal Code to determine the General Assembly's

[15] *Mayor and Council of Wilmington*, 157 A.2d 789, 793-94 (Del. 1960) (citation omitted).

[16] 11 *Del. C.* § 208.

intent when it drafted subsection (1)(a). The Commentary to section 208 states: "Subsection (1) applies where the former prosecution resulted in a conviction or an acquittal and the subsequent prosecution is either (a) for any offense of which the defendant could have been convicted in the prosecution (*e.g., an included offense*)…."[17] As the court had found in *Esham*, this comment shows:

> [T]he draftsmen of the commentary understood the quoted language of the section to apply to an offense for which the defendant *could have been convicted under the indictment in the first prosecution*. If this language had been intended to apply to all outstanding charges against a defendant, exclusionary language such as that used in § 208(1)(b)(ii) could have been used."[18]

The *Esham* court's conclusion about the meaning of section 208(1)(a) is not dependent on the factual circumstances of that case, as Holland appears to argue. (Op. Brf. 14-15).

The court's conclusion about the meaning of section 208(1)(a) makes sense. Acquittal for an offense necessarily means that a second prosecution is precluded for any lesser included offense. The drafters covered this factual scenario in subsection (1)(a), and then addressed prosecutions for the "same conduct" in subsection (1)(b). Holland's broad reading of subsection (1)(a) to include anything that *could* have been included in the first indictment renders subsection 208(1)(b)(1) surplus.

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[17] *Delaware Criminal Code with Commentary*, § 208, p. 19 (1973) (emphasis added).

[18] *State v. Esham*, 321 A.2d 512 (Del. Super. 1974) (emphasis added).

Moreover, because the Delaware Criminal Code is based on the provisions of the Model Penal Code, the Superior Court also properly relied on the Model Penal Code Commentary to determine the meaning of section 208(1)(a). Section 208(1)(a) is identical to section 1.09(1)(a) of the Model Penal Code. The commentary to section 1.09(1)(a) states that "the test under this subsection is 'any offense of which the defendant could have been convicted' not 'any offense for which the defendant could have been prosecuted' at the first trial." Consequently, the Superior Court's construction was correct.

Relying on dissenting and concurring opinions by Justice Brennan, Holland argues that "[b]ecause 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." (Op. Brf. 15). But dissenting and concurring opinions do not establish law, and Holland's argument improperly ignores section 208(1)(b), which specifically permits a subsequent prosecution based on the same conduct in certain circumstances.[19] Holland's "sound policy" and "public interest" protestations (Op. Brf. 15) provide no basis for the Court to re-write the statute in a way that disregards the General Assembly's intent.

The Superior Court properly found that section 208(1)(b) allowed the prosecution for Attempted Robbery First Degree to proceed. Even though the

[19] *See* 11 *Del. C.* § 208(1)(b) (*supra* at p. 12).

prosecution was based on the same conduct as the first prosecution in which Holland was acquitted of Assault First Degree against Mr. Moore and Mr. Deshields, "Robbery First Degree and Assault First Degree are not the same offenses for double jeopardy purposes."[20] Holland does not dispute this on appeal. Consequently, the Superior Court properly denied Holland's motion to dismiss.

**Holland waived his claim of vindictive prosecution and, in any event, the claim is meritless.**

*By failing to fairly present his claim of vindictive prosecution to the court below, Holland has waived the claim here.*

Holland argues that "[t]he reindictment was the product of vindictive prosecution" and that "the trial court deprived Mr. Holland of his right to due process by failing to dismiss the newly-indicted charges." (Op. Brf. 16, 23). Holland waived this issue by failing to fairly present it to the Superior Court.[21] Holland's counseled motion to dismiss, reply and motion for reargument relied solely on a claim that the reindictment violated the Double Jeopardy Clause and 11 *Del. C.* § 208. (A297, 387, 402). While he was represented by counsel, Holland filed *pro se* filings that raised vindictive prosecution, however, those filings were

[20] Order (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Hackett v. State*, 569 A.2d 79, 90 (Del. 1993)) (A398-99).

[21] Del. Supr. Ct. R. 8.

not properly before the court.[22] (A407, 412). After the court granted his request to proceed *pro se* at trial, the court provided Holland an opportunity to "make any argument you wish *over and beyond* what was set forth in [counsel's] motion for reargument…." (A425) (emphasis added). Holland had the opportunity, but did not argue vindictive prosecution, and the court, therefore, only discussed Double Jeopardy and section 208 in its bench ruling denying the motion for reargument. (A425-26). The next morning, Holland raised his concern about "the fairness of the trial" and that the "reindictment was based on lies," but failed to clearly present his argument as one that could be understood as a due process claim. (A429-30). The court noted that the motion was too late,[23] and in any event was not an issue that the court could adjudicate, stating "It's going to have to be tested by the evidence that comes in at trial." (A430). Because Holland did not properly present it, the court never ruled on his vindictive prosecution claim. Consequently, this Court should not consider this due process issue.[24] However, should the Court review the issue in interests of justice, there was no plain error.

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[22] Del. Super. Ct. Crim. R. 47 ("The court will not consider pro se applications by defendants who are represented by counsel unless the defendant has been granted permission to participate with counsel in the defense").

[23] *See* Del. Super. Ct. Crim. R. 12(b)(1) (requiring motions to be raised pretrial if based on the indictment), (c) (allowing court to set motion deadline) & (f) (failure to timely raise defense that must be made pretrial "shall constitute waiver thereof"); A7, D.I. 37 (establishing May 15, 2015 as motion deadline).

[24] Del. Supr. Ct. R. 8.

*The Superior Court did not commit error, plain or otherwise, by failing to dismiss the new charges in the reindictment based on claims of vindictive prosecution.*

"[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision of whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[25] However, the prosecutor's discretion is not unlimited.[26] In *Blackledge v. Pearce*, the United States Supreme Court held that that the due process clause was violated when the State responded to the defendant's exercise of his statutory right to a trial *de novo* on appeal of his misdemeanor conviction by obtaining a felony indictment, based on the same evidence, against the defendant prior to the trial *de novo*.[27] In *Johnson*, this Court found that the rationale of *Blackledge* applies to cases in which a more serious charge is brought after a mistrial.[28]

In *Johnson*, the defendant was originally tried for attempted murder in the second degree, two counts of robbery in the second degree, and two counts of conspiracy in the second degree with possible penalties of life plus 34 years.[29]

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[25] *Albury v. State*, 551 A.2d 53, 61 (Del. 1988) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

[26] *Id.* at 61, n.13.

[27] 417 U.S. 21 (1974).

[28] *Johnson v. State*, 396 A.2d 163 (Del. 1978).

[29] *Id.* at 164.

After a mistrial, the defendant was reindicted on the charges of attempted murder in the first degree, two counts of robbery in the first degree, and two counts of conspiracy in the second degree, with possible penalties of life plus 74 years.[30] "The only reason appearing in the record for reindicting the defendant on the more serious charges is a statement of the prosecutor during an office conference with the Trial Judge prior to the first trial that the defendant was undercharged."[31] The Court found that, even in the absence of evidence of bad faith, the due process clause required striking the judgments of conviction and entry of judgment of conviction on the original, lesser charges.[32] Thus, the Court applied *Blackledge's* presumption of vindictiveness to a reindictment after a mistrial. The Court carefully noted, however, that it was *not* holding "that an indictment on a more serious charge is impermissible after a mistrial when the facts have changed."[33]

The record, here, shows that the State's decision to reindict Holland to charge Attempted Robbery First Degree (and the accompanying PFDCF) against the three victims was based on information the State learned from Mr. Moore shortly before the first trial. Mr. Moore then told prosecutors that he, in fact, had been dealing marijuana at the time of the incident. When interviewed by police

[30] *Id.*

[31] *Id.*

[32] *Id.* at 165.

[33] *Id.*

immediately after the incident, Mr. Moore lied and said that he *previously* dealt marijuana because he was afraid of being incarcerated.[34] (A84, 87, 89-90, 93-96, 437, 441-43). Within a few days of the incident, the victims moved from their apartment, and the police had no forwarding address or phone numbers for the victims. (A444, 509, 547). The police had not asked Mr. Moore about the marijuana found at the apartment before losing contact with him. (A442, 443). The police did not locate the victims until shortly before the first trial in January 2015. (A509). Although, as Holland points out, the police were aware that there was marijuana and baggies in the apartment and that a person in the apartment complex said that Mr. Moore sold marijuana and was known as the as the "weed man," it was not until Mr. Moore admitted that he was dealing marijuana at the time of the incident that the motive for a robbery was provided sufficiently for indictment and trial. Before that, the State could only reasonably believe that Mr. Moore would testify in accordance with his initial statement to police - that he no longer sold marijuana.[35] This change in factual circumstance is sufficient to rebut

[34] Indeed, Holland highlighted the fact that Mr. Moore initially lied to the police.

[35] Holland's contention that the State represented that it did not possess the knowledge "until the midst of the first trial" is factually erroneous. (Op. Brf. 23). Although the State asserted that its "decision to reindict was based upon the testimony presented at trial," the State noted that it had become aware of the information on "the eve of trial." (A382-83) (quoted at Op. Brf. 21).

any presumption of vindictiveness and there is no evidence of actual vindictiveness.[36]

**Holland waived his claim that the State was estopped from arguing Holland possessed a firearm and caused Moore's injury, and, in any event, it is meritless.**

Holland argues that "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." (Op. Brf. 27) (emphasis added). From this faulty assertion, Holland argues that the State was collaterally estopped "from arguing that [Holland] caused physical injury to Moore during an Attempted Robbery or possessed a firearm," (Op. Brf. 28), and contends that "Mr. Holland's conviction of the Attempted Robbery of Moore, as well as the related PFDCF must be vacated." (Op Brf. 24). Holland is incorrect.

*Holland's failure to fairly present his collateral estoppel claim to the Superior Court waives review here.*

[36] *State v. Moran*, 820 A.2d 381 (Del. Super. 2002) (finding the State rebutted the presumption of vindictiveness where the State reindicted the defendant after the first trial resulted in a mistrial where the victim disclosed additional information shortly before the first trial); *United States v. Jones*, 587 F.2d 802, 805 (5th Cir. 1979) (affirming denial of motion to dismiss reindictment where "prosecutor sought the reindictment solely because of evidence discovered after the first indictment was returned"); *Hardwick v. Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977) ("An increase in the severity or number of charges if done without vindictiveness *may be easily explained*. For example, evidence of the additional crimes may not have been obtained until after the first indictment or information is filed …. Other explanations which would negate vindictiveness could include mistake or oversight in the initial action….") (emphasis added).

In his motion to dismiss below, Holland argued that the Double Jeopardy Clause and 11 *Del. C.* § 208(1)(a) precluded prosecution for certain counts of the reindictment. (A298-302). Although Holland stated that "the jury has already considered [and] rejected the theory of injury and the use of a firearm," Holland neither used the words "collateral estoppel" nor cited to 11 *Del. C.* § 208(2). Holland's vague reference to principles underlying the doctrine of collateral estoppel was insufficient to fairly present the issue to the Superior Court, waiving review here.[37]

*Collateral estoppel did not apply.*

In 1971, the Delaware General Assembly codified the application of collateral estoppel to criminal proceedings.[38] In pertinent part, section 208 provides:

> Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a former prosecution … under the following circumstances:
> …
> (2) The former prosecution was terminated by an acquittal ... [that] necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense.[39]

[37] Del. Supr. Ct. R. 8.

[38] *Banther v. State*, 884 A.2d 487, 492 (Del. 2005); 58 Del. Laws, c. 497 §§ 207-208 (1971); 11 *Del. C.* §§ 207-208.

[39] 11 *Del. C.* § 208(2).

As this Court has explained, "[t]he test for applying the collateral-estoppel doctrine requires that 'a question of fact essential to the judgment be litigated and determined by a valid and final judgment.'"[40] When applying these principles to a general verdict, as is the case here, the Court must "examine the record of the 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...."[41]

The jury in the first trial acquitted Holland of the charges of Assault First Degree against Mr. Moore and against Mr. Deshields, and the accompanying PFDCF charges. As the Superior Court properly instructed the jury, the State was required to prove beyond a reasonable doubt all of the following elements:

> One. The defendant causes serious physical injury to Nemesis Moore (that's Count III) and/or Semaj Deshields (that's Count V); and
>
> Two. The defendant acted intentionally; and
>
> Three. The defendant used a firearm to cause the injury. A firearm is a deadly weapon.
>
> **"Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ. "Intentionally" means that it was the defendant's conscious object or purpose to cause serious physical injury to Nemesis Moore and/or Semaj Deshields."** (A252) (emphasis added).

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[40] *Banther*, 884 A.2d at 492 (quoting *Taylor v. State*, 402 A.2d 373, 375 (Del. 1979)).

[41] *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (citation omitted).

To acquit Holland, the jury could have determined that it was not Holland's "conscious object or purpose to cause serious physical injury" to Mr. Moore or Mr. Deshields. The testimony at trial showed that the victims' incurred injuries only after Mr. Moore attacked Holland in defense of his mother. (A59, 74, 137). Mr. Moore, Mr. Deshields and Ms. Grier testified that they were all, at different points, thereafter involved in the struggle. (A59, 74, 137). Mr. Moore and Mr. Deshields testified that the gun was fired while Mr. Moore and Holland were struggling. (A74, 137-38). The jury could have believed that the gun accidentally discharged during the struggle or could have applied something akin to a self-defense theory to find that the State failed to prove the requisite intent. The jury could have concluded that Holland unintentionally injured Mr. Moore and Mr. Deshields.[42] Indeed, this type of determination might also explain why the first jury hung on Holland's charge of Assault Second Degree for intentionally *or recklessly* causing physical injury to Ms. Grier.

Moreover, the jury could even have concluded that the State had not proven beyond a reasonable doubt that Mr. Deshields or Mr. Moore injuries met the definition of "serious physical injuries." Mr. Deshields testified that he was shot in the finger, but never had any pain and received two or three stiches and was

[42] *Compare Peterson v. State*, 81 A.3d 1233 (Del. 2013).

released the same night. (A140). Mr. Deshields explained that his finger no longer bends at one of the joints. (*Id.*). Mr. Moore testified that he suffered a gunshot wound to the left side, and initially felt "pressure" and later felt a 7 on a scale of 1-10 for pain from the gunshot. He felt pain for two months and "periodically" still feels pain, he suffered a fractured bone, and has a scar from the entry wound, but was released from the hospital the next day and required no operation. (A74, 77-78, 83-84). Despite Holland's claim to the contrary, it is possible that the jury could have found this evidence insufficient to prove "serious physical injury."

The first jury need not have found that Holland did not possess a firearm as Holland appears to argue. (Op. Brf. 27, 28). As discussed above, the acquittal on the charges of Assault First Degree could have been based on the lack of proof beyond a reasonable doubt on one of the other elements. And the jury's acquittal on PFDCF could have been premised only on its acquittal for the underlying Assault First Degree charges.[43]

Despite his claim to the contrary (Op. Brf. 24-28), Holland's case is not like *Ashe v. Swenson*,[44] where the jury necessarily found that the defendant had not been one of the assailants in a robbery of six individuals. Rather, Holland's case is

[43] *Compare Peterson*, 81 A.3d at 1247 (finding that jury's general verdict of acquittal on Assault First Degree and PFDCF did not establish that the jury affirmatively concluded that the defendant did not possess a weapon) (affirming conviction for PFBPP).

[44] 397 U.S. 436 (1970).

more akin to the example provided in the Commentary to section 208 of the Criminal Code:

> [T]ake the case of an injury caused by allegedly reckless driving by D. Suppose that D is first charged with reckless driving, and the case results in an explicit determination that, under all the circumstances, D was not reckless. If he is later charged with manslaughter, which requires proof of recklessness, … he would be entitled to an acquittal. He would not, however, be able to avoid a trial for criminally negligent homicide, which requires proof of a lesser degree of culpability.[45]

Similarly, here, although the jury in the first trial may have decided that the State had not proven "serious physical injury," the jury did not decide whether Mr. Deshields and Mr. Moore suffered the lesser standard of "physical injury" applicable in Robbery First Degree. Moreover, the first jury was charged that it had to find that Holland *intentionally caused* the serious physical injuries; whereas, the second jury did not have to find that Holland intentionally caused the physical injuries, only that "[i]n the course of the commission of the crime or the immediate flight therefrom, the defendant, (1) caused physical injury to Nemesis Moore, Semaj Deshields and/or Vanessa Grier, who was not a participant in the crime…."[46] Holland has failed to establish his claim of collateral estoppel.

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[45] *Delaware Criminal Code with Commentary*, § 208 (p.20) (1973).

[46] The jury was also instructed that it could find him guilty if the State alternatively proved "[i]n the course of the commission of the crime or the immediate flight therefrom, the defendant, … or (2) displayed what appeared to be a firearm [to the victims], or, (3) alternatively as to Vanessa Grier, she was 62 years of age or older."

## II. The Superior Court properly determined that Holland knowingly, intelligently and voluntarily waived his right to counsel.

### Question Presented

Whether the trial judge properly found that Holland, who had proceeded *pro se* at his first trial before the same judge and obtained acquittals on four charges and a hung jury on the remaining charges, was again knowingly, intelligently and voluntarily waiving his right to counsel at his second trial.

### Standard and Scope of Review

This Court reviews *de novo* an asserted denial of the constitutional right to counsel.[47]

### Merits of the Argument

Holland argues that "[t]he 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*.[48] 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." (Op. Brf. 29). Holland is incorrect. The court possessed sufficient information to

[47] *Smith v. State*, 996 A.2d 786, 790 (Del. 2010).

[48] 606 A.2d 103, 108 (Del. 1992).

establish a basis to find that Holland's waiver was knowing, voluntary and intelligent.

**The applicable law**

"The right to represent oneself in a criminal proceeding is fundamental."[49] "It is well-established law that criminal defendants have a constitutional, Sixth Amendment right to waive counsel and continue *pro se* if they do so knowingly, intelligently, and voluntarily."[50] Once a defendant has asserted his right to self-representation, the court must proceed with a hearing to make that determination.[51] The desire to protect a defendant's right to counsel "does not diminish a court's responsibility to scrupulously honor an unequivocal request to proceed pro se."[52]

"A determination of whether a defendant has intelligently waived the right to counsel depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the defendant."[53] In *Briscoe*, this Court adopted the guidelines set out in *United States v. Welty* for evaluating a defendant's waiver of his Sixth Amendment right to counsel.[54] *Briscoe* held that

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[49] *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996).

[50] *Boyer v. State*, 2009 WL 3841973, at *1 (Del. Nov. 16, 2009) (citing *Faretta v. California*, 422 U.S. 806, 835 (1975)).

[51] *Morrison v. State*, 135 A.3d 69, 73 (Del. 2016) (citations omitted).

[52] *Stigars*, 674 A.3d at 479 (citations omitted).

[53] *Briscoe*, 606 A.2d at 107 (citation omitted).

[54] *Id.* at 108-09 (citing *United States v. Welty*, 674 F.2d 185, 188-89 (3d Cir. 1982)).

the trial court should consider a defendant's background, experience, and conduct, and should advise or discuss with him the following:

1) 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) He may be hampered in presenting his best defense by his lack of knowledge of the law;

3) The effectiveness of his defense may well be diminished by his dual role as attorney and accused;

4) The nature of the charges;

5) The statutory offenses included within those charged;

6) The range of allowable punishments thereunder;

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

8) All other facts essential to a broad understanding of the whole matter.[55]

The *Briscoe/Welty* factors are recommended guidelines.[56] "A knowing and intelligent waiver can occur without reviewing each of those factors *in haec verba*."[57]

[55] *Id.*

[56] *Smith*, 996 A.2d at 791-92.

[57] *Id.*

*Smith*,[58] *Boyer*,[59] and *Morrison*[60] are not factually similar to his case as Holland contends. (Op. Brf. 32-34). In each, unlike here, the court below addressed only two or three of the *Briscoe/Welty* guidelines.[61] In each, unlike here, the trial judge was not faced with a defendant asking to proceed *pro se* for a second trial regarding the same incident.[62]

**Holland's waiver was knowing, intelligent and voluntary.**

The trial judge here conducted a thorough inquiry, on the record, which was supplemented both by Holland's signed waiver of counsel form and the colloquy at the first trial at which Holland represented himself before the same judge. Holland's waiver was more than adequate.

At a pretrial conference the morning of trial, counsel for Holland advised the court that Holland "wishes to represent himself again since he did such a good job

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[58] *Smith*, 996 A.2d 786.

[59] *Boyer*, 2009 WL 3841973.

[60] *Morrison v. State*, 135 A.3d 69.

[61] *Morrison*, 135 A.3d at 74 (reversing where the trial judge failed to inform Morrison of five of the *Welty* guidelines: 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); *Smith*, 996 A.2d at 787-92 (reversing where defendant requested to represent himself mid-trial and where court only "warned Smith 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.'"); *Boyer*, 2009 WL 3841973, at *2 (reversing because the trial judge warned the defendant of only two *Welty* guidelines: "[t]he judge only advised Boyer that he would have to adhere to the rules of the court, the rules of evidence, and 'all those things.'"); .

[62] *Morrison*, 135 A.3d at 72 (defendant had not previously represented himself); *Smith*, 996 A.2d at 787-92 (no mention that defendant previously represented himself); *Boyer*, 2009 WL 3841973, at *2 (defendant had never been through any trial).

the last time." (A418). Counsel explained that the issue of self-representation had come up two or three weeks ago while counsel was preparing Holland to testify because counsel "did not believe he'd have any shot in the world without him getting on the stand and testifying." (A418-19). Based on counsel's representations, it is clear that counsel and Holland thought that Holland would have a better chance of presenting his story to the jury without testifying by proceeding *pro se* rather than with counsel. Holland had been successful in presenting his story without testifying in the first trial, resulting in acquittals on four charges and a hung jury on the remaining charges. (A419). Counsel further explained to the court that: he and Holland were able to get along; he had met with Holland three times over the last week to prepare for trial; he had returned to Holland a copy of all the discovery; he explained to Holland how his ability to refer to the first trial was limited and how the rule of the case applied to previous rulings made; he explained to Holland that the decision whether to testify belonged to Holland; and he believed Holland was competent to represent himself. (*Id.*). Counsel assisted Holland in executing a Waiver of Counsel form. (B1).

When the court solicited comment from the State, the prosecutor stated that "the decision to represent himself is up to the defendant, as long as the Court is satisfied with his colloquy." (A419). The State noted that Holland had "interjected a lot of what the State would categorize as testimony in his questioning

in the last trial," that doing so was improper, and that the State would be objecting every time that he attempted to present testimony without taking the stand. (A420). The court and the prosecutor discussed the admissibility of Holland's prior record if he testified. (*Id.*).

The court next addressed Holland. Holland stated that he had heard everything that his counsel and the prosecutor had said, and that it was his decision to represent himself despite counsel having been privately retained. (A420). The court reviewed the Waiver of Counsel Form with Holland. (A420-21; B1). The Waiver of Counsel Form and the colloquy on the record properly addressed the fact that Holland would have to conduct his defense pursuant to the rules of evidence and criminal procedure and that his lack of knowledge of the law could hamper his defense. (A420; B1). Although Holland does not contend that the form and the colloquy did not adequately cover the first two *Welty/Briscoe* guidelines, it should be noted that the court already knew Holland was well-aware of these points based on his self-representation at the first trial.

Holland complains that the court did not "discuss with Mr. Holland that the effectiveness of his defense could be diminished by his dual role as attorney and accused." (Op. Brf. 35). But the court did provide Holland this warning during the colloquy at the first trial, and the court incorporated its findings at the first trial into its ruling. (A47; A421). Particularly where Holland ably represented himself at

the first trial before the same judge, and the Waiver of Counsel Form executed at the second trial warned Holland of the "definite hazards in representing [himself]," the court need not have used the same, precise words for the court to find Holland's waiver knowing, voluntary and intelligent. (B1).

Holland's contention that the court did not advise him of the offenses with which he was charged in the reindictment is simply incorrect. The Waiver of Counsel Form accurately lists the offenses with which Holland was charged. (B1). (Op. Brf. 35). Moreover, Holland's *pro se* filings (docketed while he was represented) reveal that he was well aware of the Robbery First Degree charges in the reindictment, as well as the arguments made in the counseled motion to dismiss and the State's response. (A297, 385, 407, 412). Holland's arguments reveal a sophisticated understanding of the factual and legal issues related to the new/revised charges. Moreover, the new/revised charges were based on the same incident as the charges in the first trial and some of the charges were identical to those in the first trial. Not only was the factual basis for the charges set forth in detail in the waiver of counsel colloquy before the first trial (A45), but the trial judge knew, from presiding over the first trial at which Holland represented himself, that Holland had an excellent grasp of the evidence, including that which supported the new/revised charges. All of this provided the court a more than

sufficient basis to believe that Holland knew both the nature of the charges and the statutory offenses included within those charges.

Holland also contends the court did not adequately ensure that he knew the range of penalties, and therefore, could not properly find his waiver knowing, intelligent and voluntary. But, as Holland concedes, he knew, both through the colloquy and the Waiver of Counsel Form that he was facing over 200 years of incarceration. (A420; B1; Op. Brf. 36). The court also confirmed that Holland was aware that he was facing a minimum mandatory sentence of 33 years, after which the court allowed Holland to meet not only with defense counsel but with his mother. (A422-24). After that meeting, Holland declined to accept the State's plea offer and stated he wished to go to trial. (A424). Although the discussion of the minimum mandatory time occurred after the court had made its waiver of counsel finding, Holland was aware of the minimum mandatory sentence before he proceeded to trial and did not state that the minimum mandatory sentence caused him to wish to proceed with counsel. Furthermore, the minimum mandatory sentence appears to have been a driving factor for Holland's decision to represent himself. During the pretrial discussion at the first trial, Holland's recognition of the lengthy minimum mandatory time was one of the reasons that he gave when he requested a continuance to obtain other counsel that then turned into a request to represent himself, which the court granted. (A44 ("this is my life[;] after 33 years,

that's my whole lifetime."), 45-49). In light of these circumstances and the lack of record evidence supporting a belief that Holland's decision would have been different if it had been highlighted that there was a 3 year difference in the minimum mandatory time Holland faced between the first trial and the second trial, Holland's complaint about his knowledge of the range of punishments is unavailing.

Likewise meritless is Holland's complaint that the court did not discuss possible defenses to the charges. The trial judge, who presided over the first trial was aware that Holland had developed strategies to defend his case. Indeed, the trial judge knew that Holland's strategies had resulted in a partial acquittal and a hung jury. Specific to the new/revised charges as opposed to the facts of the incident, the court was aware from counsel's comments that counsel and Holland had had multiple meetings to prepare the defense and knew that counsel had returned the discovery to Holland so that he could prepare. (A418-20). These circumstances were sufficient for the court to conclude that Holland's waiver was knowing, voluntary and intelligent.

## III. The Superior Court did not commit plain error in failing to *sua sponte* grant a mistrial because of a supplemental DNA report that the State disclosed six months before trial.

### Question Presented

Whether the Superior Court committed plain error in failing to *sua sponte* grant a mistrial because of a supplemental DNA report that Holland reviewed with stand-by counsel and thereafter consented to its admission.

### Standard and Scope of Review

Where a defendant has forfeited (voluntary affirmative conduct) as opposed to waived (failure to act) a claim below, it is not reviewable on appeal.[63] A claim not raised below is reviewed at most for plain error.[64] "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."[65] Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[66]

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[63] *See Wright v. State*, 980 A.2d 1020, 1023-24 (Del. 2009) ("this Court has consistently held that a conscious decision to refrain from objecting at trial as a tactical matter is a waiver that will negate plain error appellate review) (citations omitted); *Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) (dissent) (discussing distinction between forfeiture and waiver of claims).

[64] Del. Supr. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[65] *Wainwright*, 504 A.2d at 1100 (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

[66] *Id.* (citing *Bromwell v. State*, 427 A.2d 884, 893 n.12 (Del. 1981)).

## Merits of the Argument

Holland argues that the Superior Court committed plain error by failing to *sua sponte* declare a mistrial when, mid-trial, Holland became aware of a supplemental DNA report that the State had disclosed six months earlier. Relying on a case addressing sanctions for a discovery violation (which Holland concedes did not occur here), and despite Holland's consent to the report's admissibility, Holland argues that "the trial court fundamentally prejudiced Mr. Holland and undermined the fairness of the proceeding." (Op. Brf. 39). Holland is incorrect. Holland waived claims related to the admission of the supplemental DNA report, and in any event, the court did not commit plain error by failing to *sua sponte* declare a mistrial.

**Holland waived claims related to the admission of the supplemental DNA report.**

Near the end of a trial day, when the State sought to admit the supplemental March 30, 2015 DNA report, Holland objected on the basis that it had not been produced. (A515). The court initially sustained the objection and struck the DNA expert's testimony related to the supplemental report. (A515-16). Shortly thereafter, the prosecutor noted that the docket reflected that the State had provided counsel the supplemental report on March 31, 2015, and the court recessed for the day. (A516). The next morning, counsel advised the court that he had received the supplemental report, which had inadvertently been misfiled at his office. (A519).

Counsel advised that he had reviewed the report with Holland and represented that Holland preferred the supplemental report over the initial report. (*Id.*). Holland then consented to the report's admissibility. (A515-16)[67] Holland's tactical decision not to object because he preferred the supplemental report "is a waiver that will negate plain error appellate review."[68] However, even if the Court were to consider Holland's claim, there was no plain error.

**The DNA evidence**

The most incriminating piece of the DNA evidence admitted against him at both the first and second trials was the DNA found on the mask that Grier, Deshields and Moore testified Holland was wearing when he broke into their apartment. Sarah Lindauer, a senior forensic DNA analyst, testified, and the reports admitted into evidence showed, that the DNA profile found on the front of the mask was a mixture of at least two individuals, at least one of which was male; and that the DNA profile of the major contributor was consistent with Holland's DNA profile. (A36, 293, 514, 522; State's Exs. 111 & 112). With the exception of recalculated statistics based on the FBI's updated database, the evidence on this point was the same at the first trial as it was at the second trial. (A36, 121-22, 293, 392, 514, 522). Ms. Lindauer testified at the second trial that the probability of

[67] Holland stated: "The report's – I don't see nothing wrong with them, so I wouldn't object to them coming back in."

[68] *Wright*, 980 A.2d at 1023 (citations omitted).

randomly selecting an unrelated individual with a DNA profile matching that of the major contributor and Holland's known profile ranged from one in 62 quintillion 740 quadrillion in the African-American population up to one in 32 sextillion 780 quintillion in the Southwestern Hispanic population. (A523-24. *See also* State's Ex. 111; A292).

Ms. Lindauer also testified about the results of the analysis of swabs from: the shell casing; the handgun; and the magazine and ammunition. At the first trial, Ms. Lindauer had not compared the DNA profiles obtained from the crime scene items to profiles from the three victims. At the second trial, in addition to testifying about whether Holland could be a contributor to the DNA profiles obtained from crime scene evidence, she also testified about her comparison of those profiles to known DNA profiles from Mr. Moore, Mr. Deshields and Ms. Grier.

The shell casing swab reflected a single-source DNA profile of an unknown male, with Holland, Ms. Grier, Mr. Deshields and Mr. Moore being excluded as a possible contributor. (A521-22). The magazine and ammunition swabs revealed a DNA profile consistent with a mixture of at least two individuals, at least one of which was male. Holland was included as a possible contributor; Mr. Deshields, Ms. Grier and Mr. Moore were excluded. (A522). The probability of randomly selecting an unrelated individual that could be included as a contributor to the

magazine and ammunition DNA ranged from one in 38 in the Southwestern Hispanic population to one in 53 in the Southeastern Hispanic population. (A523; State's Ex. 111). The handgun swab revealed a DNA profile consistent with a mixture of at least three individuals, at least one of which was male. (A522). Holland, Mr. Deshields and Mr. Moore were all included as possible DNA contributors to the handgun; Ms. Grier was excluded. (*Id.*). The probability of randomly selecting an unrelated individual that could be included as a contributor to the handgun DNA ranged from one in 10 in the African American population to one in 20 in the Caucasian population. (A523; State's Ex. 111).

**Holland's cross-examination**

Holland's cross-examination of the DNA expert was thorough, and targeted the most damning DNA evidence by eliciting testimony that was consistent with his strategy of arguing that the DNA profile identified on the mask was the result of secondary transfer of his blood from his stab wounds. (A524-532). Holland asked Ms. Lindauer about Lieutenant Malone's testimony regarding items being moved at the crime scene (while medical care was being provided to the victims and Holland). (A525). Ms. Lindauer conceded that "I can only say that the DNA that I found on the items submitted to me is the DNA that was there. The manner in which it got there, I can't testify to." (*Id.*). Holland had Ms. Lindauer explain to the jury the difference between primary transfer and secondary transfer of DNA

and then obtained Ms. Lindauer's concession that the DNA found on the mask could have been transferred via secondary transfer. (A528). Holland then used photographs of the crime scene, and elicited that pictures of the mask showed "some reddish staining on the clothing underneath and it does appear that the mask is touching it in this photo." (A529). Holland then elicited Ms. Lindauer's testimony that, although the picture shows the mask in contact with blood, she did not test it for the presence of blood, and that if the mask had been wrapped in the bloody shirt shown in Defendant's Exhibit 22, the DNA from the blood could have been transferred from the shirt to the mask. (A529-30). Holland then moved to the issue of the second report and the fact that, even with the addition of the reference samples from Ms. Grier, Mr. Moore and Mr. Deshields, Ms. Lindauer could not identify whose blood was found on the casing at the crime scene. (A530, 531-32).

**The Superior Court did not commit plain error; there was no "manifest necessity" for a mistrial**

"It is well-settled in Delaware that a mistrial is mandated only where there are no meaningful and practical alternatives to that remedy."[69] Moreover, a "trial judge is in the best position to assess whether a mistrial should be granted"[70] and should grant a mistrial only "where there is a 'manifest necessity' or the 'ends of

[69] *Smith v. State*, 913 A.2d 1197, 1223-24 (Del. 2006) (citations omitted) (affirming denial of motion for mistrial premised on State failure to disclose results of retest of bullet).

[70] *Id.* (citation omitted).

public justice would be otherwise defeated.'"[71] Holland ignores the rigorous standard for grant of a mistrial and argues that the Superior Court committed plain error in failing to *sua sponte* grant a mistrial because he learned of the supplemental DNA report during trial.

Holland argues that the supplemental DNA report foreclosed an argument that the gun belonged to either Mr. Moore or Mr. Deshields. (Op. Brf. 41). But Ms. Lindauer testified that both Mr. Moore and Mr. Deshields were included as possible contributors to the DNA found on the handgun swabs. (A522). Even though Mr. Moore and Mr. Deshields were excluded as possible contributors to the DNA found on the magazine and ammunition swabs (A514), Ms. Lindauer's testimony supported a theory that the gun could have belonged to Mr. Moore or Mr. Deshields. Although the supplemental report foreclosed Holland's ability to argue that the DNA analysis was incomplete as he had in the first trial, that would have been so regardless of the length of time Holland had to analyze the report and whether he had obtained an expert review it. Because Holland did not mention the DNA analysis in his opening (A434), the fact that he did not learn of the supplemental report (through no fault of the State) until mid-trial did not impact the defense strategy presented to the jury. Holland did not find it necessary even to ask for additional time to review the report. Instead, he consented to its admission.

[71] *Id.* (citation omitted).

Holland fails to articulate how his cross-examination of the DNA expert, or any other aspect of his defense, would have changed if he had had "sufficient time to review the DNA report to prepare for cross-examination and, if necessary, to consult with an independent expert." (Op. Brf. 43). This failure is fatal to his claim that the court committed plain error in failing to *sua sponte* grant a mistrial.[72] Holland's cross-examination was thorough and effective during the second trial. Indeed, his cross-examination of Ms. Lindauer is likely the reason the jury acquitted him of wearing a disguise when all three victims testified that he wore a mask. (A436, 463, 501, 528-30). Holland fails to explain how the science between the first report, on which he cross-examined Ms. Lindauer at the first trial, and the second report is any different. The only difference was that more known DNA profiles were compared to those obtained from the crime scene evidence. As Holland acknowledged at trial, and fails to refute now, there was nothing "wrong" with the reports. (A519-20). Stand-by counsel stated that Holland "actually prefers the [second report]." (A519). Holland affirmatively stated, "I wouldn't object to [the report] coming back in." (A520). Under these circumstances, there was no basis for the court to *sua sponte* order a mistrial.

[72] Although, as Holland concedes (Op. Brf. 40, n. 175), he cannot pursue a claim of ineffective assistance of counsel on direct appeal, the failure to make this showing would likewise be fatal to a claim of ineffective assistance of counsel because he could not prove the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, because he was proceeding *pro se* at trial, it does not appear any claim of ineffective assistance of counsel could be made.

## CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Dated: September 1, 2016

## CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esq., do hereby certify that on September 1, 2016, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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