



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN RASIN,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	No. 325, 2012C
v.	)	
	)	ON APPEAL FROM THE SUPERIOR
STATE OF DELAWARE,	)	COURT OF THE STATE OF
	)	DELAWARE
	)	IN AND FOR NEW CASTLE COUNTY
Plaintiff-Below,	)	
Appellee.	)	
	)	
MARC T. TAYLOR,	)	No. 293, 2012C
	)	
Defendant-Below,	)	ON APPEAL FROM THE SUPERIOR
Appellant,	)	COURT OF THE STATE OF
	)	DELAWARE
v.	)	IN AND FOR NEW CASTLE COUNTY
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

APPELLANT RASIN'S REPLY BRIEF

/s/ James J. Haley, Jr.
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Dated: April 9, 2013

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ARGUMENT I

The State's argument that the statutory meaning of "active participation" is "unmistakably clear, meaning more than nominal of passive participation" (Ans. Br., p. 14) is nothing but tautology (i.e. "needless repetition of an idea, statement or word." E.g. "'A beginner who has just started' is a tautology.") (Merriam-Webster Dictionary)).

In another sentence that makes the tautological nature of the State's argument even clearer, the State indicates that Section 616 forbids "non-passive participation." (Ans. Br., p. 15)

When the explanation for the phrase "active participation" is simply "non-passive participation," nothing can be "unmistakably clear" to persons of "ordinary intelligence" regarding exactly when the behavioral line is crossed from "passive" to "non-passive" participation.

By way of example, is it "unmistakably clear" whether a person wearing a T-shirt emblazoned with the gang logo and the phrase "Snitches get stitches" is "passively" or "actively" participating in furthering the gang's activity?

Because the State can offer nothing more than tautology to define "active participation," and because the statute failed to provide any concrete definition for said

term, 11 Del. C. § 616 is void for vagueness, failing to give persons of ordinary intelligence "fair notice" of how to adjust their behavior to comply with the statute. Because the theory of the State's case against Rasin was founded on an unconstitutionally vague statute, said prosecution was fundamentally prejudicial.

ARGUMENT II

The State argues that its DNA expert's testimony that Rasin's DNA "could not be excluded" from being present on the murder weapon was probative, and not unfairly prejudicial, even without any explanation of the statistical meaningfulness of said "non-exclusion" result.

In fact, a DNA non-exclusion result, unaccompanied by statistical explanation, has been found to be non-probative and prejudicial. See Com. v. Mattei, 920 NE 2d 845 (Mass. 2010) and Craig v. State, 45 So. 3d 699 (Miss. App. 2010).

In Com. v. Mattei, 920 NE 2d 845 (Mass. 2010), the Court explained:

"The same reasoning applies to evidence that a DNA test, although resulting in less than a complete "match," could not exclude a particular individual as a potential contributor. Without reliable accompanying evidence as to the likelihood that the test could not exclude other individuals in a given population, the jury have no way to evaluate the meaning of the result. As the dissent in Commonwealth v. Mattei, 72 Mass. App. Ct. 510, 522, 892, N.E.2d 826 (2008) (Rubin, J., dissenting), noted, there is no way to determine whether the results of nonexclusion in this case mean "that half the people in the world could have left the DNA that was found in the mixture[s]" on the interior doorknob or on the defendant's sweatpants. We simply do not know.

• • •

If the jury are not provided with similar statistical evidence where the DNA test result is a "nonexclusion," there is a real risk that jurors will be misled into thinking that these DNA test results are similarly significant and that the nonexclusion evidence is similarly conclusive as to the "matched" contributors's identity, when in fact the actual meaning of such results can vary substantially.

• • •

The challenged expert testimony concerning the nonexclusion results should not have been admitted without accompanying statistical explanation of the meaning of nonexclusion." Mattei at 855-858.

Similarly, in Craig v. State, 45 So. 3d 699 (Miss. App. 2010), the Mississippi Court was confronted with a DNA non-exclusion result:

"Moyse [the DNA expert] was allowed to read the following into the record:

DNA analysis of the boot yielded a partial DNA profile indicative of a mixture containing DNA from more than one individual. The suspect, Darrell Craig, cannot be excluded as being a contributor to this mixture profile. The probability of excluding a random individual from this mixture profile is 99.99%. The suspects Derrick Tobias and Warren Williams are excluded from as being contributors." Craig at 707

The Court concluded:

"We find no merit to Craig's argument that the evidence was not reliable, since Moyse could not conclusively testify that Craig was a 100% match to the mixture. Moyse testified that her analysis of the boot indicated that there was DNA from other people found in the boot; however, in cases where there is more than one individual in a genetic profile, an exclusion-probability calculation is conducted. Moyse stated that the exclusion-probability calculation allows the analyst to calculate the chances of taking a random individual and excluding them from the mixture. Moyse noted that 99.99% of the time when a random individual is compared to the DNA mixture, the DNA will not match, and the individual is excluded. (Emphasis added.) Craig at 708

In contrast to Mattei, Craig, and Nelson v. State, 628 A. 2d 69 (Del. 1993), the State's DNA expert offered no statistical explanation of the meaningfulness of the "could not be excluded" result developed from comparing Rasin's DNA to the DNA samples taken from the gun. The question of how narrow, or wide, was the subset of persons whose DNA "could not be excluded" from being present on the gun was completely unknown to the jury, inviting jury speculation about the scientific weight added to the State's case against Rasin. If the only male in the world's approximately 3 billion male population whose DNA was

excluded from being on the gun was Ortiz, then, as the State submits, its DNA evidence advanced the probability that Rasin's DNA was on the gun by one 3 billionth, (i.e. the world's male population less Ortiz), but that is such an infinitesimal contribution to "probability" as to raise the question of whether the terms "probative value" and "relevancy" have any meaning. If evidence advancing probability by one 3 billionth is enough to make that evidence automatically relevant, then it is hard to conceive of what evidence could not be admitted at trial. Where would probative value and relevancy possibly stop?

More importantly, though, the absence of any statistical explanation of the DNA expert's phrasing that "neither Rasin nor any paternally linked male relative" could be excluded from being a contributor to the DNA found on the gun fostered a false impression that the DNA result scientifically bolstered the conclusion that either Rasin or one of this paternal male relatives had left his DNA on the gun, when, in fact, no such conclusion could be probably reached from the DNA expert's evidence.

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CERTIFICATE OF SERVICE

I, James J. Haley, Jr., attorney for Appellant, do hereby
certify that I caused the attached Reply Brief to be served by
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