



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

**STATE OF DELAWARE,** )  
 )  
 Plaintiff-Below, )  
 Appellee/ Cross Appellant, )  
 )  
 v. ) No. 52, 2014  
 )  
 )  
 **JEFFREY W. BARNES,** )  
 )  
 Defendant-Below, )  
 Appellant/ Cross Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

**STATE'S REPLY BRIEF ON CROSS APPEAL**

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## TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities .....	ii
Argument .....	1
<b>I.    THE CROSS-APPEAL IS PROPERLY BEFORE THE COURT</b> .....	1
<b>II.   THE TRUTH IN SENTENCING ACT OF 1989 APPLIES TO THE CRIME OF DRIVING UNDER THE INFLUENCE</b> .....	4
Conclusion .....	10

**TABLE OF CITATIONS**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<i>Colonial School Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA</i> , 449 A.2d 243 (Del. 1982) .....	8
<i>Delaware Dept. of Health and Social Services v. Jain</i> , 29 A.3d 207 (Del. 2011) .....	5
<i>General Motors Corp. v. New Castle Co.</i> , 701 A.2d 819 (Del. 1977) .....	2
<i>Owens v. State</i> , 2010 WL 8250841 (Del. Super. Dec. 6, 2010) .....	8, 9
<i>Pauley v. Reinoehl</i> , 848 A.2d 569 (Del. 2004) .....	5
<i>Snyder v. Andrews</i> , 708 A.2d 237 (Del. 1998) .....	6
<i>State v. Clyne</i> , 2002 WL 1652149 (Del. Super. July 22, 2002) .....	8, 9

**STATUTES AND RULES**

2 <i>Del. C.</i> § 181 .....	5
3 <i>Del. C.</i> § 7105 .....	5
3 <i>Del. C.</i> § 7203 .....	5
3 <i>Del. C.</i> § 8713 .....	5
3 <i>Del. C.</i> § 8719 .....	5
4 <i>Del. C.</i> ch. 9 .....	5
5 <i>Del. C.</i> § 2116 .....	5
5 <i>Del. C.</i> § 2317 .....	5
5 <i>Del. C.</i> § 2745 .....	5

6 <i>Del. C.</i> § 2563 .....	5
7 <i>Del. C.</i> § 6013 .....	5
8 <i>Del. C.</i> § 397 .....	5
8 <i>Del. C.</i> § 513 .....	5
9 <i>Del. C.</i> § 8615 .....	5
9 <i>Del. C.</i> § 9113 .....	5
10 <i>Del. C.</i> § 9902(e).....	1, 2
13 <i>Del. C.</i> §§ 102-04 .....	5
13 <i>Del. C.</i> § 112 .....	5
13 <i>Del. C.</i> § 931 .....	5
14 <i>Del. C.</i> § 4110 .....	5
15 <i>Del. C.</i> ch. 23 .....	5
16 <i>Del. C.</i> § 2304 .....	5
16 <i>Del. C.</i> § 2513 .....	5
16 <i>Del. C.</i> §§ 4752-4764 .....	5
17 <i>Del. C.</i> § 513 .....	5
17 <i>Del. C.</i> § 515 .....	5
18 <i>Del. C.</i> § 106 .....	5
20 <i>Del. C.</i> § 3125 .....	5
21 <i>Del. C.</i> § 4177 .....	5

21 <i>Del. C.</i> § 4201 .....	5
21 <i>Del. C.</i> § 4202 .....	5
23 <i>Del. C.</i> § 2302 .....	5
24 <i>Del. C.</i> § 905 .....	5
24 <i>Del. C.</i> § 2308 .....	5
28 <i>Del. C.</i> §§ 701-705 .....	5
29 <i>Del. C.</i> § 5404 .....	5
29 <i>Del. C.</i> § 5805 .....	5
30 <i>Del. C.</i> §§ 571-574 .....	5
30 <i>Del. C.</i> § 2119 .....	5
31 <i>Del. C.</i> § 1003 .....	5
31 <i>Del. C.</i> § 1004 .....	5
31 <i>Del. C.</i> § 3913 .....	5
DEL. SUPR. CT. R. 25(d) .....	1

**OTHER AUTHORITIES**

Delaware General Assembly Bill Tracking for 147 <sup>th</sup> General Assembly House Bill 415 .....	7
67 <i>Del. Laws</i> , ch. 130, § 2 .....	6
67 <i>Del. Laws</i> , ch. 130, § 3 .....	5
67 <i>Del. Laws</i> , ch. 130, § 4 .....	7

<i>67 Del. Laws</i> , ch. 130, § 5 .....	6
<i>67 Del. Laws</i> , ch. 130, § 7 .....	6
<i>79 Del. Laws</i> , ch. 244, § 1 .....	8

**I. THE COURT CAN DECIDE THE ISSUE PRESENTED BY THE STATE’S CROSS-APPEAL.**

Barnes argues that the Court should dismiss the State’s cross-appeal because “Barnes is not affected by the outcome of this appeal and therefore there is no case or controversy.” (Ans. Brf. 7). Barnes makes this argument in part because, despite the ability to request expedited scheduling,<sup>1</sup> “[o]nce the briefing schedule was published and it became apparent that his incarceration would be over by the time this appeal was decided, he filed a Notice of Voluntary Dismissal.” (Ans. Brf. 8). However, section 9902(e) pursuant to which the State filed its cross-appeal,<sup>2</sup> specifically contemplates that the outcome of the State’s appeal “shall not affect the rights of the accused unless the accused, on his or her appeal, is awarded a new trial or a new sentencing hearing.”<sup>3</sup> Section 9902(e) further provides: “Once the State perfects its cross-appeal, the appellate court shall review and rule upon the questions presented therein regardless of the disposition of the defendant’s appeal.”<sup>4</sup> Thus, section 9902(e) specifically contemplates that there need not be an “actual controversy”

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<sup>1</sup> See Del. Supr. Ct. R. 25(d).

<sup>2</sup> See Notice of Cross-Appeal.

<sup>3</sup> 10 Del. C. § 9902(e).

<sup>4</sup> *Id.*

as required by *General Motors*<sup>5</sup> in other situations. Moreover, even if the appeal were not controlled by section 9902's exception to the actual controversy requirement, and the cross-appeal was mooted by Barnes' dismissal of his appeal, the Court may still decide the issue because it is an issue of public importance.<sup>6</sup> Therefore, while the outcome of the State's cross-appeal may not affect Barnes and while Barnes voluntarily dismissed his appeal, this Court is not precluded from deciding the important issue raised in the State's cross-appeal.

Barnes filed his notice of appeal captioned as an appeal from the criminal case in which he had been convicted. Thus, his claim that "this was never a criminal appeal" is wrong. (Ans. Brf. 9). The fact that the Superior Court Order from which he appealed was dual-captioned with the criminal case against him and the mandamus action against the Board or Parole does not render his appeal an appeal from a civil case. Moreover, Barnes' argument that the absence of the Board of Parole before this Court is a problem ignores the fact that, below, the Board of Parole affirmatively stated that it did not oppose the State's motion<sup>7</sup> and did not appear for the hearing on the State's emergency motion to correct

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<sup>5</sup> *General Motors Corp. v. New Castle Co.*, 701 A.2d 819, 823 (Del. 1977) (quoted by Barnes at Ans. Brf. 11).

<sup>6</sup> *See id.* at 824, n.5.

<sup>7</sup> *See* Letter from Deputy Attorney General Ryan P. Connell (counsel to Board of Parole) to the Honorable T. Henley Graves, dated Dec. 26, 2013 (B31).



sentence and petition for writ of mandamus.<sup>8</sup> Barnes' argument regarding a conflict of interest is likewise unavailing. The State is challenging the decision of the Superior Court in Barnes' criminal case. Therefore, there is no conflict with the Board of Parole.

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<sup>8</sup> See B121 (The trial court notes that the Board of Parole did not participate in the hearing on the State's emergency motion to correct sentence and the petition for writ of mandamus).

## **II. THE TRUTH IN SENTENCING ACT OF 1989 APPLIES TO THE CRIME OF DRIVING UNDER THE INFLUENCE.**

Barnes claims that “[t]he TIS Act does not include Title 21.” (Ans. Brf. 13). Barnes advances essentially three arguments, each of which fails to support his erroneous contention. Barnes first argues that “a plain reading of the Act makes it apparent that it does not include Title 21 offenses” (Ans. Brf. 13) and that “[a] passing reference to ‘all crimes,’ without the specific language in the body of the statute repealing and replacing sections of the Delaware Code, is not sufficient to broadly expand the provisions of the TIS Act.” (Ans. Brf. 14). Barnes bases this argument on the fact that the title of the bill does not reference Title 21 and that the TIS Act did not amend any section contained within Title 21. However, the title of a bill need not reference a particular Title to make changes elsewhere in the Delaware Code that impact or apply to provisions in that particular Title. Likewise, a bill need not amend a section within a particular Title to make changes that impact or apply to that particular Title.

Perhaps more importantly, Barnes’ argument ignores the structure of the laws pertaining to criminal offenses and sentencing in the Delaware Code. Statutes defining criminal offenses and addressing sentencing are included within various titles of the Delaware Code. While the bulk of criminal offenses

are defined in Title 11, many other titles also define criminal offenses.<sup>9</sup> While some of the criminal offenses defined outside of Title 11 contain specific sentencing provisions, the offenses defined outside of Title 11 are generally governed by the sentencing and criminal procedure laws contained within Title 11, including chapters 2-4 and 17-96. This structure existed prior to enactment of the TIS Act, and the General Assembly is presumed to have known the existing laws.<sup>10</sup>

As a result, when the TIS Act changed parole and good time provisions that previously applied to crimes defined outside of Title 11, the changes were likewise applicable to crimes defined outside of Title 11. Indeed, the General Assembly specifically pronounced that “[t]he provisions of this Act shall take effect with respect to *all crimes* which are committed as of 12:01 a.m., June 30, 1990 or thereafter.”<sup>11</sup> Thus, while the TIS Act itself only amended Titles 11 and

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<sup>9</sup> See, e.g., 2 Del. C. § 181; 3 Del. C. §§ 7105, 7203, 8713, 8719; 4 Del. C. ch. 9; 5 Del. C. §§ 2116, 2317, 2745; 6 Del. C. § 2563; 7 Del. C. § 6013; 8 Del. C. §§ 397, 513; 9 Del. C. §§ 8615, 9113; 13 Del. C. §§ 102-04, 112, 931; 14 Del. C. § 4110; 15 Del. C. ch. 23; 16 Del. C. §§ 2304, 2513, 4752-4764; 17 Del. C. §§ 513, 515; 18 Del. C. § 106; 20 Del. C. § 3125; 21 Del. C. §§ 4177, 4201, 4202; 23 Del. C. § 2302; 24 Del. C. §§ 905, 2308; 28 Del. C. § 701-705; 30 Del. C. §§ 571-574, 2119; 29 Del. C. §§ 5404, 5805; 31 Del. C. §§ 1003, 1004, 3913. This is only a sampling of crimes defined outside of Title 11. It would require a painstaking search to identify all crimes defined outside of Title 11, which is unnecessary for present purposes and may be why the General Assembly believed it sufficient to say that the TIS Act applies to “all crimes.”

<sup>10</sup> See *Delaware Dept. of Health and Social Services v. Jain*, 29 A.3d 207, 216 (Del. 2011) (citing *Pauley v. Reinoehl*, 848 A.2d 569, 576 (Del. 2004) (explaining that the General Assembly “is presumed to have been aware of the existing law ...”).

<sup>11</sup> TIS Act, 67 Del. Laws, ch. 130, § 3 (emphasis added) (A109).

16, those amendments affect all crimes in the Delaware Code, regardless of the title under which those crimes are listed.

An absurd result occurs if one accepts Barnes' position that when the General Assembly said that the TIS Act applies to "all crimes" it really meant only "all crimes defined in Titles 11 and 16." The TIS Act repealed the laws addressing earning of good time and replaced them with new provisions,<sup>12</sup> and made sentences imposed under the TIS Act not subject to parole.<sup>13</sup> Barnes does not explain why the General Assembly would allow persons convicted of crimes defined in Titles 11 and 16 to earn good time, but deny such privilege to persons convicted of crimes defined elsewhere in the Delaware Code. Likewise, Barnes does not explain why the General Assembly would allow persons convicted of crimes defined outside of Titles 11 and 16 to be paroled, but not those convicted of Title 11 or 16 crimes. It makes no sense for the General Assembly to create two separate good time/parole schemes when one of the express purposes of the TIS Act was to provide certainty in sentencing.<sup>14</sup> Indeed, Section 4 of the TIS Act, only a portion of which was quoted by Barnes (Ans. Brf. 14), reveals that

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<sup>12</sup> TIS Act, § 5 ("Amend Title 11 of the Delaware Code by striking Sections 4381, 4382, 4383 and 4384 in their entirety and enacting the following sections in lieu thereof") (A109).

<sup>13</sup> *Id.*, § 7 (A113).

<sup>14</sup> *Id.*, § 2 (The purposes of this Act are: A. To achieve truth in sentencing by assuring the public, the State and the Court will know that the sentence imposed by the Court will be served by the defendant; and that, the defendant will know what the actual effect of the sentence will be."). See *Snyder v. Andrews*, 708 A.2d 237, 245 (Del. 1998) (noting one purpose of TIS Act was to create predictable sentences).

the General Assembly was creating two good time/parole schemes only to the extent that one applied to all crimes committed before June 30, 1990 and one applied to all crimes committed after that date.<sup>15</sup> To avoid a result that is at odds with the General Assembly's stated intent of creating "truth in sentencing," the Court should find that the General Assembly meant "all crimes" when it said "all crimes."

Barnes' next argument that House Bill 415, introduced during this past session of the General Assembly, "shows that Title 21 was not included in the TIS Act" is also misplaced. (Op. Brf. 14). First, House Bill 415 did not pass before the 147<sup>th</sup> General Assembly adjourned; the Senate tabled the bill on June 30, 2014.<sup>16</sup> Second, even if it had passed, it would not establish that the TIS Act did not already apply to Title 21 offenses. The General Assembly can, and does, pass bills clarifying earlier legislation. For instance, in June 2014, House Bill 252 was enacted to clarify that the General Assembly had, in fact, intended to confer jurisdiction on lower courts to temporarily revoke bail in cases even

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<sup>15</sup> TIS Act, § 4 (A109).

<sup>16</sup> See Delaware General Assembly Bill Tracking for 147<sup>th</sup> General Assembly House Bill 415, available at <http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/HB+415> (last visited Aug. 20, 2014). Although, technically, the bill could be lifted from the table when the Senate convenes for a special session this Fall to hold a confirmation hearing following Justice Berger's retirement, it would be unusual for the Senate to vote on a bill such as HB 415 during the special session.

when the case on which the bail was then before a higher court.<sup>17</sup> Thus, House Bill 415 does not reveal that the General Assembly intended to exclude Title 21 offenses (or offenses defined elsewhere outside of Titles 11 and 16) from operation of the TIS Act.

As his final argument, Barnes claims that his reading of the TIS Act is supported by “two prior Superior Court cases and several decades of practice by attorneys, judges, and the Department of Corrections.” (Op. Brf. 14). However, the length of time that this erroneous application of the TIS Act has gone unchallenged does not mean that the application is correct.<sup>18</sup> Likewise, the two prior Superior Court cases on which Barnes relies<sup>19</sup> fail to support Barnes’ reading. The 2002 decision in *State v. Clyne* held that a defendant’s good time credits should be calculated under the pre-TIS law because the defendant’s DUI conviction was not encompassed by the TIS Act.<sup>20</sup> Importantly, however, *Clyne* cites only to the TIS Act itself to support this conclusion, and is void of any analysis of the issue.<sup>21</sup> As explained above and in greater detail in the opening

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<sup>17</sup> See 79 *Del. Laws*, ch. 244, § 1.

<sup>18</sup> See *Colonial School Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243, 248 (Del. 1982) (“Failure to enforce the law does not change the law.”).

<sup>19</sup> Barnes’ brief does not cite to the cases, but presumably Barnes is referring to *State v. Clyne*, 2002 WL 1652149 (Del. Super. July 22, 2002) and *Owens v. State*, 2010 WL 8250841 (Del. Super. Dec. 6, 2010).

<sup>20</sup> *Clyne*, 2002 WL 1652149.

<sup>21</sup> *Id.* at \*2, n.6.

brief, reasoned analysis shows that the TIS Act applies to “all crimes” in the Delaware Code.

*Owens* provides no further support for Barnes’ position. *Owens* merely relied on *Clyne*’s unreasoned holding that the TIS Act does not apply to DUI.<sup>22</sup> And, indeed, contrary to the court’s holding below here, *Owens* noted that “Driving under the influence convictions now are part of Truth in Sentencing pursuant to Senate Bill 320, which became effective on July 15, 2010.”<sup>23</sup> Neither *Clyne* nor *Owens* are binding on this Court, but if this Court were to follow them, then it should find that the TIS Act applies to Barnes’ sentence for a DUI committed on January 18, 2013 (i.e., after the July 15, 2010 date on which *Owens* found TIS became applicable to DUI).

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<sup>22</sup> *Owens*, 2010 WL 8250841, at \*2.

<sup>23</sup> *Id.* at \*2, n. 2.

## CONCLUSION

For the foregoing reasons, this Court should find that the Truth in Sentencing Act of 1989 applies to the crime of Driving Under the Influence and should reverse the Superior Court's judgment denying the State's motion to correct an illegal sentence.

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on August 25, 2014, I have caused a copy of the State's Reply Brief on Cross-Appeal to be served electronically upon the following:

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