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IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANK DAVENPORT, Defendant-Below, Appellant, v. STATE OF DELAWARE, Plaintiff-Below, Appellee.	)))))))))))	No. 690, 2015

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

APPELLANT'S REPLY BRIEF

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The State, in an attempt to distract the Court from the merits of the issues, argues that Davenport's claim must be reviewed for plain error because he failed to specifically argue that the plea agreement was breached to the sentencing court. This is incorrect. Defense counsel made known that the State's case summary was submitted with the intent to "inflame the court"[1] and also noted that the submission was "not appropriate."[2] Thus, while not explicitly saying the word "breach," the context in which Davenport's objection was raised preserved the issue for appeal especially considering this Court's precedent.[3] Alternatively, if this Court were to find that the issue was not properly preserved, this issue is of a magnitude so clearly prejudicial to substantial rights as to jeopardize the fairness of the proceeding. DEL. SUP. CT. R. 8.

In its Answering Brief, the State cites *United States v. Salazar*[4] in commenting that the prosecutor "never requested, nor even implied, that the court

[1] A-82.
[2] A-82.
[3] *Johnson v. State*, 607 A.2d 1173, 1176 (Del. 1992) (interests of justice required that defendant's *Brady* claim be considered even where defense counsel did not specifically characterize defendant's objection as being based on *Brady*).
[4] 453 F.3d 911 (7th Cir. 2006).

should sentence Davenport to more than 10 years."[5] *Salazar*, however, has several distinguishing characteristics which render its result inapplicable to Davenport's case.

First, in *Salazar*, the Government consistently stated that its recommendation was appropriate during its sentencing presentation.[6] In Davenport's case, the State never explained why its recommended sentence was appropriate for Mr. Davenport. The State simply put its evidence on the record and commented that "any sentence less than [ten] years at Level V would be another tragedy...."[7] In *Salazar*, the court noted that "[p]ermitting the government to perform by half-heartedly requesting a light sentence while simultaneously arguing forcefully that a defendant is vicious—*and failing to explain that its sentencing recommendation is consistent with its characterization of him*—does not serve the broad purposes behind plea agreements (such as fairness and efficiency)."[8]

Next, the conduct at issue in *Salazar* fell far short of the conduct that is at issue in Davenport's case. In *Salazar*, a sole paragraph in the prosecution's sentencing presentation was objected to by the defense; this passage included the prosecutor referring to the defendant as a "cold-blooded killer."[9] The court later

[5] St. Ans. Br., at 14-15.
[6] *Salazar*, 453 F.3d at 915.
[7] A-79.
[8] *Salazar*, 453 F.3d at 914 (emphasis added).
[9] *Id.* at 913.

noted that "Salazar's case is close…."[10] As noted in Davenport's Opening Brief, the State's conduct in this case included, *inter alia*, the submission of graphic photographs of the decedent, of home videos of the decedent from over two decades earlier, and statements that any sentence less than that State's purported recommendation would be "another tragedy," and would "unduly depreciate and ignore the violence and the abuse [the decedent] endured at the hands of the defendant."[11] If the prosecution's conduct in *Salazar* constituted a close case, then Davenport's case is clear—the State breached the plea agreement.

The State also cites *Teti v. State*[12] as support for the proposition that the State did not breach the plea agreement in Davenport's case. Again, however, the State fails to recognize key differences between *Teti* and the present case. In *Teti*, the defense attorney acknowledged that the State's comments were submitted in support of the recommended sentence.[13] No such acknowledgment was made by Davenport's attorneys. Additionally, in *Teti*, defense counsel did not object to the State's sentencing presentation.[14] In this present case, defense counsel *did* object to the submission of the State. Thus, the result in *Teti* is simply not applicable to the current case. Additionally, the State mischaracterizes Davenport's argument when addressing the prosecutor's reference to dropped charges, uncharged allegations,

[10] *Id.* at 914.
[11] App. Op. Br., at 4-5, 18.
[12] *Teti v. State*, 2006 Del. LEXIS 339 (Del. June 27, 2006).
[13] *Id.* at *6.
[14] *Id.*

and second-hand statements from unnamed declarants. The State takes great pains to argue that such information is not prohibited from being submitted to the sentencing court.[15] Mr. Davenport's argument is that the submission of these materials is entirely inconsistent with the sentence that was ostensibly recommended. The State asks this Court to apply a rigid and mechanical approach to these materials by only considering their admissibility and not their impact. Davenport asks that this Court review the submission of these materials in the context of the rest of the sentencing presentation when evaluating the State's end-run around its obligation.

With respect to the home movies provided to the trial court, the State posits that such videos were properly submitted as evidence of victim impact. This argument is erroneous. The relevant sections of 11 *Del C.* § 4331 (which the State cites in support of its argument) do not address information submitted to the court by the State. Rather, § 4331 relates only to information submitted by *victims*. This argument is supported by the law's partial title—"victim impact statement[s]." Davenport has not raised any objection to the conduct or statements of Stephen McElwee, who provided a victim impact statement in this case. As the victim impact statement of Mr. McElwee is not an issue that is raised by Mr. Davenport, § 4331 has no bearing on the case at hand.

[15] St. Ans. Brief, at 16-17.

The identical problem arises in the State's reference to *Johnson v. State*.[16] In *Johnson*, the issue before this Court was the information submitted by a witness during the victim impact statement. This was not evidence submitted by the State or the defendant. The victim impact statement in *Johnson* was supported by § 4331, and because there is no objection to Mr. McElwee's statement, *Johnson*, too, has no bearing on Mr. Davenport's case.

In this case, the content at issue was entirely within the control of the State. The State made the affirmative choice to submit home movies from over two decades prior. The State is correct when it says that "victim impact evidence is relevant to the sentencing authority."[17] This proposition, however, comes with the condition that such evidence must come from a victim or a victim's representative.[18] The State may not utilize § 4331 to authorize the introduction of all types of irrelevant and prejudicial material under the guise of "victim impact."

When a defendant enters into a plea agreement, both parties are obligated to do what each has promised to do. In the instant case, the State contracted to ask for no more than ten years of incarceration. Davenport contracted to enter pleas of *nolo contendere* to reduced charges. At the plea hearing, Davenport entered those pleas and performed his duties under the contract. Davenport satisfied his

[16] *Johnson v. State*, 983 A.2d 904 (Del. 2009).
[17] St. Ans. Brief, at 18 (citing *id.* at 934).
[18] 11 *Del. C.* § 4331(f).

obligations under the agreement. Months later, after Davenport satisfactorily performed, the State submitted to the trial court a Case Summary (including home movies from decades prior and bloody photographs of the decedent). This document was dated eleven days before sentencing and the State did not provide it to the defense until the day before sentencing.

The State claims it "does not know why" defense counsel would have received the Case Summary only one day before sentencing.[19] However, when defense counsel stated at sentencing, in open court, that the submission (dated November 9, 2015) was not received until the day before sentencing (November 19, 2015), the State did not provide an explanation.[20] At no point did the State inform the Court that it had sent the document to the defense on November 9, 2015 or at any point prior to the day before sentencing.[21] Furthermore, the State gave a sentencing presentation entirely inconsistent with its obligations under the contract. It was only after Davenport held up his end of the bargain that he learned the State was not going to do the same.

The State must be held to its obligation to pursue its recommended sentence. In this case, the State was obligated to recommend and to submit information that was consistent with its recommendation. The conduct by the State constitutes a

[19] St. Ans. Br. at 28.
[20] A-79.
[21] A-75-86.

breach of the plea agreement, and requires either withdrawal of the plea agreement or a new sentencing hearing before a different judge.

If this Court rules that the plea agreement was not breached in Davenport's case, the State will have carte blanche to simply state its sentencing recommendation in its opening sentence, and proceed to introduce whatever evidence the State wishes in support of a harsher sentence than the recommendation. Such a regime would be inconsistent with the obligation of parties to a contract to refrain from engaging in unreasonable behavior. And in Davenport's case, it would provide a judicial stamp of approval to the State's end-run around its promised recommendation.

II. APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN HE WAS SENTENCED ON THE BASIS OF INFORMATION WHICH WAS EITHER FALSE OR LACKED MINIMAL INDICIA OF RELIABILITY

Mr. Davenport seeks nothing more, and certainly nothing less, than to have a fair sentencing hearing which meets constitutional standards. He did not receive one below.

The State claims that Davenport is appealing because his sentence was in excess of the SENTAC guidelines. This is incorrect. While the sentence was twice that of the SENTAC guidelines and twice what the State ostensibly requested, that is not the basis of this appeal. Davenport appeals because he did not receive a fair sentencing hearing which violated the Fifth and Fourteenth Amendments to the United States Constitution.

"[T]he due process clause of the Fifth Amendment prohibits a criminal defendant from being sentenced on the basis of information which is either false or which lacks minimal indicia of reliability. Material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."[22] Further, the United States Supreme Court has noted that when a sentence is imposed "on the basis of assumptions concerning

[22] *Mayes*, 604 A.2d at 843 (citing *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976)) (internal quotations omitted).

[Defendant's] criminal record which were materially untrue…whether caused by carelessness or design, [it] is inconsistent with due process of law, and such a conviction cannot stand."[23] Additionally, this Court has explained that "a sentencing court abuses its discretion if it sentences on the basis of inaccurate or unreliable information.[24]

Recently, the United States Supreme Court issued an opinion that impacts this appeal. In *Molina-Martinez v. United States*,[25] the United States Supreme Court reversed and remanded because the defendant was sentenced on the basis of an incorrect sentencing guidelines range.[26] In so doing, the Supreme Court emphasized the importance of a fair sentencing hearing. That case, as here, involved sentencing guidelines which are not binding on the court. In that case, the defendant was sentenced using guidelines above those that applied to him.[27] In the instant case, the court cited aggravating factors which did not apply to the defendant or which included an incorrect definition of that aggravator. In *Molina-Martinez*, the United States Supreme Court noted: "Nothing in the text of Rule 52(b), its rationale, or the Court's precedents supports a requirement that a defendant seeking appellate review of an unpreserved Guidelines error make some further showing of prejudice beyond the fact that the erroneous, and higher,

[23] *Townsend v. Burke*, 334 U.S. 736, 741 (1948).
[24] *Mayes*, 604 A.2d at 843.
[25] *Molina-Martinez v. United States*, 2016 U.S. LEXIS 2800 (Apr. 20, 2016).
[26] *Id.* at *14.
[27] *Id.*

Guidelines range set the wrong framework for the sentencing proceedings."[28] The Court also explained that "in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder. Absent unusual circumstances, he will not be required to show more."[29] Here, Mr. Davenport was sentenced on the basis of incorrect aggravating factors which now mandate a reversal and remand for a new sentencing hearing before a different judge.

Repetitive Criminal Conduct

Astoundingly, the State simultaneously claims Davenport was sentenced based upon information which was not false,[30] but concedes, as it must, that the aggravating factor of repetitive criminal conduct does not apply to Mr. Davenport.[31]

Repetitive criminal conduct is defined as: "conviction or adjudication for the same or similar offense on two or more previous, separate occasions."[32] While conceding Mr. Davenport does not exhibit repetitive criminal history, the State points to two arrests from 2008 and 2009 for non-violent misdemeanors in an attempt to demonstrate he exhibits the repetitive criminal conduct it concedes he

[28] *Id.* at *16.
[29] *Id.* at *20.
[30] St. Ans. Br. at 20.
[31] St. Ans. Br. at 23.
[32] Delaware Sentencing Accountability Commission Benchbook 2016, p. 134 (hereinafter "SENTAC").

does not have.[33] This aggravating factor does not apply for arrests. It requires convictions.[34] Furthermore, the State fails entirely to disclose to this Court that it entered a *nolle prosequi* as to both of these offenses.[35] It is wholly disingenuous for the State to concede that this aggravator does not apply, but to try to make it apply by pointing to misdemeanor arrests for which it later entered a *nolle prosequi*.

The trial court erroneously cited repetitive criminal conduct as an aggravating factor for Mr. Davenport.[36] As a result, Davenport was "sentenced on the basis of information which is…false…."[37]

Prior Violent Criminal Conduct

Davenport does not have a prior violent criminal history. While the State tries to claim otherwise, it does not point to a single prior violent conviction of Davenport. It does not because it cannot. Tellingly, the State again resorts to the two misdemeanor arrests while simultaneously admitting that "offensive touching and terroristic threatening are not violent crimes as defined by the criminal code…."[38] Despite clearly not having a prior violent criminal history, the trial

[33] St. Ans. Br. at 22.
[34] SENTAC, p. 134.
[35] A-25-26.
[36] A-85.
[37] *Mayes*, 604 A.2d at 843 (citing *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976)) (internal quotation marks omitted).
[38] St. Ans. Br. at 24.

court cited prior violent criminal history as an aggravating factor in sentencing Mr. Davenport.[39]

In so doing, Mr. Davenport was sentenced "on the basis of assumptions concerning [Defendant's] criminal record which were materially untrue…whether caused by carelessness or design."[40] This "is inconsistent with due process of law, and such a conviction cannot stand."[41]

Vulnerability of the Victim

In its Case Summary, the State cited to "SENTAC Aggravators" including vulnerability of the victim.[42] The State, for the first time on appeal, now claims that when it cited to "SENTAC Aggravators," it was actually not citing to a SENTAC aggravator.[43]

This vulnerability factor applies when "the defendant knew, or should have known, that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability or ill health."[44] The State now attempts to advance the position that there was a wrist injury which apparently makes this factor applicable.[45] This theory was not advanced below and the State

[39] A-85.
[40] *Townsend v. Burke,* 334 U.S. 736, 741 (1948).
[41] *Id.*
[42] A-42.
[43] A-42; St. Ans. Br. at 25.
[44] SENTAC, p. 134.
[45] St. Ans. Br. at 25.

did not claim that the decedent's wrist made her vulnerable in its Case Summary.[46] Perhaps because this factor does not apply, the State now claims it was simply "choosing instead to define the aggravator" differently.[47] The reality is that the State cited to "SENTAC Aggravators."[48] Because this factor does not apply in this case, the State now simply claims it meant something different. Yet again, Mr. Davenport was "sentenced on the basis of information which is…false…."[49]

Prior Abuse of the Victim

Mr. Davenport explains that the claims regarding prior abuse of the victim lacked "minimal indicia of reliability," in part because the sources were unknown and they were vague in nature. To refute this claim, the State points to "a number of people" who thought that the decedent was in an abusive relationship.[50] To support that assertion, the State points, in a circular fashion, to its own Case Summary which cites to "bartenders to friends to family" and "all of her loved ones" who apparently all believed the decedent was in an abusive relationship.[51]

[46] A-42.
[47] St. Ans. Br. at 25.
[48] A-42.
[49] *Mayes*, 604 A.2d at 843 (citing *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976)) (internal quotation marks omitted).
[50] St. Ans. Br. at 26.
[51] A-43.

The Case Summary does not point to one named individual.[52] This clearly lacks "minimal indicia of reliability."[53]

This sentencing hearing was deeply flawed. Every aggravating factor cited by the court did not apply to Davenport.[54] This cannot be considered fair or even acceptable in our system of criminal justice. The trial court sentenced Mr. Davenport on the "basis of information which is either false or which lacks minimal indicia of reliability."[55] Further, the material false assumptions as to these relevant facts, both individually and collectively, rendered the entire sentencing procedure "invalid as a violation of due process."[56] As such, this Court must now vacate the Superior Court's sentence and remand the case for sentencing before a different judge.

[52] A-43.
[53] *Mayes*, 604 A.2d at 843 (citing *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976)) (internal quotation marks omitted).
[54] A-42-43, A-85-86.
[55] *Mayes v. State*, 604 A.2d at 843 (citing *Robin*, 545 F.2d at 779 (internal quotation marks omitted).
[56] *Id.*

III. THE TRIAL COURT ERRED WHEN IT ORDERED RESITUTION BE PAID IN DIRECT CONTRADICTION OF *STATE v. CHIANESE*

In its Answering Brief, the State asserts that Davenport's burden of paying restitution was merely shifted from the victim to the Victim's Compensation Assistance Program (VCAP).[57] This impropriety of a shift in reimbursement from a victim to VCAP was addressed by this Court in *State v. Chianese.*[58] Additionally, this Court made clear the avenues available to the State before the 2014 statutory amendment granting VCAP the power to seek reimbursement from the defendant.[59] The State could only pursue a compensating fine under § 9018.[60] Here, as in *Chianese*, the State never requested Davenport pay a compensating fine nor was restitution part of the plea agreement.[61]

[57] St. Ans. Br. at 30.
[58] *State v. Chianese* , 128 A.3d 628 (Del. 2015).
[59] *Id*. at 633.
[60] *Id*.
[61] A-29.

CONCLUSION

For the reasons and upon the authorities set forth herein, Mr. Davenport respectfully requests that this court vacate the Superior Court's sentence and either allow Mr. Davenport to withdraw his plea or remand the matter for resentencing by a different judge.

/s/ Ross A. Flockerzie
/s/ Gerard M. Spadaccini
/s/ Brett A. Hession

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