



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRAVIS JONES,	§	
	§	
Appellant/Cross Appellee,	§	No. 534, 2015
	§	On Appeal From The Superior
	§	Court Of Delaware In And For
	§	New Castle County
v.	§	
	§	
STATE OF DELAWARE,	§	
Appellee/Cross Appellant.	§	
	§	
	§	

CROSS-APPELLEE'S AMENDED ANSWERING BRIEF ON CROSS APPEAL

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NATURE OF THE PROCEEDINGS

Mr. Jones filed his Opening Brief on May 10, 2016, which alleged prosecutorial misconduct. The State answered Mr. Jones' claims and filed its Opening Brief On Cross-Appeal on June 13, 2016. The State argued that Superior Court abused its discretion by refusing the State's request to call an expert witness during a two-month capital murder trial after the State failed to identify the expert witness or provide notice of said witness to opposing counsel prior to trial and despite having received the defense expert's report more than a year before trial. The State claims relief from its own error, which the Superior Court properly determined was unwarranted. This Court should affirm the Superior Court's denial of the State's request to admit expert testimony without advance notice to defense counsel.

This is Mr. Jones' Answering Brief On Cross-Appeal.

SUMMARY OF THE ARGUMENT

- I. To avoid repetition and gratuitous adjuration, Mr. Jones relies on the arguments presented in his Opening Brief.
- II. **Denied.** According to the record before this Court, the State failed to perfect the jurisdictional requirements of 10 Del. C. §9902(e) by obtaining the personal authorization of “either the Attorney General or the Chief Deputy Attorney General,” which is required to file as a matter of right under 10 Del. C. §9902(g). Consequently, this Court does not have the proper jurisdiction to hear the State’s cross appeal claims and they should be dismissed.

The State argues that Superior Court abused its discretion by refusing the State’s request to call an expert witness during the final stretch of a two-month long¹ capital murder trial after the State failed to identify the expert witness or provide notice of said witness to opposing counsel prior to trial and despite having received the defense expert’s report more than a year before trial.

Moreover, the State ably cross-examined the defense expert witness after consulting with the very same expert; thus it had ample opportunity to

¹ This includes jury selection, which started on April 21, 2015. A016. Trial and jury deliberation continued until June 15, 2015. A016.

elicit testimony and impeach the defense witness with the benefit of the expert's knowledge and experience.² The State seeks relief from its own error, which the Superior Court properly determined was unwarranted. This Court should affirm the Superior Court's denial of the State's request to admit expert testimony without prior advance notice to defense counsel.

The State also argues that it was error for the court to prohibit a rehashing of an informant's testimony that was offered to determine whether Mr. Bieber considered witness statements in his analysis of the cause and origin of the Clinton Street fire.³ The court permitted the State to impeach Mr. Bieber's credentials,⁴ mistakes in his report,⁵ the reliability of the reports that he relied on in making his conclusions,⁶ the differences between the Clinton Street fire and the exercises he relied upon,⁷ and whether or not he considered witness statements in his analysis.⁸ The prosecutor zealously argued that Mr. Bieber's testimony was not as reliable as the State's expert's testimony and was never precluded from rigorously impeaching Mr. Bieber's credibility.⁹ Consequently, the Court's decision to limit the

² A127-28.

³ State's Answering Brief ("AB") at 23-24.

⁴ A122, A131.

⁵ A122.

⁶ A127

⁷ A128

⁸ B47-B48a

⁹ A133.

prosecutor's digression into informant testimony was reasonable, especially in light of the State's ample opportunity to cross-examine the witness about the materials that he used in his analysis.

The State argues as if it was denied the opportunity to impeach Mr. Bieber. On the contrary, the court's narrow ruling properly prevented the State from delving into a mini-trial of every statement that witnesses made during the investigation, including statements from witnesses that lacked any personal knowledge about the Clinton Street home or fire and who could not contribute probative information that would reasonably effect the expert's analysis of fire reconstruction.¹⁰ The Superior Court's limitation on how far the State could delve into other witnesses' testimony was well within its discretion to control the order, pace, and focus of the trial.

¹⁰ B-47-48.

COUNTER-STATEMENT OF FACTS
TO STATE'S CROSS APPEAL

Mr. Jones relies on the Statement Of Facts submitted in his Opening Brief and supplements those details with the following:

A. More Than A Year Before Trial, Mr. Jones Provided The State With The Defense Expert's Report That Expressed The Substance Of The Expert's Testimony And Citations To Supporting Materials

The house fire on Clinton Street occurred on October 4, 2010 at approximately 5:45 A.M.¹¹ The State formally indicted Mr. Jones on August 5, 2013, after almost three years of investigation.¹² From the outset, the defense strategy focused on the limitations of the arson investigation.¹³ Defense counsel retained an arson investigation expert who reviewed the State's evidence and provided the defense with a report delineating conclusions, or lack thereof, about the cause and origin of the fire.¹⁴

Mr. Jones, through counsel, provided the report to the State on May 12, 2014, over a year before trial commenced, and indicated that Mr. Bieber would be called to testify at trial consistent with the substance of his report.¹⁵ Mr. Bieber explicitly cited to Mr. Carman's "exercise" in his report.¹⁶ Mr. Bieber's report

¹¹ A025.

¹² A001.

¹³ B-52.

¹⁴ See AR004-19.

¹⁵ AR003-19.

¹⁶ AR010-12.

generally took issue with the scientific nature of arson investigation when used as an infallible pronouncement of the cause and origin of a fire, especially when fires escalate to the point of “flashover.”¹⁷ The report cited the exercises that Mr. Carman conducted and explained them, in detail, to illustrate the fallibility of fire pattern analysis in certain situations.¹⁸ The report also cited to the title of Mr. Carman’s exercises and a website link, which the State had ample opportunity to review.¹⁹

The State provided Mr. Jones with notice of its intended experts on April 30, 2014.²⁰ In its notice, the State identified several experts, including the following:

1. Caryn Tazartus, Office of the Chief Medical Examiner, Arson Lab;
2. Paul Gematto, Alcohol, Tobacco and Firearms (ATF), origin and cause of the fire;
3. Michael Keller, ATF Lab, engineer;
4. Brian Grove, ATF Lab, engineer;
5. Scott Walker, Delaware State Fire Marshall, origin and cause of the fire;
6. Hank Alfree, Delaware State Fire Marshall, origin and cause of the fire.²¹

Several of the identified fire-related experts testified at trial.

Mr. Jones also retained an electrical engineer to inspect several pieces of electrical wiring evidence. The engineer’s report was the subject of a defense

¹⁷ AR009-10.

¹⁸ AR009-12.

¹⁹ Mr. Bieber’s report specifically stated, “[t]he 2008 live fire test was used in the creation of the CFI Trainer learning module, Post Flashover Fires, available for viewing at: <http://www.cfitrainer.net/>.” C011.

²⁰ AR001.

²¹ AR001.

motion to extend the expert notice deadline because of the logistics involved in having the State's evidence tested by an out of state engineer.²² The engineer's report was provided to the State on October 31, 2014 via email and to the court, in hard copy, on November 7, 2014.²³ The State did not supplement its expert list or request an extension of the expert deadline after it received Mr. Bieber's report in the spring of 2014 or after reviewing the electrical engineer report in the fall of 2014. Counsel for both parties met several times to discuss trial and witnesses. A witness list was provided to the court pre-trial.²⁴

B. The State's Surprise Rebuttal Expert/Factual Witness

After trial commenced in May 2015, all fact witnesses were sequestered and both the State and the defense experts were permitted to hear and review the witness testimony in order to aid counsel's preparation and inform the experts' testimony.²⁵ After the State concluded its case, including the presentation of testimony from several fire experts, the defense called its arson investigation expert to testify that the ATF investigator's conclusion as to the cause and origin of the fire was overstated and that, at most, the cause and origin of the fire were undetermined.²⁶

²² B-52, A005-06.

²³ AR020-31.

²⁴ B-54.

²⁵ B-54.

²⁶ A-124-31.

The State filed a motion/memorandum with the court and requested that a previously unidentified expert witness, Mr. Carman, be permitted to testify as a *fact witness*.²⁷ The State argued that it could not have anticipated the need for Mr. Carman's testimony until it had been provided with a copy of a Power Point presentation that the defense intended to present during Mr. Bieber's testimony, which utilized "diagrams and photos...that were used by Mr. Carman in his reports"²⁸—the same reports that Mr. Bieber cited in his expert report provided to the State on May 12, 2014, more than a year prior to Mr. Bieber's testimony.²⁹

According to the State, and immediately after telling the Court that it could not have anticipated Mr. Carman's usefulness, the prosecutors described how they contacted Mr. Carman, a former ATF agent, during the trial.³⁰ Mr. Carman sat through the technical aspects of the fire investigation testimony and consulted with the State about strategy and cross-examination techniques prior to and during Mr. Bieber's testimony "in the event that Mr. Bieber deviated from his report...if he were to misstate or misrepresent."³¹

Defense counsel objected to the State's characterization of Mr. Carman as a factual witness as opposed to an expert witness, particularly in light of his presence in the courtroom during testimony and that he had not been sequestered like all

²⁷ B-53.

²⁸ B-50-51.

²⁹ AR010-12.

³⁰ B-50-51.

³¹ B-50-51.

other factual witnesses in the case.³² Defense counsel argued that the State had never identified Mr. Carman as a witness, never put the defense on notice of the State's intent to use him as a witness, and had never before identified the substance of Mr. Carman's expert testimony.³³

The court rejected the State's theory that Mr. Carman was a fact witness and read into the record Mr. Carman's proffered testimony, most of it scientific and technical in nature.³⁴ The Court properly determined that the State had never identified Mr. Carman as an expert or provided notice to defense counsel.³⁵ The State had other arson experts at its disposal, including the arson-related experts identified in the State's expert notice and those that had already testified.³⁶ The court concluded that the "probative value of the State's proffered testimony [was] outweighed by the prejudice to the defense" and properly excluded the testimony.³⁷

³² B-52-52.

³³ B-51-56.

³⁴ B-54-56.

³⁵ B-56.

³⁶ B-56.

³⁷ B-56.

**I. IN ORDER TO AVOID REPETITION AND GRATUITOUS
ADJURATION, MR. JONES RELIES ON THE ARGUMENTS
PRESENTED IN HIS OPENING BRIEF**

The State's Answering Brief essentially counters that any prosecutorial error was harmless either because the case was not close or because curative action remedied the error. Mr. Jones addressed each of these arguments in his Opening Brief and further argument on those points would be gratuitous. Therefore, Mr. Jones relies on the arguments presented in his Opening Brief and elects not to further reply to the State's claims on those points.

II. SUPERIOR COURT PROPERLY EXCLUDED THE STATE’S LAST-MINUTE EXPERT TESTIMONY AND PREVENTED THE STATE’S QUESTIONING FROM DEVOLVING INTO A MINI-TRIAL THAT WOULD UNNECESSARILY RE-HASH THE TESTIMONY OF OTHER TANGENTIAL TRIAL WITNESSES

A. Question Presented

Whether Superior Court abused its discretion by (1) refusing to allow the State to badger an expert witness about other witnesses’ testimony when such testimony was tenuously connected to the expert’s analysis and would have devolved the cross examination into an unnecessary and distracting mini-trial, and (2) refusing to ignore an expert discovery violation and deadline where the probative value of the proffered evidence was outweighed by the prejudice to the defense.

B. Standard And Scope Of Review

Because the trial court “is in a unique position to evaluate...the evidence,” this Court disturbs a trial court’s evidentiary ruling for an abuse of discretion and only if “a court has ... exceeded the bounds of reason in view of the circumstances,’ [or] ... so ignored recognized rules of law or practice ... to produce injustice.”³⁸

³⁸ *Floudiotus v. State*, 726 A.2d 1196, 1202 (Del. 1999) (internal quotations omitted).

C. Merits Of The Argument

The State failed to properly perfect its appeal in compliance with 10 Del. C. §9902(g). The State’s authority to appeal as a matter of right is narrowly circumscribed and conferred by statute.³⁹ Under 10 Del. C. §9902(e), upon which the State relies for the authority to cross appeal, the State may appeal a question of law adverse to the State when an accused has been convicted and appeals from the final judgment. Only when the State “perfects its cross-appeal” does this Court “review and rule upon the questions presented.”⁴⁰

Under 10 Del. C. §9902(g), the State perfects its appeal only after it has been “personally authorized by either the Attorney General or the Chief Deputy Attorney General.” As of the filing of this Answering Brief, there is no record of either the Attorney General or the Chief Deputy Attorney General’s personal authorization. Therefore, the State has yet to perfect its cross appeal and this Court lacks jurisdiction to consider the State’s arguments.

If this Court determines that a review of the State’s claims is appropriate, it should hold that the Superior Court’s two evidentiary rulings were grounded in the rules of evidence and Delaware jurisprudence and should not be disturbed.

³⁹ See *Wright v. State*, 91 A.3d 972, 984 (Del. 2014) (explaining the Delaware Supreme Court’s jurisdiction under 10 Del. C. §9902).

⁴⁰ 10 Del. C. §9902(e).

i. Superior Court Properly Limited The State’s Improper Questioning Under D.R.E. 611 In Order To Avoid A Mini-Trial Involving Cumulative And Tangential Evidence

The State initially complains that the Superior Court improperly limited the cross-examination of the defense expert witness, Paul Bieber, when the prosecutor questioned Mr. Bieber about his knowledge of witness statements that were irrelevant to the substance of Mr. Bieber’s analysis.

The State cross-examined Mr. Bieber about whether he reviewed witness statements. The trial court permitted such testimony and defense counsel initially had no objection. However, the State expanded its inquiry into the witness statements of Jeremy Kokotaylo, an informant who was not at the fire and who lacked any personal knowledge of the fire investigation.⁴¹ The State argued that the questioning was permissible because Kokotaylo’s statements were generally considered “witness statements,” which Mr. Bieber testified could inform the fire reconstruction analysis.⁴²

Defense counsel objected because Kokotaylo’s statements were irrelevant to Bieber’s analysis and were not the type of “witnesses” to which Mr. Bieber had referred.⁴³ The “witnesses” that the expert relied upon were actual scene witnesses to the fire, not after-the-fact informants for the State.⁴⁴ Defense counsel further

⁴¹ B-47.

⁴² B-47.

⁴³ B-47-48.

⁴⁴ B-48.

argued that the questioning would devolve into a mini-trial of every other witness that had testified in the case.⁴⁵

The court allowed the State to ask Mr. Bieber about the materials that he relied upon in forming his opinion and whether he relied upon witness statements; however, the court cautioned the State not to take it “too far.”⁴⁶ Counsel for both parties agreed that it was proper for the State to ask Mr. Bieber about whether he reviewed Mr. Jones’ statements.⁴⁷ Mr. Bieber testified, in response to the State’s questioning, that he reviewed several materials and witness statements.⁴⁸

Counsel objected when the State again attempted to go into the particulars of every witness statement that Mr. Bieber may or may not have reviewed.⁴⁹ Defense counsel asked for a mistrial because the prosecutor continued to take the questioning “too far,” which the court denied.⁵⁰ The court ruled that the State could ask whether Mr. Bieber had reviewed witness statements, Mr. Bieber could respond, and the State was to move on and establish what other sources informed the analysis.⁵¹ Thereafter, the State questioned Mr. Bieber regarding the extent to

⁴⁵ B-48.

⁴⁶ AR034.

⁴⁷ AR035.

⁴⁸ AR035-37.

⁴⁹ AR036.

⁵⁰ AR036.

⁵¹ AR036.

which he used witness statements, including the defendant's statement, in his analysis.⁵²

Under D.R.E. 611(a), the court has the authority to control the “mode and order” of the presentation of evidence in order to “(1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”⁵³ The State assigns blame to defense counsel for a “fundamental misunderstanding of the scope of examination” and to the court for “prevent[ing] the jury from hearing which facts Bieber either considered or disregarded.” The State's malcontent is meritless and belied by the record.

The State argued to the trial court and now to this Court that Mr. Bieber testified that NFPA requires analysts to rely on “witness information” along with “fire pattern analysis, fire dynamics, arc mapping” and other tools to ascertain the cause and origin of the fire.⁵⁴ While Mr. Bieber agreed that witness information was a tool, he did not testify or assert that witness information encompassed secondhand informant testimony, the inclusion of which would have opened a Pandora's box of other issues.⁵⁵

Despite the State's argument to the contrary, the court encouraged the State

⁵² AR036-37.

⁵³ D.R.E. 611(a).

⁵⁴ AB at 23.

⁵⁵ AR033.

to ask Mr. Bieber, “what formed the basis of his opinion, and you can ask him specific information as to the fire, how the fire was set, or something along those lines, would that change his opinion. If he had information specifically about that for a moment, would that change your opinion.”⁵⁶ The prosecutor then questioned Mr. Bieber about whether he relied on witness statements. The following exchange took place⁵⁷:

State: Mr. Bieber, you were reciting items that you had relied on and you did not finish. What items did you rely on?

Witness: I’m sorry, I may have misspoken. I relied — I received many documents. I relied on the report of Investigator Gemmato; the preliminary transcripts of Investigator Walker; dozens of photographs of the same; and, two—at least two—videos that include the interior examination of the same. I received several other documents, witness statements, that I reviewed quickly to see if they had anything to do with the—with developing a hypothesis regarding the origin, cause, or development of the fire, but I did not rely upon them in my conclusions in my report.

State: Okay. There—Did you receive statements made by Travis Jones?

Witness: I’m almost certain that I did.

State: Did you rely on those statements?

Witness: No.

⁵⁶ AR034.

⁵⁷ AR036-37.

State: And are you aware that in those statements that he places himself in the kitchen shortly before the fire?

Witness: I have heard that through testimony during this case.

State: But you weren't aware of that in the statements that you reviewed?

Witness: If I was, it was not something that I used to—that I recall, or that I used in basing my opinions in my report.

State: If you had the statement from him that said that he was in the kitchen near that countertop shortly before the fire, would that be something important to you to consider?

Witness: It would in helping an investigator. I think this is how Investigator Gemmato put it yesterday, that witness statements are important for helping an investigator to develop a hypothesis. So, that would be a hypothesis that that would be something that has to be considered. But in order to draw a final conclusion, it is not simply based on a witness statement; it's based on the scene examination and the forensic conclusions based on that examination of the physical evidence that either support or contradict a witness statement.

State: Okay. But you don't have anything to contradict that this may have been an incendiary fire at the countertop at this point, right?

Witness: No.

State: And that is why you are not able to rule that out?

Witness: That's correct.

The State argues that “an assessment of what Bieber reviewed and considered, and what he disregarded goes to the core of the credibility of Bieber’s opinion.” The State had a lengthy colloquy with Mr. Bieber about the documents

upon which he relied, whether he considered witness statements, whether he considered Mr. Jones' own statement, and whether those considerations would affect Mr. Bieber's analysis and conclusion. Mr. Bieber's answers to the State's cross-examination provided the jury with the information required to "assess the credibility and reliability" of Mr. Bieber's testimony. Consequently, the State was not denied the opportunity to discredit Mr. Bieber's theories merely because informant testimony was not regurgitated and re-hashed.

Additionally, it was well within the court's discretion under D.R.E. 611 to control the extent with which the State delved into the informant testimony. The court permitted the State to ask questions designed to ascertain the truth without needlessly presenting cumulative or irrelevant testimony intended to re-emphasize the State's collateral evidence. Therefore, the court properly narrowed the scope of the testimony in accordance with the procedure set forth in D.R.E. 611 and the State's claim that such measures constituted an abuse of discretion must fail.

ii. Superior Court Properly Excluded The State's Expert Rebuttal Testimony After Classifying The State's Witness As An Expert Who Would Provide Specialized And Technical Knowledge That The State Failed To Identify Prior To Trial

The State complains that the Superior Court improperly excluded its rebuttal expert testimony.⁵⁸ The State's argument is unpersuasive particularly because even the State itself recognized the issues with admitting last-minute expert testimony,

⁵⁸ AB at 21.

as evidenced by the State’s attempt to characterize its consulting expert witness, Mr. Carman, as a “fact witness.”⁵⁹ Defense counsel immediately objected not only to the last-minute nature of the witness and inadequate notice to properly prepare, but also the inclusion of scientific analysis, specifically elevated fires, that had not been presented in either the State or the defense case and was thus outside the scope of rebuttal.⁶⁰

The State provided counsel and the trial court with a proffer of the type of information that its “fact witness” would provide.⁶¹ During oral argument, the court read several of the proposed questions and answers into the record.⁶² The witness would have opined concerning:

- Flashover Burning: “It’s true that in post flashover [sic] burning, the fire intensity can increase greatly, but that’s only in limited areas. In a pre flashover [sic], fire patterns occur near the burning fuel...”
- Fire-origin Patterns: “The important issue is whether the fire investigator is aware of these basic principles of fire science and if he or she can identify likely areas where ventilation would have flowed into a burning compartment...”
- Elevated Fires: “...in an elevated fire, the smoke level will envelope the

⁵⁹ B-53.

⁶⁰ B-53.

⁶¹ B-54-56.

⁶² B-54-56.

upper parts of the fire earlier than with a fire at floor level. The smoke layer will descend until the flames are partially or nearly completely emersed [sic] in smokey [sic] air.”

After reviewing the proffered testimony, the Court immediately dismissed the State’s theory, concluding that the information was scientific, technical, and specialized. Consequently, the court held that the evidence needed to satisfy the requirements of Delaware Rules of Evidence (“D.R.E.”) 702 and 703.⁶³ The Court noted that the witness had not been sequestered with other fact witnesses and that he had been participating in a consulting capacity while seated in the gallery of the courtroom.⁶⁴ The Court further held that the State had “other resources” to rebut Mr. Bieber’s testimony, including several of the expert federal ATF agent witnesses who had already testified.⁶⁵ As an additional basis for exclusion, the court held that the probative value of the proffered evidence was outweighed by the prejudice caused by the last-minute nature of its offer.⁶⁶ The Court’s analysis is sound under either theory.

In *Jackson v. Hopkins Trucking Co., Inc.*, the Superior Court excluded an expert report that was provided to opposing counsel *pre-trial* but after the imposed

⁶³ B-56.

⁶⁴ B-54.

⁶⁵ B-56.

⁶⁶ B-56.

discovery deadline.⁶⁷ This Court held that it was not an abuse of discretion for the trial court to have excluded the report because the court considered the prejudice to the opposing party, the resulting trial delay, and the report's comparatively minimal probative value when determining the appropriate sanction.⁶⁸

The Superior Court relied on the case, *DeJesus v. State*.⁶⁹ In *DeJesus*, this Court noted that the Superior Court has "broad discretion to determine the appropriate sanction for a discovery violation."⁷⁰ The defendant, DeJesus, provided the State with notice of his intent to call an expert witness on the day of trial.⁷¹ The expert was to testify to DeJesus' mental capacity.⁷² When the defense counsel attempted to elicit testimony regarding other subject matter, the judge excluded any substantive testimony beyond that identified in the notice to the State.⁷³ This Court approved the trial court's limitation of the trial testimony and noted that DeJesus provided last-minute notice of his expert on the day of trial, despite that his arrest occurred approximately one year before trial began.⁷⁴

Inexplicably, the State in this case alleges that it could not have anticipated Mr. Bieber's testimony, despite that the images in the Power Point that it refers to

⁶⁷ 2010 WL 3397478, at *3 (Del. Aug. 30, 2010).

⁶⁸ *Id.*

⁶⁹ 655 A.2d 1180, 1207 (Del. 1995). B-56.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

were taken directly from the reports cited in Mr. Bieber’s expert materials, which were provided to the State more than a year before trial. The State, in fact, anticipated the issue prior to Mr. Bieber’s testimony, contacted Mr. Carman, and had him present in the courtroom during Mr. Bieber’s examination. The State essentially seeks a remedy for its failure to review the reports cited in Mr. Bieber’s analysis prior to trial. Any substantive information provided to the State during trial had first been made available to the State for its review in May 2014. Consequently, the State had ample opportunity to review the defense expert materials and prepare rebuttal testimony pre-trial.

This is not a case where the defense provided a Power Point presentation to the State with no prior notice of its contents moments before a defining moment in the trial.⁷⁵ Mr. Jones, through counsel, provided a comprehensive report authored by Mr. Bieber that explicitly referred to Mr. Carman. It described, in detail, the exercises and the reports that Mr. Carman conducted.⁷⁶ Despite the State’s argument that it knew only of Mr. Bieber’s “general reliance”⁷⁷ on Mr. Carman’s work, Mr. Bieber’s report specifically cited to the title and page numbers of Mr. Carman’s work.⁷⁸ The “diagrams and photos” that triggered the State’s awareness came directly from the cited reports and are found on Mr. Carman’s professional

⁷⁵ See *Spence v. State*, 129 A.2d 212, 217 (Del. 2015) (explaining that the State provide defense counsel a Power Point presentation “moments before closing argument”).

⁷⁶ AR010-12.

⁷⁷ AB at 27.

⁷⁸ AR010-12.

website.⁷⁹ Consequently, the State had ample opportunity to review them prior to trial.

The State's arguments are unavailing and the issue is straightforward. Superior Court set a discovery deadline.⁸⁰ Both the State and defense provided the opposing party with a list of expert witnesses more than a year before trial. Defense counsel wished to have evidence re-tested by an independent expert and requested a continuance of the discovery deadline, which was granted. The State did not supplement its expert list and did not request an extension of the expert deadline. After several weeks of picking a capital-qualified jury, giving opening statements, and conducting witness examinations, the State sought—at the final hour—to admit additional expert rebuttal testimony.

If it was not an abuse of discretion for the Superior Court in *Jackson* to exclude expert testimony pre-trial in a civil case for a similar discovery violation, than it was not an abuse of discretion for the Superior Court to exclude the State's expert rebuttal evidence at the end of a two-month long capital criminal trial, determined that the defendant would be prejudiced, and held that the State had alternative means to impeach the expert testimony.⁸¹

⁷⁹ <http://carmanfireinvestigations.com/publications/>.

⁸⁰ Discovery deadlines have the “full force and effect as any other order of the [Superior] Court.” *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 528 (Del. 2006).

⁸¹ B-56.

The Superior Court explicitly based its decision to exclude Mr. Carman's testimony on this Court's approval of the discovery violation sanction in *DeJesus*, which also prohibited the use of last-minute expert testimony. Because the court considered the prejudice to both parties, properly determined that there was a discovery violation, and based the evidentiary ruling on settled Delaware law, it was not an abuse of discretion for the court to exclude the State's proffered testimony.

CONCLUSION

The State's claims should be dismissed because they are not properly before this Court. Should the Court address them, the Superior Court was well within its discretion to limit the State's improper questioning and to prevent a mini-trial into minimally probative testimony and the re-hashing of other witnesses' testimony. The State ably presented impeachment testimony and clearly articulated its position that the defense expert was not reliable. The court's evidentiary decisions regarding both impeachment evidence and expert testimony were well-reasoned, supported by legal authority, and within its broad discretion to control the order, pace, and focus of the trial.

Based upon the facts and legal authorities set forth above, Defendant-Below, Appellant Travis Jones respectfully requests that this Honorable Court reverse his convictions and remand for a new trial.

Respectfully submitted,

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