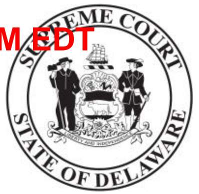
EFiled: Jul 09 2018 02:00PM EDT
Filing ID 62218334
Case Number 103,2018



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAVIER AYALA,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 103, 2018
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Carolyn S. Hake (No. 3839)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French St., 7th Floor
Wilmington, DE 19803
(302) 577-8500

Date: July 9, 2018

TABLE OF CONTENTS

Table of Authorities ii

Nature and Stage of the Proceedings 1

Summary of the Argument 3

Statement of Facts 5

Argument

I. THE SUPERIOR COURT PROPERLY ADMITTED THE TESTIMONY OF THE FORENSIC CHEMIST 9

II. THE SUPERIOR COURT PROPERLY SENTENCED AYALA AS AN HABITUAL OFFENDER 22

Conclusion 32

TABLE OF AUTHORITIES

Cases **Page**

Bowen v. E.I. DuPont de Nemours & Co., Inc., 906 A.2d 787 (Del. 2006) 20

Breslin v. State, 1995 WL 13446 (Del. Jan. 12, 1995) 15, 16

Butcher v. State, 171 A.3d 537 (Del. 2017) 22

Ellerbe v. State, 161 A.3d 674 (Del. 2017) 17

Fensterer v. State, 509 A.2d 1106 (Del. 1986) 15, 16

Graves v. State, 2003 WL 261796 (Del. Feb. 5, 2003) 9

Johnson v. State, 2007 WL 3119657 (Del. Oct. 24, 2007) 9

Lawrie v. State, 643 A.2d 1336 (Del. 1994) 15, 16

Monroe v. State, 652 A.2d 560 (Del. 1995) 9

Perry v. Berkley, 996 A.2d 1262 (Del. 2010) 21

Rodriguez v. State, 30 A.3d 764 (Del. 2011) 20, 21

Snyder v. Andrews, 708 A.2d 237 (Del. 1998) 22

State v. Roundtree, 2015 WL 5461668
(Del. Super. Ct. Sept. 17, 2015) ..... *passim*

Tolson v. State, 900 A.2d 639 (Del. 2006) 20

Turner v. State, 5 A.3d 612 (Del. 2010) 9

Wainwright v. State, 504 A.2d 1096 (Del. 1986) 9, 15, 16

Watson v. Burgan, 610 A.2d 1364 (Del. 1992) 22

Watson v. State, 892 A.2d 366 (Del. 2005) 25, 26, 27, 30

Weber v. State, 457 A.2d 674 (Del. 1983) 15, 16

Wehde v. State, 2015 WL 5276752 (Del. Sept. 9, 2015) 25, 27

Zimmerman v. State, 628 A.2d 62 (Del. 1993) 22

Statutes and Rules

11 *Del. C.* § 1448 24

11 *Del. C.* § 4201 .... 24, 25

11 *Del. C.* § 4214 .... 3, 22, 24, 25, 26, 30

11 *Del. C.* § 4215A 4, 23, 24, 26, 27, 30, 31

16 *Del. C.* § 4751 22

16 *Del. C.* § 4751A (2011) 28

16 *Del. C.* § 4751C (2012) 29

16 *Del. C.* § 4755 22

16 *Del. C.* § 4755 (2011) 29

16 *Del. C.* § 4760 (2011) 28

16 *Del. C.* § 4763 (2011) 28, 29

16 *Del. C.* § 4768 22

16 *Del. C.* § 4791 (2011) 24, 28

Supr. Ct. R. 8 .... 9, 15, 16

D.R.E. 103 .... 15, 16

D.R.E. 702 .... 17, 20

D.R.E. 705 16

NATURE AND STAGE OF THE PROCEEDINGS

On August 31, 2015, a grand jury indicted Javier Ayala for possession with intent to deliver heroin ("PWID"), aggravated possession of heroin ("Aggravated Possession"), possession of a firearm by a person prohibited ("PFBPP"), possession of ammunition by a person prohibited ("PABPP"), endangering the welfare of a child ("Endangering Welfare"), and driving a vehicle while license is suspended or revoked ("Driving While Suspended"). (DI [A] 4; DI [B] 1; A12-14).[1] Prior to trial, the Superior Court granted Ayala's motion to sever the PFBPP, PABPP, and Endangering Welfare charges. (DI [B] 1). On June 8, 2016, after a two-day jury trial on the charges of PWID, Aggravated Possession, and Driving While Suspended, the court declared a mistrial because the jury could not reach a verdict. (DI [A] 32). After a second trial on October 11, 2016, a jury found Ayala guilty of PWID, Aggravated Possession, and Driving While Suspended.[2] (DI [A] 45). On November 22, 2016, trial on the severed charges was held, and a jury found Ayala guilty of PFBPP, PABPP and Endangering Welfare.[3] (DI [B] 9).

---

[1] "DI [A] __" refers to the Superior Court Criminal Docket in *State v. Ayala*, ID No. 1507021247A. (A1-8). "DI [B] __" refers to the Superior Court Criminal Docket in *State v. Ayala*, ID No. 1507021247B. (A9-11)

[2] At trial, Ayala requested for the jury to be instructed on lesser included offenses and moved for judgment of acquittal on the Driving While Suspended offense. (DI [A] 45). The Superior Court denied both motions. (*Id.*).

[3] Ayala stipulated that he was a person not legally permitted to possess a firearm or ammunition. (DI [B] 10).

On February 14, 2017, the State moved to declare Ayala an habitual offender. (DI [A] 49; DI [B] 11). The Superior Court granted the State's motion and, on February 2, 2018, the court sentenced Ayala as follows: (i) for PFBPP, as an habitual offender, to seven years, six months at Level V; (ii) for Aggravated Possession, as an habitual offender, to two years at Level V;[4] (iii) for PABPP to eight years at Level V, suspended for six months at Level IV DOC discretion, followed by one year at Level III; (iv) for Endangering Welfare, to one year at Level V, suspended for one year at Level III; and (v) for Driving While Suspended, to a fine.[5] (DI [A] 53-55; DI [B] 19-22; A156-60).

Ayala filed a timely notice of appeal and an Opening Brief and Appendix. This is the State's Answering Brief.

---

[4] The PWID and Aggravated Possession offenses were merged for sentencing, and the Level V sentence imposed runs concurrent with the Level V sentence for PFBPP. (A156-60).

[5] A corrected sentence order was issued on February 23, 2018 to reflect that the Level V sentence for PWID and Aggravated Possession runs concurrent with the Level V sentence for PFBPP. (DI [A] 56; DI [B] 23; Exhibit B to Op. Brf.).

SUMMARY OF ARGUMENT

I. DENIED. After a lengthy *voir dire*, the Superior Court properly admitted the forensic chemist's testimony concerning the identity and weight of the untested drugs seized from Ayala's vehicle and residence. Although the chemist did not test all of the seized bags, she testified that she used the hypergeometric sampling method, which has been accepted as reliable by Delaware courts, to test random samples of the seized drugs using standard presumptive and confirmatory drug tests, and that she followed proper protocol. Because all of the samples tested positive for heroin, the chemist concluded that, based on statistical probability, there was a 95% likelihood that at least 90% of the entire populations of seized drugs (tested and untested), weighing 15 grams in total, contained the same substance as the tested samples.

II. DENIED. The plain language of 11 *Del. C.* § 4214 provides that "any person who has been 3 times convicted of any felony under the laws of this State . . . , and who shall thereafter be convicted of a subsequent felony is declared to be an habitual criminal." Ayala meets this unambiguous statutory requirement because he was convicted of felonies in this State on at least three separate occasions. Although two of Ayala's predicate offenses were removed as freestanding offenses under the General Assembly's 2011 amendments to Delaware's drug laws, both of the offenses were undisputedly considered felonies when Ayala was convicted of them. Under

11 *Del. C*. § 4215A, Ayala's predicate offenses remain felonies for purposes of sentencing Ayala for his PFBPP conviction under the habitual offender statute. Thus, the Superior Court properly sentenced Ayala as an habitual offender.

STATEMENT OF FACTS

On July 27, 2015, Wilmington Police were conducting surveillance of Ayala's residence at 1002 Sycamore Street in the City of Wilmington, prior to executing a search warrant at that location. (B-100; B-135). During surveillance, Wilmington Police Detective Schupp saw Ayala driving a mini-van a few blocks from his residence. (B100-01; B-135). Knowing that Ayala's driver's license was suspended, Detective Schupp stopped Ayala. (B101-03). After Ayala stopped, the police ordered him to exit the vehicle. (B-104). Although Ayala denied having anything illegal in the vehicle, Detective Schupp saw what he suspected to be a bundle of heroin near the vehicle's center console, in plain view. (B104-05). Ayala consented to a search of his vehicle. (B104-05). During the search of the vehicle, Detective Schupp located 50 individual bags of heroin, labeled "Jaguar Blue," weighing approximately .75 grams in total. (B105-07). Ayala was arrested and taken to the police station. (B108-09). After being read his *Miranda* rights, which he acknowledged he understood, Ayala agreed to speak to Detective Schupp. (B108-110; B-135). Ayala told Detective Schupp that there was gun in his bedroom dresser.[6] (B-135).

[6] Testimony about the firearm and the accessibility of the gun to Ayala's children was presented at the severed trial held after Ayala was convicted of PWID, Aggravated Possession, and Driving While Suspended.

After Ayala's statement, Wilmington Police immediately executed the search warrant of his residence. (B110-111, 118). Ayala's wife and three children were present and police directed them to sit in the living room while they searched the house. (B111-12; B-136). During the search, the police found three rolls of cash, totaling $2,600, in a second floor bedroom belonging to Ayala, along with drug paraphernalia.[7] (B112-15). Officers also located 1,236 individual bags of suspected heroin, stamped "Jaguar Blue," weighing approximately 18.54 grams combined, in a laundry room addition on the rear of the first floor of the house. (B115-16, 117, 118-120). Although officers did not find a gun in Ayala's bedroom dresser, they located a loaded .22 caliber gun hidden underneath a cushion of the living room couch where his 8- or 9-year-old daughter was sitting.[8] (B-136, 141).

After the search warrant was executed, Detective Schupp again interviewed Ayala at the police station. (B-121; B-138). Prior to the interview, which was audio and video recorded, Detective Schupp read Ayala his *Miranda* rights again. (B-121; B-138). After acknowledging that he understood his rights, Ayala signed a *Miranda* waiver and agreed to give a statement. (B-122; B-138). During the interview, Ayala

---

[7] Ayala was unemployed at the time the search warrant was executed. (B-113).

[8] Ayala's wife told the police the gun was under the cushion. (B-136). Ayala's daughter had located the gun before and believed it was a BB gun. (B136-37, 141). The gun was loaded with eleven rounds of ammunition, but the magazine was not "ready to go," because possibly three steps needed to be taken to fire the gun (*i.e.*, cocking the magazine, pulling back slide and removing the safety). (B140-42).

admitted that the heroin found in his vehicle and residence belonged to him, and that he sold heroin. (B122-29; 10/11/16 State's Trial Exhibit 11). Ayala also admitted that the gun found in his residence belonged to him.[9] (B138-39; 11/22/16 State's Trial Exhibit 8). Ayala's video recorded statement was played for the jury at each of his trials. (B-122; B-138; 10/11/16 State's Trial Exhibit 11; 11/22/16 State's Trial Exhibit 8). At the severed trial, Ayala stipulated that he was legally prohibited from possessing a firearm when the gun was found at his house. (B-143).

The suspected heroin seized from Ayala's vehicle and residence was sent to the Division of Forensic Science's ("DFS") laboratory to be analyzed by a forensic chemist. (A78-79). The chemist testified about the tests she conducted on the drug evidence to determine the identity and amount of the drugs.[10] (A80-91). The chemist testified that she did not test each bag, but instead used hypergeometric sampling methodology, which "uses statistics that tell [her] the minimal number of samples that [she] . . . need[s] to test in order to have a 95 percent confidence level that 90 percent of [the seized bags] will all have the same result."[11] (A81-84). In

---

[9] Ayala claimed to have the gun for protection. (B-139, 141).

[10] The forensic chemist analyzed the 50 individual bags seized from Ayala's vehicle separately from the 1,236 individual bags seized from his residence. (A85).

[11] Delaware courts have accepted the validity of hypergeometric sampling, which "allows the testing laboratory to test a portion of the seized drugs, and based upon those test results, infer certain conclusions about the balance of the untested seized drugs." *See State v. Roundtree*, 2015 WL 5461668 (Del. Super. Ct. Sept. 17, 2015). Hypergeometric sampling "is a statistical model based upon a mathematical formula

relevant part, the chemist explained that, in accordance with the DFS laboratory's standard operating procedures, she counted all of the bags, made a homogeneity determination, weighed each homogenous population, and randomly selected the requisite number of bags to test from each population, per the hypergeometric sampling table. (A80-81; *see also* B91-92). The chemist analyzed 23 of the 50 bags and 39 of the 1,236 bags, by performing presumptive and confirmatory drug tests, and concluded that all 62 bags she tested contained heroin.[12] (A82-90; B35-36, 37, 41-42). Based on hypergeometric sampling, the chemist was 95 percent confident that at least 90% of the bags seized from Ayala's vehicle and 90% of the bags seized from Ayala's residence contained heroin. (B35-36; B93; 10/11/16 State's Trial Exhibit 16; A82-90). The chemist also testified that the total weight of the heroin was 15 grams.[13] (A88; *see also* B35-36).

---

that produces a statistical inference that, if a certain number of randomly selected samples are tested and all test positive, then it is probable that most of the remaining items would likewise test positive if actually tested." *Id.*, at *2; *see also* A81-84. In this case, the forensic chemist testified that, like most other drug labs in the country, the DFS uses hypergeometric testing to test drug samples if there are more than ten bags. (A81-84, A117). According to the chemist, if all 1,286 bags seized in this case had to be tested, it would take several weeks to do so. (A83-84).

[12] For each of the random samples, the forensic chemist conducted a presumptive test, "which is called a color test, based on the color that it turns . . . [which] gives a general idea of what kind of substance it is," and a confirmatory test, using a gas chromatograph mass spectrometer in combination with a known standard in order to make an identification of what the evidence is." (A84; *see also* B41-42).

[13] The heroin in the 62 bags the forensic chemist actually tested weighed less than one gram. (A94).

ARGUMENT

I. THE SUPERIOR COURT PROPERLY ADMITTED THE TESTIMONY OF THE FORENSIC CHEMIST.

QUESTION PRESENTED

Whether the Superior Court abused its discretion by denying Ayala's motion *in limine* to exclude the forensic chemist's use of the hypergeometric sampling method to analyze the drugs in this case.

STANDARD AND SCOPE OF REVIEW

A decision whether to admit expert testimony is within the sound discretion of the trial judge and will not be reversed absent a clear abuse of that discretion.[14] However, this Court generally declines to review arguments or questions not raised below and not fairly presented to the trial court for decision.[15] This Court "may excuse a waiver, however, if it finds that the trial court committed plain error requiring review in the interests of justice."[16]

---

[14] *Graves v. State*, 2003 WL 261796, at *1 (Del. Feb. 5, 2003).

[15] Supr. Ct. R. 8; *Johnson v. State*, 2007 WL 3119657, at *1 (Del. Oct. 24, 2007); *Wainwright v. State*, 504 A.2d 1096, 1099-1100 (Del. 1986).

[16] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (citing Supr. Ct. R. 8 & *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995)).

MERITS

The suspected heroin seized from Ayala's vehicle and residence was sent to the DFS laboratory to be analyzed by a forensic chemist. The chemical analysis was performed by Ashley Wang, a forensic analytical chemist. (A72). Wang has a master's degree in forensic science and has worked for DFS for over six years. (A72-73). Wang's analysis was undertaken following the DFS's standard operating procedures and sampling plan. (A81-90, A94-96, A111-15, A123-24; B91-93). Using hypergeometric sampling, Wang determined, with 95 percent confidence, that at least 90% of the bags seized from Ayala's vehicle and 90% of the bags seized from Ayala's residence contained heroin, and the total weight of the heroin was 15 grams. (B35-36; A89-90).

On the eve of trial, Ayala filed a motion *in limine* to exclude the 1,224 bags that were not tested and to preclude the State from relying on hypergeometric testing in this case. (*See* B83-97). Relying on *State v. Roundtree*,[17] and guidelines from the Scientific Working Group for the Analysis of Seized Drugs ("SWGDRUG")[18], and the European Network of Forensic Sciences ("ENFSI"), Ayala claimed that Wang's methodology in this case did not satisfy the foundational requirements for

[17] 2015 WL 5461668 (Del. Super. 2015).

[18] Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) Recommendations Ed. 7.1 (June 9, 2016), *available at* http://www.swgdrug.org/approved.htm (last visited July 6, 2018).

hypergeometric sampling to yield a reliable result, because she did not have a "random sampling plan," using either a random numbers or "black box" approach.[19] (B83-89; B96-97; B130-33; A59-68, A125-26).

Rather than delay trial, the Superior Court permitted Ayala to conduct *voir dire* before Wang was permitted to testify at trial. (B-99). During *voir dire*, Wang explained the hypergeometric sampling model and testified that she followed the DFS laboratory's standard operating procedures to test the drug evidence seized in Ayala's case. (A16-31, A37-41, A48-52). Wang testified that, after counting the bags, she visually inspected each bag for homogeneity and segregated the bags into four homogenous populations.[20] (A17-18, A50-51). After counting and sorting, Wang weighed each homogenous population. (A50). In accordance with DFS

---

[19] Ayala also questioned Wang to determine whether she properly assessed the homogeneity of the tested population. (A30-48). On appeal, Ayala does not challenge Wang's determination as to the homogeneity of the tested population.

[20] The forensic chemist analyzed the 50 individual bags seized from Ayala's vehicle separately from the 1,236 individual bags seized from his residence. (B-35; A39-41, A51; *see also* A85). The chemist divided the 50 bags into two groups and the 1,236 bags into two groups based on their homogeneity. (A49-50; B-35); *see also* A85). Specifically, the chemist determined that 49 of the 50 bags were all of similar appearance - in same size and color bags and stamped with the notation "Jaguar Blue," so she segregated the one different bag, which was unstamped, from the group of 49. (A50-51; B-35, B38-39; *see also* A85-86). Of the 1,236 bags, the chemist also divided those bags into two populations – one group of 1,224, which were all of similar appearance – in same size and shaped bags and stamped with the notation "Jaguar Blue," and a group of 12, which were all of similar appearance – in same size and shaped bags without a stamp. (A50-51; B40-41; *see also* A85-86).

protocol, Wang then randomly selected the requisite number of samples required to be tested by DFS's sampling plan for each of the four populations. (A29-30, A50-52; B91-93). Wang explained that she used the table in DFS's sampling plan to determine the number of samples in each of the four populations that had to be tested under the hypergeometric model. (A17-19, A51; B91-93; *see also* A81-82, A86-87). Wang testified that she randomly selected 22 of the 49 population of bags; 1 of the 1 population of bags; 29 of the 1,224 population of bags; and 10 of the 12 population of bags, per the hypergeometric sampling table.[21] (A51; *see also* B-37; B91-93; A86-88).

Although Wang could not specifically recall randomly selecting bags in this case, she testified that she randomly selects the requisite number of bags in every hypergeometric testing case. (A18-19, A29, A50-51). Wang also testified that her report in this case notes that samples of each population were "randomly" sampled, and referred to photographs attached to her report showing the bags she randomly selected to test. (A19-20, A38-45; B35-82). When asked to explain how she randomly samples, Wang stated that "random sampling is random, so there is no real

---

[21] The chemist performed presumptive and confirmatory drug tests on each sample, and concluded that all 62 bags she tested contained heroin. (A51, A82-90; B35-36, B37, B38-42). As a result, the chemist concluded that, based on statistical probability, there was a 95% likelihood that at least 90% of the populations of seized drugs (both tested and untested), weighing 15 grams in total, contained the same substance as the tested samples. (B35-36; 10/11/16 State's Trial Exhibit 16; A82-90).

way to state how you randomly sample." (A20; *see also* A29-30). Wang also explained that, after weighing each population together, she "dumps" the entire population on her workbench and "just randomly select[s] [the requisite number of samples required to be tested by DFS's sampling plan] from all the bags that are laying on the bench." (A50). Wang also testified that, while random sampling is required, there is no specific method or procedure to randomly sample. (A30-31, A49-52). According to Wang, the decision in selecting the samples is discretionary, and neither SWGDRUG, nor ENFSI, require the use of a certain method to sample. (A27-28, A51-52). Wang testified that the random sampling methods discussed by SWGDRUG and ENFSI are only suggested methods by those organizations and not requirements that DFS must follow. (A27-31, A51-52).

Following this lengthy *voir dire*, the Superior Court denied Ayala's motion, ruling that Wang could testify about her use of hypergeometric testing to determine the probability that all of the seized bags contained heroin. (A59-68). In ruling, the court rejected Ayala's contention that a specific method of random sampling is required under *Roundtree* and found that the random sampling techniques discussed by SWGDRUG and ENFSI are only recommendations, not requirements. (A67). The court also noted that Ayala's argument that a random selection method must have some rigid structure is undermined to the extent the population is truly a

homogenous group, because "[i]f it's all the same anyway, then how random you are becomes less important." (A67).

Ayala renewed his motion after Wang testified, arguing that Wang did not "put forth a foundation for hypergeometric testing for the samples that [were not] tested." (A125-26). The court overruled Ayala's objection, ruling that:

> [T]he witness has established a threshold for admissibility, but that if the homogeneity test is met, and there doesn't seem to be much question but that it has . . . , the issue becomes whether or not the specific procedure by which the witness arrived at random was sufficient. And having gone over all of this during the luncheon recess with counsel, there's no reason to reiterate everything again. But I think that what you end up with is questions that go to weight and not the admissibility of evidence. So the motion is denied.

(A126).

On appeal, Ayala contends that the Superior Court abused its discretion when it allowed Wang to testify "concerning the chemical nature of and weight of all of the controlled substances." (Op. Brf. at 6-10). According to Ayala, the Superior Court "depart[ed] from the two-step foundational requirement for admissibility of substances pursuant to geometric sampling under *Roundtree*," because "[t]he chemist did not testify that she used an acceptable method for random sampling." (*Id.* at 9). Ayala also contends that the court improperly "read the requirement of random selection out of geometric sampling if it appeared from testimony that the selection of samples to test came from separate populations that appeared to [be]

homogenous." (*Id.* at 8). Relying on *Fensterer v. State*,[22] Ayala further argues that Wang's inability to recall and testify as to the basis for her testimony that she randomly sampled each of the homogeneous groupings rendered her conclusion that she randomly sampled the groupings inadmissible." (*Id.* at 9-10).

Ayala appears to have expanded his original objection to Wang's testimony at trial to include challenges to her testimony concerning the *weight* of heroin. (Op. Brf. at 6-10). Having failed to present this specific claim to the Superior Court, Ayala cannot raise it on appeal, absent a showing of plain error.[23] The record does not reflect, however, that Wang used the hypergeometric sampling method to determine the total *weight* of the heroin in this case. As explained by the Superior Court in *Roundtree*:

> Hypergeometric sampling is used only for determining the probability of the entire population containing the same substance. It tests each sample to determine one of two things: positive for controlled substance or negative. Hypergeometric sampling is not used to determine the total weight; weight is determined by another process.[24]

Here, Wang only used the hypergeometric model to determine the probability of the entire population of bags containing the same substance – heroin, and determined

---

[22] 509 A.2d 1106 (Del. 1986).

[23] Supr. Ct. R. 8; D.R.E. 103; *Breslin v. State*, 1995 WL 13446, at *2 (Del. Jan. 12, 1995); *Lawrie v. State*, 643 A.2d 1336, 1340-41 (Del. 1994); *Wainwright*, 504 A.2d at 1100; *Weber v. State*, 457 A.2d 674, 680 n.7 (Del. 1983).

[24] *Roundtree*, 2015 WL 5461668, at *5.

weight by another process.[25]

Ayala has also expanded his original objection to the forensic chemist's testimony to include a claim that Wang's testimony lacks a factual basis and should be excluded under D.R.E. 705 because of Wang's alleged inability to recall and testify as to the basis for her testimony that she randomly sampled each of the homogeneous populations. (Op. Brf. at 6-10). Having failed to present this specific claim to the Superior Court, Ayala cannot raise it on appeal, absent a showing of plain error.[26] Ayala cannot show plain error. This case is quite different from *Fensterer*, upon which Ayala relies. In *Fensterer*, this Court ruled that the State failed to meet its burden of establishing a sufficient basis under D.R.E. 705 for the expert opinion of a FBI special agent in a murder case, where the agent was unable to recall which of the three possible observations he had made in determining that one of the victim's head hairs had been forcibly removed.[27] Here, Wang satisfied D.R.E. 705 by establishing a proper factual basis for her opinion that the substance in at least 90% of the seized bags was heroin. The record reflects that Wang identified the facts and data upon which she based her opinion and her reasons for

---

[25] The chemist weighed *all* 1,286 bags. (*See* A50, A81, A88, A114-15). Specifically, she testified that, after sorting all of the bags into homogeneous populations, she weighed each population together in a "weigh boat." (A50).

[26] Supr. Ct. R. 8; D.R.E. 103; *Breslin*, 1995 WL 13446, at *2; *Lawrie*, 643 A.2d at 1340-41; *Wainwright*, 504 A.2d at 1100; *Weber*, 457 A.2d at n.7.

[27] *See Fensterer*, 509 A.2d at 1108-10.

it. Although Wang could not specifically recall her actual testing of the evidence in Ayala's case, she testified that she followed normal laboratory procedures in this case and randomly selected the requisite number of samples to test for each population, as she did in every hypergeometric case, and as stated in her report and documented by photographs attached to her report. (A17-19, A29, A38-45, A50-51, A80; *see also* B35-36, B37, B38-42, B43-82, B91-93).

Ayala's challenge to the Superior Court's ruling that no specific method of random sampling is required under *Roundtree*, (Op. Brf. at 8-9), is also unavailing. In *Roundtree*, the Superior Court recognized the validity of using hypergeometric sampling to determine the probability of the entire population containing the same substance.[28] As Ayala notes, the *Roundtree* court held that "the State must show how a determination as to the homogeneity of the tested population was made and how the tested samples were randomly selected."[29] However, the *Roundtree* court did not dictate a method that a chemist must use to randomly sample or require a chemist to use either the "black box" or numbers approach, advocated by Ayala.[30] Rather, the court only held that the chemist must "randomly" select the samples to

---

[28] *Roundtree*, 2015 WL 5461668, at *4; *see also Ellerbe v. State*, 161 A.3d 674 (Del. 2017) (finding D.R.E. 702 standard met where chemist used hypergeometric sampling method to analyze drugs).

[29] *Roundtree*, 2015 WL 5461668, at *4.

[30] *See id.*

be tested after a population is determined.[31] Here, Wang repeatedly explained that, although she did not use a specific sampling procedure, she used a "random approach" where she dumped all of the homogeneous bags together on her workbench and randomly selected the requisite number of bags to sample. (A20, A29-30, A50).

Further, Wang's described method of random selection is actually similar to that used by the chemist in *Roundtree*. In *Roundtree*, after the chemist counted the bags and made a homogeneity determination, she placed the bags back into a common container and randomly selected the requisite number of bags to sample, per the hypergeometric sampling table.[32] The record in *Roundtree* does not indicate that the chemist's container was markedly different from Wang's workbench (*i.e.*, one that would prevent the chemist from consciously selecting a specific item of the population, like a "black box").[33]

Ayala's reliance on SWGDRUG's and ENFSI's sampling guidelines to challenge the Superior Court's ruling, is also misplaced. In denying Ayala's application, the Superior Court accepted Wang's testimony that SWGDRUG's and ENFSI's sampling guidelines are only recommendations, and found that the

---

[31] *See id.*

[32] *See id.*; *see also* A22-23 (describing "black box" method).

[33] *Id.*

guidelines do not dictate that a chemist must use a specific technique to take a random representative sample from a population.[34] (A67). Indeed, ENFSI's guidelines, which Ayala questioned Wang about during *voir dire*, make clear that that "[t]he decision on how to perform [a representative sampling procedure on a population of units with sufficient similar external characteristics (e.g. size, colour),] . . . is left to the discretion of the examiner." (B97; *see also* A52).

Finally, the Superior Court did not "read the requirement of random selection out of geometric sampling," or hold that a random selection was not required. (*See* Op. Brf. at 6-10). The court merely rejected Ayala's contention that a *specific method* of random sampling is required under *Roundtree* or by the SWGDRUG and ENFSI guidelines. (A59-68, A125-26). Although the court remarked that "[i]f it's all the same anyway, then how random you are becomes less important," (A67), the court was not "read[ing] the requirement of random selection out of geometric sampling if it appeared from testimony that the selection of samples to test came from separate populations that appeared to [be] homogenous." (*See* Op. Brf. at 8). Rather, the court was simply remarking that a truly homogeneous group undermines Ayala's argument that a random selection method must have some rigid structure.

[34] Wang's testimony is consistent with the forensic scientist's testimony in *Roundtree* that "SWGDRUG cannot publish standards, *per se*, but can make recommendations to the international forensic community." *Roundtree*, 2015 WL 5461668, at *1.

(A67).

Contrary to Ayala's claim, the Superior Court properly exercised its discretion as a "gatekeeper" in admitting Wang's testimony.[35] The test Wang employed, which is used by most other laboratories in the country, is considered reliable by the scientific community.[36] Further, the record shows that the State satisfied the requirements set forth in *Roundtree* for proper hypergeometric testing. Wang testified that she determined the homogeneity of the tested populations and randomly selected the samples required to be tested under the hypergeometric testing protocol, in accordance with DFS's standard laboratory procedures.

Because Wang's testimony met the threshold for admissibility, it was for the

---

[35] Under D.R.E. 702, the trial court is given wide latitude in allowing an expert to testify:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) The testimony is based on sufficient facts or data; (c) The testimony is the product of reliable principles and methods; and (d) The expert has reliably applied the principles and methods to the facts of the case.

D.R.E. 702; *see Rodriguez v. State*, 30 A.3d 764, 768-69 (Del. 2011); *Bowen v. E.I. DuPont de Nemours & Co., Inc*., 906 A.2d 787, 795 (Del. 2006) (citing *Tolson v. State*, 900 A.2d 639, 645 (Del. 2006)).

[36] *Roundtree*, 2015 WL 5461668, at *4-5.

jury to determine the weight to be given Wang's testimony.[37] The court gave Ayala wide latitude to explore his attack on Wang's opinion before the jury. (A68). By probing Wang on her hypergeometric sampling methodology, Ayala challenged Wang's credibility before the jury and the weight to be given the hypergeometric sampling evidence. The Superior Court did not abuse its discretion or otherwise err in allowing the jury to consider the hypergeometric evidence.

[37] *See id.*, at *3 ("Ultimately, the jury must decide whether the inference supports a conviction or whether the State's evidence falls short of its burden."); *Rodriguez*, 30 A.3d at 770; *Perry v. Berkley*, 996 A.2d 1262, 1270 (Del. 2010).

II. THE SUPERIOR COURT PROPERLY SENTENCED AYALA AS AN HABITUAL OFFENDER.

Question Presented

Whether the Superior Court properly found that Ayala was an habitual offender, pursuant to 11 *Del. C.* § 4214.

Standard and Scope of Review

This Court reviews "statutory construction issues *de novo* to determine if the Superior Court erred as a matter of law in formulating or applying legal precepts."[38]

Merits

Before sentencing, the State moved to declare Ayala an habitual offender pursuant to 11 *Del. C.* § 4214(a), alleging four prior felony convictions in Delaware: (1) a 1993 conviction for PWID cocaine (former 16 *Del. C.* § 4751); (2) a 1999 conviction for Possession of Controlled Substance Within 300 Feet of a Park (former 16 *Del. C.* § 4768); and (3) 2009 and 2011 convictions for Use of a Dwelling for Keeping a Controlled Substance (former 16 *Del. C.* § 4755(a)(5)).[39] (A128-31;

---

[38] *Butcher v. State*, 171 A.3d 537, 539 (Del. 2017); *Snyder v. Andrews,* 708 A.2d 237, 241 (Del. 1998) (citing *Zimmerman v. State,* 628 A.2d 62, 66 (Del. 1993)); *Watson v. Burgan,* 610 A.2d 1364, 1367 (Del. 1992).

[39] 11 *Del. C.* § 4214(a) only requires three separate, successive convictions. *See* 11 *Del. C.* § 4214(a) ("[A]ny person who has been 3 times convicted of any felony under the laws of this State . . . , and who shall thereafter be convicted of a subsequent felony is declared to be an habitual criminal."). Ayala concedes that his 1993 conviction for PWID cocaine is a sufficient felony predicate for habitual offender

A127-31; B145-49). Ayala does not contest these convictions or dispute that the offenses were considered felonies when he was convicted of them. Rather, Ayala argues that his 1999 conviction for Possession of Controlled Substance Within 300 Feet of a Park and his 2009 and 2011 convictions for Use of a Dwelling for Keeping a Controlled Substance, "were not sufficient predicates because they were no longer felonies under the law in effect at the time of [Ayala's] sentencing" in 2018. (Op. Brf. at 13). Specifically, according to Ayala, under the Ned Carpenter Act, which was enacted in 2011, Possession of Controlled Substance Within 300 Feet of a Park and Use of a Dwelling for Keeping a Controlled Substance, "are no longer felonies and no longer defined as offenses." (*Id.* at 13-14). Relying on 11 *Del. C.* § 4215A, entitled "Sentence of greater punishment because of previous conviction under prior law or the laws of other jurisdictions," Ayala contends that, since there are no existing maintaining a dwelling or parkland felony statutes, the 1999, 2009 and 2011 convictions should no longer be considered sufficient predicate offenses, because they are not "the same as, or equivalent to" offenses that are currently punishable in Title 16. (*Id.*).

Ayala's arguments were rejected by the Superior Court. (A152-53). According to the Superior Court, although the offenses of Possession of Controlled

---

sentencing purposes. (Op. Brf. at 12). Thus, the State was only required to establish two additional prior felony convictions to satisfy the habitual offender statute.

Substance Within 300 Feet of a Park and Use of a Dwelling for Keeping a Controlled Substance "were taken off the books as part of a substantial revision to Title 16 in 2011," both of these offenses were considered felonies under the Delaware Criminal Code at the time Ayala was convicted of these offenses, and thus can serve as predicate convictions for purposes of habitual offender sentencing.[40] (*Id.*). The court also found that 11 *Del. C.* § 4215A did not aid Ayala, because section 4215A provides that the status of the crime *at the time of conviction* is controlling for purposes of the repeat offender statute. (*Id.*). Because Ayala's predicate convictions were considered felonies when he was convicted of them, the court concluded that Ayala's prior felony convictions qualified him for sentencing as an habitual offender under 11 *Del. C.* § 4214(a), and sentenced Ayala as an habitual offender.[41] (*Id.*).

---

[40] On April 20, 2011, H.B. 19 (known as the "Ned Carpenter Act"), of the 146th General Assembly was signed. H.B. 19, 146th Gen. Ass'y (Del. 2011-12), 78 Del. Laws ch. 13, B9-34. The bill repealed the existing drug laws and implemented new ones. The Ned Carpenter Act went into effect on September 1, 2011, and applied only prospectively, leaving the previous statutory scheme to govern past conduct. *See* B32 at § 66; *see also* 16 *Del. C.* § 4791 (2011).

[41] The Superior Court sentenced Ayala as an habitual offender, pursuant to 11 *Del. C.* § 4214(a), for his conviction for Aggravated Possession. (Exhibit B to Op. Brf.; A157-60). The Superior Court also sentenced Ayala as an habitual offender, pursuant to 11 *Del. C.* § 4214(b), for his conviction for PFBPP, a designated "violent felony" under 11 *Del. C.* § 4201(c). (Exhibit B to Op. Brf.; A157-60). As Ayala concedes, Ayala's conviction of PFPBB constitutes a "violent felony," because Ayala, at the time he possessed the firearm, was a convicted violent felon as a result of his 1993 conviction for PWID cocaine, which is defined as a Title 16 violent felony under section 4201(c). (*See* Op. Brf. at n. 3 (conceding that "[i]n the absence of the habitual offender enhancement, [Ayala] would have been otherwise subject to a minimum three years imprisonment under 11 *Del. C.* § 1448(e)(1)a, [which

The Superior Court correctly found that Ayala's convictions for Possession of Controlled Substance Within 300 Feet of a Park and Use of a Dwelling for Keeping a Controlled Substance, could be used as predicate offenses qualifying him for sentencing as an habitual offender. The habitual offender statute, 11 *Del. C.* § 4214, provides, in relevant part:

> (a) [A]ny person who has been 3 times convicted of *any felony under the laws of this State* . . . , and who shall thereafter be convicted of a subsequent felony is declared to be an habitual criminal. The court, upon the State's petition, shall impose the applicable minimum sentence, pursuant to subsection (b), (c) or (d) of this section and may, in its discretion, impose a sentence of up to life imprisonment. . . .[42]

Section 4214 does not expressly address prior felony convictions that were legislatively removed as free standing offenses or reclassified as misdemeanors after the convictions. This Court has consistently held, however, that the status of the crime at the time of conviction is controlling for purposes of the habitual offender statute.[43]

---

mandates a minimum sentence if the person has previously been convicted of a violent felony], because he had a prior possession with intent to deliver cocaine conviction in 1993.")); *see also* A157-60; 11 *Del. C.* § 4201(c) (defining PFBPP as a "violent felony" when a "firearm [is] . . . owned, possessed or controlled by a violent felon.").

[42] 11 *Del. C.* § 4214(a) (emphasis added).

[43] *See Wehde v. State*, 2015 WL 5276752, at *3 (Del. Sept. 9, 2015) ("The later reclassification of some of the crimes underlying [the defendant's] predicate felony convictions as misdemeanors does not make those convictions non-predicate convictions under Section 4214."); *Watson v. State*, 892 A.2d 366, 369-70 (Del. 2005) (holding that defendant's prior felony conviction for trafficking in 6.18 grams

For example, in *Watson v. State*,[44] this Court applied section 4215A where a defendant was previously convicted of a felony in 1999 of trafficking in 6.18 grams of cocaine, and where the trafficking statute at the time of his sentencing under the habitual offender statute made possession of less than 10 grams a misdemeanor.[45] Although the habitual offender statute "does not expressly address prior felony convictions that [have been] legislatively reclassified as misdemeanors after the convictions," this Court held that the defendant's "prior conviction was properly included as a predicate offense for purposes of § 4214(b)."[46] This Court explained that while other jurisdictions "have consistently held that the status of the crime at the time of conviction is controlling for purposes of repeat offender statutes, [i]n Delaware, that conclusion is mandated by . . . [section] 4215A, which provides:

> (a) Notwithstanding any provision of law to the contrary, if a previous conviction for a specified offense would make the defendant liable to a punishment greater than that which may be imposed upon a person not so convicted, that previous conviction shall make the defendant liable to the greater punishment *if that previous conviction was*:
>
> > (1) *For an offense specified in the laws of this State* or for an offense which is the same as, or equivalent to, such

---

of cocaine was properly included as a predicate offense under habitual offender statute, even though statute at time of sentencing made possession of less than ten grams a misdemeanor, because section 4215A mandates that the status of the crime at the time of conviction is controlling).

[44] 892 A.2d 366.

[45] *Id.* at 369-70.

[46] *Id.*

> offense as the same existed and was defined under the laws of this State *existing at the time of such conviction*;
>
> . . .
>
> (b) This section shall apply to any offense or sentencing provision defined in this Code unless the statute defining such offense or sentencing provision or a statute directly related thereto expressly provides that this section is not applicable to such offense or sentencing provision.[47]

Ayala claims that *Watson* is distinguishable because the predicate offense in *Watson* was reclassified as a misdemeanor, while his prior predicate convictions are no longer free-standing offenses under Delaware's Criminal Code. (Op. Brf. at 14-15). Ayala is mistaken. Such a distinction is irrelevant. As 11 *Del. C.* § 4215A and this Court's decisions in *Wehde* and *Watson* instruct, the status of a predicate crime *at the time of the prior conviction* is controlling as to whether such conduct is a felony, and thus, can serve as a predicate offense, regardless of whether such conduct today would be considered a felony or a stand-alone offense.

Further, Ayala ignores that, although the General Assembly repealed Possession Within 300 feet of a Park and Maintaining a Dwelling as free-standing offenses in 2011, such conduct is still a misdemeanor under the current law. As the General Assembly explained, the repeal of Maintaining a Dwelling results in "'simple possession' amounts of drugs in a home or a car" being a misdemeanor

[47] *Id.* (citing 11 *Del. C.* § 4215A (emphasis added)).

rather than a felony.[48] Similarly, the current law provides that possessing a controlled substance within 300 feet of a park is an aggravating factor, not a stand-alone offense.[49] Nonetheless, possessing a controlled substance still constitutes a misdemeanor at a minimum.[50] In fact, when Ayala pled guilty to Possession of Controlled Substance Within 300 Feet of a Park, he also pled guilty to possession of heroin, a lesser included misdemeanor. (*See* B145). Moreover, Ayala pled guilty in 2011 to Maintaining a Dwelling for keeping at least 2.5 grams of heroin.[51] (*See* B147-49) (pleading guilty to count III of indictment, which charged Ayala with

---

[48] Synopsis to H.B. 19, 146th Gen. Ass'y, at B2-8; *see also* 16 *Del. C.* § 4763 (2011) (prohibiting possession of controlled substances). Ayala compares the prior offense of Maintaining a Dwelling to current 16 *Del. C.* § 4760 (2011). (Op. Brf. at n.9). Section 4760, however, only pertains to people with control of a dwelling or business who permit *others* to use it for drug dealing. *See* 16 *Del. C.* § 4760 (2011); Synopsis to H.B. 19, 146th Gen. Ass'y, at B2-8.

[49] *See* 16 *Del. C.* § 4751A (2011); Synopsis to H.B. 19, 146th Gen. Ass'y, at B2-8.

[50] *See* 16 *Del. C.* § 4763 (2011).

[51] Although the Ned Carpenter Act went into effect on September 1, 2011 – 6 days prior to Ayala's September 7, 2011 plea bargain to the felony offense of Maintaining a Dwelling, Ayala's 2011 plea and felony conviction remain undisturbed because the changes to Delaware's drug laws applied only prospectively, leaving the previous statutory scheme to govern past conduct. *See* Synopsis to H.B. 19, 146th Gen. Ass'y, at B2-8; *see also* 16 *Del. C.* § 4791(a) (2011) ("Prosecution for any violation of law occurring prior to the effective date of any amendment to this chapter is not affected or abated by any amendment to this chapter."); 16 *Del. C.* § 4791(d) (2011) ("This chapter and any amendments thereto apply to any violation of law, seizure and forfeiture, injunctive proceeding, administrative proceeding or investigation which occurs or is commenced following the effective date of this chapter and any amendments thereto.").

keeping a dwelling at 1002 Sycamore Street "for keeping or delivering controlled substances in violation of Chapter 47, Title 16 of the Delaware Code of 1974, as amended, as set forth in Count I or II of this Indictment [which charged Ayala with possessing at least 2.5 grams of heroin]"). Possessing that amount of heroin would constitute a class E felony under the current law.[52]

Ayala also claims that "[p]ermitting [his] prior offenses in question to serve as sufficient predicates for habitual offender sentencing is fundamentally unfair because the predicates in question are no longer offenses." (Op. Brf. at 15). According to Ayala, "[t]he General Assembly has recognized that the prior conduct defined by the offenses in question should no longer carry their punitive consequences prospectively." (*Id.*). Ayala is again mistaken. The underlying conduct is still criminal behavior. As Ayala conceded below, the conduct underlying his prior convictions for Possession Within 300 feet of a Park and Maintaining a Dwelling, are misdemeanors under the current law. *See* A145-46 ("Possession of a Controlled Substance with an aggravated factor is now completely within 11 *Del. C.* Section 4763, and it is a class A misdemeanor."); A154-55 ("The Legislature

[52] *See* 16 *Del. C.* § 4755 (2011) ("[A]ny person who possesses a controlled substance in a Tier 2 quantity, as defined in any of § 4751C(4)a-i of this title, shall be guilty of a class E felony."); 16 *Del. C.* § 4751C(4)b (2012) ("'Tier 2 Controlled Substances Quantity' means 2 grams or more of any morphine, opium or any salt, isomer or salt of an isomer thereof, including heroin, as described in § 4714 of this title, or of any mixture containing any such substance.").

Repealed Possession Within 300 Feet of a Park and Maintaining and indicated that the conduct is misdemeanor conduct.”).

Although the habitual offender statute is directed at repeat felony offenders, and applying section 4215A may result in a defendant serving an enhanced sentence because of conduct that today would not be considered a felony, section 4215A “leaves no doubt as to the General Assembly’s intent” to include those prior felony convictions as predicate offenses for purposes of the habitual offender statute.[53] Indeed, the General Assembly stated in the synopsis to the law enacting section 4215A that:

> Many criminal statutes allow for the imposition of enhanced penalties when repeat offenders are subsequently convicted for the same or similar crimes. These sentencing enhancement statutes were enacted at various times and therefore do not contain uniform language defining what constitutes a “previous conviction.” This Act makes it clear that, unless specifically expressed in the statutory language of a criminal offense, *convictions for previous offenses under prior versions of Delaware criminal law . . .* ***do*** *act to enhance the sentence of persons convicted of subsequent crimes in Delaware.*[54]

---

[53] *Watson*, 892 A.2d at 370 (“We are not unmindful of the fact that the habitual offender statute is directed at repeat felony offenders, and that [defendant] is serving a life sentence because of conduct that today would be considered a misdemeanor. But § 4215A leaves no doubt as to the General Assembly’s intent. In 1999, when Watson was previously convicted, the amount of cocaine he possessed constituted a felony. As a result, that prior conviction was properly included as a predicate offense for purposes of § 4214(b).”).

[54] Synopsis to S.B. 26, 142d Gen. Ass’y, at B1 (emphasis added).

Under section 4215A, the Superior Court properly found that Ayala's prior convictions for Possession of Controlled Substance Within 300 Feet of a Park and Use of a Dwelling for Keeping a Controlled Substance were included as predicate offenses for purposes of the habitual offender statute. Even though these offenses were taken off the books as free-standing felonies as part of the General Assembly's substantial revision to Title 16 in 2011, section 4215A leaves no doubt that Ayala's predicate convictions, which were undisputedly considered felonies when he was convicted of them, remain felonies for purposes of sentencing Ayala for his PFBPP conviction under the habitual offender statute.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

/s/ Carolyn S. Hake
Carolyn S. Hake (No. 3839)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

Dated: July 9, 2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAVIER AYALA,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 103, 2018
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7,702 words, which were counted by Microsoft Word 2016.

Dated: July 9, 2018 /s/ Carolyn S. Hake