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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| DARREN WIGGINS, | ) | |
| | ) | |
| Plaintiff-Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 46, 2019 |
| | ) | |
| STATE OF DELAWARE | ) | |
| | ) | |
| Defendant-Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# APPELLANT'S OPENING BRIEF

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## NATURE AND STAGE OF THE PROCEEDINGS

Darren Wiggins was indicted on Aggravated Possession of PCP, Possession of Heroin, Possession of Cocaine and Possession of Marijuana.[1] On June 27, 2018, he filed a Motion to Suppress. The State responded and, after a hearing, the trial court denied the motion.[2]

On September 5, 2018, a one-day jury trial was conducted. After the State rested, Wiggins moved for a judgment of acquittal on Aggravated Possession of PCP arguing the State failed to provide sufficient evidence that the PCP weighed 15 or more grams. The chemist reported the weight at 17.651 grams. However, she testified that the vial containing a liquid she confirmed to be PCP also contained unknown distinctive brown chunky substances floating in the liquid and the weight included both the PCP and the unknown chunks. Nonetheless, the trial court denied Wiggins' motion.[3]

Wiggins was convicted of all charges. Later, he was declared a habitual offender and sentenced to over 3 years in prison plus probation.[4] This is his Opening Brief in support of his timely-filed appeal.

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[1] A-2-3, 7-8.
[2] A-3-4.
[3] *See* Decision Denying Motion for Judgment of Acquittal, Ex.A.
[4] *See* January 18, 2019 Sentence Order, Ex.B.

## SUMMARY OF THE ARGUMENT

1. The State failed to provide sufficient evidence to establish that Wiggins possessed at least 15 grams of PCP, the minimum weight required for his conviction of Aggravated Possession. The State had claimed that the vial seized from Wiggins contained liquid PCP and that, at the time it was seized, the contents weighed 17.651 grams. Thus, it argued, Wiggins possessed a Tier 5 weight and was guilty of Aggravated Possession. However, the vial contained not only the liquid but also distinctive brown chunky substances floating in the liquid and the reported weight of 17.651 grams included both substances. For the actual testing, the chemist removed the liquid from the vial leaving the chunks behind. She confirmed the liquid to be PCP. She never tested the solid substances and, thus, was unable to identify their composition. Nor did she take any separate weight of either of the distinct substances.

Because the chunky substances could be easily distinguished and separated from the liquid, the two substances were not a mixture and, thus, the weight of the chunky substances should not have been included for purposes of determining Tier 5 weight. Therefore, the trial court erroneously denied Wiggins' motion for judgment of acquittal and his conviction must now be reversed.

## STATEMENT OF FACTS

"[I]n the early morning hours" of February 22, 2018, Detective McAndrew saw a Chrysler with a purported window tint violation in that the car's entire front windshield and all of its other windows were tinted.[5] Police had stopped the same vehicle the previous night due to the exact same violation and issued a warning to the driver. Yet, McAndrew of the Governor's Task Force[6] felt another traffic stop was warranted.[7] Because his police vehicle was not equipped with emergency lights, he passed along the "window tint" information to Detective Radcliffe, also a member of the Governor's Task Force, who, in his appropriately equipped police car, stopped the Chrysler.[8] McAndrew pulled over as well.[9]

At trial, the detectives recalled that there were three or four people in the Chrysler. The occupants included the driver, a front seat passenger and Wiggins who was in the rear passenger-side seat.[10] While Radcliffe initially approached the driver, McAndrew approached the passenger-side of the car

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[5] A-13-14.
[6] A-13-14.
[7] A-15.
[8] A-17.
[9] A-14. During the traffic stop, about three or four other officers from the same unit stopped by at various points.
[10] A-15-16, 18.

and contacted Wiggins who was very cooperative.[11] According to the detectives, it is custom to conduct a warrant check for all the occupants during a traffic stop. However, they both acknowledged that before "running his name," Wiggins may have volunteered to them information about his warrant status.[12] Once police confirmed that he was wanted on a few traffic warrants, Radcliffe had Wiggins step out of the car.[13] Wiggins continued to cooperate while police arrested him and searched him incident to arrest.[14] No other occupants were arrested.[15]

During the search incident to arrest, Radcliffe found in Wiggins' "fifth jean pocket" a little bag of what appeared to be marijuana.[16] While searching Wiggins' groin area, Radcliffe "felt a vial, which was abnormal to be in that area."[17] He pulled the object out and found that it was a "vial containing suspected PCP."[18] Also in the groin area, the detective found two bags of suspected crack cocaine and 36 bags of suspected heroin. Radcliffe handed the evidence to McAndrew who placed the various substances in

[11] A-15, 18.
[12] A-15, 18.
[13] A-13, 16.
[14] A-13, 15-16.
[15] A-18.
[16] A-14.
[17] A-14.
[18] A-14.

evidence bags, took them to Troop 2 and turned them over to Detective Pierre Lawlor, also a member of the Governor's Task Force.[19]

While he did not go into detail, Lawlor testified that once he received the evidence, he obtained preliminary weights and conducted field tests.[20] He then placed the substances into separate evidence bags, sealed the bags and placed them in the evidence locker at Troop 2.[21] Later, the substances were sent to the Delaware State forensic laboratory to be analyzed.[22]

At the lab, Heather Moody, the forensic chemist, was assigned to test the substances.[23] She confirmed the substance found in the jeans pocket was marijuana. She also confirmed there were 36 bags of heroin and 2 bags of cocaine seized from Wiggins' groin area.[24] With respect to the vial seized from that area, Moody reported that it contained an "amber liquid with brown chunks."[25] At first, she testified that she

> took the weight of the liquid within that bottle and then [she] took samples from that liquid to perform [her] presumptive and confirmatory testing. And once [she] had taken those samples and performed

[19] A-14, 16-17, 19.
[20] A-20.
[21] A-18-19.
[22] A-20.
[23] A-20-21.
[24] A-23-24.
[25] A-24.

> [her] presumptive testing, [she] placed the liquid back into the bottle.[26]

The chemist testified that the "weight of the liquid within the bottle" was 17.651 grams which excluded the weight of the glass vial.[27] However, upon further questioning, Moody conceded that she did not know what the brown chunks were and that she did not test the brown chunks.[28] Significantly, she also conceded that she weighed the chunks along with the liquid inside of the bottle.[29] Therefore, the reported weight of 17.651 grams included not only the liquid PCP but the unknown chunks as well.[30]

[26] A-22.
[27] A-23.
[28] A-24.
[29] A-24.
[30] A-24-25.

## I. NO RATIONAL TRIER OF FACT COULD FIND WIGGINS GUILTY BEYOND REASONABLE DOUBT OF AGGRAVATED POSSESSION AS THE STATE FAILED TO MEET ITS BURDEN TO PROVE THAT WIGGINS POSSESSED A TIER 5 WEIGHT OF A MIXTURE CONTAINING PCP.

### *Question Presented*

Whether any rational trier of fact could find Wiggins guilty beyond reasonable doubt of Aggravated Possession when the State attempted to satisfy the "Tier 5" requirement with a weight that included not only a mixture containing PCP but also a separate and distinct unknown substance.[31]

### *Standard and Scope of Review*

This Court "review[s] the denial of a motion for judgment of acquittal *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt."[32]

### *Argument*

The State failed to provide sufficient evidence to establish that Wiggins possessed at least 15 grams of PCP, the minimum weight required for his conviction of Aggravated Possession. The State had claimed that the

[31] A-26-28.
[32] *Pardo v. State*, 160 A.3d 1136, 1149–50 (Del. 2017) (internal quotation marks and citation omitted).

vial seized from Wiggins contained liquid PCP and that, at the time it was seized, the contents weighed 17.651 grams. Thus, it argued, Wiggins possessed a Tier 5 weight and was guilty of Aggravated Possession. However, the vial contained not only the liquid but also distinctive brown chunky substances floating in the liquid and the reported weight of 17.651 grams included both substances. For testing, the chemist removed the liquid from the vial leaving the chunks behind. She confirmed the liquid to be PCP. She never tested the solid substances and, thus, was unable to identify their composition. Nor did she take any separate weight of either of the distinct substances.

Because the chunky substances could be easily distinguished and separated from the liquid, the two substances were not a mixture and, thus, the weight of the chunky substances should not have been included for purposes of determining Tier 5 weight. Therefore, the trial court erroneously denied Wiggins' motion for judgment of acquittal and his conviction must now be reversed.

The State alleged Wiggins committed Aggravated Possession in violation of 16 *Del. C.* §4752 (4) when he

> …knowingly possess[ed] 15 grams or more of phencyclidine (PCP) or of any mixture containing any such controlled substance as described in 16 *Del. Code* section 4716 (e)(5)…

The term "mixture" is not defined in Title 16.

During trial, and at the conclusion of the State's case, Wiggins moved for a judgment of acquittal on the charge of Aggravated Possession because the liquid PCP along with the distinguishable unknown brown chunky substances floating in it did not amount to a mixture for purposes of §4752 (4) and § 4716 (e) (5) and, thus, the weight of the unknown chunky substances should not be included in establishing the weight element of the offense. Therefore, the State failed to establish the actual weight of the PCP and Wiggins could only be convicted of the lesser-included offense of misdemeanor possession of PCP.

The trial court denied Wiggins' motion ruling that his argument was one for the jury. Essentially, the trial court said that, even though there were no facts to support such a conclusion, the jury could speculate that

> whatever [is] put in PCP, some may remain clumpy, some may be reduced to liquid form. Maybe it's liquid and it becomes clumpy or becomes a solid, I don't know.[33]

And, even though the State's chemist, i.e. scientist, testified that she had no idea what the clumpy substance was, the trial court speculated,

> Well, I mean I'm not a scientist, but I'm thinking, you know, through my kids science experiments. I think

[33] A-27.

> there might have been salt that evaporated. It's still a saltwater mixture, but when it evaporates, you start seeing some of the solid sort of being pulled to the side and there's still some liquid but it's still a saltwater mixture.[34]

Delaware takes a "market oriented" approach to punishing possession of illegal drugs. This approach recognizes that by diluting their drug supply with some other substance, major drug dealers "increase the amount of the drug [they] ha[ve] available to sell to consumers[.]"[35] When addressing the the approach in *Traylor v. State*,[36] this Court also explained that major drug dealers need a network of street peddlers to make the actual sales to users.[37] So, punishing the possession of a "mixture" that includes an illegal drug as severely as a pure form of a drug, a street-level peddler will be at just as much risk for "possession of large, but diluted, amounts of illegal drugs" as he would for possession of the same amount of the pure form of a drug.[38] This, in turn, makes it more difficult for high volume dealers "to find street-

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[34] A-27.

[35] *United States v. Jennings*, 945 F.2d 129, 137 (6th Cir. 1991).

[36] 458 A.2d 1170, 1177 (Del. 1983). *Traylor* addressed the offense of trafficking which was later repealed in an overhaul of Title 16 designed, in large part, to fix piecemeal legislation. The "new" offense of Aggravated Possession is composed of the same elements. Nothing indicates the legislature intended any change with respect to the purpose of the classification scheme that makes severity of crime dependent upon weight of mixture containing illegal substance. *Compare* §4753A (1983) *with* 16 *Del. C.* §4752 (4) (2011).

[37] *Traylor*, 458 A.2d at 1177.

[38] *Id*.

level peddlers willing to risk possession of large amounts of even diluted illegal drugs.[39]

The Federal sentencing scheme follows the same "market oriented" approach to punishing drug possession as does Delaware.[40] And, like Delaware's Title 16, it too punishes the possession of a "mixture" containing an illegal substance but fails to define the term "mixture."[41] In *Chapman v. United States*, the United States Supreme Court sought to divine the meaning of the term "mixture" as it applies to drug possession, particularly with respect to sentence enhancement based on the weight of the substance.

In *Chapman*, the Court concluded that when blotter paper is used to distribute LSD, the two form a mixture containing an illegal substance as "[t]he LSD is diffused among the fibers of the paper. Like heroin or cocaine mixed with cutting agents, the LSD cannot be distinguished from the blotter paper, nor easily separated from it. Like cutting agents used with other drugs that are ingested, the blotter paper, gel, or sugar cube carrying LSD can be and often is ingested with the drug."[42] The Court held that since the paper and the LSD were a mixture, the weight of the paper should be included in the weight for purposes of punishment.

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[39] *Traylor*, 458 A.2d at 1177.
[40] *Chapman v. United States*, 500 U.S. 453, 465 (1991).
[41] *Chapman*, 500 U.S. at 461-462.
[42] *Id*.

In reaching its decision, the Court turned to the ordinary meaning of the term "mixture" and noted that it can mean "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence."[43] Further, "[a] 'mixture' may also consist of two substances blended together so that the particles of one are diffused among the particles of the other."[44] Many courts rely on *Chapman*'s rationale in finding that the weight of a visually and physically distinct lawful substance should not be combined with that of the accompanying known unlawful substance in calculating the defendant's sentence.

In *United States v. Rodriguez,*[45] there were three brick-like packages which each contained cocaine and boric acid. The bricks were "constructed in an effort to fool an unsuspecting customer" to believe that they "were comprised wholly of cocaine." However, "the boric acid and cocaine in the packages had distinct colors" and once the packages were opened, the substances "could be distinguished by the naked eye." Boric acid is not a controlled substance and there was no finding that it "was used or intended

[43] *Chapman*, 500 U.S. at 462 (*quoting Webster's Third New International Dictionary* 1449 (1986)).
[44] *Id.* (*citing 9 Oxford English Dictionary* 921 (2d ed.1989)).
[45] 975 F.2d 999, 1005 (3d Cir. 1992).

to be used as a cutting agent."[46] "[U]nlike the blotter paper in *Chapman*, the boric acid [] did not facilitate the distribution of the cocaine."[47] Thus, the boric acid was not part of the mixture and should not have been added to the weight for purposes of sentence enhancement. Courts have reached the same conclusion with respect to cornmeal,[48] wine,[49] and crème liqueur.[50] Courts have also ruled that non-drug waste that is "easily distinguished and separated from" a mixture of the drug and its cutting agents is not itself part of the mixture as it is not "usable" and thus, should not have been included in determining weight.[51]

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[46] *Rodriguez*, 975 F.2d at 1005.
[47] *Id.*
[48] *United States v. Robins*, 967 F.2d 1387 (9th Cir.1992) (concluding cornmeal used to wrap two bricks of cocaine was not a "tool of the trade," a carrier medium, a cutting agent, packaging material or a facilitator for the distribution of cocaine and, thus should not be included in the weight calculation as part of a drug "mixture or substance" for sentencing).
[49] *United States v. Bristol*, 964 F.2d 1088, 1089–90 (11th Cir. 1992) (holding weight of wine used as a medium to transport cocaine should not have been included in determining the drug weight for base offense level because the mixture was "unusable").
[50] *United States v. Acosta*, 963 F.2d 551, 554 (2d Cir.1992) (crème liqueur mixed with cocaine is the functional equivalent of packaging material and its weight should not have been included in calculating defendant's sentence under *Chapman*).
[51] *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1237 (11th Cir. 1991) (finding that liquid waste should not be considered part of a mixture as it was a carrier medium for cocaine even though the liquid appeared almost like a real saturated salt solution but not all of the salt was dissolved). *See also Griffith v. United States*, 871 F.3d 1321, 1332–33 (11th Cir. 2017) (finding defense counsel ineffective for not arguing that liquids in his home

In our case, because the chemist conducted no analysis of what the prosecutor referred to as the "[l]ittle brown things floating in a vial that contains PCP,"[52] she was unable to identify the substance. Accordingly, the record is bare as to whether the substance was some random foreign object, dirt, unusable waste, a cutting agent, or some other "tool of the trade." Thus, there was no way of knowing whether the brown chunky substance could or did comingle or blend with the liquid to form a mixture as defined in *Chapman*.

Further, the mere speculation by the trial judge, who admitted he was not a scientist, that the solid chunks could have been salt left over from evaporated PCP, was in no way supported by the record. The testimony of the State's scientist and of McAndrew supports the conclusion that liquid PCP evaporates in to the air. No mention was made of it leaving behind any

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which contained methamphetamine were not a usable mixture and should not have been used for calculating weight where State chemist acknowledged that included as part of the "mixture" and thus the weight used for sentencing were liquids that were mostly "toxic" "waste materials" that were "unusable."); *Jennings*, 945 F.2d 129 (finding "unwarranted by the statute to hold the defendant punishable for the entire weight of the "mixture" in Crockpot containing a small amount of methamphetamine and *poisonous* by-products not intended for ingestion).

[52] A-33-34.

solid clumps of salt. In fact, any such theory was belied by the chemist's inability to surmise what the chunks could be.[53]

There was also no circumstantial evidence to support a conclusion that the chunky substances were composed of PCP.[54] The chunks did not match the description of the substance that was chemically tested and proven to be PCP. None of the officers provided any testimony regarding the chunks in the vial being in any way consistent with the character or properties of PCP. They simply testified that the vial contained PCP or what they believed to be PCP.[55]

Ultimately, the State failed to provide sufficient evidence that the known liquid PCP and the unknown brown chunky substances floating in the liquid combined into a "mixture" punishable pursuant to § 4716 (e)(5). The chunks were easily separated from the liquid, they were visually and physically distinct, there was no evidence that the PCP was diffused among the particles of the chunks and there was no evidence that the chunks were used to dilute or facilitate the distribution of the PCP. Because the State failed to establish a mixture, the weight of the two substances should not

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[53] A-24.

[54] *Seward v. State*, 723 A.2d 365, 369 (Del. 1999) (sufficient circumstantial evidence that substance was cocaine when officer's description of the substances matched the description of the substance that was chemically tested and proven to be crack cocaine).

[55] A-14, 16, 19.

have been used to establish the weight element of the offense of Aggravated Possession. Therefore, Wiggins' conviction for Aggravated Possession must be vacated.

## CONCLUSION

For the reasons and upon the authorities cited herein, Wiggins' conviction must be vacated.

Respectfully submitted,

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DATED: May 21, 2019