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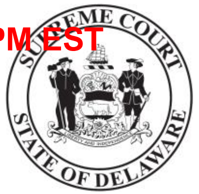

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAKAI CHAVIS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 520, 2018
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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DATED: February 26, 2019

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NATURE AND STAGE OF THE PROCEEDINGS

On April 3, 2017, Dakai Chavis was indicted on 4 counts of unlawful trespassing, 3 counts of burglary, 1 count of theft and 3 counts of attempted burglary.[1] On February 12, 2018, the State filed a motion to admit the results of DNA tests through only one analyst, Sarah Siddons.[2] However, other analysts participated in testing DNA samples submitted by the police in this case. And, two of those analysts physically touched the actual unsealed samples. Yet, after further pleadings and a hearing, the trial court granted the State's motion.[3]

A four-day jury trial began on June 19, 2018. At the end of the State's case, Chavis moved for a judgment of acquittal as to Count X, arguing that the location of DNA outside an alleged point-of-entry into a residence was insufficient to establish his guilt of burglary.[4] The trial court denied his motion.[5] The jury convicted Chavis of that offense and acquitted him of the remaining offenses – none of which involved any DNA evidence. He was sentenced to four years Level V followed by probation.[6] This is Chavis' Opening Brief in support of his timely-filed appeal.

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[1] A12

[2] A18.

[3] A49, 70, 72. *See* Decision Denying State's Motion, Ex. A

[4] A112-113.

[5] *See* Decision Denying Motion For Judgment of Acquittal, Ex. B.

[6] *See* October 5, 2018 Sentence Order, Ex.C.

SUMMARY OF THE ARGUMENT

1. Chavis' Sixth Amendment right to confront witnesses against him required that all the forensic analysts involved in testing the DNA samples in this case testify at Chavis' trial. Not only did two analysts, Rachel Aponte and Feng Chen, actually touch the unsealed DNA samples collected in this case, Sarah Siddons and 3 to 4 other analysts actively participated in the testing of those samples. An objective witness would reasonably believe that the report containing the results of that testing would be available for use in a criminal prosecution. Thus, Chavis was entitled to confront the analysts who handled and tested the samples in his case. The State was also required to satisfactorily establish that the DNA was not misidentified or adulterated. Since the trial court did not require any analyst but Siddons to testify, Chavis' conviction must be reversed.

2. The State presented no evidence that Chavis ever entered the apartment at 61 Fairway Road or that he was even present when the burglary at that apartment purportedly occurred. Nonetheless, the trial court ignored this Court's clear precedent that requires, when the State relies solely on forensic evidence (such as fingerprints or DNA) to establish identification, that the forensic evidence could only have been left at the time the crime occurred. Therefore, this Court must now reverse Chavis' conviction.

STATEMENT OF FACTS

Between the months of October and December 2016, there were reports that multiple criminal trespasses, burglaries and attempted burglaries had occurred in the apartment complexes of Hunters Crossing and Harbor Club in New Castle County, Delaware.[7] These two complexes are less than two miles apart and each of the units involved in the trespass-related events are located on the ground level. Only one of three reported burglaries involved an allegation that property was removed from the unit.[8]

Police obtained surveillance videos that showed a figure walking around the respective areas when some of the alleged crimes purportedly occurred.[9] In some instances, an individual was seen peeking into windows.[10] Footage from December 4, 2016, the night of one alleged burglary, shows an unidentified individual using a cell phone.[11] As a result, and with the use of cell phone towers as guidance, police obtained cell phone records and developed Dakai Chavis, (Chavis), as a suspect. Police then obtained a search warrant for Chavis' home.[12] At trial, police testified that they found clothes in his home that they believed matched those worn

[7] A84.
[8] A84, 94.
[9] A85,87-89.
[10] A86-88.
[11] A90.
[12] A90.

by the unidentified individual in the footage.[13] At the conclusion of trial, the jury acquitted Chavis of all charges supported by the surveillance videos and cell phone records.

Chavis was convicted of only one of the 11 offenses with which he was charged. He was convicted of Burglary Second Degree that was charged in connection with one incident that purportedly occurred at one unit sometime between November 11, 2016 and November 12, 2016.[14] The State alleged that, within that timeframe, someone entered the first-floor apartment located at 61 Fairway Road, Apartment 1C in Hunters Crossing ("61 Fairway Road").[15] Police believed the point of entry was a bedroom window which had its screen removed.[16] There was no theft. Various items on the window sill were knocked over, including: a Chap stick, a back-scratcher, and a photograph, which were found outside on the ground beneath the window.[17] The occupants of the apartment could not identify the possible trespasser;[18] police obtained no fingerprints of any value from the window or any of the items that had been disturbed;[19] and the State produced no witnesses identifying the possible trespasser. In fact, two witnesses

[13] A91-93.
[14] A114-115.
[15] A102.
[16] A96.
[17] A103.
[18] A104.
[19] A100.

testified that they actually saw someone in the area around the relevant time who did not even match Chavis' description.[20] Unlike other charges for which Chavis was acquitted, there was no surveillance footage providing any information to assist police in identifying the possible trespasser.[21] And, the State presented no cell phone records to establish that Chavis was in the area at the time. However, the State did obtain a DNA sample from outside of the residence at 61 Fairway Road.

Police processed the exterior of the bedroom window at 61 Fairway Road for DNA, and then sent the sample (two swabs labeled "handprint window POE")[22] to be analyzed at Bode Cellmark Forensics ("Bode"), a private laboratory in Lorton, Virginia.[23] When Chavis was later arrested, police obtained a DNA sample from him. That sample was also sent to Bode for analysis.[24]

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[20] A104.
[21] A103.
[22] The designation of the sample as a "handprint" was actually never confirmed at trial, as the officer who took the sample testified that in the process of swabbing a surface for DNA, as opposed to fingerprints, the results are not visible, and it is unknown whether the swab contained anything of evidentiary value. A101. Siddons claimed, however, that the designation of the sample as a "handprint" came from New Castle County Police when the sample was submitted to Bode. A110.
[23] A99, 105-107.
[24] A93, 107-108.

Bode uses "an assembly line"[25] process in testing each DNA sample. Multiple analysts participated in testing DNA samples submitted by the police in this case. And, two of those analysts physically touched the actual unsealed samples. Nonetheless, over Chavis' objection, the trial court only required the State to present the testimony of one of the forensic analysts involved in the testing, Sarah Siddons. She testified that she completed the final steps in the process which included comparing the profiles of two swabs sent by the police in this case. She claimed that the two swabs matched.[26] This DNA match was the only evidence linking Chavis to the 61 Fairway Road burglary, which was the only charge for which he was convicted.

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[25] A111.
[26] A109.

I. THE TRIAL COURT DENIED CHAVIS HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM AND VIOLATED DELAWARE'S CHAIN OF CUSTODY LAW WHEN IT ALLOWED THE STATE TO INTRODUCE DNA TEST RESULTS, THE ONLY EVIDENCE LINKING HIM TO THE CRIME OF WHICH HE WAS CONVICTED, WITHOUT THE TESTIMONY OF ALL INDIVIDUALS WHO TOUCHED THE ACTUAL DNA SAMPLE AND WHO PARTICIPATED IN ITS ANALYSIS.

Question Presented

Whether the State was required, pursuant to Chavis' federal right to confrontation, as well as Delaware's statutory dictates, to produce, at trial, the testimony of all the forensic analysts who actually touched and participated in the analysis of the DNA when those analysts did not simply handle the packaged sample as part of its routine transfer from one party to the next in the chain of custody and when the report containing the results of the DNA analysis was the only evidence linking Chavis to the crime of which he was convicted.[27]

Standard and Scope of Review

This Court reviews the trial court's decision to exclude evidence for abuse of discretion.[28] If the Court finds an abuse of discretion, it "must then determine whether there was significant prejudice to deny the accused of his or her right to a

[27] A18, 49, 70.
[28] *See Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015).

fair trial."[29] "Alleged constitutional violations relating to a trial court's evidentiary rulings are reviewed *de novo*."[30]

Argument

Chavis' Sixth Amendment right to confront witnesses against him required that all the forensic analysts involved in testing the DNA samples in this case testify at Chavis' trial. Not only did two analysts, Rachel Aponte and Feng Chen, actually touch the unsealed DNA samples collected in this case, Siddons and 3 to 4 other analysts actively participated in the testing of those samples. An objective witness would reasonably believe that the report containing the results of that testing would be available for use in a criminal prosecution. Thus, the report was "testimonial" in nature and, pursuant to *Crawford v. Washington*,[31] Chavis was entitled to confront the analysts who handled and tested the samples in his case.[32] The State was also required to satisfactorily establish that the DNA was not misidentified or adulterated. As such, under Delaware law, it was required to present at trial each "person who actually touched the substance[.]"[33] Since the trial court did not require any analyst but Siddons to testify, Chavis' conviction must be reversed.

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[29] *Johnson v. State*, 878 A.2d 422, 425 (Del. 2005).
[30] *Milligan*, 116 A.3d at 1235.
[31] 541 U.S. 36, 51 (2004).
[32] *Milligan*, 116 A.3d at 1236.
[33] 10 *Del. C.* § 4331(1) (c).

The Trial Court Violated Chavis' Sixth Amendment Right To Confront Witnesses Against Him When It Ruled The State Was Not Required To Present The Testimony Of All The Forensic Analysts Who Actually Touched And Actively Participated In Testing The DNA Samples.

At trial, Chavis had the right to be confronted with those who bore testimony against him.[34] "Testimony" is considered to be "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[35] Specifically, if the material at issue consists of a "statement[] that [a] declarant[] would reasonably expect to be used prosecutorially, . . . [or] made under circumstances which would lead an objective witness reasonably to believe that . . . [it] would be available for use at a later trial," it is considered testimonial for purposes of the Confrontation Clause, and the declarant's presence is necessary at trial, unless the person is unavailable and at some prior time was subject to cross-examination by the defense.[36] Here, the report containing the results of the DNA analysis was testimonial in nature.[37] Thus, Chavis had the right to cross examine the analysts in his case.

The circumstances under which the report of the DNA results was issued in our case would lead an objective witness to reasonably believe that it would be

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[34]*See Milligan*, 116 A.3d at 1236 (*quoting* U.S. Const. amend. VI and *citing Crawford*, 541 U.S. at 51).
[35]*Crawford*, 541 U.S. at 51 (*quoting* 2 N. Webster, *An American Dictionary of the English Language* (1828)).
[36]*Milligan*, at 116 A.3d at 1236–37 (*quoting Crawford*, 541 U.S. at 51 and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009)).
[37]*Melendez-Diaz*, 557 U.S. at 309.

available for use in a criminal trial. In fact, the circumstances in our case are similar to those in *Melendez-Diaz v. Massachusetts* where the United State Supreme Court found the "certificates of analysis" to be "'incontrovertibly … affirmation[s] made for the purpose of establishing or proving some fact' in a criminal proceeding[.]"[38] In that case, as later pointed out in *Bullcoming v. New Mexico*, the testimonial nature of the results is reflected by the facts that: the evidence to be analyzed had been seized by police; police requested that the analysis be conducted; and the results of the analysis were reported to police.[39] Likewise, the report containing the results in *Bullcoming* was testimonial in nature because it was "created solely for an 'evidentiary purpose'" and "made in aid of a police investigation."[40]

Here, both the "evidence sample," collected from 61 Fairway Road, and the "reference sample," purportedly obtained from Chavis, were sent for analysis to Bode – a *forensics*[41] lab - by the New Castle County Police Department.[42] Siddons explained that "[a]n 'evidence sample' means that the evidence was collected as part of a criminal investigation[]" and that a "[r]eference sample profile is then

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[38] *Bullcoming v. New Mexico*, 564 U.S. 647, 663 (2011).
[39] *Id.*
[40] *Id.* at 664.
[41] The definition of "forensics" in the context of application of science involves application to "legal problems" or "analysis of physical evidence (as from a crime scene)[.]" https://www.merriam-webster.com/dictionary/forensics (last visited 2/22/19).
[42] A67, 69.

compared to the evidence sample profile, if one was obtained."[43] The evidence sample in this case was labeled on an inventory sheet as a "swab of hand print on window (POE)[.]"[44] Meanwhile, the reference sample was labeled on an inventory sheet as belonging to "Chavis/Dakai."[45] Before being opened by Aponte and Chen, each of the samples had been sealed with evidence tape.[46] Because the record reveals that the DNA report in our case, like the reports in *Melendez-Diaz* and *Bullcoming*, was "created solely for an 'evidentiary purpose'" and "made in aid of a police investigation"[47] this Court must conclude that it was testimonial in nature and, thus, Chavis had an accompanying right to confrontation.

Bode uses "an assembly line" approach,[48] which employs multiple analysts in the testing process.[49] When the testing first begins, an analyst unseals the package containing the DNA sample submitted by the law enforcement agency. That analyst cuts the swab containing the collected sample lengthwise and places pieces of the swab into test tubes. Then, there are a series of steps in the actual analysis that involve adding chemicals to the swab pieces contained in the test tubes and

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[43] A40.
[44] A63.
[45] A65.
[46] A63, 65.
[47] *Bullcoming*, 564 U.S. at 664.
[48] A111.
[49] A41-45.

placing them in or on machines.[50] In our case, these functions were performed not only by Siddons but by other analysts as well.

The testing of the evidentiary swab (collected from 61 Fairway Road) involved the active participation of 4 forensic analysts: Aponte unsealed the package, cut the swab and placed the pieces in the test tubes;[51] Kelsey Powell added chemicals to the test tubes then, with the use of a centrifuge, extracted the liquid with DNA from the swab;[52] Douglas Ryan, with use of a robot, separated the DNA from everything else;[53] and Siddons added chemicals to measure the amount of the sample, concentrated the sample through a filter, placed the sample on a machine to make copies of it, placed it on a machine to create a profile and wrote the report.[54] The lab used a similar multi-analyst process when testing the reference swab: Chen unsealed the package, cut the swab and placed the pieces in the test tubes;[55] apparently only one analyst, Vanessa Sufrin, conducted the entire extraction process;[56] and Siddons conducted the remaining steps as she had with the evidentiary swab.[57]

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[50] A41-45.
[51] A41.
[52] A41-42.
[53] A42.
[54] A42-43.
[55] A43.
[56] A43.
[57] A21, 41-45, 110-111.

The United States Supreme Court has noted that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials." [58] And, "[c]onfrontation is one means of assuring accurate forensic analysis."[59] All of the aforementioned analysts performed more than just administrative or ministerial duties. They did not merely pass along sealed envelopes from one party to the next. Aponte and Chen observed the actual DNA sample inside the package they each unsealed. These two analysts also handled the sample that they each physically unsealed. Thus, only they could testify as to whether the DNA samples were intact when the packages were unsealed.

The remaining analysts did more than just run machines and document results. Just as Siddons, they too were required to follow protocols and add chemicals as part of the process. Thus, only the analyst who performed his/her particular phase of the test could testify as to whether he/she adhered to "precise protocols"[60] or whether there were "circumstances or conditions" that may have existed during that phase that may have " . . . affected the integrity of the sample or . . . the validity of the analysis[.]"[61] These topics were "meet for cross

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[58] *Melendez-Diaz*, 557 U.S. at 319.

[59] *Id.*

[60] *Bullcoming*, 564 U.S. at 659–61.

[61] *Id.* (citation omitted) (internal quotation marks and brackets omitted).

examination" because they "relat[ed] to past events and human actions not revealed in raw, machine-produced data[.]"[62]

Here, Siddons' assurances at trial regarding the actions of the other analysts did not satisfy Chavis' right to confront and cross-examine those analysts. The Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."[63] When asked at trial how Bode could have safeguarded against a problem that the other analysts detected, Siddons responded that there were "controls at every step of the way to test the reagents . . . to make sure that they are clean."[64] Siddons described Bode as "a very ethical lab," and testified that had the other analysts believed that there was a problem with either the samples they received or the work they performed on them, "[t]here would be documentation somewhere."[65] This general response was speculation at best and Chavis was prevented from confronting the other analysts on this issue.

In any event, the violation of Chavis' "particular guarantee" of the right to confrontation under the Sixth Amendment could not be cured by the "substitute

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[62] *Id.*
[63] *Bullcoming*, 564 U.S. at 662.
[64] *Id.*
[65] A111.

procedure" of simply calling Siddons to testify.[66] And, "[n]o additional showing of prejudice is required to make the violation 'complete.'"[67] Consistent with the rationale on confrontation in the context of witnesses within the chain of custody and forensic analysis, Chavis did not seek the appearance of the analysts solely to confront them on the issue of chain of custody. While chain of custody was an issue of concern, the forensic analysts in our case had additional knowledge of evidentiary facts from their active participation in the testing process. Thus, Chavis sought and had the right to confront the analysts on the analysis in which they participated. Because the trial court denied him that right, his conviction must be reversed.

The State Failed To Properly Authenticate DNA Evidence When It Failed To Present The Testimony Of The Analysts Who Actually Touched And Actively Participated In Testing The DNA Samples.

Under *D.R.E.* 901, the State was required to establish that the evidence sent to Bode for testing was what it claimed to be – Chavis' DNA.[68] The State attempted to accomplish this by tracing its continuous whereabouts.[69] To be successful, the State was required to "eliminate the possibilities of

[66] *Bullcoming*, 564 U.S. at 663

[67] *Id.* (*quoting United States v. Gonzalez–Lopez,* 548 U.S. 140, 146 (2006)).

[68] Under *D.R.E.* 901(a), the party producing that evidence must authenticate it by "produc[ing] evidence sufficient to support a finding that the item is what the proponent claims it is."

[69] *Demby v. State*, 695 A.2d 1127, 1133 (Del. 1997) (setting forth general processes by which State may authenticate an item).

misidentification and adulteration, not to an absolute certainty, but simply as a matter of reasonable probability."[70] Yet, it failed to do so as it failed to present all of the forensic analysts who participated in the testing, including Aponte and Chen who actually touched the unsealed DNA swabs sent to the lab by the New Castle County Police Department.

While there is no statute in Delaware that deals specifically with the introduction of DNA at trial, 10 *Del. C.* § 4331 applies in drug cases and requires the State to produce "[t]he forensic toxicologist or forensic chemist *or other person who actually touched the substance and not merely the outer sealed package in which the substance was placed* . . . ."[71] The purpose behind § 4331 is to "eliminate the logistical and financial burden that the State would face if it were required to produce at trial every person who handled the evidence, irrespective of how tangential the contact might have been[.]"[72] It also precludes those with only "limited involvement in the chain of custody"[73] from being required to appear at trial.

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[70] *Id.* at 1131.

[71] 10 *Del. C.* § 4331(1) (c) (emphasis added). There is a statute, 11 *Del. C.* §4504, which discusses the unrelated issue of DNA testing for postconviction inmates. It states that "[t]he movant [must] present[] a prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered or replaced in any material aspect."

[72] *Demby*, 695 A.2d at 1132.

[73] *McNally v. State*, 980 A.2d 364, 372 (Del. 2009).

While this Court has described §4331 as "eliminat[ing] the required appearance at trial of those individuals who merely handle contraband evidence in sealed packages during its transportation between a law enforcement agency and the State Medical Examiner's office . . . .",[74] it appears that §4331 does have applicability outside of the "controlled substance" context. For example, in *Milligan v. State*, this Court considered §4331 applicable to a case involving driving under the influence.[75] In *McNally v. State*, this Court noted the importance of the prosecution's compliance with defense counsel's subpoena demands under §§ 4331 and 4332 in a case involving a gun prosecution.[76]

Unlike prior cases where the person's level of involvement was deemed insufficient to require live, in-court testimony under § 4331,[77] Aponte and Chen unsealed the packages sent by the police and physically manipulated the DNA samples that were inside. They cut the swabs and placed them in test tubes. Several other analysts played active roles in the testing process by adding chemicals to the samples at various points. These functions are not the same as merely transporting a sealed package from one party to another. Rather, these are

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[74] *Demby*, 695 A.2d at 1131.
[75] 116 A.3d 1232, 1235 (Del. 2015).
[76] *McNally*, 980 A.2d at 370–72.
[77] *See McNally*, 980 A.2d at 370–72 (ruling that a laboratory employee who placed gunshot residue samples in a machine for analysis and turned the machine on was not required to appear); *Demby*, 695 A.2d at 1132 (ruling that a currier transporting a sealed envelope was not required to appear).

the type of functions precisely contemplated by § 4331. Thus, the State was required to produce them in accordance with their requirement to establish a proper chain of custody. Because the trial court abused its discretion in ruling to the contrary, Chavis' conviction must be reversed.

II. NO RATIONAL TRIER OF FACT, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, COULD FIND CHAVIS GUILTY BEYOND A REASONABLE DOUBT OF BURGLARY AS THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE WAS PRESENT WHEN THE CRIME OCCURRED OR THAT HE ENTERED THE PURPORTEDLY BURGLARIZED APARTMENT.

Question Presented

Whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find Chavis guilty beyond a reasonable doubt of burglary when the State presented evidence of DNA found outside a window of an apartment that was purportedly burglarized, but the State failed to present any evidence that the DNA was left behind at the time the crime occurred or that Chavis actually entered the apartment.[78]

Standard and Scope of Review

The standard of review in assessing an insufficiency of evidence claim is "whether *any* rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt."[79]

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[78] A112-113.

[79] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995) (emphasis added).

Argument

The State presented no evidence that Chavis ever entered the apartment at 61 Fairway Road. In fact, the State failed to present any evidence that Chavis was even present when the burglary at issue was committed. Nonetheless, with little consideration of this Court's long-held decision in *Monroe v. State*,[80] the trial court erroneously allowed the jury to convict Chavis of that crime.[81] The trial court refused to follow the principle in *Monroe* that when the State relies solely on forensic evidence (such as fingerprints or DNA) to establish identification, the State must also demonstrate that the evidence could only have been left at the time the crime occurred.

While the State relied solely on DNA evidence to establish identification as to the alleged burglary at 61 Fairway Road, it failed to present evidence that the DNA found outside that apartment could only have been left at the time that crime purportedly occurred. Thus, had the trial court applied *Monroe* as required, it would have granted Chavis' motion for judgment of acquittal. Since it refused to do so, this Court must now reverse his conviction.

In *Monroe*, this Court followed the logic of a "substantial number of jurisdictions" that "a conviction cannot be sustained solely on a defendant's fingerprints being found on an object at a crime scene unless the State

[80] 652 A.2d 560.
[81] Ex.A.

demonstrates that the prints could have been impressed only at the time the crime was committed."[82] This Court has never backed off this conclusion. In fact, *Monroe* remains consistent with the multitude of cases that came before it and, significantly, that have followed it.[83] This rationale applies not only to fingerprint evidence but to DNA evidence as well.[84]

Just as other jurisdictions continue to do in cases where identification rests solely on fingerprint or DNA evidence, this Court requires the presence of "circumstances surrounding a defendant's fingerprints [or DNA that] create a

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[82] *Monroe*, 652 A.2d at 564.

[83] *See, e.g., Commonwealth v. French*, 68 N.E.3d 1191 (2017) (finding that even though defendant's fingerprint was found on plexiglass that was removed from window to allow access to store, corroborating evidence was insufficient to support convictions for breaking and entering); *In re Q.C.*, 2015 WL 6457810, at *1 (Pa. Super. Ct. Oct. 7, 2015) (finding fingerprint evidence to be insufficient to establish guilt of theft of a car from a gated car lot routinely open to the public during regular business hours); *State v. Wade*, 639 S.E.2d 82 (N.C.App. 2007) (stating that where fingerprints are the sole evidence of guilt a motion to dismiss must be granted unless the jury can reasonably infer that the fingerprints could only have been impressed at the time of the crime); *Watkins v. Commonwealth*, 2000 WL 343813 (VA Ct.App. April 4, 2000) (finding evidence insufficient to convict defendant of burglarizing a car where the only evidence was his prints on the car exterior which could have been impressed at any time prior to the crime).

[84] *See, e.g., Interest of E.T.*, 136 So. 3d 971 (La.Ct.App.3d Cir. 2014) (holding evidence of defendant's DNA found on t-shirt left in victim's burglarized residence, standing alone, was insufficient to establish his identity as a participant or principal in the burglary of victim's residence); *People v. Wesley*, 633 N.E.2d 451 (N.Y.Ct.App. 1994) (analogizing the role of DNA evidence to that of fingerprint evidence in establishing- or not establishing- "a person's presence at and participation in a criminal act").

strong inference that the defendant was the perpetrator" in order to establish his guilt.[85]

In *Barber v. State*,[86] the Nevada Supreme Court addressed a case where the only direct evidence identifying the defendant as the perpetrator of burglary and grand larceny of a residence was his palm print on the outside of the bathroom window, that the occupants did not know him and that there was no reason for his print to be there. In that case, property was stolen but nothing linked the defendant to that property. Further, there was no evidence to prove that the defendant entered the residence. While there was either dirt or marks inside the tub below the window, nothing revealed that it was the defendant who left the dirt or marks. There, the court concluded that, "[a]lthough circumstantial evidence alone may support a verdict," the evidence was just too "limited" to support the defendant's conviction.[87]

Here, similar to *Monroe* and *Barber*, the only evidence identifying Chavis as having been at the location where the crime took place was his DNA "handprint," and it was found outside the structure alleged to have been burglarized.[88] It was found on a bedroom window believed by police to be the point of entry into the

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[85] 652 A.2d at 564.
[86] 363 P.3d 459, 464 (Nev. 2015).
[87] *Id.*
[88] A99-100.

ground-level apartment. That particular window was relatively accessible to the public as it faced the sidewalk and parking lot.[89]

According to the occupant of the apartment, the window and blinds had been closed at night and then, the following morning (November 12, 2016) the window was open and the blinds were completely up.[90] There were also items that had been sitting on the window sill that had been knocked over. Some of the items were on the floor inside the apartment and other items were on the ground outside the apartment.[91]

The State alleged the perpetrator removed the screen on the bedroom window and set it to the side. However, police did not dust the screen for prints or swab it for DNA.[92] They did dust the window and items that were knocked over for prints and found nothing of value.[93] Police swabbed the majority of the exterior of the window for DNA and obtained the sample that eventually led to the identification of Chavis as their suspect.[94] However, there was no evidence that the DNA sample was found where it would be expected to be left by someone who had opened the window. Significantly, no fingerprints or DNA were found inside the apartment. The occupant claimed that her purse had been moved around but

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[89] A97.
[90] A95.
[91] A95.
[92] A96.
[93] A100.
[94] A100.

that nothing had been taken from it.[95] Yet, no fingerprints or DNA were located on the purse.

The occupants of the apartment could not identify the possible trespasser;[96] unlike other events for which Chavis was acquitted, there was no surveillance footage providing any information to assist police in identifying the possible trespasser;[97] and the State produced no witnesses identifying the possible trespasser. Thus, something more than the DNA evidence was required for the State to prove that Chavis was at the scene at the time the crime was committed and that he actually went inside the residence. Yet, there was no cell phone tower activity supporting a conclusion that Chavis was in the area at the time of the alleged burglary. And, significantly, two witnesses testified that they actually saw someone in the area around the relevant time who did not even match Chavis' description.[98]

Here, the evidence shows Chavis touched the window at some unknown time, but it does not demonstrate that he actually entered the apartment. In order to convict Chavis of burglarizing 61 Fairway Road, the State was not only required to establish that he was at the scene when the crime was committed, but also that he

[95] A98.
[96] A104.
[97] A103.
[98] A104.

actually entered the apartment.[99] Thus, the State did not meet its burden to prove the necessary element of "enters or remains unlawfully."[100] Due to the lack of evidence as to when the burglary occurred, any inferences involving guilt would require impermissible speculation that Chavis was present at the time of the burglary and that he actually entered the apartment. Therefore, this Court must reverse Chavis' conviction.

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[99] Chavis was charged under 11 *Del.C.* §825, which states that "person is guilty of burglary in the second degree when the person knowingly enters or remains unlawfully [i]n a dwelling with intent to commit a crime therein[.]"

[100] *See Blevins v. State*, 6 S.W.3d 566, 569 (Tex. App. 1999) (finding that fingerprint on outside of habitation does not, in itself, establish defendant committed burglary). See also *McCleskey v. State*, 924 S.W.2d 427 (Tex. App. 1996) (finding defendant's fingerprints on broken window pane at point of entry into house insufficient to support burglary conviction, where no fingerprints were found inside the house, defendant was not seen in the house or area during ten-day period in which burglary occurred, and no evidence of stolen goods were found in his possession.).

CONCLUSION

For the reasons and upon the authorities cited herein, Chavis' conviction must be reversed.

Respectfully submitted,

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