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Case Number 373,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN HERBERT,	:	
	:	**C.A. No. 373, 2022**
Defendant-Below, Appellant,	:	
	:	**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE**
v.	:	
	:	**ID No. 2005000034**
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below, Appellee.	:	
	:	

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

OPENING BRIEF

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DATED: March 27, 2023

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NATURE AND STAGE OF THE PROCEEDINGS

On May 1, 2020, New Castle County Police arrested John Herbert alleging unlawful sexual contact with his daughter. In August 2020, the State indicted John Herbert on Unlawfully Sexual Contact First Degree and Sexual Abuse of a Child by a Person in a Position of Trust or Authority Second Degree. On July 6, 2021, the State reindicted John Herbert adding the that the victim was less than seven years old at the time of the offense, pursuant to 11 *Del.C.* 3 4205A,

On November 5, 2021, the Defendant filed a Motion to Dismiss the Indictment. On December 13, 2021, The State filed their Response to the Motion to Dismiss. The Motion to Dismiss was denied based upon the Court's finding the indicted offense was not unconstitutional.

On April 14, 2022, the Superior Court issued a scheduling order setting deadlines to the admissibility of two expert's opinions at Trial. On April 29, 2022 the State filed a Motion in Limine to preclude the testimony of Dr. Cooney- Koss. On May 6, 2022, Defendant filed a response to the State's Motion. On the same date, the Defendant filed a Motion to admit the testimony of Dr. Zingaro. On June 3, 2022, the State filed a response to Defendant's Motion to Admit testimony of Dr. Zingaro. On August 8, 2022, the Court

granted the Motion to exclude the testimony of Dr. Cooney-Koss and Dr. Zingaro.

Jury trial began on September 12, 2022. On September 15, 2022, the jury found Mr. Herbert guilty of Unlawful Sexual Contact First Degree and Sexual Abuse of a Child by a Person in a Position of Trust, Authority or Supervision in the Second Degree. The Court imposed an immediate sentence of eight years at Level V suspended after five years at Level V pursuant to Section 4205(d)(1) on Count II, the Court imposed a sentence of eight years at Level V, suspended for one year Level II probation.

On September 22, 2022, Defendant filed a Motion to Correct an Illegal Sentence and a Motion for Judgment of Acquittal.

Through Counsel, Mr. Herbert filed a timely Notice of Appeal.

On November 17, 2022, the Superior Court stayed the issue on the Motion for Correction or Reduction of Sentence.

On November 21, 2022, the Superior Court denied the Motion for Judgment of Acquittal.

This is Mr. Herbert's Opening Brief.

SUMMARY OF ARGUMENT

I. The Superior Court erred in denying the Motion to Dismiss since the definition of "Sexual Contact" defined under law violated the 14th amendment of the U.S. Constitution and Delaware Constitution by failing to require the State to prove a Defendant committed a sexual act intending that it be sexual or for the purpose of sexual gratification.

II. The Superior Court erred in excluding Defendant's Experts from testifying about the insight in intra-family sexual abuse allegations and about the interviews of the complaining witness and Defendant's whole person to assess whether Defendant possessed the requisite *mens rea* during the alleged sexual contact.

III. The Superior Court erred by imposing a sentence of 5 years of minimum mandatory unsuspended Level V time.

STATEMENT OF FACTS

John Herbert and his wife Kathleen Herbert had been separated for an extended period of time (A-338). The Herbert's had a young daughter A.H. born on September 23, 2016. (A-187). In early 2020, Mr. Herbert and his wife shared custody of their daughter (A-196-197). Frequently, A.H. would stay overnight at Defendant's apartment (A-196-197). In April, 2020, a call was made to the New Castle County Police Officer to report her daughter mentioned that the pork tenderloin she was cooking looked like a penis (A-80, 201). A.H. also said that she had touched her "dadas" penis multiple times (A-80, 201).

A.H. was interviewed by a forensic interviewer at the Children's Advocacy Center on April 28, 2020 (A- 293-294). A.H. was examined at A.I. Dupont on the same date with no apparent penetrating evidence (A-229-330, 325-326, 372). During the CAC interview, A.H. said she had touched her father's penis at his apartment (A-80). A.H. said she touched it more than one time (A-80, 201). Defendant admitted the touching on two occasions (A-355-356). Defendant believed these touchings (a matter of mere seconds) were age-appropriate curiosity, not sexual in nature and did not reprimand A.H. (A-345).

Defendant was arrested a few days after the disclosure (A-350). The State indicted Defendant on (1) Unlawful Contact First Degree and (2) Sexual

Abuse of a Child by a Person in a Position of Trust, Authority or Supervision Second Degree (A-1).

LEGAL ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING THE MOTION TO DISMISS SINCE THE DEFINITION OF "SEXUAL CONTACT" DEFINED UNDER LAW VIOLATED THE 14TH AMENDMENT OF THE U.S. CONSTITUTION AND DELAWARE CONSTITUTION BY FAILING TO REQUIRE THE STATE TO PROVE A DEFENDANT COMMITTED A SEXUAL ACT INTENDING THAT IT BE SEXUAL OR FOR THE PURPOSE OF SEXUAL GRATIFICATION.

A. QUESTION PRESENTED

Whether the Court committed legal error by failing to hold the definition of "Sexual Contact" violated the U.S. and Delaware Constitutions. This issue was preserved for appeal by filing the Motion to Dismiss before the Trial began (A-16).

B. STANDARD AND SCOPE OF REVIEW

This Court reviews violations of Constitutional rights de novo. *Cooke v. State,* 977 A-2d 803, 840 (Del. 2009).

C. MERIT OF ARGUMENT

"Sexual contact" as Defined under Delaware Law violated the Due Process Clause of the 14th Amendment of the U.S. Constitution and The Law of the Land Clause of the Delaware Constitution by failing to require the State to prove a Defendant committed the act intending that it be sexual in nature or for the purpose of sexual gratification.

The Definition of "Sexual Contact" Under Delaware Law as it

Relates to Unlawful Sexual Contact First Degree and Sexual Abuse of a Child by a Person of Trust Second Degree.

Both Unlawful Sexual Contact 1st and Sex Abuse by a Person of Trust 2nd criminalize intentional sexual contact. A person is guilty of USC 1st when he/she "intentionally has sexual contact with another person who is less than 13 years of age or causes the victim to have sexual contact with the person or a third person." 11 *Del.C.* § 769. A person is guilty of Sex Abuse by a Person of Trust 2nd when he/she:

> Intentionally has sexual contact with a child who has not yet reached that child's sixteenth birthday or causes the child to have sexual contact with the person or a third person and the person stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

11 *Del.C.* § 778A(1).

Pursuant to 11 *Del.C.* § 761(f) "sexual contact" means:

> [I]ntentional touching, causing touching, or allowing touching of another's anus, breast, buttocks or genitalia under circumstances, as viewed by a reasonable person, is intended to be sexual in nature. Sexual contact includes touching when covered by clothing.

11 *Del.C.* § 761(f). The Delaware Family Court has observed that this "reasonable person" language was added to the USC statutes in the mid-1980s. See *State v. Sapps*, 820 A.2d 477, 486 (Del. Fam. Ct. 2002).

In the definition of "sexual contact" 11 *Del.C.* 761(f), the State does not have the burden of proving that the contact was intended by the defendant to be sexual, or for the purpose of sexual gratification. The State only must prove that a "reasonable person" would have intended the contact to be "sexual in nature." 11 *Del.C.* § 761(f).

Federal Due Process Limits on Elements of Criminal Offenses.

In criminal proceedings, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution requires the state to prove "beyond a reasonable doubt ... every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "[I]n determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive." *McMillan v. Pennsylvania*, 477 U.S. 79, 85, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). States historically have had the authority to define the elements of criminal offenses, to regulate the admission of evidence, and allocate the burden of persuasion. *Martin v. Ohio*, 480 U.S. 228, 232, 107 S.Ct. 1098 (1987).

State laws that Offend a Fundamental Principle of Justice or Impermissibly shift the Burden of Proof to the Defendant Violate the Due Process Clause of the 14th Amendment.

A state statute will not violate the Due Process Clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v New York*, 432 U.S. 197, 202 (1977) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). Establishing that a fundamental principle exists is a "heavy burden" that is primarily guided by historical practice. *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (finding no due process violation where state law precluded the factfinder from considering evidence of voluntary intoxication in determining the existence of the *mens rea* element of an offense).

In *Apprendi v. New Jersey*, the U.S. Supreme Court observed that "We did not … [in *McMillan v. Pennsylvania*] budge from the position that … constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense." 530 U.S. 466, 486, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Jones v. United States*, the Court stated, "The seriousness of the due process issue is evident from *Mullaney*'s insistence that a State cannot manipulate out its way of *[In re] Winship*, and from *Patterson*'s recognition of a limit on state authority to reallocate traditional burdens of proof. …" 526 U.S. 227, 243, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (discussing the holdings of *Mullaney v. Wilbur* and *Patterson v. New York* and judicial factfinding that may increase the severity of sentence).

In *Schad v. Arizona*, the U.S. Supreme Court addressed whether or not a conviction for first-degree murder could stand where the state law did not require that the jurors agreed on whether the defendant was guilty of first-degree murder or felony murder. 501 U.S. 624, 626, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). The Court stated that the "issue in this case, then, is one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions[.]" *Id.* at 631. In ruling that the state law and jury instructions in that case did not violate due process, a plurality of the Court observed that, "[T]here are obviously constitutional limits beyond which the States may not go in defining offenses." *Schad*, 501 U.S. at 639, (citing *Patterson v. New York*, 432 U.S. 197, 210 (1977)).

"No person may be punished criminally save upon proof of some specific illegal conduct." *Schad*, 501 U.S at 632. A plurality of the Court determined that it was impractical to:

> [D]erive any single test for the level of definitional and verdict specificity permitted by the Constitution, ... instead of such a test, our sense of appropriate specificity is a distillate of the concept of due process with its demands for fundamental fairness, ... and for the rationality that is an essential component of that fairness."

Id. at 637. The Court also explained that:

> Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has

> defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden.

Id. at 640 (1991). The U. S. Supreme Court also observed in a footnote:

> We note, however, the perhaps obvious proposition that history will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common law roots than it is in cases, ... that deal with crimes that existed at common law.

Schad v. Arizona, 501 U.S. 624, 640 n.7 (1991).

Decades earlier, the U.S. Supreme Court also observed that a scienter, or *mens rea* element is the firm rule of jurisprudence in the Anglo-American legal tradition. "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Smith v. California*, 361 U.S. 147, 150 (1959) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)). The Court also stated a year later that "an injury can amount to a crime only when inflicted by intention." *Morissette v. United States*, 342 U.S. 246, 250 (1952).

Underpinning the jurisprudential norm of requiring the state to prove a *mens rea* element beyond reasonable doubt for a criminal conviction to pass constitutional muster is the concept that a defendant's intention is relevant to his culpability. "American criminal law has long considered a defendant's intention — and therefore his moral guilt — to be critical to 'the degree of [his]

criminal culpability' and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." *Enmund v. Florida*, 458 U.S. 782, 800 (1982).

Also within Due Process jurisprudence are restrictions on how the State can apply presumptions in criminal cases. Once a state has defined a crime, identified the relevant defenses, and has established rules governing admission of evidence in relation to the crime and defenses, the state may not rely on a conclusive presumption to establish an element of the crime or to defeat a defense. See *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). Conclusive presumptions cannot substitute for evidentiary proof at trial, nor can shifting the burden of proof to a defendant to negate an essential element of the offense with proof of a lesser mental state. *Mullaney v Wilbur*, 421 U.S. 684 (1975). As the Delaware Supreme Court has observed, "[a] presumption which, although not conclusive, [has] *the effect of shifting the burden of persuasion to the defendant* ... [suffers] from similar infirmities." *Craig v. State*, 457 A.2d 755, 760 (Del. 1983)(quoting *Sandstrom*, 442 U.S. at 524, 99 S.Ct. at 2459)(emphasis added).

The Definition of "Sexual Contact" as an element of both Unlawful Sexual Contact 1st and Sex Abuse by a Person of Trust Second lacks a critical, inherent element of blameworthiness or wrongfulness, i.e. the State does not have to prove that the touching was intended to be sexual in nature, or for the purpose of sexual gratification. The absence of this element violates the due process clause of the 14th Amendment.

Both offenses with which Mr. Herbert was charged required the State to prove only that a "reasonable person" would find whatever contact that occurred was sexual in nature under the circumstances. The defendant's actual intention, or purpose for the contact, is not relevant to the factfinder when it determines whether the State proves the "sexual contact" element of either crime.

Since both statutes do not require the State to prove that the touching was for the purpose of sexual gratification, or intended by the defendant to be sexual in nature, they are constitutionally infirm. The touching for the purpose of sexual gratification, or specifically intended by the defendant to be sexual touching is an "inherent" element of the crimes Unlawful Sexual Contact and Sex Abuse by a Person of Trust 2nd. *Schad*, 501 U.S. at 640. Justice Scalia observed that both offenses at issue in that case—murder first degree and felony murder—were both subsumed in the long-established common law crime of murder or the unlawful killing of a person with "malice aforethought." *Schad*, 501 U.S. at 648 (Scalia, J.). Justice Scalia further noted that, "Submitting killing in the course of a robbery and premeditated killing to the jury under a single charge is not some novel composite …" and was the "norm" throughout most of the country's history. *Id.* at 652.

Unlawful Sexual Contact, on the other hand, dates from the 1980s. See *State v. Sapps*, at 486. Sex Abuse by a Person of Trust Second also is not based in the Common Law. The crime was enacted by the General Assembly in 2010. 77 Del. Laws., c. 318, § 6 (2010). Because the crimes are of more modern design, does not mean that they need not comply with Due Process limits on how a state can criminalize certain conduct. Unlike the USC and Sex Abuse by a Person of Trust statutes presented in Mr. Herbert's case, the antecedent Sexual Assault statute enacted in the early 1970s did require the State to prove that the touching was "for the purpose of arousing or satisfying sexual desire." Del. Crim. Code With Commentary § 781 Definitions generally applicable to sexual offenses, 223; *Sapps*, 820 A.2d at 484.

The Commentary also noted that the State had to prove a sexual motive in order to prove a defendant committed the of offense Sexual Assault. The Commentary to that section notes that "a sexual motive is obviously required by the definition of 'sexual contact.'" Del. Crim. Code with Commentary § 761 Sexual assault, 205. Other states require a factfinder to consider "the personality of the defendant" or other factors specific to the defendant in determining whether the state proved the element of "sexual contact."

Ohio, for example, requires the factfinder to consider the "personality of the defendant" when determining whether "sexual contact" occurred. "When

there is no direct testimony of sexual arousal or sexual gratification, the trier of fact may infer a purpose of sexual arousal or sexual gratification from the "'type, nature and circumstances of the contact, along with the personality of the defendant." *State v. Walker*, No. L-19-1214, 2020 Ohio 5043, 6-7 (Ohio Ct. App. 2020). See also *State v. Cobb*, 81 Ohio App. 3d 179, 185, 610 N.E.2d 1009 (Ohio Ct. App. 1991)

> ("In making its decision [as to whether sexual contact occurred] the trier of fact may consider the type, nature and circumstances of the contact, **along with the personality of the defendant**. From these facts the trier of facts may infer what the defendant's motivation was in making the physical contact with the victim. If the trier of fact determines, that the defendant was motivated by desires of sexual arousal or gratification, and that the contact occurred, then the trier of fact may conclude that the object of the defendant's motivation was achieved.")(emphasis added).

Federal law also requires the government to prove that a "sexual act" was committed with intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.] 18 U.S.C. § 2246; see *also United States v. Barcus*, 892 F.3d 228, 232-233 (6th Cir. 2018)(holding that a "sexual act" under 18 U.S.C. § 2246(D) requires specific intent).

New York's definition of "sexual contact" includes as an element that the touching be "for the purpose of gratifying the sexual desire of either party." N.Y. PENAL LAW § 130.00.3 "Sexual contact."

Here the definition of sexual contact lacks any consideration of whether the contact was for the purpose of sexual gratification, or any consideration as

to whether the contact was intended to be sexual in nature, it violates due process. When charging a person with a crime where "sexual contact" is an element of that crime, the state must prove the contact was intended to be sexual in nature, or for the purpose of sexual gratification, an inherent element of that crime. Failure to include that element offends due process. The Jury's verdict must be reversed.

Both verdicts must be reversed because the evidence lacked of an element that the contact was intended to be Sexual, or for the Purpose of Sexual Gratification.

The "Law of the Land" provision of Article I, Section 9 of the Delaware Constitution is "analogous" to the due process clause of the 14th Amendment and "incorporates comparable due process requirements." *DeStefano v. Watson*, 566 A.2d 1, 6 n.7 (Del. 1989); see, *e.g. In re Opinion of the Justices*, 246 A.2d 90, 92 (Del. 1968); *Matter of Carolyn S.S.*, 498 A.2d 1095, 1098 (Del. 1984); *Cheswold Volunteer Fire Co. v. Lambertson Const. Co.*, 462 A.2d 416, 419 (Del. 1983). "The protection afforded by the guarantee of substantive due process interposes a bar to legislation that 'manifests a patently arbitrary classification, utterly lacking in rational justification.'" *DiStefano v. Watson*, 566 A.2d 1, 6 (Del. 1989)(quoting *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 4 L.Ed.2d (1960)).

The Delaware Supreme Court has recognized that the Delaware Constitution provides greater rights that the U.S. Constitution. *Hammond v. State* 569 A.2d 81, 87 (Del. 1989).

Mr. Herbert argues that the lack of an element requiring the State to prove beyond reasonable doubt that any contact that occurred was intended to be sexual in nature, or for the purpose of sexual gratification, also violates the law of the land clause of the Delaware Constitution.

Failing to require that the State prove that "sexual contact" is contact that is intended to be sexual in nature, or for the purpose of sexual gratification is "patently arbitrary" and lacking any rational justification. If "sexual contact" is not intended to be sexual, or for the purpose of sexual gratification, the touching cannot, as a matter of law, be considered "sexual." The touching may be offensive, or non-consensual. That could classify as another non-sexual criminal offense. See, *e.g.*, 11 *Del.C.* §601(a) (Offensive Touching). Absent a purpose of sexual gratification, or specific intent on the part of the person that the touching be sexual in nature, the touching cannot be considered to be sexual.

The definitions of "Intent" and "Sexual Contact" when read together, violate due process because the statutes, effectively create a conclusive presumption as to intent, or have the effect of shifting the burden of proof upon the defendant to disprove intent.

When read and applied together, these definition of "intentional" *mens rea* and "sexual contact" are constitutionally problematic. A jury or factfinder is reasonably likely to conclude that the defendant acted intentionally if it finds that the contact was "sexual contact."

First, the way the word "nature" is used repeatedly in both the definitions of "intentional" and "sexual contact" is confusing and misleading. Both crimes with which the State indicted Mr. Herbert required the State to prove that the defendant had an "intentional" state of mind. Section 231 of Title 11 defines "intentional" *mens rea* as: (1) "If the element involves the *nature* of the person's conduct or the result thereof, it is the person's conscious object to engage in conduct of that *nature* or to cause that result." 11 *Del.C.* § 231 (emphasis added).

Also as noted above, "sexual contact" in §761 of Title 11 is defined in pertinent part: "any … touching, if the touching, under the circumstances as viewed by a reasonable person is intended to be *sexual in nature*[,] [and] intentionally causing or allowing another person to touch the defendant's … genitalia." This language of both statutes were included in the jury instructions in this case (A-422-425).

The way these two statutes are read together, the jury would reasonably likely interpret the instructions as ordering that, if the contact at issue was

"sexual in nature" to a reasonable person, then it would also satisfy the intent element, as the factfinder is ordered by the instructions to find that a person acts intentionally "if the element involves the *nature of the person's conduct* or a result thereof, it is the person's conscious object to engage in conduct of that *nature* . . ."

This is constitutionally problematic because the *mens rea* element is different than the sexual contact element. A jury must determine whether or not the State has met its burden of proof on each element separately. But because of the way both elements were defined—they use the term "nature" in such similar ways, a jury in this case could reasonably likely conclude that, if they determined that the physical contact in this case was "sexual in nature," then they could also conclude that the defendant acted intentionally because they had just found that the "nature of the person's conduct" was sexual.

Given the similar phrasing, the repeated use of the word nature in both instructions, and the way the term is used, it is reasonably likely the jury did apply the instructions in a way that relieves the State of proving that the defendant acted intentionally.

Mandatory presumptions violate the Due process Clause if they relieve the State of the burden of persuasion on an element of the offense. *Patterson v. New York*, 432 U.S. 197, 215 (1977); *Sandstrom v. Montana*, 442 U.S. 510,

520-524 (1979). This includes shifting the burden of persuasion on the issue of intent.

As the Court summarized in *Francis v. Franklin*:

> Our cases make clear that 'such shifting of the burden of persuasion with respect to a fact which the State deems so important that is must be either proved or presumed is impermissible under the Due Process Clause.'

471 U.S. 307, 316 (1985) (quoting *Patterson*, 432 U.S. at 215).

In discussing presumptions, the Delaware Supreme Court has observed:

> It is clear that a mandatory or conclusive presumption, that is, a presumption which makes it mandatory on the jury to find the presumed fact from the proven fact, constitutionally invades the province of the jury. Such a presumption, when the presumed fact is a necessary element of a criminal offense, amounts to an erroneous rule of law and improperly relieves the State of its burden of proof.

Craig v. State, 457 A.2d 755, 760 (Del. 1983) (citing *Sandstrom v. Montana*, 442 U.S. 510, 521-23, 99 S.Ct. 2450, 2458-59, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970)). Further, "[a] presumption which, although not conclusive, [has] *the effect of shifting the burden of persuasion to the defendant* ... [suffers] from similar infirmities." *Craig*, 457 A.2d at 760 (quoting *Sandstrom*, 442 U.S. at 524, 99 S.Ct. at 2459)(emphasis added).

The way these two elements were defined, when read together, effectively creates a conclusive presumption as to the *mens rea* element the

State must prove for both charged crimes—that the defendant acted intentionally. This violated Defendant's right to have the State prove beyond reasonable doubt each element of the offenses with which he was charged.

LEGAL ARGUMENT

II. THE SUPERIOR COURT ERRED IN EXCLUDING DEFENDANT'S EXPERTS FROM TESTIFYING ABOUT THE INSIGHT IN INTRA-FAMILY SEXUAL ABUSE ALLEGATIONS AND ABOUT THE INTERVIEWS OF THE COMPLAINTING WITNESS AND ABOUT DEFENDANTS WHOLE PERSON TO ASSESS WHETHER DEFENDANT POSSESSED THE REQUISITE *MENS REA* DURING THE PURPORTED SEXUAL CONTACT.

A. QUESTION PRESENTED

Whether the Court improperly excluded two experts retained by Defendant who would have provided proper insight about the interviews of the complaining witness and the whole person of Defendant and the requisite *mens rea* during the alleged criminal act. These issues were preserved by the filing of Motion in Limine and response to State's Motion in Limine before Trial began (A-67, 89).

B. STANDARD AND SCOPE OF REVIEW

This Court reviews a Trial Court's decision to admit or exclude expert evidence for abuse of discretion. *Gen. Motors Corp. v. Grenier,* 981 A.2d 531, 536 (Del. 2009). That standard applies as much to the Trial Court's decision about how to determine reliability as to the Trial Court's ultimate conclusion. *MG Ban Corporation, Inc. v. LeBeau*, 737 A.2d 513, 522 (Del. 1999).

C. ARGUMENT

The Trial Court erred by excluding the Expert Testimony of Dr. Cooney-Koss.

Mr. Herbert provided notice to the State that he intended to call Dr. Cooney-Koss to testify about the allegations of intra-family sexual abuse which formed the basis of his charges. The State provided in its Discovery Response three interviews of the complaining witness from February, April, and June, 2020.

A portion of the third CAC interview with the complaining witness includes bizarre, medically unsupported (in fact – SANE report indicates no evidence of vaginal/penal contact) allegations of sexual contact involving the vagina of the complaining witness. No charges were lodged concerning that allegation and no forensic evidence existed to support that allegation.

Applicable Legal Standards

In 1987, the Delaware Supreme Court addressed whether and under what circumstances the State may elicit testimony from experts in cases involving intra-family child sexual abuse in two companion cases: *Wheat v. State*, 527 A.2d 269 (Del. 1987) and *Powell v. State*, 527 A.2d 276 (Del. 1987). In *Wheat*, the Court observed that "The scope of admissibility of expert testimony regarding the psychological dynamics and behavioral patterns of complainants

in sexual abuse prosecutions has been the focus of abundant recent litigation and comment." 527 A.2d at 272. The Court further observed that "the subject of expert analysis and testimony in child sexual abuse cases is essentially that of psychological or behavioral dynamics" and that psychologists, psychiatrists and social workers who possess the requisite educational and occupational requirements may qualify as experts. *Id.*

In *Wheat*, the Court approved of the use of expert opinion testimony in cases of intra-family child sexual abuse cases "where the child's behavior is not within the common experience of the average juror" but reversed in that case because the expert testified about the complaining witness's credibility in terms of statistical probability. 527 A.2d at 275. "[T]hough we approve the limited use of such testimony, we are required to reverse this conviction because the expert witness was permitted to evaluate the complainant's credibility in terms of statistical probabilities." *Wheat*, 527 A.2d at 274.

In *Wheat,* the Court provided guidance as to what expert clinicians can, and cannot testify about, in intra-family sexual abuse cases. "[E]xpert testimony impermissibly invades the province of the jury if it embraces matters in which the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, i.e. matters not beyond the ken of the average layman." *Wheat*, 527 A.2d at, 272-73. The Court further observed that

expert testimony can be helpful to the trier of fact because of the "interpersonal dynamics involved in intrafamily child sexual abuse[.]" *Id.* at 273. Expert testimony may be helpful in explaining actions or statements that are, to the layperson, bizarre or unusual or inconsistent. *Id.* (citations omitted).

The Court provided further instructions to trial courts and emphasized that an expert cannot express opinions about the truth or falsity of allegations of abuse:

> If the witness qualifies as an expert, the witness may express opinions consistent with the holding in this case. The expert may not directly or indirectly express opinions concerning a particular witness' veracity or attempt to quantify the probability of truth or falsity of either the initial allegations of abuse or subsequent statements.

Wheat, 527 A.2d at 275. The Court also specified the circumstances under which its holding applied:

> This holding applies only where the complainant has displayed behavior (e.g. delay in reporting) or made statements (e.g. recantation) which, to average laypeople, are superficially inconsistent with the occurrence of sexual abuse and which are established as especially attributable to intrafamily child sexual abuse rather than simply stress or trauma in general. (Emphasis added)

Id. at 274. [cf: 3 CAC interviews with added improbable facts.] The Court also emphasized that expert testimony is considered helpful to the factfinder where the "child's behavior is not within the common experience of the average juror[.]" The Court further advised that the expert testimony should be in "general" terms and discuss "behavior factors in evidence":

> We emphasize that limited use of expert testimony in child sexual abuse prosecutions is appropriate to assist the finder of fact, whether judge or jury, in evaluating the psychological dynamics and resulting behavior patterns of alleged victims of child abuse, where the child's behavior is not within the common experience of the average juror. To the extent such expert testimony is given in general terms and directed to behavior factors in evidence, it is admissible. To the extent it attempts to quantify the veracity of a particular witness or provide a statistical test for truth telling in the courtroom, it is clearly unacceptable.

Id. at 275.

In *Powell*, the Court reversed the conviction of a man accused to raping his stepdaughter where an expert witness testified to the complaining witness's credibility and attempted to quantify the probability of the truth or falsity of the allegation. 527 A.2d at 279.

In more recent cases, the Supreme Court has affirmed the Superior Court's decision to decline to allow the defendant to call an expert to testify that about the susceptibility of young children to be programmed to falsify abuse information about fathers in hostile custody and visitation disputes. *Floray v. State*, 720 A.2d 1132, 1134 (Del. 1998). The Supreme Court affirmed the trial court's determination that expert testimony was not appropriate because the complaining witness was not related to the defendant and the defendant did not show there was any behavior "that the jury needed assistance in understanding." *Id.* at 1136. Here, Dr. Cooney-Koss would have explained the three (3) separate

CAC interviews the victim gave and her professional appreciation as to how and why the versions changed.

In *Wittrock v. State*, No. 373, 1992, 1993 WL 307616 (Del. Jul. 27, 1993), the Supreme Court reaffirmed the admission of expert testimony in cases involving allegations of intrafamilty child sexual abuse.

In *State v. Redd*, 642 A.2d 829, 832-33 (Del. Super. Ct. 1993) the Superior Court rejected the defendant's request for a psychiatric examination of a complaining witness who was not related to the defendant; the trial court also denied defendant's request to permit the expert to testify "consistent with the teachings of *Wheat v. State*[.]" *Id.* at 813. The Superior Court noted that *Wheat* and *Wittrock* "expressly limited the admissibility of expert testimony to instances of 'intrafamily' sexual abuse." *Id.* at 832.

Dr. Cooney-Koss prepared a 10-page report. (A79-88) The doctor distinguishes between observations from the CAC videos, and her analyses of the video interviews, which are in italics. (A-80 at n.2.)

The factors outlined in D.R.E. 702 and 703 and *Nelson* Support Permitting Dr. Cooney-Koss to Testify.

As explained below, the factors outlined in D.R.E. 702 and 703 outlined and discussed below support the admission at Trial of Dr. Cooney-Koss's testimony.

Dr. Cooney-Koss has a doctoral degree in clinical psychology and has

been a licensed psychologist in Delaware since 2006. (A-442-447). Her graduate degrees in clinical psychology included concentrations in forensics. *Id.* She possessed certifications to treat both juvenile and adult sexual abusers. *Id.* She also has experience assessing children and adults who have engaged in inappropriate sexual behavior and has years of experience treating both juvenile and adult patients who were victims of sexual abuse. (A-80, 442-447)

Dr. Cooney-Koss Opinions were Relevant.

"Expert testimony is relevant if it assists the fact finder in understand[ing] the evidence or . . . determin[ing] a fact in issue." *Henlopen Hotel, Inc. v. United Nat'l Ins. Co.*, C.A. No. N18C-09-212 (PRW), at *6 (Del. Super. Ct. Jan. 10, 2020). Dr. Cooney-Koss's opinions and analysis were relevant to the specific allegations at bar: allegations of intra-family childhood sexual abuse. Her opinions and analysis were based upon two decades of experience in speaking with and treating both victims and perpetrators of childhood sexual abuse. The Supreme Court in *Wheat* has observed that expert testimony may be beneficial to the factfinder on this specific subject-matter. See *Wheat*, 527 A.2d at 273.

Dr. Cooney-Koss analysis would have provided academic helpful background and context for the factfinder. A.H. was 3 and 4 years old at the time of her interviews. A layperson does not have understanding of the

appropriate vocabulary, social skills and social dynamics at play when a complaining witness of that age is asked about sex, anatomy, and family dynamics. Dr. Cooney-Koss's testimony about these issues were crucial and would have been helpful in understanding and interpreting the evidence to the jury.

Dr. Cooney-Koss Used Professionally Reasonable Methods.

Dr. Cooney-Koss is a clinical psychologist. She speaks with adults and children about sexual and behavioral issues that require assessment and treatment. The Supreme Court observed in *Wheat* that that "the subject of expert analysis and testimony in child sexual abuse cases is essentially that of psychological or behavioral dynamics[.]" 527 A.2d at 272. Conducting interviews, and reviewing recorded interviews, reports, and investigative materials is reasonable and standard practice for practitioners of psychology and behavioral health. This Court has recently noted that:

> [A] rigid application of the *Daubert* factors simply cannot be engaged to determine testimonial reliability in every field of expertise. For example, many scientific, technical, or specialized fields are not subject to peer review and publication. That is why the test of reliability is flexible, and the trial court has broad latitude when it decides how to determine reliability.

Henlopen Hotel, Inc. v. United Nat'l Ins. Co., C.A. No. N18C-09-212 PRW, at *7 (Del. Super. Ct. Jan. 10, 2020).

Dr. Cooney-Koss's opinions were based upon her training and experience. She notes in her report that she has conducted therapy and psychological evaluations with child and adult victims of trauma for two decades. (A-80) She also notes that she has worked with children, adolescents and adults who have engaged in sexually inappropriate behavior for nearly 20 years. *Id.* Given her training and extensive experience, the insights in her report can be considered relevant and reliable pursuant to D.R.E. 702 and 703.

The Testimony Would Have Assisted the Trier of Fact.

The subject-matter of the allegations is beyond the scope of knowledge of the factfinder: allegations of intra-family sexual abuse involving a younger child. The dynamics of allegations of intra-family abuse is a subject-matter appropriate for expert testimony. The social development and communication skills of a 3 or 4-year-old, considering that the child was also extensively interviewed about contact with the private parts of another family member, is likewise appropriate subject-matter for expert testimony. The Trial Court erred in excluding Dr. Cooney-Koss's testimony. Her testimony did not touch on the "credibility" of A.H.

The Trial Court erred by also excluding the Expert Testimony of Dr. Joseph Zingaro.

As detailed in Dr. Zingaro's Report, the doctor interviewed Defendant on two different occasions (A-107). He also interviewed Defendant's parents,

current psychotherapist, and a former work supervisor. (A-109-110)

Dr. Zingaro's testing revealed no evidence of any clinical psychopathology in Mr. Herbert (A-111). Dr. Zingaro's evaluation found that Defendant grew up with unique opportunities; he lived in different countries, on different continents, in different cultures and was exposed to a variety of social and culture mores different than those found in the United States (A-111). Defendant lived in Zimbabwe, Libya and Puerto Rico during his childhood. *Id.* Mr. Herbert lived in countries of water scarcity, where he showered with a sibling in order to conserve water (A-109). He also showered with his father as a child (A-331). Even when he lived in America as a child, Mr. Herbert grew up in a family environment where swimming naked in secluded, private ponds was permitted and normalized (A-109)..

Dr. Zingaro's research also found that family standards for modesty, nudity and privacy vary greatly from family to family in all parts of the world (A-111). Further Dr. Zingaro's research also found that, within the bounds of normal sexual behaviors in children between two and six, such normal behaviors may include a child attempting to view and/or touch naked peers or adults. *Id.*

Both the United States and Delaware constitution's guarantee a criminal defendant the right to "a meaningful opportunity to present a complete

defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Hamann v. State*, 565 A.2d 924, 928 (Del. 1989)(noting the right to confront witnesses guaranteed by art. I, § 7 of the Delaware Constitution and observing the right is subject to the trial court's discretion regarding scope). The evidence presented must be relevant. "The right to present a defense, however, is not without limits. At a minimum, a defendant is limited to presenting relevant evidence." *United States v. Markey*, 393 F.3d 1132, 1135 (10th Cir. 2004).

Relevant evidence is evidence having "any tendency" to make a fact more probable or less probable than it would be without the evidence. D.R.E. 401. "Because the ultimate purpose of admitting or excluding evidence is to assist the jury's understanding of the underlying factual bases for its application of the law, the courts are to interpret D.R.E. 401 broadly." *Hunter v. State*, No. 161, 2001, at ¶ 5, 788 A.2d 131 (Del. 2001)(TABLE).

Both the Delaware and U.S. constitutions recognize the discretion given to judges to exclude unfairly prejudicial or marginally relevant evidence. "[T]he Constitution leaves to the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Williams*, 141 A.3d at 1033 n.62 (Del. 2016)(quoting *Crane*, 476 U.S. at 689, 106 S.Ct.

2142.

"[I]n Delaware, scientific evidence, … must satisfy the pertinent Delaware Rules of Evidence concerning the admission of scientific testimony or evidence[.]" *Nelson v. State*, 628 A.2d 69, 74 (Del. 1993). The trial court must also find that "the evidence sought to be admitted relevant and reliable." *Id.* "If a witness is qualified as an expert by skill, experience, knowledge, training or education, he may offer an opinion and testify as to that opinion." *Norman v. All About Women, P.A.*, 193 A.3d 726, 730 (Del. 2018)(citing D.R.E. 702). Further, "the facts or data in which the expert relies upon need not be admissible into evidence as long as the information is of the kind that is reasonably relied upon by experts in the particular field." *Spicer v. Osunkoya*, C.A. No. 08C-04-218 (MJB), at *4 (Del. Super. Ct. Mar. 7, 2011)(citing D.R.E. 703). Finally, "A strong preference exists for admitting evidence that may assist the trier of fact." *Norman*, 193 A.3d. at 730 (citing *Pavey v. Kalish*, 3 A.3d 1098 (Del. 2010)).

To determine whether to admit opinion testimony of an expert, the Court must determine:

(i) the witness is "qualified as an expert by knowledge, skill, experience, training or education" (D.R.E. 702);
(ii) the evidence is relevant and reliable;
(iii) the expert's opinion is based upon information "reasonably relied upon by experts in the particular field" (D.R.E. 703);
(iv) the expert testimony will "assist the trier of fact to understand the

evidence or to determine a fact in issue" (D.R.E. 702); and
(v) the expert testimony will not create unfair prejudice or confuse or mislead the jury.

Cunningham v. McDonald, 689 A.2d 1190, 1193 (Del. 1997)(citing *Nelson*, 628 A.2d at 74). These factors are not exhaustive; the "inquiry is intended to be flexible and the trial judge has broad discretion to determine whether the *Daubert* factors are the appropriate measure of reliability in a given case." *Crowthorn v. Boyle*, 793 A.2d 422, 430. (Del. 2002).

The Delaware Supreme Court also explained that the trial court must determine whether the subject-matter of the expert testimony involves "specialized knowledge which will assist the trier of fact to understand the evidence or determine a fact in issue." *Wheat*, 527 A.2d at 272. "Knowledge is specialized only when not possessed by the average trier of fact who lacks the expert's skill, training, or education.".

The Superior Court has held that a defendant may not offer evidence that the defendant does not fit the "profile" of a child sexual abuser. *State v. Floray*, 715 A.2d 855, 858 (Del. Super. Ct. 1997) *aff'd on other grounds, Floray v. State*, 720 A.2d 1132 (Del. 1998). This holding is consistent with the Delaware Supreme Court's skepticism of profile evidence in other contexts—such as prosecutions for serial homicide. See *Pennell v. State*, 602 A.2d 48, 54-55 (Del. 1991)("Profile evidence is that which attempts to link the general characteristics

of [a class of perpetrators of crime] to specific characteristics of the defendant. Such evidence is of little probative value and extremely prejudicial to the defendant since he is, in a sense, being accused by a witness who was not present for the crimes.").

This Court in *Floray* reasoned that expert testimony positing that a defendant does not possess the "general characteristics or 'profile' of a pedophile or child sexual abuser, ... would have little probative value and be extremely prejudicial to the State's case." 715 A.2d at 858. The evidence is "inadmissible because it is irrelevant and least to an impermissible inference that, because Defendant may not fit a certain profile, he is innocent of the crimes charged." *Id.* at 859. See also *State v. Screpesi*, 611 A.2d 34 (Del Super. Ct. 1991) (holding that defendant may not present expert testimony that defendant does not possess characteristics likely to result in abuse).

Dr. Zingaro's testimony is not for the belief that Defendant does not present the "profile" of a child sexual abuser. Defendant sought to admit the testimony of Dr. Zingaro to explain how Defendant's upbringing and experience shaped his ability to understand and perceive mores and norms pertaining to touching, nudity and societal norms concerning what is and is not appropriate for children and adults pertaining to sexual touching. Dr. Zingaro's testimony would have assisted the jury in understanding what might otherwise

be considered "unusual" or "bizarre" behavior in allowing A.H. to touch his penis on two occasions without reprimanding her.

Dr. Zingaro's report and research included no discussion of percentage terms about the truth or falsity of the statements of A.H. Dr. Zingaro's testimony would have been based upon the facts of this case, social norms and mores and how a person's upbringing and experience in diverse cultures on other continents may shape and inform one's understanding of boundaries about touching that would be markedly or starkly different than the average American juror.

The New Jersey Supreme Court, more recently than Delaware's Supreme Court, has recognized that expert testimony is admissible to explain a defendant's mannerisms or behavior that otherwise would be considered inappropriate. In *State v. Burr*, 195 N.J. 119, 948 A.2d 627 (N.J. 2008), the Garden State's high court reversed the conviction of a piano instructor inappropriately touching a student, holding that expert testimony pertaining to Asperger's Disorder was admissible to explain to the jury the defendant's mannerisms and inappropriate behaviors. "In our view, the evidentiary ruling on the Asperger's Disorder testimony denied defendant the access to evidence that was relevant and material to his explanation of himself and his conduct." *Burr*, 195 N.J. at 123. The Court explained:

> [The defense expert's proffered] testimony, which would have helped explain how defendant's actions in allowing children to sit on his lap might have been innocent of nefarious purpose or motivation. The conduct, although minimal, was, however, potentially suspicious. The Asberger's Disorder testimony was intended to show that defendant might not have understood that his conduct could have been perceived as socially unacceptable. In seeking to educate the jury about Asperger's Disorder, defendant sought to provide the jurors with context about him and his limitations in respect of basis social interactions.

195 N.J. at 128-29. The New Jersey Supreme Court further elaborated how the expert testimony would have "enhanced the presentation of defendant's defense to the charge against him in ways that defy specific enumeration":

> The evidence would have educated the jury about oddities in behavior that defendant might exhibit in court or were described in the testimony of witnesses. The testimony also might have enabled the jury to view the facts with greater consideration given to defendant's version of his interactions with the children. In the same vein, the testimony might have persuaded defendant to take the stand and testify before the jury, knowing that any odd behaviors or demeanor that he might exhibit would not surprise or inexplicably alienate the jury. This was defendant's only opportunity to present his defense to the jury, and he deserved a more generous grant of the trial court's discretionary evidentiary rulings on any relevant evidence that had a logical tendency to advance defendant's cause in the matter. To the extent that defendant wanted to present the whole person that he was to the jury, in whose hands his fate was placed, he should have been permitted to do so.

Burr, 195 N.J. at 130.

Defendant sought to admit Dr. Zingaro's testimony so the jury would have heard evidence about his "whole person" including his unusual unique upbringing and social background, in order to assess whether or not the State's evidence proved beyond a reasonable doubt that he

possessed the requisite *mens rea* as to any purported sexual contact that may have occurred.

LEGAL ARGUMENT

III. THE SUPERIOR COURT ERRED BY IMPOSING A SENTENCE OF 5 YEARS MINIMUM MANDATORY OF UNSUSPENDED LEVEL V TIME

A. QUESTION PRESENTED

Whether Defendant received a sentence not within the statututory structure when the Court imposed a mandatory 5 year sentence.

Defense Counsel caused an objection to the sentence by filing a Motion to Vacate an Illegal Sentence on September 22, 2022 (A-374-379).

B. STANDARD AND SCOPE OF REVIEW

Appellate review of a sentence is whether it was within the statutory limits prescribed by the General Assembly and whether it is (1) based on factual predicates that are false, impermissible or lack minimal reliability or (2) the result of a closed mind or judicial vindictiveness or bias. *Mayes v. State*, 604 A.2d 839 ,842 (Del. 1992).

C. ARGUMENT

The jury convicted Defendant of Unlawful Sexual Contact First Degree ("USC 1st") in violation of 11 *Del.C.* §§ 769 and 4205A(d)(1), and Sexual Abuse of a Child by a Person in a Position of Trust, Authority, or Supervision in the Second Degree ("Sex Abuse by a Person of Trust 2nd"), in violation of 11 *Del.C.* § 778A(1).

This Court proceeded to impose sentence immediately. Prior to imposing sentence, the Court inquired of the parties as to their positions on imposing sentence pursuant to § 4205A(d)(1) of Title 11. Section § 4205A(d)(1) states:

> Notwithstanding any provision of this chapter or any other laws to the contrary, the Superior Court, upon the State's application, shall sentence a defendant convicted of any crime set forth in § 769 or § 783(4) of this title to not less than 5 years to be served at Level V if the victim of the crime is a child less than 7 years of age.

11 *Del.C.* § 4205A(d)(1).

Immediately after trial, both parties stated that the subsection at issue required the Court to impose not less than 5 years of unsuspended Level 5 time. The Court also stated its belief that § 4205A(d)(1) required the Court to impose not less than 5 years of unsuspended Level 5 time (A-415-416).

Upon further reflection, counsel for Defendant respectfully submitted that §4205A(d)(1) does not require the Court to impose not less than 5 years of *unsuspended* Level 5 time. Rather, counsel for Defendant submitted the statute provides the Court with the discretion to suspend some or all of that sentence. Counsel submits that the operative language "shall sentence a defendant . . . to not less than 5 years to be served at Level 5" does not mandate the imposition of 5 years of unsuspended Level 5 time. Rather, it only requires the Court to

impose a sentence of 5 years to be served at Level 5, and the Court, in its discretion, may suspend some or all of that Level 5 sentence.

This is generally consistent with sentencing language in our Criminal Code. The habitual offender statute, codified at § 4214 of Title 11, specifically states in paragraph (e) in pertinent part:

> Notwithstanding any provision of this title to the contrary, any minimum sentence required to be imposed pursuant to subsection (b), (c), or (d) of this section *shall not be subject to suspension by the court, and shall be served in its entirety at full custodial Level V institutional setting without the benefit of probation or parole* ...11 *Del.C.* § 4214(e)(emphasis added).

Section 1448 of Title 11, codifying all the provisions that criminalize the possession of a firearm by a person prohibited, includes a similar provision: "Any sentence imposed for a violation of this subsection *shall not be subject to suspension and no person convicted for a violation of this subsection shall be eligible for good time, parole or probation during the period of the sentence imposed.*" 11 *Del.C.* § 1448(e)(4)(emphasis added).

Given that neither §§ 769, nor 4205A include any such similar language as in § 4214(e) or 1448(e)(4), Defendant respectfully submits that, pursuant to § 4205(g), this Court has the discretion to suspend all, or a portion of, the sentence imposed pursuant to §4205A(d)(1).

In *Brittingham v. State*, our Supreme Court recognized that:

> A sentence is also illegal if it is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.

Brittingham v. State, 705 A.2d 577, 578 (Del. 1998)(quoting *United States v Dougherty*, 106 F.3d 1514, 1515 (10th Cir. 1997)). For the reasoning outlined above, Defendant submits that §4205A(d)(1) did not mandate a sentence of 5 years of unsuspended Level 5 time, and therefore such a sentence is not "authorized" by the statute. Accordingly, Defendant's sentence should have been corrected by the Court pursuant to Rule 35(a).

Even if this Court finds that Mr. Herbert's sentence is not "illegal", if this Court finds that the Court below had the discretion to suspend all, or a portion of a sentence pursuant to § 4205(d)(1), then the sentence should have been reconsidered pursuant to Rule 35(a).

CONCLUSION

For the foregoing reasons, Appellant John Herbert respectfully requests that this Court reverse the judgment of the Superior Court.

Respectfully submitted,

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