IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	
DILIP NYALA,	)	ID No. 1310000634
MICHAEL IRWIN,	)	ID No. 1309012464
Defendants.	)	

POST HEARING BRIEF

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I. PURPOSE, SCOPE, AND ISSUES PRESENTED.

As a result of the ongoing misfeasance, malfeasance and criminal conduct at the Office of the Chief Medical Examiner's Controlled Substances Unit (CSU),[1] the undersigned attorneys filed motions *in limine* seeking orders excluding all drug evidence in the cases of *State v. Michael Irwin* and *State v. Dilip Nyala.* These cases share a common characteristic with many other pending drug cases: evidence was seized and brought to CSU, but not tested by CSU, then gathered up by the Delaware State Police (DSP) as part of the Department of Justice (DOJ) criminal investigation.

This Court granted a hearing on the Irwin-Nyala cases, but the parties understood that the scope of the hearing went beyond the two cases at bar and would have some precedential effect on other pending cases. As such, the record was expanded. The State provided to the defense, subject to a protective order, some summaries of witness statements, for example, as well as chain of custody information on certain other cases. Other items were not provided, with the State citing the ongoing nature of the investigation as the reason. Likewise, the scope of the motion hearing was expanded somewhat to establish a record of the situation at CSU before it was shuttered. However, the parties were mindful not to engage in

[1] The CSU has been referred to as "OCME," "the drug lab," and other names. The Department of Justice refers to it as the CSU and for clarity's sake, this brief will use that nomenclature.

questioning that could jeopardize the ongoing investigations into the CSU and into Richard Callery, MD, the erstwhile Chief Medical Examiner.

In a completely separate proceeding, the Office of the Public Defender (PD) filed motions about the CSU but based on a different legal theory. A separate hearing was convened for that purpose. As such, the Appendix to this brief consists of transcripts of both hearings, some of the exhibits, and sundry other information provided by the State to the defense.[2]

This is Mr. Irwin and Mr. Nyala's post-hearing brief. The motions present two questions for consideration by this Court:

1. Given the crisis at CSU, with its root cause still undetermined, can the evidence stored at CSU be considered reliable and thereby admissible?

2. Under well-established precedential law, can the State establish a legitimate chain of custody for the evidence?

As this brief demonstrates, both questions must be answered in the negative; therefore Mr. Irwin and Mr. Nyala respectfully request that this Court issue an Order granting their motions *in limine*.

[2] Witness/suspect statements provided to the undersigned pursuant to a protective order are not included in the Appendix.

II. FACTS AND PROCEDURAL HISTORY.

The following overview provides a history of the OCME saga from inception to the present day, as well as a description of the evidence trail for the two cases at bar.

The Tyrone Walker Trial.

On January 14, 2014, Tyrone Walker's trial set off a series of well-publicized events. Months before, DSP seized 67 oxycodone pills from Mr. Walker and arrested him for Drug Dealing. DSP stored the evidence in an envelope and documented the quantity and suspected substance on the exterior of the envelope. DSP then submitted the envelope to the CSU for testing. A chemist later determined that the seized substance contained oxycodone and returned the envelope to DSP Troop 3 for storage.[3]

During Mr. Walker's trial, the State sought to admit the 67 pills seized into evidence. When presented with the envelope, the officer noted that the original DSP tape was intact.[4] The trooper also noted that the CSU tape on the left side of

[3] A79.

[4] The subsequent investigation launched by the Delaware Department of Justice ("DDOJ") and DSP revealed evidence of tampering despite the testifying officers assertion that he did not find any signs of tampering on the envelope. A577-579. The signs of tampering were apparently taped over by CSU tape. A578. This discovery does not change the fact that DSP's audit revealed a number of discrepancies in cases where there are no signs of tampering whatsoever. The facts and circumstances behind these discoveries will be discussed in detail later in this brief.

the envelope was also intact. The trooper acknowledged that the envelope demonstrated "no overt signs of tampering to the exterior of the package."[5] But rather than showing 67 oxycodone pills to the jury, the trooper found ten pink round pills that were inscribed "M 32," which is a blood pressure medication known as metoprolol. The 67 oxycodone pills vanished and have not been seen since the initial seizure. The Court recessed and Mr. Walker subsequently pled guilty to a lesser charge.

The Subsequent CSU Investigation.

Following the Walker trial debacle, DSP notified the CSU of the discrepancy. CSU management researched Forensic Advantage, also known as FLIMS (Forensic Laboratory Information Management System), in an effort to locate the 67 oxycodone pills and the origin of the pills that were discovered during Mr. Walker's trial.[6] Their efforts proved futile in that there were no records of anyone logging metoprolol into FLIMS.[7] OCME employees also could not locate the missing oxycodone pills.[8] This is not surprising given Robyn Quinn's description of the lab prior to her taking over as the laboratory manager for the

[5] *Id.*

[6] A737.

[7] A738. FLIMS is sometimes referred to by its brand name, Forensic Advantage, but for clarity, FLIMS will be used throughout.

[8] A80.

CSU: "Prior to my being in the position,[9] there was really no documentation of anything that took place in the controlled substances unit."[10]

After discovering the initial discrepancy, more instances of tampering were brought to the attention of DSP. On January 27, 2014, a Forensic Evidence Specialist (FES) disclosed to a DSP detective discrepancies with evidence submitted in a case in New Castle County. Of the seven envelopes submitted, the first should have contained 170 oxycodone pills.[11] Upon opening the envelope, 74 assorted pills, none of which were oxycodone, were discovered. Testing revealed that the pills were clonazepam, which is a muscle relaxant.[12] DSP collected the evidence and returned it to Troop 2.[13] Further examination revealed that not only were the 170 oxycodone pills missing but four bags of marijuana were missing as well. DSP initiated an internal audit of all the evidence held at DSP Troop 2 in response to the missing evidence.[14]

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[9] Ms. Quinn took over managing the CSU in October of 2013.

[10] A743.

[11] A81.

[12] A81. Only 71 pills remained after testing because the chemist used 3 pills for testing purposes.

[13] A81.

[14] A82.

Alerted to the fact that drug evidence was missing from several cases, the CSU initiated an internal audit of the drug evidence locker on February 2, 2014. OCME's director and deputy director, Dr. Richard Callery and Hal Brown, assigned Jack Lucey, Kelly Georgi, and Laura Nichols to the audit team.[15] But even that process had its failings. Mr. Lucey began the audit by opening an unknown number of evidence envelopes at the original integrity seal, thereby destroying, with his own tampering, any preexisting evidence of tampering.[16] The OCME also initially limited the scope of the audit to "pill cases," even though marijuana had been reported missing,[17] but broadened it later.[18]

The internal audit process did not include written policies or procedures related to the internal audit process.[19] OCME employees, including Quinn, simply met to talk about it and followed up in emails. Lucey would begin the process by removing an envelope from the evidence locker and documenting it in FLIMS with a note. Next he would photograph the front and back of evidence envelopes and then open the envelope to examine its contents. Kelly Georgi was the "scribe,"

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[15] A738.

[16] A739. Quinn testified that Lucey cut the tape used to seal the envelope instead of cutting the envelope in a different location.

[17] *Id*.

[18] A740.

[19] A773.

meaning that she would document Mr. Lucey's findings once the envelope was opened. Ms. Georgi made notations within the FLIMS system but only documented discrepancies on a self-created Microsoft Excel spreadsheet.[20] Laura Nichols shared these duties with Georgi.[21]

The internal audit continued until February 20, 2014 when DSP shut down the CSU.

The DOJ and DSP Take Over the Investigation.

Developments over the course of the month of February resulted in DSP shutting down the CSU by putting a lock on the drug vault door. DSP locked the vault to "secure the integrity of that evidence at that time."[22]

DSP's investigation began with Sergeant McCarthy and his team working to move the evidence currently stored in the evidence vault to a secure evidence locker at DSP Troop 2.[23]

The DSP audit entailed the collection of the drug evidence held in the CSU vault, starting with the most recent piece of evidence submitted and working backwards to the oldest piece. As McCarthy collected the evidence, typically 25-

[20] A755. The defense has yet to see this document.

[21] *Id*.

[22] A244.

[23] A245.

50 pieces in a banker's box, he would then take it to James Daneshgar to log it into FLIMS. This was done to document that evidence in the vault was being moved from the CSU vault to the Troop 2 evidence locker.[24] As McCarthy recited cases to Daneshgar, FLIMS generated two evidence receipts, which McCarthy placed in the corresponding banker's box with the evidence.[25] Once boxes of evidence removed from the drug vault were logged into FLIMS, DSP transported the evidence back to Troop 2.[26] All told, DSP removed over 9000 pieces of evidence from the CSU, although OCME records only accounted for 8568 pieces.[27] The removal process started on February 21, 2014 and lasted until March 31, 2014.

With all of the evidence back at Troop 2, DSP began a massive audit process. A discussion of that process and its shortcomings are discussed in Part V of this brief.

Preliminary Findings Following the DSP Investigation and Audit.

By the time the DOJ released its "Investigation of Missing Drug Evidence: Preliminary Findings" (DOJ Report), the audit revealed 51 pieces of potentially

[24] A247-248.

[25] A248-249.

[26] A250.

[27] A273.

compromised evidence stemming from 46 separate cases.[28] Of those cases, thirteen were not subjected to testing at the CSU,[29] although it was later revealed that the DOJ Report was incorrect and several of the 13 cases had in fact been tested. Section VI of this brief discusses the 13 cases and their importance to the instant motions.

The DOJ Report is discussed elsewhere, but in broad strokes, the DOJ Report revealed the following shortcomings at the CSU:

- "Systematic operational failings of the OCME resulted in an environment in which drug evidence could be lost, stolen, or altered, thereby negatively impacting the integrity of many prosecutions," which include: lack of management, lack of oversight, lack of security, and a lack of effective policies and procedures;
- The systematic failures led to evidence in several cases being lost or stolen;
- "The loss of this evidence is not always traceable to any one individual."[30]
- A lack of policies, procedures, and protocols related to evidence intake or return.[31]

In addition to those 46 cases, the DOJ entered a *nolle prosequi* during the OCME hearings held in the State v. Braheim Reed/Hakeem Nesbitt matters due to a

[28] A107.

[29] A1115-1116.

[30] A77-78.

[31] A732.

discrepancy identified during the course of the hearing on a case that had been cleared as “no discrepancy”.

The investigation had led to the arrests of James Woodson and Farnam Daneshgar, and Chief Medical Examiner, Dr. Richard Callery, was suspended, and then ultimately fired. The investigation is ongoing.

III. THE IRWIN AND NYALA CASES: EVIDENCE HANDLING AND AUDIT PROCEDURES.

Both Mr. Irwin and Mr. Nyala were arrested and indicted for, among other things, Drug Dealing. The facts and circumstances leading up to their arrests and subsequent prosecution differ; however, the commonality in their cases lies within obvious discrepancies between the alleged quantity of drug evidence seized versus the quantity returned after testing.

Dilip Nyala's Case.[32]

The Grand Jury indicted Mr. Nyala on December 9, 2013 on charges of Aggravated Possession, Drug Dealing, and other offenses.[33] The Wilmington Police department initiated an investigation into Mr. Nyala's activities after a confidential informant approached Detective Pfaff of the Wilmington Police Department on October 1, 2013. The CI provided information about "Chin" who was alleged to sell heroin from his car and apartment. This information led to the Wilmington Police Department seizing Mr. Nyala and suspected drugs, which ultimately led to his arrest.

[32] In a separate proceeding, the Honorable Diane Clarke Streett granted Mr. Nyala's motion to suppress; the State filed a motion for reargument, which was denied.

[33] A19-22.

Submission of Evidence to the Narcotics Control Officer.

The Wilmington Police Department employs the use of a single drug locker on the second floor of the police station that is maintained by Corporal Aaron Lewis.[34] Corporal Lewis is responsible for storing, collecting, and logging all of the drug evidence brought through the Wilmington Police Department.[35]

When drug evidence is brought in by Wilmington police officers, it is stored in the drug locker.[36] Corporal Lewis then empties the locker and takes it to his office to log it into their computer tracking system[37] and in "the book."[38] The "Drug Tracking Input Form" generated in Mr. Nyala's case for the "A package" indicates that 48 grams of crack cocaine, 66 grams of marijuana,[39] and 17.14 grams of heroin were submitted to Corporal Lewis.[40] Only 2.6 grams of heroin were submitted in the "B Package."[41] The initial weights submitted in the Affidavit of

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[34] A177.

[35] *Id*.

[36] All supervisors have access to this locker. A178.

[37] A113-114.

[38] A177.

[39] For clarity's sake and without concession of any fact that must be proved at trial, this brief just refers to the drugs by their names, without the use of qualifiers like "purported" or "suspected."

[40] A185.

[41] A186.

Probable Cause and the corresponding evidence envelopes used in this case matches up with the quantities submitted to the CSU.[42] After logging the evidence, Lewis stored it in a drug safe[43] located in his office until taking it to the CSU for testing.[44]

Prior to transporting evidence to the CSU, Corporal Lewis generated an evidence submission report, which included Mr. Nyala's case.[45] Whatever cases he included on that sheet is the evidence that he took to the CSU.[46] According to Corporal Lewis' testimony, he also inspected the envelopes he was submitting for any signs of tampering or other discrepancies.[47] In this particular case, Corporal Lewis delivered the drug evidence in Mr. Nyala's case and others to the CSU on October 7, 2013 at 1:00 p.m.[48]

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[42] A11-18; A193-198.

[43] Only Corporal Lewis, his Captain, and the Chief of Police can access the safe in his office. A178.

[44] A177.

[45] A115.

[46] A179; A115.

[47] A180.

[48] A115; A187.

Subsequent Delivery for Testing to the CSU.

Areatha Bailey, an administrative assistant acting as a Forensic Evidence Specialist prior to Quinn's takeover, met Corporal Lewis at the door to the CSU. She then guided Corporal Lewis up to the evidence room by using a keypad to enter.[49] This comports with the evidence submission sheet that Areatha Bailey signed for the evidence submitted by Corporal Lewis on that day.[50] As Corporal Lewis submitted the evidence, he reviewed the contents of the box with the receiver, which included identifying every piece of evidence he brought to the lab.[51] This process did not include opening the envelopes.[52]

Notwithstanding an evidence submission sheet to the contrary, the submission receipt generated by FLIMS purports that the evidence submitted by Corporal Lewis to the CSU on October 7, 2013 was submitted to James Daneshgar at 3:36 p.m.[53] The chain-of-custody report also reflects that the evidence submitted by Corporal Lewis went to James Daneshgar by "hand-to-hand"

[49] A207.

[50] A115; A188-189.

[51] A189.

[52] A190.

[53] A116, A210.

transfer.[54] Corporal Lewis testified that he was "long gone" by then and did not submit the evidence to James Daneshgar on that day.[55] James Daneshgar explained during his later testimony that although Bailey received the evidence, it sat in the evidence locker, unlogged, until he got around to logging it into the system. And rather than adding a simple note to maintain the integrity of the chain-of-custody in FLIMS, Danesghar allowed an inaccurate version to persist. When asked why he would he would create a document that suggests he received the evidence when in reality he had not, James Daneshgar replied, "just the way we have done it, the way I was trained to do it."[56]

The Audit and Independent Testing Reveals Weight Discrepancies.

Mr. Nyala's case was not one of the cases flagged by the DOJ as tainted even though significant differences in weight were discovered after the audit and independent testing by NMS laboratories.

The audit team who examined the drugs in Mr. Nyala's case weighed the baggie of purported crack cocaine seized from Mr. Nyala at 44.5 grams. The initial seizure weight was 48 grams, which is noted on the audit sheet.[57] Even so,

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[54] A118.

[55] A211.

[56] A326.

[57] A119.

this case was not flagged as a "discrepancy" case. In fact, the auditors did not indicate one way or the other whether a discrepancy existed. And the details surrounding their weighing process, the calibration of the scale, the amount of time it took the auditor to weigh the substance or to review the contents of the package, just to name a few, are all not included on the audit sheet. Most troubling is the fact that the "time opened" is provided but the "time closed" is left blank,[58] and that the alleged marijuana seized is not even mentioned on the audit sheet.

The independent testing conducted by NMS also revealed a substantial discrepancy in the weight of the purported drugs seized in this case. According to the Wilmington Police Department, police officers seized 66 grams of marijuana from Mr. Nyala. However, the testing conducted by NMS concluded that the drugs only weighed 52.96 grams – 13.04 grams (20%) lighter than the initial seizure weight.[59] Again, DSP, its audit team, or the DOJ has not noted a discrepancy. With respect to the heroin seized, the Wilmington Police claimed to have seized 17.4 grams of heroin from Mr. Nyala but according to NMS, the aggregate total of heroin seized in this case only weighed 4.94 grams[60] - a 12.46

[58] A119.

[59] A120. There was much discussion of marijuana weights changing over time due to the nature of the plant material, but as will be discussed, cases were flagged with far smaller discrepancies than the one in Mr. Nyala's case.

[60] *Id.*

gram (72%) difference.[61] As to the crack cocaine seized, the Wilmington Police claim to have submitted 48 grams of crack cocaine to Corporal Lewis. During its audit, DSP determined that the weight was 44.5 grams.[62] NMS labs returned a weight of 41.87 grams—a 12.7% discrepancy. None of the officers or auditors involved in Mr. Nyala's case could provide a concrete explanation for the differences in weights.

Michael Irwin's Case.

In Michael Irwin's case, the Grand Jury indicted him on multiple counts of Drug Dealing, Aggravated Possession, and other offenses.[63] His charges arise out of a car stop by DSP on September 17, 2013 in which purported MDMA (ecstasy) and marijuana were seized. A subsequent search warrant resulted in the seizure of more contraband. Evidence seized by DSP is taken to various troops and ultimately picked up by a designated evidence custodian.

[61] The audit team never weighed heroin; their practice was to count baggies. In the field, officers estimate the weight per baggie rather than weigh the seized drugs. As such, the NMS weight is used.

[62] A119.

[63] A2-10.

The Evidence is Submitted to Sergeant McCarthy, the Chief Evidence Custodian.

Sergeant Scott McCarthy is the Chief Evidence Custodian for the DSP troops in New Castle County, Troops 1, 6, 9, and 2.[64] At Troop 2, Sergeant McCarthy has three other detectives who help him to manage the evidence locker. At the other troops, he is the sole evidence custodian.[65] At those troops, only the criminal lieutenant, the troop commander, and himself have access to the lockers. At Troop 2, the previously mentioned detectives, the troop commander and criminal lieutenant, and Sergeant McCarthy have access to the locker.[66] These lockers are secured by keycards and video surveillance systems.[67]

Sergeant McCarthy Delivered Irwin Evidence on Two Separate Occasions.

Similar to Corporal Lewis, Sergeant McCarthy was responsible for transporting evidence from the DSP troops to the CSU.[68] He would also visually examine the envelopes for signs of tampering prior to transporting the evidence[69] and generated a "case report" to track the movements of the drug evidence within

[64] A217.

[65] *Id*.

[66] A218.

[67] *Id*.

[68] A219.

[69] A220.

Troop 2.[70] Before delivering drug evidence to the OCME-CSU, Sergeant McCarthy generated an evidence submission worksheet, or as he described it, a "pre-inventory."[71]

The evidence submission sheets generated and submitted in Mr. Irwin's case establish that Sergeant McCarthy delivered the evidence in Mr. Irwin's case twice; once on September 24, 2013 at 1:10 p.m. to Kelly Georgi[72] and once on November 5, 2013 at 1:00 p.m. to James Daneshgar.[73] Between the two submissions, Sergeant McCarthy submitted the following evidence to the OCME-CSU:

- 25.3 grams of ecstasy, assigned number FE: 07936
- Two marijuana blunts, totaling .8 grams, assigned number FE: 08433
- An additional 30.9 grams of marijuana and a rock of ecstasy weighing 2.3 grams. These were assigned the number FE: 08434, but split into separate containers, A (marijuana) and B (ecstasy).

In a narrative that would become familiar, the evidence in this case was also improperly entered into FLIMS. The submission receipt and chain-of-custody

[70] A126; 134.

[71] A127; 221.

[72] A134-135.

[73] A126-127. The second delivery, on November 5th, was the result of a piece of evidence undergoing latent fingerprint testing. A228.

reflect that although Sergeant McCarthy submitted evidence on September 24, 2014, it was not logged into FLIMS until September 30, 2013 at 12:19 p.m.[74] As to the November 5th submission, the submission receipt and the chain-of-custody suggests that Sergeant McCarthy delivered the evidence on that date at 4:10 p.m. when in reality he delivered the evidence at 1:00 p.m. The incorrect entry of data into FLIMS was the norm, not the exception.

The DSP Audit.

The evidence seized in this case was also submitted to the DSP audit process. This particular audit team noted the time they opened the envelope and the time they closed it. Somehow the auditors were able to open the evidence envelopes, assess or weigh approximately 28 grams total of ecstasy and 30.9 grams of marijuana, and document their findings in one minute.[75] The auditors also noted that there were no discrepancies.

NMS Testing Casts Doubt on the DSP Audit, Again.

When DSP arrested Michael Irwin, the arresting officers allegedly seized 30.9 grams of marijuana.[76] However, subsequent testing by NMS resulted in a quantity of 16.01 grams (among three bags), a difference of 14.89 grams, or 48

[74] A136-137.

[75] A131.

[76] A1

percent. Even with almost half of the weight missing, the officers conducting the audit did not note a discrepancy on the audit form. How this did not raise a red flag is a mystery and as in Mr. Nyala's case, none of the officers involved in Mr. Irwin's case had a credible reason for an almost 50% drop in weight from the time of seizure to the time of weighing and analysis.

IV. THE EVIDENTIARY HEARING DEMONSTRATED THAT THE CRISIS AT CSU WAS FAR MORE PERVASIVE THAN WAS DISCLOSED IN THE DOJ REPORT.

The DOJ Report is part of the record in the Irwin-Nyala cases and need not be discussed at length in this brief.[77] Although fairly candid about the lack of oversight, shoddy procedures, unqualified personnel and other problems at the lab, the DOJ Report is a generally sanitized document that does not provide much specificity.

[77] Some of the more relevant findings from the DOJ Report that are not otherwise discussed in detail in this brief include:

- There is no video camera inside the drug vault; the footage from the camera outside the vault is overwritten weekly. A87.
- There were no established criteria for the distribution of the building alarm code to employees; one employee (Bailey) had the alarm code due to her odd hours. A88.
- Workers would report to work on weekends to find the alarm disabled. Some employees slept at the OCME, allowing them access after hours. A89.
- The key fob security system used for access to sensitive areas was essentially inoperable. It is housed on a laptop running Windows 95. All door entries show a date of January 1, 1970. A90.
- The door to the drug vault was routinely left propped open. A91.
- Virtually no background checks or drug testing is done for CSU candidates and employees. A93.
- Two employees (Woodson and Bailey) left previous jobs under suspicion of theft. A93-94.
- No manuals or procedures were issued or discussed. If manuals existed, they were not followed. A96.
- All kinds of old evidence was found that should have been returned or destroyed, with one package dating back to 1989. A102.
- One chemist repeated failed proficiency testing yet remained in his or her job. A103.
- Another chemist, Farnam Daneshgar, engaged in "dry-labbing," the practice of declaring a result of an examination without actually performing the examination. A106.
- FES James Woodson and chemist Farnam Daneshgar were indicted for their roles in the criminal activity. Their cases are pending. A107.

Some of the vagueness is certainly justified, as the criminal investigation is ongoing, both into the CSU and into Dr. Callery, the now-ousted medical examiner. But the general conclusions made in the DOJ report are inadequate to provide this Court to rule on the pending motions *in limine.* As such, this Court granted a hearing on the motions. A separate hearing was held as to the clients of the Public Defender that filed separate motions.[78] The testimony in these hearings provides a clearer, although not complete, picture of the utter chaos at CSU.

OCME-CSU Personnel.

Lieutenant Laird was placed in charge of the OCME criminal investigation. He testified about several OCME employees. The investigation confirmed that Dr. Callery was not involved in the CSU operation.[79] The CSU was managed by Caroline Honse, who in addition to not being competent, missed work frequently.[80] Honse was a manager who played favorites, and her favorite was Areatha Bailey.[81] Laird described the Honse-Bailey connection as "a very odd relationship."[82] Honse

[78] *State v. Braheim Reed,* ID No. 1310006496 and *State v. Hakeem Nesbitt,* ID No. 1310018849.

[79] A558.

[80] *Id.* Honse is the manager referred to in the DOJ Report as having "demonstrated management deficiencies." An audit in 2009 indicated the CSU lacked policies or procedures, but she survived that audit. A95.

[81] *Id.*

[82] A559.

always covered for Bailey when Bailey would miss long periods from work or when Bailey committed errors with the evidence according to lab employee Laura Nichols.[83] When Nichols saw Bailey engaging in irregular activity, she would not go to Honse, because "You don't go to Caroline if you want to keep your job."[84] Tellingly, as soon as Honse retired, Bailey began looking for a job and left CSU about two weeks later.[85]

Robyn Quinn takes over as manager of CSU.

After Honse retired and Robyn Quinn took over the CSU, Honse's office was cleaned out. The mold was removed and it was repainted.[86] According to Quinn, Honse's office was like an episode of Hoarders.[87] Boxes of drugs and evidentiary items were found in Honse's office.[88] Much of the evidence was still in police envelopes and pertained to closed cases.[89] Also found were numerous personal items belonging to Areatha Bailey.[90]

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[83] A1094.

[84] A1096.

[85] A1094.

[86] A801.

[87] A802.

[88] *Id.*

[89] A1003.

[90] A803.

Quinn implemented new policies and procedures as soon as she could.[91] The changes were in response to several troubling discoveries.

First, she discovered that too many people had access to the evidence locker.[92] An investigator, an employee from toxicology, and Areatha Bailey were observed by Quinn in the restricted office area that led to the evidence locker.[93] According to Quinn, only forensic evidence specialists and lab managers should have been in this area. Consequently, Quinn "locked down this area."[94] This included the office area and the entrance to the evidence locker itself.

Quinn also limited access to the evidence locker. Prior to these changes, employees had unfettered access to the OCME building and the CSU.

Areatha Bailey

Lieutenant Laird testified about Areatha Bailey at some length. Bailey was suspected of theft at her previous job, but was able to obtain employment at CSU without a background check.[95] Laird's investigation revealed she had actually

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[91] Quinn's power to implement new policies and procedures was limited until Caroline Honse retired. As such, formal policy and procedure changes were not introduced until November, 2013. Even then, any proposed changes had to go through the "chain of command." A730.

[92] A726-727; A757.

[93] A729.

[94] A730.

[95] A560.

admitted to the theft at one point.[96] Bailey did not remain an administrative assistant for long. Lacking in qualifications, she nevertheless quickly became a Forensic Evidence Specialist (FES), entrusted with receiving, handling, and distributing evidence.[97] She even assigned cases to chemists and acted as the liaison with the Department of Justice.[98] So by having access to both the DOJ and the evidence, she could learn from the DOJ which cases were pled out and not going to trial, then have unfettered access to those evidentiary items.[99] Over time, Bailey was able to determine through the DOJ exactly which cases were going to court and which ones did not need to be tested.[100]

Bailey was universally regarded as terrible at her job.[101] She made all kinds of mistakes. She missed work frequently.[102] She talked constantly on the phone about her kids' problems, her sex life, and notably, her financial difficulties.[103] Bailey had a habit of keeping evidence in a separate box she forbade others to

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[96] A564.

[97] A561.

[98] A562.

[99] A971.

[100] A1101.

[101] A562.

[102] A563.

[103] *Id.*

touch.[104] Bailey had the ability to find evidence in minutes that other employees had been looking for without success.[105]

Bailey herself admitted that she had a conversation with Woodson about how easy it would be to remove drugs from CSU without anyone knowing, according to Lieutenant Laird.[106] Moreover, Bailey, thanks to Honse, had unfettered access to CSU on the weekends and early in the morning on weekdays when no one else was present.[107]

Drug Handling and Chain of Custody.

The most basic lab management practices were not done at CSU. There had never been an inventory, or at least in anyone's memory.[108] The lack of an inventory certainly contributed to the extra 705 pieces of evidence that the State Police found during their audit, some of them very old.[109] There were no written procedures in place for CSU couriers, who picked up and dropped off evidence for downstate police agencies.[110]

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[104] A564.

[105] A565.

[106] A1004.

[107] A1000.

[108] A805.

[109] A806.

[110] A732.

As Robyn Quinn noted, "prior to me being in the position, there was really no documentation of anything that took place in the controlled substances unit."[111] Some of her more troubling discoveries include:

- Lengthy gaps in the chain of custody from when the submitting officer would bring the evidence to the OCME-CSU and it was logged into the paper chain of custody by Areatha Bailey, Kelly Georgi, or James Daneshgar to when it was ultimately logged into FLIMS.[112] According to Ms. Quinn, despite glaring chain of custody issues, this went unnoticed until January, 2014 and was chalked up to the fact "that was just the way it was always done."[113]

- Forensic evidence specialists would transfer evidence from the evidence locker to the general chemists' locker in the general lab. The chemist would then remove the evidence for the general locker and transfer it to their personal locker for testing. Despite this transfer, the chain of custody did not reflect the movement.[114] Ms. Quinn ordered the chemists to cease this practice immediately.[115]

- Kelly Georgi was never qualified to intake drug evidence in the CSU unit.[116] Areatha Bailey, an administrative assistant, also was responsible for evidence intake notwithstanding her lack of qualifications to do so.[117]

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[111] A743.

[112] A733. As testimony established, sometimes days would go by before an OCME employed logged the evidence into FLIMS.

[113] A733.

[114] A733-734.

[115] A734. Despite instructing chemists to stop using their personal lockers, chemists had to be brought in to the CSU during the DSP investigation and audit to empty their personal lockers of drug evidence.

[116] A734.

- Although the general lockers were locked with combination locks, a master list of the combinations was stored in an open drawer that was accessible by all of the chemists.[118]

- All the supposedly secure transport boxes used by the CSU couriers had the same combination, and everyone knew the combination.[119]

When asked if other shortcomings in the CSU would surprise her, Quinn responded, "What I have been through the last six months, nothing would surprise me."[120]

Data Mismanagement and the Problems with FLIMS.

FLIMS was a problem; misuse of FLIMS at CSU was a larger problem. FLIMS is far from a closed system. The DOJ can access it. Even police officers can access it remotely via the FA-Web system in what is termed a "pre-log" for evidence transfers.[121] As such, much of the access to the system is not even controlled by CSU, who is supposed to be tracking the chain of custody.

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[117] A766.

[118] A747-748.

[119] A999.

[120] A749.

[121] *Id.*

Like many data systems, FLIMS was not perfect. Quinn testified it was not user-friendly and has a lot of issues.[122] As was evident from the hearing, many of the entries in FLIMS were phony ones that were required simply to make the entry, rendering most FLIMS documents inaccurate. Sergeant McCarthy was asked by this Court as to a particular entry whether Daneshgar had ever gone to Troop 2 and returned evidence. "No, never," responded McCarthy. "I think he may have gone through the steps to *satisfy the program* so it could be returned to me."[123] So clearly FLIMS was a matter of the tail wagging the dog. This Court asked McCarthy how anyone would know whether the FLIMS form was correct or whether McCarthy's testimony was correct. McCarthy: "They [CSU] would have to explain that, Your Honor. Sorry."[124]

As established throughout the hearing, the chain of custody documents were flat out wrong most of the time, so these official documents are useless as a record of what really happened to the evidence. For example, Kelly Georgi signed for the Irwin evidence, but one would never know that from the FLIMS documents. They show that Daneshgar received it by hand-to-hand transfer six days later.[125] That

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[122] *Id.*

[123] A271-272 (emphasis added).

[124] A272.

[125] A135-137.

was because Daneshgar was away at orientation and Georgi, for whatever reason, "does not log in drug evidence," despite having the same job as Daneshgar.[126] The same phenomenon occurred with the Nyala evidence, in which Areatha Bailey signed for the evidence but it sat idle until Daneshgar logged it into FLIMS, thereby creating a patently incorrect chain of custody document.[127] This Court queried Daneshgar, "why would you take the responsibility of putting it in, even though you didn't accept it?"[128] Daneshgar: "just the way we have done it, the way I was trained to do it."[129]

Of course, there was no real reason for this garbage in-garbage out use of the FLIMS system. Bailey received the evidence; she could have logged it in.[130] Alternatively, Daneshgar could have simply added a note in the comment section for the FLIMS entry. But he did not do so: "I was never taught to do it that way."[131] Even after Quinn took over as manager and banned everyone but Daneshgar from receiving evidence from the police, the log entries were still made

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[126] A389.

[127] A321.

[128] A324.

[129] *Id.*

[130] A326.

[131] A324.

by other CSU employees, rendering all those chain of custody documents inaccurate.[132]

Finally, every single item of evidence of which the police took custody in March 2014 created an inaccurate entry in FLIMS. Each case reflects that Daneshgar brought the evidence to the State Police, which is of course wrong, but was "generated automatically through FLIMS," according to Daneshgar.[133]

It appears from the testimony that FLIMS was a somewhat cumbersome system of entries forced by dropdown boxes—it seems like the employees felt that had to "trick" FLIMS in order to make the entries happen. But accuracy was possible in FLIMS had anyone at CSU given it any effort. What emerges from the hearing is that CSU had a cavalier and almost disdainful attitude about establishing a genuine chain of custody historical document that would reliably reflect what actually occurred to the evidence as it worked its way through CSU.

Evidence Tape.

The presence of stray evidence tape became an issue in the case because the audit team noted that in some cases, police tape was used to reseal tampered envelopes to avoid detection. Lieutenant Laird testified that his investigation revealed that the criminal or criminals were using police evidence tape to reseal the

[132] A866.

[133] A385.

envelopes once they stole the drugs.[134] For example, in Case #3 in the DOJ Report, blue evidence tape was used, but it was a darker blue and obviously from a different batch than the tape used by the seizing officer.[135] And of course, in the Tyrone Walker trial that started it all, it was white medical examiner tape used to conceal the envelope access.[136]

It should go without saying that a drug storage area is no place for evidence tape to be. Yet Laura Nichols testified she saw at various times blue (State Police) tape, white tape and red tape around the storage area.[137] Robin Quinn testified that the CSU permitted police officers to borrow their red OCME tape to seal evidence envelopes that had become unsealed.[138] In fact, the CSU had two kinds of red tape: a thicker roll and a thinner roll. This Court asked Quinn if an envelope had red tape on it, could it be assumed that the envelope had been opened during the OCME audit. Quinn initially said yes, but then admitted that if the tape only said "evidence" then "you can't really" tell where the tape originated.[139] The forensic chemists used white tape.[140] The Wilmington Police use clear tape.[141]

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[134] A574.

[135] A949.

[136] A585.

[137] A1097.

[138] A779.

[139] A778.

Sergeant McCarthy testified that when he arrived at the vault to conduct the audit, he found a box containing different types of evidence tape, which he thought was unusual.[142] Although it would later be revealed that many of the package tampering was the result of a manipulation of tape, no one at CSU kept track of or inventoried the tape in there. It never occurred to Quinn until the revelations of the audit.[143]

To complicate matters further, the audit team used State Police blue evidence tape to reseal packages, the same color tape used to seal them in the first place in every case involving the State Police.[144]

The DOJ Report and the hearings exposed the great number of irregularities that plagued CSU. It was a rudderless and haphazard operation, bereft of command and control, or even policies and procedures. The chain of custody evidence demonstrates there was a complete lack of interest in generating accurate documentation—in fact, there seemed to be more interest in generating inaccurate documentation if it would satisfy the FLIMS system. The lack of controls over

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[140] A777.

[141] A214.

[142] A1053.

[143] A780.

[144] A290.

drugs, documentation, evidence tape, or anything else for that matter, was a perfect environment for rogue employees to seize on an opportunity. The complete lack of oversight coupled with the flawed data management system means the true extent of the malfeasance is not known, and probably cannot be known.

V. THE AMBIGUITY OF PURPOSE, LACK OF PROTOCOLS, AND INEFFECTUAL IMPLEMENTATION RENDERED THE STATE POLICE AUDIT A RATHER MEANINGLESS EXERCISE.

There was much testimony at the hearing about the State Police audit of the 9000 pieces of evidence that was once stored at CSU. Before examining the inconsistent accounts of the auditors and supervisors, it is worth stepping back to assess what this massive audit was supposed to accomplish.

Ambiguity of Purpose.

This was a DOJ investigation. This Court tried to get the CIO, Laird, to explain the level of DOJ involvement in the initial planning of the audit. Laird, amazingly, could not even recall what marching orders he was given by the prosecutors.[145] Laird seemed to think his directive was "looking to identify as quickly as possible any additional criminally compromised cases."[146] However, Sergeant Lloyd, who was the "conduit" between the criminal investigation and the audit, did not see it that way.[147] Yes, part of his agenda was to support the criminal investigation by identifying compromised cases.[148] But he also testified that the departmental purpose under the leadership of Captain Sawyer and others was to

[145] A1011.

[146] A958.

[147] A898.

[148] A906.

"salvage pending cases we had worked on as a law enforcement community."[149] After a planning meeting in the Troop 2 conference room, he came away with the following understanding:

> The purpose would be to create an audit so the reliability of the evidence that could eventually be introduced in a criminal courtroom in the State of Delaware would, again, create the reliability of the evidence.[150]

Although either purpose is perfectly legitimate, they cannot be reconciled. If the purpose of this project was to build a criminal case against drug thieves at CSU, then the audit would surely involve building on the facts of the Walker case, which involved undetected envelope tampering. Presumably, investigators would have peeled back tape to look for means of entry. But they were specifically told not to peel back tape.[151] Presumably, the police would perform forensic techniques on the evidence such as swabbing for DNA or fingerprints, probably beginning with the evidence touched by Areatha Bailey and James Woodson. And so on. There would be no priority for maintaining the integrity of the evidence for criminal prosecution of drug defendants; the priority would be to catch the bad actors at OCME.

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[149] A907.

[150] A908.

[151] A914.

Moreover, there would be no need for the big hurry that was presumably created by trial dates and speedy trial rights. Laird testified the audit had to be done "as quickly as possible."[152] Lloyd testified the audit "was put on the State Police pretty suddenly."[153]

On the other hand, if the purpose of the audit was to save prosecutions, then the precision of the audit was crucial. Priority would have been given to pending active cases, and old closed cases would have no relevance. Procedures would be laid down for the review of the case files, discussions with the seizing officers, determination of how the original weight or quantity was obtained, and the like. Then the measurement of the evidence would become the paramount consideration, and precise methods with clearly delineated, discretionless means for determining a discrepancy would be published. And of course, if the police are trying to maintain prosecutive merit, then the police would not be performing the audit—an outside agency would no doubt be the best practice. It would certainly be difficult for a police auditor to be objective when the goal is to "salvage pending cases."

The lack of clear direction from the top compromised the entire project. By trying to accomplish both purposes, the DOJ accomplished neither.

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[152] A958.

[153] A907.

Lack of Protocols.

There was testimony about a meeting to discuss the audit among the officers, but no one was very specific about what was discussed at the meeting.[154] Even when the Court asked questions, the usual response was along these lines, this one from Sergeant McCarthy:

> Basically a synopsis saying this is what we are going to do, open the envelope, evidence in there that has not been compromised or taped before, assess whether or not the contents mirror what is actually reflected on the face of the envelope. If everything is good, seal it back up and go.[155]

All the witnesses testified that there were no documents promulgated to establish a standard operating procedure.[156] As McCarthy testified, "we talked amongst each other. I think myself, Lieutenant Laird, and Captain Sawyer. It is something that developed pretty quickly because of the scope of what we were dealing with."[157] What emerged at the hearing was a description of the methodology. Teams of two officers, one examiner and one scribe, would examine the exterior of the evidence envelope for signs of tampering then open it. After weighing, counting, or just visually inspecting the evidence, the team had

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[154] A502.

[155] A298.

[156] *See, e.g.,* A1037, A485, A503.

[157] A1039.

discretion to determine if it was a discrepancy case or not, and then note that on the audit form.[158] If a discrepancy was noted, the auditor would alert the supervisor, usually McCarthy or Gary Taylor, who would then bring it to the CIOs, Laird and Wallace. Those individuals determined whether it was a "criminal compromise" or "administrative discrepancy."[159] Sergeant McCarthy used the term "criminal intent" to define whether a case went to Laird or Wallace.[160] So there were multiple levels of discretionary decisions being made by the police.

The issue of discretion yielded a dizzying array of inconsistent testimony. McCarthy said the individual officers had the discretion to decide what constituted a discrepancy.[161] Then he changed his answer at the next hearing in response to a query from this Court, and indicated they examined evidence in tandem with the supervisor and all were in close proximity.[162] Laird agreed with this Court's statement that there were no protocols in place to ensure it was conducted consistently, and testified it was a "use best discretion" system.[163] Auditor Maiura

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[158] *See, e.g.,* A899-901.

[159] A901.

[160] A1042.

[161] A294.

[162] A1058-1059.

[163] A581.

testified he based his decisions on his years of experience, but that a supervisor was present.[164] Taylor testified that as long as the weight was a reasonable approximation explainable by paraphernalia or scale issues, he would not declare a discrepancy.[165] Lloyd testified that the individual auditors were not permitted to decide whether to declare a discrepancy, but rather it was the supervisor's job to refer discrepancies to Laird and Wallace.[166] Corporal Parker also testified that it was the supervisor's role to determine whether a discrepancy was to be "classified administrative discrepancy versus criminal discrepancy."[167]

This Court finally asked CIO Laird, about the incongruous testimony regarding discretion. The Court noted that some officers gave sworn testimony that any discrepancy at all required them to bring it to the attention of the sergeant. Yet other officers testified they were given discretion to decide whether the discrepancy was significant or not.[168] In response to a hypothetical involving 14 grams versus 13.5 grams, Laird clarified, "they would not have to bring that to my

[164] A538.

[165] A509.

[166] A923.

[167] A937.

[168] A983-984.

attention."[169] The Court: "even though your sergeant just testified that they would."[170] Laird then tried to minimize Lloyd's role in the investigation, and stated that Sergeant Taylor understood that such cases need not be brought to Laird's attention.[171] So the leaders of the audit team were not on the same page, and neither were the individual auditors.

Regardless of how much or little discretion the auditors had, they still had no guidelines with which to work. When drugs were weighable, there was no guideline as to how much weight constituted a compromise.[172] That problem led to wildly inconsistent results. As noted previously, as to Nyala's marijuana, the seized amount was 66 grams and the NMS weight was 52.96 grams.[173] That is a discrepancy of 12 percent that would have been considered a discrepancy according to Auditor Gary Taylor.[174] But when Auditor Thomas Mauira was asked about the Irwin marijuana discrepancy of 51 percent (30.9 grams seized and an NMS weight of 16.01 grams), Maiura stated, "it could be. It's going to be right

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[169] A984.

[170] A985.

[171] *Id.*

[172] *See, e.g.,* A1043, A507.

[173] A520.

[174] A520.

in the kind of fine line in that," and stated that he would have to look at packaging material to decide.[175]

The entire concept of fine lines could have been taken off the table had the DOJ and police leadership simply established a protocol. In the untested yet compromised cases, discussed in Part VI of this brief, the discrepancies found included 2.5%, 10% and 17%. Are those cases that made the compromised list due partly to the serendipity of landing on the right auditor's table? It seems fairly certain that Maiura would not have considered these to be discrepancies.

Ineffectual Implementation.

As noted, there was a strong sense of urgency to accomplish the audit. As Sergeant Lloyd noted, referring to the various uncalibrated scales used in the audit, "There [*sic*] was, obviously, sprung on us at the last minute, we used scales that were available at the troop."[176] The question is, "why?" No witness testified as to why there was a rush to complete the audit. In an undertaking of this size, an extra day or two was warranted for protocol development, training, and logistical preparations.

Nowhere is the haphazardness of the audit more apparent than in the design and implementation of the audit form. For a form that was going to be used 9,000

[175] A543.

[176] A904.

times, it certainly makes for a weak document. At minimum, form fields were needed to record the following additional crucial information:

- Who was the auditor and who was the scribe.
- The defendant's name and the Case ID Number.
- A space to note any visible signs of tampering.
- The type, quantity, and weight of the drug as listed on the evidence envelope.
- The method used to audit the evidence: visual, count, or weight.
- Whether the case was escalated to a supervisor.
- Supervisor name and nature of review of the evidence.
- Whether the case was escalated to the CIOs.
- Signoff by auditor and supervisor (if applicable) and CIO (if applicable) when the evidence was closed and returned to storage.

With all that information missing, the audit form is not much use in creating the reliability and admissibility of the evidence, which according to Sergeant Lloyd was one of the audit's goals.

The audit form, however, was similar to FLIMS: not the best system, but it still could have worked if implemented properly. A look at Mr. Nyala's audit form,[177] for example, makes clear how little attention was paid. The envelope was

[177] A119.

opened at 8:43. It is not known when it was closed because no one recorded it. From the other audit forms in the Irwin-Nyala cases, it appears the auditors worked quickly. (It took Taylor only one minute to audit the MDMA evidence in the Irwin case.)[178] The form lists that the bag count of heroin was "OK" but that the cocaine was off by 3.5 out of 48 grams. What happened next? Was that flagged and brought to a supervisor? Did a supervisor decide that it was not a significant enough discrepancy? Taylor testified that he did not find a discrepancy, despite the weight difference.[179] That came only from his testimony because the Yes/No section of the form was left blank.

As to the Irwin MDMA evidence, Taylor simply circled "no discrepancy." He did not record the weight of the drugs. When asked what it actually weighed, he responded, "it weighed within an approximation of 25.3."[180] Since he did not simply write down the weight, there is no record of what it did weigh, or whether a supervisor was summoned to help evaluate Taylor's "approximation."

If the audit form was partly intended to establish reliability, it was poorly designed and implemented for that task. That was quite apparent in the Braheim Reed case, in which the count of heroin bags was off by 50 yet "no discrepancy"

[178] A131.

[179] A492.

[180] A525.

was still circled.[181] The auditor offered an explanation about a counting system that went awry,[182] but the reason for the miscount is less important as that it happened. Had the form forced the auditor to record the actual count, subject to supervisor review, mistakes like this would have been minimized.

Ultimately, it appears the audit may have been some help in the criminal investigation; the State is understandably tight-lipped about that. But as a tool for "salvaging cases" and "creating reliability," as was discussed in the State Police meeting, the audit was a failure.

[181] A1068-1069.

[182] A1073.

VI. THE CASES THAT WERE COMPROMISED DESPITE NOT BEING TESTED AT CSU FURTHER DEMONSTRATE THE COMPLETE LACK OF RELIABILITY OF CSU-HANDLED EVIDENCE.

The DOJ Report lists 51 compromised evidence samples arising out of 46 cases.[183] As noted, given the lack of standards and protocols for the audit, it is impossible to determine if these are the only 46 cases that are compromised, or if there are others. Further frustrating any meaningful analysis is that *no audit forms were ever completed for the compromised cases*.[184] For example, in DOJ case #2, 79 grams of marijuana are missing, but the lack of an audit sheet means there is no way to determine how many grams were seized in the first place.[185]

At the conclusion of the Irwin-Nyala hearing, this Court observed that among the 46 cases, ten were identified in the DOJ report as compromised yet were never tested by the lab. This Court noted there may be some value in determining what happened in those cases.[186] In response to a defense request for supplemental discovery, the State sent information about these cases to the undersigned. However, the State identified 13 compromised cases that were not

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[183] A107.

[184] An email from County Prosecutor to the undersigned dated August 19, 2014 states, in relevant part, "No audit sheets exist for the criminal discrepancy cases."

[185] However, Lieutenant Laird's testimony at the PD hearing is that there exists a spreadsheet about these cases. This spreadsheet was not provided to the undersigned, which underscores the selective nature of the information being provided by the DOJ in this case. A967.

[186] A682.

tested by CSU.[187] The information sent was far from complete. As noted, no audit sheets were done. Moreover, chain of custody documents, especially those from the pre-FLIMS era, do not exist. Finally, evidence transfer documents were not done by all submitting police agencies. In response to a query from the defense, the County Prosecutor sent the undersigned an email on August 19, 2014 confirming that "everything that exists" had been provided.[188]

Of course, the fact that cases not tested by CSU were nevertheless compromised while in CSU care is troubling and speaks volumes about the lack of reliability of the operation. Moreover, the lack of chain documentation on many of the cases is an inexcusable breach of protocol.

In another chain of custody issue, it was revealed at the PD hearing that many of the evidentiary items had been returned from OCME to the various police agencies then transported to DSP for the audit.[189] It turns out that the DOJ sent a memo to all the police agencies to turn in their evidence to Troop 2. The defense was not provided a copy of this memo.[190] There is no documentation of these transfers anywhere—or at least in the documentation provided.

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[187] A1115.

[188] As noted, "everything that exists" has definitely not been provided, including the Excel spreadsheet maintained by the audit team.

[189] A968.

[190] A1005.

- *Case #3—Newman and Redlich:* This was a 2010 drug bust in which pills of various types were seized. The State Police turned over 73 pills, including 58 Oxycodones.[191] The evidence receipts indicate Patricia Monaghan of CSU received the pills on May 3, 2010.[192] No police evidence submission worksheet was provided, even though Sergeant McCarthy indicated he did complete these worksheets on such cases, including Mr. Irwin's case.[193] There is, however, an evidence return worksheet indicating that McCarthy received this evidence back on August 13, 2013. Areatha Bailey's name is preprinted on the return form, but it is crossed out and replaced by Laura Nichols' name.[194] There is no indication that the count was off, but according to the DOJ Report, the 58 Oxycodones went missing somewhere along the way.[195] Chain of custody documents were not provided for this case.

[191] A1126.

[192] A1127-1128.

[193] A223-225.

[194] A1129.

[195] A107.

Laird testified that in this case, someone used a different shade of blue State Police tape to conceal the theft, and the pills were replaced with substitutes.[196]

- *Case #4—Sanders:* In this 2010 case, police seized multiple containers of pills, including 99 Oxycodone pills, which are missing, according to the DOJ Report.[197] According to the Troop 2 Evidence Form, these pills were taken to CSU on August 2, 2010. There is a written notation on the form that Troop 2 is "unable to locate the transfer sheet/receipt."[198] However, the CSU evidence receipt shows that Areatha Bailey received the evidence on September 16, 2010.[199] Nothing provided by the State explains why the delay from receipt to logging in occurred. A return worksheet indicates that Bailey turned the evidence back over to DSP on August 26, 2013.[200] No chain of custody paperwork was provided. Bailey's handling of the evidence, a task for which she was untrained and unqualified, emerges as a

[196] A949.

[197] A107.

[198] A1150.

[199] A1148.

[200] A1149.

commonality among many of the compromised cases. Laird testified this was another case in which the culprit used blue tape.[201]

- *Case #5—Kopp:* This was a 2010 Milford Police case in which the officer turned over to James Woodson on August 4, 2010.[202] Woodson's receipt to the Milford officer is dated 11:21 the next morning, August 5, 2010. Additionally it has the quantities of Oxycodone and Xanax reversed.[203] Police seized 60 Oxycodone and 100 Xanax pills, but the forms indicate the opposite. Woodson's forms indicate 100 Oxycodone pills and 60 Xanax pills. The forms indicate that Woodson had the ability to make edits to the documents.[204] In any event, all the Oxycodone is missing.[205] No chain of custody was provided. The pills were accessed by a cut made in the envelope that was concealed in a fold.[206]

[201] A950.

[202] A1157.

[203] A1158.

[204] A1164.

[205] A108.

[206] A952.

- *Case #24—Ferenbach:* This is another case in which Woodson signed for the evidence, this time on March 8, 2012.[207] No case information or chain of custody information was provided, but the DOJ Report indicates 502 Oxycodone pills went missing.[208] This evidence was removed by a cut in the envelope that was resealed with Scotch tape.[209]
- *Case #34—Hinton:* This is another Woodson case in which 165 Oxycodone pills went missing.[210] Sergeant McCarthy dropped off the evidence to Woodson on July 9, 2012.[211] But the chain of custody report says the evidence went to Jack Lucey, who apparently put it in the second floor evidence locker.[212] Then, 19 months later, Lucey took the evidence, reopened the envelope, photographed the evidence and resealed the evidence.[213] There is no indication whether Lucey determined a discrepancy. Ultimately, James Daneshgar turned the evidence over to the

[207] A1194.

[208] A110.

[209] A954.

[210] A111.

[211] A1203.

[212] A1204.

[213] *Id.*

State Police on February 24, 2013 as part of the audit. Laird testified the audit team was unable to determine how entry was made.[214]

- *Case #38—Price:* This is another Woodson case, in which 118 Oxycodone pills were missing.[215] The evidence is turned over to Woodson on November 5, 2012, but not logged in until three days later.[216] This was a case in which Lucey handled the evidence in February 2012. Daneshgar turned the evidence over to the audit team on March 24, 2012.[217] There are two chain of custodies in FLIMS. On the chain prepared on February 25, 2014, Lucey's description of opening the envelopes and photographing their contents.[218] However, in July 2014, the chain of custody was printed again, this time with no mention of Lucey's activities. There is no explanation why the official chain of evidence was edited to remove the Lucey entries.[219] Laird testified that once the envelope was opened, a small hole was found in the "v fold" of the envelope.[220]

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[214] A954.

[215] A111.

[216] A1213-1214.

[217] A1214.

[218] A1216.

[219] *Id.*

[220] A955.

- *Case #41—Davis and Weiss:* This is another Woodson case. The Oxycodone was brought to CSU and signed for by Woodson on March 21, 2013, but not logged into FLIMS until March 25, 2013.[221] Like a great many cases, this evidence sat around for days without being logged in. Moreover, the FLIMS chain of custody report shows Laura Nichols returning the evidence to McCarthy on December 24, 2013, but it was James Daneshgar who actually did so.[222] This is another case that upon further examination revealed a cut in the envelope and tape used to reseal it.[223]
- *Case #45—Immediato:* In this case, 2.6 pounds of marijuana and 170 Oxycodone pills went missing.[224] It appears from a handwritten note on the Troop 2 form that it was the Oxycodone that caused the discrepancy.[225] However, converting the 1871 grams seized to English measurements, it appears 63% (2.6 of the 4.12 pounds seized) was the amount of marijuana missing. This case featured the usual slipshod chain of custody work by CSU. The oft-mentioned Areatha Bailey signed for the evidence on August

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[221] A1232.

[222] A1231-1232.

[223] A955.

[224] A112.

[225] A1252.

8, 2013,[226] but it was Laura Nichols who logged it in by "hand to hand transfer."[227] The chain of custody form shows the usual multiple transfers around CSU. The Troop 2 form indicates that on January 28, 2014, the evidence was returned back to Troop 2 by Daneshgar due to a discrepancy with the Oxycodone.[228] There is nothing in the CSU chain of custody reflecting this transfer.[229] But somehow it ended up back at CSU, because the chain of custody reflects that it was removed from storage by Daneshgar on March 6, 2014 and turned over to the State Police.[230] Laird testified that this evidence was stolen from the brown paper bag and resealed with tape.[231]

- *Case #46—Adrian Baynard:* This marijuana case is interesting because of the amount of marijuana that triggered a discrepancy. Although there is no audit form, information from the Affidavit of Probable Cause[232] and the DOJ Report[233] demonstrate that 1.8 pounds disappeared from the 14.2

[226] A1259.

[227] A1260.

[228] A1252.

[229] A1261-1265.

[230] A1265.

[231] A956.

[232] A1267.

[233] A112.

pounds of marijuana seized, for a discrepancy of 12 percent. As such, this case made it into the DOJ Report. But with no established standards for the audit, there is no telling what cases were left out of the report. For example, as to Nyala's marijuana, the seized amount was 66 grams and the NMS weight was 52.96 grams.[234] That is a discrepancy of 8 percent that would have been considered a discrepancy according to Auditor Gary Taylor.[235] But when Auditor Thomas Mauira was asked about the Irwin marijuana discrepancy of 51 percent (30.9 grams seized and an NMS weight of 16.01 grams), Maiura stated "it could be. It's going to be right in the kind of fine line in that."[236] He went on to discuss packaging material and the like which would have influenced his decision. Obviously, the subjective nature of the audit makes the distinction between a compromised case and an uncompromised case rather meaningless.

- *Case #36—Foster:* This case is listed in the DOJ Report as not tested at CSU[237] but was in fact tested, as pointed out in the transmittal letter.[238] This

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[234] A520.

[235] A520.

[236] A543.

[237] A111.

[238] A1115.

is another Woodson-Bailey case in which Woodson received the evidence and Areatha Bailey handled it downstream.[239] The evidence was tested by Theresa Moore, and then Bailey took it from the Evidence Pass Thru and returned it to storage. Laura Nichols then took it from storage and returned it to the police. It is not clear if this was one of those odd circumstances that Laura Nichols testified about: Nichols looking for evidence unsuccessfully and then Bailey able to find it in minutes.[240] Or perhaps it was one of the cases in which Bailey had her own box of evidence "no one else could work on."[241] In any event, only Bailey and Nichols handled the evidence after testing.

- *Case #42—Harry Snow:* This 2013[242] case presents the opposite scenario: The DOJ Report states the evidence was tested[243] but in fact it was not. Jack Lucey signed for the evidence on March 20, 2013,[244] but in typical CSU

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[239] A1282.

[240] A1098.

[241] A1095.

[242] The State provided an Affidavit of Probable Cause for a 2004 case for the same defendant (A1234-1235), but that seems to have been in error. All the other paperwork refers to the 2013 case.

[243] A112.

[244] A1239.

fashion, the evidence was logged into FLIMS five days later by Woodson, purportedly by hand to hand transfer.[245] The Complaint[246] memorializes a seizure of 280.5 grams, while the DOJ Report lists 28 grams missing.[247] So in this case, a 10 percent discrepancy was enough to compromise a case. So despite the testimony at the hearing from Detective Randy Pfaff, who investigated Mr. Nyala, about all the ways in which police weights can be inaccurate,[248] at least in the Snow case, a 10 percent discrepancy was found to be significant. Without an audit form, it is not possible to determine which investigator audited the Snow case. As to the chain of custody, not surprisingly, Areatha Bailey handled the evidence, as did Daneshgar.[249] Laird did not provide any details about this case as it is "part of the pending criminal investigation."[250]

- *Case #19—Neal, Sage and Trigg:* It is difficult to tell what happened in this case due to the unavailability of paperwork. The DOJ Report indicates that

[245] A1241.

[246] A1244.

[247] A112.

[248] A670-672.

[249] A1241.

[250] A955.

280 grams of marijuana went missing (17% of the 1621 grams seized[251]), but not the 54 Oxycodone pills.[252] The Report also indicates the drugs were tested, but in fact they were not, according to the State's letter.[253] As is usually the case, the CSU paperwork does not match up to the police paperwork. The NCCPD form notes the evidence was taken from their locker and turned over to OCME on December 21, 2011.[254] However, the CSU form states that Areatha Bailey received the evidence on December 23, 2011. This evidence was returned to NCCPD on June 19, 2013, but checked out again and apparently brought to Troop 2 on March 24, 2014.[255] No chain of custody was provided, so other than the usual unreliable paperwork and the presence of Areatha Bailey, it is difficult to tell what happened. Laird believes that more substitute tape was used, but he cannot be sure.[256]

- *Case #20—Wolf:* Almost no paperwork was provided for this case. According to the DOJ Report, this evidence was tested, but according to the

[251] A1181.

[252] A109.

[253] A1115.

[254] A1185.

[255] A1186.

[256] A953.

State it was not. The missing evidence is 150 Oxycodone pills, which is the entirety of the evidence.[257] All that can be determined from the limited information provided is the usual mess with transfers. According to Troop 2, the pills were turned over to James Woodson on December 22, 2011.[258] But according to the CSU documents, it was in fact received by Areatha Bailey.[259] A handwritten note on the Troop 2 form says the evidence was later returned by Bailey to Troop 2 on July 23, 2013.[260] Laird had no opinion as to how this envelope was entered.[261]

- *Case #44—Foxmoor:* Police seized 39.4 pounds of marijuana[262] and for some reason the DOJ report is not specific about what is gone. The DOJ estimates 1-3 pounds.[263] That means the evidence was flagged for a loss amount of 2.5% to 7.6%, which is ironic given all the testimony at the hearing about how marijuana dries out and becomes lighter in storage.

[257] A109, A1187.

[258] A1187.

[259] A1188.

[260] A1187.

[261] A953.

[262] A1247.

[263] A112.

Clearly some auditor (and it is not known who, due to the lack of audit forms) thought it was significant.

This is another case in which the DOJ Report indicates the evidence was tested by CSU but in fact the State now says it was not.[264] Moreover, despite this case occurring in the FLIMs era, there is only one piece of chain of custody paperwork, with no evidence transfer forms. This is mystifying, because the State has the ability to print FLIMS form when needed. The forms for Mr. Irwin, for example, were printed on June 19, 2014 by Brianna Oaddams of the Department of Justice.[265] According to the scant information available, this was yet another case in which Areatha Bailey and Daneshgar handled the evidence before it being turned over to the State Police for the audit.[266] Laird testified that both blue and white evidence tape was used to reseal the envelope after the drugs were stolen.[267]

The foregoing revelations further demonstrate the utter morass that was the CSU. They also show that the bad actors at the CSU were able to steal evidence that was unopened by chemists and somehow conceal the evidence of their crimes. To be sure, untested evidentiary samples were just as vulnerable to malfeasance as

[264] A112, A1087.

[265] A137.

[266] A1251.

[267] A956.

were the tested samples. Many other observations can be made about the foregoing untested compromised cases, but chiefly among them are:

- The DOJ Report contains many inaccuracies and even those statements which are accurate are utterly unsupported by documentation.
- The incompetent bungling of the handling of evidence transfers and the attendant paperwork was the norm, not the exception.
- The audit team's failure to complete audit reports for the compromised cases absolutely defies logic and renders the audit just about pointless as an investigative tool. The audit raises more questions than it answers.
- Areatha Bailey, James Woodson, and Jay Daneshgar had their hands on just about all the untested compromised cases.
- Although many of the items were shuttled back and forth after being returned to their police agencies, no one seemed to notice any tampering until the auditors started to look much more closely. In some cases, they were able to find the entry point. In others, there were not.
- Clearly there was a supply of unauthorized police evidence tape available to the culprits.
- The audit team's nonexistent standard operating procedures caused items with well under 20% discrepancies to be flagged as compromised, while testimony at the hearing made clear that some auditors would not have

flagged the exact same sample. Query how many other cases that were just as compromised if not more passed muster solely on the whim of the auditor unconstrained by any rules.

- No meaningful distinction can be drawn between compromised cases that were tested and compromised cases that were not. Whether it was by the use of extra evidence tape or other means, the bad actors were able to avoid detection.

These observations make clear that the crisis at the CSU was so severe that any evidence passing through that quagmire cannot be considered reliable and admissible.

VII. BECAUSE THE ROOT CAUSE OF THE EVIDENCE BREACH HAS NOT YET BEEN DETERMINED, THE EVIDENCE HELD AT CSU CANNOT MEET THE THRESHOLD FOR INTEGRITY AND RELIABILITY.

Expert witness Joseph Bono is uniquely qualified to opine on the Delaware drug lab breach.[268] He has been lab director at numerous labs, including for the DEA and the Secret Service.[269] He is a past president of The American Academy of Forensic Science,[270] and was one of the founders of The Strategic Working Group for Analysis of Seized Drugs (SWGDRUG), which sets the standard for best practices.[271] He served on the Board of Directors of the American Society of Crime Lab Directors, which is an accrediting body.[272] Both before and after retiring from the DEA, Mr. Bono has conducted investigations and audits into troubled drug labs.[273]

After his long career in the DEA and Secret Service, Mr. Bono became an independent forensic consultant. He frequently provides consultation to drug labs

[268] Mr. Bono's *curriculum vitae* is at A164-A169.

[269] A592.

[270] *Id.*

[271] A593.

[272] A598.

[273] A608.

seeking accreditation, for example.[274] The defense in the Irwin-Nyala cases retained Mr. Bono to conduct a review of pertinent materials[275] and to bring his expertise to bear on an analysis of the Delaware lab situation. Mr. Bono also attended most of the July 2014 hearing.[276] He authored an expert report[277] and testified at the Irwin-Nyala hearing. Ultimately, Mr. Bono concluded that the evidence stored at the CSU, including the Irwin-Nyala evidence, is unreliable due to the lab's failure to ensure standards for forensic integrity.[278]

Standards the CSU Failed to Meet.

The CSU was required for accreditation to adhere to ISO/IEC 17025: General Requirements for the Competence of Testing and Calibration Laboratories, which is of course an international standard promulgated by the International Organization for Standardization.[279] Even before the discovery of criminal activity, the CSU was far out of compliance with these standards.

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[274] A165.

[275] A153.

[276] A596.

[277] A152-A163.

[278] A154.

[279] A600.

Standard 5.8.4 addresses the appropriate procedures required for the handling, storing and securing of evidence.[280] Due to the utter lack of security, the unfettered access to the vault, and general lack of control, Mr. Bono opined that the CSU failed to meet this basic operational standard.[281] Much of Mr. Bono's opinion is based on shortcomings addressed elsewhere in this brief, but he found the discovery of 705 unaccounted-for pieces of evidence particularly troubling. Not only did that signify that the evidence tracking system failed, but it also demonstrated that the CSU neglected to conduct basic functions such as an annual inventory of all evidence.[282] He testified:

> But when you see that many cases in a vault that are unaccounted for, that raises the possibility that things, additional things could go wrong. In other words, someone could take the evidence, no one would ever know about it because it is not in the system, which leads then to who is in charge? Who is keeping track of all this? Are the people responsible for that vault doing their jobs? Is laboratory management doing their own jobs?[283]

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[280] A154.

[281] A602. The corollary standard under Forensic Quality Systems International (FQSI), which accredited the lab, is 25.5.3.4, which states in relevant part:
(a) Access to the operational area of the laboratory shal be controllable and limited.
(b) Evidence storage areas shall be secure to prevent theft or interference and there shall be limited, controlled access. The storage conditions shall be such as to prevent loss, deterioration, and contamination and to maintain the integrity and identity of the evidence. This applies both befor ena dafter examinations have been performed. A154.

[282] A614.

[283] A616.

He further described the conditions which would allow over 700 cases to be unaccounted for:

> There was no oversight of what was—obvious there was no oversight of what was happening in the laboratory. If there were, the evidence tracking system would have been accurate. The chain of custody documents would have been accurate. The weights would have been accurate.[284]

Another basic standard the CSU failed to meet relates to data management. Standard 4.13.1.4 states, "the laboratory shall have procedures to protect and back up records stored electronically and to prevent unauthorized access to or amendment of those records."[285] Mr. Bono was particularly troubled by the Delaware system called FA-Web, which allowed police officers access to FLIMS to enter data.[286] The access to FLIMS was corrupted by the add-on FA-Web system, which subverted the requirement that only authorized lab workers have province over the data.[287] In all his years of experience, Mr. Bono has never heard of a system like FA-Web.[288]

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[284] A616.

[285] A155.

[286] A617-618.

[287] A617.

[288] A618.

As to all the various inaccuracies in FLIMS documents demonstrated at the hearing, Mr. Bono testified that systems are run by humans and mistakes will occur. However, "when you are dealing with human beings, there has to be a provision to correct a mistake when it is made. You can't just let it sit there."[289] And of course, the hearing in these cases did not only mistakes, but outright false data entry. As Mr. Bono testified:

> False documentation, in other words, dates, times, people who received evidence, where evidence was stored, if that is not correct, that information is flawed, the entire system is flawed. There is only one system worst [*sic*]…than no system and that is a system that generates false documentation.[290]

Ultimately, having reviewed all the documentation, and attended most of the hearing, Mr. Bono reached this conclusion:

> Because the problems that were identified by the Delaware State Police were so pervasive, because of the inaccuracy of the laboratory information management system, anything [sic] that was discovered, anything that was in that vault that was being tracked I believe is subject to scrutiny, as such is not reliable.[291]

The Lack of a Known Root Cause Amplifies the Unreliability of the Evidence.

The CSU's obligations after the discovery of stolen evidence at the Tyrone Walker are clearly set forth in ISO 17025. Standard 4.11.1 requires the lab to have

[289] A621.

[290] A619.

[291] A622.

a policy and procedure set up for implementing corrective action when nonconforming activities have been identified. Standard 4.11.2 mandates, "the procedure for corrective action shall start with an investigation into the root cause(s) of the problem."[292] Mr. Bono agreed that the actions taken by the State Police to shutter the lab and stop further testing were good initial steps.[293] However, the root cause or causes have not yet been determined.[294] Mr. Bono agreed that it would be possible to correct a corrupt lab if the root cause, such as a rogue chemist, was isolated and all those cases separated.[295] But in Delaware, the root cause of the theft in 46 or so cases identified by the State Police has not been found.[296]

Even had the root causes been found, the CSU had no procedure in place, although it was required by ISO 17025, to implement corrective action.[297] There is no ISO standard for how to standards to employ when auditing a problem lab.[298] But Standard 4.11.1 requires the lab to have a procedure in place, or a flow sheet as

[292] A154.

[293] A605-606.

[294] *Id.*

[295] A623.

[296] A623-624.

[297] A610.

[298] *Id.*

Mr. Bono put it, for auditors to conduct the audit and document their findings.[299] So when the State Police conducted its audit, "there was no standard to determine what was a deficiency. We heard terms like approximate weighing and what we thought was best, and it just seems like there was [sic] no guidelines in place that people were expected to follow."[300] Mr. Bono believes that given the derelictions in the CSU, such as the 700 random pieces of evidence, the number of discrepancy cases is higher than listed in the DOJ Report.[301] He found that the simple circling of Yes or No on the audit form was insufficient without any explanation of why that conclusion was reached by the auditor: "Yes or no is not the way. There has to be an explanation that justifies yes or no. [In] a forensic laboratory setting that is especially important.[302]

Finally, Mr. Bono also opined that the subsequent testing of evidence at NMS Laboratories, although "a noble cause," did not address that problem of what was happening to the evidence that was being stored in the vault.[303] As he stated in

[299] A609-610.

[300] A610.

[301] A613.

[302] A612.

[303] A627.

his report, "no amount of restesting on the back end of a process can address a serious problem on the front end of the same process."[304]

Much of the cross-examination of Mr. Bono, and this Court's questioning of Mr. Bono established that the audit procedure did not affect the level of reliability of the Irwin-Nyala evidence.[305] Or as the State put it, Mr. Bono's opinions of the reliability of the drugs "are based on the Medical Examiner's Office's failures, not the integrity of the evidence envelope as to whether or not there had been tampering."[306] Mr. Bono's opinion pertained to the Irwin-Nyala cases as it does to all the cases: "Until a cause analysis has been conducted to determine not only what happened, but also the extent of what happened, no evidence handled by past OCME employees, or stored in the OCME laboratory, can be trusted."[307]

Mr. Bono used the analogy of the recall of Tylenol years ago. When the problem with poisoned Tylenol was identified, the company pulled everything off the shelf. A cause analysis had to be undertaken. He testified, "before they proceeded they had to do a cause analysis to figure out what happened, instead of taking a risk chance that in the absence of identification of a cause something

[304] A162.

[305] *See, e.g.,* A652.

[306] A653.

[307] A162.

could have gone wrong, they just pulled everything back."[308] Clearly, Mr. Bono's perspective based on his years in the field is that none of the evidence from CSU can be relied upon; it is as unreliable as the potentially tainted Tylenol that was on store shelves before the recall.[309]

[308] A653.

[309] *Id.*

VIII. THE APPLICABLE LAW

These pretrial motions *in limine* seek exclusion of the drug evidence on two independent grounds. The first is that the proffered evidence cannot meet minimum standards for reliability and this Court should thereby exclude it. The second is that the State cannot meet its burden of proving the chain of custody. Both grounds for exclusion have ample support in the law.

*Relevance and Reliability Are Required for the Admission of Drug Expert Testimony***.**

The State's prosecution of drug dealing under Title 16 must include evidence that the substance underlying the indicted charge does in fact contain the drug (and the weight of the substance, if applicable). The State must present such evidence through "a chemist or other qualified witness."[310] For example, in *Seward v. State,* the Delaware Supreme Court found error when a police officer was allowed to testify as a lay witness that a substance "looked like crack cocaine."[311] Noting that the identification of illegal drugs is not within the common knowledge of a layperson, the *Seward* court held that the officer improperly testified as an expert.[312]

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[310] *See* 16 *Del C.* § 4751D(b).

[311] *Seward v. State,* 723 A.2d 365, 372 (Del. 1999).

[312] *Id.*

By operation of D.R.E. 702, this Court's gatekeeping function requires it to determine whether the expert testimony presented is both "relevant and reliable."[313] That inquiry hinges on whether the testimony (1) is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[314] When courts analyze proffered evidence, they must focus on "the validity and the evidentiary relevance and reliability of the principles that underlie a proposed submission."[315]

Delaware, moreover, requires all admissible evidence to be both relevant and reliable.[316] Under Delaware Rule of Evidence 401, relevancy is interpreted to consist of both materiality and probative value."[317] To meet the criteria of materiality, evidence must be of consequence to the action, and it must be probative in that it advances the likelihood of the facts asserted.[318] Courts must declare inadmissible any evidence failing to meet this standard.[319] Moreover, an

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[313] *State v. McMullen,* 900 A.2d 103, 112 (Del. 2006).

[314] D.R.E. 702.

[315] *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 843 (Del. Super. 2000).

[316] D.R.E. 401, 402.

[317] *Getz v. State*, 538 A.2d 726, 731 (Del. 1988).

[318] *Farmer v. State*, 698 A.2d 946 (Del. 1997).

[319] D.R.E. 402.

inquiry into probative value includes a simultaneous assessment of the reliability of proposed evidence.[320]

Preventing unreliable evidence from reaching the trier of fact is a core function of Delaware's evidentiary rules. The Rules are modeled after the Federal Rules of Evidence,[321] which are designed to ensure that "only reliable evidence is admitted at trial."[322] Like scientific evidence or eyewitness testimony, "critical physical evidence" must be reliable before it can be utilized in court.[323]

The United States Supreme Court has declared that "State and Federal governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial."[324] As the Delaware Supreme Court has often held, it should be the trial court that ultimately

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[320] *Barnes v. State*, 858 A.2d 942, 944 (Del. 2004) ("The trial judge viewed both the original time-lapse video and the converted tape before ruling on its admissibility. The trial judge determined that the converted tape was a relevant, reliable and fair depiction of the events as they occurred and that the tape's probative value substantially outweighed any resulting prejudice to Barnes.").

[321] *Manna v. State*, 945 A.2d 1149, 1157 n.14 (Del. 2008).

[322] Nathan J. Buchok, *Plotting a Course for GPS Evidence*, 28 Quinnipiac L. Rev. 1019, 1056 (2010).

[323] *See Johnson v. Phelps*, 2009 WL 4726597, at *2 (D. Del.) (citing *Hubbard v. Pinchak*, 378 F.3d 333, 339-340 (3d Cir. 2004) ("A petitioner establishes actual innocence by asserting 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial,' showing that no reasonable juror would have voted to find the petitioner guilty beyond a reasonable doubt.").

[324] *U.S. v. Scheffer*, 523 U.S. 303, 309 (1998).

determines the reliability of evidence. In fact, the judge must take an "active role in ruling on the admissibility of evidence."[325]

The State Must Establish Chain of Custody to Admit Drug Evidence.

Delaware requires proper authentication of evidence prior to its admission.[326] Specifically, a party offering an item into evidence at trial must present "other evidence sufficient to support a finding that the matter in question is what its proponent claims."[327] The decision of whether to admit evidence is generally within the court's discretion.[328] The State generally seeks to obtain admission of drug evidence by "establish[ing] a 'chain of custody.'" [329] Establishing the chain validates the identity and integrity of the evidence by tracing its "continuous whereabouts," understood as an item's "physical location from the time of the commission of the underlying offense until the time of trial."[330]

When proving a complete chain of custody, the State is "obliged to account for its careful custody of evidence from the moment the State is in receipt of the

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[325] Patrick C. Barry, *Admissibility of Scientific Evidence in the Remand of* Daubert v. Merrell Dow Pharmaceuticals, Inc.*: Questioning the Answers,* 2-Fall Widener L. Symp. J. 299, 311 (1997).

[326] D.R.E. 901.

[327] *Trioche v. State*, 525 A.2d 151, 152 (Del. 1987).

[328] *Id.* (citing *Ciccaglione v. State*, 474 A.2d 126, 130 (1984)).

[329] *Id*; *Whitfield v. State*, 524 A.2d 13, 16 (Del. 1987).

[330] *Whitfield*, 524 A.2d at 16.

evidence until trial."[331] Moreover, the chain of custody consists of individuals who have had "physical custody of the object."[332] Those individuals constitute the "links"[333] in the chain that must be established with "sufficient certainty."[334]

When admitting evidence over the objection of a party challenging the chain of custody, the Court must find that there is a reasonable probability that the evidence offered has been properly identified and that no adulteration or tampering has occurred."[335] The State bears the burden of establishing the chain of custody.[336] Establishing a chain of custody means eliminating the possibilities of misidentification or alteration; the State must "convince the Court that it is improbable that the … item … has been tampered with."[337] *Whitfield*[338] announced three additional factors that Delaware courts consider relevant for

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[331] *Tatman v. State*, 314 A.2d 417, 418 (Del. 1973).

[332] *State v. Croce*, 1997 WL 524070, at *2 (Del. Super.) (citing Edward J. Imwinkelreid et al., Courtroom Criminal Evidence 121 (1993)).

[333] *Id. State v. Croce*, 1997 WL 524070, at *2 (Del. Super.) (citing Edward J. Imwinkelreid et al., Courtroom Criminal Evidence 121 (1993)).

[334] *Clough v. State*, 295 A.2d 729, 730 (Del. 1972).

[335] *Murphy v. State*, 632 A.2d 1150, 1153 (Del. 1993).

[336] *Demby v. State*, 695 A.2d 1127, 1131 (Del. 1997).

[337] *Trioche*, 524 A.2d at 153 (citing *Tatman*, 314 A.2d at 418); *Clough*, 295 A.2d at 730.

[338] *Whitfield v. State*, 524 A.2d at 16.

analyzing the chain of custody.[339] Those factors are "the nature of the article, the circumstances surrounding its preservation in custody, and the likelihood of intermeddlers having tampered with it."[340]

The "nature of the article" includes drug properties such as drug consistency and weight.[341] The "circumstances surrounding…custody" relate to information about how the drug was secured in the field, including how it was marked for identification, and how it was stored subsequent to field testing and prior to testing by a medical examiner.[342]

Proving that "intermeddlers" tampered with evidence under the third *Whitfield* factor does not require a showing of malice. "Inadvertent" tampering can impair the establishment of a chain of custody.[343] Ruling out intermeddling requires demonstrating that "there exists a reasonable probability that no tampering had occurred."[344] Even an "opportunity" for evidence tampering can render a chain of custody incomplete.[345]

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[339] *Trioche,* 524 A.2d at 153.

[340] *Whitfield*, 524 A.2d at 16 (citing *United States v. Gay*, 774 F.2d 368, 374 (10th Cir. 1985)).

[341] *Loper v. State*, 1994 WL 10820, *4 (Del. Jan 3, 1994).

[342] *Id.* at *4-5.

[343] *Loper,* 1994 WL 10820 at *5.

[344] *State v. Bright*, 1998 WL 283391, at *14 (Del. Super.) (citing *Trioche,* 525 A.2d at 153).

[345] *Loper*, 1994 WL 10820 at *2, 5.

Loper v. State demonstrates a failed chain of custody due to possibly inadvertent evidence tampering. In that case, seized drug evidence had been placed in a filing cabinet accessible by "[p]eople who needed files" and was subsequently marked with the defendant's name by an unknown person.[346] The Court found "[t]his chain of events…problematic" and ultimately ruled that the State failed to establish a chain of custody.[347] The Court found that the State failed to eliminate a "reasonable probability" of the risk of misidentification in that particular link of the chain.[348] It concluded:

> People who needed files had access to the filing cabinet containing envelopes full of drugs seized on the night in question. Although it is unlikely that police officers and employees of the police station tampered with the evidence, it is not unlikely that the drugs seized on the night in question could have easily been confused.[349]

As such, the burden is on the State, along every link in the chain of custody, to prove the absence of taint. When the State fails to do so, as *Loper* demonstrates, the evidence must be excluded, even if the possibility of tampering is weak.

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[346] *Loper,* 1994 WL 10820 at *5.

[347] *Id.*

[348] *Id.*

[349] *Id*.

IX. ARGUMENT IN SUPPORT OF EXCLUSION OF THE EVIDENCE

The enormous cost of the drug lab saga is almost impossible to calculate. The morass at CSU really produced two crises. The first was the utter chaos that throws all the evidence entrusted to CSU into serious question. The second crisis is the work of unscrupulous individuals who took advantage of the malaise at CSU and engaged in wanton criminal conduct.

The CSU mess has had a profoundly negative effect on many individuals and entities. Hardworking police officers that investigated drug cases and the prosecutors who sought to see them through have had all their work wasted. Thousands of police man-hours, which could have been used to investigate homicides and other major crimes, have been diverted to the investigations and the audit. Already numerous pending cases have been dropped by the State in order to maintain the integrity of the investigation. The court system has had to expend its limited judicial resources to attempt to appropriately address the fallout. Defendants like Mr. Nyala and Mr. Irwin sit in jail cells in a limbo of uncertainty about their future lives.

The most significant effect, however, has been on the citizens of Delaware, who have the right to expect that their tax dollars are being used to fund a criminal justice system that is just and effective. They have the absolute right to expect that the public officials in whom they place their trust will carry out their duties with

integrity and with the best interest of the people of Delaware in mind. Certainly that trust has been shattered.

The question becomes one of what to do now. For the reasons that follow, the only true remedy is for this Court to exclude the evidence emanating from the quagmire that was the CSU.

Unreliable Evidence is Inadmissible Evidence.

The State has chosen to pursue an investigation of CSU while still trying to prosecute individual drug cases based on evidence that is still being investigated. That decision places this Court squarely in the role of evidentiary gatekeeper. As this Court stated, "the best world for us would be to let the investigation continue, then try to figure out what happened, as [Mr. Bono] would say."[350] But the State will not allow that best world to happen because it continues its prosecutions of the pending CSU-touched cases. Given that scenario, this Court should apply the case law that establishes its active role as gatekeeper and exclude the evidence.

As the record amply demonstrates, the CSU was a cesspool of mismanagement, laziness, and apathy. The utter lack of oversight permitted conditions that cannot possibly meet the minimum evidentiary standards for reliability. In that petri dish of morass that was the CSU, criminal conduct blossomed. The thefts are not easily detectable. The thieves were clever. In some

[350] A683.

of the compromised cases, to this day the police cannot figure out how the thefts occurred. Can the weight discrepancies in the Irwin-Nyala cases be innocently explained or are they the product of malfeasance? The question is irrelevant. The State is the proponent of the evidence and reliability is a condition precedent to admissibility. The burden cannot shift to the defendants. Ultimately the DOJ relied on its vendor, the CSU, and the CSU failed them. Despite the State's laborious effort to sanitize the egregious taint, the evidence is tainted nonetheless. *Whatever the Purpose of the Audit was, it Was Not Accomplished.*

The DSP audit was truly a fool's errand and did nothing to remove the blight. It is troubling to think of all the hours wasted by hardworking police officers that were failed by their leadership. No playbook. No guidelines. No standards. None of the auditors, supervisors, or even the CIO could get on the same page as to what constituted a discrepancy and what to do in the event of a discrepancy. In that utter void of direction, it is impossible to accept the DOJ representation that there were only 47 compromised cases. Braheim Reed's case proved that in spades.

It is also impossible to accept that of the 9000-plus cases, unauthorized entry was made into only 51 packages. The proof is in the pudding; on several of the 13 cases for which the State supplied information, the *modus operandi* remains a mystery. How many other so-called non-discrepancy cases were compromised?

How many discrepancies that the police termed "administrative" were actually "criminal?"

It is not the DSP's fault that their audit was botched. They should have not been doing it in the first place. As Mr. Bono explained, ISO 17025 requires the lab to have corrective procedures in place. But of course in that vacuum of leadership there were no procedures to follow. In any event, the audit should have been conducted at a remove from police and prosecutors. Sergeant Lloyd, after meeting with leadership, believed the audit was to "salvage pending cases we had worked on as a law enforcement community" and to "create reliability" for use in the courtroom. That sentiment should dispel any notion that the audit was fair and impartial. It certainly did not create reliability where none existed.

The Possibility of the State Meeting its Burden to Prove Chain of Custody is Forever Lost.

The facts of *Loper,* in which the drug evidence was kept in a filing cabinet, would seem almost quaint compared to the shenanigans at CSU. Secret evidence, missing evidence, evidence kept on high shelves and not allowed to be touched, evidence in a box in the manager's office, evidence that was missing until Areatha Bailey miraculously found it—the list goes on and on. Sadly, a filing cabinet would be one of the more secure locations at the CSU.

How then, is the State to meet its burden of proving an improbability of tampering? How can the State establish the chain of custody with "sufficient

certainty?" Well-established law places this burden on the State and it is a burden the State cannot meet.

Certainly the State cannot establish the chain through documentary evidence. When Daneshgar repeatedly testified, "that is how I was trained to do it," or "that is just how it was done," what he is really saying is that false and bogus entries pervade the vast majority of cases, and certainly the Irwin-Nyala cases. As Mr. Bono testified, this malaise was borne out of a lack of leadership: if you are going to allow your employees to prop the vault open, why would you be troubled by phony FLIMS entries?[351]

Most fatal to the chain of custody in Irwin-Nyala and other cases is the double whammy nature of the problem. It was not just an evidence-handling problem. It was not just a data entry problem. It was an evidence-handling problem covered up by fictitious data entries. The State should concede the chain cannot be proved in a manner that comports with the teachings of our cases. In the absence of that occurrence, this Court should step in and exclude it.

The State's Solution is Not a Solution.

The State asserts these arguments should be made to the jury. The State urges the defendants to "subpoena any person in the chain of custody and question

[351] The CSU lacked any cognizable leadership until Robyn Quinn took over for Caroline Honse. Her testimony is clear – she was appalled by the practices and procedures in place at the CSU and worked to remedy its shortcomings immediately. Quinn's testimony further supports Mr. Bono's testimony that the CSU was in shambles.

them about the evidence in front of the jury."[352] What an utter quagmire that would create. The Court's already strained resources would buckle under the load. The State apparently seeks a scenario for numerous witnesses to be called in each and every pending drug trial, over and over again. Two-day drug trials would stretch to a week while the reliability issue and chain issue are litigated in the presence of countless juries. That scenario is not what is right for the Court, the defendants, and for Delawareans.

With No Root Cause Found, There Can be No Solution Found.

Conducting a root cause analysis is not just a best practice, it is required under ISO 17025 to meet minimum lab integrity standards. We have a situation in Delaware where the root cause is yet to be determined. It is not, at least currently, a scenario where the work product of one bad courier or rogue chemist can be culled from the herd and eliminated. The problem is undefined and undetermined. Nothing from the CSU can be trusted.

The likely underpinnings of the root cause were identified at the hearing: the CSU was a disaster. Those elements alone are enough to cast serious doubt on any evidence handled by CSU. When combined with the overlay of criminal conduct, with its root cause undetermined, the inexorable conclusion is that reliability cannot be established.

[352] A72.

Based on the record established in these cases and the arguments raised in this brief, Mr. Irwin and Mr. Nyala respectfully assert that this Court should exclude the drug evidence in their respective cases.

X. CONCLUSION

For the foregoing reasons, Michael Irwin and Dilip Nyala respectfully seek an Order from this court granting their motions *in limine.*

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Dated: September 15, 2014

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	
DILIP NYALA,	)	ID No. 1310000634
MICHAEL IRWIN,	)	ID No. 1309012464
Defendants.	)	

CERTIFICATE OF SERVICE

I, Patrick J. Collins, attorney for defendants Michael Irwin and Dilip Nyala, certify that I served the foregoing Post Hearing Brief and Appendix by US Mail and/or hand delivery upon:

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