IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	I.D. No. 0901009990A
v.	)	
	)	
JOSEPH DICKINSON	)	
	)	
Defendant	)	

Submitted: May 21, 2012
Decided: August 17, 2012

Upon Defendant's Amended Motion for Postconviction Relief.
DENIED.

ORDER

John W. Downs, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Michael W. Modica, Esquire, Wilmington, Delaware, Attorney for Defendant.

COOCH, R.J.

This 17th day of August 2012, upon consideration of Defendant's Amended Motion for Postconviction Relief, it appears to the Court that:

1. Defendant Joseph Dickinson ("Defendant") filed this Amended Motion for Postconviction Relief claiming ineffective assistance of counsel and due process violations, asserting that trial counsel's failure to request an *Allen v. State* accomplice level of liability instruction resulted in an unfair trial caused by incomplete jury instructions. Defendant has failed to meet his burden for both the ineffective assistance of counsel claim and the due process violation. Therefore, Defendant's Motion for Postconviction Relief is **DENIED**.

2. The key facts are as follows:

> In January 2009, a confidential informant told Wilmington Police Detective Paul Ciber that Oscar Johnson was planning to commit a robbery. Because Johnson had not selected the location of the robbery, Ciber and other police officers rented a room at the Fairview Inn and set it up to look as if the occupant was a drug dealer. The informant called Johnson and told him a drug dealer was working out of that room and … had $25,000. Johnson told the informant to pick him up. Then Johnson called two friends, Charles Thomas and Joseph Dickinson, to join in the planned robbery. Johnson, the confidential informant, Thomas and Dickinson drove in two cars to Haynes Park, where they discussed the plan. Dickinson positioned his car facing Route 13 and waited while Johnson and Thomas, carrying Dickinson's shotgun, put on ski masks and walked to the designated room. At about the time they realized there was nothing to take, the SWAT team arrived and threw a flash grenade. Dickinson saw the flash and tried to drive away, but was arrested at the scene. When the police searched Dickinson's car, they found shotgun shells and the bag used to carry the shotgun.
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> Dickinson did not testify at trial. He argued that Thomas and Johnson were the ones who committed the crimes and that they testified against Dickinson in return for their pleas. Dickinson did not ask for an accomplice liability instruction. Instead, he asked for an instruction that accomplices' testimony should be viewed with extreme caution. …[1]

3. Prior to trial, the State offered Defendant a plea agreement that required Defendant to plead guilty to Attempted Robbery Second Degree (a lesser included offense to the lead charge of Attempted Robbery First Degree), Possession of a Firearm During the Commission of a Felony, and Possession of a Destructive Weapon, and to acknowledge that he was eligible to be sentenced as an habitual offender.[2] In exchange, the State agreed to move to declare Defendant an habitual offender under 11 *Del. C.* § 4214(a) and to

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[1] *Dickinson v. State*, 8 A.3d 1166, 1167-68 (Del. 2010) (holding, on Defendant's direct appeal, that the trial court was not required *sua sponte* to provide a jury instruction on an accomplice's level of liability).

[2] Aff. of John S. Malik, Esq. at 2.

recommend a total sentence not exceeding ten years incarceration on all charges. The proposed ten year sentencing recommendation was instead of sentencing pursuant to 11 *Del. C.* § 4214(b), which mandated a life sentence without the possibility of parole.[3] If convicted of the serious charges, Defendant was potentially eligible to be sentenced under 11 *Del. C* § 4214(b). Defendant rejected the plea offer before two judges at separate times; at the final case review, trial counsel reported Defendant's unwillingness to accept the plea offer, and on the morning of trial, before the jury was sworn, Defendant personally stated his voluntary, knowing, and intelligent rejection of the plea offer during an extensive colloquy with the trial judge.

4. The jury found Defendant guilty of Attempted Robbery First Degree, Possession of a Firearm During the Commission of a Felony, Burglary Second Degree, Possession of a Destructive Weapon, and Conspiracy Second Degree. The State subsequently moved to declare Defendant an habitual offender pursuant to 11 *Del. C.* § 4214(b) on the charge of Attempted Robbery First Degree. Accordingly, Defendant was sentenced to life imprisonment on that charge.

5. Defendant appealed to the Delaware Supreme Court contending that the trial court erred by failing *sua sponte* to include an accomplice "level of liability" instruction[4] pursuant to 11 *Del. C.* § 274.[5] Neither Defendant nor the State requested a level of liability instruction, or requested an instruction on any lesser included offenses. The Supreme Court affirmed Defendant's conviction in December 2010, holding that the trial court was not required *sua sponte* to instruct on an accomplice's level of liability.[6] The Supreme Court noted that it was "apparent that Dickinson made a strategic decision not to request the accomplice 'level of liability' instruction" based on Defendant's use of an "all or nothing" defense theory at trial.[7]

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[3] *Dickinson,* 8 A.3d 1166 at 1167-68.
[4] *Id.* at 1168.
[5] 11 Del C. § 274 provides, in pertinent part: "When . . . 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance."
[6] *Dickinson,* 8 A.3d 1166 at 1168.
[7] *Id.*

6. Defendant filed this Amended Motion for Postconviction Relief, seeking a fact finding hearing as well as a new trial. Defendant cites *Allen v. State* as the primary support for his ineffective assistance of counsel claim.[8] The defendant in *Allen* had been convicted as an accomplice in three separate burglaries.[9] The defendant appealed to the Delaware Supreme Court asserting that the trial court had erred by refusing the defendant's request to instruct the jury pursuant to 11 *Del. C.* § 274.[10] The Court held that, on those charges in the criminal code that are divided into degrees, the defendant upon request was entitled to an instruction requiring the jury to make an individualized determination regarding the defendant's accountability for the codefendants gun possession.[11] *Allen* requires that when a defendant is charged as an accomplice, a defendant upon request is entitled to a level of liability instruction for each charged offense that is divisible into degrees. The *Allen* Court thus reversed the conviction.

7. In the instant Motion, Defendant first contends that trial counsel's failure to request an accomplice level of liability jury instruction constituted ineffective assistance of counsel, whether the error resulted from counsel's unawareness of current law or from a strategic decision.[12] Defendant asserts that "if counsel made a strategic decision to decline the instruction, his strategy was inherently unreasonable. Defendant was facing a mandatory life sentence if convicted of Attempted Robbery First Degree. …"[13] Defendant argues that there is no record that Defendant was advised by his trial counsel of the option to request the instruction, or that Defendant otherwise knowingly, voluntarily, and intelligently waived his right to the instruction.[14] Furthermore, Defendant now alleges that he would have requested the instruction because, if the jury had convicted him of the lesser included offense of Attempted Robbery Second Degree, the instruction could have potentially shielded Defendant from the mandatory life sentence.

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[8] *Allen v. State*, 970 A.2d 203 (Del. 2009).
[9] *Id.* at 209.
[10] *Id.* at 206.
[11] *Id.* at 214.
[12] Def.'s Am. Mot. for Postconviction Relief at 7-8.
[13] *Id.* at 9.
[14] *Id.*

8. Defendant also relies upon *Erskine v. State*, decided shortly after *Allen,* which restated the proposition that an accomplice may be guilty of a less serious offense than other criminal participants.[15] "An accomplice 'is guilty of an offense committed by another person when … intending to promote or facilitate the commission of the offense the [accomplice] … aids … or attempts to aid the other person in … committing it…."[16]

9. In Defendant's affidavit in support of his Amended Motion for Postconviction Relief, he states:

> I, Joseph Dickinson, after being duly sworn, hereby states as follows:
> 1. I am the Petitioner in the attached Rule 61 Motion for Postconviction Relief;
> 2. My attorney, John Malik, did not explain to me what a Section 274 Level of Liability jury instruction was, that I had the right to elect that instruction, and the significance of such an instruction to the potential outcome(s) of my trial.
> 3. Mr. Malik did not explain to me that a Section 274 Level of Liability instruction could have led to a Robbery 2nd Degree (instead of Robbery 1st Degree) and that a conviction for Robbery 2nd Degree would not have exposed me to sentencing as an habitual offender under 11 *Del. C.* § 4214(b).
> 4. Mr. Malik did not explain to me that he was not seeking a Section 274 Level of Liability instruction, or why he made this decision.
> 5. **If I had been advised of what a Section 274 Level of Liability instruction was, and its significance in avoiding conviction requiring me to be sentenced to a mandatory life sentence under 11 *Del. C.* § 4214(b), then I would have opted for the judge to give such an instruction.** (emphasis added)[17]

10. Secondly, Defendant contends that trial counsel's failure to request an accomplice level of liability jury instruction violated Defendant's due process right to a fair trial. Defendant argues that absent the level of

[15] *Erskine v. State*, 4 A.3d 391 (Del. 2010).
[16] *Id.* at 394 (citing 11 *Del. C.* § 271).
[17] Def's M. for Postconviction Relief at Ex. A.

liability instruction, the jury instructions were incomplete, and therefore violated due process.[18]

11. In response to Defendant's ineffective assistance of counsel claims, his trial counsel has averred, in pertinent part:

> After I was retained as counsel, Mr. Dickinson advised that he did not wish to accept a plea, but wished to proceed to trial.
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> Prior to trial, counsel had advised Mr. Dickinson of the State's plea offer. The plea offer required Mr. Dickinson to plead guilty to Attempted Robbery Second Degree, Possession of a Firearm During the Commission of a Felony, and Possession of a Destructive Weapon and to acknowledge that he was eligible to be sentenced as an habitual offender pursuant to 11 *Del. C.* § 4214(b) based upon his prior convictions of Burglary Second Degree in 1992, Robbery Second Degree in 1995, and Robbery First Degree in 1998. In exchange for Mr. Dickinson's guilty plea, the State agreed not to file a motion to declare Mr. Dickinson an habitual offender pursuant to 11 *Del. C.* § 4214(b), which requires that a mandatory sentence of life without the possibility of parole be imposed. Instead, the State agreed to file a motion to declare Mr. Dickinson an habitual offender pursuant to 11 *Del. C.* § 4214(a) on the charge of Possession of a Destructive Weapon and to request a total sentence of incarceration of ten (10) years on all charges. Mr. Dickinson rejected this plea offer prior to trial and informed counsel and the Court that he wished to proceed to trial.
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> The defense asserted at trial was that Mr. Dickinson was not aware of any robbery plan that his co-defendants had, but that he gave his co-defendants a ride to the Fairview Inn Motel solely for the purpose of purchasing drugs. Furthermore, counsel argued that Mr. Dickinson's co-defendants, who testified against him at trial, were not credible witnesses and would have said anything to obtain favorable plea offers from the State for themselves. Additionally, counsel requested and was granted a jury instruction pursuant to the holding in *Bland v. State*, 263 A.3d 286 (Del. 1970), that effectively cautioned jurors that

[18] *Id.* at 11.

> the testimony of accomplices must be viewed with suspicion and great caution.
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> At the time of trial, counsel was not aware of the holding in the case of *Allen v. State*, 970 A.2d 203 (Del. 2009), and thus did not discuss with Mr. Dickinson the *Allen* case or the possibility of requesting an accomplice "level of liability" instruction, which would have provided the jury the option of the lesser included offenses of Attempted Robbery Second Degree and Burglary Third Degree, as an alternative and inconsistent defense theory. However, had counsel been aware of the holding in *Allen* and discussed it with Mr. Dickinson, counsel would have cautioned Mr. Dickinson that arguing alternative inconsistent defense theories to a jury essentially dilutes the strength of a single defense theory and runs the highly significant risk of any defense theory losing credibility in the eyes of the jury since, on one hand, the jury is being urged that the evidence warrants a finding of "not guilty" and, on the other hand, the jury is being told that if they find the defendant guilty of committing a crime, the crime he committed was not as serious as the crime originally charged in the indictment.
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> While Mr. Dickinson certainly could have instructed counsel to proceed with alternative inconsistent defenses and counsel would have been bound to follow Mr. Dickinson's wishes, counsel would have recommended against alternative inconsistent defenses.
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> Lastly, counsel doubts that Mr. Dickinson would have wanted to proceed with alternative inconsistent defenses at the time of trial since a guilty verdict on the lesser included offenses of Attempted Robbery Second Degree and Burglary Third Degree still would have qualified Mr. Dickinson as an habitual offender pursuant to 11 *Del. C.* § 4214(a) and would have resulted in a sentence of Level 5 incarceration similar if not greater than the sentence recommended in the State's final plea offer, which Mr. Dickinson rejected.[19]

12. Procedurally, the State contends first that Defendant's Amended Motion for Postconviction Relief is procedurally barred under Rule 61(i)(3)-(5). The State asserts Defendant's Motion is precluded first because Rule 61(i)(3) bars any ground for relief that was not asserted

[19] Aff. of John S. Malik, Esq. at 2-3.

in the proceedings leading to the judgment of conviction, unless the defendant shows cause for relief from the procedural default and prejudice from a rights violation.[20] Second, that Rule 61(i)(4) bars any ground for relief formerly adjudicated, unless the claim's consideration is warranted in the interest of justice.[21] Last, that Defendant may not claim a Rule 61(i)(5) miscarriage of justice to make the procedural default bar inapplicable because this "fundamental fairness" exception is only applied in limited circumstances not present in this case.[22]

13. Defendant's Motion for Postconviction Relief is not barred by procedural default or by former adjudication because ineffective assistance of counsel claims are not subject to Rule 61(i)(3) or Rule 61(i)(4) because ineffective assistance claims cannot be brought on direct appeal.[23] Lastly, the "fundamental fairness" exception need not be reached because Defendant's Motion is not barred under any section of Rule 61(i).

14. Substantively, the State contends that Defendant cannot establish ineffective assistance of counsel because the trial strategy chosen was an "all or nothing" defense theory. The State argues that trial counsel did not request a jury instruction on possible lesser included offenses regardless of any lack of awareness of *Allen*, in large part to avoid diluting the credibility of defense's single defense theory with alternative inconsistent defenses. The State asserts that such an instruction "would have presented the same lesser-included offenses before the jury that he chose not to ask for in the jury instructions which was apparent in taking an 'all or nothing' approach."[24] The State argues that Defendant knew that a plea to the lesser included offense of Attempted Robbery Second Degree was available before trial because that was part of the plea offer, but Defendant knowingly rejected the plea offer to seek complete acquittal at trial.[25]

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[20] Super. Ct. Crim. R., Rule 61(i)(3).
[21] Super. Ct. Crim. R., Rule 61(i)(4).
[22] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).
[23] *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).
[24] State's Answer at 6.
[25] Even though Defendant's trial counsel concedes he was unaware of *Allen* when advising Defendant, that factor is not dispositive. *Allen* essentially clarified Delaware Supreme Court

15. The burden of proof for ineffective assistance of counsel claims is on the defendant and is governed by the two prong *Strickland* test, each of which must be satisfied to reverse a conviction.[26] First, Defendant must prove that trial counsel's representation was objectively unreasonable by a preponderance of the evidence.[27] When assessing counsel's performance, judicial scrutiny is highly deferential because of a defendant's temptation to second guess counsel's assistance after conviction.[28] The Court must ignore the "distorting effects of hindsight" and the defendant must overcome the strong presumption that counsel's conduct was reasonably professional and sound under the circumstances.[29] However, showing that counsel's "conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound" may rebut this presumption.[30]

16. Within this first *Strickland* prong, there is an important distinction between certain fundamental rights inherent to criminal defendants contrasted against "decisions that involve tactics and trial strategy."[31] Defendants have fundamental rights for plea decisions, jury trial waivers, and whether to testify.[32] Fundamental rights may also include the decision to forego appeals and accept the death penalty, whether to waive the right to counsel, and whether to appeal.[33] Such fundamental rights are "so personal to the defendant 'that they cannot be made for the defendant by a surrogate.' "[34] "[T]hese fundamental

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precedent in this area. *See, e.g.*, *Chance v. State*, 685 A.2d 351 (Del. 1996) (holding that the trial court did not err by failing to instruct jury to asses defendant's guilt for homicide degree according to defendant's own culpable mental state); *Demby v. State*, 744 A.2d 976, 979-80 (Del. 2000) (affirming lower court's jury instruction that a defendant whom is charged with a crime of degree under accomplice liability is culpable to extent of mental state for crime).

[26] *Strickland v. Washington*, 466 U.S. 668 (1984).

[27] *Id.* at 688.

[28] *Id.* at 689.

[29] *State v. Wright*, 653 A.2d 288, 293-94 (citation omitted).

[30] *Thomas v. Varner*, 428 F.3d 493, 499-500 (3rd Cir. 2005).

[31] *Bradshaw v. State*, 806 A.2d 131, 138 (Del. 2002).

[32] Prof.Cond.R. 1.2(a) (2008) stating a lawyer: "shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

[33] *Cooke v. State*, 977 A.2d 803,841-42 (2009); *Bradshaw*, 806 A.2d at 138.

[34] *Cooke,* 977 A.2d 803, 841 (2009) (citing *Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (citing *Strickland*, 466 U.S. at 688; *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)).

decisions are indeed strategic choices that counsel might be better to make, because the consequences of them are the defendant's alone, they are too important to be made by anyone else."[35] However, clients normally defer to a lawyer's special knowledge and skill for accomplishing legal objectives, particularly regarding tactical matters which are non fundamental.[36] Accordingly, counsel is responsible for deciding whether to request a lesser included offense or level of liability instruction because jury instructions fall within trial strategy.[37]

17. In addition to the requirement of satisfying *Strickland*'s first prong by demonstrating that counsel's performance was objectively unreasonable, Defendant must also satisfy the second prong by showing a reasonable probability that, but for counsel's objective unreasonability, the trial result would have differed.[38] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[39] In making this determination, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding" because "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding."[40] Courts must consider the "totality of the evidence."[41] Thus, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[42]

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[35] *Id.* at 842 (citations omitted).
[36] Prof.Cond.R. 1.2 cmt. 2 stating: "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters."
[37] *Cf. Cooke*, 977 A.2d 803,841-42 (2009) ("The defense attorney's duty to consult with the defendant regarding 'important decisions' does not require counsel to obtain the defendant's consent to 'every tactical decision.'") (citations omitted); *Bradshaw*, 806 A.2d at 138 (citing Prof.Cond.R. 1.2(a) (providing that a lawyer "shall consult with the client as to the means by which [the objectives of representation] are to be pursued"); Ann. Model Rules of Prof'l Conduct R. 1.2 cmt. at 20 (3d ed. 1996) ("[D]ecisions that involve tactics and trial strategy are reserved for the professional judgment of the lawyer after consultation with the client.").
[38] *Strickland*, 466 U.S. at 694.
[39] *Id.* at 693.
[40] *Id.*
[41] *Id.* at 695.
[42] *Id.* at 692.

18. In light of *Strickland*, this Court need only determine whether (1) trial counsel's failure to request a level of liability instruction was objectively unreasonable, and (2) it is reasonably probable that, but for counsel's unprofessional error, the trial result would have differed.[43] The Court concludes that Defendant's ineffective assistance of counsel claim does not satisfy either *Strickland* prong because, when considering the totality of the evidence, Defendant cannot demonstrate either that trial counsel's performance was unreasonable or that Defendant was prejudiced.

19. As to the first prong, trial counsel's performance was objectively reasonable, irrespective of whether strategic decisions resulted from counsel's lack of awareness of a recent court decision or deliberate trial strategy. That trial counsel was unaware of the *Allen* holding is of little import because Defendant has misapplied *Allen*'s holding. *Allen* simply requires that when a defendant is entitled to an accomplice liability instruction, and requests it, the court is required to provide the instruction. *Erskine* simply reemphasized the policy underlying *Allen*.[44] The issue of a level of liability instruction was not newly minted in *Allen*, but in fact has long been in effect.[45] There is no evidence that trial counsel was unaware that a potential accomplice level of liability instruction existed, only that trial counsel was unaware of the particular holding in the very recently decided *Allen* case, which bears no effect on Defendant's present claims since no instruction was requested.

20. Importantly, the 11 *Del. C.* § 274 accomplice level of liability instruction recognized in *Allen* "acts like a lesser-included offense instruction-it gives the jury a middle ground on which to find the defendant guilty."[46] An accomplice level of liability instruction is not required unless requested for the same reasons as a lesser included offense instruction.[47] Lesser included offenses and accomplice level

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[43] *Id*.
[44] *Erskine*, 4 A.3d 391, 394 (Del. 2010).
[45] *Chance*, 685 A.2d 351; *Demby*, 744 A.2d 976, 979-80.
[46] *Dickinson*, 8 A.3d at 1168.
[47] *Id. See State v. Brower*, 971 A.2d 102, 107 (Del. 2009) (the burden is initially on the parties to determine whether a lesser-included offense instruction should be an option for the jury. The trial judge should not give an instruction on an uncharged lesser offense if neither side requests it because it would interfere with the party's trial strategies.); *State v. Cox*, 851 A.2d 1269, 1273

of liability instructions can be inconsistent with an "all or nothing" defense. An "all or nothing" defense maintains the defendant's complete innocence by electing not to provide the jury with middle ground upon which to find the defendant guilty.[48]

21. Defendant's basic contention is that he now disagrees with counsel's trial strategy, with which he presumably concurred, and that Defendant was entitled to decide whether to knowingly, voluntarily, and intelligently waive his right to the instruction. However, jury instruction decisions are not universally held to be among Defendant's fundamental criminal trial rights.[49] Jury instructions fall within trial strategy, which, so long as objectively reasonable, remain counsel's responsibility.[50] The Court is aware that other jurisdictions are split regarding whether the decision to pursue an "all or nothing" defense by waiving a jury instruction on lesser included offenses is fundamental.[51] However, this Court will follow the reasoning of the Delaware Supreme Court in cases such as *Cooke* and *Bradshaw*.[52]

(Del. 2003) (applying the "party autonomy" approach, a trial court ordinarily should not give a jury instruction on an uncharged lesser included offense where neither side requests or affirmatively agrees to such instruction.).

[48] *Dickinson*, 8 A.3d at 1168.

[49] 3 W. LaFave, Criminal Procedure § 11.6(a) (3d ed. 2007) ("[C]ourts have displayed less certainty, [in determining whether fundamental to the client or in counsel's discretion] as [to] the proper classification of various other decisions, such as . . . whether to pursue an "all or nothing" defense by waiving the right to a jury instruction on lesser included offenses.").

[50] *Cf. Cooke*, 977 A.2d 803,841-42 (2009) ("The defense attorney's duty to consult with the defendant regarding 'important decisions' does not require counsel to obtain the defendant's consent to 'every tactical decision.'") (citations omitted); *Bradshaw*, 806 A.2d at 138 (citing Prof.Cond.R. 1.2(a) (providing that a lawyer "shall consult with the client as to the means by which [the objectives of representation] are to be pursued"); Ann. Model Rules of Prof'l Conduct R. 1.2 cmt. at 20 (3d ed. 1996) ("[D]ecisions that involve tactics and trial strategy are reserved for the professional judgment of the lawyer after consultation with the client.").

[51] *See State v. Boeglin*, 105 N.M. 247, 731 P.2d 943 (1987) (the defendant, and not counsel, must ultimately decide whether to seek submission of lesser included offenses to the jury); *State v. Lafferty*, 749 P.2d 1239 (Utah 1988), *affirmed on rehearing*, 776 P.2d 631 (1989) (defendant could insist upon presenting only the defense of innocence, foregoing the *mens rea* defense that would have led to the lesser included offense of manslaughter); *In re Trombly*, 160 Vt. 215, 627 A.2d 855 (1993) (defendant should be the one to decide whether to seek submission to the jury "of a lesser included offense," but trial court should reject that position if it "concludes that the defendant's strategy … for dispensing with certain jury instructions on lesser included offenses is so ill-advised that it undermines a fair trial"); *People v. Brocksmith*, 162 Ill.2d 224, 205 Ill.Dec. 113, 642 N.E.2d 1230 (1994) (as a general matter, defendant, rather than defense counsel, must have the ultimate control as to whether to tender an instruction on a lesser included offense).

22. For these reasons, Defendant's present averment that he "would have opted for the judge to give [a level of liability instruction]" is unpersuasive.[53] Furthermore, and notably, through Defendant's refusal to accept the offered pleas, Defendant impliedly adopted counsel's "all or nothing" trial strategy. On two separate occasions Defendant rejected the plea in Court. First, trial counsel clearly explained Defendant's plea rejection at the final case review and then Defendant personally rejected the plea during a thorough colloquy. Defendant's present dissatisfaction with counsel's decision not to request a level of liability instruction is somewhat weakened by Defendant's personal and fundamental decision to reject the plea offer. By so doing, the trial strategy was not only counsel's but at minimum, was adopted by Defendant during both plea offer rejections.

Compare Roberts v. State, 263 Ga. 807, 439 S.E.2d 911 (Ga.1994) ("while … it is critically important for defense lawyers in a jury trial to consult fully with accused in such vital matters as the decision whether to pursue an 'all or nothing defense' and whether to request … the lesser included offenses … , and the effect of failure to consult must be rigorously scrutinized when ineffective assistance of counsel is asserted, we do not find that failure … in every case constitutes ineffective assistance as matter of law," without regard to "the consequence when that practice has not been followed"); *Reed v. State*, 560 So.2d 203 (Fla.1990) (personal waiver is necessary as to jury instructions on lesser included offenses to first-degree murder charge, but "counsel can waive the instructions on necessarily included offenses in noncapital crimes without a showing that the defendant has knowingly and intelligently joined in the decision").

See also Arko v. People, 183 P.3d 555 (Colo.2008) (decision whether to request instruction on third degree assault as lesser included offense of attempted murder is "strategic and tactical," and "therefore reserved for defense counsel").

[52] *Cf. Cooke*, 977 A.2d 803,841-42 (2009) ("The defense attorney's duty to consult with the defendant regarding 'important decisions' does not require counsel to obtain the defendant's consent to 'every tactical decision.'") (citations omitted); *Bradshaw*, 806 A.2d at 138 (citing Prof.Cond.R. 1.2(a) (providing that a lawyer "shall consult with the client as to the means by which [the objectives of representation] are to be pursued"); Ann. Model Rules of Prof'l Conduct R. 1.2 cmt. at 20 (3d ed. 1996) ("[D]ecisions that involve tactics and trial strategy are reserved for the professional judgment of the lawyer after consultation with the client.").

Trial counsel's averment in his affidavit, that "counsel would have been bound to follow Mr. Dickinson's wishes" regarding whether to proceed with "alternative inconsistent defenses" had Dickinson wished to proceed with a level of liability instruction despite the "all or nothing" defense, is not supported by Delaware precedent. Malik Aff. at 3.

[53] Def's M. for Postconviction Relief at Ex. A.

23. Defendant fails to rebut the presumption that not requesting an accomplice level of liability instruction was reasonably professional trial conduct. Defendant personally and explicitly rejected a plea offering the same lesser included offenses that a level of liability instruction would have provided. Defendant's trial strategy was to argue his complete innocence. Accordingly, counsel structured trial arguments consistent with Defendant's desire to employ an "all or nothing" defense. Counsel's opening and closing statements emphasized that the codefendants were not credible witnesses.[54] During both, trial counsel argued Defendant did not leave his car, and that while Defendant gave codefendants a ride, he believed his friends were simply planning to purchase the drugs.[55] Additionally, trial counsel requested and was granted a *Bland* jury instruction, effectively cautioning jurors that accomplice testimony must be viewed with "suspicion and great caution."[56] Trial counsel (with Defendant's apparent agreement) reasonably declined to request a lesser included offense instruction to avoid diluting the credibility of the "all or nothing" defense. On direct appeal, the Supreme Court noted that it was "apparent that Dickinson made a strategic decision not to request the accomplice 'level of liability' instruction" based on Defendant's use of an "all or nothing" defense theory at trial.[57] For these reasons, counsel's failure to request an accomplice level of liability instruction was not objectively unreasonable, but was consistent with Defendant's "all or nothing" defense.

24. The lack of an accomplice level of liability instruction did not violate Defendant's due process right to a fair trial. A level of liability instruction, or a lesser included offense instruction, is merely an option for a defendant to request if consistent with trial strategy. Defendant's claim that his due process rights were violated is ultimately unpersuasive because the trial strategy was reasonable. Trial counsel's performance is owed deference because after conviction defendants are often tempted to second guess counsel's representation.[58]

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[54] *Dickinson*, 8 A.3d at 1168.
[55] *Id*; Malik Aff. at 2-3.
[56] *Bland v. State*, 263 A.2d 286, 289 (Del. 1970).
[57] *Id.*
[58] *Strickland*, 466 U.S. at 689.

25. Defendant's present hindsight wish for a level of liability trial strategy does not entitle Defendant to a second bite at the apple. Simply because an alternative trial strategy was available does not mean that trial counsel's performance was unreasonable or that Defendant did not receive a fair trial. While Defendant now asserts (to the Court, unpersuasively) that he would have chosen an alternative trial strategy, failure to request a level of liability instruction does not constitute deficient representation.

26. Although it is unnecessary for the Court to reach the second *Strickland* prong since Defendant failed to demonstrate counsel's objective unreasonability, the Court will address the second prong. Defendant has failed to satisfy *Strickland's* second prong. Even if trial counsel's performance was unreasonable, Defendant has failed to adduce a reasonable probability that, but for the lack of jury instruction, the trial results would have been different. The jury was presented with all the evidence, was given the *Bland* instruction regarding accomplice testimony, and still convicted Defendant to the degree of each offense charged. There is no evidence suggesting a reasonable probability that, if the jury received an accomplice level of liability instruction, it would have returned a verdict for lesser included offenses. Mere speculation that the verdict may have differed is insufficient to undermine confidence in the trial outcome.

27. The Court declines to hold a fact finding hearing.[59]

Therefore, Defendant's Amended Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary
cc: Investigative Services

[59] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) ("In a postconviction proceeding, the decision whether to hold an evidentiary hearing is a determination made by the trial court.") (citing Super. Ct. Crim. R. 61(h)(1).