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Case Number 1,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER CLAY,	)	
	)	
Defendant Below-Appellant,	)	No. 1, 2019
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID Nos. 1408007714A
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF

THE STATE OF DELAWARE

APPEALLANT'S OPENING BRIEF

COLLINS & ASSOCIATES

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Dated: February 18, 2019

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NATURE OF THE PROCEEDINGS

On August 9, 2014, police arrested Appellant Christopher Clay along with his codefendants Maurice Land and Booker Martin in connection with a robbery at the Dollar General store in Georgetown.[1]

A grand jury returned an indictment against the three defendants on November 17, 2014.[2] After severance of the Possession of a Firearm by a Person Prohibited (PFBPP) charge and various amendments and *nolle prosequis*, Mr. Clay and his codefendants were eventually charged at trial with these offenses:

1. Robbery First Degree: Land as principal, Mr. Clay and Martin as accomplices
2. Possession of a Firearm During Commission of a Felony (PFDCF): Land as principal, Mr. Clay and Martin as accomplices.
3. Conspiracy Second Degree
4. Tampering with Physical Evidence
5. Resisting Arrest with Force: Martin only
6. Resisting Arrest: Mr. Clay only
7. Resisting Arrest: Land only
8. Theft <$1,500: Land only[3]

[1] A15-23.
[2] A24-30.
[3] *See*, Charge to the Jury at A986-998.

All the defendants filed motions to sever defendants.[4] These motions were denied.[5]

The case proceeded to trial on October 12-15, 2015. Mr. Clay's attorney moved for acquittal at the close of the State's case; that motion was denied.[6] The jury returned guilty verdicts against Mr. Clay and his codefendants.[7] The trial judge sentenced Mr. Clay to 40 years of unsuspended prison time.[8]

Mr. Clay filed a timely direct appeal. On June 1, 2017, this Court affirmed Mr. Clay's convictions and sentence.[9] However, this Court reversed the Tampering with Physical Evidence count, finding that the firearm was not tampered with or suppressed; it was available for trial.[10] Mr. Clay's unsuspended prison sentence was not affected by this Court's decision.[11] The Superior Court granted codefendant Martin's Motion for Judgment of Acquittal but for the Resisting Arrest charge.[12]

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[4] A41-45.
[5] A54-55.
[6] A732-734.
[7] A921-927.
[8] A996; the sentence order is at A999-1004.
[9] *Clay v. State*, 164 A.3d 907 (Del. 2017).
[10] *Id.* at 914-915.
[11] A1005-1011.
[12] A1018-1038.

On June 21, 2017, Mr. Clay filed a timely *pro se* Motion for Postconviction Relief.[13] The undersigned attorney (postconviction counsel) was appointed.[14] On February 28, 2018, postconviction counsel filed an Amended Motion for Postconviction Relief containing two claims.[15] After reviewing two new documents that were not previously provided, postconviction counsel moved to amend.[16] That motion was granted,[17] and a third claim was added. In the Reply, postconviction counsel moved to strike certain parts of trial counsel's affidavit.[18] The Court did not rule on this application. At the conclusion of the briefing, the judge did not hold an evidentiary hearing.

On December 7, 2018, the Superior Court denied Mr. Clay's Amended Motion for Postconviction Relief.[19] This is Mr. Clay's Opening Brief.

[13] A1046-1052.
[14] A1043.
[15] A1055-1082.
[16] A1094-1095.
[17] A14a; D.I. 150.
[18] A1136-1139.
[19] *State v. Clay*, 2018 WL 6434798 (Del. Super. Dec. 7, 2018); Exhibit A.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THAT MR. CLAY WAS NOT PREJUDICED BY COUNSEL'S FAILURE TO RENEW THE SEVERANCE MOTION WHEN CODEFENDANT INTRODUCED PREJUDICIAL EVIDENCE AT TRIAL.

Trial counsel filed and argued a meritorious motion to sever defendants alleging prejudice resulting from a joint trial with the culpable codefendant Maurice Land. When Land's attorney announced pretrial that he planned to introduce evidence of other robberies in Baltimore in which one of the perpetrators also wore a black shirt with SECURITY on it, Mr. Clay's attorney was ineffective for failing to renew the motion to sever. The defenses at that point were clearly going to be antagonistic and the jury would have difficulty segregating the evidence as to Land and Mr. Clay.

The Superior Court erred in denying postconviction relief on this claim.

II. THE TRIAL COURED ERRED IN FINDING THAT MR. CLAY WAS NOT PREJUDICED BY TRIAL COUNSEL'S FAILURE TO SEEK A MISTRIAL, A LIMITING INSTRUCTION, OR EVEN OBJECT TO THE IRRELEVANT AND DAMAGING BALTIMORE EVIDENCE.

When Land's attorney did in fact elicit testimony about the Baltimore robberies at trial, Mr. Clay's counsel was ineffective for failing to move for a mistrial, object, or seek a curative instruction that this evidence should be disregarded and not considered in deliberations.

The Superior Court erred in holding that the Baltimore evidence was worthless and irrelevant. The Court also erred in finding no prejudice on the basis that the evidence of Mr. Clay's guilt was overwhelming. On similar evidence against the third defendant, Martin, the Superior Court granted a motion for judgment of acquittal on all charges except Resisting Arrest.

III. THE SUPERIOR COURT ERRED IN FINDING MR. CLAY'S COUNSEL NOT INEFFECTIVE FOR FAILING TO FILE A MOTION FOR A NEW TRIAL WHEN THE CODEFENDANT SWORE BY AFFIDAVIT THAT MR. CLAY WAS NOT INVOLVED IN THE ROBBERY.

Culpable codefendant Maurice Land filed an affidavit before any of the sentencing hearings in this case. In the affidavit, he offers scant details, but states clearly that Mr. Clay and Martin had no involvement in the robbery. Land's lawyer did not permit trial counsel to interview Land about his affidavit. Trial counsel found that the affidavit lacked merit because Land did not accept responsibility for robbing the Dollar General store. Trial counsel was ineffective for failing to file a motion for a new trial based on the new evidence presented by Land as to Mr. Clay's noninvolvement.

The trial judge erred in denying this postconviction claim. The Court adopted trial counsel's decision that the affidavit lacked merit because Land did not admit to the crime. But Land had not been sentenced yet and still had Fifth Amendment protections. His affidavit expresses regret for letting things get this far and asserts that he is coming forward because it is the right thing to do. The Court

erred in finding that Land's admission of culpability was a condition precedent to the veracity of the affidavit. Moreover, the Court's finding that the evidence against Mr. Clay was overwhelming does not square with the fact that the Court granted codefendant Martin's motion for judgment of acquittal.

STATEMENT OF FACTS

On direct appeal, this Court found the following facts:

On August 9, 2014, an employee of the Dollar General store in Georgetown, Delaware was taking a register till to her office shortly before 9:00 p.m. As she entered her office, a man wearing a black hat and a t-shirt that said "Security" on the back approached her in her office while displaying a black handgun. He ordered her to give him the money from the register till she had and another till that was in the office. After she did so, he told her to get on the ground. The man then exited the store and the employee called the police.

Shortly after the robbery occurred, Corporal Joel Diaz of the Georgetown Police Department observed three black males run across the street. Corporal Diaz testified that his attention was initially drawn to the men because a series of robberies had recently taken place in the area. As Corporal Diaz continued to observe the men, a call came over his radio that a robbery had just taken place at the Dollar General store, which was a quarter of a mile away from his location. The radio call described the suspect as a black male dressed in all black and possibly armed with a handgun. Corporal Diaz realized that one of the three men that he was observing was dressed in all black. The officer approached the men, rolled down his window and asked them to stop. At first, the men ignored him, but when Corporal Diaz stopped and exited his vehicle, one of the men, later identified as Christopher Clay, ran. Corporal Diaz radioed to other officers to pursue Clay and ordered the other two men, later identified as Maurice C. Land and Booker T. Martin, to stop.

Corporal Diaz and another Georgetown Police officer, Officer Derrick Calloway, were eventually able to detain Land and Martin. As Land was getting on the ground, he removed his shirt, which was black with "Security" written across the back in yellow letters. The officers also found a black baseball cap on the sidewalk near where Land had been standing. At the time of his arrest, Land had a latex glove and $81 in cash on his person. Martin had $897 in cash in his pocket in three bundles that were folded and organized by denomination.
While Corporal Diaz and Officer Calloway were with Land and Martin, Officer John Wilson was responding to Corporal Diaz's call to

> pursue Clay. Officer Wilson saw Clay running in the opposite direction of his car. He exited his vehicle and began chasing Clay on foot. Clay continued to run, and Officer Wilson observed him raise his hand into the air. Officer Wilson testified:
>
> I didn't know if [Clay] was going to run like he was going to turn or if he was throwing something. And I thought—I did think I saw something leave his hand, but the lights are—it was dark; my overheads on my police car are on; everything's flashing.
> Clay eventually got into a parked vehicle, and Officer Wilson ordered him out of the vehicle at gunpoint. Clay had $280 in cash in his pocket, folded and organized by denomination, and $1.17 in change. Officers later recovered a black handgun on the opposite side of a fence near where Officer Wilson observed Clay making a throwing motion.
>
> Security footage from the Dollar General store showed Clay entering the store with Land shortly before 9:00 p.m. Land went to the back of the store and into the office, where surveillance cameras recorded him putting on a clear glove and taking money out of an employee's wallet. When the employee entered the office, Land pointed a handgun at her and demanded the money from the register tills. He then made her get on the ground, and he left the office. As Land was in the back of the store, Clay placed several items on the counter. Four seconds after Land left the store, Clay followed without purchasing any of those items.[20]

The jury hears evidence of other Dollar General robberies

Among the pretrial issues litigated was the authenticity of the security footage from the Dollar General. It first arose at an office conference on July 27, 2015.[21] The video footage was of course crucial to the State's case—it showed Land robbing the victim, and showed Mr. Clay in the store looking at items and

[20] *Clay v. State*, 164 A.3d, 907, 911-912 (Del. 2017)
[21] A85-86.

placing some on the counter. The judge continued the trial so an evidentiary hearing could be held on the issue of whether the State's copy of the security camera footage was in fact a duplicate of the original.[22] At a subsequent office conference, the prosecutor explained that the skips in the video were due to the system being motion-activated.[23]

This Court convened an evidentiary hearing on August 25, 2015. Among the witnesses was Karl Woody, the regional loss prevention manager for Region 12, covering several states.[24] He testified about the procedures for when a robbery occurs; relevantly, that the videos are burned onto discs.[25]

Woody remembered watching the video from his home. He saw the person with the black shirt go in the manager's office, put on gloves, go through the employee's purse, and then return with a manager who had the tills.[26] He had a gun.[27] What stuck in his mind about the Georgetown robbery months later was the SECURITY shirt worn by one of the robbers.[28] He was investigating a string of robberies at his Baltimore stores "with the same kind of get-up." He wondered

[22] A115.
[23] A129.
[24] A174.
[25] A176.
[26] A178-179.
[27] A179.
[28] A192.

"was this the same guys hitting my Baltimore stores[?]"[29] Obviously, this testimony was very damaging to Land, who removed his black shirt with SECURITY on it when he was being arrested.

Land's attorney asked Woody about speaking to the Georgetown police about other robberies in the Baltimore area in which the perpetrator had on a SECURITY shirt.[30] Woody explained that there were two robberies of his stores in Baltimore involving such a shirt, and that there were other robberies of other stores that were not Dollar General stores.[31] He thought the Georgetown robbery might be tied to those robberies.[32] Woody stated that the stores in Baltimore should still have a copy of those discs, but he did not have a digital copy due to a computer crash.[33]

This Court held another office conference on September 21, 2015. Land's counsel stated: "my client's position is that somebody else wearing a security shirt, hat, and sunglasses walked into the store after him."[34] Acknowledging that the argument to the jury would be "difficult to believe,"[35] counsel said it was backed up by Woody's testimony that robbers in Baltimore had the "same MO, a person

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[29] *Id.*
[30] A201.
[31] A202.
[32] *Id.*
[33] A203.
[34] A229.
[35] *Id.*

with a security shirt."[36] Counsel went on to say, "…unbelievable as it may sound, my client must be, essentially, the unluckiest person in the world that he walks out of Dollar General wearing a similar shirt to somebody that goes in and robs the store minutes later."[37]

The court ruled that the video was admissible as a proper duplicate.[38]

At another office conference on October 7, 2015, this exchange occurred:

> THE COURT: I know when I heard that, I was like, well, where is this going to go. And I was thinking, you know, sure, he can argue that some other people are doing it, but the jury may think your guy is doing it too. I don't know.
>
> DEFENSE COUNSEL: I have considered that, Your Honor.
>
> THE COURT: Well, you ought to.
>
> DEFENSE COUNSEL: I was taking that into consideration. And I think—I've talked to my client about it, as well, and he is willing to take that risk.
>
> THE COURT: Well you know, I don't know that it's *Brady*.
>
> PROSECUTOR: That is the thing, Your Honor.
>
> THE COURT: That is a bit of a stretch, a huge stretch.
>
> …
>
> THE COURT: Well, we'll see where we are Monday, but it is, to me, a huge stretch the events are related. The risk to your client seems incredible, but that is your call.

[36] *Id.*
[37] A229-230.
[38] A233.

MR. WELSH: Yes, Your Honor.

> THE COURT: But, you know, other places are being robbed, so what. We will see what Monday brings. We can try to flush it out more if you like, but that is my reaction. I heard it during the hearing, but boy, it is tenuous at best on a good day.[39]

As predicted, Land's attorney brought up the Baltimore robberies at the trial. The prosecutor did not bring it up on direct examination.[40] There was some back and forth as to whether there should be a watermark on the video. At the conclusion of the cross-examinations, defense attorneys raised the objection of authenticity again.[41] This Court admitted the video and explained the reasons on the record.[42]

At that point, Land's counsel stated, "I still have questions regarding the burglaries in Baltimore."[43] For the first time, Mr. Welsh brought up the Baltimore incidents in front of the jury. He asked Woody if he testified at a prior hearing that somebody in a SECURITY shirt robbed a Dollar General in Baltimore.[44] Woody recalled testifying about Baltimore robberies, but not the shirt.[45] Even after having his recollection refreshed, Woody did not recall that. Mr. Welsh persisted in trying

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[39] A243-245.
[40] *See*, A436-456.
[41] A470-471.
[42] A472-474.
[43] A476.
[44] A478-479.
[45] A479.

to pin down Woody that he had testified previously that Dollar Generals in Baltimore and one of the gentlemen had security on his back.[46] Woody stood firm and testified, "there was several incidents that happened in the Baltimore market. One hit my store, but he was all dressed in black similar, but it wasn't a security shirt."[47]

Land's attorney continued to elicit testimony about the Baltimore robberies. He confirmed that Woody had told the prosecutor about the Baltimore robberies, and that, once again, he had testified to the security shirt on August 25, 2015.[48]

Land's attorney sought a sidebar. He stated he was going to call the prosecutor as a 3507 witness to establish what Woody told her about the Baltimore robberies. He argued that the Baltimore videos were *Brady* material.[49] This Court responded, "well, I think we discussed this a little bit in chambers and I told you that that was a stretch I think borne of desperation and barely relevant because I think I am a forgiving person and flexible and I am willing to give you some rope to work with."[50] The application to call the prosecutor as a witness was denied, however, and the Baltimore videos were not ordered to be produced.[51]

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[46] A480-481(emphasis added).
[47] A481.
[48] A482-483.
[49] A484.
[50] A485.
[51] A487.

Codefendant Land files an affidavit after trial

On October 27, 2015 (after the trial but before Mr. Clay's December 11, 2015 sentencing), codefendant Land filed an affidavit from prison. It reads, *verbatim*:

> And state the facts in writing this affidavit of what I've been accused of or convicted of, that these Men Booker Martin and Christopher Clay had nothing to do with it and I never seen these Men before until that night. I never gave Mr. Martin any money or given Mr. Clay a gun. The night of the Robbery of the Dollar General Store. I am very sorry for leting this go as far as it did So I ask that all charges against them be drop. This is my own choice because it is the right thing to do.[52]

The prosecutor forwarded the affidavit to Mr. Clay's counsel as part of her continuing discovery obligation.[53] Her cover letter is dated November 10, 2015 – about a month before sentencing. Postconviction counsel sought to interview Land to determine if he still stands by the affidavit; however, Land is represented by counsel, who declined to permit the interview.

[52] A1054.
[53] A1053.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THAT MR. CLAY WAS NOT PREJUDICED BY COUNSEL'S FAILURE TO RENEW THE SEVERANCE MOTION WHEN CODEFENDANT INTRODUCED PREJUDICIAL EVIDENCE AT TRIAL.

A. Question Presented

Did the Superior Court err in finding that trial counsel was not ineffective for failing to renew the severance motion when the codefendant introduced prejudicial evidence of other robberies at Dollar General stores? Mr. Clay preserved this issue for appeal by filing an Amended Motion for Postconviction Relief on February 28, 2018.[54]

B. Scope of Review

This Court reviews for abuse of discretion the Superior Court's decision on an application for postconviction relief.[55] Questions of law and constitutional issues are reviewed *de novo*.[56]

This ineffective assistance of counsel claim is governed by *Strickland v. Washington*,[57] which entitles a petitioner to relief if counsel performed deficiently

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[54] A1068-1078.
[55] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (citing *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996)).
[56] *E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985); *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).
[57] 466 U.S. 668, 694 (1984).

and prejudice resulted. Counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," and performs deficiently when his performance falls below "an objective standard of reasonableness."[58] Prejudice is established when counsel's deficient performance undermines confidence in the outcome of the proceeding.[59]

C. Merits of Argument

Applicable Legal Precepts

The law of severance to avoid prejudicial joinder is well-established. Judicial economy and efficiency favor joint trials pursuant to Superior Court Criminal Rule 8; however, if the joinder will result in a reasonable probability of substantial injustice and denial of a fair trial severance of the defendants is warranted.[60] A criminal defendant bears the burden of demonstrating substantial injustice and unfair prejudice in order to show that severance is warranted.[61]

The well-established rubric for considering an application for severance features four factors:

> (1) Problems involving a co-defendant's extra-judicial statements;
>
> (2) an absence of substantial independent evidence of the movant's guilt;

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[58] *Id*.
[59] *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).
[60] *State v. Skinner*, 575 A.2d 1108, 1119 (Del. 1990). *See also* Del. Super. Ct. Crim. R. 14.
[61] *Outten v. State*, 650 A.2d 1291, 1298 (Del. 1994).

(3) antagonistic defenses as between the co-defendant and the movant; and

(4) difficulty in segregating the State's evidence as between the co-defendant and the movant.[62]

If any one of the four factors exist, severance may be appropriate.[63]

Delaware courts have granted severance where the jury must reject one defendant's defense in order to accept the other.[64] In fact, the effect of each defendant blaming the other brings what is tantamount to a second prosecutor into the courtroom, thereby denigrating the defendant's right to a fair trial.[65]

Trial counsel was ineffective for failing to renew his severance motion, resulting in prejudice to Mr. Clay

Trial counsel filed and litigated a meritorious motion to sever Mr. Clay away from the culpable Maurice Land. He argued that the evidence against Land was overwhelming and that Mr. Clay's defense could get "lost in the prosecution of the codefendants."[66] He asserted, "the jury would not be able to compartmentalize their judgment of guilt or innocence based on the evidence presented against Mr. Land."[67] The Superior Court denied the motion, holding, "there is no body of

[62] *Floudiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999).
[63] *Id*.
[64] *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989).
[65] See *United States v. Tootick*, 952 F.2d 1078, 1082-83 (9th Cir. 1991).
[66] A44.
[67] *Id.*

evidence that wouldn't be admissible in one trial that would be admissible in another."[68]

The evidentiary landscape then changed when Land's attorney decided to elicit testimony about the SECURITY shirt wearing Baltimore robbers. Land's theory was that the same robbers from Baltimore committed the Delaware robbery, and Mr. Land was unfortunate enough to be in the wrong place at the wrong time – and wearing an unfortunate shirt. As Land's attorney put it, "my client must be, essentially, the unluckiest person in the world" because he happened to be at the Dollar General at the same time as the robbery and wearing the same type shirt as the robber.[69]

As far-fetched as Baltimore defense was for Land, it had serious due process repercussions for Mr. Clay. Land was determined, in a joint trial, to introduce other robberies with the same *modus operandi*, and a similarly attired perpetrator. On September 21, 2015, trial counsel was on notice of Land's defense. It was discussed again and the next office conference on October 7, 2015.

At that point, Land's defense became extremely antagonistic to Mr. Clay. Land planned to admit evidence that similar robberies were done by a group of robbers in Baltimore. That raises the specter of the jury believing that the

[68] A54-55.
[69] A229-230.

Georgetown robbery was done by the same group, with group being the operative term. Mr. Clay's defense was that he was just in the store and left, having nothing to do with Land. Land's planned theory about the Baltimore group would hurt Mr. Clay's defense and bring what amounts to a second prosecutor to the courtroom.

Given the mutually antagonistic defenses and difficulty for the jury in segregating the new Baltimore evidence trial counsel was ineffective for failing to renew his previously-litigated motion to sever. His arguments would have been significantly strengthened by the new development of Land's proposed defense. The danger of unfair prejudice would have been real rather than speculative. Most importantly, the judge's finding that the bulk of the evidence would be admissible at separate trials anyway would have to be reconsidered. In a separate trial, neither the State nor Mr. Clay would be bringing up Baltimore robberies by perpetrators, one clothed in a SECURITY shirt.

At trial, Land pursued his Baltimore theory and engaged Mr. Woody in protracted testimony about the Baltimore robberies. The jury heard testimony about the possibility that someone dressed just like Land had committed other robberies at other Dollar General stores.

This development established that Land and Mr. Clay had antagonistic defenses. Mr. Clay's defense, and it was a good one, was that Mr. Clay had nothing to do with robbing the Dollar General—although he was in the store at the

time Land was, nothing established his culpability as an accomplice. Land's defense was that he was not in there and did not do the robberies—the implication being that it must have been the Baltimore robbers and that Land unfortunately was wearing a SECURITY shirt.

Land's attorney helped the State establish Land as the perpetrator, because the jury was permitted to consider evidence that Land and his crew had committed the Baltimore robberies and then committed the Georgetown robbery. Mr. Welsh became like a second prosecutor in the courtroom, which severance would have avoided.

As such, Mr. Clay was prejudiced by his trial counsel's deficient performance. A reasonable probability exists that a renewed severance motion would have been granted and that Mr. Clay would have been acquitted of the charges. The evidence against Mr. Clay as an "in store lookout" was scant. Codefendant Martin's motion for judgment of acquittal was granted even though he was found with the likely robbery proceeds of $897 in sorted bills in his possession.

The Superior Court erred in denying this claim.

The Superior Court's reasoning for denying the claim is that it would have denied any renewed motion to sever. The Court held:

> Clay's trial counsel states that he did not renew his motion to sever because he thought it would have been frivolous to do so. Clay's trial counsel notes that Woody's pre-trial statement involved robberies that (1) did not implicate Clay, (2) did not involve more than one robber, (3) did not involve in-store and out-of-store lookouts, and (4) did not involve a robber using a gun. Quite simply, Clay's trial counsel was not concerned about the Baltimore robberies because they were not at all like the Georgetown Dollar General store robbery and, as such, did not implicate Clay.
>
> Clay's trial counsel is correct about the differences in the robberies. The Georgetown Dollar General store robbery was very different than the Baltimore robberies. It involved three people, one of whom had a handgun, and two others that acted as lookouts. Land robbed the store clerk using a handgun. Clay acted as the in-store lookout. Martin acted as the out-of-store lookout. Clay's defense was that he simply had nothing to do with the robbery. [70]

The Court's holding is factually erroneous. There was not much information about how the Baltimore robberies were conducted, but certainly it was established that the robbery was committed by more than one person. As Woody testified, "was this the same guys hitting my Baltimore stores[?][71] The jury was free to infer that the Baltimore robberies were similar to the Georgetown robbery. The Court erred in holding that "the Baltimore robberies were so different from the robbery of the Georgetown Dollar General store…"[72] The Court's expressed opinion that Woody's testimony was "so vague and general as to be worthless"[73] does not

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[70] *State v. Clay*, 2018 WL 6434798 at *3 (Dec. 7, 2018).
[71] A192.
[72] *Clay*, 2018 WL 6434798 at *5.
[73] *Id.*

comport with the record. The jury heard the evidence and was free to conclude that the Georgetown robbery was another in a series of robberies committed by multiple perpetrators, one of whom was wearing a SECURITY shirt just like Land.

The Court went on to explain why severance was originally denied. But the Court does not explain why the new evidence presented by Land's counsel would not have resulted in the granting of a renewed severance motion.

For these reasons, Mr. Clay seeks reversal of the Superior Court.

II. THE TRIAL COURED ERRED IN FINDING THAT MR. CLAY WAS NOT PREJUDICED BY TRIAL COUNSEL'S FAILURE TO SEEK A MISTRIAL, A LIMITING INSTRUCTION, OR EVEN OBJECT TO THE IRRELEVANT AND DAMAGING BALTIMORE EVIDENCE.

A. Question Presented

Did the Superior Court err in finding that trial counsel was not ineffective for failing to move for a mistrial, a curative instruction, or otherwise object when the codefendant introduced prejudicial evidence of other robberies at Dollar General stores? Mr. Clay preserved this issue for appeal by filing an Amended Motion for Postconviction Relief on February 28, 2018.[74]

B. Scope of Review

This Court reviews for abuse of discretion the Superior Court's decision on an application for postconviction relief.[75] Questions of law and constitutional issues are reviewed *de novo*.[76]

This ineffective assistance of counsel claim is governed by *Strickland v. Washington*,[77] which entitles a petitioner to relief if counsel performed deficiently and prejudice resulted. Counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," and

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[74] A1078-1080.
[75] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (citing *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996)).
[76] *E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985); *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).
[77] 466 U.S. 668, 694 (1984).

performs deficiently when his performance falls below "an objective standard of reasonableness."[78] Prejudice is established when counsel's deficient performance undermines confidence in the outcome of the proceeding.[79]

C. Merits of Argument

Mr. Woody had memory problems at trial. He denied testifying about Baltimore robberies.[80] His recollection was constantly refreshed by Land's attorney. He even denied that the person who robbed Baltimore stores had a security shirt on, even though he had previously testified that was the fact that caught his attention when reviewing the Georgetown footage.[81] He continued to testify inconsistently with his prior sworn testimony. Eventually, he seemed to indicate that one of the Baltimore robbers wore all black and the other had gray and black pants and a black shirt.[82] Land's counsel's continued refreshing of Woody's recollection with the prior hearing transcript served, if anything, to emphasize the evidence to the jury.

None of this evidence elicited by Land's counsel should have been heard by the jury anyway. Mr. Clay's counsel should have sought a mistrial, or at the very least objected so the trial judge could issue a curative instruction. In denying

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[78] *Id*.
[79] *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).
[80] A479.
[81] A481.
[82] A490.

postconviction relief, the trial judge noted that "if anything, Woody's trial testimony was irrelevant."[83] If that was the case, the jury should have been instructed to disregard it and not consider it in their deliberations. But because Mr. Clay's counsel did not object, the Court had no objection upon which to rule.

Zealous advocacy includes the vigilant monitoring of trial evidence and making timely objections to irrelevant or otherwise inadmissible evidence. Trial counsel was ineffective for failing to do so.

The trial court erred in finding that Mr. Clay's problem was not Mr. Woody, but rather it was evidence that was "powerful and overwhelming."[84] It was not, as demonstrated by the fact that the judge vacated codefendant Martin's convictions. Martin was with Land when apprehended and had most of the robbery proceeds on him.[85] He fled from police and had to be Tasered twice.[86] Yet in the opinion denying postconviction relief to Mr. Clay, the Court held, "Martin acted as the out-of-store lookout."[87] The factual findings by the postconviction judge do not align with each other or the record.

As to Mr. Clay, this was a close case. This Court held that a rational juror, considering the evidence in a light most favorable to the State, "could find that

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[83] *State v. Clay*, 2018 WL 6434798 at *5 (Del. Super. Dec. 7, 2018).
[84] *Id.*
[85] A1022.
[86] A1021.
[87] *Clay*, 2018 WL 6434798 at *3.

Clay intended to facilitate the commission of the robbery by being Land's 'lookout' while he was in the back of the store, and Clay knew that Land was armed."[88] But viewed by the prism of a presumption of innocence, the case was close. The only quantifiable difference between Mr. Clay and the now-acquitted Booker is that Mr. Clay entered the store, walked around, put items on the counter, and left. There were no indicia he secured the front of the store to facilitate a robbery or threatened anyone, or made any move for the cash register.

The invocation of the Baltimore robberies, therefore, was prejudicial to Mr. Clay, because it raised the possibility of other similar bad acts performed by the same group. It would have taken very little time or effort for trial counsel to object and for the jury to be instructed to ignore the evidence.

Because the trial judge erred, Mr. Clay seeks reversal.

[88] *Clay v. State*, 164 A.3d 907, 914 (Del. 2017).

III. THE SUPERIOR COURT ERRED IN FINDING MR. CLAY'S COUNSEL NOT INEFFECTIVE FOR FAILING TO FILE A MOTION FOR A NEW TRIAL WHEN THE CODEFENDANT SWORE BY AFFIDAVIT THAT MR. CLAY WAS NOT INVOLVED IN THE ROBBERY.

A. Question Presented

Did the Superior Court err in finding that trial counsel was not ineffective for failing to file a motion for a new trial when codefendant Land swore out an affidavit asserting that Mr. Clay was not involved at all in the robberies? Mr. Clay preserved this issue for appeal on May 29, 2018 by filing a Motion to Amend[89] the pending postconviction motion to add this claim.[90]

B. Scope of Review

This Court reviews for abuse of discretion the Superior Court's decision on an application for postconviction relief.[91] Questions of law and constitutional issues are reviewed *de novo*.[92]

This ineffective assistance of counsel claim is governed by *Strickland v. Washington*,[93] which entitles a petitioner to relief if counsel performed deficiently and prejudice resulted. Counsel has a "duty to bring to bear such skill and

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[89] A1092-1095.
[90] A1097-1104.
[91] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (citing *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996)).
[92] *E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985); *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).
[93] 466 U.S. 668, 694 (1984).

knowledge as will render the trial a reliable adversarial testing process," and performs deficiently when his performance falls below "an objective standard of reasonableness."[94] Prejudice is established when counsel's deficient performance undermines confidence in the outcome of the proceeding.[95]

C. Merits of Argument

Trial counsel did not find Land's affidavit credible

Two weeks after the verdict, Land swore out and filed an affidavit from prison. The affidavit reads,

> And state the facts in writing this affidavit of what I've been accused of or convicted of, that these Men Booker Martin and Christopher Clay had nothing to do with it and I never seen these Men before until that night. I never gave Mr. Martin any money or given Mr. Clay a gun. The night of the Robbery of the Dollar General Store. I am very sorry for leting this go as far as it did So I ask that all charges against them be drop. This is my own choice because it is the right thing to do.[96]

The prosecutor forwarded the affidavit to Mr. Clay's counsel on November 10, 2015 – a month before Mr. Clay's sentencing.[97] Trial counsel followed up with Land's attorney, who did not give trial counsel permission to interview Land.[98]

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[94] *Id*.
[95] *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).
[96] A1102.
[97] A1101.
[98] A1107.

Land's counsel also stated that Land was not accepting responsibility for the robbery.[99]

Trial counsel stated in his own affidavit that Land's affidavit "lacks all credibility when Land does not acknowledge that he himself was involved in the robbery, was not aware a robbery was occurring by anyone, or even present during the robbery."[100]

Land filed his affidavit prior to his own sentencing and the sentencing of either codefendant. As such, he still had Fifth Amendment protections and appellate rights after sentencing.

Applicable legal precepts

Superior Court Criminal Rule 33 provides that a motion for new trial may be filed based on newly discovered evidence, provided it is filed within two years of final judgment.[101] To prevail on such a motion, the defendant bears the burden of proving:

> (1) The new evidence is of such a nature that it would have probably changed the result if presented to the jury;
>
> (2) The evidence was newly discovered; i.e., it must have been discovered since trial, and the circumstances must be such as to indicate that it could not have been discovered before trial with due diligence; and

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[99] *Id.*
[100] A1108.
[101] Super. Ct. Crim. R. 33.

(3) The evidence must not be merely cumulative or impeaching.[102]

The Superior Court erred in denying this claim

The Superior Court's reasoning for denying the claim is as follows:

> Clay argues that Land's affidavit is newly discovered evidence and that it forms the basis for a new trial. Land's affidavit is neither. It is not newly discovered evidence because it did not exist until after the trial. The allegations in the affidavit, as far as anyone knows, were never made until post-trial. Moreover, Land's affidavit is just not credible. Land does not accept responsibility for the robbery and he does not explain why Clay and Martin had nothing to do with the robbery even though Clay was obviously an in-store lookout and Clay and Martin ended up with the gun and most of the stolen money. Quite simply, Land's affidavit is just a conclusory statement that fails to explain away the evidence against Clay. I certainly would not have given Clay a new trial based on Land's affidavit. Trial counsel's performance was neither deficient nor did it prejudice the defense.[103]

Trial counsel's reasoning, as adopted by the Court, erroneously conditions the veracity of the affidavit with a requirement that Land take responsibility for the robbery. There is no basis to establish such a nexus. Land had no reason to admit culpability before his own sentencing and appeal. The fact that he declined to do so does not render his affidavit worthless. Besides, he expresses remorse for "letting it go as far as it did" and states that he is coming forward because "it is the right

[102] *Hicks v. State*, 913 A.2d 1189, 1194 (Del. 2006).
[103] *State v. Clay*, 2018 WL 6434798 at *6 (Del. Super. Dec. 7, 2018).

thing to do."[104] The implication is that Land was responsible for the robberies but the other two defendants were not.

The Court also erred in finding that the evidence did not exist pretrial. The fact of Mr. Clay's noninvolvement certainly existed pretrial, but trial counsel could not have discovered through due diligence a posttrial affidavit establishing that fact.

The Court goes on to reason that Land offers no explanation as to how Clay ended up with the gun and some of the proceeds, so his affidavit lacks credibility. There was no evidence at trial that the gun Mr. Clay tossed had anything to do with the robbery. One could speculate that it was the gun Land used and he somehow passed it off to Mr. Clay, but there was no evidence of such a fact ever presented. Moreover, the Court does not explain why, if Mr. Clay's arrest with Land and being in possession of money seals his fate, then codefendant Martin's motion for judgment of acquittal was granted. Martin was arrested with Land and had $897 in sorted bills in his possession. Martin similarly tried to run when police attempted to apprehend him. Land's affidavit is in a sense corroborated by the fact that the trial judge granted Martin's acquittal motion. The judge found that even considering the evidence in a light most favorable to the State, Martin should not

[104] A1102.

have been convicted. The disparate treatment of similarly situated defendants Martin and Clay cannot be reconciled on this record.

Because there is a probability that the evidence in Land's affidavit would have changed the outcome of the trial, trial counsel was ineffective for failing to litigate a motion seeking a new trial. As such, the Superior Court erred in denying this claim.

CONCLUSION

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

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