



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER CLAY,)
)
 Defendant Below,)
 Appellant,) Case No. 1, 2019
)
 v.)
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE OF DELAWARE'S ANSWERING BRIEF

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DATE: March 19, 2019

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	ii
NATURE AND STAGE OF THE PROCEEDINGS.....	1
SUMMARY OF ARGUMENT.....	4
STATEMENT OF FACTS.....	5
ARGUMENT	
I. The Superior Court Did Not Abuse Its Discretion in Finding Trial Counsel Not Ineffective for Failing to Renew the Motion to Sever and for Failing to Object, Move for a Mistrial, or Request a Limiting Instruction After Testimony About Similar Robberies in Baltimore.....	6
II. The Superior Court Did Not Abuse Its Discretion in Finding Trial Counsel Not Ineffective for Failing to File a Motion for a New Trial.....	17
CONCLUSION.....	20

TABLE OF CITATIONS

	<u>Page(s)</u>
Cases	
<i>Albury v. State</i> , 551 A.2d 53 (Del. 1988).....	11
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	8
<i>Burrell v. State</i> , 953 A.2d 957 (Del. 2008).....	6, 17
<i>Clay v. State</i> , 164 A.3d 907 (Del. 2017).....	2, 5, 14
<i>Floudiotis v. State</i> , 726 A.2d 1196 (Del. 1999).....	13, 14
<i>Frey v. Fulcomer</i> , 974 F.2d 348 (3d Cir. 1992).....	12
<i>Gattis v. State</i> , 955 A.2d 1276 (Del. 2008).....	6, 17, 18
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	12
<i>Neal v. State</i> , 80 A.3d 935 (Del. 2013).....	6, 17
<i>State v. Clay</i> , 2018 WL 6434798 (Del. Super. Ct. Dec. 7, 2018).....	passim
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	11, 12, 19
Rules	
Super. Ct. Crim. R. 8(b).....	13
Super. Ct. Crim. R. 14.....	13
Super. Ct. Crim. R. 33.....	18

NATURE AND STAGE OF THE PROCEEDINGS

Appellant Christopher Clay was arrested on August 9, 2014 and subsequently indicted by a Sussex County grand jury on November 17, 2014 with first degree robbery, aggravated menacing, second degree conspiracy, possession of a firearm by person prohibited (PFBPP), possession of ammunition by person prohibited (PABPP), receiving a stolen firearm, tampering with physical evidence, resisting arrest, and two counts of possession of a firearm during the commission of a felony (PFDCF). A24-30. The charges stemmed from an incident in which Clay, Maurice Land, and Booker Martin robbed a Dollar General Store in Georgetown. *Id.*

The Superior Court scheduled a joint trial for all three defendants. A2. On July 14, 2015, Clay filed motions to sever his case from his codefendants and to sever his person prohibited charges. A4, 40-45. After a hearing on July 17, 2015, the court granted the motion to sever the charges, but not the defendants. A5, 46-57.

Trial began on October 12, 2015. A8. At the close of the State's case, Clay moved for judgment of acquittal as to all counts of the indictment. A728-34. The court denied the motion. A734. After four days of testimony, the jury found Clay guilty of first degree robbery, PFDCF, tampering with physical evidence, second

degree conspiracy, and resisting arrest.¹ A9, 921-25. After a presentence investigation, the Superior Court sentenced Clay as follows: (i) for PFDCF, to 20 years of Level V incarceration (with credit for 490 days previously served); (ii) for first degree robbery, to 25 years at Level V, suspended after 20 years for 18 months of Level III probation; (iii) for tampering with physical evidence, to two years at Level V, suspended for one year of Level III probation; (iv) for second degree conspiracy, to two years at Level V, suspended for one year of Level III probation; and (v) for resisting arrest, to six months at Level V. A999-1004.

Clay appealed. This Court affirmed all of Clay's convictions, except for his conviction for tampering with evidence, which it reversed, finding the Superior Court erred in denying Clay's motion for judgment of acquittal as to that charge.² The Superior Court resentenced Clay on June 22, 2017 without the tampering with evidence charge. A1005-06. Clay's sentences as to the other charges remained the same. *Id.*

On June 21, 2017, Clay filed a *pro se* motion for postconviction relief. A13, 1046-52. Counsel was appointed to represent him, and on February 28, 2018,

¹ The jury also found Land and Martin guilty of all charges against them, except that the jury found Martin guilty of a lesser-included resisting arrest offense. A926-27. The Superior Court later dismissed all but one of Martin's charges (resisting arrest) on a motion for judgment of acquittal. A1018-38.

² *Clay v. State*, 164 A.3d 907, 913 (Del. 2017).

counsel filed an amended motion for postconviction relief. A13, 14a, 1055-82. Thereafter, trial counsel filed an affidavit responding to Clay's claims of ineffective assistance of counsel. A14a, 1083-91. On June 4, 2018, Clay filed a motion to amend his amended motion for postconviction relief to add an additional claim of ineffective assistance of counsel. A14a, 1092-1104. The court granted the motion, and on July 20, 2018, trial counsel filed a second affidavit responding to the amendment. A14a, 14b, 1105-09. The State responded to Clay's motion and amendments, and Clay filed a reply. A14b, 1110-47. The Superior Court denied Clay's motion for postconviction relief on December 7, 2018.³ Clay appealed and filed a timely opening brief. This is the State's Answering Brief.

³ *State v. Clay*, 2018 WL 6434798 (Del. Super. Ct. Dec. 7, 2018).

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The Superior Court did not abuse its discretion in finding trial counsel not ineffective for failing to renew the motion to sever after Land's attorney indicated that he intended to introduce evidence at trial about similar Baltimore robberies. The witness's testimony about the other robberies did not implicate Clay, and, therefore, did not prejudice him.

II. Appellant's second claim is DENIED. The Superior Court did not abuse its discretion in finding trial counsel not ineffective for failing to seek a mistrial or limiting instruction, or to object after Clay's counsel elicited testimony at trial about similar Baltimore robberies. The witness's testimony about the other robberies did not implicate Clay, and, therefore, did not prejudice him.

III. Appellant's third claim is DENIED. The Superior Court did not abuse its discretion in finding trial counsel not ineffective for failing to file a motion for a new trial after Land sent the State an affidavit in which he stated Martin and Clay "had nothing to do with it." Trial counsel investigated the affidavit and learned from Land's counsel that Land still claimed he was innocent. Given the vagueness of the affidavit and Land's continued maintenance of his innocence, trial counsel's failure to file a motion for a new trial was not objectively unreasonable.

STATEMENT OF FACTS

The State adopts the Appellant's Statement of the Facts to the extent he cited this Court's recitation of the facts in its direct appeal opinion.⁴

⁴ See *Clay*, 164 A.3d at 911-12.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING TRIAL COUNSEL NOT INEFFECTIVE FOR FAILING TO RENEW THE MOTION TO SEVER AND FOR FAILING TO OBJECT, MOVE FOR A MISTRIAL, OR REQUEST A LIMITING INSTRUCTION AFTER TESTIMONY ABOUT SIMILAR ROBBERIES IN BALTIMORE.⁵

Question Presented

Whether the Superior Court abused its discretion in finding trial counsel not ineffective for failing to renew the motion to sever after he learned Clay intended to present evidence at trial about similar robberies in Baltimore.

Whether the Superior Court abused its discretion in finding trial counsel not ineffective for failing to object, move for a mistrial, or request a limiting instruction after testimony about similar robberies in Baltimore.

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.⁶ "[F]actual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous."⁷ Questions of law are reviewed *de novo*.⁸

⁵ Argument I addresses claims I and II in Clay's Opening Brief.

⁶ *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008) (citation omitted).

⁷ *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008).

⁸ *Neal v. State*, 80 A.3d 935, 941 (Del. 2013); *Gattis*, 955 A.2d at 1280-81.

Merits of the Argument

Prior to trial, Clay filed a motion to sever his case from those of his codefendants. A40-45. He argued that because the evidence against him was circumstantial and the evidence against Land was overwhelming, “there [was] a substantial risk of unfair prejudice in that Mr. Clay’s defense could get lost in the prosecution of the codefendants and the jury would not be able to compartmentalize their judgment of guilt or innocence based on the evidence presented against Mr. Land.” A44. The Superior Court denied Clay’s motion, finding that severance was not warranted because “the evidence that the State would need to present in a separate trial is the same evidence it would be presenting in the one trial, and there is no body of evidence that wouldn’t be admissible in one trial that would be admissible in another.” A54-55.

Just prior to trial, Land’s attorney objected to the State being able to use surveillance video from the robbery because the State could not explain why there were skips on the copy provided by the police. A85-86. The Superior Court postponed trial to hold an evidentiary hearing on the issue. A115-16, 118. At the hearing, the State presented Dollar General’s Regional Loss Prevention Manager, Karl Woody, to testify about the video’s integrity. A174. When asked by Land’s

attorney on cross-examination how Woody knew the surveillance video was the same as what he had retrieved just after the robbery, Woody responded:

Well, what stuck out with me was the one gentleman had security on his back. I was working a string of robberies in the Baltimore area with the same kind of get-up. So that kind of stuck with me. I was really concerned, was this the same guys hitting my Baltimore stores. So that kind of stuck in my mind on some of the details.

A191-92. Land's counsel asked followup questions about the Baltimore robberies, including whether video from those robberies existed. *See* A201-03.

During argument on the admissibility of the video surveillance tape, Land's counsel stated that Land's position was that somebody else, also wearing a security shirt, robbed the Dollar General, not Land, asserting:

Now as difficult as that might be to believe, I think that is a valid argument to the jury, one. And two, to a degree, it was backed up at the evidentiary hearing. The person testifying from Dollar General said that there has been other robberies that took place in Baltimore with the same MO, a person with a security shirt. There is no evidence to suggest that my client was involved in that. So that lends credence to the fact that, as unbelievable as it may sound, my client must be, essentially, the unluckiest person in the world in that he walks out of Dollar General wearing a similar looking shirt to somebody that goes in and robs the store minutes later.

A229-30. Land's counsel also later tried, unsuccessfully, to obtain copies of any videos of the Baltimore robberies Woody had mentioned, arguing they were *Brady*⁹ material. *See* A243-45.

⁹ *Brady v. Maryland*, 373 U.S. 83 (1963).

Land's defense at trial was that he was not the man on the surveillance video robbing the store. *See* A858-61 (Land's closing argument). In keeping with that strategy, Land's counsel asked Woody at trial about the Baltimore robberies:

Q. Do you recall testifying at a prior hearing regarding a string of robberies at Dollar General stores in the Baltimore area?

A. That's not what I testified to, but I remember saying there was a string of robberies in the Baltimore area?

Q. A string of robberies involving somebody wearing a security shirt?

A. Yes sir.

A478-79. Land seemed to be trying to elucidate from Woody that someone wearing a "security" shirt had robbed Dollar General stores in Baltimore, but that Land was not involved in those robberies. *See* A229-30, 243-45. But Woody did not remember previously testifying to those details. A479-80.

Land's counsel had Woody read his prior testimony out loud. A480-81. Then, when he asked Woody if that clarified his recollection, Woody replied: "Actually, 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." A481. Woody further testified that he had no video with a guy with a "security" shirt, but that there was a guy dressed in black involved in a robbery; there was an emblem on

the shirt, but he could not distinguish what it was. A482-83. When asked to explain why his prior testimony had been different, the following exchange occurred:

A. Well, originally, there was a news flash that came out about this guy running around with a security shirt. I had a robbery where a guy entered the building with a black shirt, black pants similar. So when I – without looking at the video, he fit the same description, the same operation when he came in with the weapon and demanded money from the safe. Going back and looking at it, it was not the same guys as I testified before. It was not the same guy that was involved in my robbery.

Q. So these gentlemen were not, in any way involved in a robbery in Baltimore?

A. No, sir, not to my knowledge.

Q. It was someone wearing a very similar getup?

A. Right.

Q. Why is it that you believed previously that that getup included a security shirt?

A. Because what happened was, when I had my robbery, which was a gentleman dressed in all black and when the broadcast came over the news that there was a robbery, a string of robberies in Baltimore with a gentleman going around with a security shirt on, and then I saw this robbery, I kind of thought that this guy had some connection. And when I looked at my still picture that I had . . . it definitely was not this guy.

A487-89.

Clay claimed in his amended motion for postconviction relief that his trial counsel was constitutionally ineffective for failing to renew his motion for severance once he learned that Land intended to use the Baltimore robberies to try to exculpate

himself in this robbery. A1076-78. Clay also asserted his counsel was ineffective in failing to seek a mistrial, limiting instruction, or to object when Woody testified about the Baltimore robberies during trial. A1078-80. The Superior Court denied both of Clay's claims.¹⁰ Clay argues the court abused its discretion in so doing. Op. Br. at 15-26. His argument is unavailing.

In order to prevail on a claim of ineffective assistance of counsel, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness,’ and ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’”¹¹ A defendant must overcome a strong presumption that trial counsel’s conduct was professionally reasonable.¹² He must also overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.¹³

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s

¹⁰ *Clay*, 2018 WL 6434798, at *3-5.

¹¹ *Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (applying *Strickland v. Washington*, 466 U.S. 668, 688 (1984) standard to Delaware).

¹² *Id.* at 59.

¹³ *Id.*

perspective at the time.”¹⁴ The question to be answered is not whether trial counsel could have made a better choice, but whether the choice he did make was outside the “wide range of professionally competent assistance.”¹⁵ As the United States Supreme Court noted in *Strickland*, “[t]here are countless ways to provide effective assistance in any given case.”¹⁶

Because the defendant must prove both parts of his ineffectiveness claim, a court may dispose of a claim by first determining if the defendant established prejudice.¹⁷ A showing of prejudice “requires more than a showing of theoretical possibility that the outcome was affected.”¹⁸ The defendant must actually show a reasonable probability of a different result but for trial counsel’s alleged errors.¹⁹ “It is not enough to ‘show that the errors had some conceivable effect on the outcome of the proceeding.’”²⁰

In deciding Clay’s first claim, the Superior Court analyzed the four factors a trial court should consider when determining whether to sever defendants and found

¹⁴ *Strickland*, 466 U.S. at 689.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 697.

¹⁸ *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

¹⁹ *Strickland*, 466 U.S. at 695.

²⁰ *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 693).

it would not have granted a motion to sever had trial counsel renewed his motion based on Land's intent to raise the Baltimore robberies in his defense at trial.²¹ Thus, the court concluded, "[t]rial counsel's performance was neither deficient nor did it prejudice the defense."²² The Superior Court did not abuse its discretion in so finding for the simple reason that Woody's statements about the Baltimore robberies, and the purpose for which Land intended to use the evidence, in no way implicated, nor inculpated Clay. Therefore, the evidence triggered none of the factors supporting severance.

Superior Court Criminal Rule 8(b) permits the State to charge codefendants in the same indictment "if they are alleged to have participated in the same act or transaction . . . constituting an offense." "[J]udicial economy dictates that the State should jointly try defendants indicted for the same crime or crimes."²³ If, however, it appears that joinder for trial will prejudice a defendant, Superior Court Criminal Rule 14 provides that the trial court may grant a severance of defendants. The court considers four factors in determining whether severance is appropriate:

- (1) problems involving a co-defendant's extra-judicial statements;
- (2) an absence of substantial independent competent evidence of the movant's guilt;
- (3) antagonistic defenses as between the co-defendant

²¹ *Clay*, 2018 WL 6434798, at *3-5.

²² *Id.* at *5.

²³ *Floudiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999).

and the movant; and (4) difficulty in segregating the State's evidence as between the co-defendant and the movant.²⁴

It should be noted that this Court affirmed on direct appeal the Superior Court's initial denial of Clay's motion to sever.²⁵ There, Clay contended the second and fourth factors supported severance.²⁶ Thus, this Court has already found that "evidence that Land committed the robbery would still be admissible at Clay's trial had his motion to sever been granted," and the evidence presented at trial of Clay's guilt "collectively constitute[d] substantial independent competent evidence of Clay's guilt that is attributable only to Clay, and therefore, Clay did not suffer any prejudice because of the joint trial."²⁷ Woody's statements about the Baltimore robberies, either pretrial or during trial, do not change those conclusions.

Woody unequivocally testified that, to his knowledge, none of the defendants were involved in the Baltimore robberies. The only possible connection between the Georgetown and Baltimore robberies was that the Baltimore suspect was dressed all in black, as was Land. But Woody had confirmed from a surveillance video still of the Baltimore suspect that Land was not him. Clay was not prejudiced by Woody's testimony. Thus, he cannot show trial counsel's failure to renew the

²⁴ *Id.* (citation omitted).

²⁵ *Clay*, 164 A.3d at 913.

²⁶ *Id.*

²⁷ *Id.*

motion to sever was objectively unreasonable, nor that, but for, counsel's failure, the result of the trial would have been different.

For the same reason, Clay cannot show the Superior Court abused its discretion in finding trial counsel not ineffective for failing to object, or ask for a limiting instruction or mistrial as a result of Woody's testimony. The Superior Court found that trial counsel's performance was neither deficient nor that it prejudiced the defense, noting, "Woody's generalized and non-specific testimony about factually different robberies in Baltimore did not cause the jury to find Clay guilty."²⁸ The court further stated:

Clay's problem was not Woody's trial testimony. Indeed, if anything, Woody's trial testimony was irrelevant. Woody did not testify about a gang robbing the stores in Baltimore. Woody did testify that none of the defendants were involved in the Baltimore robberies. Clay's problem was the evidence that did implicate him in the robbery of the Georgetown Dollar General store. The video shows Land and Clay going into the store together and immediately turning left together. The video shows Land go to the back of the store and rob one of the store clerks with a gun. While Land is doing that, the video shows Clay walking around the front of the store where the cashiers are located and placing a few items on the counter for purchase. Lastly, the video shows Land walk past Clay and out of the store with Clay exiting the store four seconds behind Land without paying for and taking the items that he had put on the counter. The video is powerful evidence of Clay's involvement in the robbery. However, the evidence gets even worse for Clay. Only minutes after Clay and Land leave the store they and Martin are seen running across the street together. When contacted by the police, Clay runs away from the other two and is seen throwing a pistol over a fence. Once they are all arrested, the police have Clay and Land wearing the clothes they had on during the video. Land had the shirt

²⁸ *Clay*, 2018 WL 6434798, at *5.

with “Security” on it that is seen in the video. Land had the latex glove on his person that he used in the robbery. Clay had the gun and some of the money. Martin had most of the money. It was this evidence that sealed Clay’s fate.²⁹

The Superior Court’s factual findings were not clearly erroneous. And, as such, its conclusion that trial counsel was not ineffective for failing to take action in response to Woody’s statements or testimony was not an abuse of discretion.

²⁹ *Id.*

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING TRIAL COUNSEL NOT INEFFECTIVE FOR FAILING TO FILE A MOTION FOR A NEW TRIAL.³⁰

Question Presented

Whether the Superior Court abused its discretion in finding trial counsel not ineffective for failing to file a motion for a new trial after Land sent the State an affidavit in which he stated Martin and Clay “had nothing to do with it.”

Standard and Scope of Review

This Court reviews the Superior Court’s denial of postconviction relief for abuse of discretion.³¹ “[F]actual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous.”³² Questions of law are reviewed *de novo*.³³

Merits of the Argument

After trial, but before Clay had been sentenced, Land sent a notarized affidavit to the State in which he stated: “[Martin and 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. . . . I am very sorry for leting [sic] this go as far as it did So I

³⁰ Argument II addresses Claim III in Clay’s Opening Brief.

³¹ *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008) (citation omitted).

³² *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008).

³³ *Neal v. State*, 80 A.3d 935, 941 (Del. 2013); *Gattis*, 955 A.2d at 1280-81.

ask that all charges against them be drop.” A1102. The State forwarded a copy of the affidavit to trial counsel. In his amendment to his amended postconviction relief motion, Clay claimed his trial counsel was ineffective for not filing a motion for a new trial after receiving the affidavit. A1097-99. The Superior Court denied the claim.³⁴ Clay asserts the court erred in so doing. Op. Br. at 27-32. His claim is unavailing.

Before a trial court will grant a request for a new trial, “the defendant must establish (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial and could not have been discovered before by the exercise of due diligence; and (3) that it is not merely cumulative or impeaching.”³⁵ The Superior Court found that Land’s affidavit neither consisted of newly discovered evidence, nor did it form the basis for a new trial, stating:

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 the 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.³⁶

³⁴ *Clay*, 2018 WL 6434798, at * 6.

³⁵ *Downes v. State*, 771 A.2d 289, 292 (Del. 2001), *quoted in Gattis*, 955 A.2d at 1291. *See also* Super. Ct. Crim. R. 33 (providing a court may grant a motion for a new trial upon motion of a defendant if required in the interest of justice).

³⁶ *Clay*, 2018 WL 6434798, at *6.

The Superior Court's factual findings were not clearly erroneous and its conclusion that trial counsel was not ineffective was not an abuse of discretion.

Here, trial counsel did investigate the affidavit, but was told by Land's counsel that Land maintained that he was not involved in the robbery. A1107. Trial counsel asked to speak with Land, but that request was denied. *Id.* Because Land was claiming that Martin and Clay were not involved in the robbery, while at the same time maintaining his innocence, trial counsel believed the affidavit was not credible, and, therefore, did not file a motion for a new trial. A1107-08.

Given the circumstances, trial counsel's decision was not objectively unreasonable. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."³⁷ Trial counsel reasonably concluded that Land's affidavit lacked credibility because of its vagueness, and the fact that Land, through his attorney, continued to maintain his innocence. Moreover, trial counsel could not further investigate Land's affidavit because he could not speak with him. The Superior Court did not abuse its discretion in finding trial counsel not ineffective.

³⁷ *Strickland*, 466 U.S. at 690–91.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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DATED: March 19, 2019

CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on March 19, 2019, she caused the attached *State's Answering Brief* to be delivered to the following persons in the form and manner indicated:

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