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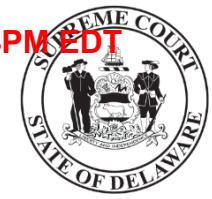

IN THE SUPREME COURT OF THE STATE OF DELAWARE

REUEL RAY,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	No. 197, 2021
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

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

APPELLANT'S OPENING BRIEF

THE LAW OFFICE OF
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DATED: September 10, 2021

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NATURE OF THE PROCEEDINGS

Appellant was arrested on October 31, 2012 and indicted five days later on multiple charges: two counts of Murder in the First Degree, six counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), and one count each of Conspiracy in the Second Degree, Possession of a Firearm by a Person Prohibited ("PFBPP"), and Attempted Robbery in the First Degree.[1] The Grand Jury subsequently issued a superseding Indictment against Appellant on October 13, 2014, adding two counts of Criminal Solicitation in the Second Degree to the original Indictment.[2] Eugene J. Maurer, Esquire, and Kevin P. Tray, Esquire, ultimately represented Appellant as conflict counsel.[3]

Jury selection began on January 6, 2015.[4] Trial began on January 12, 2015, and concluded on January 22, 2015.[5] The jury returned a verdict the next day, convicting Appellant of one count of Murder in the First Degree under a felony murder theory (hereinafter "Felony Murder"), four counts of PFDCF, two counts of Criminal Solicitation in the Second Degree, and one count each of Attempted

[1] A001-02; A028-35.

[2] A012; A124-32.

[3] *See* A005; A068; A087-90; A095.

[4] A014; A136.

[5] A017; A199-543.

Robbery in the First Degree and Conspiracy in the Second Degree.[6] Appellant was acquitted of one count of intentional Murder in the First Degree, as well as two counts of PFDCF.[7]

Appellant appeared for sentencing on July 8, 2016.[8] On that date, the State dismissed two counts of PFDCF, as well as the PFBPP offense, which had previously been severed from the other charges that proceeded to trial.[9] The Superior Court then sentenced Mr. Ray, imposing a statutorily-mandated life sentence in relation to his conviction for Felony Murder, plus twenty years for his other various convictions.[10]

Trial Counsel filed an Opening Brief in this Court on behalf of Appellant on December 31, 2016.[11] The State filed its Answering Brief on March 20, 2017.[12] Appellate Counsel did not file a Reply Brief and, after oral argument, the Court

[6] A017; A550-551; A544-54.

[7] A017; A549-50.

[8] A022; A568.

[9] A089; A570; A572; A665-67.

[10] A585-86.

[11] A590.

[12] A629.

issued an Order denying Mr. Ray's appeal on July 25, 2017.[13] Fifteen days later, this Court issued a Mandate affirming Appellant's conviction.[14]

Mr. Ray filed a *pro se* Motion for Postconviction Relief on August 11, 2017.[15] On August 14, 2017, the Superior Court ordered the appointment of counsel on behalf of Appellant for prosecution of his postconviction motion.[16] The Office of Conflict Counsel appointed Postconviction Counsel on April 23, 2018.[17]

The defense filed an Amended Motion for Postconviction Relief ("the Motion") on August 19, 2019.[18] Trial Counsel filed affidavits in response to the Motion in January 2020.[19] The State filed a Response to the Motion on April 17, 2020.[20] Appellant filed his Reply on September 17, 2020.[21]

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[13] A670.

[14] A682-83.

[15] A024; A684.

[16] A025.

[17] A025-26.

[18] A027A; A689-761.

[19] A027A; A762-65.

[20] A766-96.

[21] A027B; A797-831.

The Superior Court scheduled oral argument for January 28, 2021.[22] Thereafter, Appellant was permitted to file a supplement to the Motion on March 15, 2021.[23] The State filed a Response to the supplement on April 15, 2021.[24] On May 19, 2021, the trial court denied Mr. Ray's request for postconviction relief.[25]

A timely notice of appeal was filed on June 21, 2021.[26] This is Appellant's Opening Brief.

[22] A027C; A833-74.

[23] A027C; A907-27.

[24] A027C; A928-46.

[25] A027C; A947-77.

[26] A027D.

SUMMARY OF ARGUMENT

1. The trial court erred in finding the State did not violate *Brady v. Maryland*[27] when it failed to disclose that Jonda Tann's pending felony charge had been dismissed after she gave a statement to the police implicating Appellant in Melancon's murder. Tann's initial statement to the police, days after the incident, included nothing implicating defendant. Two years later, she was charged with a felony offense. One month after her arrest, she informed police Appellant confessed to her that he killed Melancon. Her felony charge was subsequently dismissed one month prior to her trial testimony. Tann was the only witness to directly implicate Appellant in the homicide who appeared to have no reason to fabricate her story, and thus it is reasonably likely her testimony affected the judgment of the jury.

2. The trial court erred by not finding prejudice under *Strickland v. Washington*[28] for trial counsel's failure to ensure that the charge to the jury accurately stated the law. The instruction for Felony Murder was a hybrid of the current version of the statute and the pre-2004 version. The charge failed to instruct the jury as to the current version of the Felony Murder statute, as it was

[27] 373 U.S. 83 (1963).

[28] 466 U.S. 668 (1984).

missing essential elements. It failed to include every element necessary to convict under the pre-2004 version of the statute. The instruction allowed the jury to convict if they found an accomplice committed the offense, but failed to define accomplice liability. This error turned the defense's argument that Lee was responsible for Melancon's death into an argument for conviction.

STATEMENT OF FACTS

Anthony Coursey, a drug dealer in Wilmington, Delaware, testified that he met with Tyare Lee and Appellant on May 21, 2012 in a house in the Southbridge area.[29] Coursey returned home, where some of his friends—including Craig Melancon—were present.[30] Sometime later, Coursey went outside in front of his home and saw Lee behind a brick home nearby.[31] Lee peaked around the house, made eye contact with Coursey, and walked out of sight.[32] Based on that interaction, Coursey believed Lee was "up to something."[33]

Approximately ten minutes later, Melancon left Coursey's house, walking around the corner.[34] Sometime thereafter, Melancon—also a drug dealer in Wilmington—was playing basketball when he was approached by two men wearing hoodies.[35] Marla Johnson, a neighbor and the mother of Melancon's girlfriend, testified that one man was short and stubby, while the other was thinner

[29] A226-27.

[30] A228.

[31] A228.

[32] A228.

[33] A228.

[34] A228.

[35] A214.

and taller.[36] The men eventually went with Melancon into a nearby alley.[37] Minutes later, Johnson—who had gone back inside of her residence after the three men went into the alley—heard gunshots and ran outside, where she saw Melancon laying on the ground and the two hooded men running.[38]

Coursey also heard shots ring out while he was getting pizza from a delivery driver.[39] Coursey put the pizza inside before running to the front of his home, where he too saw Melancon on the ground.[40] Coursey ran toward Melancon.[41] Coursey saw Lee and Mr. Ray running "toward the back," with Appellant running ahead of Lee from the scene.[42] He had never informed the police, however, that he had seen Appellant and Lee running from the scene.[43] Instead, Coursey informed the police weeks after the incident that he only looked out his window after the shooting, and never went outside to Melancon.[44]

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[36] A214.

[37] A215.

[38] A215-16.

[39] A228.

[40] A228.

[41] A228-29.

[42] A241.

[43] A241.

[44] A241.

Shortly thereafter, Barry Miller was driving in the area when Lee flagged him down for a ride to Lee's home.[45] Once in the car, Lee told Miller to make a right turn—when Miller was intending to continue driving straight—and the pair came upon Brandon Tann.[46] Miller approached Mr. Tann in his vehicle, causing Mr. Tann to jump off the bike and, as it appeared to Miller, reach for a gun hidden on his person.[47] Mr. Tann then got in the backseat of the vehicle and, during the drive, engaged in conversation with Lee.[48] Miller dropped Lee off on Madison Street before dropping Mr. Tann off elsewhere in Wilmington.[49]

Officers responded to the scene at approximately 7:30 p.m.[50] While at the scene, police collected three projectiles into evidence.[51] It was discovered after testing that the projectiles came from two firearms.[52]

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[45] A248.

[46] A250.

[47] A248-51.

[48] A248.

[49] A249.

[50] A219-20.

[51] A264.

[52] A301-02.

Approximately ninety minutes after Melancon was shot, Appellant spoke to his brother, Richard Ray ("Richard"), on the telephone while Richard was incarcerated in Delaware.[53] During the call, Appellant told Richard that he "hit a lick" and that someone "checked out."[54] Detective Michael Gifford of the Wilmington Police Department testified that, in his experience, a "lick" is slang for committing a robbery, while "checked out" means that someone has been killed.[55] However, Detective Gifford conceded that a "lick" can also refer to "rip[ping] someone off some way."[56]

Melancon was pronounced dead at Christiana Hospital at 8:26 p.m.[57]

Coursey testified that days after the shooting, Appellant approached him and said he did not intend to shoot Melancon.[58] However, the witness had previously informed the police that while he saw Appellant after the incident, "we never made eye contact or anything or nothing. . . . I rode past him."[59]

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[53] A276-77.

[54] A276-77; *see also* State's Exhibit 18.

[55] A277.

[56] A328.

[57] A219.

[58] A229.

[59] A238.

Jonda Tann also testified to an interaction she purportedly had with Mr. Ray within a week of the shooting.[60] Tann is the mother of Brandon Tann.[61] She testified that she saw Appellant at a store near her home and, because she had heard rumors that her son was involved in the death of Melancon, she asked Appellant whether Mr. Tann had anything to do with the murder.[62] Tann claimed that Mr. Ray told her Mr. Tann was uninvolved, and that it was actually Lee and Appellant who shot Melancon.[63]

Mr. Ray's girlfriend, Darnequia Aikens, testified that Appellant requested she get two female witnesses to testify on his behalf because two other women who actually had pertinent information to his defense were afraid to come forward.[64] Allesha Taylor testified that Appellant contacted her and requested she testify at his trial.[65] Specifically, Taylor stated Mr. Ray wrote her a letter providing an account of what happened which he wanted Taylor to recite in her own words at trial.[66]

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[60] A396.

[61] A396.

[62] A396.

[63] A396.

[64] A495.

[65] A499.

[66] A499.

Lee was a codefendant along with Appellant, but resolved his charges by way of a guilty plea to Murder in the Second Degree and other various charges related to the killing of Melancon.[67] Pursuant to his plea agreement, Lee was required to testify at Appellant's trial.[68] Lee testified he brought his own weapon, a .22 revolver, to Southbridge on the day of the murder when he met Appellant at the basketball court.[69] Lee saw Melancon at the court and, knowing Melancon sold drugs for Coursey, asked him about purchasing marijuana.[70] Appellant was present when this exchange took place.[71] Lee testified that after the conversation, the three men walked to the nearby residences at the top part of Southbridge.[72]

Lee testified that he and Appellant left Melancon and met with Mr. Tann and a woman Tann was with.[73] Lee and Appellant then left those two and, according to Lee, Appellant indicated he wanted to rob Melancon.[74] Lee watched for Melancon

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[67] A331-32.

[68] A333.

[69] A333-34.

[70] A334.

[71] A334.

[72] A335.

[73] A335; A342.

[74] A342.

to exit Coursey's residence and, when he did, Appellant and Lee approached him and told him not to move.[75] Lee testified he drew his firearm first, followed by Mr. Ray.[76] Melancon reached for his pocket and Lee pulled the trigger and shot the victim.[77] Lee told the jury that Melancon turned and started to walk in the opposite direction.[78] Lee claimed that he too turned and started to run, having had shot Melancon, at which point Appellant purportedly fired his .38 revolver at Melancon four to five times.[79] Lee stated that he and Mr. Ray ran from the scene, but Lee eventually lost sight of Appellant.[80] Lee saw Miller driving and flagged him down to ask for a ride.[81] Lee testified that days later, he and Appellant sold Lee's gun.[82]

During cross-examination, Trial Counsel thoroughly explored with Lee his prior statements to the police, and Lee admitted lying repeatedly during his interviews, despite specifically claiming to be truthful at the time.[83]

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[75] A342-43.

[76] A343.

[77] A343.

[78] A344.

[79] A343-44.

[80] A344-45.

[81] A345.

[82] A346.

[83] A352-71; A379-88.

ARGUMENT

CLAIM I. THE SUPERIOR COURT ERRED IN HOLDING THE STATE DID NOT VIOLATE *BRADY* DESPITE THE PROSECUTION'S FAILURE TO DISCLOSE THAT A WITNESS'S UNRELATED FELONY CHARGES WERE DISMISSED ONLY AFTER SHE PROVIDED A STATEMENT TO POLICE IMPLICATING APPELLANT IN THE MURDER OF MELANCON.

A. Question Presented

Whether the trial court erred in failing to find that the State violated its duties under *Brady* the State dismissed a witness's pending felony charges after she changed her story to the police by claiming Appellant confessed to her that he murdered Melancon, and the State failed to inform the defense that the witness had ever even been charged with a crime. This issue was preserved via the filing of an Amended Motion for Postconviction Relief.[84]

B. Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion.[85] A *de novo* standard is applied to legal and constitutional questions.[86]

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[84] A713-38.

[85] *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).

[86] *Id*.

C. Merits of Argument

Applicable Law.

The State's obligation pursuant to *Brady* is fundamental to the constitutional integrity of a trial because, in order to find a violation, the court must find the suppressed evidence was material to the outcome.[87] It is well-settled that "the suppression by the prosecution of evidence favorable to the defense violates due process where the evidence is material either to guilt or to punishment."[88] As this Court has acknowledged, the State's obligation under *Brady* is premised on the notion that "[s]ociety wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any of the accused is treated unfairly."[89]

Keeping with that notion, the assessment of a *Brady* violation is measured as follows:

> Under *Brady* and its progeny, the State's failure to disclose exculpatory and impeachment evidence that is material to the case violates a defendant's due process rights. The reviewing court may also consider any adverse effect from the nondisclosure on the preparation or presentation of the defendant's case. There are three components of a

[87] *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 454 (1995); *United States v. Bagley*, 473 U.S. 667, 678 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.").

[88] *Brady*, 373 U.S. at 87.

[89] *Wright v. State*, 91 A.3d 972 (Del. 2014) (quoting *Brady*, 373 U.S. at 87).

> *Brady* violation: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant. In order for the State to discharge its responsibility under *Brady*, the prosecutor must disclose all relevant information obtained by police or others in the Attorney General's Office to the defense. That entails a duty on the part of the prosecutor to learn of any favorable evidence known to the others acting on the government's behalf, including the police.[90]

In determining whether a *Brady* violation has occurred, courts' focuses generally turn on "the third component—materiality."[91] A showing of materiality does not demand that suppressed evidence would result in acquittal.[92] Instead, the requirement is that a defendant merely receive a "fair trial, 'understood as a trial resulting in a verdict worthy of confidence.'"[93] Thus, to establish materiality, a defendant need only show "that the suppressed evidence 'undermines [the] confidence in the outcome of the trial."[94]

Significantly, a defendant need not "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have

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[90] *Wright*, 91 A.3d at 988 (internal quotations and citations omitted).

[91] *Atkinson v. State*, 778 A.2d 1058, 1061 (Del. 2001).

[92] *Id*.

[93] *Id*. at 1063 (citing *Kyles*, 514 U.S. at 434).

[94] *Id*.

been enough left to convict."[95] Instead, if there is "any reasonable likelihood" non-disclosure could have "affected the judgment of the jury," relief must be granted.[96]

In determining the effect of delayed disclosure of *Brady* material, the relevant inquiry is whether the State's delay deprived the defendant of the opportunity to use the information effectively.[97] This Court has held that "[e]ffective cross-examination is essential to a defendant's right to a fair trial" as it is the "'principal means by which the believability of a witness and the truth of his testimony are tested.'"[98] As the jury is "the sole trier of fact, responsible for determining witness credibility and resolving conflicts in testimony," jurors must have "every opportunity to hear impeachment evidence that may undermine a witness' credibility."[99]

The State's* Brady *Violation.

Police first spoke to Jonda Tann approximately one month after Melancon's death.[100] During that conversation, Tann said nothing about any conversation she

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[95] *Kyles*, 514 U.S. at 435.

[96] *Napue v. Illinois,* 360 U.S. 264, 271 (1959); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

[97] *Atkinson*, 778 A.2d at 1062.

[98] *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001) (quoting *Fensterer v. State*, 493 A.2d 959, 963 (Del. 1985)).

[99] *Id.* at 515 (internal quotations omitted).

[100] A508.

had had with Appellant, let alone that he admitted that he shot Melancon.[101] Between her first interview—approximately one month after the shooting on May 21, 2012—and September 2014, Tann did not speak to the police about this case.[102]

On August 11, 2014, Tann was arrested and charged with one count of Assault in the Second Degree.[103] Assault in the Second Degree is a Class D felony.[104] As such, a conviction for Assault in the Second Degree carries a potential sentence of zero to eight years in prison, plus any fines and penalties a sentencing court deems appropriate.[105]

On September 12, 2014, Tann again spoke to police about the Melancon homicide and, during that interview, "talked about [Appellant.]"[106] That interview was either not recorded or not turned over to the defense, but is referenced in another interview with Tann the following day.[107] It is unclear what Tann said to

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[101] A508.

[102] *See* A096; A508

[103] A760.

[104] 11 *Del. C.* § 612(d).

[105] 11 *Del. C.* §§ 4205(b)(4), 4205(k).

[106] A108.

[107] A098-99.

the authorities, what was said to her, or whether her pending felony charge was discussed.[108] At the close of the interview, the detective drove Tann to her next destination.[109] Any conversation during that drive was presumably not recorded.

During the recorded interview on September 13, 2014, Tann revealed that Appellant purportedly informed her days after the shooting that he killed Melancon.[110] The officer did not inquire as to why Tann did not share such information during her first interview two years earlier.[111] The detective again offered to drive Tann to wherever she needed to go, and Tann accepted.[112] Any conversation between police and Tann during that car ride was presumably not recorded.

Two days after Tann's recorded interview occurred, the State provided a copy of the recording to Trial Counsel.[113] The cover letter did not reference *Brady* or Tann's pending criminal case.[114]

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[108] *See* A097-111.

[109] A111.

[110] A096; A100; A102.

[111] *See generally* A097-111.

[112] A111.

[113] A010-11; A096.

[114] A096.

Approximately three months after her interview and one month before trial, the State dismissed Tann's pending felony charge.[115] Tann testified on January 20, 2015.[116] Neither her felony charge nor its subsequent dismissal was presented to the jury.[117]

The State's* Brady *Violation Entitles Appellant to Relief.

The suppression by the State of any information related to Tann's felony Assault charge, or the dismissal thereof, deprived Appellant of a fair trial and renders the verdict returned by the jury unworthy of confidence. Consequently, he is entitled to postconviction relief.

Evidence of bias "is always admissible to impeach a witness."[118] "Cross-examination on bias is an essential element of the right of an accused under the Delaware constitution to meet the witnesses in their examination."[119] Such questioning is consequently "an essential element of the constitutional right of confrontation."[120] A witness's perception of bias or attempt to curry favor with the

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[115] A760.

[116] A395-98.

[117] *See* A395-98.

[118] *Allen v. State*, 644 A.2d 982, 986 (Del. 1994).

[119] *Van Arsdall v. State*, 524 A.2d 3, 7 (Del. 1987).

[120] *Wintjen v. State*, 398 A.2d 780, 781 (Del. 1979).

State is also relevant evidence for the jury to consider.[121] This Court recognized as such in *Michael v. State*.[122]

In *Michael*, the State allowed the victim of the alleged offense to enter a guilty plea to Reckless Driving rather than Driving Under the Influence.[123] That plea was entered prior to Michael's trial, but the Department of Justice did not disclose the agreement to the defense.[124] The *Michael* Court held that the State violated *Brady*, holding that "[w]henever the State reduces any pending charges (related or not) or makes any arrangement with any State's witness, disclosure is mandatory."[125] This Court has reiterated that rule, stating that "[e]ven in the absence of any *quid pro quo* arrangement, this Court established a mandatory disclosure rule [in *Michael*], where the failure to disclose a reduction of related or unrelated charges against a trial witness is a *Brady* violation."[126]

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[121] *See, e.g., McGlotten v. State*, 2008 WL 5307990 at *2 (Del. Supr. Dec. 22, 2008) (rejecting defendant's contention that State prejudiced his defense by concealing its intention to offer leniency to State witness where defense counsel properly cross-examined the witness and "highlighted the possibility that the witness may have been testifying against [defendant] with hopes of obtaining a favorable plea agreement.").

[122] 529 A.2d 752 (Del. 1987), *abrogated on other grounds by Stevens v. State*, 129 A.3d 206 (Del. 2015).

[123] *Id*. at 756.

[124] *Id*.

[125] *Id*. *See also, Van Arsdall v. State*, 524 A.2d 3 (1987) (holding that dismissal of a charge against State witness is relevant to issue of bias).

[126] *Starling v. State*, 130 A.3d 316, 333 (Del. 2015).

Here, Tann claimed that Appellant, within a few days of the shooting, admitted to killing Melancon. Despite that she spoke to the police within a few weeks of that alleged conversation, she did not tell the authorities. More than two years later, Tann was charged with a felony offense. A mere month after her arrest, she informed police of her purported conversation with Appellant. Three months later, her felony case was dismissed, having never even been presented to the Grand Jury for Indictment.[127] Just over one month after the dismissal, Tann testified on behalf of the State, repeating what she had told the authorities for the first time just months earlier.

That Tann may have spoken to the authorities after her arrest and fabricated information related to the instant case to curry favor with the prosecution as to her new charges was information that should have been presented to the jury as a source of bias. Moreover, that the dismissal of that charge could have been interpreted by Tann as a reward for her statement—thus ensuring her story for trial—was integral to the jury's assessment of her credibility. Consequently, the information relating to the charge and subsequent dismissal was impeaching and disclosure was mandatory.

[127] A760.

The State's suppression of Tann's felony charges and subsequent dismissal prejudiced Mr. Ray.

Three witnesses directly implicated Appellant in the murder of Melancon: Coursey, Lee, and Tann. The discrepancy between the tone and scope of each witness's cross-examination demonstrates why the State's failure to disclose the impeachment evidence related to Tann was prejudicial.

Coursey testified that he saw Appellant fleeing the scene of the shooting and that, days later, the defendant approached the witness and stated he did not intend to shoot Melancon. On cross-examination, Trial Counsel established that Coursey did not mention anything to the authorities about the alleged confession the first time he spoke to the police, mere weeks after the shooting.[128] Trial Counsel, after establishing that the witness was later arrested for felony-level drug offenses, then moved from Coursey's initial statement to the police to the benefit he was receiving based on his current testimony: a guilty plea to a misdemenaor entered one day before his trial testimony.[129] After thoroughly questioning the witness on the charges and potential sentence he was facing prior to entering the plea in contrast with his current exposure, Trial Counsel moved back to the timing of his

[128] A238-39.

[129] A239-41.

damning statements against Mr. Ray, in that they were revealed for the first time one week prior to his testimony in anticipation of the entry of his plea.[130]

The cross-examination of Lee proceeded similarly. Trial Counsel's questioning began by focusing on Lee's early statements to the police, during which he stated he was not involved in the shooting and made claims such as he was "telling . . . the honest to God's truth."[131] Trial Counsel established that Lee would "lie just to say it."[132] Next, Trial Counsel questioned Lee about the sentence he was facing prior to accepting a plea offer from the State.[133] Lee acknowledged he was facing a mandatory life sentence if he was convicted of Murder in the First Degree.[134] Instead, under the plea, Lee was facing a minimum-mandatory penalty of twenty-four years up to life.[135] Trial Counsel also established that were the State to file a substantial assistance motion, he could ultimately receive a sentence "way under" twenty-four years.[136] Lee admitted he continued lying during his

[130] A241.

[131] A353.

[132] A357.

[133] A358.

[134] A358.

[135] A358.

[136] A359.

proffer, admitting "the story . . . that [he] provide[d] in November of 2013 does not get [him his] deal."[137] Lee acknowledged later "change[ing] what the truth is according to [him]" in a subsequent statement to receive a plea offer that was "satisfactory" to him.[138] Trial Counsel then proceeded to parse through Lee's various statements, exposing each discrepancy for the jury to evaluate in assessing the codefendant's credibility.[139]

The cross-examination of Tann is minimalist in contrast. Trial Counsel established that two years passed between Tann's initial statement to the police and her eventual revelation that Appellant confessed to the homicide to the witness, although Tann claimed she told the police within a few days of the shooting.[140] After highlighting the discrepancy between the statement Tann gave shortly after the incident and the one she gave mere months before trial, Trial Counsel questioned the witness as to purported rumors that Tann's son, Brandon, was

[137] A360.

[138] A361.

[139] A361-71; A380-88.

[140] A397-98. Trial Counsel later confirmed with Detective Gifford that Tann never informed him of the statement Appellant purportedly made to her until September 2014. A508

involved in Melancon's murder.[141] Trial Counsel then ended his questioning of Tann.[142]

The defense attempted to implement the same strategy with Tann it had with Coursey and Lee: draw attention to the discrepancy between the witness's initial statement to the police and subsequent interviews in which more damaging information against Appellant was offered, then dissect the way that such inculpatory information ultimately served to benefit the witness. For Coursey and Lee, the additional information later in the investigation meant the dismissal of multiple charges and a plea deal that significantly minimized each man's risk of prolonged incarceration were he to proceed to trial. The strategy was less effective—if it was effective at all—when employed against Tann because it appeared as though she had no reason to change her story.

While Trial Counsel tried to convey to the jury that Tann was protecting her son, such argument carried little weight. The State's theory of the case was clear: two men approached the victim and shot him. Those two men, according to the State, were Lee and Appellant. There was no room in that theory for Brandon Tann to be one of the shooters. Consequently, the jury was likely left wondering

[141] A398.

[142] A398.

why it should believe Tann actually had anything to protect her son *from*, especially to such extent that she would perjure herself at trial.

Had the State disclosed Tann's felony arrest and its subsequent dismissal of that charge—in conjunction with the timing of those events in relation with her new statement to the police—the defense would have been able to present a cognizable theory of Tann's bias. Trial Counsel could have questioned her on the details of her various unrecorded conversations with authorities on September 12 and 13, 2014, inquiring whether the police expressly or implicitly suggested that if she gave testimony incriminating Appellant, they would be able to favorably resolve her pending felony charge. Counsel could have asked Tann whether she believed that her statement to the authorities could have any effect on the disposition of the Assault charge. Moreover, Trial Counsel could have explored whether Tann interpreted the dismissal of her charges as a *quid pro quo* for her newly-provided statement incriminating Appellant. Because the State did not disclose the charges or dismissal to the defense, however, no such questions were posed to the jury.

The trial court mistakenly analyzed materiality by evaluating the sufficiency of the other evidence against Appellant.

In denying Appellant's claim of the instant *Brady* violation, the Superior Court reasoned as follows:

> Although Tann's claim of Defendant's admission was significant evidence, the other evidence presented by the State was extensive and overwhelmingly established guilt beyond a reasonable doubt. Tann was the seventeenth witness who testified. Lee, the State's star witness, had already testified, implicating Defendant in Melancon's murder while admitting Lee's own role. Lee placed Defendant at the scene with a gun in his hand and testified that Lee and Defendant both shot Melancon. Other witnesses also placed Defendant at the scene. The State presented Defendant's own admission to his brother Richard Ray in a recorded prison phone call. Coursey testified that Defendant admitted that Defendant killed Melancon. The State also presented evidence of a motive for the armed robbery of Melancon. Finally, the State presented evidence of consciousness of guilt through Defendant's efforts to solicit witnesses who would testify falsely on Defendant's behalf. Tann's testimony was followed by the two witnesses who testified that Defendant asked each of them to help Defendant to present false exculpatory evidence to support an alibi.[143]

Such focus on the strength of the State's case was inappropriate, as the Supreme Court of the United States has explicitly held that the test for materiality "is not a sufficiency of the evidence test."[144] Appellant need not "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict," because the "possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to

[143] A963-64.

[144] *Kyles*, 514 U.S. at 435.

convict."[145] Instead, if there is "any reasonable likelihood" the non-disclosure could have "affected the judgment of the jury," relief is required.[146]

Tann was one of three witnesses who directly implicated Mr. Ray in the homicide. Trial Counsel thoroughly questioned Coursey and Lee, exposing their biases and motives to fabricate testimony to the jury. Trial Counsel were so effective in doing so that it would not be surprising if the jury disregarded much of the testimony offered by the two men.

Tann was different. She seemingly had nothing to gain from her testimony, and Trial Counsel posed no questions to the witness indicating she would have any reason to fabricate a story in which Appellant confessed to the shooting. Given that, by all appearances, Tann seemingly had no stake in the outcome of the trial, it is likely the jury gave her statement great weight when evaluating the evidence against Appellant. Had the jury known Tann only claimed Appellant confessed to her after she had been charged with a felony and that, after speaking to the authorities, her charge was dismissed, it likely would have viewed her testimony through a different lens and afforded it less weight. Consequently, there is a

[145] *Id*.

[146] *Napue,* 360 U.S. at 271; *Giglio*, 405 U.S. at 154.

reasonable likelihood the nondisclosure affected the judgment of the jury, and the trial court should have granted relief.

<u>CLAIM II</u>. THE SUPERIOR COURT ERRED IN FAILING TO FIND PREJUDICE WHERE TRIAL COUNSEL FAILED TO ENSURE THAT THE JURY INSTRUCTION FOR FELONY MURDER ACCURATELY STATED THE LAW, RESULTING IN APPELLANT BEING CONVICTED WITHOUT A FINDING THAT ALL OF THE STATUTORY ELEMENTS OF THE OFFENSE HAD BEEN MET, INCLUDING THE IDENTITY OF THE PERPETRATOR OF THE HOMICIDE.

A. Question Presented

Whether the trial court erred in holding prejudice did not result from the inaccurate Felony Murder jury instruction, despite that the jury convicted Appellant without considering all of the necessary statutory elements and were instructed they could convict Appellant even if he had not committed the homicide. This issue was preserved via the filing of Appellant's Motion for Postconviction Relief.[147]

B. Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion.[148] A *de novo* standard is applied to legal and constitutional questions.[149]

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[147] A027A; A745-57.

[148] *Ploof*, 75 A.3d at 851.

[149] *Id*.

C. Merits of Argument

Ineffective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, a petitioner must show that counsel's performance was deficient and the deficiency prejudiced the defendant.[150] To establish deficient performance, a petitioner must demonstrate counsel's representation "fell below an objective standard of reasonableness,"[151] under prevailing professional norms and that he was prejudiced.[152] The defendant must overcome the presumption that "under the circumstances, the challenged action 'might be considered sound trial strategy.'"[153]

To establish prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This is a standard lower than 'more likely than not."[154] Stated differently, it is "a probability sufficient to undermine confidence in the outcome."[155]

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[150] *Strickland*, 466 U.S. at 687.

[151] *Id*. at 688.

[152] *Id*. at 687-88.

[153] *Id*. at 689.

[154] *Ploof*, 75 A.3d at 852.

[155] *Strickland*, 466 U.S. at 694.

"The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[156] This basic principle permeates throughout counsel's entire representation of a client and warrants certain duties that are owed to a criminal defendant.[157]

The basic building blocks of an attorney's responsibilities are competence, diligence, and zealous representation.[158] These duties are embodied in the Delaware Rules of Professional Conduct and are specifically expressed in *Strickland*: "Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[159]

Counsel has the duty to assert all possible legal claims and to preserve any potential issues for review.[160] Counsel is expected to have full knowledge of

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[156] *Cooke v. State*, 977 A.2d 803, 843 (Del. 2009) (citing *United States v. Cronic*, 466 U.S. 648, 656 (1984)).

[157] *See Cooke*, 977 A.2d at 841.

[158] *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 353 (2009) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law…") (internal citations omitted); *In re Reardon*, 759 A.2d 568 (Del. 2000) (sanctioning attorney for violating duty of diligence); *Matter of Tos*, 576 A.2d 607, 610 (Del. 1990) ("A lawyer shall provide competent representation to a client").

[159] *Strickland*, 466 U.S. at 688.

[160] *Sacher v. United States*, 343 U.S. 1, 9 (1952) ("Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it

relevant legal issues.[161] The right to counsel is the right to advocacy.[162] If counsel is not acting in the role of a zealous advocate, there cannot be effective assistance.

Trial Counsel were ineffective in failing to ensure the jury instructions accurately stated the law.

"The primary purpose of jury instructions is to define with substantial particularity the factual issues and clearly to instruct the jury as to the principles of law [that] they are to apply in deciding the factual issues presented in the case before them."[163] Regardless of whether the parties request a particular instruction, a court "must give instructions to a jury as required by evidence and the law."[164] Although defendants are not entitled to particular instructions, they do "have the unqualified right to a correct statement of the substance of the law."[165] The Superior Court has held that where trial counsel fails to recognize that an instruction is improper and the jury is improperly charged, the defendant is entitled

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is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal").

[161] ABA Standards for Criminal Justice Defense Function R. 4-5.1 cmt. (3d ed. 1993) ("The lawyer's duty to be informed on the law is . . . important; although the client may sometimes be capable of assisting in the fact investigation, the client is not likely to be educated in or familiar with the controlling law").

[162] *Cronic*, 466 U.S. at 656.

[163] *Zimmerman v. State*, 565 A.2d 887, 890 (Del. 1989).

[164] *Id*. at 891 (citing *United States v. Cooper*, 812 F.2d 1283, 1286 (10th Cir. 1987)).

[165] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983) (internal citations omitted).

to postconviction relief.[166] If the charge to the jury, as delivered, "undermined . . . the jury's ability to intelligently perform its duty in returning a verdict," then a defendant is entitled to a new trial.[167]

During Appellant's trial, the trial court charged the jury as follows regarding Felony Murder:

> As to Count IV, under Delaware law, a person is guilty of murder in the first degree, when in the course of an [*sic*] and in furtherance of the commission or attempted commission of any felony, or in the immediate flight therefrom, that person recklessly causes the death of another person. In other words, in order to find the defendant guilty of murder if [*sic*] the first degree, as to Count IV, you must find that each of following [*sic*] elements has been established beyond a reasonable doubt.
>
> First, the defendant caused the death of Craig Melancon; and second, the defendant acted recklessly; and third, Craig Melancon's death occurred in the course of and in furtherance of the defendant's commission of a felony.
>
> In order to prove that the defendant caused Craig Melancon's death, the State must establish that Craig Melancon would not have died but for the defendant's conduct. Recklessly means that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk that Craig Melancon's death would result from his conduct. The State must demonstrate the risk was of such nature and degree that the defendant's disregard of it was a gross deviation from the standard of conduct that a reasonable person would observe under the same circumstances. In the course of means Craig Melancon's death was caused by the defendant, or his accomplice who committed a felony. The State does not have to prove that the defendant or his accomplice

[166] *See State v. McDougal*, 2017 WL 6372516 at *3-5 (Del. Super. Ct. Dec. 11, 2017).

[167] *Id*.

> caused Craig Melancon's death for the purpose of committing a felony.[168]

This instruction failed to track the language in the Indictment as it relates to Count IV, as well as the language of the statute setting out the elements of Felony Murder.

Section 636(a)(2) of Title 11 of the Delaware Criminal Code states a person is guilty of murder in the first degree when, "[w]hile engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person recklessly causes the death of another person."[169] Count IV of the Indictment against Mr. Ray tracked the statutory language, alleging that Appellant, "while engaged in the commission of, or attempt to commit Robbery First Degree, did recklessly cause the death of Craig Melancon by shooting him."[170] Neither the statute nor the Indictment contained the "when in the course of and in furtherance of the commission of" language used in the instruction. Similarly, the instruction did not define the language contained in the statute and Indictment consisting of "while engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony."

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[168] A534.

[169] 11 *Del. C.* § 636(a)(2).

[170] A125.

Additionally, the Superior Court instructed the jury that "in furtherance of" means that Melancon's death was caused by either Mr. Ray *or his accomplice*, but never instructed the jury as to an accomplice liability theory.[171] This means the jury could have believed it could convict Appellant if it believed Lee fired the killing shots without having been instructed on the legal analysis it must engage to conclude a principal-accomplice relationship existed.

The history of the Felony Murder statute.

Prior to 2004, the Felony Murder statute read as follows: "A person is guilty of murder in the first degree when . . . in the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, the person recklessly causes the death of another person."[172] The statute codified the common law felony murder rule, the purpose of which "was to clothe the actions of the accused and his co-felons, if any, with an implied-in-law malice, thus enabling the courts to find the felon guilty of common-law murder when a killing was committed by one of the felons in the perpetration of the felony."[173]

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[171] *See generally* A532-39.

[172] *See Williams v. State*, 818 A.2d 906, 907 (Del. 2002) (quoting 11 *Del. C.* § 636(a)(2) (2002)), *superseded by statute*, 74 *Del. Laws* ch. 246, synopsis (2004), *as recognized in Comer v. State*, 977 A.2d 334 (Del. 2009).

[173] *Weick v. State*, 420 A.2d 159, 162 (Del. 1980).

This Court, in evaluating the statute, recognized that the common law rule developed during a time when all felonies were punishable by death and "[w]ith all the general trend toward mitigation in the severity of punishment for many felonies, and with the addition of many statutory felonies of a character less dangerous than was typical of most common law felonies, the irrationality and unfairness of an unlimited felony-murder rule became increasingly apparent."[174] Consequently, limits were placed on the felony murder rule, such as "the requirement of a causal connection between the felony and the murder."[175]

In 1980, this Court held in *Weick v. State* that the Felony Murder statute does not encompass all homicides, explaining:

> The mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony murder doctrine. It is necessary . . . to show that the conduct causing death was done in furtherance of the design to commit the felony. Death must be a consequence of the felony . . . and not merely coincidence.[176]

Twelve years later, this Court decided *Chao v. State*.[177] Chao was convicted of intentional Murder, Felony Murder, Arson, and other related offenses.[178] The

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[174] *Id*. (quoting *Jenkins v. State*, 230 A.2d 262, 268 (Del. 1967)).

[175] *Weick*, 420 A.2d at 162.

[176] *Id*. at 163 (quoting *Commonwealth v. Redline*, 137 A.2d 472, 476 (Pa. 1958)).

[177] 604 A.2d 1351 (Del. 1992), *overruled by Williams v. State*, 818 A.2d 906 (Del. 2002).

[178] *Chao*, 604 A.2d at 1352.

defendant argued that since she intended to kill her victims by setting their house on fire, no rational juror could have concluded that the murders were cause in furtherance of arson.[179] This Court disagreed, holding that "for felony murder liability to attach, a killing need only accompany the commission of an underlying felony. Thus, if the 'in furtherance' language has any limiting effect, it is solely to require that the killing be done by the felon, him or herself."[180] The *Chao* Court then cited *Weick* as support without overruling the portion of *Weick* that required death be a consequence of the felony and not a coincidence of it.[181]

Ten years later, the Court overruled *Chao* in *Williams v. State*.[182] The *Williams* Court explained that *Weick* imposed two different limitations on Felony Murder: (1) a causal connection between the felony and the murder must exist, and (2) the felon, or his accomplices, must perform the actual killing.[183] Turning to *Chao*, this Court held that the "in furtherance of" language "not only requires that the murder occur during the course of the felony, but also that the murder occur to

[179] *Id*. at 1363.

[180] *Id*.

[181] *Id*.

[182] 818 A.2d 906 (Del. 2002).

[183] *Id*. at 911.

facilitate commission of the felony."[184] Thus, subsequent to *Williams*, "the felony murder language require[d] not only that the defendant, or his accomplices, if any, commit the killing, but also that the murder help[ed] to move the felony forward."[185]

Less than two years after the Court issued its decision in *Williams*, the General Assembly amended the Felony Murder statute, removing the "in the course of and in furtherance of" language.[186] The synopsis to the bill looked upon the "*Williams* decision with disapproval, stating that [the] Court's interpretation of Section 636(a)(2) . . . 'is inconsistent with the common law rule, and with the definition of felony murder in almost every other state, which does not require evidence of specific intent in a felony murder prosecution."[187] Eliminating the need that the murder help facilitate the predicate felony, the amendment required that going forward, the State prove "the killing must be directly associated with the predicate felony as one continuous occurrence."[188]

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[184] *Id*. at 913.

[185] *Id*.

[186] 74 *Del. Laws* ch. 246, §§ 1, 2 (2004).

[187] *Comer*, 977 A.2d at 340 (citing *id*.).

[188] *Id*.

Trial Counsel failed to ensure the trial court correctly instructed the jury as to the law.

The instant instruction was flawed in two distinct ways. First, the language of the instruction mostly tracked the pre-2004 version of the criminal statute and did not adequately present to the jury the elements it needed to find before finding Appellant guilty of Felony Murder. Second, the instruction allowed the jury to convict Mr. Ray under an accomplice liability theory, despite the trial court's finding that there was "no record evidence" to support a separate instruction articulating the requirements supporting such a theory under Section 271 of Title 11. Appellant suffered disjunctive prejudice from each deficiency in the instruction.

The instructed elements of Felony Murder were inadequate for conviction.

The Superior Court improperly held that the instruction it provided the jury as to Felony Murder imposed a more rigorous burden upon the State than required by the language of the statute.[189] Not so. While the pre-2004 version of the Felony Murder statute imposed a higher evidentiary burden on the State than the current version does, the instruction as given did not incorporate the heightened requirements of the pre-amendment statute. Additionally, elements that must be

[189] A975-76.

proven under the current version of the statute before a jury can convict were not contained within the instruction and thus not considered during deliberations.

The pre-2004 version of the Felony Murder statute stated that "[a] person is guilty of murder in the first degree when . . . in the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, the person recklessly causes the death of another person."[190] "In the course of" and "in furtherance of" were separate elements that needed to be proven in order to convict a defendant under the Felony Murder statute.[191] The "in the course of" element required that the homicide occur during the felony.[192] The "in furtherance of" element required the jury to find that the murder occurred "to facilitate commission of the felony," *i.e.*, when "the murder help[ed] to move the felony forward."[193]

Thus, under the pre-2004 version of the Felony Murder statute, the State was required to prove the following elements beyond a reasonable doubt: (1) the defendant (2) recklessly (3) caused the death of another person (3) during the

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[190] *See Williams*, 818 A.2d at 907.

[191] *Id.* at 908 ("We hold that where a burglary is alleged to be the felony on which the felony murder charge is predicated, the death that occurs must not only be 'in the course of' the burglary but also must be 'in furtherance of' the burglary.").

[192] *Id*. at 912.

[193] *Id*. at 913.

commission of a specific felony, and (4) the death was necessary to facilitate commission of said felony.

While the pattern instruction for Felony Murder has not been updated to reflect the post-2004 version of the statute, it contains only remnants of what was required under the statute prior to its amendment, despite its facial language.[194] Specifically, while the pattern instruction states the second element is that "[t]he person's death occurred in the course of and in furtherance of Defendant's commission of a felony, attempt to commit a felony, or Defendant's immediate flight after committing a felony," it does *not* include the definition of "in furtherance of" discussed *supra*.[195] On the contrary, the pattern instruction provides that "[t]he State does not have to prove Defendant [or Defendant's accomplice] caused the person's death for the purpose of committing a felony, attempting to commit a felony, or Defendant's fleeing after committing a felony."[196]

The instruction as given mostly followed the pattern instruction, but added additional language not contained therein. Specifically, the instruction defined "in the course of" to mean that "Melancon's death was caused by the defendant, or his

[194] A829-30.

[195] A829-30.

[196] A829-30.

accomplice who committed a felony."[197] The definition does not state, as required pre-2004, that "in the course of" required not only the victim's death be caused by the defendant, but that it occurred *during the commission* of the felony. The instruction did not include the pre-2004 language that the homicide must occur to facilitate the commission of the felony, the heightened standard disavowed by the legislature after *Williams*. In fact, the instruction given by the Court stated the victim's death must have occurred "in the course of *and* in furtherance of the defendant's commission of a felony," but failed to define "in furtherance of" at all.[198]

The post-2004 version of the Felony Murder statute states that a person commits the offense when, "[w]hile engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person recklessly causes the death of another person."[199] The legislature made clear that going forward, "while engaged in the commission of" a felony meant "the killing must [have been] directly associated with the predicate felony as one continuous occurrence."[200] That element was wholly absent from the instant instruction.

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[197] A534.

[198] A254 (emphasis added).

[199] 11 *Del. C.* § 636(a)(2).

[200] *Comer*, 977 A.2d at 340.

While one could read the "in the course of and in furtherance of" language in the instruction to mean approximately the same thing as required by the legislature, such reading is dispelled by the definition provided for "in the course of": that Melancon's death was caused by the defendant, or his accomplice who committed a felony.[201]

Moreover, the instruction did not even specify the felony during which the homicide must have occurred, merely stating the victim's death must have occurred during *a* felony.[202] Although the State charged Appellant with causing Melancon's death during the commission or attempted commission of Robbery in the First Degree, such requirement was not included within the instruction itself.[203]

The instruction as given was problematic. It failed to instruct the jury as to the current version of the Felony Murder statute. It failed to include every element necessary to convict under the pre-2004 version of the statute. Despite that the language should not have been in the instruction at all, the charge failed to define "in the course of" as requiring that the homicide occur *during* the commission of a felony, instead stating the State's burden was met if the victim's death was caused by a defendant who committed a felony. The instruction failed to include the

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[201] A534.

[202] *See* A534.

[203] *Compare* A029 *with* A534.

element drafted by the legislature specifically to repudiate *Williams*, its entire rationale for amending the Felony Murder statute in the first place.

The instruction also failed to identify the felony during which the homicide must have occurred—to the extent the jury even understood the victim's death must have occurred *during* the commission of a felony, rather than merely caused by an individual who also happened to commit a felony—creating the possibility that the jury assessed the charge through the lens of a separate felony offense charged in the Indictment. It is even possible that the jury may have been splintered as to the felony during which the death took place, thereby violating the specific unanimity requirement.

Appellant had an unqualified right to an accurate statement of the law. The instruction as delivered vitiated that right by creating a hybrid variation of the Felony Murder statute that failed to reflect the elements necessary for conviction at any time during the operation of Section 636. Mr. Ray was convicted under a statute for which the jury could not have properly determined the State had met its burden of proof, as it was never told the correct elements it needed to find. Had the jury been properly instructed, there is a reasonable probability it would have acquitted Appellant of Felony Murder, just as it had done for the charge of intentional Murder. Instead, Appellant is serving a life sentence in relation to the jury's finding of guilt based on elements that do not and have never constituted a

crime in the State of Delaware. Accordingly, the Superior Court erred in denying Appellant's postconviction claim.

The introduction of an accomplice liability theory within the instruction prejudiced Appellant.

Upon request from the State for an instruction as to accomplice liability under Section 271 of Title 11, the judge held the theory "wasn't argued, wasn't presented, there is no record evidence of it, and the Court declines to present it."[204] Despite that holding, a claim of accomplice liability was mistakenly included in the instruction, as the jury was told that "in the course of" meant Melancon's death was caused by the defendant *or his accomplice*.[205]

While the Superior Court was correct that an accomplice liability theory was not supported by the record, the jury had no way of knowing that. Instead, they were forced to assess an accomplice liability theory without any guidance as to how to evaluate a principal-accomplice relationship. This Court has held that "[i]mplicit in every jury instruction is the fundamental principle that the instruction applies to the specific facts in that particular case and contains an accurate statement of the law."[206] Here, the jury was free to assume that it could convict Appellant based on the actions of an undefined "accomplice."

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[204] A531.

[205] A534.

[206] *Bullock v. State*, 775 A.2d 1043, 1053 (Del. 2001).

This was prejudicial for a myriad of reasons. First, Trial Counsel argued during his closing argument that if Coursey was to be believed, Lee fired the killing shots as Appellant ran from the scene.[207] The State, during rebuttal argument, explicitly called Lee a "murderer."[208] If the jury accepted that characterization of Lee, then it would be forced to vote guilty as to the Felony Murder offense if it believed Lee and Appellant were accomplices to one another.[209] Additionally, absent the accomplice liability instruction, the jury had no guidance from the trial court as to how to determine under Delaware law whether Lee was an accomplice to Mr. Ray.

Trial Counsel's primary argument was that Appellant simply was not involved in the incident leading to Melancon's death, but Lee was. The State vociferously argued the contrary. If the jury accepted the defense's argument that Lee was more likely to be the individual who fired the killing shots but was convinced by the State's evidence that Appellant was involved in the confrontation, then Trial Counsel's argument turned into one for conviction.

Moreover, the instruction failed to specify that the homicide had to occur during the commission or attempted commission of Robbery in the First Degree.

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[207] A525.

[208] A530.

[209] Because the accomplice liability instruction was not charged, the jury was provided no information as to what constitutes a "principal" or "accomplice."

If the jury believed Lee caused Melancon's death while committing a different felony, the instruction as given still allowed for conviction.

The accomplice language was inadvertently included in the Felony Murder instruction despite the Court's finding that it would be improper for the jury to consider the case through the lens of accomplice liability. Based on the arguments of the parties, in conjunction with the jury's not guilty verdict as to the charge of intentional murder, there is a reasonable probability that, but for the improper injection of accomplice liability into the case, the outcome of the trial would have been different.

Counsel failed to raise the instruction issue on direct appeal.

Counsel should have raised the improper jury instruction on direct appeal to this Court. Although Trial Counsel failed to object to the instruction as delivered, the Court would have entertained the argument under a plain error standard, and likely vacated Appellant's conviction.[210]

This Court has held that, although the *Strickland* test was developed to evaluate trial counsel's performance, it is also applied to determine whether appellate counsel was effective.[211] Appellate counsel need not raise every

[210] *See, e.g., Robinson v. State*, 1996 WL 69797 at *3 (Del. Supr. Jan. 29, 1996) (evaluating a claim of improper jury instructions not raised below under plain error standard).

[211] *Ploof*, 75 A.3d at 831.

nonfrivolous issue on appeal.[212] However, if a defendant can show that appellate counsel omitted issues that were stronger than those actually raised, he will have successfully established ineffective representation.[213] The reviewing court determines whether a defendant has been prejudiced by his appellate counsel's failure to raise particular claims by considering the merits of the unraised issues.[214]

When reviewing a jury instruction, this Court views the entire instruction "as a whole, with no one statement to be viewed in a vacuum."[215] If an instruction is "reasonably informative and not misleading, judged by common practices and standards of verbal communication," then reversal is inappropriate.[216]

Appellant incorporates by reference the entirety of his prior discussions as to the defects within the Felony Murder statute, as well as the prejudice resulting from those deficiencies. The instruction as given was not reasonably informative, as it failed to enumerate all the elements that constituted the offense, and it was misleading, as it suggested that the jury could decide the guilt or innocence of

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[212] *Id*.

[213] *Id*.

[214] *Id*.

[215] *Id*.

[216] *Id*.

Appellant as to that charge based on a theory of accomplice liability despite the judge's prior holding that no record evidence existed to support such a theory.

This Court has unequivocally held that although a defendant is not entitled to a particular instruction, he does enjoy the "unqualified right to a correct statement of the substance of the law."[217] The Court has routinely reversed convictions where jury instructions failed to correctly explain the law.[218] The instruction at issue failed to properly explain the elements of Felony Murder as the charge existed at the time, excluded elements defined by the legislature when amending the statute in 2004, failed to specify the actual felony during which the death of Melancon needed to occur, and improperly injected accomplice liability into the jury's consideration despite having found the record did not support such a charge.

Had Counsel raised the improper jury instruction on direct appeal, there is a reasonable probability, based on the foregoing, Appellant's conviction would have

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[217] *See, e.g., Flamer*, 490 A.2d at 128 (citing *Miller v. State*, 224 A.2d 592, 596 (Del. 1966)).

[218] *See, e.g., Mills v. State*, 201 A.3d 1163, 1178-81 (Del. 2019) (reversing conviction for Drug Dealing where, despite that trial court mentioned "intent to deliver" element of offense during its charge, trial judge omitted that element when breaking down the individual elements of the offense); *Gallman v. State*, 14 A.3d 502, 506 (Del. 2011) (reversing conviction where trial court failed to inform jury, as to charge of Possession of a Destructive Weapon, that defendant must have had intent to exercise control over the device); *Comer*, 977 A.2d 334 (reversing conviction where trial court failed to properly charge jury as to agency theory of Felony Murder); *Bullock v. State*, 775 A.2d 1043 (Del. 2001) (reversing conviction where trial court improperly instructed the jury as to an "unavoidable accident" theory unsupported by the evidence in a vehicular manslaughter case).

been reversed. Failure to raise the claim was ineffective, and Appellant suffered prejudice. The Superior Court erred in holding otherwise.

CONCLUSION

For the reasons stated herein, Mr. Ray respectfully requests that this Honorable Court reverse the judgment of the Superior Court.

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