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NATURE OF PROCEEDINGS

On February 29, 2016, a Superior Court grand jury indicted Aaron Thompson for the murders of Joseph and Olga Connell outside the Paladin Club Condominiums.¹ Thompson's February 2016 arrest and indictment occurred just weeks before the joint trial of his co-defendants, Christopher Rivers and Dominique Benson.²

Thompson's own case proceeded to trial in June 2017.³ The jury convicted him of all charges: two counts of first-degree murder, two counts of possession of a firearm during the commission of a felony, and one count of first-degree conspiracy.⁴ On October 6, 2017, the Superior Court sentenced Thompson to two natural life sentences plus 45 years in prison.⁵ Thompson appealed the judgment.⁶ On February 21, 2019, this Court affirmed.⁷

Then, on April 8, 2019, Thompson filed *pro se* motions for postconviction relief and appointment of counsel under Superior Court Criminal Rule 61.⁸ The

¹ *State v. Thompson*, 2022 WL 1744242, at *1 (Del. Super. Ct. May 31, 2022); A1, at Docket Item ("D.I.") 1; A25–27.

² *Thompson*, 2022 WL 1744242, at *1; A1, at D.I. 1, 3.

³ A13, at D.I. 60.

⁴ A13, at D.I. 60.

⁵ *Thompson v. State*, 205 A.3d 827, 832 (Del. 2019); A14, at D.I. 66.

⁶ *Thompson*, 205 A.3d at 829.

⁷ *Id.*

⁸ A17, at D.I. 89–90.

Superior Court granted the motion for counsel.⁹ Thompson subsequently filed amended motions through his appointed counsel.¹⁰ The Superior Court ultimately denied him postconviction relief on May 31, 2022.¹¹

Thompson filed a timely notice of appeal. He filed an opening brief on November 7, 2022. This is the State's answering brief.

⁹ A17, at D.I. 93.

¹⁰ A19, at D.I. 104; A21, at D.I. 119.

¹¹ A24, at D.I. 141.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. The Superior Court did not abuse its discretion when it rejected Thompson's "Commerce Street Claim." Thompson did not suffer prejudice from the characterization of 20 Commerce Street, Wilmington, as a business location of his employer, Leonard's Express, at the time of the Connells' murders. The State offered Leonard's Express as the location Thompson lied in wait before traveling to the murder scene. The identity of 20 Commerce Street may have had some marginal benefit for the State's narrative, but the State's cell-site evidence placed Thompson in those geographical areas, regardless of the precise address where he stayed or what was there. Not to mention, the characterization of 20 Commerce Street as Leonard's Express bolstered the defense. The defense portrayed Thompson as a hard worker on a good salary, and the Leonard's Express location offered an explanation for Thompson's whereabouts. Investigating the matter might have undermined the defense case.

II. The Appellant's argument is denied. The Superior Court did not abuse its discretion when it determined that Thompson's counsel did not operate under an actual conflict of interest that adversely affected his representation of Thompson. While Thompson's case was pending on direct appeal, counsel undertook the representation of Carl Rone. Rone, who was a forensic firearms examiner for the

State, was charged with falsifying time sheets to get paid for work not performed. Rone testified at Thompson's trial, but he played a very minor role. The police did not recover any firearm, and Rone did not link Thompson to any of the ballistics evidence. Counsel did not pursue any claim against Rone on Thompson's behalf because Rone's credibility was inconsequential to his case. Counsel instead pursued appellate claims that might have reversed Thompson's convictions.

STATEMENT OF FACTS

On direct appeal, this Court summarized the facts underlying this case as follows:

[Christopher] Rivers and Mr. [Joseph] Connell were joint owners of C & S Automotive Repair. In October 2012, Rivers and Mr. Connell secured a nearly one million-dollar mortgage in connection with their business. As part of that transaction, they were both required to purchase life insurance in the amount of \$ 977,500, with the other partner named as the beneficiary, so that the surviving partner could pay off the mortgage if one of them were to die.

At approximately 1:30 a.m., on September 22, 2013, New Castle County police officers responded to a reported shooting at the Connells' residence in Wilmington. The officers discovered that the Connells had been shot and killed. After an extensive investigation, the police arrested Rivers and charged him with their murders.

Early on in the investigation, on October 4, 2013, [Joshua] Bey was questioned by Detective James Leonard because Rivers's phone records revealed that, around the time of the murders, he had deleted certain communications with a phone number associated with Bey's girlfriend. Initially, Bey declined knowing anyone by the name of Chris Rivers, but after the detective confronted him with Rivers's phone records, Bey admitted that Rivers was his mechanic. During the questioning, it became apparent that Bey was not telling the entire truth with regard to his contact with Rivers around the time of the murders. As for his location on the night of the murders, Bey stated that he worked an overnight shift at a department store (from approximately 10:00 p.m. to 6:00 a.m.). His timesheet and video surveillance of the parking lot corroborated Bey's statement that he was at work at the time of the murders.

Detective Leonard questioned Bey again on October 24, 2013, and this time Bey admitted he was Rivers's drug dealer. The next day, Bey was arrested for providing a false statement to the police. This arrest violated the terms of a probationary term he was serving and led to a violation of probation proceeding against him.

After almost ten months of incarceration, while awaiting trial on the charge of providing a false statement to the police, and moments before trial was to start, Bey agreed to provide information about the murders in exchange for a deal from the State. On August 14, 2014, Bey gave a proffer that implicated not only himself, but also Rivers and [Dominique] Benson (the “August 14 proffer”). At that time, however, Bey declined to enter into an agreement with the State.

Bey was arrested for the Connells’ murders the following month. He then agreed to cooperate. In exchange for his cooperation, the State made a plea offer involving a plea of guilty to Conspiracy in the First Degree and a finding that he had violated his probation. On September 5, 2014, after becoming a cooperating witness, Bey provided his fourth and final statement to the police (the “September 5 statement”).

At Thompson’s trial, Bey testified for the State, and his testimony provided the main narrative of the Connells’ murders. He explained that shortly after meeting Rivers in 2012, he started selling him prescription pills and cocaine and that in 2013, Rivers asked him to hire someone to kill the Connells. Bey and Rivers negotiated over the price, eventually settling on \$ 60,000. Rivers agreed and arranged to pay half up front and the other half in installments. Bey told Rivers that he needed \$ 5,000 immediately, which Rivers paid in cash.

Bey testified that he hoped to make money from this transaction by hiring someone else to do the murders for less. Bey asked Benson to do it and brought him to C & S to see the shop and meet Rivers. After learning from Rivers that Bey had lied to him about how much Rivers was willing to spend (so that he could keep the extra for himself), Benson nonetheless agreed to find someone else to do it for them. As the planning progressed, Bey was under the impression that Benson would commit the murders, but at some point, Benson told Bey that he would ask Thompson to assist him.

Bey further testified that Benson’s cousin, Willis Rollins, was also asked to carry out their plan. Benson arranged for Bey and Rollins to meet at a restaurant near the Connells’ residence so that Bey could show Rollins where the Connells lived. Bey testified that Thompson arrived at the restaurant and handed Rollins a gun with a silencer. After

showing Rollins the path to take to get to the Connells' residence, Bey went back to his car and waited for Rivers to provide updates as to their location. The next day, Bey called Benson to ask what happened. Benson stated that Rollins "froze up" and did not go through with the plan.

Bey then testified about a second attempt to kill the Connells. Benson told Bey, who in turn told Rivers, that they were having trouble finding a car to use. Rivers offered to let them drive his truck, a Chevrolet Tahoe, so Bey picked it up at C & S and then met Benson and Thompson in a parking lot behind his mother's house. Bey testified that Benson and Thompson got into the car and drove off. But the Connells were not killed this time either. Bey explained that because Rivers's car was equipped with On Star, Thompson was concerned about driving it.

On September 22, 2013, the night of the murders, shortly before beginning his overnight shift at the department store, Bey learned from Rivers that the Connells would be returning home from dinner in about thirty minutes. Bey relayed this information to Benson. Bey did not speak to Benson again until after his shift ended the next morning. When Bey first called Benson the next morning to ask what happened, Benson said he needed to call Thompson to find out. A few hours later, Bey received a call from Benson saying that it was official and to "go collect."

Apart from the initial \$ 5,000 payment, Bey did not receive any other money prior to the murders. After the murders, Rivers eventually paid another \$ 5,000 to Bey on September 26. Bey testified that after he received the money from Rivers, he "called up Dom [Benson]" and then met with Benson, who was accompanied by Rollins, at a park near Benson's house to give Benson this \$ 5,000 payment. According to Bey, Benson refused the payment. Later that day, Bey received a phone call from Benson instructing him to meet with Thompson. Bey went to Thompson's house and gave him the \$ 5,000 and explained that Rivers would be receiving more money from an insurance payout.

.....

In addition to Bey’s (and other witnesses’) testimony, the State presented phone records and cellular location information that generally was consistent with, and circumstantially corroborated, Bey’s testimony. . . .¹²

¹² *Thompson*, 205 A.3d at 829–32 (internal footnotes omitted).

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THOMPSON’S “COMMERCE STREET CLAIM.”

Question Presented

Whether the Superior Court abused its discretion when it denied Thompson’s “Commerce Street Claim” because it determined that Thompson suffered no prejudice from the characterization of 20 Commerce Street as one of his employer’s business properties at the time of the murders.

Scope of Review

This Court reviews the denial of postconviction relief for an abuse of discretion.¹³ A trial court abuses its discretion when it exceeds the bounds of reason under the circumstances or when it ignores recognized rules of law or practice in a way that produces injustice.¹⁴ This Court reviews associated legal and constitutional questions *de novo*.¹⁵

¹³ *Cabrera v. State*, 173 A.3d 1012, 1018 (Del. 2017).

¹⁴ *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

¹⁵ *Cabrera*, 173 A.3d at 1018.

Merits of Argument

Thompson argues that his counsel rendered ineffective assistance by failing to investigate the ownership and occupancy history of 20 Commerce Street, Wilmington. According to Thompson, if counsel did investigate, he would have discovered that his employer, Leonard's Express, did not yet occupy the property at the time of Connells' murders. The Superior Court did not abuse its discretion by denying this claim.

Thompson worked as a truck driver for Leonard's Express, a transportation and warehousing company.¹⁶ Daniel Barrick, the general manager at Leonard's Express and Thompson's supervisor, testified during the State's case-in-chief.¹⁷ When the prosecutor asked, "[W]hat's the address of your company or business?" Barrick responded, "300 Pigeon Point Road, New Castle, Delaware, and then we have another yard, it's 20 Commerce Street, that's in Wilmington."¹⁸ The 20 Commerce Street property is located just south of the Christina River, off Route 9 and between Interstates 95 and 495.

The State also presented cell-site location information ("CSLI") through FBI Special Agent William B. Shute, a member of the FBI's certified cell analysis survey team ("CAST") and an expert in cellular technology and historical cell-site

¹⁶ B221-23.

¹⁷ B220-41.

¹⁸ B225.

analysis.¹⁹ Special Agent Shute analyzed the call-detail records of two phones associated with Thompson: a Sprint phone with number (302) 275-5939 (“Thompson’s phone”) and a MetroPCS disposable phone with number (267) 622-3252, which listed its subscriber as “Kenny AAAA” (the “Kenny AAAA phone”).²⁰ Special Agent Shute’s analysis revealed that the phones generally moved in unison the night of the murders, back and forth between two geographical areas: the vicinity of the crime scene and the vicinity of Route 9 and Interstate 95, a “section of Wilmington along the Christina River.”²¹ On cross-examination, Special Agent Shute testified that coverage area along the Christina River included 20 Commerce Street.²²

In closing argument, the prosecutor used the CSLI evidence to form a narrative of Thompson’s movements the evening of the homicide. Before the murders, the Kenny AAAA phone pinged the cell tower “[i]n the area of Leonard’s Express, Aaron Thompson’s business.”²³ The prosecutor argued that “it was a good place to wait . . . where he wouldn’t be noticed hanging around waiting,

¹⁹ B120-40.

²⁰ B147-48.

²¹ B148-61.

²² B199-200.

²³ B244.

maybe for some further instructions.”²⁴ In rebuttal argument, the prosecutor summarized the State’s proffered interpretation of the CSLI evidence:

[Thompson] is the one who had [the Kenny AAAA phone]. . . . He drove from Leonard’s Trucking to the crime scene. . . . He went back briefly to Center City. . . . Back to the crime scene. . . . And then, as fast as he could, back to Leonard’s Trucking, where at 1:41 he makes a very brief call to his girlfriend . . . from the Kenny [AAAA] phone²⁵

In November 2020, Thompson’s investigator re-interviewed Barrick regarding the ownership and occupancy history of 20 Commerce Street.²⁶ According to the investigator, Barrick stated the company’s lease at 20 Commerce Street began on January 29, 2014—months after the Connells’ murders.²⁷

Thompson now argues, as he did in the Superior Court, that the prosecutors misstated the facts when they argued that Thompson traveled back and forth between Leonard’s Express and the murder scene.²⁸ Thompson faults his counsel for failing to investigate and discover when the Leonard’s Express lease began—a fact, if known, that would have enabled him to object to the State’s argument.²⁹ He contends that his counsel’s lapse in performance allowed the State to present a persuasive narrative of the events and draw a “concrete, real link between

²⁴ B244.

²⁵ B337.

²⁶ A369.

²⁷ A369.

²⁸ Opening Br. 21.

²⁹ Opening Br. 21.

[Thompson] and the homicides.”³⁰ He argues that the Superior Court therefore erred by denying his ineffective-assistance-of-counsel claim.³¹

The Sixth Amendment to the United States Constitution guarantees not only the right to counsel, but also the right to the effective assistance of counsel.³² In *Strickland v. Washington*,³³ the United States Supreme Court established a two-part test for evaluating claims that defense counsel rendered ineffective assistance. To prevail, the criminal defendant must prove that: (i) his counsel’s representation was deficient; and (ii) he suffered substantial prejudice as a result of counsel’s errors.³⁴

To satisfy the first prong of the *Strickland*, the claimant must prove that his attorney’s conduct fell below an objective standard of reasonableness, as judged by prevailing professional norms.³⁵ The performance prong places a heavy burden on the claimant.³⁶ He must overcome ““a strong presumption that counsel’s conduct falls within a wide range of reasonable professional assistance.””³⁷ If an attorney makes a strategic choice after a thorough investigation of the relevant law and

³⁰ Opening Br. 22–23.

³¹ Opening Br. 20–24.

³² *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

³³ 466 U.S. 668, 687–88 (1984).

³⁴ *See id.*

³⁵ *Bussey v. State*, 2020 WL 708135, at *2 (Del. Feb. 11, 2020) (citing *Strickland*, 466 U.S. at 687–88).

³⁶ *Green v. State*, 238 A.3d 160, 174 (Del. 2020).

³⁷ *Id.* (quoting *Strickland*, 466 U.S. at 689).

facts, the decision is virtually unchallengeable.³⁸ That said, the relevant question is not whether the attorney’s choices were strategic, but whether they were reasonable.³⁹ The reviewing court evaluates the attorney’s performance as a whole.⁴⁰

Under the second part of the *Strickland* test, the claimant “‘must show there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’”⁴¹ A “reasonable probability” is a “‘probability sufficient to undermine confidence in the outcome.’”⁴² There must be a “substantial likelihood” or a “meaningful chance” that the outcome would have been different.⁴³ The standard is lower than “more likely than not,”⁴⁴ but a merely conceivable chance is not sufficient.⁴⁵ The claimant must make specific allegations of actual prejudice and substantiate them.⁴⁶

The Superior Court denied Thompson’s claim under *Strickland*’s second prong for lack of prejudice.⁴⁷ The decision was not an abuse of discretion. The

³⁸ *Id.*

³⁹ *Id.* (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000)).

⁴⁰ *Id.*

⁴¹ *Starling v. State*, 130 A.3d 316, 325 (Del. 2015) (quoting *Strickland*, 466 U.S. at 694).

⁴² *Id.*

⁴³ *Baynum v. State*, 211 A.3d 1075, 1084 (Del. 2019).

⁴⁴ *Id.*

⁴⁵ *Starling*, 130 A.3d at 325.

⁴⁶ *Outten v. State*, 720 A.2d 547, 552 (Del. 1998).

⁴⁷ *Thompson*, 2022 WL 1744242, at *18–19.

20 Commerce Street evidence may have supplied some marginal benefit to the State's narrative, but it also bolstered the defense's case.⁴⁸ The State's CSLI evidence placed Thompson's in the same geographic areas, regardless.⁴⁹ But the characterization of 20 Commerce Street as a Leonard's Express location afforded the defense an innocent explanation for Thompson's presence there.⁵⁰

Because the Superior Court found no prejudice, it did not consider whether his counsel performed deficiently.⁵¹ Even though the Superior Court found it unnecessary to reach the question, the record is sufficient to allow this Court to affirm under the first prong of *Strickland* as well.⁵² Counsel explained in his Rule 61 affidavit that he made a strategic decision to portray Thompson as a hard worker who was working the night of the murders.⁵³ The investigation of 20 Commerce Street would have undermined the defense without rebutting the CSLI evidence; thus, counsel's failure to investigate was not unreasonable.

⁴⁸ *Id.* at *19.

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *Id.* at *18 (“Since the Commerce Street Claim fails for lack of prejudice, the Court will assume for analytical purposes that Trial Counsel performed deficiently.”).

⁵² *See Colon v. State*, 900 A.2d 635, 638 n.12 (Del. 2006) (stating that this Court may affirm a judgment on grounds other than those relied upon by the lower court); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (same).

⁵³ B342.

A. Thompson did not suffer prejudice from the characterization of 20 Commerce Street as a Leonard’s Express location.

Challenging the Superior Court’s findings, Thompson argues that he suffered prejudice from the 20 Commerce Street evidence on two counts.⁵⁴ First, he claims that “the erroneous connection between 20 Commerce Street and Paladin Club was an unforced error introduced by trial counsel.”⁵⁵ Thompson does not substantiate this allegation beyond labeling it an “unforced error.” Such a conclusory allegation is insufficient to establish actual prejudice under *Strickland*.⁵⁶

Second, Thompson claims that, contrary to the Superior Court’s conclusion, the 20 Commerce Street evidence solidified the State’s narrative but did not bolster the defense.⁵⁷ By presenting 20 Commerce Street as a Leonard’s Trucking location, the State supplied the jury “a concrete reference point” and “a plausible location where [Thompson] could have purportedly lay in wait until the right time to commit the homicides.”⁵⁸ According to Thompson, it also tended to confirm Bey’s account.⁵⁹ Finally, he contends that because his supervisor testified he did

⁵⁴ Opening Br. 22–24.

⁵⁵ Opening Br. 22.

⁵⁶ *Blanchfield v. State*, 1994 WL 590536, at *1 (Del. Oct. 18, 1994).

⁵⁷ Opening Br. 22–24.

⁵⁸ Opening Br. 22–23.

⁵⁹ Opening Br. 23.

not work the night of the homicides, the evidence could not have supported his defense, as the Superior Court found.⁶⁰

Thompson describes the 20 Commerce Street evidence as “crucial” to the State’s case,⁶¹ but the Superior Court found otherwise. The court explained:

Bey testified that Thompson killed the Connells. CSLI corroborated Bey’s testimony. The FBI agent explained that cell towers captured Thompson within a seven-minute driving distance from the Paladin Club both before and after the murders. . . . CSLI freezes the target within a triangulated zone; it does not snap a street-level picture. So whether Thompson was physically “at Leonard’s,” or simply in the same neighborhood, did not matter. CSLI showed that Thompson was close enough to the Paladin Club to ambush a couple as they came home from dinner and then get away quickly. Given that reality, it is difficult to imagine that the jury ascribed case-dispositive importance to whether Thompson was seven minutes away or seven minutes away and at Leonard’s. Either way, he was in the area.⁶²

The Superior Court acknowledged that the 20 Commerce Street location may have benefited the State at the margins of its narrative, but it was not the crucial information.⁶³ The CSLI evidence, in and of itself, implicated Thompson in the Connells’ murders and supported Bey’s testimony. The CSLI evidence tended to show that Thompson had the opportunity to carry out the murders, whether 20 Commerce Street was a Leonard’s Express location at the time or not.

⁶⁰ Opening Br. 24.

⁶¹ Opening Br. 24.

⁶² *Thompson*, 2022 WL 1744242, at *19 (internal footnote omitted).

⁶³ *See id.*

At the same time, the 20 Commerce Street evidence was meaningful for the defense narrative. Counsel portrayed Thompson as a “hard-working man who . . . earned \$75,000 to \$90,000 a year.”⁶⁴ He had a good job as a trucker, “ma[de] more than most people,” and thus had no motive to work as a hitman.⁶⁵ This defense strategy effectively coopted the State’s evidence. “By telling the jury Thompson was ‘at Leonard’s,’ the State also told the jury that Thompson was ‘at work’”—and not merely in the area for the purpose of committing the murders.⁶⁶ As the Superior Court found, this “bolstered the defense.”⁶⁷ Indeed, it was Thompson’s counsel who asked Special Agent Shute to explicitly put 20 Commerce Street in the coverage area of the cell towers.⁶⁸

Thompson attempts to rebut the court’s findings by claiming Barrick “testified that [Thompson] did not work on the night of the homicides.”⁶⁹ If Thompson was not working that night, it would diminish the persuasiveness of counsel’s defense.⁷⁰

The record does not support Thompson’s contention, however. Barrick testified that he did not “see” Thompson on Saturday (the day leading into the

⁶⁴ B293.

⁶⁵ *Id.*

⁶⁶ *See Thompson*, 2022 WL 1744242, at *19.

⁶⁷ *Id.*

⁶⁸ B199-200.

⁶⁹ Opening Br. 24.

⁷⁰ Opening Br. 24.

murders), but that Thompson *was* working that day.⁷¹ Barrick personally saw Thompson at work on Friday evening around 8:00 to 8:30 p.m.⁷² Barrick did not work in the office Saturday morning and did not return until Sunday.⁷³ Instead, on Saturday he worked remotely “by phone.”⁷⁴ Barrick knew that Thompson was working Saturday from speaking with dispatch.⁷⁵ Barrick contacted dispatch to confirm that Thompson was returning from New York.⁷⁶ He estimated Thompson would have arrived back in Delaware between 11:00 a.m. and noon, depending on traffic.⁷⁷

Barrick testified that he would not see Thompson every day that he worked.⁷⁸ He also testified that Thompson might work multiple routes in a single day.⁷⁹ For example, on the Friday before the murders, Thompson traveled to Eddystone, Pennsylvania, earlier in the day before traveling to New York that night.⁸⁰ Overall, Barrick’s testimony gave the impression that Thompson worked throughout the weekend. Accordingly, the Superior Court found that it supported

⁷¹ B225.

⁷² B230.

⁷³ B231-32.

⁷⁴ B231.

⁷⁵ B225.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ B230..

⁷⁹ B239-40.

⁸⁰ *Id.*

the defense’s story that Thompson was “a hard-worker with steady income who did not need and would not want to commit a murder for money.”⁸¹

Presenting evidence that 20 Commerce Street was not a Leonard’s Express location might have put a nick in the State’s narrative, but it would not have rebutted the State’s evidence. Even without that location “reference point,” the CSLI evidence still corroborated Bey’s testimony that Thompson killed the Connells.⁸² But without the characterization of 20 Commerce Street as Leonard’s Express, the jury might not have had the opportunity to conclude that Thompson, the hard worker on a good salary, was in the area for benign reasons.⁸³ The Superior Court thus concluded that the postconviction audit of Leonard’s Trucking properties did not undermine confidence in the outcome of the verdict.⁸⁴ That conclusion did not exceed the bounds of reason under the circumstances.

B. Trial Counsel did not perform deficiently by failing to investigate the history of 20 Commerce Street’s ownership or occupation.

Because the Superior Court found that Thompson’s claim failed for lack of prejudice, it did not reach the question of deficient performance under the first

⁸¹ *Thompson*, 2022 WL 1744242, at *3.

⁸² *Id.* at *19.

⁸³ *See id.*

⁸⁴ *Id.*

prong of *Strickland*.⁸⁵ But the record is sufficient for this Court to affirm the Superior Court’s judgment under the first prong, too.

Even if Thompson can demonstrate that his counsel failed to investigate the issue, his evidence did not establish the failure constituted deficient performance under *Strickland*. In his Rule 61 affidavit, counsel explained that he made a strategic decision “to attempt to put Mr. Thompson at work on the evening in question apart from the location of the homicide scene.”⁸⁶ Absent the exclusion of the CSLI evidence altogether, counsel was better positioned to defend Thompson armed with a plausible explanation for his whereabouts.

Failure to investigate a critical source of potentially exculpatory evidence may, in some circumstances, constitute ineffective assistance of counsel, as Thompson argues.⁸⁷ But not here. If 20 Commerce Street was not a Leonard’s Express location in 2013, that fact is not exculpatory. The State’s CSLI evidence tended to put Thompson in that area, regardless of what businesses or residences were also there. Thompson could have laid in wait at a remote riverside location. As the Superior Court observed: “[I]t is difficult to imagine that the jury ascribed case-dispositive importance to whether Thompson was seven minutes away or

⁸⁵ *Id.* at *18.

⁸⁶ B342.

⁸⁷ Opening Br. 19 & n.10 (citing cases).

seven minutes away and at Leonard's.'⁸⁸ Therefore, Thompson's counsel did not perform deficiently by failing to investigate a fact that would have undermined the defense without materially rebutting the State's evidence.

⁸⁸ *Thompson*, 2022 WL 1744242, at *19 (internal footnote omitted).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THOMPSON’S CONFLICT-OF-INTEREST CLAIM.

Question Presented

Whether the Superior Court abused its discretion by concluding that Thompson’s counsel did not operate under an actual conflict of interest that adversely affected his performance when he concurrently represented an inconsequential State’s witness in a separate matter while Thompson’s case was pending on direct appeal.

Scope of Review

This Court reviews the denial of postconviction relief for an abuse of discretion.⁸⁹ A trial court abuses its discretion when it exceeds the bounds of reason under the circumstances or when it ignores recognized rules of law or practice in a way that produces injustice.⁹⁰ This Court reviews associated legal and constitutional questions *de novo*.⁹¹

⁸⁹ *Cabrera*, 173 A.3d at 1018.

⁹⁰ *Lilly*, 649 A.2d at 1059.

⁹¹ *Cabrera*, 173 A.3d at 1018.

Merits of Argument

The police did not recover any firearm used to murder the Connells.⁹² Even though it had no firearm that might tie Thompson to the shooting, the State called Delaware State Police firearms examiner Carl Rone to testify.⁹³ He testified that some bullets were fired from the same unidentified gun and that he could not determine whether the remaining bullets were fired from one or more guns.⁹⁴ The Superior Court remarked, “[H]e played a very minor role in trial.”⁹⁵

It is well-documented that Rone since faced criminal charges of his own.⁹⁶ An arrest warrant, issued on May 3, 2018, alleged Rone provided false time sheets for work he did not perform between January 1, 2016, and December 31, 2017.⁹⁷ He ultimately pled guilty to theft by false pretenses and falsifying business records.⁹⁸

⁹² *Thompson*, 2022 WL 1744242, at *2.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *E.g.*, *Sierra v. State*, 242 A.3d 563, 569 (Del. 2020); *State v. Phillips*, 2019 WL 1110900, at *6 (Del. Super. Ct. Mar. 11, 2019); *State v. Romeo*, 2019 WL 918578, at *28 (Del. Super. Ct. Feb. 21, 2019).

⁹⁷ *Sierra*, 242 A.3d at 569; *Phillips*, 2019 WL 1110900, at *6.

⁹⁸ *Sierra*, 242 A.3d at 569.

Rone retained Thompson’s counsel to defend him on his criminal charges. Counsel’s representation of Rone began soon after he submitted Thompson’s opening brief on direct appeal.⁹⁹

Thompson claims that counsel’s concurrent representation of him and Rone gave rise to a conflict of interest.¹⁰⁰ He argues that counsel did not take steps to impeach Rone’s credibility for Thompson’s benefit because it would have been detrimental to Rone’s cause.¹⁰¹ The Superior Court found otherwise, considering the very minor and ultimately inconsequential role that Rone played in Thompson’s trial.¹⁰² The court’s decision was not an abuse of discretion.

A. Legal Background on Conflict-of-Interest Claims

The Sixth Amendment right to the effective assistance of counsel calls for representation that is free from conflicts of interest or divided loyalties.¹⁰³ The Sixth Amendment does not preclude a single attorney from representing multiple criminal defendants, even in the same trial.¹⁰⁴ Nevertheless, “a possible conflict

⁹⁹ *Thompson*, 2022 WL 1744242, at *4; *see also* B340 (“[C]ounsel’s involvement in Mr. Rone’s case did not begin until this matter was on direct appeal.”); Opening Br. 30 (“[T]rial counsel’s representation of Rone appears to have commenced around the time trial counsel submitted [Thompson’s] Opening Brief to this Court in his direct appeal.”).

¹⁰⁰ Opening Br. 25.

¹⁰¹ Opening Br. 31–33.

¹⁰² *Thompson*, 2022 WL 1744242, at *10–16.

¹⁰³ *Lewis v. State*, 757 A.2d 709, 714 (Del. 2000).

¹⁰⁴ *Cuyler v. Sullivan*, 446 U.S. 335, 348; *Lewis*, 757 A.2d at 714.

inheres in almost every instance of multiple representation.”¹⁰⁵ But the mere possibility of a conflict is insufficient to impugn a criminal conviction.¹⁰⁶

When an attorney actively represents conflicting interests, a departure from the ordinary *Strickland* test is warranted. The courts will not “indulge in nice calculations as to the amount of prejudice attributable to the conflict.”¹⁰⁷ Instead, a defendant “must establish that an actual conflict of interest adversely affected his lawyer’s performance” to garner relief.¹⁰⁸

An actual conflict exists “if, during the course of the representation, the defendants’ interests do diverge with respect to a material factual or legal issue or to a course of action.”¹⁰⁹ The test then requires proof of a causal relationship between the conflict and the allegedly flawed performance.¹¹⁰ When a defendant alleges a resulting lapse in counsel’s performance, as Thompson does here, he must:

First . . . demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he

¹⁰⁵ *Sullivan*, 446 U.S. at 348.

¹⁰⁶ *Id.* at 350; *Purnell v. State*, 254 A.3d 1053, 1107–08 (Del. 2021); *Santucci v. State*, 2019 WL 6170853, at *2 (Del. Nov. 19, 2019).

¹⁰⁷ *Sullivan*, 446 U.S. at 349 (internal quotation marks omitted).

¹⁰⁸ *Id.* at 350.

¹⁰⁹ *Purnell*, 254 A.3d at 1107 (quoting *Sullivan*, 446 U.S. at 356 n.3 (Marshall, J., concurring in part and dissenting in part)).

¹¹⁰ *Charette v. Bell*, 106 Fed. App’x 327, 329 (6th Cir. 2004); *United States v. Gambina*, 51 Fed. App’x 40, 43 (2d Cir. 2002).

must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.¹¹¹

In accordance with these standards, a defendant who presents only a theoretical division of loyalties fails to substantiate his conflict-of-interest claim.¹¹²

Delaware has adopted the federal standard for evaluating conflict-of-interest claims under the Sixth Amendment.¹¹³ Thompson acknowledges that these principles govern, but he also cites the Delaware Lawyers' Rules of Professional Conduct ("DLRPC") as "instructive for evaluating constitutional issues."¹¹⁴ This Court will sometimes reference the DLRPC to identify or explain the expectations of counsel in particular situations,¹¹⁵ but Thompson ultimately uses the DLRPC to define when a "concurrent conflict of interest" exists.¹¹⁶ Applying the DLRPC definition would impermissibly expand the scope of the constitutional inquiry established by *Sullivan* and its progeny. The DLRPC covers circumstances where "there is a significant risk that representation of one or more clients will be

¹¹¹ *United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988) (quoting *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985)); accord *Duncan v. Morris*, 256 F.3d 189, 197 (3d Cir. 2001).

¹¹² *Purnell*, 254 A.3d at 1107 (quoting *Mickens v. Taylor*, 535 U.S. 162, 171 (2002)).

¹¹³ *E.g., id.* at 1107–08; *Lewis*, 757 A.2d at 718–19.

¹¹⁴ Opening Br. 37–41.

¹¹⁵ *See, e.g., Purnell*, 254 A.3d at 1106–09; *Santucci*, 2019 WL 6170853, at *2.

¹¹⁶ Opening Br. 40.

materially limited by the lawyer’s responsibilities to another client.”¹¹⁷ But this Court and the United States Supreme Court have stated that the mere possibility—or “risk”—that a conflict exists is insufficient to impugn a conviction under the Sixth Amendment.¹¹⁸

B. Appellate Counsel did not have an actual conflict of interest that adversely affected the adequacy of his representation.

Thompson claims that his interests diverged from Rone’s.¹¹⁹ His argument centers on the issue of Rone’s credibility.¹²⁰ According to Thompson, counsel had to maintain Rone’s credibility and reputation to defend Rone’s case, but it was in Thompson’s interest to discredit Rone’s work, handling of evidence, and testimony.¹²¹ As a result, Thompson argues, counsel “could not represent both effectively.”¹²² He contends the alleged conflict adversely affected counsel’s performance by deterring him from revisiting Rone’s testimony, presenting a claim pertaining to Rone on direct appeal, or requesting a remand to investigate Rone’s misconduct or move for a new trial.¹²³

¹¹⁷ DLRPC 1.7(a)(2).

¹¹⁸ *Sullivan*, 446 U.S. at 350; *Purnell*, 254 A.3d at 1107–08.

¹¹⁹ Opening Br. 30–34.

¹²⁰ Opening Br. 31–32.

¹²¹ Opening Br. 36.

¹²² Opening Br. 37.

¹²³ Opening Br. 31–33.

But to give rise to an actual conflict of interest, the factual issue with allegedly divergent interests must be material to the defendant's case. Rone's credibility was not. As the Superior Court found, the State "did not need Rone" at all:

The Connells' cause of death was not in dispute: it was no mystery that they were shot to death. But no firearms were recovered. And no one saw the shooter(s). So the case was a "whodunit," not a "what happened."

Rone testified to what happened, not who did it. Rone performed inconclusive ballistics analyses on bullets discharged by an unidentified shooter from a missing firearm. He then made the unremarkable observation that at least some of the bullets came from a gun. Rone's scientific display might have entertained the jury, thereby curtailing the so-called "CSI effect." But he did little, if anything, to help prove beyond a reasonable doubt that Thompson killed the Connells.¹²⁴

Thompson refutes the Superior Court's conclusion, arguing that Rone's forensic and chain-of-custody testimony "was essential to the State's case."¹²⁵

Thompson notes the evidence tended to show how the Connell's died, that two shooters were involved, and that the State "conducted a thorough, professional investigation."¹²⁶

The Superior Court was not swayed by Thompson's efforts to elevate the importance of Rone's testimony. The issues he cites were either not in dispute or

¹²⁴ *Thompson*, 2022 WL 1744242, at *10.

¹²⁵ Opening Br. 43.

¹²⁶ Opening Br. 43–44.

not central to the case. Moreover, Rone’s testimony was largely duplicative of other evidence the State presented.

Rone testified that New Castle County Police Department (“NCCPD”) asked him to analyze ballistics from the scene of the Connells’ murders.¹²⁷ Rone examined 18 cartridge cases—two brands of six nine-millimeter cartridge cases that were fired from the same firearm and twelve .22-caliber cartridge cases from which he could make no determination because of insufficient markings.¹²⁸ Rone also received six nine-millimeter projectiles, nine .22-caliber projectiles, and bullet fragments. Some of the nine-millimeter projectiles were damaged, possibly from a misfire or malfunction.¹²⁹ Rone added that a nine-millimeter firearm was larger and louder than a .22-caliber firearm, but he could not determine if the firearms used in this case were equipped with a silencer.¹³⁰ He could not determine whether the two damaged nine-millimeter projectiles were fired from the same firearm.¹³¹ He could not determine if the nine .22-caliber projectiles were fired from the same firearm.¹³² He could not make any conclusions regarding the bullet fragments he received.¹³³ He could not state how many bullets were loaded into the firearms

¹²⁷ A100–02.

¹²⁸ A103–06; A117–18.

¹²⁹ A113.

¹³⁰ A109–10; A112–13.

¹³¹ A107–08.

¹³² A109.

¹³³ A109.

before they were fired.¹³⁴ He could not say whether one or more firearms were used to commit the murders.¹³⁵ He could not match the ballistics to any particular firearm.¹³⁶

NCCPD Detective Amy McCabe also testified about the ballistics evidence recovered.¹³⁷ She detailed the evidence that NCCPD collected and later submitted to Rone for examination.¹³⁸ Her testimony, like Rone’s, highlighted that the police found casings or projectiles for two different calibers of firearms. They included five nine-millimeter casings near Joe Connell’s body and eight .22-caliber casings closer to Olga Connell’s body.¹³⁹

The Superior Court found that Rone’s testimony was “barely relevant to the State’s case.”¹⁴⁰ Thompson argues it tended to show how the Connells died,¹⁴¹ but the cause and manner of their death—a homicide by multiple gunshot wounds—was not in dispute.¹⁴² The Chief Medical Examiner at the Division of Forensic Science, Dr. Gary Collins, supplied the primary evidence on the nature of their

¹³⁴ A118–20.

¹³⁵ A118–22.

¹³⁶ A121–22.

¹³⁷ B1-76.

¹³⁸ B14-16, 38-41, 55-57

¹³⁹ *Id.*

¹⁴⁰ *Thompson*, 2022 WL 1744242, at *10.

¹⁴¹ Opening Br. 43–44.

¹⁴² *Thompson*, 2022 WL 1744242, at *10; B77-119.

injuries.¹⁴³ Thompson also contends that Rone’s testimony tended to show the State conducted a thorough investigation.¹⁴⁴ But the “CSI effect” was at most tangentially related to the central issue of proving Thompson to be one of the shooters.¹⁴⁵ Whether or not the State conducted ballistics testing when no firearm was recovered may have been interesting, but it did little to nothing to prove the State’s case.¹⁴⁶ Finally, Thompson argues that Rone’s testimony tended to show that two shooters intentionally killed the Connells.¹⁴⁷ But Rone—the State’s ballistics expert—told the jury he could not conclude whether one or more firearms were used to commit the murders.¹⁴⁸ He identified two different calibers of ammunition, but Detective McCabe had already done that. Her account of where the police found the various ballistics evidence provided a much clearer depiction of what happened than Rone’s inconclusive opinion. In sum, Rone’s role was minor, and consequently, his credibility was not a material issue in Thompson’s case.

Thompson therefore did not have a material divergence of interests from Rone. Regardless, any conflict did not actually affect counsel’s performance.

¹⁴³ B77-119.

¹⁴⁴ Opening Br. 43–44.

¹⁴⁵ See *Thompson*, 2022 WL 1744242, at *10.

¹⁴⁶ *Id.*

¹⁴⁷ Opening Br. 43–44.

¹⁴⁸ A118–22.

Counsel did not pursue the Rone issue during Thompson's direct appeal because it would not have helped Thompson overturn his convictions.

Counsel had filed Thompson's opening brief before Rone's arrest. Even then, the claims he asserted on Thompson's behalf did not focus on Rone or his testimony. Counsel never considered the ballistics evidence to be important to Thompson's defense:

[C]ounsel did not challenge the ballistics evidence that was presented during the course of the trial and, in particular, the testimony presented by Mr. Rone. Counsel did not believe the evidence was significant insofar as the defense theory of the case was concerned.

. . . . [N]othing relating to the ballistics evidence was argued or considered as an issue in that direct appeal.¹⁴⁹

Thus, the Superior Court reasonably concluded that counsel did not pursue the Rone issue, not because of any conflict, but because it was unimportant:

Rone's testimony was barely relevant to the State's case. So attacking Rone on appeal would not have resulted in a new trial. Trial Counsel left Rone out of Thompson's appeal because Rone was of no use to Thompson on appeal, not because of some conflicting interest with Rone.

. . . .

Given the importance of Bey's character and testimony to Thompson's convictions, it is not surprising that Trial Counsel focused all of Thompson's appellate arguments on Bey and not Rone. Trial Counsel's arguments maximized the likelihood that Thompson's convictions would be overturned. Rone-based arguments did not.

¹⁴⁹ B340-41.

. . . . Thompson wanted his convictions overturned. Arguments against Bey gave him the best chance of doing so. Accordingly, Trial Counsel disregarded Rone not due to an actual conflict, but rather because Rone was irrelevant to Thompson’s defense.¹⁵⁰

Thompson contends that, once he learned of Rone’s misconduct, counsel should have amended his opening appellate brief to assert a Rone-based claim or request a remand to further investigate the issue or move for a new trial. But appellate counsel ““need not (and should not) raise every nonfrivolous claim, but rather may select the arguments that maximize the likelihood of success on appeal.””¹⁵¹ Rone-based claims were not viable alternative options for Thompson, and they would not have earned him a new trial.

Under *Sullivan* and its progeny, a criminal defendant asserting a conflict of interest is not required to prove *Strickland* prejudice—a reasonable likelihood that the outcome of his proceedings would have been different but for the alleged error. But he is expected to identify some plausible alternative defense strategy with sufficient substance to be considered viable.¹⁵²

Rone-based claims would have lacked sufficient substance and were not viable alternative strategies. Newly discovered evidence does not warrant a new

¹⁵⁰ *Thompson*, 2022 WL 1744242, at *10–11.

¹⁵¹ *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *accord Neal v. State*, 20 A.3d 935, 946; *see also Ryle v. State*, 2020 WL 2188923, at *2 (Del. May 5, 2020).

¹⁵² *E.g., Duncan*, 256 F.3d at 197.

trial if it is merely impeaching.¹⁵³ The new evidence must “attack[] the credibility of the witness in the case at bar specifically, rather than impeaching the witness’s credibility in general.”¹⁵⁴ Thompson does not provide evidence that Rone falsified the ballistics report in this case, which was peer reviewed.¹⁵⁵ And “every court to consider Rone’s indictment has found that stealing ‘extra pay’ for oneself is not the same as ‘submitting false evidence logs and testing documentation’ against someone else.”¹⁵⁶ Thus, armed with at most general character evidence, Thompson did not have sufficient substance to launch a meritorious attack on his conviction after the fact. An appellate claim was not viable, and neither was a motion for a new trial.¹⁵⁷

Thompson attempts to fit his case within the scope of *Williams v. State*¹⁵⁸ as an alternative basis for finding the existence of a conflict. *Williams* involved a “positional conflict,” where counsel was required to take mutually inconsistent legal positions in appeals pending simultaneously before the same court.¹⁵⁹ On behalf of one capital-murder defendant, counsel argued the sentencing court was not required to give “great weight” to the jury’s vote in the penalty phase; on

¹⁵³ *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987).

¹⁵⁴ *Purnell*, 254 A.3d at 1098–99.

¹⁵⁵ *Thompson*, 2022 WL 1744242, at *13.

¹⁵⁶ *Id.* at *12–13 & nn.116, 120 (internal ellipsis omitted) (citing cases).

¹⁵⁷ *Id.* at *12–13.

¹⁵⁸ 805 A.2d 880 (Del. 2002).

¹⁵⁹ *Id.* at 881.

behalf of another, he argued the sentencing court was required to give it great weight.¹⁶⁰

There was no positional conflict in this case. Rone's credibility was a factual issue, not a legal question. The legal questions—whether Thompson murdered the Connells and whether Rone stole from his employer—were different, and they were not presented simultaneously to the same appellate court. *Williams* is inapposite.

Thompson's counsel did not operate under an actual conflict of interest that adversely affected his representation. Counsel's strategy at trial—developed and implemented before any conflict possibly arose—was to challenge Bey's credibility and convince the jury that the State did not prove Thompson's involvement in the murder-for-hire scheme.¹⁶¹ Counsel did not pursue Rone-based arguments because Rone's evidence was not significant.¹⁶²

¹⁶⁰ *Id.*

¹⁶¹ B340.

¹⁶² B340-41.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: December 12, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON THOMPSON,	§	
	§	No. 220, 2022
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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Date: December 12, 2022

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