

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON THOMPSON,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	No. 220, 2022
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below,	:	
Appellees.	:	

Upon Appeal from the Superior Court of the State of Delaware in and for New Castle County to the Supreme Court of the State of Delaware

**REPLY BRIEF OF**  
**APPELLANT AARON THOMPSON**

JOHN P. DECKERS, ESQ.  
ID No. 3085  
800 N. King Street, Ste. 303  
Wilmington, Delaware 19801  
(302) 656-9850  
Attorney for Appellant,  
Aaron Thompson

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## REPLY ARGUMENT

- I. This Court Should Apply *De Novo* Review to Both Claims, as Both Allege Violations of the Sixth Amendment. This Court Applies *de novo* Review to constitutional claims.

The State argues that the appropriate standard of review for these claims is the abuse of discretion standard.<sup>1</sup> In *Green v. State*, this Court stated, “We review legal or constitutional questions, including *ineffective assistance of counsel claims, de novo.*”<sup>2</sup> This Court has also noted recently in *Ryle v. State*<sup>3</sup> and *Baynum v. State*<sup>4</sup> that it applies the *de novo* standard of review to claims of ineffective assistance of counsel.<sup>5</sup> *De novo* review is appropriate here because both these claims are constitutional claims. Both claims stated by the Appellant argue that his Sixth Amendment right to effective assistance of counsel was violated in some way. Accordingly, Appellant respectfully submits that *de novo* review is appropriate and proper as to both claims, not the abuse of discretion standard.

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<sup>1</sup> See Ans. Br. at 9, 23.

<sup>2</sup> *Green v. State*, 238 A.3d 160, 173 (Del. 2020)(emphasis added).

<sup>3</sup> No. 470, 2019, at ¶ 8, 228 A.3d 1064 (Del. 2020)(TABLE)(“We review *de novo* constitutional claims, including claims of ineffective assistance of counsel.”).

<sup>4</sup> 211 A.3d 1075, 1082 (Del. 2019)(“We review *de novo* constitutional claims, including ineffective assistance of counsel claims.”).

II. Trial Counsel’s Failure to Investigate and Discover that 20 Commerce Street Was Not a Leonard’s Express Site at the Time of the Homicides was a Professional Lapse that Constitutes Deficient Performance under *Strickland*.<sup>6</sup>

- a. The 20 Commerce Street Evidence Was Persuasive Evidence that Provided a Concrete Link Between Appellant and the CSLI Evidence on the Night of the Homicides. It was Not of Mere “Marginal Benefit” as the State Contends.

In its Answering Brief, the State attempts to minimize the importance of the 20 Commerce Street evidence and contends it was of “marginal benefit” to the State’s case.<sup>7</sup> The State emphasizes the importance of the CSLI evidence as implicating Appellant and placing him in areas of Wilmington, and then in the area of the homicide scene.<sup>8</sup> The State’s characterization minimizes the importance of how the 20 Commerce Street evidence instantiated the complicated CLSI evidence that it presented to the jury.

As noted in our Opening Brief, the State used CSLI evidence to argue that, based upon the general locations of Appellant’s known cell phone and the Kenny AAAA phone, Appellant was in certain incriminating locations in the Wilmington area on the night of the Connell homicides.<sup>9</sup> The CLSI evidence could only

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<sup>6</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984).

<sup>7</sup> Ans. Br. at 15.

<sup>8</sup> Ans. Br. at 15 (citing *State v. Thompson*, 2022 WL 1744242, at \*19 (Del. Super. Ct. May 31, 2022)).

<sup>9</sup> See Op. Br. at 12-14.

suggest general areas, based upon cell phone activity, of where Thompson could have been that night. 20 Commerce Street, on the other hand, was a real, concrete, singular location that the State could point to, and reference, to the jury; moreover, instead of suggesting that Thompson's cell phone was active in the specified areas, the State maintained, and trial counsel conceded, that Thompson himself was in those areas. Instead of only saying that CSLI evidence showed that Thompson's phone was in some amorphous general area, the State was able to argue, "he was here, right here" at 20 Commerce Street, and it made sense that he was, in fact, there because that was where he worked. That argument is more appealing, and more persuasive, than stating, "the complex, scientific, CSLI evidence shows that the defendant's phone was in these general locations leading up to the homicides."

To be effective, trial counsel needed to make sure that the State met its burden of proof as to each and every element of the offense charged and not allow the State to take any shortcuts. Due to trial counsel's failure to investigate on this point, the State was able to take a shortcut here. The State should never have been able to point to a specific location, and repeatedly reference it in argument to emphasize to the jury that Appellant waited at a specific location until the right, or best time, to commit the homicides. The State's argument understates the importance a factfinder would place in a specific concrete reference point, in contrast to more technical, amorphous areas on a map of cell tower location data.

The State specifically and repeatedly referenced 20 Commerce Street, not the CSLI evidence in closing, and drew the jury’s attention to that evidence.<sup>10</sup> By virtue of a flawed pretrial investigation, trial counsel conceded a compelling, but erroneous, “fact” and thereby failed to zealously challenge the State’s case against his client. This misstep constituted deficient performance under *Strickland*.

b. The 20 Commerce Street Evidence Did Not “Bolster” the Defense Case as the State Contends.

In its Answering Brief, the State contends that, in some ways, the 20 Commerce Street evidence “bolstered” the defense’s case by providing an “innocent explanation” for Appellant’s presence there on the night of the homicides.<sup>11</sup> Thus, the State argues that Trial Counsel’s performance was not deficient.<sup>12</sup>

The trial record does not reveal that Thompson was working the night of the homicides. Testimony was elicited at trial that Appellant worked the weekend of the homicides.<sup>13</sup> Specifically, the dispatcher at Leonard’s Express testified that he saw Thompson at work on Friday, the day before the homicides were committed, and the dispatcher “knew” that Thompson came in on Sunday, the day after the

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<sup>10</sup> See Op. Br. at 15-16; A359-60, A362, A364.

<sup>11</sup> Ans. Br. at 15.

<sup>12</sup> *Id.*

<sup>13</sup> A320, A322.

homicides.<sup>14</sup> The dispatcher further testified that he was not at work on Saturday, but checked in that day and he heard, second-hand, that Appellant worked Saturday morning.<sup>15</sup> There was no testimony from Appellant's employer that Appellant was working on Saturday night, when the homicides occurred.

Trial Counsel's decision to portray Thompson as working the night of the homicides was not made based upon an adequate investigation of the facts. If Trial Counsel had investigated and learned that Leonard's Trucking did not operate at 20 Commerce Street when the homicides occurred, he could have objected to the State's assertions of fact on that point, would not have conceded that Thompson was working in that area, and, as noted in the Opening Brief, could have deprived the State of a concrete, plausible link to Thompson's whereabouts on the night of the homicide.

The State's argument that the 20 Commerce Street evidence "bolstered" the defense's case presupposes that Trial Counsel had conducted an adequate investigation into the facts. Trial Counsel did not do that. If Trial Counsel had, they would have formulated a trial strategy that deprived the State of a concrete point of reference for its argument as to Appellant's whereabouts on the night of the homicides.

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<sup>14</sup> A320, A322.

<sup>15</sup> A322.



- c. 20 Commerce Street was Not “Meaningful” to the Defense Strategy to Present Appellant as a Hard Worker with No Motive to Engage in a Murder-for-Hire Scheme.

Finally, the State asserts that the trial defense’s assumption that 20 Commerce Street was a Leonard’s Express location was “meaningful for the defense narrative[]” that portrayed Appellant as a hard worker with a good income.<sup>16</sup> The State further asserts that “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.”<sup>17</sup>

Contrary to this assertion, the defense could have portrayed Appellant as a hard worker with a good income without any reference to 20 Commerce Street. As noted above, the trial record showed that Appellant worked on Friday, Saturday morning, and on Sunday, of the weekend that the homicides occurred.<sup>18</sup> Testimony was elicited about Appellant’s good income, and consistent work as a trucker.<sup>19</sup> The jury would have had the opportunity to consider that Appellant earned a good income and worked most of the weekend of the homicides without reference to 20 Commerce Street as a Leonard’s Trucking location.

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<sup>16</sup> Ans. Br. at 18-20.

<sup>17</sup> *Id.* at 20.

<sup>18</sup> A320, A322.

<sup>19</sup> A325-A326.

III. Application of the Delaware Lawyer’s Rules of Professional Conduct To Trial and Appellate Counsel’s Simultaneous Representation of Appellant and Carl Rone Does Not “Impermissibly Expand” the Scope of the Constitutional Conflict Inquiry.

In addressing the conflict-of-interest claim asserted by Appellant, the State argues that Appellant’s application of the Delaware Lawyer’s Rules of Professional Conduct definition of a concurrent conflict of interest “would impermissibly expand the scope of the constitutional inquiry established by [*Cuyler v.*] *Sullivan* and its progeny.”<sup>20</sup> However, the Delaware Supreme Court considers ethical standards of the profession in assessing whether a conflict of interest amounts to a constitutional violation, and whether a criminal proceeding is fair: “[t]he United States Supreme Court and this Court have held that the judiciary has an independent interest in ensuring that criminal trials are conducted *within the ethical standards of the profession* and that legal proceedings are fair.”<sup>21</sup>

Appellant cites Rule 1.7 of the DLRPC in support of his claim that Trial and Appellate Counsel violated his Sixth Amendment right. Appellant does not seek to substitute or change any constitutional standard in discussing this important rule. But both the U.S. and Delaware Supreme Courts have stressed the importance of

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<sup>20</sup> Ans. Br. at 27 (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)).

<sup>21</sup> *Purnell v. State*, 254 A.3d 1053, 1107 (Del. 2021)(emphasis added)(citing *Lewis v. State*, 757 A.2d 709, 713 (Del. 2000)(citing *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988))).

ensuring that criminal trials are conducted within the ethical standards of the profession. Consideration of the applicable Rule of Professional Conduct is relevant and warranted when this Court considers whether an actual conflict of interest existed, as Appellant asks this Court to so determine.

- IV. *Williams v. State* is Not Inapposite. Just as in *Williams*, Appellant was, and is, Entitled to Insist On Fidelity to the Factual and Legal Positions that Best Serve that Client.

Finally, the State argues that *Williams v. State*<sup>22</sup> is inapposite because no positional conflict existed pertaining to Trial and Appellate Counsel's advocacy in this Court.<sup>23</sup> Respectfully, *Williams* is instructive here. In *Williams*, appellate counsel was faced with the dilemma of arguing conflicting legal positions to the same court for two different clients.<sup>24</sup> In Appellant's case, his counsel faced a similar dilemma—a request to this Court for a remand to conduct further investigation into the nature and extent of Rone's misconduct would have been in Appellant's interest, but would not be in client Rone's interest. When Rone's acts of theft and dishonesty came to light, the extent of those acts was not known. Further, it certainly was not in the State's interest to investigate whether Rone's work product was also infected by dishonesty. Additional investigation was also not in Rone's interest. An unconflicted counsel would have sought leave from the

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<sup>22</sup> 805 A.2d 880 (Del. 2002).

<sup>23</sup> Ans. Br. At 35-36.

<sup>24</sup> 805 A.2d at 881.

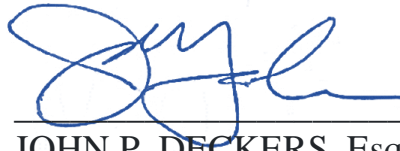
Court to ferret that out. Unconflicted counsel would have sought leave to determine whether Rone was committing theft and other dishonest acts around the time he performed the ballistics testing in the Connell homicide investigation. Since Mr. Thompson's counsel also represented Rone, he simply could not do that without violating his ethical obligations to Rone.

The State's Response presumes that Rone's acts of theft and dishonesty never crossed the threshold separating his office, where he submitted false business records, from the laboratory and/or gun range, where he examined evidence and conducted tests. Further, the State also presumes little to no significance on the issue of whether Rone was committing theft and other dishonest acts when testing was done for the Connell homicide investigation. Mr. Thompson submits that this question is material to Mr. Thompson's case. Unconflicted counsel for Mr. Thompson would have had no compunction in seeking further investigation into whether Rone's acts of dishonesty crossed the threshold from the office into the laboratory and outside onto the firing range, and into whether he was committing theft and other dishonest acts when he performed testing for the Connell homicide investigation.

## CONCLUSION

For the reasons outlined in Appellant's Opening Brief, and in this Reply, Appellant respectfully requests that his convictions be reversed, vacated, and remanded for a new trial.

Respectfully submitted,



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JOHN P. DECKERS, Esq. (DE#3085)  
800 N. King St., Ste. 303  
Wilmington, DE 19801  
(302) 656-9850  
*John@JohnDeckersLaw.com*  
*Attorney for Aaron Thompson*