IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH DICKINSON, Defendant Below – Appellant, v. THE STATE OF DELAWARE, Plaintiff Below – Appellee.	))))))))))))	Supreme Court No. 484, 2012 On appeal from Superior Court ID No. 0901009990

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

Joseph Dickinson was arrested in January, 2009 on charges relating to an attempt to commit a robbery at the Fairview Inn with Oscar Johnson and Charles Thomas. He was indicted on charges of attempted robbery first degree, possession of a firearm during the commission of a felony, burglary second degree, possession of a destructive weapon, a conspiracy second degree. A jury found him guilty of all charges. The State subsequently moved to declare him an Habitual Offender pursuant to 11 Del. C. §4214(b) on the charge of attempted robbery first degree. Accordingly, Defendant was sentenced to life imprisonment on that charge.

Defendant appealed his convictions to the Delaware Supreme Court. The Supreme Court affirmed Defendant's conviction in December, 2010.[1]

Defendant filed a Rule 61 Motion for Postconviction Relief which was later amended by adding a second ground. By Order dated August 17, 2012, the Superior Court denied the Defendant's Amended Motion For Postconviction Relief.[2]

Defendant filed a notice of appeal of the Superior Court decision. This is the Defendant's opening brief in support of his appeal.

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[1] *Dickinson v. State*, 8 A. 3d 1166 (Del. 2010).

[2] *State v. Dickinson*, ID number 0901009990A, Cooch, J., (Del. Super., 2012) (Exhibit A).

SUMMARY OF ARGUMENT

I. Trial counsel owed the following duties to Dickinson:

a. The duty to know the law pertaining to the right to a "level of liability" instruction pursuant to 11 Del. C. §274.

b. The duty to advise defendant of his right to a "level of liability" instruction, and the potential benefits of the instruction;

c. The duty to obtain a knowing, intelligent and voluntary waiver of defendant's right to a "level of liability" instruction.

d. The duty to re-advise the defendant of the benefits of a "level of liability" instruction as the trial progressed, and as defendant's innocence defense became more illusory, so that the defendant could make decisions based upon the developments at trial.

Trial counsel breached his duty to Dickinson by his lack of knowledge of the law relating to defendant's right to a "level of liability" instruction, and failure to advise him of his right to the instruction, both prior to and during the trial. As a result, the outcome of the trial was unfair and unreliable.

The lower court erred/abused its discretion by denying defendant's claim that his trial attorney was ineffective resulting in an unfair, unreliable outcome.

II. Defendant was deprived of his due process right to a fair trial due to his attorney's deficient performance. The lower court erred/abused its discretion by denying defendant's claim of ineffective assistance of counsel.

STATEMENT OF FACTS

Viewing the evidence most favorably to the State, the historical facts which led to Dickinson's convictions are summarized in the Courts decision in his direct appeal as follows:[3]

> In January 2009, a confidential informant told Wilmington Police Detective Paul Ciber that Oscar Johnson was planning to commit a robbery. Because Johnson had not selected the location of the robbery, Ciber and other police officers rented a room at the Fairview Inn and set it up to look as if the occupant was a drug dealer. The informant called Johnson and told him a drug dealer was working out of that room, and that the dealer had $25,000. Johnson told the informant to pick him up. Then Johnson called two friends, Charles Thomas and Joseph Dickinson, to join in the planned robbery. Johnson, the confidential informant, Thomas and Dickinson drove in two cars to Haynes Park, where they discussed the plan. Dickinson drove Johnson and Thomas to a salvage yard next to the Fairview Inn, and the confidential informant drove into the hotel parking lot. Dickinson positioned his car facing Route 13 and waited while Johnson and Thomas, carrying Dickinson's shotgun, put on ski masks and walked to the designated room. At about the time they realized there was nothing to take, the SWAT team arrived and threw a flash grenade. Dickinson saw the flash and tried to drive away, but was arrested at the scene. When the police searched Dickinson's car, they found shotgun shells and the bag used to carry the shotgun.
>
> Dickinson did not testify at trial. He argued that Thomas and Johnson were the ones who committed the crimes and that they testified against Dickinson in return for their pleas. Dickinson did not ask for an accomplice liability instruction. Instead, he asked for an instruction that accomplices' testimony should be

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[3] *Dickinson v. State*, 8 A.3d 1166 (Del. 2010).

> viewed with extreme caution. The jury found Dickinson guilty of first degree attempted robbery, second degree burglary and related charges. Dickinson was sentenced as an habitual offender to life in prison.

<u>SUPPLEMENTAL FACTS RELATING TO DICKINSON'S RULE 61 CLAIMS</u>

Dickinson's Rule 61 claims relate to the failure of defense counsel to seek a "level of liability" instruction pursuant to 11 Del. Code. Section 274. There is no dispute that defense counsel did not request a "level of liability" instruction, or that it was even addressed with the trial judge.

In Defendant's affidavit in support of his Amended Motion for Postconviction Relief, he states:

> I, Joseph Dickinson, after being duly sworn, hereby states as follows:
>
> 1. I am the Petitioner in the attached Rule 61 Motion for Postconviction Relief;
>
> 2. My attorney, John Malik did not explain to me what a Section 274 Level of Liability jury instruction was, that I had the right to elect that instruction, and the significance of such an instruction to the potential outcome(s) of my trial.
>
> 3. Mr. Malik did not explain to me that a Section 274 Level of Liability instruction could have led to a Robbery 2nd Degree (instead of Robbery 1st Degree) and that a conviction for Robbery 2nd Degree would not have exposed me to sentencing as a habitual offender under 11 *Del.C.* § 4214(b).
>
> 4. Mr. Malik did not explain to me that he was not seeking a Section 274 Level of Liability instruction, or why he made this decision.
>
> 5. **If I had been advised of what a Section 274 Level of Liability instruction was, and its significance in avoiding conviction requiring me to be sentence to a mandatory life sentence under 11 *Del. C.* § 4214(b), then I would have opted for**

> **the judge to give such an instruction.** (emphasis added).[4]

In response to Defendant's ineffective assistance of counsel claims, his trial counsel has averred, in pertinent part:

> After I was retained as counsel, Mr. Dickinson advised that he did not wish to accept a plea, but wished to proceed to trial.
>
> Prior to trial, counsel had advised Mr. Dickinson of the State's plea offer. The plea offer required Mr. Dickinson to plead guilty to Attempted Robbery Second Degree, Possession of a Firearm During the Commission of a Felony, and Possession of a Destructive Weapon and to acknowledge that he was eligible to be sentence as an habitual offender pursuant to 11 *Del. C.* §4214(b) based upon his prior convictions of Burglary Second Degree in 1992, Robbery Second Degree in 1995 and Robbery First Degree in 1998. In exchange for Mr. Dickinson's guilty plea, the State agreed not to file a motion to declare Mr. Dickinson an habitual offender pursuant to 11 Del. C. §4214(b), which requires that a mandatory sentence of life without the possibility of parole be imposed. Instead, the State agreed to file a motion to declare Mr. Dickinson an habitual offender pursuant to 11 Del. C. §4214(a) on the charge of Possession of a Destructive Weapon and to request a total sentence of incarceration of ten (10) years on all charges. Mr. Dickinson rejected this plea offer prior to trial and informed counsel and the Court that he wished to proceed to trial.
>
> The defense asserted at trial was that Mr. Dickinson was not aware of any robbery plan that his co-defendants had, but that he gave his co-defendants a ride to the Fairview Inn Motel solely for the purpose of purchasing drugs. Furthermore, counsel argued that Mr. Dickinson's co-defendants, who testified against him at trial, were not credible witnesses and would have said anything to obtain favorable plea offers from the State for themselves. Additionally, counsel requested and was granted a jury instruction pursuant to the holding in *Bland v. State*, 263 A.3d 286 (Del. 1970), that effectively cautioned jurors that the testimony of accomplices must be viewed with suspicion and great caution.

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[4] Exhibit 1, p. 5.

At the time of trial, counsel was not aware of the holding in the case of *Allen v. State*, 970 A.2d 203 (Del. 2009), and thus did not discuss with Mr. Dickinson the *Allen* case or the possibility of requesting an accomplice "level of liability" instruction, which would have provided the jury the option of the lesser included offenses of Attempted Robbery Second Degree and Burglary Third Degree, as an alternative and inconsistent defense theory. However, had counsel been aware of the holding in *Allen* and discussed it with Mr. Dickinson, counsel would have cautioned Mr. Dickinson that arguing alternative inconsistent defense theories to a jury essentially dilutes the strength of a single defense theory and runs the highly significant risk of any defense theory losing credibility in the eyes of a jury since, on one hand, the jury is being urged that the evidence warrants a finding of "not guilty" and, on the other hand, the jury is being told that if they find the defendant guilty of committing a crime, the crime he committed was not as serious as the crime originally charged in the indictment.

While Mr. Dickinson certainly could have instructed counsel to proceed with alternative inconsistent defenses and counsel would have been bound to follow Mr. Dickinson's wishes, counsel would have recommended against alternative inconsistent defenses.

Lastly, counsel doubts that Mr. Dickinson would have wanted to proceed with alternative inconsistent defenses at the time of trial since a guilty verdict on the lesser included offenses of Attempted Robbery Second Degree and Burglary Third Degree still would have qualified Mr. Dickinson as an habitual offender pursuant to 11 *Del. C.* §4214(a) and would have resulted in a sentence of Level 5 incarceration similar if not greater than the sentence recommended in the State's final plea offer, which Mr. Dickinson rejected.[5]

[5] Exhibit 1, p. 6, 7.

ARGUMENT I

THE TRIAL JUDGE COMMITTED LEGAL ERROR AND/OR AN ABUSE OF DISCRETION BY DENYING DICKINSON'S CLAIM THAT HIS FORMER ATTORNEY WAS INEFFECTIVE UNDER *STRICKLAND V. WASHINGTON* IN FAILING TO REQUEST A JURY INSTRUCTION CONCERNING THE LEVEL OF LIABILITY AS AN ACCOMPLICE UNDER *ALLEN V. STATE*[6] *AND ERSKINE V. STATE*.[7]

1. Question Presented

Was Dickinson's trial attorney "ineffective" under the Sixth Amendment in failing to request a jury instruction concerning the level of liability as an accomplice under *Allen v. State* and *Erskine v. State*. The issue was raised in the court below in Appellant's Amended Rule 61 Motion for Postconviction Relief. (DKT 67).

2. Standard and Scope of Review

Claims of ineffective assistance of counsel are viewed as mixed questions of law and fact and, therefore, are reviewed *de novo*.[8] Subsidiary findings of fact made by the trial court in the course of deciding an ineffectiveness claim are entitled to deference. However the trial court's ultimate conclusion that counsel rendered effective assistance is not a finding of fact. *Id.*

3. Merits

Overview of Law: Ineffective Assistance of Counsel

In order to prevail on a claim which alleges ineffective assistance of counsel, the defendant has to meet the well established two-pronged test established in *Strickland v.*

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[6] *Allen v. State, 970 A.2nd 203(Del.2009)*
[7] *Erskine v. State, 4 A.3rd 391 (Del. 2010)*
[8] *Strickland v. Washington*, 466 U.S. 668, 697-698 (1984).

Washington. In *Strickland,* the Court identified the two components to any ineffective assistance claim as being: (1) deficient attorney performance; and (2) prejudice. See, *Lockhart v. Fretwell,*[9] *Zebroski v. State*[10].

(1) Deficient Attorney Performance Under *Strickland*

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."[11] The United States Supreme Court has clarified that the right to counsel means "the right to the effective assistance of counsel."[12] The purpose of this right is to "ensure a fair trial" and "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."[13] Accordingly, counsel may not "so undermine the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[14]

An attorney who represents a criminal defendant has an "overarching duty to advocate the defendant's cause and more particular duties to consult with the defendant on important decisions."[15] Certain decisions regarding the exercise or waiver

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[9] *Lockhart v. Fretwell*, 506 U.S. 364 (1993
[10] *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003) (defendant must show that counsel's actions fell below an "objective standard of reasonableness," and "there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the trial (or appeal) would have been different.").
[11] U. S. Const. Amend VI
[12] *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970)
[13] *Strickland v. Washington*, 466 U.S. at 691-692.
[14] *Strickland v. Washington*, 466 U.S. at 686.
[15] *Strickland v. Washington*, 466 U.S. at 688.

of basic rights are so personal to the defendant, however, that "they cannot be made for the defendant by a surrogate."[16]

A criminal defendant has "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."[17] The Delaware Supreme Court has recognized that these choices "implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant."[18]

This Court has ruled that with regard to basic decisions about the objectives of representation, a lawyer must "both consult with the defendant and obtain consent to the recommended course of action."[19] Of course, trial counsel must know the applicable law in order to provide effective representation.

The failure to consult with a client about the possibility of instructions on lesser included offenses may breach the duty to keep the client informed about the status of his trial thus depriving him of his right to participate in this very important decision.[20] The fact that an "all or nothing" defense was an "implicit" objective of the representation does not excuse an attorney from his obligation to consult with the client to

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[16] *Florida v. Nixon*, 543 U.S. 175, 187 (2004).
[17] *Jones v. Barnes*, 463 U.S. 745, 751 (1983).
[18] *Cook v. State*, 977 A.2d 803, 841 (Del. 2009).
[19] Id. (quoting *Nixon*, 543 U.S. at 187.
[20] In Re Wolfram, 847 P.2d 94, 101 (AZ Supr., 1993).

provide an explanation of lesser included offenses and consult with him regarding whether to seek such an instruction.[21]

Under *Strickland's* "performance component," the defendant must establish that his counsel's performance was deficient - "that under all the circumstances, the attorney's representation fell below an objective standard of reasonableness."[22] *Strickland* also adopted a somewhat deferential standard in reviewing counsel's performance and established a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance… The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*[23], *Frey v. Fulcomer*[24].

The distinction between omissions that were the result of sound "strategy" and omissions that were the result of "prejudicial oversight" was parsed by the Third Circuit Court of Appeals in *Thomas v. Varner*[25]:

> Our review reveals a tiered structure with respect to Strickland's strategic presumptions. At first, the presumption is that counsel's conduct might have been part of a sound strategy. The defendant can rebut this "weak" presumption

[21] *Wolfram*, at 101. ("A lawyer has an obligation to explain the problem, lay out the significant choices, and help the client make an informed, rational decision. Failure to consult with his client regarding the possibility of instructing the jury on lesser included offenses was a violation).
[22] *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).
[23] *Strickland*, 466 U.S. 689
[24] *Frey v. Fulcomer*, 974 F.2d 348, 358 (4d Cir 1992), *cert. denied* 507 U.S. 954 (1993) ("claimants must identify specific errors by counsel and we must indulge a strong presumption that counsel's conduct was reasonable").
[25] *Thomas v. Varner*, 428 F. 3d 498. 499-500 (4d Cir. 2005).

> by showing either that the conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound. In cases in which the record does not explicitly disclose trial counsel's actual strategy or lack thereof (either due to lack of diligence on the part of the petitioner or due to the unavailability of counsel), the presumption may only be rebutted through a showing that no sound strategy posited by the Commonwealth could have supported the conduct… However, if the Commonwealth can show that counsel actually pursued an informed strategy (one decided upon after a thorough investigation of the relevant law and facts), the "weak" presumption becomes a "strong" presumption, which is "virtually unchallengeable."

(2) **Determination of "Prejudice" under *Strickland***

In *Strickland*, it was also explained how a court should make the "prejudice" determination:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect…Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695-696.[26]

[26] The prejudice standard under Strickland is not a stringent one. Strickland's "prejudice" prong does not require a defendant to "prove" that but for his counsel's errors, he would have been found "not guilty." Id. 466 U.S. at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if

Although *Strickland* phrases the "prejudice" inquiry in terms of "proving prejudice, in reality, the "prejudice" determination is a three-step process. First, it is the defendant's burden to identify and substantiate the errors made by trial counsel. See, *Varner*, 428 F.3d at 502, n12 ("As it is the petitioner's burden to show prejudice, it is his responsibility to develop a record under which the merits of the [claimed error] can be determined"). Second, the petitioner must show that he likely would have prevailed on the merits of the claimed attorney error. *Id.*, at 502 ("Were it likely that the suppression motion would have been denied (or the objection overruled), then [petitioner] could not show prejudice"). If the petitioner succeeds in the first two steps, the court then decides, as a matter of law, whether, in the words of *Strickland*, the error[s] were "pervasive" or "trivial." See, *Strickland*, 466 U.S. at 696 ("A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); *Buehl v. Vaughn*, 166 F.3d 163, 172 (3d Cir. 1999) ("A court simply cannot make [*Strickland's* prejudice] determination without considering the strength of the evidence against the accused"); *Varner*, 428 F.3d at 502 (determination of prejudice is a legal conclusion).

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the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome"); *Jacobs v. Horn*, 395 F.3d 92, 105 (3d Cir. 2005) (The prejudice standard under Strickland "is not a stringent one"…the defendant "need not show that counsels deficient performance 'more likely than not altered the outcome in the case' – rather, he must show only 'a probability sufficient to undermine confidence in the outcome'").

(3) Defense counsel's failure to request an accomplice level of liability instruction constitutes ineffective assistance of counsel.

Dickinson was charged with Attempted First-Degree Robbery and Second-Degree Burglary as an accomplice. Dickinson's counsel was ineffective by failing to request an instruction to the jury on Accomplice Liability consistent with the statutory mandate of 11 Del.C. §274.

In *Allen v. State*,[27] the Court held that when a charged offense is divided into degrees, a defendant convicted of the offense on the basis of accomplice liability is entitled to an instruction requiring that the jury make an individualized determination of the degree of the defendant's culpability. No such instruction was given for the robbery and burglary charges in this case.

In *Allen*, the Court created a two step analysis for determining legal culpability under accomplice liability. First, the trier of fact must decide whether the State has established that the defendant was an accomplice to a criminal offense. If the State proves that the defendant is liable as an accomplice and the offense is divided into degrees, the fact finder must then determine what degree of the offense for which the defendant is culpable.

Under the second prong of *Allen* , a defendant is only liable to the criminal degree "compatible with his own accountability for an aggravating fact or circumstance."

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[27] Allen v. State, 970 A.2d 203 (2009)

Allen was based upon 11 Del. Code §274 which provides that:

> When, pursuant to [the accomplice liability statute], two or more persons are criminally liable for an offense
> which is divided into degrees, each person is guilty of an
> offense of such degree as is compatible with that person's
> own accountability for an aggravating fact, or circumstance.

In *Erskine v. State*, the Court repeated and reemphasized the proposition that an accomplice may be guilty of a less serious offense than other participants in a crime:

> An accomplice "is guilty of an offense committed by another person when. . . . intending to promote or facilitate the commission of the offense the [accomplice]. . .aids . . .or attempts to aid the other person in . . . committing it. . ."
>
> * * * *
>
> Under 11 Delaware code section 274, if two or more people are liable for "an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that persons own culpable mental state and with that person's own accountability for an aggravating factor or circumstance. . . *Erskine at 394.*

The Delaware Supreme Court previously found that "there was a factual basis in the record to support a finding that Dickinson was guilty of attempted second degree robbery and third-degree burglary".[28] Therefore, there can be no dispute that Dickinson was entitled to a section 274 "level of liability" jury instruction. On direct appeal, the Delaware Supreme Court ruled that the trial

[28] *Dickinson v. State, 8 A.3rd 1166 (2010).*

court was not required to give it to the jury, since he did not ask for the instruction (assuming it was a strategic decision).

The issue in this case is whether trial counsel was ineffective for failing to request an accomplice "level of liability" instruction in light of the existing law. Defendant claims that trial counsel was ineffective for failing to request the instruction because he was not aware of the existing law, or because he made an unreasonable strategic decision not to request the instruction. If requested, the trial court was required to give it to the jury.

While the Supreme Court commented that "it is apparent that Dickinson made a strategic decision not to request the accomplice level of liability instruction" the record is absent of any evidence that defense counsel consciously considered, and decided against, requesting an accomplice level of liability instruction. In fact, trial counsel admits that he was not aware of the *Allen* holding. (Exhibit 1, p. 7). Counsel's admission provides indisputable evidence undermining the Court's assumption that the decision not to request the "level of liability" instruction was strategic. One cannot make a strategic decision based upon *Allen* when there is a lack of awareness of its existence. Therefore, the record does not support a finding that counsel made a knowing, strategic decision not to request the "level of liability" instruction since trial counsel was unaware of the *Allen* decision.

While the State's evidence was arguably strong on the issue of whether Dickinson had some involvement with the co-defendants, the degree of his involvement was unclear. While Dickinson's defense was that he was an innocent bystander to the attempted robbery, that theory did not preclude defense counsel from asking the jury to consider an alternative verdict consistent with his level of liability in the event that it was convinced that he had some involvement, but not the same involvement as the co-defendants.

Defense counsel's failure to request an accomplice "level of liability" instruction constitutes ineffective assistance of counsel on a number of levels. First, trial counsel admits that he was not aware of the *Allen* holding. Counsel has a duty to be familiar with established rules of law. Furthermore, there is no record that defendant was advised of his option to request the instruction, and that he made a knowing, voluntary and intelligent waiver of his right to the instruction consistent with counsel's trial strategy. (Exhibit 1, p. 7).

Counsel's strategic decision to decline level of liability and/or lesser included offense instructions was inherently unreasonable. Defendant was facing a mandatory life sentence if convicted of Attempted Robbery First Degree because he would be deemed a Habitual Offender pursuant to 11 Delaware Code section 4214(b). *However, Defendant would not be exposed to a life sentence under section 4214(b) if convicted of Attempted Robbery Second Degree.* Therefore it was reckless, and therefore unreasonable, to reject an instruction for a lesser included offense which would have prevented the Defendant from receiving a life sentence pursuant to section 4214(b) based upon a conviction for Attempted Robbery First Degree.

Allowing the jury to consider lesser included offenses was not antagonistic to Defendant's claim of innocence. Defendant was free to maintain his innocence, but allow the jury to consider an alternative verdict (lesser included offenses) in the event that there was some evidence to support the Defendant's culpability. It was unreasonable not to pursue this strategy in view of the fact that Defendant was facing a mandatory life sentence if convicted of Attempted Robbery First Degree.

The prejudice caused by counsel's errors deprived Dickinson of a fair trial and a constitutionally unreliable outcome. Prejudice is demonstrated on a number of levels. To the extent the jury considered Defendant to be the driver of the getaway car, it was misled to assume that he was responsible for the acts of the principals, even if he was not aware that one of the codefendants possessed a weapon. Secondly, Defendant suffered prejudice by not allowing the jury to consider an alternate outcome that would have precluded the Defendant from being sentenced as a Habitual Offender. Finally, trial counsel's ineffectiveness led to the probability that because the Defendant was charged only with the greater offense, (Robbery First Degree), it was probable that the jury returned a guilty verdict even though in doubt as to proof of one of the elements of the greater offense rather than acquit the Defendant on that charge.

Dickinson repeats and reemphasizes that his burden to show "prejudice" under *Strickland* "is not a stringent one," *Jacobs, 395 F.3d at 105.* Dickinson "need not show that counsel's deficient performance 'more likely than not altered the outcome in the case' - rather, he must show only 'a probability sufficient to undermine confidence in the outcome." It is something less than proof by a preponderance of the evidence. *See, Strickland, 466 US at 694.* "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by preponderance of the evidence to have determined the outcome." Id.

The trial court's instructions on accomplice liability for the attempted robbery and burglary second degree offenses ignored the second part of the two step analysis required under Section 274 causing prejudice to the Defendant, therefore the Defendant's convictions for must be reversed. Defense counsel should have known that the failure to request a level of liability instruction would cause prejudice to Dickinson.

In his affidavit, trial counsel admits that he was not aware of the *Allen* decision and did not discuss the "level of liability" instruction with Dickinson. Consequently, Dickinson suffered prejudice because he did not knowingly waive his right to a Section 274 level of liability instruction.

Trial counsel attempts to rationalize his failure to consider *Allen*, and its application to this case, because it would have presented an alternative strategy inconsistent with defendant's defense theory. Defense counsel's rationalization should be rejected. First, defendant cannot make a reasonable strategic decision without knowing all of his options. Here, defendant was not presented with his legal right to request a "level of liability" instruction, therefore he was prevented from making a knowing, voluntary and intelligent waiver of his right to the instruction. Consequently, the strategy, or lack thereof, is incapable of being reasonable.

In his affidavit, Dickinson states that he would have opted for the "level of liability" instruction if he was made aware of its benefits. Dickinson verifies that he would have elected the Section 274 level of liability instruction because it supported an outcome that would have avoided a mandatory life sentence. Consequently, Dickinson suffered prejudice because he did not knowingly waive his right to a Section 274 level of liability instruction.

Second, a defense of actual innocence and an assertion of a reduced level of liability are not mutually exclusive. It is routine for defense counsel to request lesser included offense instructions even when the primary defense is actual innocence. In light of defendant's failure to take the stand and in view of the State's evidence (especially the testimony of his codefendants), a claim of actual innocence was "pie-in-the-sky" since it rested exclusively on the State's failure to meet its burden. Under the circumstances, it was unreasonable not to seek jury consideration of Defendant's reduced liability in the event it rejected his actual innocence claim.

Moreover, even though the initial objective may have been an "all or nothing" approach, defense counsel was required to consult with the Defendant about reconsidering that defense as the trial progressed, and the prospects for an acquittal became illusory. A defendant is not bound to stick with a particular defense when the strength of the State's case during the course of a trial renders the defense unrealistic. A defendant has a right to modify his objective, including whether to seek lesser included offenses. Trial counsel has a duty to continuously consult with a client whether a particular defense is realistic in light of developments at trial, and whether other options would be more effective. Trial counsel was ineffective by failing to communicate with the defendant during the course of the trial that an actual innocence defense was unrealistic, and that he may want to consider more realistic options involving a level of liability instruction in conjunction with lesser included liability instructions. Surely, trial counsel recognized that an innocence defense was a fantasy as the trial progressed.

Next, trial counsel suggests that seeking a lesser degree of liability instruction could have led to a conviction for Attempted Robbery 2nd Degree and a significant sentence as an Habitual Offender under 11 Del. C. §4124(a). However, he would have avoided the prospect of a mandatory life sentence under Section 4214(b). While trial counsel speculates that his client would have rejected a strategy involving the "lesser degree of liability instruction," he cannot know for sure as Mr. Dickinson was never given the opportunity to make the choice, especially as the trial progressed. Thus, Mr. Dickinson was deprived of his right to effective representation due to his counsel's failure to advise him of a viable option to minimize his potential sentence exposure.

(4) Analysis of Superior Court Decision.

In the decision below, the Superior Court found that counsel's failure to request an accomplice level of liability instruction was not objectively unreasonable, but was consistent with Defendant's "all or nothing" strategy. In support of its decision, the Court discounted trial counsel's lack of awareness of the *Allen* holding, reasoning that the decision to request a jury instruction was a matter of trial strategy, and that the lack of a "level of liability" instruction was consistent with a Defendant's "all or nothing" strategy.[29]

The Court's reasoning is flawed. First, trial counsel's failure to request a "level of liability" instruction cannot be considered a "strategy" in view of his admitted lack of awareness of the *Allen* holding. Strategy implies a conscious decision after all options are considered. The "level of liability"

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[29] Trial counsel stated it was Defendant's decision to pursue an "all or nothing" strategy and the trial court found that Defendant's plea rejection corroborated that strategy.

instruction was not an option that was considered or discussed. Therefore, its application as part of an overall strategy was not addressed.

Next, counsel's lack of knowledge of the *Allen* holding meant that the Defendant could not have been advised of his right to a "level of liability" instruction. Defendant cannot be charged with a voluntary, knowing and intelligent waiver of that option since he was not advised of its existence and application in his case.

The lower court's reasoning wrongfully assumes that once a strategy is set, a defendant is bound by that strategy and cannot change it based upon developments at trial. A defendant has the right to change his strategy at any time, especially if there are developments at trial which support a change. In this case, once the defendant had an opportunity to view the apparent strength of the State's case, including defense counsel's inability to impeach his co-defendants' testimony, then his defense of actual innocence became illusory. At that point, reason dictated that a reassessment of the strategy should take place, including consideration of the "level of liability" instruction as a vehicle to avoid a conviction for Attempted Robbery 1st Degree. Unfortunately, defense counsel was not aware of *Allen*, and failed to consult with Dickinson about this option.

Trial counsel's strategy fell below an objective standard of reasonableness. Any attorney in this case would have understood that the innocence defense was unrealistic after the testimony of the co-defendants, especially since Dickinson was not going to testify or present any defense witnesses. Therefore, it was unreasonable not to revisit Dickinson's strategy, and consider a level of liability instruction to avoid a life sentence.

The lower court erred/abused, its discretion by finding the Defendant failed to stratify *Strickland's* second prong.

As a general matter, an attorney's failure to request a jury instruction on a lesser-included offense prejudices a defendant if the instruction was warranted.[30] The same reasoning applies to a "level of liability" instruction.

In *Trotter*, the Oregon Court of Appeals recognized that a jury's conviction of an appellant of an offense does not foreclose a finding of prejudice by his attorney's failure to request a lesser-included offense instruction "because the jury did not have a complete statement of the law…we are unable to determine what the verdict would have been had the jury been properly instructed."[31]

That principle applies here. The lower court is unable to find that the jury's lack of awareness of a lesser offense based upon a "level of liability" instruction was unlikely to have an effect on how the jury evaluates the greater offense. Without a proper jury instruction, it is likely that the jury found defendant guilty of the greater offense (Attempted Robbery First

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[30] *Trotter v. Santos*, 157 P.3d 1233, adh'd to on recons., 167 P.3d 488, rev. den. 174P3d 1017 (2007).
[31] Id. at 1233.

Degree) even if there was insufficient proof on one of the elements of the offense rather than to acquit the Defendant on that charge.

The failure to consider a "level of liability" instruction, in view of the evidence presented by the State, and the failure of the defense to attack it, was so ill-advised that it undermines a fair trial, regardless of the Defendant's initial "all or nothing" strategy.

<u>Argument II</u>

THE TRIAL JUDGE COMMITTED LEGAL ERROR AND/OR AN ABUSE OF DISCRETION BY DENYING DICKINSON'S CLAIM THAT HIS FORMER ATTORNEY WAS INEFFECTIVE BECAUSE HIS FAILURE TO REQUEST A JURY INSTRUCTION CONCERNING THE LEVEL OF LIABILITY VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. <u>Question Presented</u>

Was Dickinson's trial attorney "ineffective" under the Fifth Amendment in failing to request a jury instruction concerning the level of liability as an accomplice. The issue was raised in the court below in appellant's amended rule 61 motion for postconviction relief.[32]

2. <u>Standard and Scope of Review</u>

Claims of ineffective assistance of counsel are viewed as mixed questions of law and fact and, therefore, are reviewed *de novo*.[33] Subsidiary findings of fact made by the trial court in the course of deciding an ineffectiveness claim are entitled to deference. However the trial court's ultimate conclusion that counsel rendered effective assistance is not a finding of fact. *Id.*

3. <u>Merits</u>

The Fifth Amendment to the United States Constitution guarantees a criminal defendant the due process right to a fair trial, including accurate jury instructions. This fundamental right extends to individual state actions through the due process clause of the Fourteenth Amendment.

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[32] Dkt.63.
[33] *Strickland v. Washington*, 466 U.S. 668, 697-698 (1984).

A fair hearing in a fair tribunal, including correct jury instructions, is a basic requirement of due process. Stated another way, due process requires that a criminal defendant be given a fair trial before a jury, which has been accurately instructed on the law applicable to the case. Where a jury has rendered a verdict based upon erroneous or incomplete jury instructions, including instructions on lesser included offenses, the proceedings violate due process.[34] The failure to provide instructions on lesser included offenses applies to non-capital cases and is a violation of due process.[35] This requirement is based on the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid sending him free.[36]

In the current case, even if there was evidence supporting a finding that Dickinson was an accomplice to an attempted robbery, there is also a factual predicate to support a "level of liability" instruction in support of a lesser included offense for attempted robbery second degree. Defense counsel was ineffective by failing to know the law relating to the "level of liability" instruction and its application in this case, by failing to discuss its application to the case with the

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[34] *Beck v. Alabama,* 100 SCt. 2382 (1980).

[35] *Bishop v. Mazurkiewicz*, 634 F.2d 724 (3d Cir. 1980), cert. denied, 452 U.S. 917 (1981), *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir. 1987).

[36] *Keeble v. United States*, 412 U.S. 205, 212-13 (1973).

defendant, and by failing to obtain a knowing, intelligent and voluntary waiver of the "level of liability" instruction from the defendant after discussing the matter with him as a reasonable basis for not requesting the instruction.

Trial counsel's ineffectiveness led to the probability that because the defendant was charged only with the greater offense (robbery first degree) it was probable that the jury returned a guilty verdict even though in doubt as to proof of one of the elements of the greater offense, rather than to acquit the defendant on that charge. This is precisely the danger *Beck* intended to address, as well as this Court in *Allen*.

Defense counsel's ineffectiveness relating to the "level of liability" instruction issue justifies relief because it so infected the entire trial that the resulting conviction violates due process.[37] The lower court abused its discretion by denying Defendant's claim that his counsel was constitutionally ineffective and that his Fifth Amendment due process rights were violated.

Finally, Dickinson incorporates by reference the facts and reasons set forth in Argument 1 as further support for his argument that his Fifth Amendment due process rights were violated by his counsel's ineffectiveness.

[37] *United States ex rel. Dori v. New Jersey*, 560 F.2d 584, 587 (3rd Cir. 1977).

Conclusion

Defendant contends that but for counsel's unprofessional errors set forth herein, the result of the trial would have been different, and that the prejudice caused by the errors (individually or cumulatively) deprived him of a fair trial.

WHEREFORE, Defendant asks that the Court grant him all relief to which he may be entitled in this proceeding. Defendant is seeking the following:

1. Order reversing his convictions and ordering a new trial.

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