



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KAHLIL LEWIS)
)
Defendant Below) No. 122/123, 2015
Appellant,)
) Court Below—Superior Court
v.) of the State of Delaware
) in and for New Castle County
STATE OF DELAWARE,) I.D. Nos. 1111020024 & 1304026571
)
Plaintiff Below,)
Appellee.)

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

APPELLANT’S OPENING BRIEF

**WOLOSHIN, LYNCH &
NATALIE, P.A.**

Natalie S. Woloshin, ID No. 3448
3200 Concord Pike
Wilmington, DE 19808
(302) 477-3200

and

Benjamin S. Gifford IV, ID No. 5983
3200 Concord Pike
Wilmington, DE 19808
(302) 477-3200

DATED: December 11, 2015

TABLE OF CONTENTS

TABLE OF CITATIONS iii

NATURE OF THE PROCEEDINGS.....1

SUMMARY OF THE ARGUMENT5

STATEMENT OF FACTS7

ARGUMENT9

 I. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CHARGE OF POSSESSION OF A DEADLY WEAPON BY PERSON PROHIBITED-NEGLIGENTLY CAUSING DEATH BECAUSE AT THE TIME OF THE RE-INDICTMENT, 11 *DEL. C. §1448(E)(2)* HAD BEEN REPEALED WITH NO SAVINGS CLAUSE AND BECAUSE THE TIMING OF THE RE-INDICTMENT TWO WEEKS BEFORE TRIAL PREJUDICED THE SUBSTANTIAL RIGHTS OF MR. LEWIS BY ALLEGING NEW CRIMES9

 A. Question Presented9

 B. Standard and Scope of Review.....9

 C. Merit of Argument.....10

 II. THE TRIAL COURT ERRED IN PERMITTING THE ADMISSION OF MR. LEWIS’S PRIOR FELONY DRUG CONVICTION AND REFERENCING IT IN ITS INSTRUCTIONS TO THE JURY BECAUSE MR. LEWIS STIPULATED THAT HE WAS A PERSON PROHIBITED AND ADMITTED THAT HE WAS A CONVICTED FELON18

 A. Question Presented18

 B. Standard and Scope of Review.....19

 C. Merit of Argument.....19

III. THE TRIAL COURT ERRED IN FAILING TO GIVE A SELF-DEFENSE INSTRUCTION TO THE JURY ON THE CHARGE OF POSSESSION OF A DEADLY WEAPON BY PERSON PROHIBITED NEGLIGENTLY CAUSING DEATH.....	28
A. Question Presented	28
B. Standard and Scope of Review	28
C. Merit of Argument.....	29
IV. THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING MR. LEWIS WITH A CLOSED MIND ON THE VIOLATION OF PROBATION	33
A. Question Presented	33
B. Standard and Scope of Review	33
C. Merit of Argument.....	33
CONCLUSION.....	35
SENTENCING ORDER, CASE NUMBER 1111020024	Exhibit A
ORDER, CASE NUMBER 1304026571 (NOVEMBER 18, 2013)	Exhibit B
ORDER DENYING DEFENDANT’S MOTION FOR JUDGMENT OF ACQUITTAL, CASE NUMBER 1304026571 (JUNE 17, 2014)	Exhibit C
SENTENCING ORDER, CASE NUMBER 1304026571	Exhibit D

TABLE OF CITATIONS

Federal Cases

Berger v. United States, 295 U.S. 78 (1935)22

State Cases

Angelini v. Court of Common Pleas, 205 A.2d 174 (Del. 1964)..... 12, 14
Baker v. State, 906 A.2d 139 (Del. 2006)..... 23-25
Bennett v. State, 164 A.2d 442 (Del. 1960)25
Carper v. New Castle County Bd. of Ed., 432 A.2d 1202 (Del. 1981).....19
Coffield v. State, 794 A.2d 588 (Del. 2002)17
Daniels v. State, 859 A.2d 1008 (Del. 2004)..... 23-26
Delaware Bay Surgical Servs. v. Swier, 900 A.2d 646 (Del. 2006).....9
Delaware Solid Waste Auth. v. News-Journal Co., 480 A.2d 628 (Del. 1984).....19
Dutton v. State, 452 A.2d 127 (Del. 1982) 21, 30
Ellerbe v. State, 2000 WL, 949625 (Del. 2000).....34
Fink v. State, 817 A.2d 781 (Del. 2002).....33
Harris Enter., Inc. v. State, 408 A.2d 284 (Del. 1979).....12
Hughes v. State, 437 A.2d 559 (Del. 1981)24
Hunter v. State, 815 A.2d 730 (Del. 2002)..... 23-26
Keller v. State, 425 A.2d 152 (Del. 1981)16
Keyser v. State, 893 A.2d 956 (Del. 2006)31
Kurzman v. State, 903 A.2d 702, 714 (Del. 2006)33
LeVan v. Independence Mall, Inc., 940 A.2d 929 (Del. 2007).....18
Perkins v. State, 920 A.2d 391 (Del. 2006)31
Rapposelli v. State Farm Mut. Auto. Ins., Co., 988 A.2d 425 (Del. 2010).....9
Rogers v. State, 2003 Del. LEXIS 595 (Del. 2003).....9, 16
Sexton v. State, 397 A.2d 540 (Del. 1979).....23
Shelton v. State, 744 A.2d 465, 513 (Del. 1999).....34
Shockley v. State, 2004 Del. LEXIS 331 (Del. 2004).....16
Small v. State, 51 A.3d 452 (Del. 2012) 19, 28
State v. Blendt, 120 A.2d 321 (Del. Super. 1956)16
State v. Gen. Chem. Corp., 559 A.2d 292 (Del. Super. 1988)..... 12-14
State v. Haskins, 525 A.2d 573 (Del. Super. 1987)12
State v. McGonigal, 189 A.2d 670 (Del. Super. 1963).....12
State v. Patnovic, 129 A.2d 780 (Del. Super. 1957).....12
Wainwright v. State, 504 A.2d 1096 (Del. 1986) 19,25, 28
Weston v. State, 832 A.2d 742, 746 (Del. 2003) 33
Williams v. State, 756 A.2d 349 (Del. 2000).....12-14

Wright v. State, 953 A.2d 144 (Del. 2008) 19,22

Rules

D.R.E. 609.....22

Sup. Ct. Crim. R. 7.....16

Statutes

1 *Del. C.* § 10913

11 *Del. C.* § 21115

11 *Del. C.* § 30330

11 *Del. C.* § 46430

11 *Del. C.* § 60430

11 *Del. C.* § 1447A30

11 *Del. C.* § 1448 *passim*

Other Authorities

73 Am. Jur.2d Statutes § 146 (1974)19

79 Del. Laws, c. 12410

2013 Del. HB 3614

NATURE OF THE PROCEEDINGS

On June 24, 2013, Mr. Lewis was indicted on the charges of Murder Second Degree, two counts of Possession of a Firearm During the Commission of a Felony, Reckless Endangering First Degree, and Possession of a Firearm by Person Prohibited.¹ The Person Prohibited charge was pursuant to 11 *Del. C.* § 1448.² A first case review was scheduled for August 19, 2014; a final case review on December 16, 2013; and trial on January 7, 2014.³ At an office-conference on August 26, 2013, the Court ordered the defense to submit a memorandum about the availability of a defense to the charge of Possession of a Firearm by Person Prohibited.⁴ The defense filed its memorandum on October 1, 2013.⁵ The State filed its memorandum on September 20, 2013.⁶ The Court issued its Order concerning the availability of the justification defense on November 18, 2013.⁷

On December 18, 2013, the State filed an information charging Mr. Lewis with one count of Possession of a Firearm by Person Prohibited pursuant to 11 *Del. C.* §1448(e)(2) which alleged that while Mr. Lewis, a person prohibited, was in

¹ A008; A025-27.

² A026-27.

³ A009.

⁴ A010.

⁵ A011; A028.

⁶ A010, A037.

⁷ A040.

possession of a firearm, he negligently caused the death of Toney Morgan through the use of the firearm.⁸

On December 23, 2013, a week after the final case review, the State re-indicted Mr. Lewis charging with: Murder Second Degree, two counts of Possession of a Firearm During the Commission of a Felony, Reckless Endangering First Degree, and Possession of a Firearm by Person Prohibited.⁹ This time, the Person Prohibited charge was pursuant to 11 Del. C. §1448(e)(2).¹⁰

Two weeks after the State's re-indictment, Mr. Lewis's trial began.¹¹ The State only proceeded on three charges: Reckless Endangering First Degree, Possession of a Firearm During the Commission of a Felony and Possession of a Firearm by Person Prohibited pursuant to 11 Del. C. §1448(e)(2).¹² The defense made a motion for judgment of acquittal during trial which was denied.¹³

The jury convicted Mr. Lewis on the Person Prohibited charge, but acquitted him of the other two charges. The defense filed a Motion for Judgment of Acquittal on January 17, 2014.¹⁴ The State responded on February 5, 2014.¹⁵ On

⁸ A042.

⁹ A011-12; A045-47.

¹⁰ A046-47.

¹¹ A014.

¹² A015.

¹³ A015.

¹⁴ A015, A294-306.

¹⁵ A015; A307-15.

March 4, 2015, a *pro se* letter from Mr. Lewis to the trial judge was docketed.¹⁶ The Motion for Judgment of Acquittal was denied on June 18, 2014.¹⁷ The Court's Order also addressed the *pro se* claims asserted by Mr. Lewis in his March 4, 2014 letter to the trial judge.¹⁸

Mr. Lewis was sentenced on February 13, 2015.¹⁹ On the Person Prohibited charge, Mr. Lewis was sentenced to twenty-five (25) years at Level V, suspended after seven (7) years for eighteen (18) years at Level IV, suspended after six (6) months for two (2) years at Level III.²⁰

Mr. Lewis was on Level II probation at the time of his arrest for the Murder Second Degree and related charges based upon an earlier conviction in 2012.²¹ As such, on May 6, 2013, an administrative warrant was filed by probation and parole.²² The violation of probation hearing was rescheduled several times because Mr. Lewis had pending charges.²³ On February 13, 2015, Mr. Lewis was found in violation of probation and sentenced contemporaneously with the Person Prohibited.²⁴ Mr. Lewis was sentenced to 8 years Level 5.²⁵

¹⁶ A015; A316-21.

¹⁷ A016, A322-29; Exhibit C.

¹⁸ A326-29; Exhibit C.

¹⁹ A018.

²⁰ A351; Exhibit D.

²¹ A003.

²² A003.

²³ A003-4.

²⁴ A004.

A notice of appeal was filed on March 11, 2015.²⁶ This is Mr. Lewis's Opening Brief.

²⁵ A021; Exhibit A.

²⁶ A018.

SUMMARY OF ARGUMENT

1. The trial court erred in failing to dismiss the charge of Possession of a Deadly Weapon by Person Prohibited-Negligently Causing Death because the statute prohibiting such conduct had been repealed at the time Mr. Lewis was re-indicted for the offense and no savings clause was in place to allow for prosecution. Moreover, the trial court, in contravention of Superior Court Criminal Rule 7(e), erred in allowing the State to re-indict Mr. Lewis as he was charged with a new offense a mere two weeks before trial.

2. The trial court committed plain error by allowing the State to cross-examine Mr. Lewis as to his prior felony conviction for Drug Dealing since he had already stipulated that he was a person prohibited and admitted on direct examination that he was a convicted felon and because the court failed to apply the required balancing test to determine whether the prejudicial effect of Mr. Lewis's prior felony drug conviction was outweighed by its probative value. Had the court done so, such evidence would have been excluded. Additionally, the introduction into evidence of the specific felony for which Mr. Lewis had been convicted led to the State committing prosecutorial misconduct during its closing argument, the effect of which, was amplified by the court's instructions to the jury reiterating the prior offense.

3. The trial court committed plain error in failing to give a self-defense instruction as to the Person Prohibited charge because it's prior ruling that such an instruction was inappropriate was made before the State re-indicted Mr. Lewis. As the jury found Mr. Lewis not guilty of the charges for which they were instructed as to self-defense, the defendant was substantially prejudiced by the trial court's failure to give the same instruction for the Person Prohibited charge.

4. The trial court abused its discretion by sentencing Mr. Lewis with a closed mind on the charge of Violation of Probation as evidenced by the court's failure to find any mitigating factors on that charge.

STATEMENT OF FACTS

On April 27, 2013, police were dispatched to the 600 Block of Jefferson Street, Wilmington, Delaware due to a report of shots fired.²⁷ When the police arrived, Toney Morgan was located lying in between two parked cars.²⁸ The police did not recover a gun where Morgan was found; however, a 9 mm casing was recovered near Morgan's body.²⁹ Several shell casings were located on the ground.³⁰ A blood trail was also located which began in the 600 block of Jefferson Street to the rear yards of 708-712 Madison Street.³¹ A 9 millimeter gun was recovered from the top of a grill in this area.³² DNA testing determined that the blood found on the 9mm was consistent with the DNA of Mr. Lewis. Gunshot residue testing on the hands of Mr. Lewis and Morgan revealed that both had residue on their hands.³³

Carl Rone, the Delaware State Police Firearms Examiner, determined that the four 9mm cartridge casings were shot from the 9mm that had been recovered.³⁴ Mr. Rone could not make any determinations regarding the projectiles removed

²⁷ A062-63.

²⁸ A063-64.

²⁹ A210.

³⁰ A140.

³¹ A141-42.

³² A132.

³³ A208.

³⁴ A160; A168.

from Morgan's chest and thigh.³⁵ Due to the different kind of bullets and casings recovered, Mr. Rone opined that there were at least two shooters and could have been up to five.³⁶

Witnesses who were at the scene of the shooting were interviewed and identified Mr. Lewis as the shooter.³⁷ Morgan did have a gun.³⁸ However, witnesses said that Mr. Lewis pulled out a weapon and started firing it first.³⁹

Mr. Lewis admitted he was in the area talking with Morgan when he someone standing behind him, at which point he heard a click.⁴⁰ Believing it was a gun, Mr. Lewis went to grab it, and the gun began firing.⁴¹ Mr. Lewis maintained that he did not enter the area with a gun.⁴² His intention was to get the gun from the armed individual in order to protect himself.⁴³

³⁵ A169-70.

³⁶ A171-72.

³⁷ A208.

³⁸ A200-01.

³⁹ A099; A072; A199; A201.

⁴⁰ A229.

⁴¹ A230.

⁴² A240.

⁴³ A230.

ARGUMENT

CLAIM I: THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CHARGE OF POSSESSION OF A DEADLY WEAPON BY PERSON PROHIBITED-NEGLIGENTLY CAUSING DEATH BECAUSE AT THE TIME OF THE RE-INDICTMENT, 11 DEL. C. §1448(E)(2) HAD BEEN REPEALED WITH NO SAVINGS CLAUSE AND BECAUSE THE TIMING OF THE RE-INDICTMENT TWO WEEKS BEFORE TRIAL PREJUDICED THE SUBSTANTIAL RIGHTS OF MR. LEWIS BY ALLEGING NEW CRIMES.

A. Question Presented

Whether the Court committed error by failing to dismiss the charge of Possession of a Deadly Weapon by Person Prohibited-Negligently Causing Death which was added by re-indictment two weeks before trial when, at the time of the reindictment, 11 *Del. C.* § 1448 (e)(2) had been repealed with no savings clause and because Mr. Lewis's substantial rights were prejudiced by the timing and content of the re-indictment. These issues were preserved by Mr. Lewis's *pro se* letter to the trial judge.⁴⁴

B. Standard and Scope of Review

This Court reviews questions of statutory interpretation *de novo* as they involve questions of law.⁴⁵ This Court reviews the Superior Court's decision to grant a motion to amend the indictment for abuse of discretion.⁴⁶

⁴⁴ A316.

⁴⁵ *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010); *Delaware Bay Surgical Servs. v. Swier*, 900 A.2d 646, 652 (Del. 2006).

⁴⁶ *Rogers v. State*, 2003 Del. LEXIS 595, *6 (Del. 2003).

C. Merits of Argument

1. The Re-Indictment.

Mr. Lewis was arrested on April 30, 2013.⁴⁷ The Grand Jury returned an indictment on June 24, 2013, charging Mr. Lewis with Murder Second Degree, two counts of Possession of a Firearm during the Commission of a Felony, Reckless Endangering First Degree, and Possession of a Firearm by Person Prohibited.⁴⁸ The Person Prohibited charge alleged that, in violation of 11 *Del. C.* § 1448, Mr. Lewis did knowingly and unlawfully possess or control a firearm after having been convicted of a violent felony.⁴⁹

On July 18, 2013, the Court issued an order scheduling the trial for January 7, 2014. The first case review was held on August 19, 2013,⁵⁰ and a final case review took place on December 16, 2013.⁵¹ Just two weeks before trial, the State sought re-indictment of Mr. Lewis. For the first time, this new indictment charged Mr. Lewis with Possession of a Deadly Weapon by Person Prohibited-Negligently Causing Death pursuant to 11 *Del. C.* §1448(e)(2).⁵²

⁴⁷ A008.

⁴⁸ A008; A025.

⁴⁹ A026-27.

⁵⁰ A009.

⁵¹ A011.

⁵² A046-47.

The matter went to trial, and the jury acquitted Mr. Lewis of all charges except Possession of a Deadly Weapon by Person Prohibited-Negligently Causing Death.⁵³

On January 17, 2014, Mr. Lewis's then-attorney filed a Motion for Judgment of Acquittal alleging that the jury's acquittal of Mr. Lewis on charges of Reckless Endangering First Degree and Possession of a Firearm During the Commission of a Felony was inconsistent with the guilty verdict on the charge of Possession of a Deadly Weapon by Person Prohibited-Negligently Causing Death.⁵⁴ By letter received by the Court on March 4, 2014, Mr. Lewis, *pro se*, sought relief from the Court because of the untimely nature of the re-indictment two weeks before trial and the Legislature's repeal of 11 *Del. C.* §1448(e)(2) that was in effect at the time of the State's re-indictment.⁵⁵ By Order dated June 17, 2014, the Court denied the Motion for Judgment of Acquittal and Mr. Lewis's *pro se* application for relief.⁵⁶

2. The Repeal of 11 *Del. C.* § 1448(e)(2): Possession of a Deadly Weapon by Person Prohibited – Negligently Causing Death.

⁵³ A014-15.

⁵⁴ A294.

⁵⁵ A316-18.

⁵⁶ A322.

On July 18, 2013, the General Assembly's revisions to 11 *Del. C.* § 1448 became effective.⁵⁷ These revisions repealed section (e)(2) of the statute which had made Possession of a Deadly Weapon by Person Prohibited-Negligently Causing Serious Physical Injury or Death a crime.⁵⁸ The revisions also significantly increased the penalties under (e)(1) as follows:

If convicted of a violent felony--penalty increased from 1 year to 3 years;

If convicted of a violent felony within the previous 10 years—penalty increased from 3 years to 5 years;

If convicted on 2 or more separate occasions of any violent felony—penalty increased from 5 years to 10 years.⁵⁹

On January 30, 2014, over a month after the State's re-indictment of Mr. Lewis, additional revisions to the Person Prohibited statute became effective and included restoration of section 1448(e)(2). However, it is clear that at the time of the State's re-indictment, section (e)(2) had been eliminated from 11 *Del. C.* §1448.

3. Applicable Law.

A repeal of a statute voids all prosecutions under it that have not attained a final judgment.⁶⁰ This general rule has exceptions.⁶¹ One exception is an express

⁵⁷ 79 Del. Laws, c. 124.

⁵⁸ *Id.*

⁵⁹ *Id.*

savings clause in the new statute.⁶² When there is no express savings clause, “the overarching concern is discerning legislative intent when deciding whether to imply a savings clause.”⁶³ The question this Court must decide is whether the legislation enacted on July 18, 2013—eliminating section (e)(2) from 11 *Del. C.* § 1448—was an amendment or a repeal of the former statute.⁶⁴ This Court has held that a repeal absent a savings clause “suggests a legislative intent not to punish acts previously deemed to be criminal acts.”⁶⁵ Statutory amendments, however, “are indicative of a legislative intent to continue to criminalize certain conduct.”⁶⁶

1 *Del. C.* § 109(d) codifies the distinction between statutory amendments and the repeal of a statute as follows:

When it is the purpose of a bill to change the language of a code provision, as distinct from affecting an outright repeal of the code provision, the change shall not be made by repealing the code provision and enacting a new section in lieu thereof. Any bill which amends an existing code provision shall set out in full that part of the code provision to be amended and shall indicate the words to be deleted by strike through and shall indicate new words by underline. If the changes are such as do not lend themselves easily to this type of

⁶⁰ *Angelini v. Court of Common Pleas*, 205 A.2d 174, 175 (Del. 1964); *Harris Enter., Inc. v. State*, 408 A.2d 284 (Del. 1979); *State v. Patnovic*, 129 A.2d 780 (Del. Super. 1957); *State v. McGonigal*, 189 A.2d 670 (Del. Super. 1963); *State v. Haskins*, 525 A.2d 573 (Del. Super. 1987); *Williams v. State*, 756 A.2d 349, 353 (Del. 2000).

⁶¹ *State v. Gen. Chem. Corp.*, 559 A.2d 292, 300 (Del. Super. 1988).

⁶² *Gen. Chem. Corp.*, 559 A.2d at 300.

⁶³ *Williams*, 756 A.2d at 351; *Gen. Chem. Corp.*, 559 A.2d at 300.

⁶⁴ *Williams*, 756 A.2d at 352.

⁶⁵ *Id.*

⁶⁶ *Id.*

amendment, the amending act may state that the section (specifying it by section and title number) is amended to read as thereafter set forth. A section should be repealed, as distinct from amended, when an outright repeal thereof is intended or when the subject matter of the proposed new law is more than a mere amendment or revision of the old section.⁶⁷

The use of the word “amend” is not, by itself, dispositive of legislative intent.⁶⁸ An act by the General Assembly labeled as an amendment “can, in some circumstances, have the same qualitative effect as a repeal.”⁶⁹ Courts can imply a savings clause “from other circumstances that manifest legislative intent.”⁷⁰ This Court has held that an implied savings clause could be construed “if the essence of the offense charged under the former statute remained an offense under the replacement statute.”⁷¹

4. No Savings Clause Can Be Implied.

On July 18, 2013, after this prosecution began, the General Assembly altered 11 *Del. C.* §1448 with House Bill 36 so that, as of the date of the re-indictment, section (e)(2) was eliminated. The text of House Bill 36 explains that insertions

⁶⁷ 1 *Del. C.* § 109(d)(1).

⁶⁸ *Williams*, 756 A.2d at 352; See *Gen. Chem. Corp.*, 559 A.2d at 300.

⁶⁹ *Williams*, 756 A.2d at 352.

⁷⁰ *Id.*; see also *Angelini*, 205 A.2d at 176.

⁷¹ *Williams*, 756 A.2d at 353.

are shown by underlining and deletions are shown by strikethrough.⁷² All of section (e)(2) was deleted as shown by strikethrough of the entire section.⁷³

5. 11 *Del. C.* § 211 Does Not Apply to This Case.

The trial court erred when it determined that 11 *Del. C.* § 211 was a “catch-all savings statute” that applied in this case to save the prosecution under 11 *Del. C.* § 1448(e)(2), despite that the State did not charge Mr. Lewis with that offense until after that section was repealed.⁷⁴ 11 *Del. C.* § 211(b) provides:

Any action, case, prosecution, trial or other legal proceeding in progress under or pursuant to any statute relating to any criminal offense set forth under the laws of this State shall be preserved and shall not become illegal or terminated in the event that such statute is later amended by the General Assembly, irrespective of the state of such proceeding, unless the amending act expressly provides to the contrary. For the purposes of such proceedings, the prior law shall remain in full force and effect.⁷⁵

The trial court viewed the statute broadly, finding that, because the prosecution began with Mr. Lewis’s arrest, the re-indictment merely furthered the original prosecution and was thereby saved by section 211.⁷⁶ However, the trial court’s view on the applicability of section 211 the State’s re-indictment to add a charge for which Mr. Lewis was never arrested and was only charged after the repeal is erroneous. There was no prosecution for the charge of Person Prohibited

⁷² 2013 Del. HB 36. A357.

⁷³ *Id.*; A357.

⁷⁴ A327; Exhibit C.

⁷⁵ 11 *Del. C.* § 211(b).

⁷⁶ A328; Exhibit C.

Negligently Causing the Death until December of 2013, by which point section (e)(2) had already been eliminated. Certainly, if Mr. Lewis had been charged with that crime prior to the repeal, section 211 would have acted to save the prosecution. However, since he was never arrested for or charged with that crime prior to the repeal, section 211 is inapplicable.

6. The Timing and Content of the Re-Indictment Prejudiced Mr. Lewis and Violated His Due Process Rights.

The Superior Court may permit the amendment of an indictment at any time before the verdict if no additional offense is charged and substantial rights of the defendant are not prejudiced.⁷⁷ Superior Court Criminal Rule 7(e) reads in pertinent part:

The court may permit an indictment or an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.⁷⁸

Thus, the court may amend the indictment as to matters of form but not as to matters of substance.⁷⁹ This rule ensures that the accused receives notification of the charges against him so that he has the opportunity to prepare an adequate

⁷⁷ *Rogers v. State*, 2003 Del. LEXIS 595, *6 (Del. 2003); Super. Ct. Crim. R. 7(e).

⁷⁸ Super. Ct. Crim. R. 7(e).

⁷⁹ *State v. Blendt*, 120 A.2d 321, 322 (Del. Super. 1956).

defense and prevents him from twice being placed in jeopardy for the same offense.⁸⁰

Moreover, Superior Court Criminal Rule 7(e) permits an amendment to an indictment at any time before a verdict "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."⁸¹ This Court has clearly held that the trial court cannot authorize an amendment to an indictment if that amendment would in any way alter the substance of the Grand Jury's charge.⁸² The principal test for determining the appropriateness of an amendment under the Delaware Constitution focuses on the extent to which an amendment substantively changes the material elements of the crime alleged in the original indictment.⁸³ This Court has found no abuse of discretion where a trial court permitted amendments that "neither charged separate offenses nor worked discernable prejudice on the Appellant".⁸⁴

In this case, Mr. Lewis was arrested and charged by indictment with, among other charges, Possession of a Deadly Weapon by Person prohibited pursuant to 11 *Del. C.* § 1448. In anticipation of a trial date on January 7, 2014, the Court set

⁸⁰ *Id.* at 323.

⁸¹ *Shockley v. State*, 2004 Del. LEXIS 331, *6 (Del. 2004); *Keller v. State*, 425 A.2d 152 (Del. 1981).

⁸² *Coffield v. State*, 794 A.2d 588, 591, 594 (Del. 2002).

⁸³ *Id.* at 592.

⁸⁴ *Id.* at 590.

deadlines concerning proposed jury instructions.⁸⁵ In addition, the defense prepared for trial creating a defense strategy to combat against the indicted charges. Just two weeks prior to trial, the State obtained a re-indictment against Mr. Lewis that included the charge of Person Prohibited pursuant to section (e)(2), a much more significant offense than that which he was initially charged under the original indictment. Not only does the Person Prohibited charge under (e)(2) have a more severe penalty—three years versus six years—but the charge also includes the additional element of “while in possession or control of a . . . firearm, did negligently cause the death of [another person] through the use of such firearm.”⁸⁶ This additional element substantially changed the material elements of the Person Prohibited charge for which Mr. Lewis was initially charged in the original indictment.⁸⁷

The increased penalty and the additional element combined with the timing of the re-indictment less than two weeks prior to trial worked a substantial prejudice to Mr. Lewis that is incompatible with the concept of due process. Therefore, this Court must vacate Mr. Lewis’s conviction and sentence for the charge of Person Prohibited Negligently Causing Death.

⁸⁵ A010.

⁸⁶ A047; *see* 11 *Del. C.* § 1448(e)(2).

⁸⁷ This charge is also significantly different from the Murder Second Degree charge, wherein the State alleged that Mr. Lewis “recklessly caused the death of Toney Morgan under circumstances which manifest a cruel, wicked and depraved indifference to human life.” A025.

CLAIM II: THE TRIAL COURT ERRED IN PERMITTING THE ADMISSION OF MR. LEWIS’S PRIOR FELONY DRUG CONVICTION AND REFERENCING IT IN ITS INSTRUCTIONS TO THE JURY BECAUSE MR. LEWIS STIPULATED THAT HE WAS A PERSON PROHIBITED AND ADMITTED THAT HE WAS A CONVICTED FELON.

A. Question Presented

Whether the trial court committed reversible error by permitting the State to question Mr. Lewis about his prior felony drug conviction and referenced the prior felony drug conviction in the jury instructions when Mr. Lewis stipulated that he was a person prohibited and admitted he was a convicted felon. This issue was not preserved in the trial court, but the interest of justice exception applies because the error was so clearly prejudicial as to jeopardize the fairness of the trial.

B. Scope and Standard of Review

Since Mr. Lewis did not object to the State’s questions about Mr. Lewis’s prior felony drug conviction, the State’s comments during the closing argument or the jury instructions regarding the charge of Possession of a Deadly Weapon by Person Prohibited, the standard of review is plain error.⁸⁸ Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.⁸⁹ If

⁸⁸ *Small v. State*, 51 A.3d 452, 456 (Del. 2012).

⁸⁹ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

a trial judge alters the content, form or language of a proposed jury instruction, the standard of review is for an abuse of discretion.⁹⁰

C. Merits of the Argument

1. Admission of the Prior Felony Drug Conviction.

In addition to other charges, Mr. Lewis was charged by indictment with Possession of a Firearm by Person Prohibited which read as follows:

Kahlil D. Lewis, on or about the 27th day of April, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess, purchase, own or control a 9-millimeter gun, a firearm, as defined by Title 11, Section 222 of the Delaware Code of 1974, after having been convicted in Case Number 1111020024, in the Superior Court of the State of Delaware, in and for New Castle County, on or about June 8, 2012, to the charge of Possession with Intent to Deliver Heroin, and, while in possession or control of 9-millimeter gun, a firearm, did negligently cause the death of Toney Morgan through the use of such firearm.⁹¹

In order to avoid the prior conviction coming before the jury, as is common practice, the State and defense entered into a stipulation which was made Joint Exhibit 1 and read as follows:

The State of Delaware and the defendant, Kahlil Lewis, by and through his attorney, hereby stipulate that on or about the 27th day of April 2013, Kahlil Lewis was a person prohibited by Delaware law from possessing, owning or controlling a firearm and/or deadly weapon as defined under 11 Del. C. Section 222.⁹²

⁹⁰ *Wright v. State*, 953 A.2d 144, 148 (Del. 2008).

⁹¹ A279.

⁹² A276; A293.

While the State is required to prove that Mr. Lewis was a person prohibited on April 27, 2013, the stipulation obviates the need as his prohibited status is conceded.

Mr. Lewis testified at trial. On direct examination, he testified that because he had a felony conviction, he could not possess a firearm.⁹³ Therefore, the State not only had a stipulation that he was a person prohibited on April 27, 2013, but also an admission under oath before the jury that he was a convicted felon and unable to possess a firearm. However, the State was not satisfied with the stipulation and the admission under oath. After the conclusion of Mr. Lewis's direct examination, the State explained to the Court that it had put the defense on notice that if Mr. Lewis took the stand at trial, "his prior convictions are fair game."⁹⁴ In response, the Court stated:

And I'm prepared –and I think you've seen the instruction—to tell the jury that they can only consider the past history for impeachment purposes, other than there is that element about being convicted that's part of the possession of a deadly weapon by a person prohibited. So I'm –I'm prepared to instruct on that.⁹⁵

The defense lodged no objection.⁹⁶

On cross-examination, Mr. Lewis again testified that he was a convicted felon.⁹⁷ The State went further and asked if he was convicted in 2012 of drug

⁹³ A229-30.

⁹⁴ A233.

⁹⁵ A233.

⁹⁶ A233.

dealing.⁹⁸ While he answered yes, he tried to explain what happened, but was interrupted by the Court.⁹⁹

Delaware Uniform Rule of Evidence 609 provides in pertinent part:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect¹⁰⁰

In this case, there was no finding that the probative value of Mr. Lewis's prior felony drug conviction outweighed its prejudicial effect because the Court never conducted the required weighing process. It is hard to imagine what probative value existed to justify the admission of the name of the prior felony because Mr. Lewis had already stipulated that he was a person prohibited and admitted that he was previously convicted of a felony and could not possess a firearm. The only probative value of his prior felony was to prove that he was in fact a person prohibited on the date in question and for credibility determinations by the jury. However, both of those were accomplished by the stipulation that he was a person prohibited on the date charged and his admission that he was a convicted felon. The improper admission of Mr. Lewis's prior felony conviction had a rippling

⁹⁷ A239.

⁹⁸ A239.

⁹⁹ A239.

¹⁰⁰ D.R.E. 609(a).

effect on this case as it lead to an improper comment by the State in its closing argument regarding the prior conviction and references to it injury instructions.

2. Improper Comments to the Jury During the State’s Closing Argument.

The prosecutor’s proper role in a criminal case “is not that it shall win a case, but that justice shall be done.”¹⁰¹ As part of this duty, a prosecutor has a special duty to avoid improper argument to the jury. The Delaware Supreme Court has made it clear that “the prosecutor ‘represents all the people, including the defendant’ and must “seek justice, not merely convictions.”¹⁰²

Allegations of prosecutorial misconduct are reviewed under different standards depending on whether the issue was raised at the trial level. If defense counsel raised a timely objection or if the trial judge addressed the issue *sua sponte*, the standard for appellate review is “harmless error.”¹⁰³ Under this standard of review, the first step courts will take in reviewing allegations of prosecutorial misconduct is “a *de novo* review of the record to determine whether misconduct actually occurred.”¹⁰⁴ The analysis will only end there if the Court determines that no misconduct occurred.¹⁰⁵

¹⁰¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹⁰² *Hunter v. State*, 815 A.2d 730, 735 (Del. 2002) (citing *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960)); *Sexton v. State*, 397 A.2d 540, 544 (Del. 1979).

¹⁰³ *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

¹⁰⁴ *Id.* at 148; *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004).

¹⁰⁵ *Baker*, 906 A.2d 148.

If the Court determines that the prosecutor engaged in misconduct, the next step is to determine whether the misconduct “prejudicially affect[ed] the defendant’s substantial rights warrant[ing] a reversal of his conviction.”¹⁰⁶ In order to make this determination, the court must apply the three (3) factors announced by this Honorable Court in *Hughes v. State*: (1) the closeness of the case; (2) the centrality of the issue affected by the error; and (3) the steps taken to mitigate the effects of the error.¹⁰⁷ This application of this test is done in a “contextual, case-by-case, and fact sensitive manner.”¹⁰⁸

If the prosecutorial misconduct “fails” the *Hughes* test, the Court examines the misconduct by applying the test enumerated by this Court in *Hunter v. State*¹⁰⁹ and “consider[s] whether the prosecutor’s statements or misconduct are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.”¹¹⁰

As in this case, if the defendant did not object at trial and the trial judge failed to intervene *sua sponte*, the standard is plain error.¹¹¹ In a plain error review, the Court also examines the record *de novo* to determine if prosecutorial

¹⁰⁶ *Id.* at 149; *Daniels* 859 A.2d at 1011.

¹⁰⁷ *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

¹⁰⁸ *Baker*, 906 A.2d at 149.

¹⁰⁹ 815 A.2d 730.

¹¹⁰ *Baker*, 906 A.2d at 149 (citing *Hunter*, 815 A.2d at 732).

¹¹¹ *Baker*, 906 A.2d at 148.

misconduct did occur.¹¹² If the Court determines that there was no prosecutorial misconduct, the inquiry ends.¹¹³ However, if there is error on the part of the prosecutor, the Court applies the *Wainwright v. State*¹¹⁴ plain error standard.¹¹⁵ Such standard requires the error to be “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”¹¹⁶ If the Court finds plain error, reversal is required.¹¹⁷ However, if the Court concludes that the prosecutor’s conduct does not satisfy the plain error standard, the Court proceeds to a *Hunter* analysis.¹¹⁸

The State began its closing argument as follows: “Ladies and gentleman of the jury, the defendant is a convicted drug dealer, which prohibits him from possessing a firearm.”¹¹⁹ Such argument was improper. The defendant had already conceded he was a convicted felon and thereby prohibited from possessing a firearm by stipulation and in testimony before the jury. There was absolutely no need for the State to emphasize the name of the prior felony when it was utterly irrelevant to any fact the State had to prove. The State’s comment on Mr. Lewis’s prior drug conviction was clearly prejudicial to the defendant. Such prejudice was

¹¹² *Id.* at 150.

¹¹³ *Id.* at 148.

¹¹⁴ 504 A.2d 1096 (Del. 1986).

¹¹⁵ *Baker*, 906 A.2d at 150.

¹¹⁶ *Wainwright*, 504 A.2d at 1100.

¹¹⁷ *Baker*, 906 A.2d at 150.

¹¹⁸ *Id.*

¹¹⁹ A253.

further exacerbated by the jury instructions given by the judge on the person prohibited charge which immediately followed the closing arguments.

3. Improper Jury Instructions.

The judge charged the jury with regard to the Possession of a Deadly Weapon by Person Prohibited Charge as follows:

Kahlil D. Lewis, on or about the 27th day of April, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess, purchase, own or control a 9-millimeter gun, a firearm, as defined by Title 11, Section 222 of the Delaware Code of 1974, after having been convicted in Case Number 1111020024, in the Superior Court of the State of Delaware, in and for New Castle County, on or about June 8, 2012, to the charge of Possession with Intent to Deliver Heroin, and, while in possession or control of 9-millimeter gun, a firearm, did negligently cause the death of Toney Morgan through the use of such firearm.

Delaware law defines Possession, Purchase, Own or Control a Firearm by a Person Prohibited, in pertinent part:

The following persons are prohibited from purchasing, owning, possessing or controlling a deadly weapon within the State.

Any person who has been convicted for the unlawful use, possession or sale of a narcotic drug or controlled substance as defined in Chapter 47 of Title 16.

Chapter 47, Section 4716, of Title 16 provides, in part:

(a) The controlled substances listed in this section are included in Schedule II.

Subsection (b) of Section 4716 says as to controlled substances: (1) Opium, and opiate, and any salt, compound, derivative or preparation of opium or opiate.

[. . .]

In order to find Defendant guilty of Possession of a Firearm by Person Prohibited, therefore, you must find that all the following elements have been established beyond a reasonable doubt:

One, Defendant knowingly possessed a firearm at the time of the alleged offense; and, two, at the time of the alleged offense, that's the Possession of a Firearm by Person Prohibited, Defendant was prohibited by law from possessing, purchasing, owning or controlling a firearm because he had been convicted for possessing a narcotic drug¹²⁰

In this case, the defendant stipulated that he was a person prohibited at the time of the offense. The stipulation was done in exchange for a sanitized charge to the jury without his prior felony drug conviction being presented. Mr. Lewis's prior drug charge being repeated to the jury first by the State then by the Court without any need for such evidence warrants reversal.

¹²⁰A279-80.

CLAIM III: THE TRIAL COURT ERRED IN FAILING TO GIVE A SELF-DEFENSE INSTRUCTION TO THE JURY ON THE CHARGE OF POSSESSION OF A DEADLY WEAPON BY PERSON PROHIBITED NEGLIGENTLY CAUSING DEATH.

A. Question Presented

Whether the trial court committed reversible error by only permitting the defendant to argue self-defense in regard to the charges of Reckless Endangering 1st Degree and Possession of a Firearm During the Commission of a Felony but not to Possession of a Firearm by Person Prohibited-Negligently Causing the Death. This issue was not preserved in the trial court, but the interest of justice exception in Delaware Supreme Court Rule 8 applies because the trial court's decision on the availability of defenses to the Person Prohibited statute was made before the State's re-indictment of Mr. Lewis, done just two weeks prior to trial.

B. Scope and Standard of Review

Since Mr. Lewis did not request a self-defense instruction, but only a choice of evils instruction, the standard of review is plain error.¹²¹ Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.¹²²

C. Merits of the Argument

¹²¹ *Small*, 51 A.3d at 456.

¹²² *Wainwright*, 504 A.2d at 1100 (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

The Grand Jury returned an indictment on June 24, 2013 charging Mr. Lewis with Murder Second Degree, two counts of Possession of a Firearm during the Commission of a Felony, Reckless Endangering First Degree, and Possession of a Firearm by Person Prohibited.¹²³ The Person Prohibited charge alleged that, in violation of 11 *Del. C.* § 1448, Mr. Lewis did knowingly and unlawfully possess or control a firearm after having been convicted of a violent felony.¹²⁴ During an office conference on August 26, 2013, the Court ordered memoranda on the availability of a defense to the charge of Person Prohibited.¹²⁵ The defense memorandum requested the justification Choice of Evils instruction for the charge of Person Prohibited because that is the only available defense for that charge.¹²⁶ Ultimately, the Court agreed and issued its Order on November 18, 2013.¹²⁷

However, just two weeks before trial and after the Court had already resolved the jury instruction issue on the Person Prohibited charge, the State sought re-indictment of Mr. Lewis charging him with Possession of a Deadly Weapon by Person Prohibited-Negligently Causing Death pursuant to 11 *Del. C.* § 1448(e)(2).¹²⁸ The new charge alleged that not only did Mr. Lewis possess a firearm while prohibited, but also while in possession of the firearm, did

¹²³ A008. A025-27.

¹²⁴ A026-27.

¹²⁵ A010.

¹²⁶ A037.

¹²⁷ A040; Exhibit B.

¹²⁸ A046-47.

negligently cause the death of Toney Morgan.¹²⁹ Since the Court had already ruled on the availability of a justification defense, the issue was never raised again even though the Person Prohibited charge had changed. The Court did instruct the jury on a justification self-defense as to Reckless Endangering First Degree¹³⁰ and Possession of a Firearm during the Commission of a Felony.¹³¹ However, with regard to the Possession of a Deadly Weapon by Person Prohibited-Negligently Causing Death charge, the Court only charged the jury with the defense of choice of evils.

Under 11 *Del. C.* § 464(c), deadly force is justifiable “if the defendant believes that such force is necessary to protect the defendant against death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat.”¹³² 11 *Del. C.* § 303(c) dictates that “[i]f some credible evidence supporting a defense is presented, the defendant is entitled to a jury instruction that the jury must acquit the defendant if they find that the evidence raises a reasonable doubt as to the defendant’s guilt.”¹³³ In this case, Mr. Lewis testified that he did not possess a gun on April 27, 2013.¹³⁴ He testified that he was called over to a group of people and began talking with them, at which point someone was standing behind him with a

¹²⁹ A046-47.

¹³⁰ 11 *Del. C.* § 604.

¹³¹ 11 *Del. C.* § 1447A.

¹³² 11 *Del. C.* §464(c)

¹³³ 11 *Del. C.* §303(c).

¹³⁴ A237.

hoodie and a black bag.¹³⁵ Mr. Lewis testified he was shocked and then heard a click and thought either the gun was not loaded or it was jammed.¹³⁶ To protect himself, he grabbed the gun at the same time the person with it was trying to clear the chamber, causing the gun to begin to fire.¹³⁷ Mr. Lewis heard Antwyne Magrum yell “hit him hit him.”¹³⁸ He struggled with Toney Morgan to get the gun away from him.¹³⁹ Mr. Lewis was shot too, and believed he was going to die.¹⁴⁰ Mr. Lewis’s testimony is credible evidence requiring the Court to give the jury the instruction of self-defense.

Under a plain error review, there must be a showing that the failure to grant the instruction would have affected the outcome of the trial.¹⁴¹ In this case, the jury was instructed on self-defense as to the charges of Reckless Endangering First Degree and Possession of a Firearm During the Commission of a Felony. The jury acquitted Mr. Lewis of those charges. It stands to reason that the jury must have believed his self-defense claim or they would not have acquitted him. However, the jury was not instructed on self-defense as to the Person Prohibited-Negligently Causing the Death charge. Therefore, the outcome of the trial would have been

¹³⁵ A229.

¹³⁶ A230.

¹³⁷ A230.

¹³⁸ A230.

¹³⁹ A230.

¹⁴⁰ A230.

¹⁴¹ *Perkins v. State*, 920 A.2d 391, 399 (Del. 2006); *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006).

different if the jury had been instructed on self-defense as to that charge. Therefore, reversal is required.

CLAIM IV: THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING MR. LEWIS WITH A CLOSED MIND ON THE VIOLATION OF PROBATION

A. Question Presented

Whether the trial court abused its discretion by sentencing Mr. Lewis with a closed mind. This issue was preserved by way of the filing of the Notice of Appeal.

B. Scope of Review

This Court reviews sentencing of a criminal defendant under an abuse of discretion standard.¹⁴² More particularly, this Court has held that where a sentence, such as this one, falls within the statutory limits, this Court will only consider whether the sentence “is based on factual predicates which are false, impermissible, or lack minimal reliability, judicial vindictiveness or bias, or a closed mind.”¹⁴³

C. Merits of Argument

1. Legal precepts.

A judge sentences with a closed mind when the sentence is based on a preconceived bias without consideration of the nature of the offense or the character of the defendant.¹⁴⁴ To put it another way, “the judge must have an open mind for receiving all information related to the question of mitigation.”¹⁴⁵

¹⁴² *Fink v. State*, 817 A.2d 781, 790 (Del. 2002).

¹⁴³ *Kurzmann v. State*, 903 A.2d 702, 714 (Del. 2006); *Weston v. State*, 832 A.2d 742, 746 (Del. 2003).

¹⁴⁴ *Ellerbe v. State*, 2000 WL 949625 at *1 (Del. 2000).

¹⁴⁵ *Shelton v. State*, 744 A.2d 465, 513 (Del. 1999).

2. The Trial Court Failed to Consider Important Mitigating Evidence.

The court did not find any mitigating factors on the charge of Violation of Probation as the Court sentenced Mr. Lewis to serve 8 years which was all of his back time. The mitigating evidence presented during the sentencing concerned Mr. Lewis's traumatic childhood which consisted of the murder of his mother who was shot in the face and neck during the course of a theft.¹⁴⁶ Upon his mother's death, Mr. Lewis and his siblings went to live with their aunt whose husband made it clear that they were not welcome in the home.¹⁴⁷ Homelessness plagued the family who were first displaced due to a fire and then by extreme poverty.¹⁴⁸ In addition to his mother being murder, Mr. Lewis was confronted with the murder of his cousin, who was raised as his brother.¹⁴⁹ Finally, the fact that Mr. Lewis was shot by Toney Morgan was also provided as a mitigator.

The court's failure to consider the mitigating evidence constitutes plain evidence that the court did not adhere to the holding in *Shelton v. State* that the sentencing judge must have an open mind to all information related to the question

¹⁴⁶ A339-40.

¹⁴⁷ A340-41.

¹⁴⁸ A341.

¹⁴⁹ A342-43.

of mitigation.¹⁵⁰ This sentencing was the product of a closed judicial mind, and Mr. Lewis respectfully seeks a remedy from this Court.

CONCLUSION

For the reasons stated herein, Mr. Lewis respectfully requests that this Honorable Court reverse his convictions and remand the case for a new trial.

**WOLOSHIN, LYNCH, & NATALIE
P.A.**

/s/ Natalie S. Woloshin _____

Natalie S. Woloshin
3200 Concord Pike
Wilmington, DE 19803
302.477.3200

and

/s/ Benjamin S. Gifford IV _____

Benjamin S. Gifford IV
3200 Concord Pike
Wilmington, DE 19803
302.477.3200

Attorneys for Defendant Below - Appellant

Dated: December 11, 2015

¹⁵⁰ 744 A.2d at 513.