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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GABRIEL F. PARDO, Defendant Below, Appellant, v. STATE OF DELAWARE Plaintiff Below, Appellee.	))))))))))))	No. 68, 2016

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF
(AMENDED TO CORRECT BRIEF DEFICIENCY)

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Dated: July 25, 2016

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Nature of the Proceedings

On September 16, 2014, Appellant-Defendant Gabriel F. Pardo (hereinafter "Pardo") was arrested in connection with his involvement in a hit and run collision involving a bicyclist that occurred on September 12, 2014, at approximately 8:45p.m. on Brackenville Road in Hockessin, Delaware. (A1).

On November 24, 2014 Pardo was indicted on the following charges: Manslaughter, Leaving the Scene of an Accident Involving Death, six counts of Endangering the Welfare of a Child, and Reckless Driving. (A1)

A nine-day bench trial was held in New Castle County Superior Court before the Honorable Andrea J. Rocanelli. Pardo was found guilty of all counts and was immediately remanded into custody pending sentencing. (A12)

On January 15, 2016, Pardo was sentenced to 8 yrs, 7 months of Level 5 time. (Exhibit A).

On February 12, 2016, Pardo timely filed a Notice of Appeal in this Honorable Court.

Summary of the Argument

I. Superior Court Erred When It Ruled that 21 *Del. C.* § 4202 is Constitutional

Although this Court upheld the strict liability nature of a similar Title 21 offense (21 *Del. C.* § 4176A) in *Hoover v. State,* to date this Court has not ruled on the constitutionality of a strict liability crime that results in a felony conviction and includes minimum mandatory imprisonment. Pardo asserts that on its face 21 *Del. C.* § 4202 violates due process and as applied to him because, for a strict liability crime, he received a felony conviction and three years of imprisonment. *This is case of first impression for this Court.*

II. Superior Court Erred When It Permitted an Addition to the Manslaughter Pattern Jury Instruction Involving Voluntary Intoxication

As there was no evidence of Pardo being under the influence, impaired or intoxicated, the Court had no reason to add the following language to the pattern jury language: "A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto." Pardo asserts that such language permitted the Court to improperly consider alcohol consumption when assessing whether or not he consciously disregarded a substantial and unjustifiable risk that another person's death would result from his conduct.

III. Superior Court Erred in Denying Motion for Judgment of Acquittal Because the State Failed to Present Sufficient Evidence and the Court Considered Evidence It Should Not Have

Under the circumstances of a curvy, dark, narrow road with overhanging branches, a reasonable person could not expect to come upon a bicyclist at night. In addition, the Superior Court articulated that Mr. Bishop was "lawfully riding" when there is a dispute as whether or not he was appropriately lighted. Finally, although the Superior Court indicated that it did not find that Pardo was impaired or intoxicated, it did erroneously find him "under the influence" and considered his alcohol consumption in determining that he acted with the level of recklessness necessary to convict him of manslaughter.

IV. Superior Court Erred When It Denied a *Deberry* Instruction

Evidence was collected the day after the accident by a reporter from the *News Journal*. The police collected this evidence *from the reporter, not from the scene*, and never determined where the evidence was located at the scene of the accident. As the exact location of impact was never determined, and the approximate location was determined by paint chips in the roadway, the location of plastic pieces could have been extremely relevant. Pardo asserts that the State's failure to collect and preserve the evidence entitled him to a *Deberry* instruction and presumption that the evidence could have been exculpatory.

V. Superior Court Erred in Denying Motion for Judgment of Acquittal on Leaving the Scene of an Accident Involving Death

21 *Del. C.* § 4202(a) states: "The driver of any vehicle involved in a collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such collision." Pardo (and his children) believed that they struck a branch rather than a person and did not know that they had been in a collision resulting in injury or death and therefore did not stop at the scene. Pardo asserts that knowledge that a person had been injured or killed is necessary to be found guilty of this crime.

Statement of Facts

On September 12, 2015, sometime between 8:30-8:45 p.m., Phillip Bishop was traveling southbound on Brackenville Road on his bicycle. At the same time, Gabriel Pardo was traveling northbound on the same road in his Audi sedan with his three children as passengers in his car. Pardo struck what he thought was a large branch. (A151, pg 53; A151, pg 56; A164, pg 113; A188, pg 225; A190, pg 235; A197, pg 19-20; A199, pg 28). Because it was dark and the road was narrow, Pardo continued the approximately .3 miles to his residence and parked in his garage. (A50). He and his children looked at the car and noticed a damaged windshield and a couple of dents but the lighting in the garage was poor. (A197). When he and the children got into the house, Pardo telephoned his ex-wife to inquire about insurance coverage since the windshield needed to be repaired. (A163-164)

Tragically, unbeknownst to Pardo, he had struck and killed Phillip Bishop. It wasn't until the next morning (September 13, 2014) when his ex-wife telephoned him and told him about a newspaper article regarding a hit and run accident involving an Audi the evening before, on Brackenville Road, that Pardo realized he may have hit a person rather than a branch. (A150 pg. 51-52)

Since he had an Audi and knew he struck something the night before, Pardo contacted the New Castle County Police Department at 9:20A.M. and

requested that police respond to his residence at 2307 Brackenville Road, Hockessin, Delaware, to look at his car and to ascertain his involvement with the accident on Brackenville Road (A49, pg 183).

Pardo's car was impounded, and search warrants issued for the event data recorder or airbag control module of his Audi, and all digital contents of his IPhone. (A153). Evidence was analyzed and Pardo was arrested on September 16, 2014.

A nine-day bench trial was held from September 22 – October 2, 2015. The State presented evidence that Pardo had consumed alcohol prior to driving that evening. (A61, pg 10-11; A64, pg 32; A65, pg 33). There was no evidence of impairment or intoxication. (A54-55; A65, pg 34, A69, pg 49, A80, pg 75). The State presented fifteen witnesses, including Corporal Hussong, who was the investigating officer as well as the court-recognized expert in accident reconstruction. The approximate point of impact was determined by paint chips. (A119, pg 132; A120, pg 176; A286, pg 155). The actual point of impact on Brackenville Road was never determined. (A48, pg 175; A111, pg 137, A131, pg 222-223) Based on a "cone of debris" Hussong testified that the accident occurred in the southbound lane, meaning Pardo crossed the double yellow line.

Brackenville Road is a narrow winding road with no shoulders and trees

overhanging the road. (A21, pg 34; A27, pg 62; A29, pg 69; A38, pg 126). Because of the winding character of the road, it is not uncommon for drivers to cross the double yellow line in a curve. (A59, ln 17-22).

The Superior Court held that Pardo demonstrated the level of recklessness necessary for manslaughter. (A264). In addition, since he left the scene of the accident that involved the death of a person, he was found guilty of Leaving the Scene of an Accident Involving Death. (A265). As his three children were in the vehicle when these two crimes were committed, Pardo was found guilty of six counts of Endangering the Welfare of a Child. Finally the Court found Pardo guilty of Reckless Driving. (A265).

ARGUMENT ON THE MERITS

I. Superior Court Erred When It Ruled that 21 *Del. C.* § 4202 is Constitutional

Question Presented

Is 21 *Del. C.* § 4202 unconstitutional because it violates due process by being a strict liability crime that is a felony and includes minimum mandatory imprisonment? This is a case of first impression for this Court. This issue was preserved at A261.

Standard of Review

Constitutional questions are reviewed *de novo.*[1]

Merits of Argument

Role of the Court When Interpreting the Constitution

It is the sole province of this Court, not the General Assembly, to define the meaning of the Delaware Constitution as it is this Court's "province and duty... to say what the law is" in particular cases and controversies.[2]

This Court must interpret the Constitution in such a way as to ensure that, whenever avoidable, not to "nullify, or substantially impair, any other constitutional provision or to produce an irrational result."[3] When construing

[1] *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006).
[2] *Evans v. State*, 872 A.2d 539, 549 (Del. 2005).
[3] *State v. Roberts*, 282 A.2d 603, 606 (Del. 1971) (citing *Opinion of the Justices*, 225 A.2d 481, 484 (Del. 1966)).

constitutional provisions, the court's "ruling must come from the [1] interrelationship of concepts set forth in the Constitution, [2] the language of the Constitution, and [3] the prior case law that has construed the Constitution."[4]

It is also clear that the General Assembly can make law as long as the enactments do not impermissibly conflict with the Delaware Constitution because any "act of the legislature, repugnant to the constitution, is void."[5] Therefore, the power of the General Assembly "is subject to constitutional restrictions, whether express or necessarily implied. In an appropriate case, it is the duty of the Court to define such restrictions."[6] The General Assembly has broad authority to define crimes[7] and it may legislate in any manner on any subject it sees fit, unless there is some constitutional limitation, express or implied.[8]

The Posture in Delaware of the Constitutionality of the Penalty Associated With Strict Liability Crimes

In *Hoover v. State*, this Court engaged in an analysis of the constitutionality of 21 *Del. C.* § 4176A, a strict liability offense of operation of

[4] *State ex rel. Gebelein v. Killen,* 454 A.2d 737, 747 (Del. 1982).
[5] *Evans v. State*, 872 A.2d 539, 553 (Del. 2005) (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).
[6] *State ex rel. Gebelein* at 745.
[7] *Eaton v. State,* 703 A.2d 637 (Del. 1997).
[8] *State v. Avila-Medina,* 2009 WL 2581874 at*2 (Del. Super. Mar. 5, 2009) (citing Del C. Ann. Const. art. 2, §1.)

a motor vehicle causing death. The Court held that the question of intent with respect to statutory crimes is a decision for the legislature and the mere absence of a state of mind element does not render a statute unconstitutional.[9] Of import, though, is that this Court specifically left open the question of whether or not the penalty associated with 21 *Del. C.* § 4176A (up to thirty months in prison) was "relatively small" such that it did not violate due process rights of a person under *Morissette.*[10] As § 4176A is a misdemeanor, this Court also left open whether a strict liability crime can be a felony.

Six months later in March 2009, the Superior Court held that the penalty portion of 21 *Del. C.* § 4176A was constitutional.[11] The Superior Court noted that the statute, upon conviction, represented a misdemeanor record. The Court distinguished what would amount to a "gravely besmirched reputation" by noting that "a misdemeanor conviction does not carry the stigma of a felony conviction, and the defendant does not suffer the loss of rights that accompany felony convictions."[12]

In April 2009, in *State v. Adkins,* this Court held that the question of whether a potential thirty month prison sentence for operation of a motor

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[9] *Hoover v. State,* 958 A.2d 816, 821 (Del. 2008).
[10] *Id.* at 823
[11] *State v. Avila-Medina,* 2009 WL 2581874 at *4 (Del. Super. Mar. 5, 2009) "…[r]elative to similar statutes in other jurisdictions, Delaware's maximum sentence of two and half years does not strike the Court as excessive or severe."[11]
[12] *Id.* at *4.

vehicle causing death violated due process was not ripe.[13]

Although this case involves 21 *Del. C.* § 4202, and the above relates to a different section of Title 21, Pardo respectfully submits that any analysis as to the constitutionality of 21 *Del. C.* § 4176A would be applicable to 21 *Del. C.* § 4202 because it also is a strict liability offense.

21 *Del. C.* § 4202 is Unconstitutional Because It is a Strict Liability Crime That is a Felony With Minimum Mandatory Imprisonment

Pardo argues that § 4202 is unconstitutional because it is a strict liability statute that results in a felony conviction with a possible sentence of one to five years, six months of which is mandatory imprisonment.

The Superior Court ruled that the statute was constitutional. As part of its basis for finding the law constitutional, the Superior Court referred to the two-prong test set out in *Morissette v. United States*[14], "a strict liability offense is not deemed to violate the due process clause where (1) the penalty is relatively small, and (2) where the conviction does not gravely besmirch a defendant's reputation."[15]

The Superior Court held that the two-prong test was satisfied because a six-month minimum mandatory imprisonment term is a relatively small penalty and a conviction for this offense is not such that a defendant's reputation would

[13] *State v. Adkins*, 970 A.2d 257 (Del. 2009).
[14] 342 U.S. 246, 256 (1952).
[15] *Id.*

be "gravely besmirched".[16]

The Superior Court's finding is flawed for two reasons: 1) while it is true that the minimum mandatory penalty is six months, the maximum penalty for a conviction under § 4202 is five years in prison which is not "relatively small"; and 2) a reputation is "gravely besmirched" by a felony conviction.

While the Superior Court focused on the minimum mandatory sentence, Pardo argues that focusing only on the minimum mandatory sentence is not sufficient for a due process analysis. The evaluation must consider the entire penalty. A conviction under 21 *Del. C.* § 4202 can result in up to five years imprisonment, not a "relatively small" amount of time.

Furthermore, Pardo argues that the reputation of a convicted felon is "gravely besmirched" as evidenced by the loss of significant civil rights.

Finally, while the Superior Court determined that six month's imprisonment does not violate due process, it then sentenced Pardo to three year's imprisonment and violated his due process rights.

[16] *State v. Pardo,* 2015 WL 6945310 at *2 (Del. Super. Nov 9, 2015)

II. Superior Court Erred When It Permitted an Addition to the Manslaughter Pattern Jury Instruction Involving Voluntary Intoxication

Question Presented

Did the Court err in permitting language regarding voluntary intoxication to be added to the manslaughter jury instruction? This issue was preserved at A221.

Standard of Review

This Court reviews a decision by a trial judge to alter a proposed instruction's content, form or language for abuse of discretion.[17]

Merits of Argument

At the prayer conference, the State requested that the pattern jury instructions for manslaughter be augmented to include the Delaware Code definition of a reckless state of mind located in 11 *Del C.* § 231. An additional provision is included in 11 *Del. C.* § 231 that is not included in the pattern jury instructions for manslaughter,[18] namely, "[a] person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto." Against the objection of defense counsel, this additional sentence was included in the manslaughter instruction.

The State put forth a great deal of effort to "make the case" that Pardo

[17] *Wright v. State*, 953 A.2d 144, 148 (Del. 2008)
[18] *See A291* for Manslaughter Pattern Jury Instruction

had been drinking. In terms of evidence, they called Pardo's co-worker who was his happy hour companion as well as the waiter from the restaurant. There is no dispute that evidence was submitted that Pardo consumed alcohol. Significantly, though, is that even with the testimony concerning alcohol consumption, there was no evidence submitted that Pardo was under the influence, impaired or intoxicated.

Pardo was at the restaurant at least four (4) hours. (A64, pg 31). According to his co-worker, he showed no signs of impairment and was the same way all through dinner. (A65, pg 34; A69, pg 49). The waiter testified that he showed no signs of impairment. (A77, pg 48; A78, pg 49). There was a video of his behavior in Acme supermarket and showed him to be completely stable as he walked around, conversed with a sales person, put his stuff up on the conveyor belt and paid. Corporal Hussong testified as to Pardo's behavior in the video and there was no testimony about impairment. (A54-55).

Defense counsel elicited testimony from the co-worker and waiter regarding the amount of food and non-alcoholic beverages consumed by Pardo over the four-hour period. (A67, pg 41-44).

Pardo's ex-wife Catherine testified that there were no signs of impairment when she met him for the exchange of the children. (A80, pg 75). In fact, she testified that she felt no need to be concerned about Pardo with the

children. (A83, pg 92). As she was standing 3-4 feet from Pardo at the Acme grocery store, one could make the argument that Catherine would not have permitted Pardo to take the children if anything had seemed amiss. (A79, pg 63.)

Finally, Pardo himself admitted that he had 6-7 drinks over the four-hour period (along with water and an abundance of food) and that he did not feel impaired. (A183, pg 206). He testified that he would not have driven his vehicle if he had felt impaired. (A183, pg 206).

One has to wonder why the State wanted the additional language included in the manslaughter instruction. Pardo posits that that the State knew that making the case that he consciously disregarded a substantial and unjustifiable risk that death would result *under the circumstances of encountering a bicyclist on a dark, narrow, curvy road at night*, would be difficult. The State knew that they would have to prove that Pardo was aware that he could encounter a bicyclist at night on that road and that he "consciously disregarded" that risk.

By including the additional language regarding voluntary intoxication, a mechanism was provided for the Superior Court to find the requisite state of mind necessary for manslaughter. Put another way, the language regarding voluntary intoxication undermined the need for the State to demonstrate that the

defendant's conduct was a *conscious* decision.

In the verdict, the Court stated:

> "It is not an element of the offenses before the Court that the defendant was impaired or intoxicated, and the Court does not so find. The Court does note that, 'while under the influence' in Delaware statutory law means a person is less able than the person ordinarily would have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle. Based on the record evidence, including defendant's own testimony, the Court finds the defendant was under the influence of alcohol after consuming six to seven alcoholic drinks within 1.5 to 5 hours of the accident before the Court.

The problem with this is two-fold: 1) there is *no* testimony or evidence that Pardo was under the influence and 2) as a practical matter the additional language made voluntary intoxication an element of the offense by undermining the need to be conscious of the risk ("[a] person who creates such a risk but is unaware thereof) and by making voluntary intoxication *per se* recklessness ("acts recklessly with respect thereto [the risk]."

Finally, if evidence of alcoholic consumption was not an element of offense, why did the Court find him "under the influence"?

Alcohol consumption was significant to the Court in its findings. There are several references in the verdict and sentencing regarding alcohol consumption. (A259, pg 8; A260, pg 9; A262, pg 18-19; A265, pg 29; A267). In fact, alcohol consumption was so impressed upon the Superior Court that

Pardo is required to wear a transdermal bracelet to ensure compliance with zero tolerance for alcohol for a period of five years of probation. (A273, pg 55).

III. Superior Court Erred in Denying Motion for Judgment of Acquittal Because the State Failed to Present Sufficient Evidence and the Court Considered Evidence It Should Not Have

Question Presented

Did the Superior Court Err in Denying Motion for Judgment of Acquittal because the State failed to present sufficient evidence and the Court considered improper evidence? This issue was preserved by the timely filing of a Motion for Judgment of Acquittal Pursuant to Rule 29 of the Superior Court Criminal Rules at A-13.

Standard of Review

This Court reviews the Superior Court's denial of a motion for acquittal *de novo*.[19] "We review *de novo* a trial judge's denial of a motion for a judgment of acquittal to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of a crime."[20]

Merits of Argument

In order to sustain the sufficiency of the conviction of the count of Manslaughter, the evidence must reveal that the State has established, beyond a reasonable doubt, that the defendant's driving of his vehicle at or about the

[19] *See Flonnory v. State*, 893 A.2d 507, 537 (Del. 2006) (citing *Priest v. State*, 879 A.2d 575, 577 (Del. 2005)).
[20] *Id.*

place and time of the crime charge was "…aware of and consciously disregarded a substantial and unjustifiable risk that the death of another person will result from the manner in which he operated his vehicle.[21]

On October 2, 2015, the Superior Court made findings of fact, stated its conclusions of law and rendered a verdict of guilty on all charges. In the Memorandum Opinion denying the Motion for Judgment of Acquittal Pursuant to Rule 29 the Superior Court adopted those findings.[22] Although the Court indicated that the facts established at trial support the convictions, Pardo submits that not only did the Court not consider all of the facts in evidence but that the Court considered evidence that it should not have.

Specifically, the verdict ignored repeated testimony by the defendant that he adopted his driving strategy, dependent upon the lighting and terrain conditions of Brackenville Road, enabling him to have "sufficient time" to adjust to the changing condition brought forth by an oncoming vehicle by, quickly and safely, returning to his designated lane of travel. (A158, pg 86-87; A163; pg 109-110). Furthermore, Pardo testified that he personally would not ride a bicycle at night (A158, pg 88) and had *never* seen a bicyclist at night. (A163, pg 110).

[21] *Motion for Judgment of Acquittal Pursuant to Rule 29 of the Superior Court*, pg. 1
[22] The citation for the Memorandum Opinion is *State v. Pardo*, 2015 WL 6945310 (Del. Super. Nov. 9, 2015).

In addition, the Court's conclusion that a reasonable and rational motorist, with knowledge of the roadway found at the site of the accident on Brackenville Road could have reasonably anticipated that somebody would be riding a bicycle, in darkness, on a narrow road, with no shoulder is erroneous. State's witnesses Shannon Athey, Dierdre Ritchie, and Patrick Ritchie all testified that the Brackenville Road is dark and narrow. (A21, pg 34; A27, pg 62; A28, pg 66-67; A32, pg 86). Dierdre Ritchie also testified that the road had curves that made it difficult to see and her husband Patrick Ritchie testified that there was no shoulder. (A27, pg 62; A32, pg 86). Corporal Hussong also testified that the roadway was dark, with no shoulder and that any shoulder that was present was in poor condition. (A38, pg 126; A58-59; A60 pg 6; A102, pg 13).

In addition, there was testimony elicited from DelDOT regarding reports of downed limbs/branches on Brackenville Road in the months preceding September 2014. (A104 thru A108).

Finally there is the testimony of Pardo himself that he believed that he struck a limb (A151, pg 53, A151, pg 56; A164, pg 113), that he had seen limbs on the road before (A157, pg 81-83; A188, pg 227), and that he thought the damage to his vehicle had been a hanging branch because of the windshield damage (A199, pg 28; A200, pg 29).

Much was made of the fact that Pardo crossed the double line although Pardo was unsure if he crossed the line the night of the accident. (A186, pg 218). He did testify that he would "routinely" drive to the left of the center line at night (A186, pg 217) and that is was likely that he did that night (A186, pg 218) but he also testified that at night it was his perception that it was safer to cross the line in a curve because of the narrowness and soft shoulder and that he would see headlights and be able to move to the right in ample time (A158, pg 87).

Under 11 *Del. C.* §262(2) there is not a sufficient basis to find guilt beyond a reasonable doubt.

The Superior Court Considered Improper Evidence of "Lawfully Riding"

Pardo asserts that part and parcel to determining if his conduct rose to the level of recklessness necessary for a conviction of manslaughter is whether the Court considered evidence that it should not have, namely, whether or not Mr. Bishop was lawfully on the road. Although comparative negligence is a concept in civil law rather than criminal law, Pardo argues that when evaluating whether his conduct was reckless that the trier of fact must consider whether or not the other party was lawfully on the road.

Defense counsel challenged Corporal Hussong on his characterization in his report that Mr. Bishop was lawfully on the road. (A115, pg 113-116)

Following is a portion of the exchange:

> Mr. Hurley: Would you read into the record what your conclusion was in your report regarding the compliance of Mr. Bishop with the law?
>
> Hussong: "Lawfully riding"
>
> Hurley: But you just told us that you don't know if he was lawfully riding or not, do you? [A115, pg 115]
>
> Hussong: Well, he had lighting. He had headlamps and – but I can't say exactly where on the bicycle everything was.
>
> Hurley: So, then, is it not an overstatement to say "lawfully riding" because you didn't have sufficient information?
>
> Hussong: I *believe* that he was lawfully riding with the proper lighting equipment. That's why I wrote it in there. (emphasis added).

The "lawfully riding" theme did not stop there. In its closing, the State said that Mr. Bishop was "lawfully riding" (A226, pg 136) and in the verdict and sentencing the Superior Court indicated that Mr. Bishop was lawfully on the road (A262, pg 20; A270, pg 52).

The problem is that no one *concluded* based on *evidence* that Mr. Bishop was "lawfully riding." 21 *Del. C.* §4198F provides:

> (a) Every bicycle when in use at nighttime shall be equipped with a lamp on the front which shall emit a white light visible from a distance of at least 500 feet to the front.
>
> (b) Every bicycle shall be equipped with a red reflector of a type approved by the Department which shall be visible for 600 feet to the rear when directly in front of lawful lower beams of head lamps on a motor vehicle.

> (c) Every bicycle when in use at nighttime shall be equipped with reflective material of sufficient size and reflectivity to be visible from both sides for 600 feet when directly in front of lawful lower beams of head lamps on a motor vehicle or, in lieu of such reflective material, with a lighted lamp visible from both sides from a distance of at least 500 feet.

There was an abundance of testimony regarding Mr. Bishop's lighting. (A20, pg 26; A21, pg 35; A24, pg 45; A38, pg 128; A39, pg 131; A41, pg 139; A43, pg 156; A44, pg 158; A45, pg 162). There is no doubt that he had a lamp affixed to his helmet and that he had a flashlight. (A20, pg 26; A38, pg 128) There was no evidence that the flashlight was attached to the bicycle, the handlebars or the frame. (A235, pg 171). There is doubt as to the lighting mode of the flashlight (flashlight mode or flare mode) as well as the amount of illumination from the lamp affixed to Mr. Bishop's helmet because it would have necessarily been pointed in the direction that Mr. Bishop's head was pointed. (A235, pg171-172; A236, pg173-174). There is no evidence that Mr. Bishop was illuminated for 500 feet in the direction of Pardo as required by law. Significantly, Corporal Hussong testified that he could not form an opinion as to whether Mr. Bishop was visible to oncoming traffic (A285, pg 149) and that the flashlight could have been in Mr. Bishop's hands rather than on the bicycle. (A284, pg 148).

With this many unknowns, Pardo argues that a declaration that Mr. Bishop was "lawfully riding" was erroneous.

The Superior Court Considered Improper Hearsay Evidence

The CAC video (out of court statement) of Pardo's son, John Pardo, was viewed by the Court pursuant to 11 *Del. C.* § 3507. In the proffer at sidebar, the State indicated that it believed John made a statement that that State posited was either a present-sense impression or an excited utterance. (A91, pg 137). As the video had not yet been viewed, the Court did not rule on whether the statement (that it had not yet seen) was permissible hearsay as a present-sense impression or excited utterance.

Defense counsel objected to the viewing of the CAC video based on an improper foundation of "touching upon" the night of the accident. (A91, pg 139). The Court required the State to elicit more testimony that "touched" on the night of the accident. Ultimately, the Court allowed the video to be played. Defense counsel objected and the following exchange occurred:

> The Court: We had discussed previously at sidebar the fact that the Court, as the trier of fact, is going to hear some information that the jury might not hear. So, I'll consider any motions to strike.
>
> Hurley: Fine.
>
> The Court: All right? And we'll only consider that evidence that is appropriate.

Hurley: Fine.

The video was then played and in the video John told the interviewer that he heard his brother Gabe say "Did you kill a person?"[23] At trial, John stated that he didn't remember saying that to the interviewer. (A93, pg 147). What is significant is that John's statement is double hearsay and should not have been considered.

There is no doubt that the State wanted this statement before the Court. Interestingly, when Gabe, the actual Declarant of the proffered statement, testified in the State's case he was not asked if he said "Did you kill a person" the night of the accident. The State used § 3507 in order to introduce a hearsay statement without a proper foundation or cross-examination of the Declarant on that statement, violating Pardo's right to confront the statement.

The State managed to get the damning statement before the Court, as the trier of fact, without a ruling on whether or not the statement was admissible. The statement was therefore improperly admitted yet it was a crucial argument for the State and was adopted by the Superior Court.

The State used a variation of the statement in its closing argument[24] and then in the verdict, the Court stated "This young son [Gabriel] exclaimed, "Dad,

[23] Pardo testified that he did not hear his son say anything about hitting a man (A188, pg 227).
[24] The prosecutor incorrectly stated "You just killed a person" (A226, pg 135).

did you kill a person?" (A263, pg 22).

The Superior Court said that it would "only consider that evidence that is appropriate," yet this double hearsay statement was obviously considered in the assessment of whether or not Pardo *knew* he struck a person rather than a limb.

IV. Superior Court Erred When It Denied a *Deberry* Instruction

Question Presented

Did the Court err in failing to include a *Deberry* instruction? This issue was preserved at A223, pg 121 and A260, pg 10.

Standard of Review

This court reviews a trial judge's determination whether the evidence supports a particular instruction *de novo.*[25]

Merits of Argument

When evidence is not collected or not preserved, the Court must undertake the analysis of (1) the degree of negligence or bad faith involved; (2) the importance of the evidence that is lost; and (3) the sufficiency of other available evidence.[26]

The pattern jury instruction for uncollected/unpreserved/unmaintained evidence includes the following language:

> "Because the State failed to [collect/preserve/maintain] this evidence, you must assume that, if the evidence were available at trial, it would tend to prove the defendant is not guilty."[27]

During the defense's case, it was brought out that several pieces of plastic were recovered from the scene of the accident by a *News Journal*

[25] *Wright v. State*, 953 A.2d 144, 147 (Del. 2008) (citing *Claudio v. State*, 585 A.2d 1278, 1282 (Del. 1991)).
[26] *Deberry v. State*, 457 A.2d 744, 754 (Del. 1983).
[27] *Pattern Criminal Jury Instructions of the Superior Court of the State of Delaware*, Instruction 4.17 "[Uncollected/Unpreserved/Unmaintained] Evidence"

reporter the day after the accident. The reporter notified the police of the discovery and provided the plastic pieces to the police.

Corporal Hussong was asked about plastic pieces that were collected the day after the accident by a reporter from the *News Journal* and he indicated that once the police were notified of the existence of the plastic pieces, they simply obtained the pieces from the reporter and logged them into evidence. (A286, pg 156; A287-A288). To be clear, NO inquiry was made of the reporter as to the exact location of the plastic pieces.

Defense Counsel requested a *Deberry i*nstruction on the basis that the State did not collect the plastic pieces. (A223, pg 121). At the prayer conference, the Court was willing to include the *Deberry* instruction (A224, pg 125) but ultimately indicated that a *Deberry* instruction was not appropriate when it rendered the verdict. (a260, pg 10). Specifically, the Court said:

> "The Court finds that the defendant is not entitled to a *Deberry-Lolly* instruction, because, one, the State did not fail to collect and preserve the evidence, and two, the defendant is not entitled to an inference that the evidence would have been exculpatory."(A260, pg 10).

The court erred in two ways its analysis that a *Deberry* instruction was unnecessary: 1) simply taking custody of the evidence from an untrained citizen and not even inquiring from where the pieces originated hardly counts as "collecting"; and 2) the entitlement to an inference that the evidence is

exculpatory is part of the jury instruction, not the initial *Deberry* analysis identified *supra.*

Pardo disputes that the police "collected" the evidence. It is clear that the State did not collect the evidence in the traditional way that evidence is collected. Corporal Hussong testified to the procedure for collecting evidence at a scene and noting the exact location of each piece of evidence. (See generally A38-40).

Here, the Superior Court considered the fact that the police merely obtained the evidence from the *News Journal* reporter as collecting the evidence. Pardo asserts that "collecting" evidence from a reporter rather than the accident scene, and not even inquiring as to where the evidence was located does not qualify as "collected" for the purpose of a *Deberry* analysis.

Furthermore, the *Deberry* analysis requires that the importance of the missing evidence and sufficiency of other evidence be considered in the analysis. The Superior Court did not engage in this analysis at all.

Pardo argues that the exact location of the plastic pieces could have been germane to the location of the collision because the exact location of the point of impact was never determined. As it was, Corporal Hussong determined the approximate point of impact based on paint chips from Pardo's vehicle. (A119, pg 132). Paint chips that could move. (A112, pg 141). It is not unreasonable to

think that in a case that hinged on paint chips, that the location of plastic pieces could have been germane to the case.

Finally, the premise of *Deberry* is that the defendant is entitled to an inference that the missing evidence would have been exculpatory and that given the ongoing dispute as to where the accident happened, that the inference could have been beneficial.

V. Superior Court Erred in Denying Motion for Judgment of Acquittal on Leaving the Scene of an Accident Involving Death

Question Presented

Did the Superior Court err in denying Defendant's Motion for Judgment of Acquittal on Leaving the Scene of an Accident Involving Death? This issue was preserved by the timely filing of a Motion for Judgment of Acquittal Pursuant to Rule 29 of the Superior Court Criminal Rules at A-13.

Standard of Review

This Court reviews the Superior Court's denial of a motion for acquittal *de novo*.[28]

Merits of Argument

21 *Del. C.* § 4202(a) states:

> "The driver of any vehicle involved in a collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such collision."

Defense counsel argued that § 4202 was unconstitutional for two reasons: 1) that a state of mind was required and 2) that the penalty portion was not "relatively small" under a *Morissette* analysis.

In the verdict, following *Hoover*, the Superior Court held that the absence of a state of mind element does not make the statute unconstitutional. (A261, pg

[28] *See Flonnory v. State*, 893 A.2d 507, 537 (Del. 2006) (citing *Priest v. State*, 879 A.2d 575, 577 (Del. 2005)).

13). The Superior Court went on to find that the penalty portion also did not render the statute unconstitutional.

Pardo's argument with respect to the penalty portion has already been articulated *supra.*

As for the state of mind argument, in the verdict the Court "hedged its bets" in the event the statute were to be found unconstitutional because of no mental state and held:

> "Accordingly, even if the statute requires a mental-state requirement for a finding of constitutionality, then Section 251 of Title 11 is hereby applied to resolve any due-process concerns. *According to this statutory construction, there is a presumption that a defendant must know the facts that make his conduct illegal.* Here, the State has established beyond a reasonable doubt that defendant knew he was in a collision and, yet, continued on without stopping. Mr. Pardo did not have to know that the accident involved the death of an individual. Requiring that a defendant know that the collision involved injury or death to another individual prior to requiring a defendant to stop is incompatible with the legislative intent. Instead, the legislative intent of Section 4202 reflects that it is the driver's responsibility to immediately assess the scene of the collision for whether any person was injured or killed." (A261, pg 16; A262, pg 17) (*emphasis added*).

Pardo argues that in order to ". . . know the facts that make his conduct illegal" he would have to *know* that a person had been injured or killed and that the Court was wrong in its conclusion that he did not need to know that the collision involved injury or death.

In the denial of the Motion for Acquittal, the Court stated:

> "Defendant was the driver of the vehicle involved in a collision resulting in the death of Mr. Bishop. Defendant knew he was in a collision. Defendant had a legal obligation to stop at the scene and render reasonable assistance to Mr. Bishop or contact law enforcement or emergency personnel and await their arrival. Defendant left the scene without rendering aid or contacting emergency personnel. Accordingly, with respect to Count Two, Defendant is guilty of Leaving the Scene in violation of 21 *Del. C.* § 4202(a)."[29]

Pardo testified that had he known that he injured a person that he had an obligation to stop and render aid. (A175, pg 171). The issue with the Superior Court's denial above is that the Court made a leap in the statute from the word collision to the requirement to render aid and skipped *resulting in injury or death of a person*.

Pardo asserts that if a person is going to be convicted of a felony, and face up to five years in jail, without a state of mind element, that, at a minimum it has to be proven that he knew he was in a collision involving injury or death – not a collision that he thought was with a large limb or branch.

[29] *State v. Pardo,* 2015 WL 6945310 at *8 (Del. Super. Nov 9, 2015).

CONCLUSION

There is no doubt that the death of Mr. Bishop was tragic. It is human nature to want to punish the person that is responsible for the death of another. However, Pardo maintains that this was a horrible accident and that he did not know that he struck a human being on September 12, 2014.

Pardo argues that he was found guilty of all charges on the basis of multiple errors made by the Superior Court and that the errors were of such a nature and degree that his convictions should be reversed.