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Case Number 546,2016

IN THE SUPREME COURT OF THE STATE OFDELAWARE

ATIBA MAYFIELD,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	No. 546, 2016
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

Upon Appeal from the Superior Court of the State of Delaware to the Supreme Court of Delaware

APPELLANT'S AMENDED OPENING BRIEF

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Dated: MAY 2, 2017

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NATURE AND STAGE OF THE PROCEEDINGS[1]

Under Del. Supr. Ct. R. 6(a)(ii), Atiba Mayfield appeals from his judgment in Superior Court and seeks reversal, vacatur, and remand for new trial.

A grand jury jointly indicted Mayfield and Co-Defendant Michael Broomer, on charges of First Degree Murder as to Rae'Kwon Mangrum (Count I), Possession of a Firearm during the Commission of a Felony – two counts (Counts II and V), First Degree Conspiracy (Count III), and First Degree Reckless Endangering as to Tyezghaire Stevens (Count IV).[2] Broomer and Mayfield also were indicted respectively on additional counts of Possession of a Firearm by a Person Prohibited under 11 *Del. C.* § 1448 (Counts VI and Count VII).[3] Superior Court severed trial of Mayfield and Broomer,[4] and, as to Mayfield, severed trial as to the Person Prohibited charge.[5]

On June 13, 2016, trial began.[6] On June 24, 2016, Mayfield was found guilty of all tried charges.[7] The State entered a *nolle prosequi* on the Person Prohibited charge.[8] On November 4, 2016, Mayfield received life imprisonment

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[1] "A__" refers to a page of Appellant's appendices. "T__/__/__" refers to a page
[2] A9-11 (vol. 1).
[3] A11-12.
[4] A2; D.I. #8.
[5] A5; D.I. #27.
[6] A7; D.I. #33.
[7] A456-57 (vol. 2); T06/24/2016V — 3-4.
[8] A460 (vol. 2); T06/24/2016V — 7.

on Count I.[9] Mayfield filed a Notice of Appeal on December 22, 2016.

[9] Exhibit A to Op. Br.

SUMMARY OF ARGUMENT

I. Under First Degree Murder, the court below erred by refusing jury instructions under the doctrines of transferred justification and derivative justification. The prejudice here crippled Mayfield's strongest defense and left the jury to speculate whether or not Mayfield's and Co-Defendant Broomer's conduct was justifiable.

(1) Transferred justification is cognizable and its recognition under *State v. Stevenson*, 188 A. 750, 752 (Del. Ct. Oyer & Terminer 1936) is substantially preserved by the Delaware Criminal Code and applied by courts in other Model Penal Code jurisdictions.

(2) There was a factual basis for transferred justification. Mayfield consented to a fistfight, but Mangrum secreted a gun on his person and arranged for Morris and one other man to open fire. Mayfield wrested the gun from Mangrum, and attempted to return fire at Morris, while Broomer likewise returned fire. Mayfield described his fear of being killed. His statement is corroborated by physical evidence and other witness testimony.

(3) Derivative justification is cognizable and its recognition under *State v. Winsett*, 205 A.2d 510, 519 (Del.Super. 1964) is preserved by the Delaware Criminal Code and applied by courts in other Model Penal Code jurisdictions.

(4) There was a factual basis for derivative justification. Mayfield recalled Broomer screaming, "he has a gun," and, after Morris opened fire, Broomer immediately returned fire. When they drove off, Broomer was "hysterical," stating, "They was trying to kill us again." These statements support reasonable inferences of Broomer's subjective belief of the necessity of preventing death as to both of them. The record likewise shows Mayfield's own subjective intent to aid Broomer for defensive purposes.

(5) The court below did not err in concluding that Mayfield's consent to mutual combatance did not preclude justification.

II. As to First Degree Murder, the court below erred by refusing jury instructions on lesser-included homicide offenses. These had a factual basis under an alternative view of retaliatory violence by Mayfield and Broomer, intending only to cause serious physical injury to Mangrum, but still an antecedent but-for cause of Mangrum's accidental death by Morris.

(1) The court below correctly understood 11 *Del. C.* § 271(2), but not Section 274, by holding that Mayfield cannot be guilty as accomplice unless having a *mens rea* of acting "intentionally" as to Mangrum's death.

(2) The court below improperly created other rules of automatic preclusion of lesser-included offenses.

(3) There was a factual basis for lesser-included offenses. The

instant case is indistinguishable from *Kellum v. State*, 2008 WL 2070615 (Del. May 16, 2008). Although Mayfield does not admit retaliation, a jury may hypothetically draw negative inferences that he did, precluding justification because Mayfield and Broomer provoked serious physical injury. Thus, if Morris accidentally killed Mangrum as stated in Part I *supra*, then justification does not shield liability for homicide under a lesser mental state.

STATEMENT OF FACTS

I. Evidence Presented at Trial.

From a *de novo* review, a rational jury could have believed any of the following in whole or in part:

A. Why Did Michael Broomer and Atiba Mayfield Go to North Monroe Street on April 4, 2015?

A few days before April 4, 2015, Rae'Kwon Mangrum and Michael Broomer were jointly tried in a case involving drugs inside a vehicle.[10] Broomer testified that the drugs were Mangrum's, which angered Mangrum, who declined to testify but privately maintained his innocence and blamed Broomer for the betrayal.[11]

On March 21, 2015, Wilmington Detective Robert Fox responded to a hospital where a victim received treatment for a gunshot to the leg — it was Mayfield, who would not divulge who shot him.[12] Nicodemus Morris testified that he traveled with Mangrum, Mayfield, and Broomer on March 21st.[13] Mangrum drove, contrary to the terms of his probation, and at a gas station Mayfield moved

[10] A195, A207 (vol. 1); T06/20/2016 — 108-09, 155-56 (testimony by Nicodemus Morris).
[11] A195-96, A207; T06/20/2016 — 108-10, 155.
[12] A267 (vol. 1); T06/21/2016 — 192-93 (testimony by Detective Fox).
[13] A192 (vol. 1); T06/20/2016 — 97 (testimony by Nicodemus Morris).

into the driver's seat and told Mangrum not to drive.[14] Mangrum became angry, snatched the keys and began walking away, but Morris persuaded Mangrum to come back.[15] They drove to Windsor Street, where Mangrum drew a firearm and shot at Mayfield's legs in the backseat, telling him to get out.[16] Mangrum shot twice, and Mayfield fled on foot.[17]

The shooting on April 4, 2015 occurred at 6:13 p.m.[18] One hour previously,[19] Morris accompanied Tyezghaire Stevens and others to a McDonald's on Fourth Street in Wilmington.[20] Seeing Broomer inside a vehicle at the drive-through, Morris promptly left to notify Mangrum.[21] Stevens later left with her son for Mangrum's grandmother's house, intending to meet Mangrum there.[22] She crossed a parking lot and reached a pedestrian alleyway cutting from Third Street to North Monroe Street and happened upon Mangrum waiting at the top of the alleyway.[23] They walked to Monroe Street and hung-out by the steps near his

[14] A192-93, A208; T06/20/2016 — 97-98, 161.
[15] A193; T06/20/2016 — 98-101.
[16] A193-94; T06/20/2016 — 101-05.
[17] *Id.*
[18] A234 (vol. 1); T06/21/2016 — 59-60 (testimony by Officer Begany).
[19] A221; T06/21/2016 — 7-8 (testimony by Tyezghaire Stevens).
[20] A190 (vol. 1); T06/20/2016 — 88-89 (testimony by Nicodemus Morris).
[21] A190-92; T06/20/2016 — 89-90, 94.
[22] A222-23 (vol. 1); T06/21/2016 — 13-14 (testimony by Tyezghaire Stevens).
[23] *Id.*

grandmother's house.[24]

With the aid of a transcript, the jury heard a partially redacted audio-recorded interview of Mayfield on April 5, 2015.[25] Mayfield and Broomer drove to North Monroe Street so Mayfield could settle his "beef" with Mangrum through a fistfight, "hand to hand like a man" and in Broomer's presence.[26] Mangrum had agreed, and it was organized through Mangrum's mother.[27] The agreed location was the same where Stevens found Mangrum: the *pedestrian alleyway* from North Monroe Street leading to the McDonald's parking lot.[28]

B. What Happened When Broomer and Mayfield Arrived?

Mayfield arrived at the pedestrian alleyway, and Mangrum was not there but was seen further down North Monroe Street.[29] Mangrum had "tried to set us up,"[30] using two men,[31] as Mayfield explained:

> I get out of the car and you know we start going[,] talk all crazy like he want to fight me[,] and everything tussling like pulling and then he [Mangrum] pulled a gun then some other dude [Person 2] was there

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[24] A223; T06/21/2016 — 14-16.
[25] A269-70; T06/21/2016 — 198, 201-02 (testimony by Detective Fox as foundation for State's Exhibit 99); A347 (vol. 2); T06/22/2016 — 9-10 (State's Exhibit 99 is played before the jury).
[26] A272 (vol. 1) (statement by Mayfield).
[27] *Id.*
[28] *See* A273 (vol. 1) (statement by Mayfield); A364 (vol. 2); T06/22/2016 — 77-78 (testimony by Detective Fox).
[29] A283 (vol. 1) (statement by Mayfield).
[30] A273.
[31] A275.

> just started shooting, bang, bang, bang, bang, and we were still tussling for his [Mangrum's] gun and then he [Person 2] just starts shooting and then the other guy [Person 3] runs around somewhere and I get back in the car with Mike [Broomer] and then he [Person 3] hauls out another gun just starts shooting at us again.[32]

Mayfield could only identify one of the shooters, who darted around the house, as "Nick," i.e., Nicodemus Morris.[33] Mangrum's gun was the same previously used to shoot Mayfield.[34] Mayfield wrested it from Mangrum, punched him in the face, and pushed him to the ground.[35] Mayfield tried to return fire at Morris,[36] and thought he discharged three rounds; but, the gun seemingly ran out of ammunition because it stopped firing.[37] With time for reflection, Mayfield realized that "[g]uns were simultaneously ranging off."[38]

During the interview, Mayfield learned for the first time that Mangrum died. This was deeply upsetting because they were friends.[39] Mayfield did not bring any guns,[40] and neither shot nor conspired to kill Mangrum.[41] Mayfield believed that

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[32] A272-73 (alterations added); *see also*, A295, A340 ("I didn't say Raekwon was shooting. The dude Nick was shooting.").
[33] *See* A275, A287, A295.
[34] A276.
[35] A276-77, A287.
[36] A285.
[37] A285-86.
[38] A339.
[39] A278, A281.
[40] A276.
[41] A310, A317.

Mangrum was shot by his own people,[42] i.e., while Morris was "shooting in our direction Raekwon got hit."[43] Morris began firing ten yards away from Mangrum.[44]

It was possible that Broomer shot Mangrum to save Mayfield's life, but Mayfield did not see Mangrum hit by gunfire.[45] While fighting Mangrum, Mayfield was initially unaware,[46] but saw Broomer return fire at Morris.[47] Mangrum crawled towards Morris, who continuously shot at Mayfield and Broomer before fleeing.[48]

Residing on North Monroe Street,[49] Mangrum's grandmother heard gunshots on April 4, 2015, looked outside, and saw Broomer shooting, but not at whom he was shooting.[50] Tyezghaire Stevens was outside and received a single bullet wound to her leg.[51] Speaking under panic, Stevens inculpated Broomer.[52] However, Stevens recanted at trial, admitting she did not see any guns from the

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[42] A280, A282, A297.
[43] A303.
[44] A311.
[45] A340.
[46] *See* A293-94.
[47] A332-33, A335.
[48] A340.
[49] A371 (vol. 2); T06/22/2016 — 105 (testimony by Dorothy Mangrum).
[50] A371-72; T06/22/2016 — 108-09.
[51] A224 (vol. 1); T06/21/2016 — 18 (testimony by Tyezghaire Stevens).
[52] A370 (vol. 2); T06/22/2016 — 102-03 (testimony by Brittany Mangrum).

arriving vehicle and could not identify the shooter.[53]

Broomer and Mayfield sped from North Monroe Street inside a blue Ford Focus.[54] Other Wilmington police officers located the vehicle, pursued it into Pennsylvania,[55] and later recovered two firearms that were tossed from inside — a .380 caliber Cobra and a .40 caliber handgun.[56] When ultimately caught in Ridley Township,[57] Broomer was wearing a single-knit glove over his right hand and was the driver, and Mayfield wore no gloves and was the front-seat passenger.[58] Mayfield tossed the .380 Cobra,[59] and Broomer tossed the .40 caliber.[60]

During the police chase, Broomer spoke to Mayfield under stress from the shooting, "They was trying to kill us again," and, "I told you we should have never came around here."[61] Mayfield never anticipated Mangrum's set-up: "Our families are close,"[62] Mangrum had a deeper friendship with Broomer,[63] and

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[53] *See* A225-26, A229-30 (vol. 1); T06/21/2016 — 24-26, 42-43 (testimony by Tyezghaire Stevens).
[54] A238-39; T06/21/2016 — 76-78 (testimony by Officer Begany).
[55] A28-29; T06/14/2016 — 58-59, 69-70 (testimony by Officer Wham).
[56] A57; T06/14/2016 — 176-77 (testimony by Corporal Irons); A54-55; T06/14/2016 — 163-66 (testimony by Corporal Jordan).
[57] A34; T06/14/2016 — 83 (testimony by Officer Wham).
[58] A47-48; T06/14/2016 — 137-39 (testimony by Corporal Martinez); A34, A43;T06/14/2016 — 84-89, 119-20 (testimony by Officer Wham).
[59] A279 (vol. 1) (statement by Mayfield).
[60] A334.
[61] *Id.*
[62] A292.
[63] A331.

Mangrum's death "was the furthest thing from my mind."[64] Reconciliation would have been achieved, if "we were just supposed to just fight like his mother said."[65]

Morris identified the recovered .380 caliber pistol from the police chase, State's Exhibit 13,[66] as the same caliber Mangrum used to shoot Mayfield.[67] In fact, Mangrum's firearm "[l]ooks a lot like" State's Exhibit 13.[68]

On April 4, 2015, and after hearing gunshots on patrol,[69] Officer Matthew Begany began driving southbound on North Monroe Street.[70] Approaching the 200 block, Begany heard more gunshots and saw in the distance a blue Ford Focus with a black male standing next to it with his arm fully extended.[71] The arm moved consistent with gunfire recoil.[72] The gunman either jumped back into the vehicle or retreated down the adjoining alleyway.[73]

Morris admitted to shooting at Mayfield and Broomer on April 4, 2015 with

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[64] A341.
[65] A330.
[66] *See* A57 (vol. 1); T06/14/2016 — 174-76 (testimony by Corporal Irons as foundation for State's Exhibit 13).
[67] A192, A211 (vol. 1); T06/20/2016 — 94, 171-73 (testimony by Nicodemus Morris).
[68] A173; T06/20/2016 — 173
[69] A234; T06/21/2016 — 58-61 (testimony by Officer Begany).
[70] A235; T06/21/2016 — 65.
[71] A235-36; T06/21/2016 — 63-67.
[72] *Id.*
[73] *Id.*

a .9 millimeter Glock.[74] While firing the gun, "It recoiled, it was jumping" and, "The more I shot, the more the gun jumped, and it just kept going up."[75] Seeing the police car, Morris ran down the same alleyway where he earlier hid his gun.[76] He knew, as a probationer, that he was a "Person Prohibited" from possessing a firearm.[77]

Morris claimed that a firearm was protruding from the Ford Focus when it arrived and he ran for his gun before any shots were fired.[78] But Stevens testified that Morris was not outside.[79] Morris claimed he was inside Mangrum's grandmother's house, but was summoned by Mangrum purportedly for no reason moments before the shooting,[80] with enough time to hide a gun in an alleyway.[81] Morris equivocated whether he was instructed to bring the gun outside, (e.g., "No, *not really*"); but, it "stayed for protection"[82] because of Mangrum's "beef" with Broomer.[83]

In exchange for Morris' testimony, the State provided immunity and entered

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[74] A186-88; T06/20/2016 — 73-79 (testimony by Nicodemus Morris).
[75] A188; T06/20/2016 — 79.
[76] A188-89; T06/20/2016 — 81-82.
[77] A188, A197; T06/20/2016 — 81, 116.
[78] A186; T06/20/2016 — 73.
[79] A223; T06/21/2016 — 15 (testimony by Tyezghaire Stevens).
[80] *See* A204-05; T06/20/2016 — 142-43, 146-48 (testimony by Nicodemus Morris).
[81] *See* A204; T06/20/2016 — 143.
[82] A204; T06/20/2016 — 143-44 (emphasis added).
[83] *See* A206; T06/20/2016 — 152.

into a cooperation agreement.[84] The State dropped a charge under 11 *Del. C.* § 1448,[85] and agreed to recommend an out-of-state placement in lieu of revocation of probation.[86] Morris inculpated Broomer in a police interview,[87] but claimed at trial that Mayfield fired a gun at Mangrum from inside a vehicle.[88] Morris never previously told that to police and was afraid of being a murder suspect.[89] He was impeached by prior convictions for Receiving Stolen Property and Carrying a Concealed Deadly Weapon.[90]

C. What Does the Physical Evidence Reveal?

1. Communications between Mangrum and Broomer.

Cell phone records confirm that, at 5:28 P.M. — approximately 45 or 47 minutes before the shooting, Broomer's cell phone received a text message from Mangrum's.[91] At 5:30 P.M. and 5:35 P.M., Broomer's cell phone received voicemails from Mangrum's.[92] Between 5:52 p.m. and 6:06 p.m., there were seven phone calls between these cell phones with only three going to voicemail.[93]

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[84] Defense Exhibits 5 and 6, *referenced in*, A199 (vol. 1); T06/20/2016 — 122-25.
[85] A199-200; T06/20/2016 — 125-26.
[86] A201; T06/20/2016 — 132.
[87] A206-07, A213; T06/20/2016 — 153-54, 180-81.
[88] A213; T06/20/2016 — 181.
[89] A200, A215-16; T06/20/2016 — 126, 189-90.
[90] A203; T06/20/2016 — 138-39.
[91] A406-07 (vol. 2); T06/23/2016 — 12-14 (testimony by Detective Fox).
[92] A407; T06/23/2016 — 14-16.
[93] A406; T06/23/2016 — 11-12.

2. Hand-to-Hand Fighting between Mangrum and Mayfield.

Fingernail scrapings from Mangrum's hands were found during an autopsy,[94] but the State did not offer any DNA testing. A sweater worn by Mayfield on April 4, 2015 was recovered by police, and its hood had Mayfield's blood on it.[95]

3. Mangrum Was Not Shot at Close Range.

Mangrum died from five gunshot wounds and none were close range (three feet or less).[96] None of the projectiles were recovered, having exited his body.[97] Forensic pathology could not conclude whether a wound resulted from any particular caliber of bullet.[98] Bullets struck Mangrum in his left thigh, chest, abdomen, and posterior torso.[99]

4. Multiple Guns Were Fired from Different Positions And at Moving Targets.

At North Monroe Street, the police recovered six spent casings that were discharged by a .40 caliber firearm,[100] and five spent casings from a .9 millimeter

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[94] A176 (vol. 1); T06/20/2016 — 35-36 (testimony by Jennie Vershvovsky, M.D.); A92; T06/15/2016 [A.M. Session] — 97 (testimony by Corporal Law).
[95] A179; T06/20/2016 — 44-45 (testimony by Detective Fox).
[96] A172-73, A176; T06/20/2016 — 17-19, 30 (testimony by Dr. Vershvovsky).
[97] A173, A175; T06/20/2016 — 20, 29.
[98] A178; T06/20/2016 — 40-41.
[99] A174-75; T06/20/2016 — 23-26.
[100] A121 (vol. 1); T06/15/2016 [P.M. Session] — 104 (testimony by Corporal Stephey).

firearm.[101] Bullets of .40 caliber and .9 millimeter cannot be fired from the same gun.[102] All .40 caliber casings were found north of a manhole cover on North Monroe Street and all .9 millimeter cases were found south of it.[103]

The .40 caliber casings from North Monroe Street matched the recovered .40 caliber firearm recovered.[104] Although the .9 millimeter caliber firearm that Morris used was not recovered, a ballistics expert determined that all .9 millimeter casings were fired from the same weapon.[105]

The police also recovered two projectiles, both were .40 caliber,[106] consistent with a moving target: One had ricocheted off the bottom of a stockade fence towards the east in an alleyway alongside and lodging within 220 North Monroe Street[107] — a good distance away from Mangrum and Stevens, where Mangrum's grandmother resides at 226 North Monroe Street.[108] The alleyway along 220 North Street, on the other hand, goes east to Adams Street.[109]

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[101] A125; T06/15/2016 [P.M. Session] — 118.
[102] *Id.*
[103] *Id.*
[104] A252; T06/21/2016 — 132 (testimony by Carl Rone).
[105] A252-53 (vol. 1); T06/21/2016 — 132, 134-35.
[106] *Id.*
[107] *See* A123-24; T06/15/2016 [P.M. Session] — 111-12, 114-15 (testimony by Corporal Stephey); A253-55; T06/21/2016 — 137, 141-44 (testimony by Carl Rone).
[108] *See* A371 (vol. 2); T06/22/2016 — 105 (testimony by Dorothy Mangrum).
[109] A124 (vol. 1); T06/15/2016 [P.M. Session] — 116 (testimony by Corporal Stephey).

5. Mayfield Had Gripped the .380 Caliber Cobra; But, It Was Defective.

No fingerprints were recovered from any firearms,[110] but DNA was obtained, and swabs from Mayfield and Broomer were taken for comparison.[111] Results from the .40 caliber were inconclusive.[112] One sample from the grip of the .380 caliber Cobra matched Mayfield and the remaining samples were inconclusive.[113]

No spent casings from a .380 caliber firearm were recovered from North Monroe Street.[114] Inside Broomer's vehicle, the police recovered one spent casing from a .380 firearm,[115] but could not determine if it came from the recovered .380 Cobra.[116] When a ballistics expert inspected the recovered Cobra, it was initially operable.[117] But once test-fired, a defective extractor, causing the firearm to stovepipe, was discovered — it happened twice.[118] "Stovepiping" means a bullet is discharged, but the spent casing fails to eject and becomes lodged or "jammed"

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[110] A88, A92; T06/15/2016 [A.M. Session] — 80, 94 (testimony by Corporal Law).
[111] A75; T06/15/2016 [A.M. Session] — 27-29 (testimony by DNA Analyst Jennifer Sampson).
[112] A78-79; T06/15/2016 [A.M. Session] — 41-44 (discussing results for DNA samples E05 to E08).
[113] A76-79; T06/15/2016 [A.M. Session] — 33-42.
[114] A125; T06/15/2016 [P.M. Session] — 118-19 (testimony by Corporal Stephey).
[115] A86; T06/15/2016 [A.M. Session] — 70-71 (testimony by Corporal Law).
[116] A253; T06/21/2016 — 134 (testimony by Carl Rone).
[117] A258; T06/21/2016 — 157.
[118] A259-60; T06/21/2016 — 159-61, 164.

inside, rendering the firearm inoperable until the casing is cleared.[119]

That the Cobra was initially operable resulted from police examination of the evidence: Before testing, it is standard police procedure to "make the gun safe," by removing any bullets or magazines and, if a gun had stovepiped, by clearing the spent casing.[120]

D. What Happened Afterwards?

On April 4, 2015, but after the shooting of Mangrum, someone shot a .9 millimeter firearm into the home of Mayfield's grandmother.[121] On April 5, someone shot a .9 millimeter firearm into the home of Mayfield's brother's girlfriend.[122] No one was hurt.[123] The casings from these two shootings matched the same gun that fired the .9 millimeter casings recovered from North Monroe Street.[124] Morris denied using his .9 millimeter to shoot into these homes.[125] He offered a fantastic story that, after the shoot-out with Mayfield and Broomer, he gave the gun to some unknown person he just met, who so happened to know

[119] A94; T06/15/2016 [A.M. Session] — 101-02, 104 (testimony by Corporal Law).
[120] A94-95; T06/15/2016 [A.M. Session] — 105-06 (testimony by Corporal Law).
[121] A180; T06/20/2016 — 47-49 (testimony by Detective Fox).
[122] A180-81; T06/20/2016 — 47-50.
[123] *Id.*
[124] A263-64; T06/21/2016 — 176-79 (testimony by Carl Rone).
[125] A212 (vol. 1); T06/20/2016 — 174-75 (testimony by Nicodemus Morris).

Mangrum and Broomer, but not Mayfield or his relatives.[126]

II. Defense Requests for Jury Instructions.

During the prayer conference, defense counsel requested jury instructions on lesser-included offenses and justification by self-defense and by defense of others.[127] A factual basis existed for the requested instructions under multiple alternatives: As to lesser-included offenses: (1) if Mayfield and Broomer were initial aggressors and had forfeited their right to use deadly force;[128] or (2) if Mayfield (using the .380 caliber Cobra) shot Mangrum once in the thigh, as retaliation in kind for having been shot in the leg, but lacked an intent to kill.[129]

As to justification, where Mayfield's statement was capable of being believed by the jury, he would not be guilty of First Degree Murder,[130] having acted in self-defense and, from putative accomplice liability, he also shared in Broomer's justification because there was no underlying crime to have aided or abetted: (1) Mayfield consented to a fistfight but Mangrum unexpectedly drew a firearm and Morris began shooting; (2) Mayfield acted in self-defense by using the .380 Cobra to return fire at Morris; and, (3) as a result, either Morris accidentally killed Mangrum, or Broomer intentionally shot Mangrum in mutual or self-

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[126] *Id.*
[127] *See* A388, A392 (vol. 2); T06/22/2016 — 174, 189-91.
[128] *See* A388-89, A395; T06/22/2016 — 175-79, 201-02.
[129] *See* A391; T06/22/2016 — 186-88.
[130] A388; T06/22/2016 — 175-76.

defense.[131] Justification was necessary because the jury could determine if Mayfield's conduct was a but-for cause of Mangrum's death.[132]

The Superior Court rejected all grounds,[133] globally ruling that Mayfield's statement, if believed, would be "exculpatory" only.[134] As to lesser-included offenses, Superior Court rejected the proposition that accomplice liability can reach any lesser mental state than *intentional*.[135]

Justification was rejected because Mayfield never admitted to shooting Mangrum,[136] and the record was undeveloped on "what Broomer's subjective state of mind was."[137] Superior Court disagreed with argument that the inability to retreat and Broomer's subjective state of mind are reasonably inferable where Mangrum unexpectedly drew a firearm and Morris had opened fire as well.[138] Superior Court further reasoned, "[I]f the argument is that Broomer was justified in shooting Mangrum," then this defense was not good for Mayfield: "Well, just because you get vicarious liability doesn't mean you get vicarious justification."[139]

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[131] A390-94; T06/22/2016 — 183, 186-88, 190-200.
[132] A391; T06/22/2016 — 186-87.
[133] A397; T06/22/2016 — 212.
[134] A89; T06/22/2016 — 180.
[135] *See, e.g.*, A395; T06/22/2016 — 202 ("How [can] you be an accomplice to a reckless crime?").
[136] A389, A392; T06/22/2016 — 177, 179, 189.
[137] A395-96; T06/22/2016 — 204-05.
[138] A396; T06/22/2016 — 207-08.
[139] A394; T06/22/2016 — 197-98.

Finally, Superior Court rejected the basis if Mayfield and Broomer's actions, singularly or combined, caused Morris to inadvertently shoot Mangrum.[140]

[140] A391; T06/22/2016 — 185-86.

ARGUMENT

I. SUPERIOR COURT ERRED BY REFUSING REQUESTS FOR A JURY INSTRUCTION ON JUSTIFICATION BY SELF-DEFENSE OR BY DEFENSE OF OTHERS.

A. Question Presented.

Where Count I of the Indictment accused Atiba Mayfield as principal or accomplice to Murder First Degree of Rae'Kwon Mangrum, did the court below commit reversible error by denying requested jury instructions on justification by self-defense or by defense of others, 11 *Del. C.* §§ 464-65, where there was a factual basis in the record to have requested such?

Mayfield preserved this issue in the court below by argument on the record during the prayer conference.[141]

B. Standard and Scope of Review.

This Court reviews "*de novo* a trial court's refusal to give a requested jury instruction on any defense theory."[142]

C. Merits of Argument.

As a case of first impression, the doctrines of transferred justification and of derivative justification are cognizable,[143] there was a factual basis in the record for

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[141] *See* Statement of Facts, Part II *supra*.
[142] *Allen v. State*, 970 A.2d 203, 210 (Del. 2009) (en banc) (citations omitted).
[143] *See* Subparts 1 and 3 *infra*.

both,[144] and the requirement of "without fault" is derogated.[145] Refusal by the court below to so instruct constituted reversible error.

1. Transferred Justification is Cognizable because Co-Extensive with Liability under the Transferred Intent Doctrine.

The court below erred by ruling that justification is unavailable if Morris accidently shot and killed Mangrum, where Mayfield and Broomer, acting in mutual or self-defense, used deadly force towards Morris.[146]

(a) Common Law.

Chief Justice Layton recognized a "somewhat unusual" situation in *State v. Stevenson*, where the accused did not intentionally shoot the deceased, but aimed at his associate (also armed) and, under "a state of affairs which would excuse the killing of an assailant under the law of self-defense," accidentally shot and killed the deceased.[147] The "emergency" of self-defense "will be held to excuse the person attacked from culpability if in attempting to defend himself he unintentionally and without negligence kills a third person."[148] Other courts have

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[144] *See* Subparts 2 and 4 *infra*.
[145] *See* Subpart 5 *infra*.
[146] *See supra* Statement of Facts, Part II.
[147] *State v. Stevenson*, 188 A. 750, 752 (Del. Ct. Oyer & Terminer 1936).
[148] *Id.*; *see also*, *State v. Phillips*, 187 A. 108, 110 (Del. Ct. Oyer & Terminer 1936), where on a requested instruction on misadventure "the principles of self-defense may be involved, not for the purpose of establishing self-defense, but only to determine whether the accused was or was not at the time engaged in a lawful act." *Stevenson* is the better approach because the accused in *Phillips* still had a

termed this doctrine "transferred justification,"[149] because justification is co-extensive with liability under the transferred intent doctrine.[150]

(b) Text, Structure, and History of Our Statutory Law.

The text, structure, and history of the Delaware Criminal Code demonstrate that transferred justification is preserved. First, the common law is derogated whether force must be directly inflicted upon the body in order to invoke justification: "The use of force upon ***or toward*** another person is justifiable,"[151] i.e., "upon or ***directed towards*** the body of another person,"[152] and, "Purposefully firing a firearm ***in the direction of*** another person or at a vehicle ***in which another person is believed to be*** constitutes deadly force."[153]

Second, causation is an antecedent but-for standard.[154] Intentional causes of harmful results suffice where the actual result differs (1) only in respect that a different person is injured or affected or (2) "the same kind of injury or harm as the probable result" and "not too remote or accidental in its occurrence to have a

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conditional intention under 11 *Del. C.* § 254 to act in self-defense if the aggressor did not withdraw.

[149] *E.g.*, *Crawford v. State*, 480 S.E.2d 573, 575 (Ga. 1997).

[150] *E.g.*, *Rogers v. State*, 994 So. 2d 792, 802 (Miss. Ct. App. 2008); *Smith v. State*, 419 S.E.2d 74, 75 (Ga. Ct. App. 1992); *People v. Matthews*, 154 Cal. Rptr. 628, 631 (Ct. App. 1979); *State v. Clifton*, 290 N.E.2d 921, 923 (Ohio Ct. App. 1972).

[151] *See* 11 Del. C. § 464(a) (emphasis added).

[152] *Id.* § 471(d) (emphasis added).

[153] *Id.* § 471(a) (emphasis added).

[154] *Id.* § 261.

bearing on the actor's liability or on the gravity of the offense."[155] This reduces to statutory form the transferred intent doctrine,[156] without distinguishing volitional human intervention and other intervening causes.[157] If a robber "shoots at a policeman with intent to kill and provokes a return of fire by the officer that kills a bystander or an accomplice," then the robber incurred liability for intentional murder, leaving a jury question if death was too remote or accidental to have any bearing on the gravity of the offense.[158] Likewise, one who acts in self-defense becomes an "innocent intermediary" of the aggressor: "So too an aggressor who provokes his victim to fire in reasonable self-defense ought to be guilty, at the least, of manslaughter if a bystander is hit, even though he does not mean to cause the shot in self-defense."[159] This is analytically the same as causation under a transferred intent.[160] Clearly, justification is co-extensive with such forms of liability.

Finally, under Delaware's analogue to Section 3.09 of the Model Penal Code, if one "recklessly or negligently injures or creates a risk of injury to innocent

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[155] *Id.* § 262(1)-(2).
[156] DELAWARE CRIMINAL CODE WITH COMMENTARY 44 (1973) (discussing *State v. Gardner*, 203 A.2d 77 (Del. 1964)), *available at* http://delawarelaw.widener.edu/current-students/library/research/delaware-criminal-code-with-commentary.
[157] 1 MODEL PENAL CODE, pt. I, § 2.03, cmt. 3 at 262 **[A474 (vol. 2)]**.
[158] *Id.* at 263.
[159] *Id.* § 2.06, cmt. 3 at 302 **[A481]**.
[160] *Id.* at 302 & n.13 (citing § 203, Comment 3).

persons," then justification is "unavailable in a prosecution for an offense involving recklessness or negligence towards innocent persons."[161] But, "innocent persons" exclude aggressors.[162] Thus, the portion of *Stevenson* relating to transferred justification is substantially preserved and modified by excluding liability for the accidental death of any aggressor.

(c) Application by Courts.

Courts in other Model Penal Code jurisdictions are in accord, first, that "innocent persons" under Section 3.09 do not include aggressors.[163] It is a jury question whether the injured person was an "innocent" non-aggressor if part of a hostile mob that threatened and pursued the accused.[164]

Second, even if the injured person was an innocent bystander, the accused is still entitled to an instruction that justification exonerates accidental injuries if unaccompanied by recklessness or negligence.[165] Refusal is inherently prejudicial because it invites a "[l]eisurely assessment of the circumstances and the danger to others" under a jury's hindsight bias, whereas, "In many cases, the victim has only

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[161] 11 Del. C. § 470(b).
[162] *See id.* § 464(e)(1) (alteration added).
[163] *State v. Rodriguez*, 949 A.2d 197, 202 (N.J. 2008) (discussing N.J.S.A. § 2C:3-9(c)).
[164] *Dugar v. State*, 464 S.W.3d 811, 819 (Tex. Ct. App. 2015).
[165] *Id.* at 819-20; *People v. Morris*, 491 N.Y.S.2d 860, 862-63 (Sup. Ct. App. Div. 1985).

seconds to act in order to avoid injury or death."[166]

Third, justification is available even if the accused is neither charged with an intentional offense,[167] nor directly inflicted the injury: An instruction was warranted where, during a fistfight, a third person fell out of a hotel window. It was immaterial that the accused neither opened the window nor pushed the victim out, if the affray was an antecedent but-for cause of the result.[168]

Finally, transferred justification is not cumulative of mistake-of-fact or accident,[169] because a jury may improperly convict even where "uncontested" by the State that the alleged victim was the aggressor,[170] or under an unfair prejudice that merely having a weapon or using deadly force is wrong under any circumstance,[171] or under a confusion why resulting harm was accidental where the accused *intentionally* acted in self-defense, implicating the transferred intent doctrine.[172] For the same reasons, the court below committed reversible error.

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[166] *Commonwealth v. Fowlin*, 710 A.2d 1130, 1133-34 (Pa. 1998).
[167] *People v. McManus*, 496 N.E.2d 202, 205 (N.Y. 1986).
[168] *Holloman v. State*, 51 P.3d 214, 222 (Wyo. 2002).
[169] *See Commonwealth v. Scott*, 73 A.3d 599, 602-03 (Pa.Super. 2013).
[170] *See, e.g.*, *Rodriguez*, 949 A.2d at 170-71, 173.
[171] *See, e.g.*, *Rogers*, 994 So. 2d at 803.
[172] *See, e.g.*, *Holloman*, 51 P.3d at 222 (defense of accident "does not address a claim that an intentional blow in self-defense against one victim caused the accidental death of a third person.").

2. The Facts Warranted an Instruction on Transferred Justification, if Morris Shot Mangrum while Mayfield and Broomer Acted in Mutual or Self-Defense.

There was a factual basis in the record for a jury instruction under 11 *Del. C.* §§ 464-65, as a matter of transferred justification if Morris had accidentally shot Mangrum. First, Mayfield consented to a fistfight.[173] Why consent to mutual combatance, or provocation by physical injury, will not forfeit the privilege of deadly force is incorporated from Subpart 5, *infra*. A jury can believe Mayfield's statement as to consenting to a fistfight with Mangrum,[174] and that Mangrum expected Mayfield and Broomer's arrival on April 4, 2015.[175]

This is corroborated by other evidence: Tyezghaire Stevens described Mangrum's reputation for fighting,[176] and on April 4, 2015 she happened upon Mangrum, who was waiting in an alleyway consistent with the agreed-upon location for the fistfight.[177] Fingernail scrapings were discovered on Mangrum's body and Mayfield's blood was on his own clothes, supporting inferences of hand-to-hand fighting.[178] Mangrum was notified that Broomer was in the vicinity,[179] and

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[173] *See supra* Statement of Facts, Part I.A.
[174] *See supra* Statement of Facts, Part I.A.
[175] *See supra* Statement of Facts, Part I.C.1.
[176] A231 (vol. 1); T06/21/2016 — 46 (testimony by Tyezghaire Stevens).
[177] *See supra* Statement of Facts, Part I.A.
[178] *See supra* Statement of Facts, Part I.C.3.
[179] *See supra* Statement of Facts, Part I.A.

cell phone records establish actual or attempted communication between them.[180]

Despite the opportunity to interview the Mangrum family, the State presented no rebuttal that Mayfield was close to the Mangrum family and that Mangrum's own mother arranged the fistfight[181] — and a rational jury may resolve that against the State under its burden of production. Furthermore, Mangrum's grandmother knew Broomer since he was a child,[182] which is probative of his deep friendship with Mangrum notwithstanding their recent feud.

Second, Mayfield's interview satisfies his subjective belief of the necessity of deadly force to prevent death or serious physical injury, and of his inability to retreat with complete safety, as well as a foundation for Broomer's defense of Mayfield.[183] When Mayfield fought with Mangrum, the latter unexpectedly drew a .380 caliber Cobra,[184] "Once I saw Raekwon had a gun, I was scared," and "all I could see was not getting shot again, trying to take the gun from him."[185] Then Morris started shooting at both Mayfield and Broomer,[186] where Mangrum had set them up.[187] Mangrum thereby exceeded the scope of Mayfield's consent,[188] and

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[180] *See supra* Statement of Facts, Part I.C.1.
[181] *See supra* Statement of Facts, Part I.A.
[182] A372 (vol. 2); T06/22/2016 — 109 (testimony by Dorothy Mangrum).
[183] 11 Del. C. § 465(a)(2).
[184] *See supra* Statement of Facts, Part I.B.
[185] A333 (statement by Atiba Mayfield)
[186] *Id.*
[187] *See supra* Statement of Facts, Part I.B.

Mangrum and Morris became aggressors by provoking the unlawful force of death or serious physical injury.[189] Mayfield wrested the gun from Mangrum and, acting in his own self-defense, pointed it at Morris and pulled the trigger.[190] This was "deadly force," whether or not the firearm malfunctioned.[191]

These statements are corroborated: Morris admitted that Mangrum owned a .380 caliber Cobra which "[l]ooks a lot like" the one recovered by police.[192] Mayfield's DNA was on this weapon and it had a defective ejector rendering it inoperable,[193] consistent with his statement that, when trying to shoot at Morris, it stopped firing.[194] Mangrum sent for Morris minutes before the shooting, Morris brought his gun with him and hid it;[195] Tyezghaire Stevens did not see Morris outside at all;[196] and Morris opened fire on Broomer and Mayfield,[197] which are all probative of a plan for ambush. Given Morris' *crimen falsi* convictions and corrupt bias, a jury may rationally disbelieve that portion of his testimony where he

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[188] *Potts v. State*, 2007 WL 646202, at *1 (Del. Mar. 5, 2007) (consent to fighting one-on-one under 11 *Del. C.* § 452 is not consent to being blind-sided by a third person or attacked by a deadly weapon).
[189] 11 Del. C. §§ 464(e)(1), 471(e).
[190] *See supra* Statement of Facts, Part I.B.
[191] *See* 11 Del. C. § 471(a), and Argument in Part I.C.1(b) *supra*.
[192] *See supra* Statement of Facts, Part I.B.
[193] *See supra* Statement of Facts, Part I.C.5.
[194] *See supra* Statement of Facts, Part I.B.
[195] *See supra* Statement of Facts, Part I.B.
[196] *See supra* Statement of Facts, Part I.B.
[197] *See supra* Statement of Facts, Part I.B.

denied any instruction by Mangrum to bring a gun outside.[198]

Mayfield's subjective fear is supported by Mangrum and Morris' propensity for violence and their regular access to firearms, "[D]etermining the reasonableness of a defendant's fear at the time of a killing includes the defendant's familiarity with the victim's behavior in the past."[199] Mangrum shot Mayfield in the leg on March 21, 2015,[200] supporting inferences of Mangrum's violent temper over a trivial dispute. Morris has a conviction for Carrying a Concealed Deadly Weapon and keeps a gun on him at all times despite his probationer status.[201] Two subsequent shootings were directed at Mayfield's family, which utilized the same .9 millimeter caliber handgun used by Morris at the shooting on North Monroe Street.[202] A jury may disbelieve Morris' testimony that he was not responsible for those shootings, thereby inferring Morris' own propensity for deadly violence and access to firearms.

Third, there was a factual basis of Mangrum's accidental shooting by Morris. Forensic pathology could not determine which caliber of bullets struck Mangrum, because none lodged in his body.[203] Mayfield fought Mangrum hand-

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[198] *See supra* Statement of Facts, Part I.B.
[199] *Commonwealth v. Zenyuh*, 453 A.2d 338, 340 (Pa.Super. 1982).
[200] *See supra* Statement of Facts, Part I.A.
[201] *See supra* Statement of Facts, Part I.B.
[202] *See supra* Statement of Facts, Part I.D.
[203] *See supra* Statement of Facts, Part I.C.3.

to-hand, but Mangrum was not shot at close range,[204] whereas Morris opened fire ten yards away and admitted that his gun recoiled and kept jumping as he fired.[205] That comports with Officer Begany's testimony that he saw a man whose arm moved consistent with recoil from gunfire and fled on foot into an alleyway.[206] Likewise, Stevens recanted her police statement and acknowledged she did not see any guns and did not know who shot her,[207] consistent with being shot at a distance and accidentally by Morris.

Accordingly, there was an ample record basis that Morris accidentally shot Mangrum while Mayfield and Broomer acted in mutual or self-defense. The outcome is no different if Broomer accidentally shot Mangrum. Preclusion under 11 *Del. C.* § 470(b) does not include aggressors, such as Mangrum, whether accidentally killed by Morris or by a third party.[208] Here, acting in own self-defense, Mayfield had a ground independent of Broomer's. The court below thereby committed reversible error.

3. Derivative Justification is Cognizable: An Accomplice is Justified if the Principal Was Justified.

The court below erred by ruling, "[J]ust because you get vicarious liability

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[204] *See supra* Statement of Facts, Part I.C.3.
[205] *See supra* Statement of Facts, Part I.B.
[206] *See supra* Statement of Facts, Part I.B.
[207] *See supra* Statement of Facts, Part I.B.
[208] *See supra* Argument, Part I.C.1.

doesn't mean you get vicarious justification."[209]

(a) Common Law.

The common law required a principal to be convicted as a condition precedent to that of any accomplice,[210] because accomplice liability is derivative.[211] The existence of a crime by a principal must be proved,[212] "It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act."[213]

Delaware common law recognized derivative justification in *State v. Winsett*, where two accomplices were jointly-tried with the principal and the jury was charged that if the principal acted in self-defense, then the accomplices "cannot be held criminally responsible for aiding and abetting a homicide which is found to have been committed in self-defense."[214] Other jurisdictions reached the same result.[215]

(b) Text, Structure, and History of Our Statutory Law.

The Delaware Criminal Code derogated the rule that a principal must be

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[209] *See supra* Statement of Facts, Part II.
[210] DELAWARE CRIMINAL CODE WITH COMMENTARY 50 (1973).
[211] *People v. Prettyman*, 925 P.2d 1013, 1018 (Cal. 1996).
[212] *State v. Hawk*, 170 S.W.3d 547, 550 (Tenn. 2005).
[213] *Shuttlesworth v. City of Birmingham*, 373 U.S. 262, 265 (1963).
[214] *State v. Winsett*, 205 A.2d 510, 519 (Del.Super. 1964).
[215] *E.g.*, *Adams v. United States*, 558 A.2d 348, 349-51 (D.C. 1989); *United States v. Nystrom*, 39 M.J. 698, 703 (N-M. Ct. M.R. 1993) (accessory after-the-fact).

convicted,[216] but only to accomplish "procedural independence" and not to "dispense with the necessity of proving the commission of the crime as an element of liability of the accomplice . . ."[217] The derivative nature of accomplice liability remains intact, and if "the reason for the principal's acquittal are relevant to the accomplice's guilt," then such "can be taken into account in his trial."[218]

Nothing alters the result in 11 *Del. C.* § 272, an analogue to Section 20.05 of the New York Penal Law of 1965 and Section 2.06 of the Model Penal Code.[219] It is no defense for accomplices if a principal is not guilty "**[1]** because of irresponsibility or other legal incapacity or exemption, or **[2]** because of unawareness of the criminal nature of the conduct in question or of the accused's criminal purpose, or **[3]** because of other factors precluding the mental state required for the commission of the offense . . ."[220]

The original meaning of Section 272 does not include justification, where usage of "irresponsible" in the New York Penal Law of 1965 is seen in Article 30: "Defenses Involving Lack of Criminal Responsibility," which provide for Infancy

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[216] *See, e.g.*, 11 *Del. C.* § 272(2).
[217] 1 MODEL PENAL CODE, pt. I, § 2.06, cmt. 10 at 327 **[A327 (vol. 2)]**.
[218] DELAWARE CRIMINAL CODE WITH COMMENTARY 50-51 (1973).
[219] *Compare* PROPOSED DELAWARE CRIMINAL CODE § 131(1), at 55-56 (1967) **[A522-23 (vol. 2)]** *with id.*, *Appendix C* at 500 **[A524]** *and* 1 MODEL PENAL CODE, pt. I, § 2.06(7) **[A476-78]**.
[220] 11 Del. C. § 272(1) (alterations added).

(§ 30.00) and Mental Disease or Defect (§ 30.05).[221] Practice commentary clarifies that "other legal incapacity or exemption" includes infancy and immunity.[222] The Model Penal Code likewise placed immaturity with insanity under Article 4, "Responsibility,"[223] because juvenile delinquency developed under concepts of "irresponsibility" or "incapacity" of the person or "exemption" from the subject-matter jurisdiction of criminal court.[224] In addition to insanity,[225] "irresponsible" refers to morally-similar volitional defenses: involuntary intoxication,[226] automatism,[227] and duress.[228]

Our legislature intended for the same usage in Section 272(1), where juveniles ordinarily do not have criminal liability, but adults do if aiding or abetting a juvenile.[229] Section 272(1) does not bar justification, because "irresponsible" refers to circumstances where a crime occurred but a person is not responsible, as opposed to where no crime occurred at all. This distinction

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[221] N.Y. Penal Law §§ 30.00-30.05.
[222] Richard G. Denzer & Peter McQuillan, *Practice Commentary to § 20.05*, *in* 39 MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK *Penal Law* § 20.05, at 39 (1967) **[A529-30 (vol. 2)]**.
[223] 2 MODEL PENAL CODE, pt. I, §§ 4.01, 4.10 **[A514-16]**.
[224] *See id.* § 4.10, cmt. 2 at 273-76 **[A517-520]**.
[225] *Id.* § 4.01(1) **[A514]**.
[226] *See, e.g.*, 1 MODEL PENAL CODE, pt. I, § 2.08, *Explanatory Note* at 349-50 **[A496-97]**.
[227] *See, e.g., id.* § 2.01, cmt. 2 at 219 **[A468]**.
[228] *See, e.g., id.* § 2.09, cmt. 2 at 373 **[A499]**.
[229] *See* 10 Del. C. § 1002(a); *State v. Busse*, 847 P.2d 1304, 1306-07 (Kan. 1993) (adults have accomplice liability for aiding juvenile delinquent).

comports with 11 *Del. C.* §§ 464 to 467, which describe "justifiable" conduct,[230] i.e., "socially desirable," where the actor "has done nothing wrong; nor does his act suggest any criminal propensity to deviate from social norms."[231]

Justification does not relate to "unawareness of the criminal nature of the conduct in question or of the accused's criminal purpose."[232] That clarifies the scope of "innocent intermediary" liability.[233] To equate that with justification "confuses the issue of who commits a crime with the issue of whether a crime was committed."[234]

Finally, justification does not *preclude* a mental state "required for the commission of the offense,"[235] such as Mistake-of-Fact or Extreme Emotional Disturbance,[236] because one *still has* intent to harm but it is justified.[237] The same rationales for transferred justification apply.[238] Since Section 272(1) is derived from the New York Penal Law of 1965, "[T]here is no basis for limiting the application of the defense of justification to any particular *mens rea* or to any

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[230] *See* 11 Del. C. §§ 464(1), 465(1), 466(1), 467(1).
[231] *Coleman v. State*, 320 A.2d 740, 742 (Del. 1974) (quoting DELAWARE CRIMINAL CODE WITH COMMENTARY 117 (1973)).
[232] *See* 11 Del. C. § 272(1).
[233] *See id.* § 271(1).
[234] *See State v. Montanez*, 894 A.2d 928, 944 n.22 (Conn. 2006).
[235] *See* 11 Del. C. § 272(1).
[236] *See, e.g.*, *id.* § 441(1); *Pendry v. State*, 367 A.2d 627, 630-31 (Del. 1976).
[237] 2 MODEL PENAL CODE, pt. I, § 3.04, cmt. 2(b) at 39 ("The existence of other motives does not detract from the reason why the privilege is granted.") **[A508]**.
[238] *See supra* Argument, Part I.C.1.

particular crime involving the use of force."[239] "The defense must not be viewed as one that operates to negate or refute an aspect of the crime change," because justified conduct is lawful and exonerating.[240]

(c) Application by Courts.

The Supreme Court of Connecticut held that its analogues to the Model Penal Code did not abrogate derivative justification, and expressly relied upon our Superior Court in *Winsett* as authority that accomplices are entitled to an instruction whether a principal committed homicide in self-defense.[241] It is warranted on a factual basis of the subjective belief of the principal, the accomplice, or both: "Even if a principal does not act in self-defense, an accused accessory still may defend against an accessory charge by demonstrating that his act of soliciting, requesting, commanding, importuning or intentionally aiding the principal itself was committed in self-defense . . ."[242]

That acquittal of the principal is no defense for the accomplice has no bearing on derivative justification,[243] because that "confuses the issue of who

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[239] *People v. McManus*, 496 N.E.2d 202, 205 (N.Y. 1986).
[240] *Id.* at 206-07.
[241] *State v. Montanez*, 894 A.2d 928, 944-45 (Conn. 2006) (citing with favor and quoting *State v. Winsett*, 205 A.2d 510, 519 (Del.Super. 1964)).
[242] *Id.* at 944 n.24 (citing *United States v. Lopez*, 662 F. Supp. 1083, 1087 (N.D. Cal. 1987)).
[243] *See* 11 Del. C. § 272(2).

commits a crime with the issue of whether a crime was committed."[244] Justification relates to the merits of whether a crime occurred at all; procedural independence does not.[245] "A justified action is not wrongful; therefore, the prerequisite to imposing liability on [the accused] as an aider and abettor will not be satisfied. No criminal offense will have been committed by a principal."[246] Justified conduct exonerates a person and, as Paul Robinson writes, "may be desired and encouraged."[247]

For the forgoing reasons, derivative justification is cognizable. The facts of the instant case are stronger than the others because the record rationally shows that Broomer acted for Mayfield's defense and Mayfield aided Broomer for defense purposes;[248] whereas, the principals in the aforementioned cases had acted only *for their own* defense.[249] The court below committed reversible error.

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[244] *State v. Montanez*, 894 A.2d 928, 944 n.22 (Conn. 2006) (discussing 1 MODEL PENAL CODE, pt. I, § 2.06, cmt. 10 at 327).
[245] *E.g.*, *People v. Fisher*, ___ N.E.3d ___, 2017 WL 572303 (N.Y. 2017) (acquittal of a principal on self-defense grounds does not vitiate the guilty plea of an accessory).
[246] *Montanez*, 894 A.2d at 943 (quoting *Lopez*, 662 F. Supp. at 1087)) (alteration added).
[247] *Id.* at 939 (quoting Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 245 (1982)); *see also*, *Rodriguez*, 949 A.2d at 201 ("Self-defense exonerates a person . . ." (quotation omitted)).
[248] *See* Argument in Subpart 4 *infra*.
[249] *See Adams*, 558 A.2d at 349 (principal testified that the victim drew a knife and the principal feared being struck by the knife); *Montanez*, 894 A.2d at 944-45.

4. The Facts Warranted an Instruction on Derivative Justification, if Broomer Shot Mangrum in Defense of Mayfield.

There was a factual basis for a jury instruction under 11 *Del. C.* §§ 464-65, as a matter of derivative justification. First, as a foundation for justification and for the same reasons stated in Subpart 2 *supra*, Mayfield was not an aggressor because having consented to a fistfight,[250] but Mangrum exceeded the scope of Mayfield's consent and Mangrum and Morris thereby became aggressors. Why consent to mutual combatance, or provocation by physical injury, will not forfeit the privilege of deadly force is incorporated from Subpart 5 *infra*.

Second, where the State accuses Broomer as the principal in the murder of Mangrum and never conceded that at Mayfield's trial, the State must acknowledge a factual basis that Broomer had shot Mangrum.

Third, for the same reasons stated in Subpart 2 *supra*, there is a factual basis for Mayfield's belief in the necessity of deadly force to prevent death or serious physical injury and of the inability to retreat with complete safety, as well as a foundation for Broomer's defense of Mayfield.[251]

Fourth, Mayfield's interview is also probative of Broomer's then-existing state of mind, for mutual and self-defense, why deadly force was necessary for

[250] *See supra* Statement of Facts, Part I.A.
[251] 11 Del. C. § 465(a)(2).

protection against death and serious physical injury.[252] When Mayfield and Mangrum exchanged fighting words, Broomer had alighted his vehicle and watched them.[253] When Mangrum drew a gun, Broomer screamed, "he has a gun, he has a gun,"[254] and, after Morris opened fire, Broomer immediately returned fire.[255] Broomer got back into the car, and told Mayfield to get in.[256] When they drove off, Mayfield described Broomer as "hysterical."[257] Ignoring Mayfield's requests to stop the vehicle,[258] Broomer stated, "They was trying to kill us again."[259] Mayfield did not realize the chase lasted 20 minutes, "It didn't seem long with my adrenaline and fear pumping."[260]

Based on the forgoing, the record was sufficiently developed on Broomer's subjective state of mind.[261] Since Broomer was unavailable,[262] his subjective belief for the defense of justification "may be inferred by the jury" from his out-of-court statements.[263] Where justification is not an affirmative defense,[264] a prima facie

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[252] *Id.* §§ 464(c), 465(a)(1).
[253] A333 (vol. 2) (statement by Atiba Mayfield)
[254] A338.
[255] A333.
[256] A322.
[257] A273.
[258] A323.
[259] A333.
[260] A320.
[261] *See* Statement of Facts, Part II *supra*.
[262] D.R.E. 804(a).
[263] *See* 11 Del. C. § 307(a).

case can be made "at trial from whatever source"[265] and without forfeiting the privilege against self-incrimination.[266] Additionally, as stated above, Broomer's subjective state of mind is not dispositive, because a prima facie case is also established through an accomplice's testimony that aiding was done for defense purposes.[267] Here, Mayfield *subjectively* believed that Broomer acted to save them,[268] and Mayfield's assistance flowed from a belief that it was necessary to protect himself, Broomer, or both from death or serious physical injury. Consequently, there was ample evidence warranting an instruction on derivative justification.

5. Consent to Mutual Combatance or Provocation by Non-Deadly Force Will Not Preclude Defense against Deadly Force.

The court below did not err by ruling that Mayfield's consent to a fistfight with Mangrum did not preclude any defense of justification.[269] The State did not argue to the contrary, but out of caution it is submitted that the common law standard of "without fault" is derogated where the Delaware Criminal Code permits consent to physical injury and where the privilege to use deadly force is

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[264] *See Id.* § 461.
[265] *Commonwealth v. Cropper*, 345 A.2d 645, 649 (Pa. 1975); accord. *Murphy-Bey v. United States*, 982 A.2d 682, 690 (D.C. 2009).
[266] *McCraney v. State*, 871 P.2d 922, 925 (Nev. 1994).
[267] *See supra* Argument, Part I.C.3(c).
[268] *See supra* Statement of Facts, Part I.B.
[269] *See* A388; T06/22/2016 — 175-77.

only forfeited by provocation of death or *serious* physical injury within the same encounter.[270] That does not reach fist-fighting.[271] Courts in Model Penal Code jurisdictions recognize the derogation of "without fault,"[272] and a jury instruction having that language is reversible error by "propound[ing] an absolute for the jury while the statute does not."[273]

[270] *See* 11 Del. C. §§ 452(2), 464(e)(1), 471(e); *contra State v. Bell*, 192 A. 553, 554 (Del. Ct. Oyer & Terminer 1937).
[271] 2 MODEL PENAL CODE, pt. I, § 3.04, cmt. 4(b) at 49 **[A510]**.
[272] *State v. Corchado*, 453 A.2d 427, 432-33 (Conn. 1982); *Commonwealth v. Samuel*, 590 A.2d 1245 (Pa. 1991); *State v. Butler*, 634 N.W.2d 46, 61-62 (Neb. Ct. App. 2001).
[273] *Corchado*, 453 A.2d at 433 (alteration added).

II. SUPERIOR COURT ERRED BY REFUSING JURY INSTRUCTIONS ON THE LESSER-INCLUDED HOMICIDE OFFENSES, NAMELY, MURDER IN THE SECOND DEGREE, MANSLAUGHTER, AND NEGLIGENT HOMICIDE.

A. Question Presented.

As to Murder in the First Degree under Count I of the Indictment, did the court below commit reversible error by denying Appellant Mayfield's request for jury instructions on lesser-included offenses, namely, Murder in the Second Degree, Manslaughter, and Criminally Negligent Homicide, when there was a factual basis in the record for such requests?

Mayfield preserved this issue in the court below by argument on the record during the prayer conference.[274]

B. Standard and Scope of Review.

This Court reviews "*de novo* a trial court's refusal to give a requested jury instruction on any defense theory."[275]

C. Merits of Argument.

1. Superior Court Correctly Understood Section 271(2), But Not 274 of the Delaware Criminal Code.

As to Section 271(2), the court below correctly reasoned that if Mayfield is liable as an accomplice to Murder in the First Degree then he must share the mens

[274] *See* Statement of Facts, Part II *supra*.
[275] *Allen v. State*, 970 A.2d 203, 210 (Del. 2009) (en banc) (citations omitted).

rea of intentionally.[276] But the court below and this Court misunderstand Section 274 of the Delaware Criminal Code.

Our Code modified the common law by subjecting accomplices to the same punishment as the principal,[277] but if having a "purposive attitude" towards the resulting offense,[278] i.e., "Intending to promote or facilitate" the same.[279] Guilt by association is strongest in respect of accomplices, "because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent."[280] Our Code also purposefully omits Section 2.06(4) of the Model Penal Code, where liability reaches harmful results if the accomplice acted with the same culpability for the offense.[281]

It was held in *Hooks v. State* that an accomplice need not "specifically intend" for the resulting offense under Section 271(2), thereby disregarding its original meaning.[282] In *Chance v. State*, this Court modified *Hooks* by concluding

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[276] A394-95; T06/22/2016 — 197-98 (alteration added).
[277] *See* 1 MODEL PENAL CODE, pt. I, § 2.06(1) **[A476]**.
[278] *Id.*, cmt. 6(c) at 316 (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1928)) **[A490]**.
[279] 11 Del. C. § 271(2).
[280] 1 MODEL PENAL CODE, pt. I, § 2.06, cmt. 6(b) at 312 n.41 **[A486]**.
[281] *Compare id.* § 2.06(4) **[A476-77]** *with* 11 Del. C. § 271.
[282] *See Hooks v. State*, 416 A.2d 189, 197 (Del. 1980), which relied on MODEL PENAL CODE § 2.04(3), cmt. at 24-26 (Tent. Draft No. 1, 1953) that an accomplice may have "knowingly" facilitated an offense, but the "Institute rejected that position" in the 1962 Proposed Official Draft, 1 MODEL PENAL CODE, pt. I, § 2.06, cmt. 6(c) at 318 **[A492]**.

that Section 274 implicitly reaches Section 2.06(4) of the Model Penal Code.[283]

Chance recognized derivation of Section 274 from Section 20.15 the New York Penal Law of 1965,[284] but did not examine its original meaning. Section 20.15 is partially borrowed from Section 610 of a former New York statute,[285] which reads, "Upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime."[286] Under the New York Penal Law of 1965, if "one indifferently but knowingly aids or facilitates the commission of a crime . . . without having any specific intent on his own part to commit or profit from the crime," then liability is had under the separate offense of Criminal Facilitation.[287] Thus, Section 20.15 does not include liability under Section 2.06(4) of the Model Penal Code.

Consequently, 11 *Del. C.* § 274 is a rule of procedure, not of substance. From a harmonious construction and the forgoing original meanings, and where our legislature purposefully omitted Section 2.06(4) of the Model Penal Code and

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[283] *Chance v. State*, 685 A.2d 351, 357 (Del. 1996) (en banc).
[284] *Id.* at 355.
[285] Richard G. Denzer & Peter McQuillan, *Practice Commentary*, *in* 39 MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK *Penal Law* § 20.15, at 41 (1967) **[A531 (vol. 2)]**.
[286] *Id.*, *Appendix* at 406 **[A533]**.
[287] *Id.*, *Practice Commentary*, *Penal Law* § 20.00 at 32 (citing N.Y. Penal Law §§ 115.00 to 115.05) **[A528]**.

Criminal Facilitation from New York law, the conclusion follows: Section 271(2) restricts the charging decision by the State to intentional crimes only, but Section 274 revives accomplice liability described in *Hooks* and *Chance* if, and only if, a lesser-included offense is affirmatively controverted by the accused. At a minimum, that occurs where, as here, the accused requested instructions on lesser-included offenses as a matter of party autonomy.[288]

2. Superior Court Improperly Created Other Rules of Preclusion.

The court below erred in its reasons for refusing jury instructions on lesser-included offenses, that Mayfield's statement was exculpatory only, and that a jury could not partially disbelieve it.[289] "[A] defendant may present alternative defenses, even if they are inconsistent."[290] Asserting complete innocence will not preclude instructions on lesser-included offenses, if otherwise factually supported in the record.[291] A rational jury can disbelieve portions of the evidence, so long as "there is some basis in the record for inferring from the gaps in the State's case some evidence to support the elements of any of the lesser included offenses."[292]

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[288] *See, e.g.*, *Wiggins v. State*, 902 A.2d 1110, 1112-13 (Del. 2006); *State v. Brower*, 971 A.2d 102, 108-09 (Del. 2009).
[289] Statement of Facts, Part II *supra*.
[290] *Muhammad v. State*, 829 A.2d 137, 139 (Del. 2003).
[291] *Capano v. State*, 781 A.2d 556, 630 (Del. 2001) (en banc).
[292] *Id.*

3. The Facts Warranted a Jury Instruction on Lesser-Included Offenses, if Mayfield or Broomer Shot Mangrum in the Thigh as Retiliatory Violence.

Where the accused was charged with Attempted First Degree Murder in *Kellum v. State*, this Court accepted a factual basis that shooting the victim in the thigh and waist area warranted the State's request for an instruction on the lesser-included offense of Assault in the First Degree.[293] This Court expressly rejected the counter-argument that since the victim was shot "five times, at point black range," an attempt to kill was the only factual basis.[294]

What's good for the State is good for the defense. The facts of the instant case are even stronger than *Kellum*: Mangrum was shot five times, including in the thigh, but not at close range,[295] and Mangrum previously shot Mayfield in the leg over a trivial argument.[296] Thus, a jury could reasonably infer that Mayfield, likewise, intended to shoot Mangrum in the leg — as symbolic violence in kind. Although Mayfield adamantly denies any such motive for retaliation, a jury could hypothetically draw negative inferences that he did. The jury also partially can believe Mayfield's statement that he did not want Mangrum to die.[297]

This is supported where Nicodemus Morris saw a gun protruding from the

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[293] *Kellum v. State*, 2008 WL 2070615, at *1 (Del. May 16, 2008).
[294] *Id.*
[295] *See supra* Statement of Facts, Part I.C.3.
[296] *See supra* Statement of Facts, Part I.A.
[297] *See supra* Statement of Facts, Part I.B.

Ford Focus, before he ran to retrieve his own.[298] It was the province of the jury whether to credit that portion of Morris' testimony.

Under this alternative, Mayfield and Broomer provoked "serious physical injury" in the same encounter and forfeited any privilege to deadly force.[299] Consequently, if Morris began shooting at Mayfield and Broomer but accidentally killed Mangrum,[300] then Mayfield and Broomer are liable under a lesser mental state than "intentionally" as an antecedent but-for cause. This is usually Manslaughter where intent to cause serious physical injury results in death,[301] but whether that reaches Murder in the Second Degree or Criminally Negligent Homicide, is a question for the jury where all offenses include the essential element of "causes the death of another person."[302]

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[298] *See supra* Statement of Facts, Part I.B.
[299] *See* 11 Del. C. § 464(e)(1).
[300] *See supra* Argument, Part I.C.2.
[301] *See* 11 Del. C. § 632(2).
[302] *See id.* §§ 631, 632, 635.

CONCLUSION

For the forgoing reasons, Appellant Atiba Mayfield respectfully requests that the Court (1) reverse the court below where it refused Mayfield's requested jury instructions; (2) vacate his sentence and remand for new trial; and, (3) grant such other relief as is just and proper.

Respectfully submitted,

/s/ John S. Malik
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Attorney for Appellant,
Atiba Mayfield

Dated: April 10, 2017

EXHIBIT “A”

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

ATIBA MAYFIELD

Alias: See attached list of alias names.

DOB: 01/23/1994
SBI: 00741224

CASE NUMBER:
N1504011040A

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:
IN15-04-1264
MURDER 1ST(F)
IN15-04-1265
PFDCF(F)
IN15-04-1266
CONSP 1ST(F)
IN15-04-1745
RECK END 1ST(F)
IN15-04-1746
PFDCF(F)

Nolle Prosequi on all remaining charges in this case
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE
SEE NOTES FOR FURTHER COURT ORDER-TERMS/CONDITIONS

SENTENCE ORDER

NOW THIS 4TH DAY OF NOVEMBER, 2016, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. Costs are hereby suspended. Defendant is to pay all statutory surcharges.

AS TO IN15-04-1264- : TIS
MURDER 1ST

Effective April 4, 2015 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level

AS TO IN15-04-1265- : TIS
PFDCF

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

STATE OF DELAWARE
VS.
ATIBA MAYFIELD
DOB: 01/23/1994
SBI: 00741224

AS TO IN15-04-1266- : TIS
CONSP 1ST

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

AS TO IN15-04-1745- : TIS
RECK END 1ST

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

AS TO IN15-04-1746- : TIS
PFDCF

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
ATIBA MAYFIELD
DOB: 01/23/1994
SBI: 00741224

CASE NUMBER:
1504011040A

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Have no contact with victim's family

NOTES

Pursuant to T11, Del Code, Section 4204(l), a flowdown to Level 4 or below is not required due to the imposition of a life sentence.

Restitution is deemed uncollectible in light of defendant's sentence.

JUDGE FERRIS W WHARTON

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
ATIBA MAYFIELD
DOB: 01/23/1994
SBI: 00741224

CASE NUMBER:
1504011040A

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	5.00
DELJIS FEE ORDERED	5.00
SECURITY FEE ORDERED	50.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	75.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	
TOTAL	135.00

LIST OF ALIAS NAMES

STATE OF DELAWARE
VS.
ATIBA MAYFIELD
DOB: 01/23/1994
SBI: 00741224

CASE NUMBER:
1504011040A

ATIBA C MAYFIELD

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ATIBA MAYFIELD,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	No. 546, 2016
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word and reviewed by Microsoft Word for Mac 2011 Version 14.5.3.

2. This brief complies with the type-volume limitation of Rule 14(d) because it contains 9,976 words, as counted by Microsoft Word.

Respectfully submitted,

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Dated: May 2, 2017

IN THE SUPREME COURT OF THE STATE OFDELAWARE

ATIBA MAYFIELD,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	No. No. 546, 2016
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

CERTIFICATE OF SERVICE

I, John S. Malik, do hereby certify that on this 2nd day of May A.D., 2017, I have had forwarded via Lexis Nexis File and Serve electronic delivery a copy of Appellant Atiba Mayfield's Amended Opening Brief and Appendix to the following individual at the following address:

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