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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| TREVIE BURRELL,<br><br>Defendant Below-Appellant,<br><br>v.<br><br>STATE OF DELAWARE,<br><br>Plaintiff Below-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 282,2023<br><br>Court Below---Superior Court of the State of Delaware in and for New Castle County ID No. 2107007983 |

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

# APPELLANT'S CORRECTED[1] OPENING BRIEF

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[1] The table of contents has been corrected to indicate that the July 28, 2023 Sentence Order of the Superior Court is attached as Exhibit A.

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## NATURE OF PROCEEDINGS

On April 5, 2023, a New Castle County jury found the Appellant, Trevie Burrell guilty of murder in the first degree and possession of a firearm during the commission of a felony. On April 6, 2023, Mr. Burrell's jury found him guilty of possession of a firearm by a person prohibited. The charges involved the shooting of Lionel Benson (nickname "Stink") on December 10, 2017, on Rodney Street in Wilmington. Mr. Benson died of his injuries on August 23, 2018.

The trial court sentenced Mr. Burrell on July 28, 2023, to life in prison on the murder charge, and terms of years sentences on the two possession counts. On August 14, 2023, Mr. Burrell filed a timely Notice of Appeal. This is his Opening Brief.

## SUMMARY OF ARGUMENT

### I

Neither of the State's purported identification witnesses (Church and Cabrera) identified Mr. Burrell as the perpetrator in their testimony. This required the State to rely on the highly incentivized out-of-court accusation of one witness, and the out-of-court accusation of another witness who materialized eighteen months later and told the jury that the first witness had recruited him to help him get out of trouble. This otherwise unreliable and unconvincing case was given a huge boost, when the trial court erroneously permitted the jury to find that the out-of-court statements of Dilip Nyala (who asserted his Fifth Amendment right not to testify) attempting to dissuade a witness from testifying, proved that Mr. Burrell conspired with Nyala in those efforts. The Nyala evidence satisfied no hearsay exception, violated Mr. Burrell's right to confrontation, and furthermore did not plainly, clearly and conclusively establish Mr. Burrell's participation.

### II

Mr. Burrell sought to show that any hesitation Andre Church demonstrated in identifying the shooter in this case was a function of his willingness to identify someone to police only when it would benefit him in his own criminal matters. The defense attempted to prove this by pointing out that it was not until Church was bartering for leniency on the day of his own arrest that he first disclosed the identity

of the man (Thomas Payne) who had allegedly shot him in a related incident. The trial court, however, over defense objection, redacted his accusation against Payne from the recording of Church's statement played for the jury. This violated Mr. Burrell's due process and Sixth Amendment rights to a fair trial and to present a defense.

Notably, the redaction also distorted Church's statement in a way that suggested to the jury that Mr. Burrell was the one who shot Church, a finding that the parties knew to be false, and that was devastatingly prejudicial to Mr. Burrell. Even if this Court finds that: 1) this prejudicial impact is not part of a preserved claim; or 2) the trial court did not err in redacting "Thomas Payne," permitting redaction in a manner that falsely that implicated Mr. Burrell in a shooting he was not part of, constitutes plain error prejudicial to his due process right to a fair trial as to jeopardize the fairness and integrity of the trial.

**III**

The trial court's "firmly convinced" reasonable doubt instruction, identical in all meaningful respects to the "clear and convincing evidence" burden of proof, effectively permitted the jury to convict upon proof that is less than beyond a reasonable doubt." As such, it violated due process. This unpreserved error is structural and requires reversal.

## STATEMENT OF THE FACTS

**March 29, 2023, Pretrial Conference**

During the pretrial conference, the trial court addressed the parties' motions for redaction of video recorded statements of Andre Church and Edwin Cabrera. Relevant to this appeal, the trial court made the following ruling:

**March 12, 2019, Statement of Andre Church**

The trial court denied trial counsel's motion to keep within Church's statement at page 7, lines 7-8,[1] the portion in which Church identifies the person, Thomas Payne, who shot him in a related incident. *Id.,* 22-35.

**Summary of the Trial**

**Wilmington Police Corporal Jason Alava**

Corporal Alava testified that on December 10, 2017, he observed an unconscious male victim laying on his back in front of 222 North Rodney. Tr. 4/3/23, 54-59, 65. There was blood coming from the back of his head. *Id.,* 61. Corporal

[1] The video-recorded statements of Andre Church (March 12, 2019) and Edwin Cabrera (June 19, 2019), as well as the audio recording of Cabrera's 911 call, and the three telephone calls from Dilip Nyala that were intercepted at the prison, are being submitted as flash drives along with the hard copies of this Brief. They are noted at the "placeholder" page in the Appendix, A309. The State-created transcripts of the Church and Cabrera statements are attached at A254 and A288 respectively. The portions of those statements that were redacted from the videos are highlighted in yellow.

Alava rode in an ambulance with the EMS team and the victim to Christiana Hospital. *Id.,* 63.

**Eugene Matthews**

Lyft driver Eugene Matthews testified that he was at Second and Rodney to pick up a fare. *Id.,* 68-69. Someone came over to his car and told him to call 911 because there was a body nearby on the sidewalk. *Id.,* 71, 84. He called 911. *Id.* When the police pulled up, Matthews left the scene. *Id.,* 72, 78.

**Wilmington Police Master Corporal Richard Michael Evans**

Forensic Services Unit Corporal Evans was one of the officers who processed the crime scene. *Id.,* 87-91. During the playing of the crime scene video, he pointed out several pieces of evidence near 222 North Rodney Street, *id.,* 93, including an opened hand warmer packet, *id.,* 92, a single spent shell casing, *id.,* 93, and a red SUV-type vehicle in front of 222 North Rodney, with the snow brushed off it. *Id.,* 94.

**Wilmington Police Detective Mackenzie Kirlin**

Detective Kirlin interviewed Jamir Graham, after learning that Graham was the fare that Matthews was picking up that morning and was the person who asked Matthews to call 911. *Id.,* 116. Graham had called 911. *Id.*

**Jamir Graham**

Graham, who lived at 213 North Rodney Street on December 10, 2017, ordered a Lyft that morning to go to work. *Id.,* 119-121. He was coming outside when the Lyft driver pulled up. *Id.,* 120. He heard a gunshot and then went back inside. *Id.* He called the police. *Id.,* 124.

**Detective Mackensie Kirlin (recalled)**

Detective Kirlin was aware of two potential witnesses, Edwin Cabrera and Andre Church. *Id.,* 147. She tried over ten times to speak with Cabrera, by phone and at his residence. *Id.,* 150-51. Twice she contacted him by phone, and he indicated he would call her back, but she did not hear back. *Id.,* 151. It was not until years after the shooting that she was able to get him to come in for an interview. *Id.*

**Edwin Cabrera**

Cabrera admitted to providing a statement to Detective Kirlin about the events of December 10, 2017. *Id.,* 155 He "somewhat" told her the truth in the statement. *Id.,* 156. He knew the decedent in passing as "Stink" from the neighborhood. *Id.,* 158. He was out there when the shooting happened. *Id.* 157. He was addicted at the time to crack and heroin and was high at the time of the incident. *Id.,* 159, 172. He had been clearing the sidewalk and had just cleaned snow off a car when he heard shooting. *Id.,* 158. Lionel Benson and Andre Church were with him. *Id.,* 164. He did not know Benson that well, but he had known Church for about 16, 17 years. *Id.*

Cabrera heard a few shots and called 911. *Id.,* 165, 167. Cabrera looked over, and "Stink" was lying there and not moving. *Id.,* 167-68. It was dark and he did not see the shooter. *Id.,* 169-70.

**Wilmington Police Detective Mackenzie Kirlin (recalled)**

Detective Kirlin identified the video recording of her June 19, 2019, interview with Edwin Cabrera, which was played for the jury. *Id.,* 176-78. In the video (A309 and A288 (transcript)), Cabrera told Detective Kirlin that, after walking past himself and the others, Mr. Burrell ("Trev") went into a nearby basement, then came out and walked behind "Stink" (Lionel Benson) and shot him in the back of the head. A309/A290.

On cross-examination, the detective testified that Cabrera called 911 on the day of the incident and during that call stated he did not know who shot the victim. *Id.,* 178. She also testified that Cabrera was arrested and placed in custody for this trial because he did not want to talk to police because (he said) there was nothing to talk about. *Id.,* 179. During his interview, Cabrera stated that he heard at least two shots. *Id.,* 180-81.

**Edwin Cabrera (recalled)**

Cabrera testified that he did not really know Mr. Burrell, and that he had only seen him around. *Id.,* 184. State's Ex. 65, A309, a recording of his 911 call was played. *Id.,* 185. During the call Cabrera said he did not see anything. *Id.,* 186. He

testified that he only told Detective Kirwin that he did see something to help Andre Church. *Id.,* 186-87. He also testified that Detective Kirlin "knows why" he did so. *Id.,* 188. At the time of the incident, he was high, and he was focused on cleaning snow off a car and not paying attention to who was around at the time. *Id.,* 188. He later identified Mr. Burrell to Detective Kirwin because Church had called him from lock-up and told him what he needed to say. *Id.,* 189-90.

Church was facing a lot of jail time, so he told Cabrera to go in and tell Detective Kirlin that Trevie Burrell shot Lionel Benson. Tr. 4/4/23, 14. Cabrera was high on crack cocaine and heroin when the incident occurred and had been out there all night. *Id.,* 15. At the time, he, Church and Benson were all standing around the car. *Id.,* 17. Cabrera did not see Trevie Burrell. *Id.,* 18. Cabrera told Detective Kirlin that he only said Trevie Burrell did it because Church told him to say that. *Id.,* 19. Church described everything to him. *Id.,* 21.

**Wilmington Police Detective Mackenzie Kirlin (recalled)**

When Detective Kirlin interviewed Cabrera she showed him a photo lineup, Ex. 67. *Id.,* 33. Cabrera pointed to photograph number 3, the photograph of Mr. Burrell, as the person who shot Lionel Benson. *Id.,* 34. The detective circled and signed the photo. *Id.,* 34. The detective testified that Church had mentioned during his first (December 12, 2017) interview that Cabrera had been there. *Id.* She had

been unable to interview Cabrera since December 10, 2017, and then "all of a sudden he" came in and spoke freely after Church was arrested. *Id.,* 37.

**Wilmington Police Officer John Fleming**

Officer Fleming processed the crime scene along with Corporal Evans. *Id.,* 38-40. He also went to Christiana Hospital where he recovered items that had been obtained from the victim, including clothing and currency. *Id.,* 48-51.

**3507 Hearing – Wilmington Police Detective Mackenzie Kirlin**

Outside the presence of the jury, Detective Kirlin testified that she interviewed Andre Church on December 12, 2017. *Id.,* 65. The interview occurred at the offices of probation and parole after Kirlin and Detective Puit learned that Church was on the probation schedule. *Id.,* 65-66. He was not handcuffed and spoke freely and voluntarily about the incident. *Id.,* 66. Sometime after the interview, Church left probation and parole. *Id.* The interview was not recorded, and no notes of the interview were taken. *Id.,* 75. There was no attempt to document the interview. *Id.* Later at her office, Kirlin typed up what she remembered Church had told her. *Id.,* 68, 78. She read from her report that incorporated what she had typed, in which Church was alleged to have identified "Trev" as the person who shot Lionel Benson. *Id.,* 71.

Kirlin admitted that despite her earlier testimony that in the December interview Andre Church told her that Cabrera was at the scene, she had been mistaken about that. *Id.,* 79-80.

For purposes of 3507 admissibility the trial court found the December 12, 2017, statement contemporaneous and voluntary. *Id.,* 82-83.

**Andre Church**

Andre Church testified that his nickname is "Hoov," and that he was in the 200 block of North Rodney Street when his friend Lionel Benson was shot. *Id.,* 87. He spoke with Detective Kirlin at the probation office, but he did not remember whether he told her the truth. *Id.,* 87-89. He also spoke with her after he had been arrested on gun and drug charges on March 12, 2019. *Id.,* 89-90. He waived his *Miranda* rights and confessed to the crimes he was charged with. *Id.,* 90. After he was interrogated on March 12, 2019, he saw a judge, made bail, and went home. *Id.,* 91-92. He later had his bail revoked, took a plea in the gun and drug case, and was sentenced to jail. *Id.,* 92. Initially, pursuant to an agreement, Church received a twelve-year prison sentence on his case. *Id.,* 92-93. Church admitted to five felony convictions including drug possession, and two counts of drug dealing and two counts of possession of a firearm by a person prohibited. *Id.,* 94. He remembered that it was cold and snowy on December 10, 2017. *Id.,* 97-98. He initially testified that he had no recollection of being present when Lionel Benson ("Stink") was shot.

*Id.,* 98-99. Nor did he recall whether Edwin Cabrera was there or whose house had the green awning. *Id*., 99. Right before the shooting he was talking with Lionel Benson about football tickets. *Id.,* 100. He was not familiar with the exterior stairs leading down to the basement next to 222 Rodney and could not recall how many shots he heard when Benson was shot. *Id.,* 100. He did not know how close the shooter was to Benson when the shot went off, all he could recall is that Benson fell in the middle of the street. *Id.,* 101. He went to check on Benson after Benson was shot but did not recall what he noticed when he did so. *Id.* He also had no recollection of whether Benson had a gun. *Id.* Church was asked a series of question about a March 12, 2019, interview by Detective Kirlin, to which he responded: "I don't recall." *Id.,* 102.

At side bar, the trial court informed all counsel that based on the earlier voir dire and Church's testimony, that the court was making "an explicit finding" that both statements Church made to Detective Kirlin were voluntarily given. *Id.,* 103.

**Wilmington Police Detective Mackenzie Kirlin (recalled)**

Detective Kirlin testified that she interviewed Church twice. *Id.,* 104. The first interview (with Kirlin and Detective Puit) took place at the probation office. *Id.* The interview was not recorded but was typed into a word document that became part of the running report. *Id.,* 106. Detective Kirlin read directly from her report:

> I responded directly to probation and parole with Detective Puit and attempted to speak with Church regarding the homicide of Lionel

> Benson. These investigators received information that Church may have been present for the homicide. These investigators asked Church -- as these investigators advised Church we have video of the incident, Church confirmed he was standing with Benson when Trev walked up wearing all black and approached the victim from behind and shot Benson unexpectedly. Church attempted to run and fell in the street. Before Church was able to get up, the suspect was gone and Benson was laying on the ground lifeless. Church went over to check on Benson and saw he wasn't moving. Church attempted to wake Benson by nudging his body. During these attempts, Church noticed a gun under his shirt. Church took the gun from Benson and got rid of it. These investigators advised Church that we would get back in touch with him and speak with him again regarding the incident. We also provided Church with this investigator's cell phone number.

*Id.,* 109. On March 12, 2019, Detective Kirlin spoke to Church again after he had been arrested in another case, a case in which he confessed. *Id.,* 110. Church had asked to speak to Detective Kirlin. *Id.* Kirlin interviewed Church and a redacted video of that interview was played for the jury *Id.,* 113. A309/A254 (transcript). In the video-recorded statement, Church told Detective Kirlin that after "Trev" walked behind the group he was with and went down to a basement, he turned back around, stood behind Church, and shot Benson in the head. A309/A258-59 (transcript). The March 12, 2019, statement contains the first mention of an "Ed." A309/A263. Kirlin showed Church an array with Mr. Burrell's photograph in it. *Id.,* 113-14. Church put "squiggle marks" on the array, after which Detective Kirlin circled the photograph of Mr. Burrell. *Id.*

Neither Kirlin nor Detective Puit recorded the December 12, 2017, interview or took notes of it. *Id.,* 115-16. They wrote nothing down until they got back to the

police station. *Id.,* 116. There was no indication in Detective Kirlin's police report that on December 12, 2017, Church mentioned Edwin Cabrera as being there. *Id.,* 118-19. She had earlier testified that she believed Church had told her on December 12, 2017, that Cabrera was there. *Id.,* 119. She admitted that this was not accurate. *Id.* Police made no further efforts to interview Church (before his arrest) or Mr. Burrell, despite learning "Trev's" full name a couple of weeks after the incident. *Id.,* 122.

During the March 12, 2019, interview Church was handcuffed to a chair after he and his father had been arrested for drugs and guns. *Id.,* 127. Church made it clear to the detective that he would not give information unless it helped him and his father. *Id.,* 128-30. During the interview Church made the following statements: "I'm really not going to give you all this information if you all are not going to help me and my dad," *id.,* 128; "I don't want to do this, to be a situation where I give information and then I don't get anything rectified out of it for me and my father," *id.,* 129; and "if you all aren't going to be able to do shit I just keep my motherfucking mouth shut." *Id.,* 130. Detective Kirlin admitted that Church's "main focus" was on what the police were "going to do for him." *Id.,* 132. Church told Detective Kirlin that Benson had retrieved the gun Church took from him from the basement. *Id.,* 130. Church admitted that the gun was Church's, and that "they" kept it when he got shot. *Id.,* 131-32. It was a black nine-millimeter. *Id.,* 131.

**Andre Church (recalled)**

Church identified himself in a video where he was being interviewed on the case in which he was arrested. *Id.,* 137. He testified that in that case the police found five guns and crack cocaine at his father's house. *Id.,* 138-39. He admitted to police that he had purchased those guns from Terrell Mobley. *Id.,* 139. During that interview he told police that he had information on three shootings, one of which implicated Mobley, and one of which involved the shooting in this case. *Id.,* 139-40. He also told police that he had already talked to Detective Kirlin about this case but had told her that he did not see who shot Benson. *Id.,* 140. He was thereafter charged with 28 criminal counts, most of which involved guns or drugs. *Id.,* 141. Church was shown State's Ex. 68, his plea agreement in which Church admitted he was a habitual offender. *Id.,* 141. Nevertheless, after the March 12, 2019, interviews, bail was set low enough for him to be able to make bail. *Id.,* 142. He entered into the plea agreement after his release from jail and received a 12-year minimum mandatory sentence. *Id.,* 143. But during the April 2023 trial he was no longer in custody. *Id.* This was because after Church testified against Terrell Mobley the State filed a substantial assistance motion and the sentence was reduced to time served. *Id.,* 146. He was only in custody from April of 2019, until November of 2022. *Id.,* 146. Church admitted that as a habitual offender facing his charges, he was otherwise "basically facing the rest of [his] life in prison." *Id.,* 147.

**Dr. Khalil Wardak**

Forensic Pathologist Dr. Khalil Wardak testified that Lionel Benson died in hospice care in Montgomery County, Pennsylvania. *Id.,* 154-55. There were injuries to the victim's cervical spinal cord causing immediate paralysis. *Id.,* 157. The injuries resulted from a gunshot wound. *Id.* The injury caused further complications, and the victim died on August 23, 2018. *Id.,* 158-59. Dr. Wardak performed the autopsy the next day. *Id.* The cause of death was complication of a gunshot wound to the neck, and the manner of death was homicide. *Id.,* 160-61.

**Trial Court Ruling Regarding Communications from Prison**

Over defense objection, the trial court ruled that three phone calls and a tablet message from Dilip Nyala, who was in custody at the time of these communications, were admissible under D.R.E. 804(b)(6) and 801(d)(2)(e). 4/5/23 Tr. 16-19. The trial court also made a finding that under 404(b) the probative value outweighed any unfair prejudice. *Id.,* 17-19. The communications occurred following the trial court's lifting of the protective order in this case that prevented defense counsel from disclosing to Mr. Burrell the identities of the witnesses. *Id.,* 11. The communications involved a March 30, 2023, 8:46 pm telephone call between Mr. Nyala and his son. A309; a March 30, 2023, 9:57 pm tablet message from Mr. Nyala to Brittany Winder. A308; a March 31, 2023, 3:22 pm call between Mr. Nyala and his son, who later add Andre Church on the call. A309; and a March 31, 2023, 9:06 pm call from Mr. Nyala

to an unknown person. A309. The expected testimony of Andre Church was discussed in these communications, and the State's contention was that they were evidence of Mr. Burrell's attempts to have others reach out to Andre Church and influence him not to testify against him.

**Dilip Nyala**

Outside the presence of the jury Dilip Nyala asserted his Fifth Amendment right against self-incrimination. *Id.,* 41-42.

**Wilmington Police Detective Mackenzie Kirlin (recalled)**

In this case, the protective order that prevented defense counsel from disclosing the identities of witnesses to his client was lifted on March 29, 2023. *Id.,* 56-57. Detective Kirlin was directed to State's Ex. 70/A308, which she described as a tablet message between Dilip Nyala and Brittany Winder, sent on March 30, 2023, at 9:57 pm. *Id.,* 58. The Detective read the message: "Hoov telling on Trev. Shaq ain't even trying to talk him out of it. He facing the long haul." *Id.,* 59. Detective Kirlin was then directed to State's Exs. 71, 72 and 73, A309, which were played for the jury. These exhibits contained recordings of calls from Nyala in which he is heard attempting to persuade Church not to testify against Mr. Burrell, as well as trying to get others to reach out to Church. *Id.,* 59.

**Defense Case**

**Wilmington Police Detective Mackenzie Kirlin**

Detective Kirlin testified that the victim in this case, Lionel Benson, had been shot in a previous incident on May 26, 2017. *Id.,* 68. No arrest has been made in that case. *Id.,* 68-69.

**Relevant Instructions**

The trial court instructed the jury regarding the significance of the Nyala evidence, in part directing that the jurors may use the evidence of these acts "allegedly committed by the defendant only to determine issues relevant to the crime – charged crime[, which] the State contends that the evidence of other acts relates to the defendant's identity and consciousness of guilt." *Id.,* 141-42. The trial court had given the jurors the identical instruction following the introduction of this evidence. *Id.,* 66.

The trial court also instructed the jury on reasonable doubt, stating:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Therefore, based upon your conscientious consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find the defendant guilty. If, on the other hand, you have a reasonable doubt about the defendant's guilt, you must give the defendant the benefit of the doubt by finding the defendant not guilty.

*Id.,* 136.

**Verdict**

The jury returned a verdict of guilty on all charges. *Id.,* 161-62.

**Second Phase of Trial**

The State presented a stipulation to the jury that Mr. Burrell was, on December 10, 2017, a person prohibited by Delaware law from possessing or controlling a firearm. Tr. 4/6/23, 4-5.

**Verdict**

The jury returned a verdict of guilty of possession of a firearm by a person prohibited. *Id.,* 15.

## ARGUMENT

## I

### THE SUPERIOR COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE STATE SATISFIED D.R.E. 801(d)(2)(E), 804(b)(6), AND 404(b), THUS PERMITTING THE STATE TO INTRODUCE THE NYALA COMMUNICATIONS TO DEMONSTRATE MR. BURRELL'S IDENTITY AND GUILTY KNOWLEDGE.

### A. Question Presented

Whether the Superior Court erred and abused its discretion in finding that the State satisfied D.R.E. 801(d)(2)(E), 804(b)(6), and 404(b), thus permitting the State to introduce the Nyala communications to demonstrate Mr. Burrell's identity and guilty knowledge. Trial counsel objected to the trial court's ruling and preserved this issue. Tr. 4/4/23, 168-191/A192-215; Tr. 4/5/23, 3-10/A230-37.

### B. Scope of Review

This Court reviews a trial court's decision on the admissibility of evidence under an abuse of discretion standard. *Hines v. State,* 248 A.3d 92, 99 (Del. 2021).

### C. Merits of Argument

The State's introduction of the Nyala evidence had a single purpose, to show that Mr. Burrell was actively involved in tampering with witness Andre Church. The trial court's analysis, *see* tr. 4/5/23, 14/A241 ("I'm satisfied that [] Burrell and Nyala were involved in a plan against Church to pressure him not to testify."); instruction, *see* tr. 141-42/A247 (permitting the jury to use it to find "identity and consciousness

of guilt); and the prosecutor's closing argument, *see* tr. 4/5/23, 135/A249 ("Defendant's efforts to prevent [Church] from coming to trial says everything you need to know about what his intention were back then and what they were during trial."), leaves no doubt that the evidence was introduced to demonstrate that Mr. Burrell engaged in witness tampering.

The trial court's ruling that the three telephone calls and one tablet message were admissible because they proved "that Burrell and Nyala were involved in a plan against Church to pressure him not to testify," *id.,* 14/A241, was erroneous under Delaware law and violated Mr. Burrell's right to confrontation under the Sixth Amendment and due process right to a fair trial under the Fourteenth Amendment.

First, the State failed to demonstrate that Mr. Burrell sought to "procure the unavailability of the declarant," Nyala, a foundational requirement of 804(b)(6).

Second, the State failed to establish the existence of a conspiracy separate from Nyala's statements, a foundational requirement of 801(d)(2)(E).

Third, the State provided the court with insufficient proof of Mr. Burrell's involvement, even if the above requirements of the Rules had been met. A review of Nyala's communications (Ex. 70-73/A309) demonstrates this. Some of the evidence the trial court cited as proof of solicitation simply does not exist; other evidence the trial court cited cannot be found to convincingly prove a solicitation. While Nyala's communications leave little doubt that he was attempting to dissuade Church, the

State failed to make the necessary showing of a shared intent under the required "plain, clear and conclusive" standard for other crimes evidence. *Renzi v. State,* 320 A.2d 711, 712 (Del. 1974).

In its admissibility ruling, the trial court cited what it deemed to be proof of Mr. Burrell's involvement. Tr. 4/5/23, 11-13/A238-40:

**Ex. 71 (A309) – Nyala Call on March 30, at 8:46 pm** – The trial court cited Nyala's comments to his son and another person (brought in through a third-party call) that "Hurky Rock"[2] sent him a message that he goes to trial on Monday. *Id.,* 10-11/A237-38. Thereafter, in both instances, Nyala discusses first getting a message to Church's brother, and thereafter to the "boy" (presumably Church). *Id.*

**Ex. 70 (A308) – Nyala Tablet Message –** The trial court cited Nyala's tablet message to a Brittany Winder, that Hoov[3] is telling on Mr. Burrell, that "Shaq ain't even trying to talk him out of it[, and that h]e's facing the long haul." *Id.,* 12/A239.

**Ex. 72 (A309) – Nyala Call on March 31, 2023, at 3:22 pm. –** The trial court cited Nyala and his son getting on a three-way call with Andre Church. *Id.,* 12/A239. Notably, the trial court stated that "Nyala indirectly tells Church the boy said to message you . . ." *Id.* What Nyala actually said is "the boy sent a message." A309.

[2] Mr. Burrell's nickname.
[3] Andre Church's nickname.

**Ex. 73 (A309) – Nyala Call on March 31, at 10:46 pm** – The trial court cited a final call from Nyala to an unknown person. *Id.* The trial court noted that Nyala told the unknown person that Hurky Rock sent him a message that he goes on trial on Monday. *Id.,* 12-13/A239-40. The trial court also cited the fact that Nyala mentioned the second witness Cabrera and that Nyala knew some of Cabrera's expected testimony. *Id.,* 13/A240.

**The State Failed to Prove, as Required by D.R.E. 804(b)(6), that Mr. Burrell Attempted to Procure the Declarant's Unavailability.**

At trial, it was Nyala's unavailability upon which the 804(b)(6) determination was based. *Id.,* 14-15/A241-42. This was error.

Under 804(b)(6), the State was required to prove that Mr. Burrell "engaged or acquiesced in wrongdoing that was intended to, and did, procure the declarant's [i.e., Nyala's] unavailability . . .." D.R.E. 804(b)(6). But it was never the State's position that Mr. Burrell attempted to procure *Nyala's* unavailability. Because it was not the declarant's unavailability that the State alleged Mr. Burrell tried to procure, Mr. Burrell's alleged hearsay statement to Nyala was inadmissible under both the Delaware Rules of Evidence and the Confrontation Clause of the Sixth Amendment.

Delaware precedent that applies the forfeiture by wrongdoing exception recognizes that it is the statement of the witness whom the defendant attempts to silence that constitutes the exception to the hearsay rule. *Phillips v. State,* 154 A.3d 1130, 1142-43 (Del. 2017). The Rule does not envision extending it to a third party

whom the defendant is not attempting to silence. Doing so removes the justification for allowing the statement based on a defendant's direct and nefarious contact with the person who has been made unavailable.

**The State Failed to Prove as a Condition of Admission Required by D.R.E. 801(d)(2)(e) that a Conspiracy Had Been Otherwise Established by a Preponderance of the Evidence.**

Rule 801(d)(2)(e) requires proof by a preponderance that a conspiracy be established as a precondition to admissibility. *Ayers v. State,* 97 A.3d 1037, 1041 (Del. 2014). It is a prudent rule that, in point of fact, would prevent a defendant from being convicted by a rouge inmate who made false or inaccurate statements and was never held to account for them before the jury. The *Ayers* Court cited proof offered in that case – surveillance of the parties and circumstantial evidence of the object of the conspiracy – that is absent from the trial record here. The State introduced no evidence apart from Nyala's alleged statements, and the trial court's ruling violated this important limitation of 801(d)(2)(E).

**The State Failed to Prove, as Required by D.R.E. 801(d)(2)(e), that the "Statement" Came from a Co-Conspirator**

There is no suggestion in the recordings of how Nyala received the "message" or from whom it was received. There was no basis to find that Nyala received it directly from Mr. Burrell. Any third-party communication would constitute double-hearsay and confrontation clause violations that are not excused or contemplated by 801(d)(2)(e).

Delaware cases applying this exception do so based on statements that can be directly attributable to the alleged co-conspirators. *Rivers v. State,* 183 A.3d 1240, 1244 (Del. 2018); *Harris v. State,* 695 A.2d 34, 41-42 (Del. 1997). A "message" does not qualify as a statement in the absence of any indication of how it was received or from whom it was received. Considering the many ways such information is transmitted within a prison, there was no basis for a "plain, clear and conclusive" finding that Nyala's attempts were engineered by Mr. Burrell.

**The State Failed D.R.E. 801(d)(2)(e)'s Requirement that the Statement Be Made in Furtherance of the Conspiracy**

Rule 801(d)(2)(e) envisions that the "admitted statement must have been made [] in furtherance of the conspiracy." *Smith v. State,* 647 A.2d 1083, 1089 (Del. 1994). Therefore, even if the "message" Nyala received can be directly attributable to Mr. Burrell – which it cannot – the relevant question then becomes *what was that message?* In the telephone intercepts[4] Nyala repeatedly discusses the "message" that he received, mentioning that Mr. Burrell was going to trial the following week, and the trial evidence. But for one reference in Exhibit 71 (at 6:25), without attribution, to having someone "stand down," there is little evidence supporting – let alone proving plainly, clearly and convincingly, that Nyala was solicited to reach out to Church.

[4] The tablet communication does not reference a message that Nyala received.

The trial court emphasized that Nyala's conversations occurred shortly after the protective order was lifted. 4/5/23, 13/A240. However, that finding does not permit an inference, let alone provide plain, clear, and conclusive evidence that Mr. Burrell participated in witness tampering. It is not surprising that a defendant would discuss with the people in closest proximity to him the evidence that the State had disclosed to him. If other inmates' knowledge of the evidence in the case suggests that Mr. Burrell did not keep that information confidential, that is all it suggests.

**D.R.E. 804(b)(6) Requires a Demonstration of Wrongdoing**

Mr. Burrell incorporates his argument *supra,* 24, under the heading that the statement of the defendant must be made in "furtherance of the conspiracy." For all the reasons set forth in that section the proof was insufficient to demonstrate that the "message" received by Nyala was one directing him to dissuade Church from testifying.

Mr. Burrell also incorporates his argument, *supra,* 23, under the heading that the "statement" must come from a co-conspirator. Absent evidence of an actual communication from Mr. Burrell to Nyala, the trial court was left only with the evidence of a "message." The trial court was given no evidence as to how that "message" was provided to Nyala. It thus did not have plain, clear and conclusive proof that it originated from Mr. Burrell, and therefore no proof of his wrongdoing.

**Failure to Establish the *Getz* and *DeShields* Considerations**

Aside from the State's failure to satisfy the foundational requirements of 804(b)(6) and 801(d)(2)(e), *supra,* 22-23, the Nyala evidence failed to satisfy the critical third criterion of *Getz v State,* 538 A.2d 726, 734 (Del. 1988). The evidence was inadmissible under Rule 404(b) because it was not "plain, clear and conclusive" that Mr. Burrell "sent" the message to Nyala, or that whatever message was sent directed witness tampering. Once the failure the failure of proof of the third criterion (the alleged crime) is established, the materiality of the evidence (criterion 1); its legitimate purpose (criterion 2) and its unfair prejudicial effect (criterion 5), become manifest. The rationale for preclusion of this evidence under *Deshields v. State,* 706 A.2d 502, 506 (Del. 1998) begins at the same point, "the adequacy of proof of the prior conduct." (criterion 2). There is not plain, clear and conclusive proof of Mr. Burrell's involvement in Nyala's attempts to dissuade the witness. Accordingly, it has no "probative force" (criterion 3) and its "inflammatory or prejudicial effect" (criterion 6), outweighs whatever probative value it has.

The trial court held that the recordings are "probative because they directly connect to the apprehension and lack of cooperation from the witnesses to this point in the trial." *Id.,* 17/A244. Had the trial court's ruling been based on that rationale alone – as opposed to inviting the jury to connect Mr. Burrell to Nyala's attempts to dissuade Church – it would have been a reasonable and measured way to permit the

jury to consider Nyala's attempts, in its assessment of Church's alleged reticence. *See, e.g., Commonwealth v. Carr,* 259 A.2d 165, 167 (Pa. 1969) (recognizing the importance of allowing the jury to consider attempts to dissuade a reluctant witness from testifying, without imputing the attempts to the defendant). But the trial court erred in permitting the Nyala evidence to be used for an entirely different purpose, the unfounded and prejudicial inference that Mr. Burrell was attempting to fix the result.

**The Harm Analysis**

Reversal is required if this Court "cannot say that the error was harmless beyond a reasonable doubt." *Van Arsdall v. State,* 524 A.2d 3, 11 (Del. 1987) (citing *Chapman v. California,* 386 U.S. 18, 24 (1967). "In determining whether an error is harmless, the Court must weigh the significance of the error against the strength of the untainted evidence of guilt to determine whether the error may have affected the judgment in issue." *Boatswain v. State,* 2005 Del. LEXIS 168 at *8 (Del. Apr. 27, 2005) (quotation marks and citation omitted). That standard leads to the conclusion that the error was not harmless beyond a reasonable doubt.

First, the trial court understated the prejudicial impact of the Nyala evidence. *See id.,* 18/A245 ("it is a bit inflammatory, but it can be cured with a limited [*sic*] instruction."). The link between permitting a jury to connect a defendant with witness tampering, and a jury's determination of guilty knowledge is direct and

powerful. *United States v. Walker,* 1996 U.S. App. LEXIS 33318 at *15 (10th Cir. Dec. 20, 1996); *United States v. Romero,* 54 F.3d 56, 60 (2d Cir. 1995); *United States v. Balzano,* 916 F.2d 1273, 1281 (7th Cir. 1990). It is difficult to imagine evidence more prejudicial to a defendant than that he is attempting to fix the result of his trial.

Second, the State's case was anything but strong. Although the State claimed that there were two eyewitnesses, there were no eyewitnesses who identified Mr. Burrell at trial. But for the inadmissible evidence challenged here, the State's case rested entirely on out-of-court statements of these alleged witnesses. As shown below, the jury had significant reasons to doubt the reliability of those out-of-court statements. But when presented with purported evidence of Mr. Burrell's attempts to keep those witnesses from testifying, along with the State's arguments and the trial court's instruction, those doubts were allayed.

Church, in his recorded interview, repeatedly expressed a corrupt secondary motive. A twice-convicted felon, having just been arrested on 28 counts of drug and gun related charges, he could not have been clearer that he was looking to trade his way out of prison. Detective Kirlin had no choice but to concede in her testimony that Church's "main focus" was on what the police were going to do for him. Tr. 4/4/23, 132/A173.

The other alleged eyewitness, Edwin Cabrera, called 911 moments after the shooting. In that nearly contemporaneous, detailed account, he told police his name;

his location; his home address; that he was walking when he heard gunshots; that he saw the shooting victim on the ground; that he knew the victim; and that *he did not see who did the shooting.* A309. In his trial testimony, Cabrera reiterated what he had told the 911 operator, that he did not see the shooter. Tr. 4/3/23, 169-70/A45-46. He also told the jury that he was high on crack cocaine and heroin when the incident occurred. Tr. 4/4/23, 15/A74. As for his June 19, 2019, statement to Detective Kirwin – played for the jury – in which he identified Mr. Burrell as the shooter, Cabrera testified that he only made that identification to help out Church who had called him from lock-up and told he what he needed to say. Tr. 4/3/23, 186-87/A62-63, 191/A67. According to Cabrera, Church was facing a lot of jail time, so he told his friend Cabrera to go in and tell Detective Kirlin that Mr. Burrell shot the victim. Tr. 4/4/23, 14/A73.

Thus, the two State witnesses who implicated Mr. Burrell were a pair of compromised, self-interested criminals and at least one, by his own admission, was a drug addict under the influence at the time of the incident. Each had multiple prior convictions and, when they accused Mr. Burrell, one was hoping to avoid a harsh sentence on his own serious open case, and the other testified that was attempting to assist Church to attain that goal. These are exactly the types of witnesses that experience has taught us to distrust. *Banks v. Dretke*, 540 U.S. 668, 671 (2004); *United States v. Hopkins*, 518 F.2d 152, 155 (3d Cir. 1975). While Cabrera was not

*the* informant, but only – by his own admission – the informant's accessory, his motivation was no less a secondary motivation.

There were other problems with the State's evidence that informs the harmlessness analysis. Curiously, the State never asked Detective Kirlin about Cabrera's testimony that she "knows why" he identified Mr. Burrell. Tr. 4/23/23, 188/A64 (*i.e.*, that he only identified Mr. Burrell because Church had recruited him to do so, tr. 4/4/23, 26/A85). Cabrera would have been able to pick out Mr. Burrell, since he was familiar with Mr. Burrell from the neighborhood. *Id.,* 35-36/A94-95. The question of how Cabrera seemed to suddenly appear out of nowhere, more than 18 months after the shooting was never adequately answered at the trial. Detective Kirlin initially provided the jury with an answer, but it was the wrong one, -- that she learned about Cabrera's from her first interview with Church, on December 12, 2017. Tr. 4/4/23, 36/A95. After being confronted with the fact that the interview did not contain that information, she had to acknowledge that that information was false. *Id.,* 118-19/A159-60. It was thus not surprising that in his June 19, 2019, statement, Cabrera stated that at least two shots rang out, Tr. 4/3/23, 180/A56, consistent with his testimony that he heard "a few shots," Tr. 4/3/23, 165/A41, but refuting the physical evidence that demonstrated just one shot. The State also never addressed why if Church implicated Mr. Burrell in his December 12, 2017, interview, what motivation he would have had to deny doing so during his March 12, 2019, interview

that was – by Church's own admission – infused with secondary motive. 4/4/23, 140/A181. Coupled with the absence of any contemporaneous note from that December 12, 2017, interview, *id.,* 115-16/A148-49, it raised a serious question as to whether Church ever implicated Mr. Burrell before facing the enormity of charges he faced.

As this Court held in *Boatswain,* the *Chapman/Van Arsdall* harmlessness calculus is informed by the weakness of the State's case. Considering the quality of the State's evidence and its most critical witnesses, admission of the Nyala evidence cannot be deemed harmless.

## II

**THE SUPERIOR COURT ERRED AND ABUSED ITS DISCRETION IN REDACTING FROM ANDRE CHURCH'S STATEMENT HIS ELEVENTH-HOUR IDENTIFICATION OF THE PERSON WHO ALLEGEDLY SHOT HIM, THOMAS PAYNE; ALTERNATIVELY, THE SUPERIOR COURT COMMITTED PLAIN ERROR BY PERMITTING THE RESULTING DISTORTED STATEMENT THAT FALSELY IMPLICATED MR. BURRELL AS CHURCH'S SHOOTER TO BE PRESENTED TO THE JURY.**

### A. Question Presented

Whether the trial court erred and abused its discretion, violating Mr. Burrell's rights to a fair trial and to present a defense, by redacting from Andre Church's statement his identification of Thomas Payne as the person who allegedly shot him. Trial counsel objected to the court's ruling and preserved this issue. Tr. 3/29/23, 22-35/A23-36. Alternatively, the trial court committed plain error in allowing the distortion created by the redaction, that implicated Mr. Burrell as that shooter, to be presented to the jury.

### B. Scope of Review

This Court reviews a trial court's decision on the admissibility of evidence under an abuse of discretion standard. *Hines v. State,* 248 A.3d 92, 99 (Del. 2021).

Regarding plain error, where a party did not object at trial, this Court reviews for plain error. *See, e.g., Brooks v. State*, 40 A.3d 346, 351 (Del. 2012). Plain error is error that is prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial. *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

### C. Merits of Argument

The State was entitled to its theory that Church recanted his March 12, 2019, statement due to witness tampering. The defense, however, was entitled to challenge that theory. The trial court's ruling that redacted from the video Church's identification of his shooter only first made upon Church's arrest when he was bargaining for his freedom, erroneously and substantially hampered that challenge, and Mr. Burrell's right to a fair trial and to present a defense. The trial court had ruled that the State could introduce evidence of alleged outreach to Church because "it gives an explanation for why" testifying was not something he really wanted to do." Tr. 3/29/23, 17/A21; or as the Assistant Attorney General stated, "why he didn't come forward earlier." *Id.,* 13/A18. Thus, *from the* defense perspective, the relevance of the name was clear. It rebutted that explanation and showed that even when he was the victim and had every reason to seek redress, without a payoff (or "until he was under the gun from the State and his father was in [the] situation" *id.,* 29/A30), he would not supply a name.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citation omitted); *Lindsey v. Normet*, 405 U.S. 56, 66 (1971)

(citation omitted) ("Due process requires that there be an opportunity to present every available defense."). "Criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). The erroneous exclusion of critical, corroborative defense evidence violates both the due process right to a fair trial, and the right to present a defense pursuant to that clause and the Sixth Amendment. *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973) *Washington v. Texas,* 388 U.S. 14, 19 (1967). Church's naming of Payne only when it could get him out of trouble, absent any suggestion of prior intimidation, was "critical corroborative defense evidence." Simply put, if he is playing that game when he is a victim, how can the jury believe he would not when he is merely a witness? But the trial court's ruling precluded that argument. "[R]edactions are permissible so long as the redaction does not [] exclude substantially exculpatory information." *United States v. Yousef,* 327 F.3d 56, 150 (2d Cir. 2003). The trial court's ruling did just that.

Separately, the trial court's ruling led to a redaction that wreaked havoc with the true meaning of the statement. *Yousef* counsels that "redactions are permissible so long as the redaction does not [] distort the statement's meaning." *Id.* The redaction in this case caused the statement to suggest that Mr. Burrell shot Church:

**Det. Kirlin:** So. So, what do you know about Stink's [shooting]?

**Church:** **Trev** did it.

**Det. Kirlin: Trev**? So, what happened that day?

**Church:** Same situation how I explained it to you. Right? (Inaudible) he was talking. There was conversation. I was looking up down the street at a car coming up. When I turned around, we had seen **Trev** go behind us and go down to the basement. **He** beelined, turned right back around, stood behind me, shot him in the head.

**Det. Kirlin** When you say walked down the basement, what basement?

**Church:** Bag's basement.

**Det. Kirlin:** Oh, okay. So, the house that you guys are at?

**Church:** What we used to be at.

A___/A___(Transcript) [the next portion of the statement is redacted; the video, however, is spliced and continues as if uninterrupted]

**Det. Kirlin:** Huh. Okay. So, were they all like friends? Were they friends or just what?

**Church:** I'm not going to say that. Them motherfuckers were cordial. I'm not going to say they was really friends or anything like that.

**Det. Kirlin:** Just work together.

**Church:** You know how like it ain't even work together. But you know how like some people don't like one person, so they take sides or something for someone.

**Det. Kirlin:** Right.

**Church:** And it was all surrounding what took place with me.

**Det. Kirlin:** What with the 3 Street thing?

**Church:** When I got shot.

A309/A260 (Transcript). [The next section, in which Church implicates Thomas Payne as the person who shot him, is redacted. The video, however, is spliced and continues as if uninterrupted.]

> **Church:** **He** shot me in my leg, then he came down slowly on top of me and shot me.

A309/A261 (Transcript).

The protagonist/perpetrator in this narrative is always Mr. Burrell. Thus, in context, the implication that was (falsely) created was that the "he" who shot Church in the leg was the same "he" who according to Church "beelined turned right back around, stood behind [Church and] shot ["Stink"] in the head," Mr. Burrell. Even if there is some measure of doubt that the jury drew this conclusion, it cannot be seriously disputed that this is a fair (yet false) implication from the redacted statement.

**Alternative Plain Error Argument**

This false implication – *that Mr. Burrell shot the witness* – was a devastatingly prejudicial impact of the trial court's error in redacting the actual name of the shooter, and thus part and parcel of counsel's preserved objection. However, if this Court finds that the redaction distortion required a separate objection, or if this Court affirms the trial court's decision to keep from the jury Church's identification of

Payne (rendering a related harm analysis moot), then in the alternative redacting the statement to distort its meaning constituted plain error.

Presenting altered evidence that permits a jury to infer that the defendant – no less the defendant in a murder case – shot the eyewitness, when the trial court and all the parties know that he did no such thing, is prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial. *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). In a variety of contexts courts around the country have held that due process is violated when a distortion of the fact-finding process works to the detriment of the defendant. *See, e.g., Quercia v. United States,* 289 U.S. 466, 470 (1933) (trial court may not "distort" or "add" to the evidence); *Townsend v. Burke,* 334 U.S. 736, 741 (1948) (sentence based on misinformation violated due process); *Schad v. Arizona*, 501 U.S. 624, 646 (1991) (giving jury "all-or-nothing choice between capital murder and innocence" distorts fact finding process and thus violates due process). In truth, these distortions pale in comparison to the alteration here that gave the jury license to find that Mr. Burrell shot Church. Coupled with the allegations that he sought to silence the State's witnesses, the error sealed Mr. Burrell's fate.

**Other Reasons Why Redacting the Name Was Not Harmless Beyond a Reasonable Doubt**

Mr. Burrell incorporates his harmlessness argument set forth *supra,* 27-31. Additionally, the trial court's erroneous ruling was especially prejudicial at a trial in

which the State was permitted to argue that Church's hesitation was a function of intimidation from Mr. Burrell. Even if that ruling was correct, which it was not, Mr. Burrell had the right to counter it. The trial court's inviting trial counsel to establish through cross-examination who shot Church, Tr. 3/29/23, 32/A33, did not ameliorate the harm. Church's implication of his shooter at Mr. Burrell's April 2023 trial would have done nothing to advance the legitimate defense theory that he provided Payne's name only when it was in his secondary interest to do so.

## III

### THE SUPERIOR COURT COMMITTED STRUCTURAL AND PLAIN ERROR BY PROVIDING THE JURY WITH A CONSTITUTIONALLY INADEQUATE REASONABLE DOUBT INSTRUCTION, WHICH WAS THE EQUIVALENT OF THE CLEAR AND CONVINCING EVIDENCE STANDARD.

### A. Question Presented

Whether the Superior Court erred by instructing the jury that "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt[,]" with no additional commentary that served to distinguish the burden of proof from one of clear and convincing evidence.

### B. Scope of Review

This error was not preserved by trial counsel. Where a party accepted a particular jury instruction at trial, this Court reviews for plain error. *See, e.g.*, *Volkswagen of Am., Inc. v. Costello*, 880 A.2d 230, 234 (Del. 2005). Where, as here, the jury instruction involved a defective reasonable doubt instruction, the error is structural, *Brice v. State,* 815 A.2d 314, 324-25 (Del. 2003), and review of the error, even absent a trial objection, is *de novo. Thomas v. State,* 293 A.3d 139, 142 (Del. 2023). If this type of structural error is found (a constitutionally inadequate reasonable doubt instruction), prejudice is presumed. *Weaver v. Massachusetts,* 582 U.S. 286, 301 (2017). Alternatively, the error is also addressable upon plain error review under Supr. Ct. Rule 8, in that this violation was so clearly prejudicial to

substantial rights as to jeopardize the fairness and integrity of the trial. *Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986).

### C. Merits of Argument

In *Victor v. Nebraska,* 511 U.S. 1, 5, 16 (1994), the United States Supreme Court held that when a State chooses to define reasonable doubt, it must not provide a definition that suggests "a standard of proof lower than due process allows." "Any jury instruction defining 'reasonable doubt' that suggests an improperly high degree of doubt for acquittal or an improperly low degree of certainty for conviction offends due process." *Id.,* 29. The *Victor* Court cited with approval the Federal Judicial Center's model reasonable doubt instruction, *id.* 16-17. In her concurring opinion Justice Ginsburg pointed out that the model instruction's use of the term "firmly convinced" was paired with language that explicated the reach of that phrase, to make clear that overcoming reasonable doubt required convincing that excluded only the "real possibility" that the defendant is not guilty. *See id.,* 27 ("If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.").

At Mr. Burrell's trial, the jury was instructed that "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt." Tr. 4/5/23, 136/A250. Justice Ginsberg's "pairing" was not part of the instruction. The instruction violated the due process clause of the Fourteenth Amendment to the

United States Constitution. Absent further explication whether as suggested by Justice Ginsberg or otherwise, the instruction directed the jury to employ a "clear and convincing" standard of proof.

In *Shipman v. Division of Social Services,* 454 A. 2d 767 (Del.Fam.Ct. 1982), the Court had occasion to apply the clear and convincing standard of proof upon remand from this Court, following the United States Supreme Court's decision in *Santosky v. Kramer,* 455 U.S. 745 (1982). The *Shipman* Court also defined that standard, as proof that will produce in the "mind of the trier of facts a ***firm belief or conviction*** as to allegations sought to be established." *Id.,* 769 (quoting *Black's Law Dictionary* 227 (5th ed. 1979) (emphasis added). *See also State v. Williams,* 2001 Del. Super. LEXIS 418 at *11 (Sept. 4, 2001) (utilizing "firm conviction" language for clear and convincing evidence burden); *Guy S. v. Robin C.,* 1999 Del. Fam. Ct. LEXIS 91 at *12-*22 (Feb. 5) (utilizing "firmly convinced" language for clear and convincing evidence burden). This precedent demonstrates that "being firmly convinced" or "having a firm conviction," without more, are apt descriptors of the "clear and convincing" standard and thus fall short of the reasonable doubt standard.

In *Mills v. State,* 732 A.2d 845 (Del. 1999) and *McNally v. State,* 980 A.2d 364 (Del. 2009), this Court reviewed instructions that were similar although not identical to the burden of proof instruction given to Mr. Burrell's jury. In *Mills,* the instruction contained both prongs of the Federal Judicial Center's model instruction (i.e., the

"firmly convinced" language and the "real possibility that he is not guilty" language) that had been cited approvingly in the majority and concurring opinions. *Id.,* 852. Citing this approval, the Court found that the instruction comported with due process. *Id.,* 853. Later, in *McNally,* the appellant challenged the trial court's language that added to the Federal Judicial Center's model instruction the phrase "in other words, *a reasonable doubt that the defendant is not guilty*." 980 A.2d at 367-68[5] (emphasis added). McNally argued that the instruction erroneously directed the jury to acquit only if it was "firmly convinced" that the defendant is not guilty. *Id.* Although this Court declined to find plain error, it acknowledged the "potential confusion" complained of by McNally. McNally's argument, however, would have had no purchase absent the burden-shifting phrase that could be read to require proof beyond "a reasonable doubt that the defendant is not guilty." That was the problematic phrase in *McNally.*

The model instruction cited approvingly in *Victor,* does not contain such language. Moreover, as noted above, Justice Ginsburg in her concurrence pointed out that the model instruction's "firmly convinced" language included a "juxtaposed prescription that the jury must acquit if there is a 'real possibility' that the defendant is innocent." 511 U.S. at 27. That language is critical, because the fact that only a

[5] That phrase was added in *Mills,* as well; however, that addition played no part in this Court's *Mills'* analysis.

"real possibility" is sufficient to create a reasonable doubt is what distinguishes the beyond a reasonable doubt standard from the clear and convincing evidence standard. The Delaware Superior Court's own "clear and convincing evidence" standard instruction proves the point. Del. P.J.I. Civ. § 4.3 (A253) requires the jury to find that the proof is "free from serious doubt," a heightened level of doubt inconsistent with the due process clause when included in a "beyond a reasonable doubt" instruction. *See Cage v. Louisiana,* 498 U.S. 39, 40-41 (1990) (holding the use of the phrase "actual substantial doubt" coupled with "grave uncertainty" suggests "a higher degree of doubt than is required for acquittal under the reasonable-doubt standard.") *Id.*

The Superior Court's standard instruction for clear and convincing evidence, requiring "serious doubt" to rebut the firm conviction as to the allegations, reflects a commonsense recognition that anything short of "serious doubt" (such as the "real possibility" that overcomes reasonable doubt) will not rebut that finding. At the very least, without a juxtaposition of the type that Justice Ginsburg emphasized, there is a substantial risk that the jurors will impose upon the State the lesser standard that the Delaware courts determined was encompassed by the phrases "firm conviction" or "firmly convinced." Any such juxtaposition saves the instruction from being interpreted as the lesser "clear and convincing" standard by directing the jury to find that merely the real possibility of innocence or its equivalent precludes a conviction.

To the extent that after *Victor,* Delaware courts and the Delaware standard instructions adopted Justice Ginsberg's formulation, the deletion of the second prong of that instruction that provides necessary context and distinguishes the instruction from a clear and convincing evidence instruction, renders it unconstitutional under the due process clause of the United States Constitution.

The trial court's instruction eliminated this second prong, substituting the sentence "[i]f, on the other hand, you have a reasonable doubt about the defendant's guilt, you must give the defendant the benefit of the doubt by finding the defendant not guilty." Tr. 4/5/23, 136/A250. That sentence provides only a circular definition, defining this essential second prong by the term that is being defined, reasonable doubt.

This Court should find that the Superior Court's instructional error was structural, or in the alternative, plain, entitling Mr. Burrell to relief.

## CONCLUSION

For all the foregoing reasons, Appellant Trevie Burrell respectfully requests that the Court reverse the judgment of the Superior Court, vacate his convictions and sentence, and remand this matter for a new trial.

Respectfully Submitted:

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