STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 18, 2024)

ANTHONY MOORE	:	
	:	
v.	:	**PM/18-3086**
	:	**(P1-2014-0891BG)**
STATE OF RHODE ISLAND	:	

DECISION

KRAUSE, J. In this postconviction-relief application Anthony Moore, who is serving two life sentences for first-degree murder with a firearm and a ten-year term for conspiracy to commit murder, claims that his constitutional right to effective assistance of counsel was compromised by his trial attorney. Moore criticizes him for not objecting to the Court's coconspiracy liability instructions and for other omissions which he says reduced the state's burden of proof.

The Court disagrees.

Facts and Travel

The facts underlying the criminal charges are fully set forth in the Supreme Court's affirmance of Moore's convictions. *State v. Moore*, 154 A.3d 472 (R.I. 2017). A shorter version will suffice here.

In January 2014, Alain Bedame and Seydina Ndoye, who wanted a gun for protection, tried to buy one from James Gomez and his brother Johnathan. James stole Bedame's cell phone and $240, and the sale was never consummated. They then asked Ndoye's friend Ashner Alexis to help them obtain a firearm. Coincidentally, Alexis also held a grudge against the Gomez brothers, believing that they had stolen scrap metal from him a few months earlier. Alexis agreed to assist

them, but the purpose of obtaining the weapon escalated: They intended to use it to exact revenge upon James Gomez.

On February 4, 2014, Alexis introduced Ndoye and Bedame to Moore, who was hosting a party for some friends at his Woonsocket residence. They explained their mission and solicited his assistance to obtain a gun. Moore said that they had "come to the right place." At trial, Moore was described as the leader of a small band of followers who referred to him as "general" and even saluted him. He sent Bedame and Robert Winston, an impressionable seventeen-year old acolyte of Moore, to retrieve a gun from one of Moore's associates at an apartment complex. They returned and displayed a shotgun to an approving Moore. Alexis, Bedame, and Ndoye, along with Winston, then headed for the Gomez residence in Providence. Before they left, Moore told Alexis that if Winston "didn't do what I told him to do, to blow his [f'ing] head off."

Upon arrival, Winston and Alexis approached the Gomez house and Winston knocked on a window. When someone appeared, silhouetted behind a shade, Alexis immediately opened fire. Instead of their intended target, he shot and killed George Holland, a high school student who was visiting the brothers' sister that night. They ran back to the car, Alexis exclaiming that he "got someone." All four returned to Moore's house, where Moore and others congratulated them.

When Moore called Winston later that night, his girlfriend, Brandi Lachance, heard Moore on the phone's speaker tell Winston that they had "shot the wrong kid, . . . someone named George." At trial, Johnathan Gomez testified that a few days before the February 4 shooting, he had received a Facebook message from someone who referenced James's theft of Bedame's money and cell phone and said that James would probably be killed.

On March 28, 2014, a grand jury indicted Moore, Alexis, Bedame, and Ndoye for the first-degree murder of George Holland, discharging a firearm resulting in Holland's death, and

conspiracy to commit murder. Bedame and Ndoye agreed to cooperate with the state. They pled guilty to the conspiracy charge, as well as to reduced charges of second-degree murder and discharging a firearm resulting in injury instead of death, thereby sparing them from mandatory consecutive life terms in prison. *See* G.L. 1956 §§ 11-23-2, 11-47-3.2(b)(4), (c). Each of them accepted a twenty-year prison term, followed by a twenty-year suspended nonparolable period. Winston waived indictment and also agreed to cooperate. He pled guilty to a reduced charge of assault with intent to commit murder and to the conspiracy charge and was sentenced to serve sixteen years of a twenty-year term, followed by four suspended years.

On October 16, 2014, a jury convicted Moore of the three charges in the indictment. Alexis's case was severed and tried the following month. He was convicted by a jury of the same three offenses. Moore's motion for a new trial was denied on December 4, 2014. On February 12, 2015, this Court sentenced each of them to two mandatory consecutive life terms, along with a consecutive ten-year term on the conspiracy count. Alexis's convictions have also been affirmed. *State v. Alexis*, 185 A.3d 526 (R.I. 2018).

* * *

General Laws 1956 § 10-9.1-1 allows a convicted felon to seek postconviction relief if, *inter alia*, his conviction allegedly resulted from a violation of his constitutional rights. An applicant must prove his claim by a preponderance of the evidence, *Hazard v. State*, 64 A.3d 749, 756 (R.I. 2013); and, if the petitioner claims that his attorney rendered prejudicially deficient representation, he must meet that challenge by surmounting the two-tiered test prescribed by *Strickland v. Washington*, 466 U.S. 668, 688 (1984), adopted by our Supreme Court. *E.g.*, *LaChappelle v. State*, 686 A.2d 924, 926 (R.I. 1996), *Brown v. Moran*, 534 A.2d 180, 182 (R.I. 1987).

Ineffective Assistance of Counsel

Under *Strickland*, applicants must first demonstrate that counsel's performance was so deficient that it fell below an objective standard of reasonableness and that the deficiency was so prejudicial and the errors so serious that his client was denied a right to a fair trial. *Njie v. State,* 156 A.3d 429, 433 (R.I. 2017). In making that determination, courts are obliged to accept a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Furthermore, in assessing counsel's efforts, a reviewing court should strive to eliminate the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689. A "heavy burden" attends a postconviction-relief (PCR) applicant who claims that his attorney rendered constitutionally defective assistance. *Rice v. State*, 38 A.3d 9, 17 (R.I. 2012). *See Padilla v. Kentucky*, 559 U.S. 356, 371–72 (2010) (observing that "[s]urmounting *Strickland's* high bar is never an easy task").

Even if a petitioner can demonstrate counsel's deficiency, he must also overcome *Strickland's* arduous second barrier by showing that counsel's shortcomings prejudiced his defense, such that a reasonable probability exists that but for such unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 694; *Crombe v. State*, 607 A.2d 877, 878 (R.I. 1992). Our Supreme Court has said that substantiating prejudice is a "prodigious burden," *Evans v. Wall*, 910 A.2d 801, 804 (R.I. 2006), and one that is "highly demanding and heavy[.]" *Whitaker v. State*, 199 A.3d 1021, 1027 (R.I. 2019); *accord, Barros v. State,* 180 A.3d 823, 829 (R.I. 2018) (citing *Knight v. Spencer,* 447 F.3d 6, 15 (1st Cir. 2006)).

Both of *Strickland's* requirements must be satisfied to mount a successful ineffectiveness claim, *Hazard v. State,* 968 A.2d 886, 892 (R.I. 2009), and it is only the "exceptional case" in which counsel is deemed ineffective. *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

Petitioner's Claims

Vicarious Liability of Coconspirators

Moore principally complains that trial counsel erred by not objecting to the Court's vicarious liability instruction, which was included in the Court's conspiracy charge. He has withdrawn his criticism of trial counsel for not objecting to the Court's aiding and abetting instruction, a concession which, by itself, undermines his application. *See infra*. Moore has also withdrawn his claim that trial counsel allegedly failed to interview witnesses and to properly investigate the case, and he has no intention of testifying at any hearing on his PCR application. *See* petitioner's memorandum at 12 and Stipulation dated March 25, 2024. The parties have submitted the matter to the Court for a ruling on Moore's remaining claims, based upon the pleadings filed and the record of the case, waiving a hearing and oral argument.

The Court gave the following conspiracy instruction to Moore's jury:

> "As you know, the State does not claim that Anthony Moore personally shot and killed George Holland. What the State contends is that he is nonetheless vicariously and criminally responsible for the murder and the firearm offense either as a co-conspirator or as an aider and abettor . . . Let me spend a few minutes with you talking about the crime of conspiracy.
>
> "The law provides that every person who conspires with another to commit a crime has thereby committed a separate criminal offense. In other words, the law provides that if two or more persons conspire to commit a substantive criminal act, such as murder, each person is also guilty of the separate offense of conspiracy.
>
> "Generally speaking, a conspiracy is a combination of two or more persons to commit an unlawful act. A conspiracy is, in effect, a partnership in a criminal venture. Once the unlawful agreement has been made, the crime of conspiracy is complete.
>
> "In order to convict the defendant of the conspiracy charge, the State must prove that there was an agreement between the defendant and at least one other person to commit murder. The evidence need not show that the members of a conspiracy entered into any express contract or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose

> was to be, or the details thereof, or the means by which the object or purpose was to be accomplished.
>
> "What the evidence must show is that the defendant and one or more persons, in some manner, came to a mutual understanding to try to accomplish a common and unlawful plan; namely, to commit murder. The existence of a conspiracy may be proved by direct evidence or entirely by circumstantial evidence, or by any combination of direct and circumstantial evidence.
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> "Because a conspiracy is a kind of partnership in crime, each member of the conspiracy becomes the agent of every other member. A person who willfully enters into a conspiracy is, therefore, charged with the same criminal responsibility for the actions of any other member of the conspiracy if those actions were taken in furtherance of that common design or plan. Similarly, the declarations and the statements of one co-conspirator, which were made during the course of the conspiracy and in furtherance of it, are likewise admissible against any other member of the conspiracy.
>
> "In other words, each member of a conspiracy is vicariously responsible for every act done by a co-conspirator in carrying out the plan, as one of its natural, probable, or foreseeable consequences, even though the act may not have been part of the original plan, or even if it was forbidden by one or more of the co-conspirators.
>
> "I think I told you about 'A,' 'B,' and 'C' robbing a bank when we started this trial. 'A' is the driver, 'B' is the lookout, 'C' goes in and holds up the teller. All three, 'A,' 'B,' and 'C' are guilty of conspiracy to commit robbery. And all three of them, even though 'A' never leaves the car, and 'B,' who doesn't do anything except keep a look out, all three are guilty of robbing that bank.[1]
>
> "Thus, if you find that the defendant, Anthony Moore, together with others, agreed to commit murder, and that thereafter one of them shot and murdered George Holland, then Anthony Moore is guilty of conspiracy to commit murder, as well as the substantive offense of murder, regardless of which one of his alleged co-conspirators actually fired the fatal shot." (Tr. at 754-57.)

Moore asserts that the last paragraph inaccurately states the law (even though it is entirely consistent with the preceding paragraphs, none of which he challenges), and he faults trial counsel

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[1] In prefatory comments to the jury before the trial began, the Court explained the vicarious criminal responsibility rule by analogizing it to "the classic example" of the bank robbery lookout who remains in the car but is just as guilty as the bank robber who shoots a security guard if it was reasonably foreseeable that the plan might go awry and result in physical violence. Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. Crim. L. & Criminology 147, 147-48 (2007).

for not objecting to it. Our Supreme Court, however, approved such a vicarious liability instruction over a century ago, has endorsed it since then, and has never withdrawn its approval of it. Moreover, similar instructions have been and continue to be used by many other courts throughout the country.

* * *

Analysis begins by examining the jury charge as a whole without, unlike Moore, isolating a portion of it. The Supreme Court has made it clear that when reviewing a jury charge, courts should "examine the instructions in their entirety to ascertain the manner in which a jury of ordinary intelligent lay people would have understood them, . . . and we review challenged portions of jury instructions in the context in which they were rendered . . . Further, [courts] will not examine a single sentence apart from the rest of the instructions, but rather the challenged portions must be examined in the context in which they were rendered." *State v. Adefusika*, 989 A.2d 467, 475 (R.I. 2010) (internal quotations omitted); *State v. Pona*, 66 A.3d 454, 470 (R.I. 2013) ("We do not simply home in on single sentences[.]"). Viewed in its entirety, the Court's charge traces long recognized principles of conspiracy law embedded in the Rhode Island and the United States Supreme Courts' decisions. *E.g. State v. Gibson*, 291 A.3d 525, 539-40 (R.I. 2023); *State v. Tully*, 110 A.3d 1181, 1194 (R.I. 2015); *State v. Mastracchio*, 612 A.2d 698, 706 (R.I. 1992); *Ocasio v. United States*, 578 U.S. 282, 287-88 (2016).

Notwithstanding those principles, which recite the vicarious liability rule - particularly where, as here, the State has affirmatively excluded the defendant as the shooter - Moore complains that it was error to instruct the jury that if he agreed with others to commit murder, then he was also guilty of the substantive offense of murder, regardless of which one of the coconspirators killed George Holland. He complains that the instruction was essentially a mandatory directive which impermissibly lessened the State's burden of proof. He insists that the instruction should

have instead been framed in discretionary or permissive language, advising the jury that if Moore had conspired with the others to commit murder, the jurors "may" find Moore guilty of the murder. He relies on cases which endorse such a permissive instruction, but he does not account for the multitude of authorities, including Rhode Island decisions, which espouse a mandatory instruction.

The *Pinkerton* Rule

In *Pinkerton v. United States*, 328 U.S. 640 (1946), the Supreme Court addressed the doctrine which assigns criminal liability for a substantive offense committed by a coconspirator. In essence, the *Pinkerton* rule refers to a form of "collective guilt" or vicarious responsibility for acts committed by other members of a conspiracy. Neal Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307, 1336, 1339 (2003). The doctrine holds that a member of a conspiracy is liable for substantive offenses committed by his coconspirators, even if he did not participate in them, when the offenses are committed to further the conspiracy, come within the scope of the illicit venture, and are reasonably foreseeable consequences of the unlawful agreement. *Pinkerton*, 328 U.S. at 647-48.

Long before *Pinkerton*, the Rhode Island Supreme Court had already adopted that derivative responsibility principle. In *State v. Brown*, 45 R.I. 9, 13, 119 A. 324, 326 (1923), the Court said:

> "The rule is established beyond question that all who participate in the commission of a crime are severally responsible to the state as though the crime had been committed by any one of them acting alone; there is no such thing as division of responsibility among the several participants in a crime. Based on this truth, it has been held that, although joint actors in the commission of a crime are jointly tried and convicted, each may be separately punished as if he had committed the offense alone and must respond in full to his own separate sentence."

Some years later, George Miller and other inmates attempted to escape from the Rhode Island State Prison. One of his confederates shot and killed a prison guard. The trial court, over Miller's objection, instructed the jury in mandatory language:

> "I charge you that as a matter of law it is not incumbent or necessary for the State to prove that the defendant Miller fired the shot which killed [Officer] McVay, and if you find the defendant Miller became an active participant in any plan or conspiracy to effect his own escape or the escape of any other person from the Rhode Island State Prison at any time before Mr. McVay was shot, and in pursuance of such plan or conspiracy acted in concert with persons who have not been apprehended, then your verdict *should be* guilty." *State v. Miller*, 52 R.I. 440, 445-46, 161 A. 222, 225 (1932) (emphasis added).

Affirming Miller's second-degree murder conviction, the Supreme Court accorded full approbation to the trial court's mandatory vicarious liability instruction and said:

> "The instruction was correct. The rule is well established that, where several persons combine or conspire to commit an unlawful act, such as an attempt to escape from the state prison, each is criminally responsible for the acts of his associates or confederates in the furtherance of any prosecution of the common design for which they combine. Each is responsible for everything done by one or all of his confederates, in the execution of the common design, as one of its probable and natural consequences, even though the act was not a part of the original design or plan, or was even forbidden by one or more of them." *Miller*, 52 R.I. at 445-46, 161 A. at 225 (citing, *inter alia*, *Brown*, 45 R.I. at 13, 119 A. at 326).

In *State v. Barton*, 424 A.2d 1033 (R.I. 1981), the Rhode Island Supreme Court addressed the *Pinkerton* doctrine and expressly reaffirmed *Miller's* holding, stating, "We regard the [*Miller*] rule as just stated to be sound and viable. Moreover, the position articulated in *Miller* continues to be the majority rule." *Barton*, 424 A.2d at 1038 (citing cases). The same rule still obtains in Rhode Island and has remained unchanged. *State v. Graham*, 941 A.2d 848, 857 (R.I. 2008) (holding that the jury "should have been instructed that it could convict defendant of murder if it found a conspiracy and that one of the conspirators killed the victim, no matter which of them pulled the trigger"); *Tully*, 110 A.3d at 1194-95 (expressly quoting *Miller*). The United States Supreme Court has not altered its position, either. *Salinas v. United States*, 522 U.S. 52, 63-65 (1997); *Ocasio*, 578 U.S. at 288; *see also United States v. Roman*, 607 F. Supp. 3d 151, 171 (D.R.I. 2022) (McConnell, C.J.).

The federal appellate courts for the Seventh and Eighth Circuits have consistently upheld mandatory *Pinkerton* instructions. In *United States v. Renteria*, 106 F.3d 765, 768 (7th Cir. 1997), the court said:

> "Renteria's final issue for appeal is equally unsubstantial. She argues that the district court's *Pinkerton* instruction impermissibly 'required' the jury to find her guilty of the distribution offense charged in Count II if it found her guilty of the conspiracy charged in Count I. The instruction given reads as follows:
>
> > "A conspirator is responsible for offenses committed by her fellow conspirators if she was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of or as a natural consequence of the conspiracy. Therefore if you find the defendant guilty of the conspiracy charged in Count 1 of the indictment and if you find beyond a reasonable doubt that while she was a member of the conspiracy, a fellow conspirator committed the offense in Count 2 of the indictment in furtherance or as a natural consequence of that conspiracy, then *you should find the defendant guilty* of Count 2 of the indictment.
>
> "We believe that this instruction, drawn directly from the Seventh Circuit's pattern jury instructions, correctly stated the law as it pertains to the liability of a conspirator for the acts of her coconspirators." (Emphasis added.)

The Eighth Circuit, in *United States v. Pierce*, 479 F.3d 546, 549 (8th Cir. 2007), has also approved a mandatory instruction:

> "A defendant who has entered into a criminal conspiracy is responsible for offenses committed by fellow conspirators if the defendant was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy. Therefore, if you find a defendant guilty of the conspiracy charged in Count 1 and if you find beyond a reasonable doubt that while the defendant was a member of the conspiracy, a fellow conspirator committed an offense charged in Counts 2 through 13 in furtherance of and as a foreseeable consequence of that conspiracy, then you *should find the defendant guilty of that [substantive] offense as well*." (Emphasis added.)

The *Pierce* defendants protested the use of the mandatory term "should," rather than the permissive word "may" in the instruction. Rejecting that contention, the Eighth Circuit observed that while some of the other Circuit Courts had upheld the use of permissive instructions, "each

[of those Circuits] has also approved instructions containing mandatory language similar to that used by the district court in this case." *Id*. at 550-51 (collecting cases from other circuits). The *Pierce* court concluded its survey as follows:

> "Therefore, while the pattern instructions of other Circuits may indicate a *preference* for permissive language in those Circuits, the law of the Circuits does not, as argued by Appellants, establish precedent standing for the proposition that mandatory *Pinkerton* instructions are erroneous. Rather, the instructions and cases illustrate that *both* mandatory and discretionary *Pinkerton* instructions are fair statements of the law, so long as each element of the *Pinkerton* doctrine is included in the instruction." *Id*. at 550-51.

The *Pierce* decision approving the mandatory *Pinkerton* instruction continues to be followed in the Eighth Circuit. *United States v. Wright*, No. 22-1194, 2023 WL 3163268 (8th Cir. 2023).[2]

In the collection of 1 *Modern Federal Jury Instructions – Criminal* ¶ 19.03 Lexis (database updated March 2023), the editors note that there has been considerable discussion in the federal courts of whether a *Pinkerton* instruction should use permissive or mandatory language to determine a defendant's guilt of the underlying substantive offense. The editors note that some of the federal circuit courts favor permissive language but that many others have opted for mandatory language. The annotations commend *Pierce's* observation that "both mandatory and discretionary *Pinkerton* instructions are fair statements of the law." *Id.* (quoting *Pierce*, 479 F.3d at 551).

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When addressing issues which have generated assorted assessments and holdings in other jurisdictions but have not been considered, adopted, or followed in Rhode Island, our Supreme

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[2] This Court is cognizant that unpublished cases are generally not cited as authority. They may, however, be referenced not "for precedential value, but by way of example" and "illustrative of the way in which courts have dealt with this issue," or if they might otherwise be "instructive." *Whitaker v. State*, 199 A.3d 1021, 1029 n.3, and 1030 n.5 (R.I. 2019); *Estate of Chen v. Lingting Ye*, 208 A.3d 1168, 1175 n.8 (R.I. 2019). The recent *Wright* case is included for those limited purposes.

Court has held that neither the courts nor attorneys err if they do not follow those alternative theories or opinions. *See State v. Davis*, 131 A.3d 679, 696 (R.I. 2016), *State v. Fuentes*, 162 A.3d 638 (R.I. 2017), and *State v. Hampton-Boyd*, 253 A.3d 418 (R.I. 2021), all of which recognize but do not mandate an explicit form of a jury instruction regarding the frailties of eye witness identification adopted by other courts; and *see Barros v. State*, 180 A.3d 823 (R.I. 2018) (discussing the (in)admissibility of expert testimony regarding false confessions).

Withal, the test is whether trial counsel and the court have followed the rules and principles which correspond to the law at the time the case was litigated. *Hampton-Boyd*, 253 A.3d at 426. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms[.] *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). In *Barros*, the Court said: "We would emphasize that, in evaluating an attorney's performance under *Strickland*, our approach is to look at the legal landscape and what was known to the attorney *at the time at issue*." *Barros*, 180 A.3d at 833 (emphasis in original text) (internal quotation marks omitted).

In sum, when Moore's case was tried in 2014, the Rhode Island Supreme Court, beginning with *Brown* in 1923, which was later reaffirmed by *Miller* in 1932 and by *Graham* in 2008, had already approved a mandatory vicarious liability instruction. The Court has not disavowed those holdings, and countless courts throughout the country did then and still do subscribe to mandatory *Pinkerton* instructions.

Under any objective standard of reasonableness, it would outreach all margins of rationality to hold that Moore's trial attorney was ineffective for not objecting to a jury instruction which has for over a century carried the approbation of our Supreme Court and the endorsement of myriad federal and state courts.

The Firearm Discharge-Death Instruction

Oddly, the State, on one hand, contends that the Court's vicarious liability charge is accurate but then joins Moore and says that the instruction on discharging a firearm causing death was error (although harmless). State's Mem. at 4.

This Court is not at all obliged to accept the State's professed concession that the Court erred on a question of law. *Orloff v. Willoughby*, 345 U.S. 83, 87 (1953); *Wisconsin v. Anderson*, 851 N.W.2d 760, 764 (Wis. 2014) ("[W]e are not bound by a party's concession of law . . . Moreover, we independently review whether a jury instruction is an accurate statement of the law."); *Moonlight Enterprises, LLC v. Mroz*, 797 S.E.2d 536, 541 n.5 (Va. 2017) ("Simply put, litigants cannot 'define [state] law by their concessions.'").

Consistent with this Court's entire conspiracy and vicarious responsibility charge, the Court instructed the jury with respect to this firearm count:

> "The defendant is also charged with the separate offense of discharging a firearm during a crime of violence, resulting in the death of George Holland. Murder is a crime of violence. If you find, *in accordance with these instructions*, that the defendant Anthony Moore is vicariously responsible as a co-conspirator or as an aider and abettor for the shotgun murder of George Holland, the State will have satisfied its burden of proof on this separate firearm charge." (Tr. at 760-61.) (Emphasis added.)

Moore was not short-changed by this instruction. It unambiguously references and fully incorporates the entirety of the Court's jury charge (a copy of which had been provided to the jurors), including conspiracy, aiding and abetting, as well as all of the elements of the substantive offense of murder (Tr. at 755-60), which were set forth in conjunction with this instruction. *See United States. v. Villagrana*, 5 F.3d. 1048, 1052-53 (7th Cir. 1993) (reminding the jury, in the context of its *Pinkerton* charge, that with respect to the substantive offenses, "I have already covered those elements in earlier instructions."). *See State v. Hampton*, 988 A.2d 167, 178-180

(Conn. 2009), holding that the trial court's reference to complete explanations elsewhere in its written instructions was sufficient and did not invite subsequent repetition:

> "When we review the jury instruction as a whole, it is clear that the trial court gave a thorough instruction on the meaning of specific intent as well as two thorough instructions on accessory liability, but, for purposes of economy, did not repeat the same instructions relative to each of the charged crimes. The trial court repeatedly referred back to its earlier instructions and admonished the jury to evaluate all of the elements of each crime as charged in the information. The trial court also provided each juror with a written copy of the instructions, which enabled each of them to quickly and easily refer back to the court's instructions regarding each element and apply the instructions to each substantive crime. Accordingly, we conclude that it is not reasonably possible that the jury was misled by not being instructed repeatedly on the specific intent of accessory liability for each of the substantive crimes charged." *Id*. at 180.

Moore's jury was fully advised of each element of the substantive crime of murder *immediately before and coupled with* the subject instruction, and the jurors were also explicitly told that the State had the burden of proving each of those elements beyond a reasonable doubt. (Tr. at 759-63. The subject instruction neither diminished the State's burden of proof nor omitted any relevant explanation for the jury to consider. We presume that juries follow the instructions they are given, and nothing in the record indicates that this presumption should be discarded. *State v. Ciresi*, 45 A.3d 1201, 1218 (R.I. 2012); *State v. Chum*, 54 A.3d 455, 461 (R.I. 2012).

The notion that the instruction is somehow deficient or irregular dispenses with the basic rule that examination of a jury instruction must be made in the context in which it was rendered, backdropped by the entirety of the charge, and not analyzed through a lens narrowly focused on a fragment of it. *State v. Nunes*, 788 A.2d 460, 463 (R.I. 2002); *Adefusika*, 989 A.2d at 475; *Pona*, 66 A.3d at 470.

The Court's Response to the Jury's Inquiry

On October 16, 2014, the jury received the Court's instructions and began deliberating at about 1:00 p.m. after a lunch break. Each juror had also been provided with a copy of the jury instructions. Within about an hour, the jury sent inquiries to the Court relating to the vicarious liability portion of the conspiracy charge. After conferring with the attorneys and with their assent, the Court then addressed the jury as follows:

> "THE COURT: Good afternoon. We have your notes, which I will read into the record so that they are preserved for posterity.
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> "The first question to me: 'If we find the defendant guilty of the conspiracy charge, does that automatically imply that he is guilty of the other two charges.' And the subsequent question that you sent to me within minutes of the first one is: 'And can the defendant be found guilty of the discharging of firearm count while being found not guilty of the other two charges.'
>
> "The two questions in my mind are hand [in] glove. They just go together. But, frankly, we're a little puzzled why you are asking us this question or these questions. We thought that the instructions that were given to you were reasonably clear on this question or these questions. If I were to answer your questions directly yes, no, or yes or no with an explanation as to why you should do yes or no, I would, in effect, be directing you to reach a verdict one way or the other, and I am not going to do that. That would be wholly improper on my part.
>
> "On the other hand, I think, if you have read the instructions, and I do hope you have, and bearing in mind that I prefaced my instructions with the caveat that you should not single out a particular instruction as stating the law and that you should consider the instructions in their entirety, nevertheless, the instructions are broken out into various subjects, including an instruction relative to conspiracy. And I certainly would ask you to reread the instruction that I offered to you on the conspiracy charge, which begins on Page 3 and carries over a little bit at the top of Page 5, with an eye towards the portion dealing with the vicarious responsibility of co-conspirators.
>
> "But I want you to consider all the instructions together, along with my example that I gave to you, and if you are having a question or a problem with a portion of the instructions that is not clear enough to you, or something that is inviting more explanation, we'd like to know what it is, but not from where you sit.
>
> "Go back upstairs, reread the instructions, if there's a portion of it that is confusing to you, or there's something written in here that you need further explanation on,

> pinpoint it in the charge, in the written charge, and tell us what it is that you need expansion on. Okay? Thank you."
>
> (Jury exits at 2:00 p.m.)
>
> "MR. SMITH: The defendant has no objection to the Court's instructions to the jury.
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> "THE COURT: Thank you. [We'll] see if they have further inquiry. If they do, then we will take it up with them. I don't want to delve into their discussions. I don't want to interfere with what they're doing up there, as much as I think I know what they're doing, I bet I'm real wrong, because I've learned over the years you really can't speculate behind those doors. I don't know what they're thinking about. So we'll see." (Tr. at 805-807.)

The jurors did not request any further explanation, and after about a half-hour, they returned guilty verdicts on all three charges. Moore challenges the Court's response, complaining that the Court did not revise the purportedly flawed vicarious responsibility instruction.

A court typically provides a jury with clarification of its instructions unless, as here, the court - and, in this instance, even counsel - believe that it is "apparent that the jury simply overlooked some portion of the original instruction or if the jurors' confusion could have been adequately addressed by directing their attention to the original instructions, then repetition of those instructions . . . suffice[s] and additional instruction [is] . . . unnecessary." *State v. Hallenback*, 878 A.2d 992, 1008 (R.I. 2005) (citing, *inter alia*, ABA Standards for Criminal Justice, Standard 15-4.3(a)(i), (2d ed. 1980)). The 1982 edition of those ABA Standards has been slightly recalibrated but contains the same guidelines. Standard 15-5-3 of the 1996 edition provides:

> "If the jury, after retiring for deliberation, desires to be informed on any point of law, the court should give appropriate additional instructions in response to the jury's request unless the jurors may be adequately informed by directing their attention to some portion of the original instructions; or, the request would call upon the court to express an opinion upon factual matters that the jury should determine. [T]he court need not give additional instructions beyond those specifically requested by the jury, but in its discretion the court may also give or repeat other

> instructions to avoid giving undue prominence to the requested instructions." *Id*. (unrelated text and signals have been omitted for ease of reference.).

In *State v. Rhines*, 548 N.W.2d 415, 454 (S.D. 1996), a death penalty case, the jury sent questions to the trial judge during its deliberations inquiring about the penalty of life imprisonment. The court refused to provide any explicit response to the inquiries other than to reference its original charge. Affirming the trial judge's ruling, the South Dakota Supreme Court said: "We can discern no error in simply referring the jurors to these instructions. 'If the court in the exercise of sound discretion concludes that information or further instructions are not required, it may properly refuse such a request,'" quoting *State v. Holtry*, 321 N.W.2d 530, 531 (S.D. 1982), which held, "It was not an abuse of the trial court's discretion to refuse to further instruct the jury when the answer to their question could be found by more carefully reading and considering the instructions already before them."

In *People v. Reid*, 554 N.E.2d 174 (Ill. 1990), Reid was charged and convicted of murder and armed robbery in an Illinois Circuit Court (the court of general jurisdiction). One of Reid's two confederates shot and killed the victim during the robbery, and the state prosecuted Reid under a felony murder theory as well as an aider and abettor.[3] While deliberating, the jurors, like Moore's jury, asked the trial judge whether it could find Reid guilty of one charge and not the other.

The trial judge shared the inquiry with the trial attorneys, and they agreed that the court's final instructions were sufficiently clear and that the court should not explicitly reply to their inquiry, but should, instead, direct them to continue their deliberations on the basis of the written instructions which had already been provided to them. An intermediate appellate court reversed Reid's conviction, believing that the circuit court should have answered the question. The dissent

[3] A third alternative theory of liability was also offered but not identified in the court's decision. *People v. Reid*, 554 N.E.2d 174, 181 (Ill. 1990).

criticized the majority for considering the issue under the plain error doctrine because the evidence was not closely balanced, and, addressing the issue itself, said that the jury instructions were "complete and proper." *Reid*, 554 N.E. 2d at 179. The Illinois Supreme Court reversed the appellate court's decision and reinstated Reid's conviction.

The *Reid* court acknowledged that a trial court will usually respond to a jury in order to clarify issues of law if "the original instructions are incomplete, [and] the jurors are manifestly confused," *id*., but the court, paralleling *Hallenback* and the ABA guidelines, enumerated several reasons to depart from the general rule:

> "Nevertheless, under the appropriate circumstances, a circuit court may exercise its discretion to refrain from answering a jury's inquiries [and] may decline to answer a jury's question if the jury instructions are readily understandable and sufficiently explain the relevant law [and] further instructions would serve no useful purpose [or] would potentially mislead the jury, and [if] the jury's inquiry involves a question of fact. A circuit court may also refuse to answer an inquiry by a jury if an answer or explanation by the court would cause the court to express an opinion which would probably direct a verdict one way or the other. Furthermore, if the jury's question is ambiguous and any response to the question may require a colloquy between the court and the jury, a further explanation of the facts, and perhaps an expression of the trial court's opinion on the evidence, the circuit court may refuse to answer the question." *Id*. at 179–80 (internal citations and quotation signals omitted).

The Illinois Supreme Court pointed out that Reid's jury, like Moore's panel, had been provided with "a full and complete set of instructions on the applicable law," along with a verdict form which explicitly reflected the options of "guilty" or "not guilty" as to each offense charged. "It is apparent the circuit court concluded that the instructions sufficiently apprised the jury of the applicable law. Thus, under the circumstances, the circuit court did not abuse its discretion by referring the jury to the written instructions." *Id*. at 180.[4]

[4] Reid raised no objection to the court's response to the jury until the following day. By then, however, the jury had been deliberating for several hours without further inquiry or requests for clarification. The circuit judge refused to alter or amplify his original reply. Having already

Addressing Moore's jurors, the Court instructed them to review the full conspiracy instruction, as well as the instructions in their entirety, as they had been at the very outset of the charge, appreciating all of them "in the context in which they were rendered." *Adefusika*, 989 A.2d at 475.

Moore's jurors, however, were not left without recourse if they had further inquiry. They were told that after reviewing "all the instructions together," if they still had "a question or a problem with a portion of the instructions that is not clear enough to you, or something that is inviting more explanation," or if there was still "a portion of it that is confusing . . . [or] need[s] further explanation on, pinpoint it . . . and tell us what it is that you need expansion on." (Tr. at 806-07.) However, it is evident from their verdict soon thereafter, without further inquiry, that simply rereading the instructions readily satisfied their inquiry.

In many ways, Moore's case mirrors the *Reid* proceedings and invites the same result. As the Illinois Supreme Court said:

> "While the circuit court, within its discretion, could have directly answered the jury's question, the circuit court had no duty to do so under the circumstances of this case. As we indicated earlier, the jury received a complete set of written instructions. The circuit court apparently determined that the jury was not manifestly confused. The circuit court also apparently decided that the written instructions settled any confusion the jury displayed. For these reasons and for the other reasons we outlined above, we conclude the circuit court did not abuse the exercise of its discretion in its response to the jury's question." *Reid*, 554 N.E.2d at 181.

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responded to the jury's question in the very manner agreed to by both parties the previous day, the Supreme Court said that if the trial judge were to have changed his answer the following day, and the jury not having reiterated its question, any new or different response would have risked surprise and confusion among the jurors. The Supreme Court affirmed the trial court's rejection of Reid's untimely request. *Reid*, 554 N.E.2d at 180.

Alleged "One-Sided" Instructions

Moore says that the Court's instructions were "one-sided," complaining that they did not sufficiently emphasize that the jurors should find him not guilty if the State failed to prove its case beyond a reasonable doubt.

First of all, Moore's reproach (item 11 of his inventory of complaints, mem. at 4-5) targets only the Court; it does not include his trial attorney. In paragraph 3 of the March 25, 2024 Stipulation, Moore *excluded* criticism of trial counsel for not voicing such an objection to the charge. Accordingly, the contention is perforce barred by the doctrine of *res judicata*. *See Barros*, 180 A.3d at 831-32, and *Hall v. State*, 60 A.3d 928, 931-32 (R.I. 2013) (noting that § 10-9.1-8 applies the doctrine of *res judicata* to PCR petitions and precludes a claim that could have been litigated in a prior proceeding, including a direct appeal).

Beyond that barrier, even on its own, this complaint is without basis. The jury was admonished during empanelment that Moore was presumed innocent of the charges and that the state was obliged to prove his guilt beyond a reasonable doubt, and that the presumption of innocence did not disappear unless the State had proved guilt beyond a reasonable doubt. At the outset of its charge, the Court also reminded the jury of Moore's presumption of innocence and of the State's obligation to prove his guilt beyond a reasonable doubt. (Tr. at 752.) Additionally, in its reasonable doubt and burden of proof instructions, the Court emphasized that the jury could not convict Moore unless the State had proved every element of any offense under consideration beyond a reasonable doubt. (Tr. at 761-63.) Furthermore, when explaining the verdict form to the jury, which included the options of "Guilty" and "Not Guilty" as to each offense, the Court stressed that the panel's decision had to be unanimous. (Tr. at 797-99.)

The charge, taken as a whole - as is the way it must be evaluated, *State v. Nunes*, 788 A.2d 460, 463 (R.I. 2002) - was evenly balanced and included clear admonitions that Moore could not be convicted of any offense unless the State had fulfilled its obligation to demonstrate guilt beyond a reasonable doubt. As referenced earlier, we presume that juries follow the instructions they are given, and Moore has not pointed to anything that directs a contrary conclusion. *Ciresi*, 45 A.3d at 1218; *Chum*, 54 A.3d at 461.

Aiding and Abetting

In its preliminary comments and in its final charge, the Court alerted the jury that the State did not expect to demonstrate that Moore shot George Holland; rather, it intended to prove his responsibility for the murder either as a coconspirator or as an aider and abettor. Offering juries alternative theories of liability - as a principal, a coconspirator, and/or as an aider and abettor – is not unusual. *See Graham*, 941 A.2d at 857-58 and n.8. *See generally Rosemond v. United States*, 572 U.S. 65 (2014); *United States v. Marino*, 277 F.3d 11, 29 (1st Cir. 2002). Without objection, this Court provided the jury with the following instruction:

> “Let me speak to you a moment about aiding and abetting. It’s a bit of a cousin of conspiracy.
>
> “The guilt of a defendant may be established without proof that the defendant who was on trial personally did every act constituting the offenses charged. The law provides that whoever aids, abets, procures, or commands another person to commit a crime is nonetheless criminally liable as a principal.
>
> “A defendant’s mere presence at the scene of a crime, or his knowledge, if any, that a crime is being or about to be committed, and his relationship, if any, with those who have committed or are going to commit a criminal offense, are not, by themselves, sufficient to warrant a conviction as an aider and abettor. They are factors, however, which you may consider in ultimately making your determination of whether or not the defendant is guilty of the charges which have been filed against him.
>
> “The law holds that anyone who knowingly and willfully participates in the commission of a crime is responsible for that crime, just as if he had committed the crime alone.

> "In order to convict the defendant as an aider and abettor, the State must prove beyond a reasonable doubt that the defendant shared in the criminal intent of his confederates, and was in some way a participant in the crime. In other words, the evidence must show that there was a community of unlawful purpose to commit the crime, and that the defendant was, in some fashion, a knowing, willing, and active participant in it.
>
> "Thus, in order to aid and abet another to commit a crime, it is necessary that a defendant willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he himself wishes to bring about.
>
> "Bear in mind, however, that an aider and abettor need not foresee all of the consequences of the crime involved, nor must his every act coincide with the actions of the person or persons who actually committed the crime.
>
> "An aider and abettor is responsible for the natural, or reasonable, or probable consequences of any act that he knowingly and intentionally assisted or in which he participated." (Tr. at 757-59.)

The principles limned in the Court's instruction have been approved by the Rhode Island Supreme Court. *E.g., State v. Delestre*, 35 A.3d 886, 895-96 (R.I. 2012); *Graham*, 941 A.2d at 857-58, and n.7. *See generally*, *State v. Lambert*, 705 A.2d 957, 963 (R.I. 1997); *State v. Leuthavone*, 640 A.2d 515, 521 (R.I. 1994).

As noted earlier, Moore has expressly withdrawn his initial criticism of the Court and counsel for providing the aiding and abetting instruction. Mem. at 12. Some discussion of this alternative theory of liability is nonetheless necessary for completeness.

The Court told the jury that the aiding and abetting theory is "a bit of a cousin of conspiracy," and the *Pinkerton* Court recognized the relationship between the vicarious responsibility doctrine and aiding and abetting liability:

> "The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is

> recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all." *Pinkerton*, 328 U.S. at 647.[5]

Although there is overlap between conspiracy and aiding and abetting, they are separate and distinct theories of criminal liability. *United States v. DeVincent*, 632 F.2d 155, 160 n.9 (1st Cir. 1980). A defendant may aid and abet the commission of a crime without being a conspirator, *United States v. Pena*, 949 F.2d 751, 755 (5th Cir. 1991), *United States v. Giovannetti*, 919 F.2d 1223, 1230 (C.A.7 1990); and, conversely, a jury may acquit the defendant of conspiracy but convict him as an aider and abettor. *United States v. Van Scoy*, 654 F.2d 257, 263 (3d Cir. 1981). Aiding and abetting is "an alternative charge in every . . . count, whether explicit or implicit," and such a jury instruction "may be given even though the indictment neither alleges nor adverts to it." *State v. Sanchez*, 917 F.2d 607, 611-12 (1st Cir. 1990) (collecting cases); *see Marino*, 277 F.3d at 29; *Graham*, 941 A.2d at 857-58.[6]

Furthermore, when given the options of considering a defendant as a principal, conspirator, or as an aider and abettor, it matters not which theory of responsibility the jurors follow, so long

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[5] *See* G.L. 1956 § 11-1-3: "*Liability for aiding, abetting, counseling, hiring, or commanding offenses*. Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as principal or as an accessory before the fact, according to the nature of the offense committed, and upon conviction shall suffer the like punishment as the principal offender is subject to by this title."

[6] In *United States v. Thirion*, 813 F.2d 146, 151-52 (1st Cir. 1987), the court said:

> "It has long been the rule in this circuit that a jury may be instructed on the theory of aiding and abetting even though not charged in the indictment. *United States v. McKnight*, 799 F.2d 443, 445 (8th Cir. 1986). 'The reason for this rule is that [the aiding and abetting statute, 18 U.S.C. § 2] does not create a separate offense, it simply makes those who aid and abet in a crime punishable as principals.' *Id*. This reasoning is equally applicable to coconspirator liability. While Congress has recognized the conspiracy itself to be a separate crime, § 371, coconspirator liability does not have its genesis in this statute, but rather in the common law.' *See Pinkerton*, 328 U.S. at 647, 66 S.Ct. at 1184 ('The rule which holds responsible one who counsel, procures, or commands another to commit a crime is founded on the same principle.').

as they unanimously agree on the defendant's guilt beyond a reasonable doubt. *Delestre*, 35 A.3d at 898-901; *State v. Davis*, 877 A.2d 642, 648 (R.I. 2005).

Quite apart from his complicity as a coconspirator, the facts conclusively demonstrate Moore's guilt as an aider and abettor. In *Rosemond*, the Supreme Court wrote:

> "[The aiding and abetting law] reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission. * * * The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part - even though not every part - of a criminal venture. . . . Accomplice liability attached upon proof of '[a]ny participation in a general felonious plan' carried out by confederates . . . And so '[w]here several acts constitute[d] together one crime, if each [was] separately performed by a different individual, . . . all [were] principals as to the whole * * *
>
> "[A]ll who shared in the [overall crime's] execution, we explained, 'have equal responsibility before the law, whatever may have been [their] different roles.' *United States v. Johnson*, 319 U.S. 503, 515 (1943). 'The division of labor between two (or more) confederates thus has no significance: A strategy of 'you take that element, I'll take this one' would free neither party from liability.'" *Rosemond*, 572 U.S. at 72-74 (emphasis and ellipses in the original; citations omitted).

There is no question that Moore chose to fully align himself with and aided and abetted a plan to commit murder. He not only gladly provided the murder weapon, he even scolded Winston later in the evening for shooting "the wrong kid." Add to that, Moore's May 8, 2014 letter to his cousin in which he solicited him to provide perjurious testimony that Moore was "too drunk to understand and didn't have a clue about what was to happen." (Hearing on Mot. for New Trial Tr. at 5-7, December 4, 2014.)

Conclusion

While other courts may prefer a permissive *Pinkerton* charge, Rhode Island had not adopted one at the time of Moore's trial. To the contrary, the instruction provided by this Court was then and continues to be accepted not only in Rhode Island but also in many other courts. Our Court has said, "We cannot fault the trial justice for instructing the jury on the law as it existed at

that time," *Hampton-Boyd*, 253 A.3d at 426 (internal quotation omitted). Most assuredly, then, Moore has no basis to criticize trial counsel for not objecting to an instruction which corresponded to the law existing at the time of his trial. *Barros*, 180 A.3d at 833.

In any case, the credible evidence of Moore's guilt was overwhelming, and no casual observer could have reached a different conclusion, and neither did the Supreme Court. *Moore*, 154 A.3d at 480-83. In denying Moore's new trial motion, this Court said:

> "It is small wonder that this jury convicted the defendant of the charges. I'm well satisfied beyond a reasonable doubt that Bedame, Ndoye, and Lachance's testimony was credible. Couple their credibility with the defendant's inculpatory letter, and his guilt was plainly cemented.
>
> "This jury was, in my opinion, well justified in convicting Anthony Moore of all the charges. He was part and parcel of this escapade that furnished the fatal tool to commit the intended killing of Gomez. That the wrong person was killed was most regrettable, but killing George Holland does not in any way diminish the murderous intent behind Moore's conduct. He was, as the evidence plainly demonstrates, vicariously responsible for the murder of George Holland, either as a co-conspirator or as an aider and abettor.
>
> "The evidence in this case satisfies both theories of criminal liability that Anthony Moore was properly found guilty of all three counts by a jury whose verdict I am in complete agreement with." (Tr. at 7, December 4, 2014.)

The Court renews those sentiments here. Anthony Moore's application for postconviction relief is denied. Judgment shall enter in favor of the State of Rhode Island.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Anthony Moore v. State of Rhode Island**
CASE NO:	**PM/18-3086 (P1-2014-0891BG)**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 18, 2024**
JUSTICE/MAGISTRATE:	**Krause, J.**
ATTORNEYS:	
For Plaintiff:	**John E. Sullivan, III, Esq.**
For Defendant:	**Judy Davis, Esq.**