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IN THE SUPREME COURT OF THE STATE OF DELAWARE

OTIS PHILLIPS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	Nos. 497, 2015 and 500, 2015
v.	)	(CONSOLIDATED)
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On October 22, 2012, a New Castle County grand jury, in a 54-count indictment, charged Otis Phillips ("Otis")[1] and numerous co-defendants with gang participation and charges associated with the activities of the Sure Shots criminal street gang. A1 at DI 1, 6; [2] A280-308.[3] The indictment charged Otis with three counts of murder in the first degree, attempted murder in the first degree, assault first degree, gang participation, conspiracy first degree, reckless endangering in the first degree, six counts of possession of a firearm during the commission of a felony, and conspiracy second degree. A1 at DI 1, 6; A280-308. Otis's crimes rendered him eligible for the death penalty. A2 at DI 11. Following a proof positive hearing on August 19, 2013, the Superior Court denied Otis bail. A5 at DI 24.

The Superior Court denied severance motions and conducted a joint capital trial of co-defendants Otis and Jeffrey Phillips. A11 at DI 67. Jury selection began on September 29, 2014, and continued for eight days. A17 at DI 90. Trial began on October 20, 2014, and lasted 21 days. A21 at DI 126. On November 21, 2014, the jury found Otis guilty of murder in the first degree, murder in the second degree (as

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[1] The indictment charged Otis Phillips, Jeffrey Phillips, Roland Phillips, Ron Phillips, Seon Phillips, and Seldon Phillips. Each will be referred to by first name in this brief.

[2] "DI__" refers to item numbers on the Delaware Superior Court Criminal Docket in *State v. Otis Phillips*, I.D. No. 1210013321. A1-31.

[3] The October 22, 2012 indictment was amended and the grand jury issued a reindictment on February 18, 2013. A2 at DI 6. The original indictment charged Otis and others; the reindictment added five co-defendants to the case. A33. References herein are to the February 18, 2013 indictment. A280-308

a lesser-included offense of murder in the first degree), manslaughter (as a lesser-included offense of murder in the first degree), gang participation, conspiracy in the first degree, six counts of possession of a firearm during the commission of a felony, assault third degree (as a lesser-included offense of assault in the first degree), and reckless endangering; the jury acquitted him of one count of possession of a firearm during the commission of a felony and conspiracy second degree. A21 at DI 126.

Beginning on December 1, 2014, the Superior Court conducted a four-day penalty hearing. A22 at DI 130. The jury found, unanimously and beyond a reasonable doubt, that Otis's "course of conduct resulted in the deaths of two or more persons where their deaths [were] the probable consequence of [Otis's] conduct, and that the "murder was premeditated and a result of substantial planning." B94. The jury weighed the aggravating and mitigating circumstances presented and unanimously found the aggravating circumstances outweighed the mitigating circumstances. B94. On September 4, 2015, the Superior Court sentenced Otis to death for murder in the first degree, life imprisonment for murder in the second degree, and 130 years of incarceration for the remaining offenses. B95-96. Otis filed a timely notice of appeal and opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument I is denied. The Superior Court did not abuse its discretion when it denied Otis's motions to sever. Otis's joint trial with his co-defendant was proper and a single trial on all his indicted charges was appropriate.

II. Appellant's arguments II, VI, and VII are admitted in part and denied in part. This Court, in *Rauf v. State*, found that the death penalty statute under which Otis was sentenced fails to comport with the Sixth Amendment to the United States Constitution. The State denies that the trial judge was required to recuse himself from the penalty phase; however, that claim is now moot.

III. Appellant's arguments III, IV, and VIII are denied. The Superior Court did not abuse its discretion by admitting co-conspirator statements, certified records of convictions of co-defendants, and the statement of a witness made unavailable by Otis's wrongdoing.

IV. Appellant's argument V is denied. The Superior Court did not abuse its discretion by denying Otis's motion for a mistrial following Clayon Green's comment that, "[i]f you think I'm lying, ask Otis and what's his name if I'm lying." This comment did not implicate Otis's right to remain silent and the trial court eliminated any potential prejudice by immediately instructing the jury to disregard Green's statement.

V. Appellant's argument IX is denied. The Superior Court properly

responded to jury notes with a correct statement of the law.

VI. Appellant's argument X is denied. Otis's right to a speedy trial was not violated. The reindictment did not unnecessarily delay the proceedings and Otis cannot demonstrate prejudice.

STATEMENT OF FACTS

On January 27, 2008, Christopher Palmer ("Palmer") was shot and killed in an after-hours nightclub in Wilmington, Delaware. B22. Herman Curry ("Curry") witnessed the murder. B20-21; State Ex. 117. On July 8, 2012, Curry and Alexander Kamara ("Kamara") were shot and killed during a soccer tournament at Eden Park in Wilmington, Delaware. B68, 91. Wilmington Police Department ("WPD") officers investigated the 2008 and 2012 murders. B20, 46. The investigations revealed that the suspects in the homicides, Otis Phillips and Jeffrey Phillips, were members of a gang known as the "Sure Shots." B37-38.

I. The Sure Shots Gang

WPD Detective Thomas Curley ("Detective Curley") explained that the gang originated in Delaware in 1995, and use of the name "Sure Shots" began in the early 2000's. B49. At trial, former gang members testified about the gang's activities and identified Otis, Jeffrey, and others as members of the gang. B8-10, 28-30, 32, 35-36. The Sure Shots gang members were primarily involved in illegal drug trafficking and sales. B11, 35-36. Members of the gang were known to carry firearms, had a reputation for using their weapons, and were involved in assaults, shootings, and homicides. B32-33.

II. The Christopher Palmer Murder

On January 27, 2008, Palmer worked as a security guard for Curry's birthday

party. B2, 6. He checked guests for weapons prior to their entry into the club. B6. Sure Shots gang members, including Otis, Jovani Luna ("Luna"), and Dwayne Kelly ("Kelly"), left a party in another part of Wilmington and attempted to enter the party at The River. B19. Palmer denied the three entry into the club. B7.

Clayon Green ("Green"), a guest at the party, saw Palmer turn away Otis and two other men because one or more of them was armed. B7. The trio returned and Palmer again stopped them from entering, saying "I told you, you can't come in with that." B7. One of the men then pushed Palmer, and both Palmer and his assailant fell into a nearby bathroom. B7. Otis "reached around" into the bathroom and Green heard three shots. B7. Palmer died as a result of gunshot wounds. B30.

Curry witnessed the physical confrontation between Palmer and the trio of Sure Shots gang members. B24; State's Trial Ex. 117.[4] After Palmer denied Otis and two others entrance to the club, Otis became upset and said, "this is bullshit." State's Trial Ex. 117. Curry saw the three leave, then return a short time later. State's Trial Ex. 117. When they returned, one of the Sure Shots gang members "stepped up" to Palmer with a gun, but dropped the gun during the confrontation. State's Trial Ex. 117. Palmer attempted to retrieve the gun when someone said "shoot the motherfucker." State's Trial Ex. 117. Curry identified Otis as Palmer's

[4] The State introduced Curry's 2008 tape-recorded statement to WPD Detective George Pigford as Exhibit 117. B21.

shooter in a photo line-up, and told police that Otis shot Palmer three times. B22; State's Trial Ex. 117; 124.

III. The Eden Park Murders

Curry organized an annual summer soccer tournament at Eden Park in Wilmington, Delaware; the 2012 tournament was held on July 8. B45-46. As he was preparing food for spectators, Ricardo Brown ("Brown) saw two men walk through a gate onto the soccer field. B69. Shortly thereafter, he heard "fire rockets go off." B70. Brown turned and saw one of the men shoot Curry while the other shot his gun "wild[ly]." B70. Curry and Kamara died as the result of gunshot wounds. B51.

Several soccer players witnessed the events surrounding Curry's murder. Raoul Lacaille ("Lacaille") saw two men approach Curry. B82. One of the men tapped Curry on the shoulder and shot him. B82. Lacaille identified Otis as Curry's shooter. B83. Omar Bromfield ("Bromfield") heard what he thought were firecrackers and saw a crowd running toward the parking lot. B71. Bromfield left the field and, when he reached the parking lot, a friend pointed out blood on his shirt. B134. Bromfield did not realize that he had been shot. B71. Bromfield received medical treatment at a nearby hospital and, when he was released, he provided a statement about the incident to police. B72. Venus Cherry ("Cherry") saw two men enter the field who looked like they "they weren't coming to play soccer." B90. The

men approached Curry, one of them tapped Curry on the shoulder and said, "Ninja, run, pussy, today you are dead," then shot Curry. B90. The second man turned toward the "kitchen" area and fired his gun; a bullet hit Kamara and Cherry. B91. Cherry identified Otis as Curry's shooter and Jeffrey as Kamara's shooter. B91.

Green arrived at the Eden Park soccer tournament and noticed a gold car in the parking lot and saw two men dressed in black walking across the field; he later identified the two men as Otis and Jeffrey. B73, 75-76. As Green parked his car, he heard gunfire and saw people dropping to the ground. B73. He saw Otis shoot at Curry, and Jeffrey shoot toward the parking lot as if to clear the way. B76. As Otis and Jeffrey returned to the gold car, Green saw Christopher Spence approach the car and shoot the driver, whom he identified as "Serge." B75-76.

Within minutes of the shooting, officers located the gold car crashed at the intersection of New Castle Avenue and C Street in Wilmington. B52. WPD Officer Corey Staats ("Officer Staats") approached the car, saw a handgun on the rear seat, and observed the semi-conscious driver bleeding from his torso. B52. Police searched the car and discovered a 9 mm handgun, a .40 caliber handgun and a black baseball cap. DNA on the hat matched that of Otis. B56-57, 80. Firearm Examiner Carl Rone examined the recovered firearms and concluded that nearly 20 shell casings collected from the crime scene at Eden Park were fired from those weapons. B65-68.

WPD officers learned that two men fled from the crashed gold car. B54. Officers searched the area and found Otis and Jeffrey in the rear yard of a house on the corner of B and Bradford Streets - approximately four blocks north of Eden Park. B54, 58-59, 62. After a brief standoff, officers took the pair into custody. B54-55, 59-61. Officers noticed that Jeffrey was wounded and he told them he had been shot in the leg. B61. Otis gave the police a fake name and officers discovered 20 rounds of 9 mm ammunition in his pants pocket. B63-64.

IV. Gang Participation

Otis and Jeffrey actively participated in the Sure Shots gang. B37-38. In addition to the murders of Palmer, Curry, and Kamara, they participated in other gang-related activity. Maria Dubois ("Dubois") testified that she had been a member of the gang since 2003. B11. She sold drugs for the gang and had daily contact with other gang members, including Otis. B11. Dubois was present at The River when Palmer was killed. B13-14. She testified that Otis was present that evening and, while she did not see him with a firearm at that time, he carried a firearm "as often as he needed." B12, 14, 17. Dubois did not remember seeing Otis after the Palmer murder. B16.

On May 5, 2007, Antoine Harris was outside of a nightclub at 8th and Adams Streets when four men approached him. B26. One of the four said "there's that motherfucker" and lifted up Harris's shirt. B26. Harris slapped the man's hand and

was then blindsided by a punch. B26. He engaged his assailants in self-defense and was pistol-whipped and shot in the leg. B27. Harris identified Michael Young ("Young") as one of his attackers. B26.

Young joined the Sure Shots gang in 2003. B28. He sold drugs for the gang on 7th Street in Wilmington. B29. According to Young, Otis was also a member of the gang and that he (Otis) would always fire a gun in the air after being at a club that closed down for the evening. B28, 30. On the evening that Harris was shot, Young, Otis, Dwayne Kelly ("Kelly") and other members of the Sure Shots gang were at the nightclub at 8th and Adams. B30. When the group left the nightclub, Young approached Harris and lifted his shirt – thinking that Harris was armed. B31. Harris pushed Young's arm away and Otis immediately punched him. B31. Kelly then hit Harris in the head with a handgun, stepped back and shot him one time. B30. Otis and Kelly fled to a nearby home where Kelly's girlfriend lived. B32.

As a result of the Palmer, Curry, and Kamara murders, the assault and shooting of Antoine Harris, the illegal possession and use of firearms, and the illegal possession and distribution of controlled substances, Otis was charged with gang participation. The charges stemming from these incidents constituted predicate offenses for the gang participation charge.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED OTIS'S MOTIONS FOR SEVERANCE.

Question Presented

Whether the Superior Court abused its discretion when it denied Otis's requests to sever his case from his co-defendant and certain charges from his indictment.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion to sever for an abuse of discretion.[5] "The trial court's decision to deny a motion to sever will be reversed only if the defendant establishes a 'reasonable probability' that the joint trial created 'substantial injustice.'"[6]

Merits of the Argument

Superior Court Criminal Rule 8(a) permits the joinder of two or more offenses in the same indictment if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected

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[5] *Jackson v. State*, 990 A.2d 1281, 1285 (Del. 2009) (citing *Winer v. State*, 950 A.2d 642, 648 (Del. 2008); *Kemske v. State*, 2007 WL 3777, at *3 (Del. Jan. 2, 2007); *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988)).

[6] *Ashley v. State*, 85 A.3d 81, 84 (Del. 2014) (quoting *Winer*, 950 A.2d at 648 (other citation omitted)).

together or constituting parts of a common scheme or plan."[7] Similarly, Superior Court Criminal Rule 8(b) permits joinder of defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[8] A trial court may grant severance if the defendant is prejudiced by the joinder.[9]

Joinder of Defendants

"Ordinarily, defendants indicted together should be tried together. However, if justice requires it, the trial judge should grant separate trials."[10] This Court has set forth four factors that a trial court should consider when assessing a motion for severance: "(1) problems involving a co-defendant's extra-judicial statements; (2) an absence of substantial independent competent evidence of the movant's guilt; (3) antagonistic defenses as between the co-defendant and the movant; and (4) difficulty in segregating the State's evidence as between the co-defendant and the movant."[11]

Otis claimed that the unsolicited comment from a witness, Kelmar Allen,

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[7] Super. Ct. Crim. R. 8(a).
[8] Super Ct. Crim. R. 8(b).
[9] Super. Ct. Crim. R. 14.
[10] *Robertson v. State*, 630 A.2d 1084, 1093 (Del. 1993) (citing *Jenkins v. State*, 230 A.2d 262, 272 (Del. 1967)).
[11] *Floudiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999) (citing *Manley v. State*, 709 A.2d 643, 652 (Del. 1998); *Jenkins*, 230 A.2d at 273)).

regarding the witness protection program led to differing cross-examination strategies between Otis and Jeffery, and required severance. A144-50. The Superior Court denied Otis's motion finding:

> In this case, both the Defendants argue that one defendant's decision to cross-examine the State's witnesses regarding their participation in witness protection would prejudice the other defendant, whose trial strategy was to not address witness protection. However, neither of the Defendants positions present separate defenses as to a State's witness's participation in witness protection, or otherwise, that the jury could only reasonably accept the core of if it rejects the core of the defense offered by his co-defendant. Moreover, neither of the Defendants testified or presented evidence that directly implicated the other in their own defense.[12]

Otis argues that the differences between his and Jeffrey's cross-examination strategies for Allen created antagonistic defenses that required severance. Otis is mistaken. "[T]he presence of hostility between a defendant and his codefendant or 'mere inconsistencies in defenses or trial strategies' do not require a severance."[13] Jeffrey wanted to explore Allen's witness protection agreement on cross examination. A147. Otis did not want testimony regarding Allen's participation in the witness protection program to come into evidence. A147. Their differing

[12] *State v. Phillips*, 2015 WL 5332388, at *10 (Del. Super. Sept. 3, 2015).
[13] *Outten v. State*, 650 A.2d 1291, 1298 (Del. 1994) (quoting *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989) (other citation omitted)).

positions did not require "the jury to reasonably accept the core of the defense offered by either defendant only if it reject[ed] the core of the defense offered by his codefendant."[14] Indeed, the jury's verdict reflects that they heeded the trial judge's instruction to "weigh the evidence and apply the law individually to render separate verdicts as to each defendant." B92. Juries are presumed to follow the court's instructions,[15] and there is nothing to suggest they did not do so here. The Superior Court did not abuse its discretion when it denied Otis's severance motion.

Joinder of Offenses

"[W]here offenses are of the same general character, involve a similar course of conduct and are alleged to have occurred within a relatively brief span of time, it is proper to try the offenses together."[16] "The mere fact that the crimes were 'separate,' committed against different individuals with a lapse of time in between them, does not require severance."[17]

Prejudice from joinder of offenses may arise in the following three situations:

> [F]irst, when the jury might cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; second, when the jury might use the evidence of one of the crimes

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[14] *Bradley,* 559 A.2d at 1241.
[15] *Sykes v. State*, 953 A.2d 261, 269 (Del. 2008).
[16] *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (citing *Brown v. State*, 310 A.2d 870, 871 (Del. 1973)).
[17] *Id.* (citing *McDonald v. State,* 307 A.2d 796, 798 (Del. 1973)).

> to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and, third, when the defendant might be subject to embarrassment or confusion in presenting different and separate defenses to different charges.[18]

"The defendant has the burden of demonstrating such prejudice and mere hypothetical prejudice is not sufficient."[19]

Prior to trial, Otis moved to sever two charges of Possession of a Deadly Weapon by a Person Prohibited ("PDWBPP") and the gang participation-related charges. A8 at DI 44. The trial judge denied Otis's motion. Ex. B to *Op. Brf.*[20] On appeal, he argues that the joinder of the PDWBPP and gang participation charges demonstrated that he "was a felon and in fact used a gun previously during the commission of a crime" and that jury "hear[d] evidence about the conduct of others that could be attributed to [him]." *Op. Brf.* at 15-16. Otis also claims that joinder of the gang participation charges "would allow the [S]tate to introduce evidence about the conduct of these other people that otherwise would not be admissible." *Op. Brf.* at 16. This Court considered, and rejected, the same arguments in *Taylor v. State*.[21]

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[18] *Ashley*, 85 A.3d at 84-85 (citing *Wiest*, 542 A.2d at 1195).
[19] *Skinner v. State*, 575 A.2d 1108, 1118 (Del. 1990) (citing *Bates v. State*, 386 A.2d 1139, 1142 (Del. 1978)).
[20] *State v. Otis Phillips*, ID No. 1210013321, Order (Del Super. Ct. Aug. 20, 2015).
[21] *Taylor v. Stat*e, 76 A.3d 791, 801 (Del. 2013).

In *Taylor*, Kevin Rasin, Taylor's co-defendant, argued that "the inclusion of the gang participation charge at his trial for murder, attempted murder, and additional felonies was unfairly prejudicial to him because it allowed the State to proffer evidence that portrayed Rasin as a frequent drug dealer."[22] Rasin claimed that "without the gang participation charge, the State would not have been able to admit prior bad acts evidence during its case-in-chief."[23] This Court rejected Rasin's argument.[24] "In determining whether the trial court abused its discretion [when denying a motion to sever charges], it is necessary to examine the facts in each case."[25]

Here, Otis was part of the Sure Shots gang; he and other members engaged in violent acts as members of the gang. "[Herman] Curry's murder is 'inextricably intertwined' with [Christopher] Palmer's murder and the evidence relating to Palmer's murder is relevant in showing the motive behind Curry's murder."[26] Ex. B. to *Op. Brf.* Gang motivation and retaliation were part and parcel of the State's case as it related to the Eden Park homicides. The evening prior to those homicides,

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[22] *Id.* at 800-01.
[23] *Id.* at 801.
[24] *Id.* (citations omitted).
[25] *Id.*
[26] *State v. Otis Phillips*, ID No. 1210013321, Order at 6 (Del Super. Ct. Aug. 20, 2015).

gang members were involved in an altercation at a nightclub where two people were shot, one of whom, Kelmar Allen, was a Sure Shot. Retaliation for the nightclub shooting was one of the motives behind the Eden Park homicides. As was true in *Taylor*, "the evidence supporting the charges in the indictment was 'inextricably intertwined' and, therefore, admissible."[27]

Here, the jury neither cumulated evidence among counts, nor inferred a criminal disposition to find Otis guilty. The trial judge instructed the jury to consider the evidence of each offense separately. B93. The jury's verdict shows that they did just that: finding Otis guilty of four lesser included offenses, and acquitting him of PFDCF and conspiracy second degree. If, as alleged by Otis, the jury had cumulated evidence or inferred a criminal disposition, the jury would have returned guilty verdicts on all of the charges. "[T]he jury was able to distinguish the offenses and segregate the evidence."[28] Consequently, Otis cannot prove a "reasonable probability of substantial prejudice."[29]

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[27] *Id.* (quoting *Younger*, 496 A.2d at 550 (other citations omitted)).
[28] *Skinner*, 575 A.2d at 1119 (finding no abuse of discretion in denying severance where jury returned guilty verdicts on certain charges and not guilty verdicts on others).
[29] *Id.*

II. AS A RESULT OF THIS COURT'S DECISION IN *RAUF V. STATE*,[30] OTIS IS NOT SUBJECT TO THE DEATH PENALTY.

Question Presented[31]

Whether *Rauf v. State* is applicable to Otis's death sentence.

Standard and Scope of Review

This Court reviews constitutional claims *de novo*.[32]

Merits of the Argument

In *Rauf v. State*,[33] this Court found that "Delaware's current death penalty statute violates the Sixth Amendment role of the jury as set forth in *Hurst*."[34] In reaching this conclusion, this Court held that "the Sixth Amendment right to a jury includes a right not to be executed unless a jury concludes unanimously that it has no reasonable doubt that is the appropriate sentence."[35] While the jury here unanimously recommended a sentence of death, "[b]ecause the respective roles of the judge and jury are so complicated under [11 *Del. C.*] § 4209, [the Delaware Supreme Court is] unable to discern a method by which to parse the statute so as to

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[30] 2016 WL 4224252 (Del. Aug. 2, 2016).
[31] This argument responds to Arguments II, VI, and VII of Appellant's Opening Brief.
[32] *Grace v. State*, 658 A.2d 1011, 1015 (Del.1995).
[33] 2016 WL 4224252.
[34] *Id.* at *1 (referencing *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016)).
[35] *Rauf*, 2016 WL 4224252, at *36.

preserve it."[36]

Rauf decided that Title 11, Section 4209, as it currently exists, is unconstitutional under the Sixth Amendment. Generally, such decisions are not "applicable to those cases which have become final."[37] A conviction is deemed "final" at the conclusion of direct appellate review.[38] Otis's conviction is under direct review, his case is not final and, thus, *Rauf* applies here.

To the extent that Otis challenges the trial judge's "failure to recuse himself from [the] penalty phase," (*Op. Brf.* at 18), that claim is now moot in light of *Rauf.* To the extent that Otis challenges the imposition of a death sentence pursuant to the provisions of Title 11, Section 4209 extant at the time of his conviction, the State respectfully suggests that this case be remanded to the Superior Court with directions that Otis be resentenced on the charge of murder in the first degree for which death was imposed.

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[36] *Id.* at *1.
[37] *Flamer v. State*, 585 A.2d 736, 749 (Del. 1990); *see also Brice v. State*, 815 A.2d 314, 321 (Del. 2003) (finding changes to Delaware death penalty statute procedural) *overruled on other grounds by Rauf*, 2016 WL 4224252, at *2.
[38] *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995).

III. THE SUPERIOR COURT DID NOT ERR IN ITS RULINGS ON THE ADMISSIBILITY OF EVIDENCE.

Question Presented[39]

Whether the Superior Court erred when it allowed the admission of: (1) Seon's statements pursuant to Rule 801(d)(2)(E), (2) Sure Shots gang members' records of conviction, and (3) Curry's statement pursuant to Rule 804(b)(6).

Standard and Scope of Review

This Court reviews "the Superior Court's evidentiary rulings for abuse of discretion."[40] "An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances,' [or] . . . so ignored recognized rules of law or practice . . . to produce injustice."[41] Constitutional claims are reviewed *de novo*.[42]

Merits of the Argument

A. The Superior Court correctly concluded that Seon Phillips' out-of-court statements were not hearsay and their introduction did not violation the Confrontation Clause.

"Under Delaware Rule of Evidence (D.R.E.) 801(d)(2)(e), a statement is not

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[39] This argument responds to Arguments III, IV, and VIII of Appellant's Opening Brief
[40] *Norwood v. State,* 95 A.3d 588, 594 (Del. 2014) (citing *Watkins v. State,* 23 A.3d 151 (Del. 2011); *Smith v. State*, 913 A.2d 1197 (Del. 2006)).
[41] *Norwood,* 95 A.3d at 594-95 (citing *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams,* 541 A.2d 567, 571 (Del. 1988))).
[42] *Grace v. State*, 658 A.2d 1011, 1015 (Del.1995).

hearsay if made by a co-conspirator during the course and in furtherance of the conspiracy."[43] "A statement qualifies as an exception if the offering party can show by a preponderance of the evidence that: 1) a conspiracy existed; 2) the co-conspirator and the defendant against whom the statement is offered were members of the conspiracy; and 3) the statement was made during and to further the conspiracy."[44]

Otis contends that portions of Allen's testimony that (1) he transported illegal drugs for Seon, who paid him $500 for each trip; (2) the Sure Shots planned to retaliate for the shooting of Williams; and (3) he overheard a phone conversation between Otis and Seon immediately after the murders at Eden Park, constituted objectionable hearsay. *Op. Brf.* at 24-26. Otis suggests that Allen was not a co-conspirator to the Eden Park murders and, therefore, his testimony recounting Seon's statements was improperly admitted in violation of the Confrontation Clause. Otis's arguments are unavailing.

Otis, and several others (including Allen and Seon) were charged with Gang Participation. That statute provides:

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[43] *Ayers v. State*, 97 A.3d 1037, 1041 (Del. 2014).
[44] *Lloyd v. State*, 534 A.2d 1262, 1264 (Del. 1987) (citing *Carter v. State*, 418 A.2d 989, 994 (Del. 1980)).

> A person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity and who knowingly promotes, furthers or assists in any criminal conduct by members of that gang which would constitute a felony under Delaware law, shall be guilty of illegal gang participation.[45]

To establish gang participation, the State must establish the existence of a "criminal street gang" and a "pattern of criminal gang activity." A "criminal street gang" is defined as:

> any ongoing organization, association, or group of 3 or more persons, whether formal or informal, having as 1 of its primary activities the commission of 1 or more of the criminal acts enumerated in paragraph (a)(2) of this section, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.[46]

A "pattern of criminal activity" is defined as:

> the commission of attempted commission of, conspiracy to commit, solicitation of, or conviction of 2 or more of the following criminal offenses, provided that at least 1 of these offenses occurred after July 1, 2003, and that the last of those offenses occurred within 3 years after a prior offense, and provided that the offenses were committed on separate occasions, or by 2 or more persons.[47]

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[45] 11 *Del. C.* § 616(b).
[46] 11 *Del. C.* § 616(a)(1).
[47] 11 *Del. C.* § 616(a)(2).

The predicate acts underlying the Gang Participation charges in this case included drug dealing, the shooting of Antoine Harris, the murder of Christopher Palmer, the Eden Park murders, and firearm possession attendant to many of those felonies.[48] Thus, the indicted charges were committed under the umbrella of the Sure Shots gang.

Prior to admitting Seon's statements pursuant to Rule 801(d)(2)(E), the trial judge required the State to show that a conspiracy existed, that Seon and Otis were members of the conspiracy, and that the statements were made during and to further the conspiracy.[49] The court properly found that Seon's statements qualified under Rule 801(d)(2)(E) as non-hearsay coconspirator statements.

Seon's statements to Allen about payment for transporting drugs were made in the course of the "pattern of criminal activity" of the Sure Shots gang. The State demonstrated, through Allen's testimony, that a conspiracy existed - the arrangement for Allen to transport drugs for the Sure Shots at a rate of $500.00 per trip.[50] Allen testified that both Seon and Otis, members of the Sure Shots gang.[51] The payment arrangement was made during the conspiracy and in furtherance of the Sure Shots'

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[48] A282-86.
[49] *See* D.R.E. 801(d)(2)(E).
[50] B36.
[51] B36-37.

pattern of criminal activity.

Otis claims that "Allen was able to testify over defense objection as to what he heard Seon Phillips and others say" as a group of the Sure Shots met with Seon following the shooting of Williams and Allen. *Op. Brf.* at 25. Allen testified:

> PROSECUTOR: Once you got to the Lamotte Street house, Kelmar, who was all there?
> ALLEN: It was – it was Pluck [Seon Phillips] there.
>
> * * *
>
> PROSECUTOR: When you got to the house, what's happening at the house, Kelmar?
> ALLEN: When I got to the house, like, they – once I walk in, I see – I see guns and they was – they was trying to get – they was trying - they was finding all the guns, put them together, and getting the bullets, putting them in all the guns.
>
> * * *
>
> PROSECUTOR: What's everybody demeanor like?
> ALLEN: They . . . was really mad because they want to find them, find the Gaza and them.
> PROSEUCTOR: Is there one particular Sure Shot that's running the show?
> ALLEN: Yeah, Pluck [Seon Phillips].
> PROSEUCTOR: And how is he doing that?
> ALLEN: Like, he had a meeting in the basement. He had a meeting. And they were talking about - - they was talking about who – where they at, where the Jamaicans at.
> PROSECUTOR: Are they trying to get any more bullets or guns?

> ALLEN: Yeah, they - they was trying to get Yanks – Pluck was trying to get Yanks to buy – to go to Walmart to buy bullets because, at that point in time, when I – when I got there, Yanks wasn't there yet. So, he came and Pluck took him upstairs and talking to him, and I went upstairs, too. And he was talking to Yanks, trying to get Yanks to go to Walmart to get some bullets.[52]

Contrary to Otis's assertion, he did not object to the above testimony.[53] Because he did not object, he is barred from challenging its admissibility for the first time on appeal.[54] This Court may review the Superior Court's admission of this portion Allen's testimony only for plain error;[55] however, because this testimony satisfies the requirements for admission under Rule 801(d)(2)(E), there is no error, plain or otherwise.

Seon's statements about finding the members of a rival gang and sending a

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[52] B40-41.

[53] Otis does not provide a specific citation to the record in support of this claim. In his Opening Brief, he simply summarizes the objectionable portion of Allen's testimony that described a meeting among Allen, Seon and other Sure Shots during which they discussed what had occurred at the nightclub the previous evening and "plans to retaliate." *Op. Brf.* at 25. Otis did, however, object to Allen's testimony regarding what Seon said to him about who had left the Lamotte Street house in a Chevy Cruze after the "meeting" when the Sure Shots were preparing firearms and ammunition. B42. The Superior Court sustained the objection.

[54] Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."); *Small v. State*, 51 A.3d 452, 457 (Del. 2012).

[55] *Collins v. State*, 56 A.3d 1012, 1020 (Del. 2012). "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.* (quoting *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (internal quotes omitted)).

member of the Sure Shots to purchase ammunition were also made in the course of the Sure Shots "pattern of criminal activity." A conspiracy existed to engage in the pattern of criminal activity perpetrated by the Sure Shots - in this instance, retaliation for the shooting of Williams and Allen. The evidence demonstrated that Seon and Otis (and other Sure Shots) were part of the conspiracy to retaliate for an attack on their associates. The statements were made during the conspiracy and in furtherance of the Sure Shots' pattern of criminal gang activity.

At trial, Allen recounted a phone conversation between Seon and Otis immediately following the Eden Park murders:

> PROSECUTOR: As you're standing on the porch, could you hear what Pluck was saying?
> ALLEN: Yep.
> PROSEUCTOR: What was Pluck saying on the phone right there at Lamotte Street?
> ALLEN: Well I know for a fact he was talking to his brother on the phone.
> PROSECUTOR: His brother being who?
> ALLEN: Dog.
> PROSECUTOR: Otis Phillips?
> ALLEN: Yep.
> PROSEUCTOR: And what is he saying to his brother on the phone?
> ALLEN: He's saying – he's asking what's going on, what's going on there?
> PROSECUTOR: What's Pluck's demeanor like when he's talking to his brother on the phone?

> ALLEN: He was like "Yo, Dog, yo, where you at? Where you at? Where you at? I'm coming to get you." And, then, like, he was in shock mode, like really scared for him, like . . .
> PROSECUTOR: What else is Pluck saying as he's talking on the phone to Dog?
> ALLEN: Yeah. As he's talking to Moe and Fats at the same time, like – because they trying to find out what's going on, too, with them. And he was, like, "Yo, he good." He was telling Fats that he good, like he good, he's under the car, he's under the car, he's under the car, like, Dog is hiding under the car, or something like that.

B44. Otis joined Jeffrey in objecting to this testimony. B43. The trial judge permitted Allen to testify "as to what he heard Pluck say, and nothing else." B44. The Superior Court found that Allen's testimony about the phone conversation satisfied the requirements of Rule 801(d)(2)(E).[56] Seon's statements during the phone conversation were co-conspirator statements made in the furtherance of a conspiracy. Here, the court did not abuse its discretion when it found the statements "were made in an effort to aid the Defendants in their flight for the Eden Park shooting."[57]

Otis broadly argues that because Allen was not a co-conspirator to murder, Rule 801(d)(2)(E) is inapplicable. He is wrong. Allen's out-of-court statements are

[56] *State v. Phillips*, 2015 WL 5332388, at *7 (Del. Super. Sept. 3, 2015).
[57] *Id.*

not at issue here. Otis's objection (and argument on appeal) involves Seon's statements, relayed by Allen at trial. Otis confuses the Rule 801(d)(2)(E) foundational requirement that the offering party demonstrate that "the co-conspirator and the defendant against whom the statement is offered were members of the conspiracy."[58] As demonstrated above, Seon's statements while at the Lamotte Street house and during the phone conversation were made in furtherance of a conspiracy with Otis and Jeffrey to perpetrate, and then flee from, the Eden Park murders. These murders, of course, were predicate offenses underlying the gang participation charges. Under Rule 801(d)(2)(E), the State was required to show that Seon, not Allen, was a co-conspirator. The State satisfied the foundational requirements and the trial judge properly admitted the statements.

Otis also argues that admission of Seon's statements under Rule 801(d)(2)(E) violated his rights under the Confrontation Clause because he was unable to cross-examine Seon. In *Jones v. State,* this Court held that co-conspirator statements made in furtherance of a conspiracy are admissible under the Delaware Rules of Evidence.[59] Moreover, co-conspirator statements, pursuant to *Davis v.*

[58] *Lloyd,* 534 A.2d at1264 (citation omitted).
[59] *Jones*, 940 A.2d at 11.

Washington,[60] are not testimonial and do not implicate the Sixth Amendment.[61] As this Court explained, "under *Crawford* and *Davis*, a statement is testimonial and implicates the Confrontation Clause where it is given in non-emergency circumstances and the declarant would recognize that his statements could be used against him in subsequent formal proceedings."[62] *Crawford* "recognize[s] . . . that statements made in the furtherance of a conspiracy are *nontestimonial*."[63] Here, Seon's statements introduced at trial are not testimonial because they were made in furtherance of a conspiracy. Stated differently, the statements are not "'testimonial' within the meaning of *Crawford* and *Davis*. . . [and] are subject only to our State's hearsay rules because they do not implicate the Confrontation Clause."[64] The Superior Court did not err in finding that Seon's statements were nontestimonial.

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[60] 547 U.S. 813, 822 (2006).
[61] *Jones*, 940 A.2d at 13. In *Davis*, the United States Supreme Court held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." 547 U.S. at 822.
[62] *Jones* at 12-13. *See also Wheeler v. State*, 36 A.3d 310, 318 (Del. 2012) ("a statement is 'testimonial' if it is provided during an investigation for the purpose of fact gathering for a future criminal prosecution." *Id.* (citing *Dixon v. State*, 996 A.2d 1271, 1277–78 (Del. 2010)).
[63] *Jones* at 12-13 (emphasis added).
[64] *Id* at 13.

B. The Superior Court correctly concluded that the records of conviction of Sure Shots gang members were admissible to establish a pattern of gang activity pursuant to Title 11, Section 612(a)(2).

Otis argues that the "introduction of co defendant pleas without producing co defendant to testify violated [Otis's] confrontation rights under the Sixth Amendment [to the United States Constitution]." *Op. Brf.* at 28. Citing to this Court's opinion in *Allen v. State*,[65] Otis suggests that "where a co defendant fails to testify there is no justifiable basis for introducing the guilty plea into evidence." *Op. Brf.* at 28. Otis is incorrect. The Superior Court did not err by granting "the State's request to admit the certified convictions and guilty pleas of other Sure Shot gang members in this case, for the limited purpose of showing that other members of the Sure Shots gang engaged in criminal activity individually."[66]

The Superior Court concluded that certified records of conviction of other members of the Sure Shots gang were "relevant to this case," were not "testimonial in nature," and that they evidence individual behavior pertinent to the gang participation statute. B84. Pursuant to this ruling, the State introduced the certified conviction of Mahary Goode for possession with intent to deliver a schedule II controlled substance (B85), and the certified conviction of Jamel Chapman for possession with intent to deliver a schedule I controlled substance. B85. The State

[65] 878 A.2d 447 (2005).
[66] *State v. Phillips*, 2015 WL 5168151, at *2 (Del. Super. Sept. 2, 2015).

then displayed a previously marked exhibit to establish Goode and Chapman as members of the Sure Shots gang. B86. "The prior convictions and guilty pleas at issue here were offered by the State for the sole purpose of showing that other members of the Sure Shots gang engaged in criminal activity, individually."[67]

The State charged Otis with gang participation which, as noted above, required the Sate to establish the existence of a "criminal street gang" and a "pattern of criminal gang activity." Possession with the intent to deliver a controlled substance is one of the criminal offenses that, pursuant to section 616(a)(2) of Title 11, may establish a "pattern of criminal gang activity."[68] As members of the Sure Shots gang, Goode and Chapman's convictions of possession with intent to deliver controlled were convictions of statutorily designated criminal offenses. The State did not elicit testimony concerning the facts and circumstances supporting these convictions. B85-86.

This Court has found that plea agreements cannot be used as substantive evidence to prove the guilt of another.[69] Here, the trial court allowed the admission of certified records of conviction of two members of the Sure Shots gang to establish the "pattern of criminal activity" required by the gang participation statute.[70] The

[67] *Phillips*, 2015 WL 5168151, at *1.
[68] 11 *Del. C.* § 616(a)(2)k.
[69] *See Allen*, 878 A.2d 450 & n.4 (citing *Kirby v. United States*, 174 U.S. 47, 55-56 (1899)).
[70] *Phillips*, 2015 WL 5168151, at *2-3.

trial court distinguished the limited admissibility of Goode and Chapman's records of conviction here with general admission of non-testifying co-defendant plea agreements addressed in *Allen* and *Kirby*. In *Kirby*, the United States Supreme Court found a confrontation clause violation where a "defendant's conviction for receiving stolen property was, in part, based on the admission of the records of conviction of three individuals who were found guilty of stealing the relevant property."[71] More recently, in *Allen*, this Court found that "a co-defendant's plea may not be used as substantive evidence of a defendant's guilt, to bolster the testimony of a co-defendant, or to directly or indirectly vouch for the veracity of another co-defendant who pled guilty and then testified against his or her fellow accused."[72] The Superior Court correctly concluded that neither Goode nor Chapman's records of conviction were admitted for any of the impermissible purposes addressed in *Allen.*

Moreover, should this Court determine that the admission of the records of conviction of Goode or Chapman was erroneous, any such error was harmless.[73] The jury found Otis guilty of gang participation, and specifically found the requisite "pattern of criminal activity" to be murder (Curry) and possession of a firearm during

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[71] *Phillips*, 2015 WL 5168151, at**Error! Bookmark not defined.** *2 (citing *Kirby*, 174 U.S. at 53).
[72] *Allen*, 878 A.2d at 450 (citations omitted).
[73] *See VanArsdall v. State*, 524 A.2d 3, 10 (Del. 1987). "[R]etrial is required when an error at trial is "injurious" to the accused. *Id.* (citing *Fisher v. State*, 41 A. 184 (Del. 1898)). "[The Delaware Supreme] Court has consistently refused to reverse convictions for errors found to be harmless." *VanArsdall*, 524 A.2d at 10 (collecting cases).

the commission of a felony. B93a, 97-107. The jury did not include Goode or Chapman's convictions as evidence of the "pattern of criminal activity." Thus, any error was harmless beyond a reasonable doubt.

C. The Superior Court properly allowed the admission of Herman Curry's statement pursuant to Rule 804(b)(6).

Otis argues that the Superior Court erred by admitting the prior out-of-court statement of Herman Curry pursuant to Rule 804(b)(6). *Op. Brf.* at 43. He contends that "[t]here was insufficient evidence to allow Curry's statement. It clearly was more prejudicial than probative [, and] it was not needed for the Eden Park Murders." *Op. Brf.* at 45. Not so. The State provided a sufficient evidentiary basis for the trial court to find that Curry's statement was admissible hearsay based on Otis's "forfeiture by wrongdoing."[74]

The State sought a ruling *in limine* permitting the admission of Curry's prior out-of-court statement "under the forfeiture by wrongdoing exception as evidence of the 2008 murder of Christopher Palmer and as motive for Curry's death." A6 at DI 28; A41a. The Superior Court considered "the testimony presented in the August 19, 2013 Proof Positive Hearing" as well as the facts proffered in "the State's motion and Defendant Otis Phillips' opposition."[75] On January 27, 2008, Curry witnessed

[74] D.R.E. 804(b)(6).
[75] *State v. Phillips*, 2014 WL 3400965, at *1 (Del. Super. Jul. 9, 2014).

the murder of Christopher Palmer at a party in Wilmington.[76] Curry saw Palmer turn a group of men away from the party, then saw one of the men begin firing a gun at Palmer.[77] Curry knew the men to be members of the Sure Shots gang and identified Otis in a photo lineup as Palmer's shooter.[78] On July 8, 2012, Otis located Curry at a soccer tournament in Eden Park.[79] Curry "head[ed] directly toward Curry, tap[ped] him on the shoulder, and [shot] him multiple times in the chest."[80] Jeffrey was with Otis at Eden park.[81] Jeffrey revealed a conversation he had with Otis to another witness; Otis told Jeffrey that Curry was "trying to take [Otis] down for a murder" and that, for that reason, Curry "needed to be taken care of."[82] Based upon these facts,[83] the Superior Court granted the State's motion to admit the statement but "reserve[d] the right to revisit [the] decision based upon the testimony presented at trial as well as other hearings in this case."[84]

The facts surrounding the Palmer and Curry murders were further developed

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[76] *Phillips*, 2014 WL 3400965, at *1.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* (citing to facts proffered by the State in its Motion in Limine at ¶ 15). A43a-44.
[83] *See United States v. Baskerville*, 448 F. Appx 243, 249 (3d. Cir. 2011) (upholding procedure whereby trial court assesses the admissibility of statements sought to be admitted pursuant to the "forfeiture by wrongdoing" hearsay exception contained in Federal Rule of Evidence 804(b)(6) by considering facts proffered by the government). "D.R.E. 804(b)(6) tracks F.R.E. 804(b)(6)." Comment D.R.E. 804.
[84] *Phillips*, 2014 WL 3400965, at *3.

at trial and clearly evidenced Otis's intent to silence Curry as a witness.[85] Palmer served as security for Curry's birthday party. B3, 6, 14. Palmer denied Sure Shots gang members, including, Otis, Luna and Kelly entrance to the party. B7, 15. The trio returned ten minutes later and, when stopped by Palmer, pushed him into the bathroom and they both fell into the bathroom. B7. Otis shot Palmer in the bathroom. B7. Curry informed police of these events and identified Otis as Palmer's assailant. B22; State Trial Ex. 117. On July 8, 2012, Curry hosted an annual soccer tournament at Eden Park. B45-46. Otis approached Curry, tapped him on the shoulder, and then shot him. B82-83, 90. Prior to shooting Curry, Otis said, "Ninja, run, pussy today you are dead." B90-91. Otis shot Curry twice at close range and a third time in the back. B87.

The Confrontation Clause embedded within the Sixth Amendment to the United States Constitution is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."[86] The doctrine of "forfeiture by wrongdoing" is grounded in the common law and permits "the introduction of statements of a witness who was

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[85] Prior to the admission of Curry's statement at trial, Otis requested a sidebar to "make sure to preserve for appeal purposes that we're still objecting to [the statement] coming in." 11/22 at 80. Otis did not ask the Court to "revisit [its] decision based upon the testimony presented at trial." *Phillips*, 2014 WL 3400965, at *3.

[86] *Giles v. California*, 554 U.S. 353, 358 (2008) (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

'detained' or 'kept away' by the 'means or procurement' of the defendant.[87] This doctrine, codified in the Federal Rules of Evidence, has met the approval of the United States Supreme Court.[88] Delaware's evidentiary rule "tracks F.R.E. 804(b)(6)."[89] "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is "not excluded by the hearsay rule if the declarant is unavailable as a witness."[90] The rule is "aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them – in other words, it is grounded in the ability of courts to protect the integrity of their proceedings."[91] The "mere" elimination of a witness is insufficient to invoke the doctrine; rather, an admitting court must determine whether the defendant procured the absence of the witness as a means of silencing their testimony.[92] That is precisely what the Superior Court found here.

Federal courts assessing the admissibility of hearsay statements pursuant to the "forfeiture by wrongdoing" exception apply a three-pronged test, requiring the government to show: "(1) that the defendant engaged or acquiesced in wrongdoing,

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[87] *Giles*, 554 U.S. at 359 (collecting cases).
[88] *Giles*, 554 U.S. at 367.
[89] Comment – 804(b)(6).
[90] D.R.E. 804(b)(6).
[91] *Giles*, 544 U.S. at 374.
[92] *Id.* at 377.

(2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability."[93] While the defendant's intent to eliminate the witness's testimony must be established,[94] the State "need not [ ] show that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defense 'was motivated *in part* by a desire to silence the witness.'"[95]

The Superior Court properly applied this framework here, where Otis was charged with killing a witness – Curry – to prevent him from testifying. The Superior Court concluded that (1) "it was Otis Phillips who killed Curry," (2) "that Otis Phillips was aware that Curry was a witness who would be able to testify about Palmer's shooting and that, when he shot Curry he was 'motivated at least *in part* by a desire to silence Curry as a witness to Palmer's murder," and (3) "Otis Phillips engaged in wrongdoing which resulted in Curry's unavailability."[96] The Superior Court did not err by admitting Curry's statement concerning the Palmer homicide.

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[93] *Baskerville*, 448 Fed. Appx. at 249 (quoting *United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002)).
[94] *Giles*, 554 U.S. at 377.
[95] *Phillips*, 2014 WL 3400965, at *2 (quoting *United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001)).
[96] *Id*. at *3 (quoting *Dhinsa*, 243 F.3d at 653 (emphasis in original)).

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING OTIS'S MOTION FOR A MISTRIAL.

Question Presented[97]

Whether the Superior Court abused its discretion when it declined to declare a mistrial after a witness suggested that the veracity of his testimony could be confirmed by Otis and Jeffrey.

Standard and Scope of Review

This Court reviews the Superior Court's decision with respect to declaring a mistrial for an abuse of discretion.[98] The "trial judge is in the best position to assess the risk of any prejudice resulting from trial events."[99] "When a trial judge rules on a mistrial application, that decision should be reversed on appeal only if it is based upon unreasonable or questionable grounds."[100]

Merits of the Argument

Clayon Green testified that he was "a hundred percent sure" he "saw Otis Phillips and Jeffrey Phillips at Eden Park" involved in the shootings at the soccer tournament on July 8, 2012. B73-74, 77. Green testified that he did not inform police investigators on July 8, 2012 of everything he saw happen. B77. When

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[97] This argument responds to Argument V of Appellant's Opening Brief
[98] *Revel v. State*, 956 A.2d 23, 27 (Del. 2008).
[99] *Id.* (citations omitted).
[100] *Id*. (citations omitted).

asked to explain his failure to be completely forthcoming at the outset, Green testified:

> Because it was a conscious decision not to really say everything I had seen. As I had mentioned before, I didn't know if these guys were caught or anything. That was, I would say, an hour or two after the whole incident. So, of course there was a concern that, well, if I go out there and say Pluck brother come and shoot the man, then, of course, I'm opening up myself to get hurt for people who retaliate against all of that. So it was a conscious decision for me not to say everything that I know then. It's a sheep among the wolves. You guys are the shepherd, and I can't – it's not something where I trust that, well, the cops really have our backs, so a way for me to say: Okay, this is what happened. And when the news media comes, then you tell them Otis and Badadan shoot up the park or none of that. So it wasn't – that was more of a conscious decision to say: Well, this is what happened, or I didn't see anything. If you think I'm lying, ask Otis and what's his name if I'm lying. B78-79.

Otis argues that Green's comment, "If you think I'm lying, ask Otis and what's his name if I'm lying," infringes on Otis's "constitutional right to testify or not testify." *Op. Brf.* at 30. Otis is wrong. Immediately after Green offered this response, the Superior Court instructed the jury to "disregard the last answer given by the witness." B79. To the extent that Green's comment prejudiced Otis, that prejudice was effectively ameliorated by the trial court's instruction. A mistrial should only be granted as a last resort when there are no alternatives, where there is

"'manifest necessity' or the 'ends of public justice would otherwise be defeated.'"[101] "A trial judge's prompt curative instructions 'are presumed to cure error and adequately direct the jury to disregard improper statements.'"[102] And, "[j]uries are presumed to follow the trial judge's instructions."[103]

This Court applies a four-factor assessment to determine whether a "mistrial should be granted in response to an allegedly prejudicial remark by a witness."[104] The factors include: (1) the "nature and frequency of the offending comment;" (2) "the likelihood of resulting prejudice;" (3) the "closeness of the case;" and (4) "the adequacy of the trial judge's actions to mitigate any potential prejudice."[105] In *Revel*, this Court applied these four factors and concluded that a police officer's isolated and accidental reference to the defendant's exercise of his constitutional right to remain silent did not warrant a mistrial.[106] The facts here compel the same result.

When pressed on the timing of his disclosure, Green posed a rhetorical question. Green's innocuous comment was made one time and immediately cured.

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[101] *Revel*, 956 A.2d at 27 (citing *Brown v. State*, 897 A.2d 748, 752 (Del. 2006); *Fanning v. Superior Court*, 320 A.2d 343, 345 (Del. 1974); *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998); *Bailey v. State*, 521 A.2d 1069, 1075-78 (Del. 1987)).
[102] *Id.* (citing *Pena v. State*, 856 A.2d 548, 551 (Del. 2004); *Steckel*, 711 A.2d at 11; *Sawyer v. State*, 634 A.2d 377, 380 (Del. 1993); *Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993); *Pennell v. State*, 602 A.2d 48, 52 (Del. 1991)).
[103] *Revel*, 956 A.2d at 27 (citing *Pena*, 856 A.2d at 551–52; *Fuller v. State*, 860 A.2d 324, 328–29 (Del. 2004); *Shelton v. State*, 744 A.2d 465, 483 (Del. 2000)).
[104] *Revel*, 956 A.2d at 27.
[105] *Id.* (citing *Pena*, 856 A.2d at 550-51).
[106] *Revel*, 956 A.2d at 30.

The likelihood of resulting prejudice was markedly low. Green's comment did not directly implicate Otis's right to remain silent as he claims here; rather, Green testified that Otis and Jeffrey were at the park and reasonably stated that they could support the veracity of his testimony. Green was neither challenging, nor was he "calling out the defendants to testify." *Op. Brf.* at 30. Furthermore, this was not a close case in which the balance may have been tipped by Green's innocuous statement. In addition to Green, several witnesses testified to Otis's involvement in the Palmer, Curry, and Kamara homicides. Otis overstates the significance of Green's testimony and ignores the Court's corrective action. The trial court swiftly responded with an instruction to prevent any potential prejudice to infect the jury.

V. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT RESPONDED TO JURY NOTES.

Question Presented[107]

Whether the trial judge abused his discretion when he responded to jury notes with a correct statement of the law.

Standard and Scope of Review

When a defendant lodges a timely objection to a jury instruction, "[t]he standard and scope of review is whether the instruction, considered as a whole, was a correct statement of the present substantive law."[108] However, when a party fails to object to an instruction at the time it was given, the issue is waived on appeal unless he can demonstrate plain error.[109]

Merits of the Argument

"Implicit in every jury instruction is the fundamental principle that the instruction applies to the specific facts in that particular case and contains an accurate statement of the law."[110] Moreover, a "charge to the jury will not serve as grounds for reversible error if it is 'reasonably informative and not misleading judged by common practices and standards of verbal communication.'"[111]

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[107] This argument responds to Argument IX of Appellant's Opening Brief.
[108] *Shackleford v. State*, 1993 WL 65100, at *2 (Del. Mar. 4,1993) (citing *Claudio v. State,* 585 A.2d 1278, 1282 (Del. 1991)).
[109] *Green v. St. Francis Hospital, Inc.*, 791 A.2d 731, 741 (Del. 2002) (citing Supr. Ct. R. 8).
[110] *Bullock v. State*, 775 A.2d 1043, 1053 (Del. 2001).
[111] *Probst v. State*, 547 A.2d 114, 120 (Del. 1988) (quoting *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947)).

During jury deliberations, the court received two notes. The first advised that a juror sought to be removed from the jury. A178. The second, which immediately followed the first, read:

> We are not able to productively discuss the case due to the fact that one juror claims to not have collected any of the evidence presented from day one. She was told not to form an opinion from the start, and has interpreted that to mean that she should not be taking in information, putting it in perspective, and apply productive reasoning to determine whether the events occurred as the State's[sic] presents. She is upsetting all of the other jurors.

A193. Otis initially suggested the trial judge respond to both notes by rereading the court's instruction on how a jury conducts its deliberations and adding that "they are the 12 that have to decide the case, there cannot be a substitution." A198-99. Jeffrey did not want the trial judge to reread the note to the jury as part of the court's instruction (A206), and Otis agreed. A207. Jeffrey objected to the portion of the trial judge's proposed instruction which stated: "Delaware law does not permit the substitution of any juror once deliberations begin." A210. On this point, Otis remained silent. A210. The court noted Jeffrey's objection and instructed the jury:

> Good morning, ladies and gentlemen. In response to the note I received, please refer to the jury instructions on how to conduct jury deliberations. Delaware law does not permit the substitution of any juror once deliberations begin. Thank you. Would you please go back into the jury room.

A211. Otis now claims that he joined in Jeffrey's objection and that the instruction "was coercive and premature." *Op. Brf.* at 46-47. Otis is mistaken on both counts.

Otis did not object to the trial judge's proposed instruction. Indeed, the court gave the instruction and included the language that Otis initially proposed. The record demonstrates that Otis objected to the rereading of the note – not the substance of the instruction. Otis received the instruction he suggested and the court did not reread the jury note per his (and Jeffrey's) objection.

Otis concedes that the court's instruction was a correct statement of the law. *Op. Brf.* at 47. Under Delaware law, alternate jurors may not be substituted during the deliberative process.[112] Otis contends, however, that the instruction was coercive to the extent that it was not accompanied by the admonition that "individual jurors should nor surrender their honest convictions." *Op. Brf.* at 47. This Court rejected this same argument in *Streitfeld v. State*.[113] There, the jury informed the court that it was deadlocked after three hours of deliberation.[114] The trial judge gave an *Allen*[115] charge but failed to admonish the jurors not to surrender their personal convictions for the sake of reaching a verdict.[116] Streitfeld did not object to the charge as given.[117] Holding that the instruction was not coercive as a matter of law, this Court found that "[t]here was no suggestion therein that either side had to

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[112] Super. Ct. Crim. R. 24(c). *See Claudio,* 585 A.2d at 1301 (holding "the substitution of an alternate juror during the deliberative process was in derogation of the common law [and] it was contrary to defendants' right to trial by jury").
[113] 369 A.2d 674 (Del. 1977).
[114] *Id.* at 676-77.
[115] *Allen v. United States,* 164 U.S. 492 (1896).
[116] *Id.* at 677.
[117] *Id.*

compromise a conviction to reach a verdict, nor was there any intimation that the jury would be held until a verdict was reached."[118] The same holds true here.

The Superior Court's instruction did not suggest to any juror that a particular course of action should be undertaken for the mere sake of reaching a verdict. This was not a situation in which the court was giving an *Allen* charge to a deadlocked jury under circumstances that would have warranted a cautionary admonition. The trial judge did not abuse his discretion or err, in any way, by providing the jury with an instruction that was an accurate statement of the law and that was not coercive.

[118] *Id.*

VI. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED OTIS'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS.

Question Presented[119]

Whether Otis's right to a speedy trial was violated.

Standard and Scope of Review

This Court reviews an "alleged infringement of a constitutional right *de novo.*[120]

Merits of the Argument

"The right to a speedy trial is a more vague concept than other procedural rights and it is impossible to determine with precision when the right has been denied. Thus, any inquiry into a speedy trial claim necessitates a functional analysis of the right on a case-by-case basis."[121] When determining whether a defendant has been deprived of his right to a speedy trial, courts should assess the following four factors: "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant."[122]

Otis claims that "the State delayed a Murder prosecution so unrelated charges

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[119] This argument responds to Argument X of Appellant's Opening Brief.
[120] *Harris v. State*, 956 A.2d 1273, 1275 (Del. 2008) (citations omitted).
[121] *Id.* (quoting *Barker v. Wingo*, 407 U.S. 514, 521 (1972) (internal quotes omitted)).
[122] *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) (citing *Barker*, 407 U.S. at 533; *Key v. State*, 463 A.2d 633, 636 (Del. 1983)).

could be added to the indictment." *Op. Brf.* at 49. While the title of his argument suggests that he was prejudiced by a delay in his trial, Otis appears to argue that the Superior Court should have dismissed the case for a delay in a reindictment. Otis's argument confuses the procedural history of the case and lacks merit.

Length of Delay

Otis was arrested on July 8, 2012. He was indicted 106 days later, on October 22, 2012, on capital murder charges, with no right to bail. A2 at DI 1. The case was reindicted on February 18, 2013. A2 at DI 6. The reindictment added several co-defendants and the gang participation-related charges. A280-308. On March 18, 2013, Otis filed a Motion to Dismiss the charges, claiming a delay in indictment. A2 at DI 10. On August 20, 2013, the Superior Court denied Otis's motion to dismiss, finding that he did not demonstrate prejudice. A5 at DI 25.

On appeal, Otis concedes that there was no delay in the original indictment. *Op. Brf.* at 50. His reindictment occurred 129 days after the original indictment. "There is no precise time period which uniformly triggers a speedy trial analysis."[123] In this case, any delay in reindictment was not of sufficient length to be presumptively prejudicial. And, "[u]nless there is some delay which is presumptively prejudicial, there is no reason to review the other factors."[124]

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[123] *Skinner v. State*, 575 A.2d 1108, 1116 (Del. 1990).
[124] *Id.* at 1115 (citations omitted).

Reason for the Delay

Otis claims that the reason for the delay was for the prosecution to "tack on unrelated charges." *Op. Brf.* at 50. This Court has held that "[a] longer period of delay can be tolerated for serious, complex charges, such as murder in the first degree and multiple conspiracies."[125] Here, the Eden Park murders sparked a broader and more complex investigation tying the murders to the Sure Shots gang and their criminal enterprise. The reindictment was a result of that expanded investigation which, contrary to Otis's contention, was directly related to the Eden Park murders.

Defendant's Assertion of Speedy Trial Rights

Otis asserted his speedy trial rights by filing a motion to dismiss on March 18, 2013 – one month after his reindictment.

Prejudice to the Defendant

"The prejudice prong [of the analysis] should be considered in light of three of defendants' interests that the speedy trial right was designed to protect: (1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired."[126] Here, Otis does not identify any of the above forms of prejudice normally considered

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[125] *Id.* at 1116.
[126] *Middlebrook*, 802 A.2d at 276 (citing *Barker*, 407 U.S. at 532).

by this Court. Instead, he cloaks his prior arguments about inadmissible hearsay, prior bad acts and prejudicial witness testimony in a claim of prejudice. The addition of charges in the reindictment did not impair his defense, lengthen his pre-trial incarceration or cause additional anxiety and concern, because Otis had been charged with capital murder prior to his reindictment. Otis has failed to demonstrate prejudice. The Superior Court did not abuse its discretion by denying Otis's motion to dismiss.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of convictions below and remand with directions to resentence Otis to life without probation or parole.

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Dated: August 19, 2016

CERTIFICATE OF SERVICE

I, Andrew J. Vella, Esq., do hereby certify that on August 19, 2016, I caused a copy of the State's Answering Brief to be served electronically upon the following:

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