



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

STEVEN KELLAM, )  
)  
Defendant Below- )  
Appellant, ) No. 201, 2018  
) ON APPEAL FROM  
) THE SUPERIOR COURT OF THE  
v. ) STATE OF DELAWARE  
) ID No. 1506014357A  
STATE OF DELAWARE, )  
)  
Plaintiff Below- )  
Appellee. )

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ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

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**APPELLANT'S AMENDED OPENING BRIEF**

**COLLINS & ASSOCIATES**

Patrick J. Collins, ID No. 4692  
716 North Tatnall Street, Suite 300  
Wilmington, DE 19801  
(302) 655-4600

*Attorney for Appellant*

Dated: December 5, 2018

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## NATURE AND STAGE OF PROCEEDINGS

A grand jury indicted Steven Kellam on June 22, 2015.<sup>1</sup> He originally had seven codefendants: Rhamir Waples, Richard Robinson, Damon Bethea, Shamir Stratton, Carlton Gibbs, Rachel Rentoul, and Jacquelyn Heverin.<sup>2</sup> Generally, the indictment encompassed charges for six incidents, as follows:

- Counts 1 and 2: Racketeering, between January 13, 2014 and January 31, 2015;
- Counts 3-25: Home Invasion and Murder First Degree pertaining to the murders of William Hopkins and Cletis Nelson on January 13, 2014;
- Counts 27-40: Home Invasion and Robbery at the home of Isaiah Phillips on May 18, 2014;
- Counts 41-46: Home Invasion and Robbery at the home of Ashley Moore on August 22, 2014;
- Counts 47-63: Home Invasion and Robbery at the home of Milton Lofland on December 11, 2014; and
- Counts 64-81: Home Invasion and Robbery at the home of Azel Foster on December 14, 2014.<sup>3</sup>

A Rule 9 warrant for Mr. Kellam issued on June 23, 2015 and was returned two days later.<sup>4</sup> The State sought the death penalty; the case was assigned to the

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<sup>1</sup> A20-55.

<sup>2</sup> A20.

<sup>3</sup> A20-5.

<sup>4</sup> A3; D.I. 4 and 7.

Honorable T. Henley Graves.<sup>5</sup> Mr. Kellam was arraigned on August 26, 2015.<sup>6</sup>

Although a proof positive hearing was scheduled for December 3, 2015, the State waived the application for Mr. Kellam to be held without bond.<sup>7</sup> After a hearing, the judge set the bail at \$1,000,000; Mr. Kellam was held for trial.<sup>8</sup>

Some defendants took pleas; the remainder were severed from each other and scheduled for trial.<sup>9</sup> After the death penalty in Delaware was declared unconstitutional, the case became a noncapital case.

Mr. Kellam, through counsel, filed a Motion to Sever Charges.<sup>10</sup> The Superior Court denied this motion on November 23, 2016.<sup>11</sup> The State filed a motion *in limine* to admit intercepted phone calls and text messages obtained during a separate investigation into Mr. Kellam and others.<sup>12</sup> The Court granted that motion on August 23, 2017.<sup>13</sup> The defense renewed its opposition to certain of the phone calls and text messages during trial; that motion was denied also.<sup>14</sup>

Just before trial, the State filed an Amended Indictment.<sup>15</sup> The State did not

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<sup>5</sup> A3; D.I. 8.

<sup>6</sup> A3; D.I. 13.

<sup>7</sup> A57.

<sup>8</sup> 65.

<sup>9</sup> A10; D.I. 75.

<sup>10</sup> A80-96.

<sup>11</sup> A137-143.

<sup>12</sup> A146-155.

<sup>13</sup> A171-179.

<sup>14</sup> A1188-1202.

<sup>15</sup> A189-214.

go forward as to the incidents involving Isaiah Phillips and Ashley Moore. Instead, the State prosecuted the Racketeering charges, the home invasion/murder case as to Nelson and Hopkins, the home invasion/robbery case as to Milton Lofland, and the home invasion/robbery case as to Azel Foster.

This case went to a jury trial beginning September 5, 2017.<sup>16</sup> Closing arguments and jury instructions occurred on September 21, 2017.<sup>17</sup> The indictment was slightly amended one final time.<sup>18</sup> On September 25, 2017, the jury reached its verdict.<sup>19</sup> Except three counts of Possession of a Firearm During Commission of a Felony (PFDCF), the jury found Mr. Kellam guilty of all charges.

Sentencing was postponed because Mr. Kellam, through counsel, filed a Motion for a New Trial, based on a recantation by a key witness, Richard Robinson.<sup>20</sup> The Superior Court denied the motion after a hearing.<sup>21</sup> On March 23, 2018, the Superior Court sentenced Mr. Kellam to two life sentences plus 769 additional years in prison.<sup>22</sup>

Mr. Kellam, through counsel, filed a timely Notice of Appeal. This is his Opening Brief.

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<sup>16</sup> A13; D.I. 105.

<sup>17</sup> A1644-1816.

<sup>18</sup> A1622-1643.

<sup>19</sup> A1847-1861.

<sup>20</sup> A1865-1886.

<sup>21</sup> A1978-1982.

<sup>22</sup> A1990-1992.

## SUMMARY OF ARGUMENT

### **I. THE TRIAL JUDGE ERRED BY PERMITTING THE ADMISSION OF IRRELEVANT AND PREJUDICIAL WIRETAP RECORDINGS AND TEXT MESSAGES.**

The Superior Court abused its discretion by granting the State's motion to play numerous wiretap phone calls and to admit text messages. All the calls and messages occurred months after the dates of offenses alleged in the indictment and were not admitted for any proper purpose under the Delaware Rules of Evidence.

The State tried Mr. Kellam on a pure accomplice liability theory – that he was a general that directed soldiers to do the work. In a three-week trial, the State put on witness after witness to testify to that effect against Mr. Kellam. The State's case should have risen or fallen on that admissible evidence. The judge's decision to permit the State to further shore up its case with gratuitous and irrelevant phone calls and texts from the following year was erroneous and deprived Mr. Kellam of the right to a fair trial. The accompanying jury instruction was insufficient to cure the unfair prejudice to Mr. Kellam.

## **STATEMENT OF FACTS**

The State presented in its opening statement its theory of Steven Kellam's criminal liability: "I'm not saying Steven Kellam ever went into a house; that Steve Kellam ever pointed a gun; or that he shot anyone."<sup>23</sup> Instead, the State likened Mr. Kellam to a "military general" who scouted locations, found the targets, and gave the orders, which were "faithfully followed."<sup>24</sup> The State informed the jury that the witnesses would present "differing accounts based on differing perceptions and motives."<sup>25</sup> That indeed turned out to be the case.

### **Hopkins/Nelson Murders: January 13, 2013**

Cletis Nelson was released from jail on December 24, 2013.<sup>26</sup> He lived in a mobile home with a roommate, Ed Cannon.<sup>27</sup> He had a friend named William Hopkins who often visited Nelson's home.<sup>28</sup> Terrence Nelson, Cletis' brother, had not been able to reach him. When he stopped by the trailer, he saw a window screen had been taken out and was lying against the structure.<sup>29</sup> He found Nelson and Hopkins dead inside the mobile home.<sup>30</sup> Police responded to the scene.<sup>31</sup>

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<sup>23</sup> A239.

<sup>24</sup> A240.

<sup>25</sup> A245.

<sup>26</sup> A255.

<sup>27</sup> A256.

<sup>28</sup> A257.

<sup>29</sup> A261.

<sup>30</sup> A263-265.

<sup>31</sup> A273.

Sergeant Marvel of the Delaware State Police processed the scene. In a shed on the property were a couple of boxes containing 650 bags of heroin.<sup>32</sup> Inside the residence, he found 12 bullet casings,<sup>33</sup> both .32 and .40 caliber.<sup>34</sup> There were bullet holes in Nelson's lower back; Sergeant Marvel found three bullets in the ground underneath the spot in the trailer where Nelson had lain.<sup>35</sup>

Including entries and exits, Hopkins suffered 20 gunshot wounds. Ten bullets were recovered from his body and clothing.<sup>36</sup> Nelson suffered 14 total gunshot wounds, eight of which were entry wounds. Six of them were concentrated in his back, directly above where bullets were found in the ground.<sup>37</sup>

Edward Cannon, Nelson's roommate, was an absconder from work release.<sup>38</sup> Cannon, Hopkins, and Nelson all sold heroin.<sup>39</sup> Nelson had a girlfriend, Rachael Rentoul, who drove him around and obtained heroin from him.<sup>40</sup> She was present while he was counting out about \$6,000 in heroin proceeds.<sup>41</sup>

Rentoul, Cannon, and Nelson decided to go to McDonald's, and Cannon was

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<sup>32</sup> A323-324, A355.

<sup>33</sup> A327.

<sup>34</sup> A329.

<sup>35</sup> A345.

<sup>36</sup> A387.

<sup>37</sup> A394-395.

<sup>38</sup> A414.

<sup>39</sup> A418.

<sup>40</sup> A422-423.

<sup>41</sup> A425-426, 476-477.

dropped off to get his hair cut.<sup>42</sup> Rentoul met up again that night at another location trying to obtain cocaine.<sup>43</sup> Throughout the night, Rentoul kept contacting Cannon, which he found strange and annoying.<sup>44</sup> Cannon eventually made it home and saw that his back door was swinging open.<sup>45</sup> He found Nelson and Hopkins deceased in the trailer.<sup>46</sup>

Cannon got back in the van that had brought him home.<sup>47</sup> He stayed overnight with friends.<sup>48</sup> Rachel Rentoul and her friend Jacquelyn Heverin arrived there the next morning; Rentoul wanted to go to Nelson's house.<sup>49</sup> Rentoul picked up Cannon, then they dropped off Jackie Heverin at home.<sup>50</sup>

Rentoul and Cannon went back to the trailer. Cannon entered and got some personal belongings. He also grabbed a bundle of heroin and gave it to Rentoul.<sup>51</sup> He still did not call the police.<sup>52</sup> Instead, he asked his sister-in-law to bring him money and a new phone.<sup>53</sup> But he never left town; he spent the money on drugs.<sup>54</sup>

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<sup>42</sup> A430.

<sup>43</sup> A438.

<sup>44</sup> A482.

<sup>45</sup> A443.

<sup>46</sup> A446.

<sup>47</sup> A447.

<sup>48</sup> A448.

<sup>49</sup> A450-451.

<sup>50</sup> A452.

<sup>51</sup> A488.

<sup>52</sup> A454-455.

<sup>53</sup> A457.

<sup>54</sup> A460.

Eventually, he contacted Detective Chambers, the chief investigating officer in the murder case.<sup>55</sup>

Having established the particulars of how the victims were found and the evidence recovered, the State next turned to witnesses who were participants in the crime.

### ***Rachael Rentoul***

Rentoul's plea agreement<sup>56</sup> required her to testify. She was also hoping to get a sentence reduction to something less than the minimum mandatory 15 years of jail time.<sup>57</sup>

Rentoul explained that she was a longtime user of heroin, cocaine, and crack.<sup>58</sup> She used drugs "all day, every day."<sup>59</sup> In January 2013 she was using about three bundles, or 39 bags, of heroin per day.<sup>60</sup> She paid for her drug habit through prostitution.<sup>61</sup> She testified that she did not get Jackie Heverin into prostitution and that Jackie was already prostituting, but she helped Jackie obtain better paying clients.<sup>62</sup>

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<sup>55</sup> A461.

<sup>56</sup> A1997.

<sup>57</sup> A572.

<sup>58</sup> A497-498.

<sup>59</sup> A499.

<sup>60</sup> A557.

<sup>61</sup> A503.

<sup>62</sup> A562.

Except for prostitution, Rentoul considered herself to be in an exclusive romantic relationship with Cletis Nelson.<sup>63</sup> The two also had a business relationship, in which Nelson supplied her drugs at reduced prices,<sup>64</sup> and she also acted as his driver.<sup>65</sup>

On the weekend of January 10-12, 2014, Nelson sent a friend to pick up Rentoul from Wilmington for a visit.<sup>66</sup> That Friday night, she was at a liquor store, and in a strange coincidence, met Shamir Stratton, who would later that weekend be involved in the murder.<sup>67</sup> She stayed overnight at Nelson's house, but in the morning, she found text messages on Nelson's phone from another woman. So, she left.<sup>68</sup>

That morning, Rentoul was feeling "dope sick" from lack of heroin, so she and Heverin began prostituting to obtain drug money.<sup>69</sup> They ended up at the Sea Esta motel, along with a client named Carlton Gibbs.<sup>70</sup> They were partying in the hotel room with alcohol and drugs. Even though Rentoul and Nelson were in a squabble, she would return to the trailer that night to buy more heroin with money

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<sup>63</sup> A574.

<sup>64</sup> A576.

<sup>65</sup> A561.

<sup>66</sup> A505.

<sup>67</sup> A506-507.

<sup>68</sup> A509.

<sup>69</sup> A513.

<sup>70</sup> A515.

supplied by Gibbs.<sup>71</sup> On one such trip, she saw Nelson counting out money; she testified the amount was \$5,682.<sup>72</sup> She returned a second time for more heroin, with money supplied by Gibbs.<sup>73</sup> This was the trip in which she drove Cannon to his haircut and Nelson to McDonalds.<sup>74</sup> Then it was back to the hotel.<sup>75</sup>

Eventually, Carlton Gibbs called friends over to the hotel. Four people showed up at the hotel. Rentoul recognized the man she had met at the liquor store the night before; now he had stitches up the back of his head.<sup>76</sup> Everyone was talking and partying; Rentoul testified that Jackie Heverin had a “date” with one of the men in the bathroom.<sup>77</sup>

Rentoul called Nelson to order up more heroin.<sup>78</sup> The others overheard the call, and she began talking about Nelson having drugs and money; “one of the boys said to rob them.”<sup>79</sup> According to Rentoul, the discussion about the robbery took place among everyone in the motel room’s bathroom. All participated.<sup>80</sup> However, robbing Nelson for drugs and money was not the only motivation. Somehow,

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<sup>71</sup> A516.

<sup>72</sup> A518.

<sup>73</sup> A521-522.

<sup>74</sup> A523-524.

<sup>75</sup> A524.

<sup>76</sup> A525-526.

<sup>77</sup> A526.

<sup>78</sup> A527.

<sup>79</sup> A527-528.

<sup>80</sup> A528-529.

Rentoul mentioned Hopkins name too, prompting Stratton (with the stitches in his head) to take interest. Stratton was excited when he learned Hopkins was with Nelson because “that’s the guy who hit me in the head with a bottle.”<sup>81</sup> Stratton was referring to a fight the night before at the VFW, in which Hopkins had cracked him over the head with a liquor bottle.

Rentoul testified she wanted nothing to do with the robbery, but Heverin convinced her: “come on, we really need this right now.”<sup>82</sup> Rentoul’s job was to show them where the trailer was – she was going over there for heroin anyway.<sup>83</sup> During this bathroom meeting, she did not hear Kellam give orders, assign jobs, or mention guns.<sup>84</sup>

Rentoul, with cars following, went back to the trailer again for more heroin. Nelson wanted her to stay and reconcile their relationship.<sup>85</sup> Although Rentoul told Nelson she would come back to the trailer, she did not intend to do so. She went to use drugs with Ed Cannon, and in fact was texting with another potential prostitution client.<sup>86</sup> She also knew Nelson was being robbed.<sup>87</sup> Nevertheless, she still texted Nelson the next morning for more heroin, because “there might have

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<sup>81</sup> A594-595.

<sup>82</sup> A596.

<sup>83</sup> A598.

<sup>84</sup> *Id.*

<sup>85</sup> A600.

<sup>86</sup> A601-602.

<sup>87</sup> A602.

been some they didn't get or I just didn't want it to look like I had anything to do with it either."<sup>88</sup>

Rentoul testified that the next morning, Mr. Kellam and Carlton Gibbs were in her hotel room. On direct examination, she testified that it was Mr. Kellam that gave her \$500 and said to split it with Jackie.<sup>89</sup> She admitted on cross-examination that it was actually Carlton Gibbs who gave her the money.<sup>90</sup>

### ***Jackie Heverin***

Heverin testified pursuant to a plea agreement also.<sup>91</sup> Heverin had just come off a drug detoxification and was staying at the Tau House halfway house in Georgetown in October 2013.<sup>92</sup> She was expelled after five days and landed at the home of Wesley Moulton, where Rentoul was staying and everyone used drugs.<sup>93</sup> Heverin was dope sick and withdrawing, and Rentoul offered to set her up with prostitution jobs.<sup>94</sup> Over time, Rentoul essentially became Heverin's pimp.<sup>95</sup> This arrangement occasioned Heverin's trip to the Sea Esta Motel on January 12, 2013 to have sex with Carlton Gibbs.<sup>96</sup> He paid her seven bags of heroin for having sex

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<sup>88</sup> A603.

<sup>89</sup> A539.

<sup>90</sup> A604.

<sup>91</sup> A1995-1996.

<sup>92</sup> A625.

<sup>93</sup> A628-629, 665.

<sup>94</sup> A631.

<sup>95</sup> A632.

<sup>96</sup> A634.

with him.<sup>97</sup> Rentoul was there also; she was on the phone setting up ways to get more heroin and clients.<sup>98</sup>

Four of Carlton Gibbs' friends arrived. There was one older guy, a friend of Gibbs, and three young ones. Heverin identified Mr. Kellam as the older person.<sup>99</sup> Rentoul told Gibbs and the others that Cletis Nelson had a lot of dope and money.<sup>100</sup> The friends were also talking about getting revenge for a fight that occurred earlier.<sup>101</sup> Heverin testified that the one who had gotten his head hit with a bottle was the most motivated.<sup>102</sup> Gibbs and Mr. Kellam hung back and were on their phones during this discussion.<sup>103</sup>

The connection of Hopkins and Nelson came up while the men were discussing revenge against Hopkins, or "Hop."<sup>104</sup> The conversation flowed from the fight to the fact that Cletis Nelson had come to Hop's aid after the fight.<sup>105</sup> Then Rentoul volunteered that Nelson had dope and money at his trailer.<sup>106</sup> Rentoul even knew that Cannon would not be home at the trailer.<sup>107</sup> Heverin

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<sup>97</sup> A635.

<sup>98</sup> A635-636.

<sup>99</sup> A675.

<sup>100</sup> A641.

<sup>101</sup> A640.

<sup>102</sup> A678.

<sup>103</sup> A680.

<sup>104</sup> *Id.*

<sup>105</sup> A681.

<sup>106</sup> A681.

<sup>107</sup> A682.

denied encouraging Rentoul to set up her boyfriend to be robbed.<sup>108</sup> Heverin then recalls everyone left shortly thereafter, except the two older men stayed behind.<sup>109</sup>

Heverin rode with Rentoul to Nelson's trailer; Heverin never got out of the car. Then they proceeded to where Ed Cannon was and Rentoul used cocaine there.<sup>110</sup> Then, back at the motel, Rentoul thought about going back to Nelson's house, but changed her mind.<sup>111</sup>

When Heverin woke up, the two older men were in the hotel room. Rentoul was questioning Gibbs about what happened the night prior.<sup>112</sup> Heverin confirmed it was Gibbs, not Mr. Kellam, who paid Rentoul \$500.<sup>113</sup>

### ***Shamir Stratton***

Shamir Stratton testified in accordance with a plea deal that carried a minimum sentence of 12 years.<sup>114</sup> He testified it was either that or life in jail.<sup>115</sup> Then he blurted out that he had a paper from his lawyer saying that if he cooperated truthfully, the State would recommend time served.<sup>116</sup> This turned out

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<sup>108</sup> A685.

<sup>109</sup> A687.

<sup>110</sup> A688.

<sup>111</sup> A689-690.

<sup>112</sup> A691.

<sup>113</sup> A693.

<sup>114</sup> A1999-2000.

<sup>115</sup> A851.

<sup>116</sup> A853.

to be the case. The State located the letter it had sent to Stratton's attorney.<sup>117</sup> The attorney was called as a witness, and the letter was entered into evidence.<sup>118</sup> The parties stipulated that the State had agreed to recommend a time served sentence for Stratton in exchange for his cooperation.<sup>119</sup>

Stratton, a New Jersey resident, testified he was a cousin to Mr. Kellam.<sup>120</sup> He was also cousins with Robinson and Waples, although he did not know that until 2013.<sup>121</sup> He also testified that Bethea was a cousin,<sup>122</sup> although Bethea was not related to Robinson and Waples.<sup>123</sup> Stratton was bored, so he called Mr. Kellam to ask if he could visit the weekend of January 10, 2014.<sup>124</sup> There was a party going on at the VFW in Millsboro.<sup>125</sup> He was also looking to put in some work and do a lick, which is vernacular for a robbery.<sup>126</sup> Stratton, Bethea, Robinson, and Waples all headed to Millsboro on Friday, January 10, 2014.

After meeting up with Mr. Kellam at the VFW, everyone went to John Snead's house. Snead was a family friend and Stratton had stayed there before.<sup>127</sup>

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<sup>117</sup> A1154-1155.

<sup>118</sup> A1164-1165.

<sup>119</sup> A1165.

<sup>120</sup> A718.

<sup>121</sup> A721.

<sup>122</sup> A720.

<sup>123</sup> A722.

<sup>124</sup> A723.

<sup>125</sup> A727.

<sup>126</sup> A725.

<sup>127</sup> A729.

Stratton testified that the next day, Mr. Kellam brought out three guns and that Stratton and his cousins were handling the guns.<sup>128</sup> Later that day, everyone went to Amy Kellam's house for dinner.<sup>129</sup> Stratton identified the car that Mr. Kellam was driving – a purple Chrysler or Plymouth.<sup>130</sup>

Later that evening, Stratton, Waples, Robinson, and Bethea took a ride to a liquor store. That was where Stratton met and exchanged phone numbers with Rentoul.<sup>131</sup> Later that evening, everyone went back to the VFW.<sup>132</sup> Waples was having an issue with someone there, so Stratton hit the person. Next thing he knew, he was on the ground.<sup>133</sup> When he recovered, he went outside for a bit. He came back in and someone was pointing a gun at his cousin Jerry DeShields. Stratton tackled the gunman to the ground.<sup>134</sup> With the police arriving, everyone left.<sup>135</sup>

Stratton's head injury was serious enough that he went to the hospital. He got staples in his head.<sup>136</sup> The next morning, John Snead woke up Stratton and asked him what happened at the VFW.<sup>137</sup> Snead had him walk with him to the end

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<sup>128</sup> A735.

<sup>129</sup> A738.

<sup>130</sup> A739.

<sup>131</sup> A741.

<sup>132</sup> A744.

<sup>133</sup> A747.

<sup>134</sup> A749-750.

<sup>135</sup> A751.

<sup>136</sup> A756.

<sup>137</sup> A761.

of the lane – to look at two people sitting in a car. Stratton said that he did not recognize them. Stratton later found out that the passenger in the car was William Hopkins, one of the two men who would be killed that night.<sup>138</sup>

Later that day, Mr. Kellam asked the four visitors to take a ride with him. They went up the street to see Snead chasing Hopkins around.<sup>139</sup> Suddenly, carloads of other men showed up, in support of Hopkins.<sup>140</sup> According to Stratton, Mr. Kellam and Waples were holding guns. Snead and Hopkins fought. Snead, who was drunk, got beaten up by Hopkins.<sup>141</sup> Stratton took the gun away from Waples because Waples seemed a little hot-headed.<sup>142</sup> Once again, police arrived, and everyone dispersed.<sup>143</sup>

That night, Sunday night, Mr. Kellam and the four visitors drove to the Wawa in Milford in Mr. Kellam's car.<sup>144</sup> On the way back, according to Stratton, Mr. Kellam met with Snead at an apartment complex.<sup>145</sup> Meanwhile, Stratton was texting with Rentoul, trying to get together.<sup>146</sup> When the group got to the Sea Esta,

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<sup>138</sup> A764.

<sup>139</sup> A769.

<sup>140</sup> A770.

<sup>141</sup> A772-773.

<sup>142</sup> A774.

<sup>143</sup> A775.

<sup>144</sup> A782.

<sup>145</sup> A789.

<sup>146</sup> A790.

Stratton was shocked upon seeing Rentoul in the hotel room.<sup>147</sup>

Stratton testified that Rentoul was talking about robbing the person from whom she bought heroin.<sup>148</sup> She said she knew a William Hopkins who had money and drugs. This name did not mean anything to Stratton, according to him.<sup>149</sup> Stratton said Waples and Robinson were excited about doing a robbery.<sup>150</sup> Stratton said everyone talked about the robbery, except for Bethea and Heverin, who were on the bed.<sup>151</sup>

Rentoul and Stratton went into the bathroom to “mess around,” then Stratton used the bathroom.<sup>152</sup> When he came out, everyone was ready to leave, but there was not much of a plan, except for Rentoul to go there and buy drugs.<sup>153</sup>

Eventually, Stratton, Waples, Robinson, Bethea, and Mr. Kellam ended up at cousin Jerry DeShield’s house; Gibbs arrived later in a different truck.<sup>154</sup> Mr. Kellam got out and got in the truck with Gibbs. Then another car pulled up to the truck.<sup>155</sup> Stratton testified that Mr. Kellam then returned to the car and provided

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<sup>147</sup> A793.

<sup>148</sup> A794.

<sup>149</sup> A795.

<sup>150</sup> A796.

<sup>151</sup> A797-798.

<sup>152</sup> A798.

<sup>153</sup> A799.

<sup>154</sup> A801.

<sup>155</sup> A802.

three guns.<sup>156</sup> He also said that Mr. Kellam next called him from Gibbs' truck; he said come take a ride.<sup>157</sup> Mr. Kellam showed the location of the trailer to Stratton and they returned.<sup>158</sup>

With the robbery set up, Waples was curious what to do next. According to Stratton, he called Mr. Kellam on speakerphone, and Mr. Kellam ordered them to "kill them."<sup>159</sup> Stratton took Waples, Robinson, and Bethea to the trailer and parked down the street.<sup>160</sup> After about 15 minutes, Stratton heard many shots. Waples and Robinson came running back to the car; Bethea did not.<sup>161</sup> According to Stratton, he threw their guns out the car window.<sup>162</sup> At the time, he thought Robinson had done something to Bethea, so he was paranoid.<sup>163</sup>

They drove to DeShields' house, which did not please DeShields; Robinson and Waples were excited, yelling "we got those N-----s."<sup>164</sup> Waples and Robinson broke their phones. Then Gibbs and Kellam showed up with Bethea.<sup>165</sup> Robinson and Waples handed the money to Mr. Kellam; so did Bethea.<sup>166</sup> Everyone went

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<sup>156</sup> A806.

<sup>157</sup> A807.

<sup>158</sup> A809.

<sup>159</sup> A812.

<sup>160</sup> A813.

<sup>161</sup> A815.

<sup>162</sup> A817.

<sup>163</sup> A818.

<sup>164</sup> A819.

<sup>165</sup> A822.

<sup>166</sup> A823.

back to Snead's house. They packed up and left for New Jersey.<sup>167</sup> On the way home, Bethea told Stratton that Waples and Robinson got way more money than they gave Mr. Kellam.<sup>168</sup>

Stratton confided in his cousin Daniel Patterson about the incident. Patterson was a confidential informant for New Jersey police.<sup>169</sup> That prompted a visit from Delaware detectives. Stratton's first statement had many untruths. He originally told police that Mr. Kellam went in the trailer. He told police that he wanted to drive away but that Robinson tackled him and held a gun to him.<sup>170</sup> He told police that he had no contact with Rentoul after the incident, but his phone records showed otherwise.<sup>171</sup> He also initially transposed the roles of Gibbs and Bethea because he was afraid of Bethea.<sup>172</sup> He walked back those statements in the later statement in connection with his plea.<sup>173</sup>

Unlike Rentoul and Heverin, Stratton testified that Nelson was never brought up as a robbery target. He just heard "Hop" and found out it was Hopkins, the one who hit him in the head with the bottle.<sup>174</sup> He testified he did not know that

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<sup>167</sup> A825.

<sup>168</sup> A831.

<sup>169</sup> A835.

<sup>170</sup> A866.

<sup>171</sup> A871-872.

<sup>172</sup> A875-876.

<sup>173</sup> A877.

<sup>174</sup> A905-906.

Nelson was there, despite his testimony that he was told to rob “them.”<sup>175</sup> In a prior trial, Stratton testified that he did not know what happened to Bethea’s gun; in this trial, he testified that Bethea gave it to Mr. Kellam.<sup>176</sup> He explained that his memory was better in this trial because he got new copies of his legal paperwork and reviewed it.<sup>177</sup>

### ***Courtland Johnson***

Courtland Johnson was a non-defendant witness who testified about the fight at Pine Ridge between Snead and Hopkins. He was playing basketball with his friends when he got a call from his friend Hopkins and he could tell “things weren’t right.”<sup>178</sup> He and about eight to 10 other guys drove over to Pine Ridge.<sup>179</sup> He encountered Snead, who was banging on a door of a house. Hopkins emerged and he and Snead began arguing.<sup>180</sup> Johnson saw three people in the yard, one of whom was Mr. Kellam, who he knew as “Silk.”<sup>181</sup> In contrast to Stratton, Johnson testified that Mr. Kellam did not have a gun.<sup>182</sup> In fact, Johnson and Mr. Kellam conversed about how stupid the fight was and that Snead should not have brought

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<sup>175</sup> A911.

<sup>176</sup> A915.

<sup>177</sup> A917.

<sup>178</sup> A701.

<sup>179</sup> A702.

<sup>180</sup> A703-704.

<sup>181</sup> A704.

<sup>182</sup> A705.

people with guns.<sup>183</sup> Johnson testified that he and Mr. Kellam were trying to defuse the situation.<sup>184</sup> After Hopkins beat up Snead, Johnson urged Snead to just let it go. Snead responded, “let it go tonight; kill him tomorrow.”<sup>185</sup>

### ***Richard Robinson***

Robinson was the other participant in the murders who testified. Waples had already been found guilty and Bethea had already been found not guilty. Like Stratton, Robinson took a plea deal that required testimony.<sup>186</sup> Like Stratton, he gave multiple statements to the police. He was not truthful in the first statement.<sup>187</sup> For the second statement, the police told him they were not even interested in him or his brother – they only wanted Silk.<sup>188</sup> Between his second and third interviews, he had been given the police reports, witness interviews, and wiretap transcripts.<sup>189</sup> In that third statement, he said that things were coming back to him now that he had his paperwork.<sup>190</sup> He also learned a lot of new things from reading police reports, statements, and wiretap transcripts.<sup>191</sup> Robinson’s plea carried a minimum mandatory sentence of 25 years, but he was hoping to shorten that to 15 by

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<sup>183</sup> A706.

<sup>184</sup> A712.

<sup>185</sup> A713.

<sup>186</sup> A2001-2002.

<sup>187</sup> A1487.

<sup>188</sup> A1491-1492.

<sup>189</sup> A1494-1496.

<sup>190</sup> A1496.

<sup>191</sup> A1497-1498.

testifying.<sup>192</sup>

Robinson's testimony was at odds with Stratton's, and with his own prior statements and testimony.

When they went to the fight between Snead and Hopkins in Pine Ridge, Robinson testified that he and his brother Waples had the guns. Stratton took a gun out of his hand and started waving it around.<sup>193</sup> Robinson did not testify that Mr. Kellam had a gun. Robinson heard Snead say to Hopkins after the fight, "you're a dead man. You're going to see the clouds."<sup>194</sup>

According to Robinson, Rentoul had heard about the fight at the VFW and had information on where Hopkins was and that he had money.<sup>195</sup> She offered to lead them to the trailer if they gave her money, because she needed money for her kids.<sup>196</sup> Robinson said that Mr. Kellam came up with the idea to "rob and kill the dude."<sup>197</sup> Robinson testified there was supposed to be \$10,000 there and that was more than he and his brother had ever seen.<sup>198</sup>

Unlike Stratton, Robinson testified that Mr. Kellam was not in the car with

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<sup>192</sup> A1578-1579.

<sup>193</sup> A1507.

<sup>194</sup> A1510.

<sup>195</sup> A1396.

<sup>196</sup> A1517.

<sup>197</sup> A1399.

<sup>198</sup> A1523.

them when they left the hotel.<sup>199</sup> Unlike Stratton, he told the police that it was Gibbs that brought the guns to the car, not Mr. Kellam. At trial, he said he must have made a mistake.<sup>200</sup> He also said it was only two guns given, not three, although he said that was another mistake.<sup>201</sup> Robinson also testified that Mr. Kellam did not take Stratton for a ride to the trailer. They all just waited in the car.<sup>202</sup> He said, in contrast to Rentoul, that it was Rentoul who took Mr. Kellam and Gibbs for a ride.<sup>203</sup> No car pulled up next to Gibbs' truck, according to Robinson.<sup>204</sup>

Robinson, Waples, and Bethea thought about going through the front door, but were concerned about a shootout. So, they went through a window.<sup>205</sup> Robinson testified that he, Bethea, and Waples found Hopkins first and shot him. then they brought Nelson out from a bedroom and Bethea shot him.<sup>206</sup> Robinson emptied the whole barrel.<sup>207</sup> Robinson had testified in another trial that Waples made Nelson lie on the floor and shot him in the back of the head.<sup>208</sup> But in this

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<sup>199</sup> A1524.

<sup>200</sup> A1526.

<sup>201</sup> A1531.

<sup>202</sup> A1526-1527.

<sup>203</sup> A1528.

<sup>204</sup> A1527.

<sup>205</sup> A1404-1405.

<sup>206</sup> A1533.

<sup>207</sup> A1535.

<sup>208</sup> A1536.

trial, he testified that was Bethea – another mistake.<sup>209</sup> Then he amended that to Waples shooting Nelson in the front of the head and Bethea shooting him in the back of the head.<sup>210</sup>

Robinson told police that after the shooting, they gave all the guns back to Silk (Mr. Kellam).<sup>211</sup> He also testified to it in a different trial.<sup>212</sup> In fact, months later, he was trying to get them back due to some issues he was having in Philadelphia.<sup>213</sup> At this trial, he said that was another mistake, and said the guns were thrown out the window.<sup>214</sup> He also told police in a different statement that he held onto his gun but Waples threw his.<sup>215</sup> He also testified that he and his brother kept \$1,000 of the robbery proceeds and did not turn it over to Mr. Kellam.<sup>216</sup>

Robinson had several versions of Mr. Kellam’s purported order to kill the victims. His first version to the police is that after the robbery but while still inside the trailer, he called Mr. Kellam and asked what to do. He said Mr. Kellam instructed, “kill them or else I will kill you.”<sup>217</sup> But he admitted that was not

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<sup>209</sup> A1537.

<sup>210</sup> A1538.

<sup>211</sup> A1540.

<sup>212</sup> A1541.

<sup>213</sup> *Id.*

<sup>214</sup> A1540.

<sup>215</sup> A1543.

<sup>216</sup> A1577.

<sup>217</sup> A1548.

true.<sup>218</sup> He also contrasted with Stratton’s version, because he did not remember any call from Mr. Kellam on speaker phone saying to kill anyone.<sup>219</sup> Robinson’s version at trial was that the kill order occurred when they were leaving the motel: “grab the money and kill him.”<sup>220</sup> Then again, he told police in one of his two statements he endorsed, that Mr. Kellam said to just rob them and get out of there.<sup>221</sup>

### ***Jackson Vanvorst***

Vanvorst was jailed for selling drugs, got out in 2006, and began selling drugs again in 2007.<sup>222</sup> In 2015, he was arrested in two indictments totaling 55 charges of the drug and firearm variety.<sup>223</sup> He ended up pleading guilty to five charges, and a condition of his deal was to testify in Mr. Kellam’s trial.<sup>224</sup> Like the other witnesses, he gave multiple statements to the police.<sup>225</sup>

Vanvorst testified about other matters, but his testimony touched on things Mr. Kellam supposedly told him about the murder incident. For example, he testified Mr. Kellam said it was he who drove Stratton to the hospital after the

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<sup>218</sup> *Id.*

<sup>219</sup> A1552-1553.

<sup>220</sup> A1546.

<sup>221</sup> A1547.

<sup>222</sup> A1250-1251.

<sup>223</sup> A1279-1280.

<sup>224</sup> A2003-2004.

<sup>225</sup> A1287.

VFW fight; the other witnesses and photo evidence demonstrate that was untrue.<sup>226</sup>

As to the murder, Vanvorst testified Mr. Kellam told him he was having nightmares because he saw blood on the floor of the trailer.<sup>227</sup> He also told the police that the door to the trailer was unlocked, providing easy access. This was in direct contrast to the participants' testimony that they went in through the window.<sup>228</sup> Vanvorst also claimed that Mr. Kellam told him they had gotten only \$500 and some pills from the Nelson/Hopkins robbery, contradicting the testimony of the participants.<sup>229</sup>

### ***Other murder evidence***

There was some corroborating evidence of certain events. Photos of Stratton, Robinson, Waples, and Bethea at Beebe Medical Center were admitted.<sup>230</sup> Photos of the group at the Wawa with Mr. Kellam were admitted also.<sup>231</sup> As mentioned, bullet casings and bullets at the scene established the number and caliber of bullets. No guns were recovered. By the time police went to the Sea Esta to obtain security footage, it had been overwritten.<sup>232</sup> The chief investigator testified that the case

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<sup>226</sup> A1317.

<sup>227</sup> A1316.

<sup>228</sup> A1317.

<sup>229</sup> *Id.*

<sup>230</sup> A970-971.

<sup>231</sup> A978.

<sup>232</sup> A960-970

essentially came down to interviews.<sup>233</sup>

Mr. Kellam went voluntarily to Troop 2 for an interview.<sup>234</sup> In the interview, which was played for the jury,<sup>235</sup> Mr. Kellam denied involvement and claimed he was elsewhere during the weekend.

Latroya Burton testified. She is the mother of one of Mr. Kellam's children.<sup>236</sup> She drove him to the police station on February 4, 2014. Mr. Kellam told her to say he was with her that weekend of January 10-12, 2014.<sup>237</sup> She in fact did tell the police that the night of January 12, 2014 into next day, Mr. Kellam was at her house – because he told her to say that.<sup>238</sup>

#### **The Home Invasions: December 11 and 14, 2014**

Two of the home invasion cases went to trial; the others were dropped by the State. Trial witnesses were the two victims, Robinson, Vanvorst, and an additional witness named Tamika Turlington.

Connie Steward testified that after she and Milton Lofland (also known as Dice or Fat Dice) went to bed on December 10, 2014, she heard someone trying to get in the front door.<sup>239</sup> Next thing she knew, four men with guns were in her

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<sup>233</sup> A994.

<sup>234</sup> *Id.*

<sup>235</sup> A982.

<sup>236</sup> A1329.

<sup>237</sup> A1330.

<sup>238</sup> A1333.

<sup>239</sup> A1107.

hallway.<sup>240</sup> One of the intruders hit her in the head with a gun and were also striking Lofland.<sup>241</sup> The others were “tearing up my Christmas presents and tearing the house up.”<sup>242</sup> All the intruders were dressed in all black and wearing masks.<sup>243</sup>

Ms. Steward testified that Lofland sold drugs out of the house but did not keep the money at the house.<sup>244</sup>

On December 14, 2014, Azel Foster was watching football with his daughter. At about 10:30, he was putting her to bed when he heard a noise at the front door.<sup>245</sup> The family did not use that door. The door was kicked open. Foster ran to his room, grabbed his pistol and shot towards the intruders.<sup>246</sup> They were dressed in all black with black masks and hoods.<sup>247</sup> Foster was shot in the shoulder during the shootout with the intruders.<sup>248</sup>

After the intruders left, Foster found a small caliber pistol and a roll of duct tape in his driveway.<sup>249</sup>

Foster was a former drug dealer who, upon release from jail, got out of the

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<sup>240</sup> A1108.

<sup>241</sup> A1109.

<sup>242</sup> A1110.

<sup>243</sup> A1121.

<sup>244</sup> A1117-1118.

<sup>245</sup> A1043-1044.

<sup>246</sup> A1045.

<sup>247</sup> A1047.

<sup>248</sup> A1052.

<sup>249</sup> A1053.

drug dealing business and obtained gainful employment.<sup>250</sup> Everyone in the community knew that Foster was no longer involved in illegal activity.<sup>251</sup> Foster knew Mr. Kellam for a number of years.<sup>252</sup>

Police did not know who the assailants were in the Lofland and Foster home invasions until Turlington, Vanvorst, and Robinson provided information.

### ***Tamika Turlington***

In July 2014, Turlington was arrested with two logs of heroin. She gave a statement to the police on January 29, 2015.<sup>253</sup> She told the police she had valuable information about Mr. Kellam and wanted to help herself out.<sup>254</sup> On March 18, 2015, the State entered a *nolle prosequi* on Turlington's pending case.<sup>255</sup>

Turlington had known Mr. Kellam for many years and had an off-and-on relationship with him.<sup>256</sup> In December 2014, she was at Mr. Kellam's house, along with Waples, Robinson, and Vanvorst.<sup>257</sup> There were other people but she did not know who they were. According to Turlington, Mr. Kellam told her they were leaving to rob Foster.<sup>258</sup> Turlington testified that after they returned, Mr. Kellam

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<sup>250</sup> A1058-1059.

<sup>251</sup> A1059.

<sup>252</sup> A1061-1062.

<sup>253</sup> A945.

<sup>254</sup> A946.

<sup>255</sup> A947.

<sup>256</sup> A931-932.

<sup>257</sup> A935.

<sup>258</sup> A939.

told her that things did not go as planned. He did not enter the house; he watched.<sup>259</sup> In her statement to police, Turlington also identified a John-John, or Johnny Boy as a person who left the house for the robbery.<sup>260</sup>

Later that evening, Turlington was in a bedroom with Mr. Kellam. Robinson entered with a gun in his hand. Mr. Kellam commented that if he had told Robinson to shoot her, Robinson would have.<sup>261</sup>

Turlington was brought back in for a second interview by the police because they received information that it was Turlington that showed them where Foster lived.<sup>262</sup> She denied doing so, however.<sup>263</sup>

### ***Jackson Vanvorst***

Vanvorst testified that he was at Mr. Kellam's house prior to the Lofland robbery. Present were Mr. Kellam, Waples, Robinson, and a new character named B-Hop.<sup>264</sup> According to Vanvorst, Mr. Kellam told them to go in and take whatever there was. The guns were supplied by Vanvorst to Mr. Kellam, who distributed them.<sup>265</sup> Vanvorst was also at Mr. Kellam's house the next morning, when Waples

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<sup>259</sup> A941.

<sup>260</sup> A951.

<sup>261</sup> A943.

<sup>262</sup> A949.

<sup>263</sup> A950.

<sup>264</sup> A1262.

<sup>265</sup> A1263.

and Robinson were bragging about beating up Lofland and Steward.<sup>266</sup>

Vanvorst said he was also present when Mr. Kellam told them to rob Foster; he said to be careful because Foster had a gun.<sup>267</sup> Apparently it did not happen on the first attempt, because Vanvorst testified they were going again and needed an extra gun. So, Vanvorst procured another gun for them, although it had no bullets.<sup>268</sup> On this second attempt, Turlington, Snead, and Snead's brother was with the group.<sup>269</sup> Once again, Vanvorst said he was there the morning after this robbery. He testified that Waples and Robinson were bragging about shooting Foster and the baby crying.<sup>270</sup>

Despite purporting to be present for the departures for both home invasions, Vanvorst told the police that he was only present for the Foster home invasion.<sup>271</sup> He also testified the Mr. Kellam did not participate in either home invasion; he did not enter either house.<sup>272</sup>

Vanvorst confirmed that Turlington did indeed take a ride with him, Mr. Kellam, and John Snead to point out the house where Foster lived.<sup>273</sup> He also

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<sup>266</sup> A1263-1264.

<sup>267</sup> A1265.

<sup>268</sup> A1266-1267.

<sup>269</sup> A1270.

<sup>270</sup> A1273.

<sup>271</sup> A1303.

<sup>272</sup> A1322-1323.

<sup>273</sup> A1296.

testified that Snead's brother was the one with the unloaded gun for the Foster robbery, which upset Snead.<sup>274</sup> Despite having provided the guns for both home invasions, Vanvorst was not charged in connection with these cases.<sup>275</sup>

***Richard Robinson***

Robinson was the only witness who testified as to participation in the murder case and the home invasion cases. In December 2014, Robinson, Waples, a cousin named Tyreek Waples (B-Hop) got a ride to Dover, where Snead was waiting for them.<sup>276</sup> Snead took the m the rest of the way to Mr. Kellam's house in Georgetown. Robinson testified Mr. Kellam told him about a robbery, where "the guy had money and drugs."<sup>277</sup>

For this robbery, Robinson said that Mr. Kellam gave them a "Glock 30," a .38 special, and a shotgun.<sup>278</sup> Robinson did not know Lofland's name, but it was established through testimony that it was the Lofland robbery to which he referred.<sup>279</sup> Robinson said he was driven there by one of Snead's friends, and the participants were himself, Snead's friend, and Waples.<sup>280</sup> Mr. Kellam did not drive

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<sup>274</sup> A1297-1298.

<sup>275</sup> A1327.

<sup>276</sup> A1446-1447.

<sup>277</sup> A1449.

<sup>278</sup> A1452.

<sup>279</sup> A1458.

<sup>280</sup> A1460.

him to this robbery; Robinson thought he was at home.<sup>281</sup> Robinson blamed the kicking in of the door and pistol whipping on Snead's friend.<sup>282</sup> Then, he admitted he punched both victims.<sup>283</sup> He said he might have opened the presents – he was not sure.<sup>284</sup>

Robinson went on to testify that Mr. Kellam identified Azel Foster as a target because he was a local drug dealer.<sup>285</sup> Robinson did that robbery with Waples, B-Hop, and one of Snead's friends.<sup>286</sup> Robinson testified Mr. Kellam warned him about a potential shootout.<sup>287</sup> Snead's friend had a .32 revolver supplied by Vanvorst; it had no bullets in it.<sup>288</sup> There was a shootout; Robinson exchanged gunfire with Foster and fired all five bullets in his pistol.<sup>289</sup> Snead's friend dropped a gun as they were running away.<sup>290</sup>

Robinson admitted on cross-examination that he left B-Hop out of his narratives with the police.<sup>291</sup> Then he changed his story and said that B-Hop was only there for one of them; "I thought it would make it better for him if I say he

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<sup>281</sup> *Id.*

<sup>282</sup> A1462-1463.

<sup>283</sup> A1464-1465.

<sup>284</sup> A1467.

<sup>285</sup> A1475.

<sup>286</sup> *Id.*

<sup>287</sup> A1476.

<sup>288</sup> A1479.

<sup>289</sup> A1482-1483.

<sup>290</sup> A1485.

<sup>291</sup> A1561.

was only at one.”<sup>292</sup> He further testified he did not know a Tamika Turlington and did not meet her at Mr. Kellam’s house.<sup>293</sup>

## **Wiretap Calls and Text Messages**

### ***Pretrial litigation***

On August 15, 2017, the State filed a motion *in limine*<sup>294</sup> to admit certain wiretap calls and text messages. The wiretap occurred in relation to a large drug investigation which netted 35 arrests.<sup>295</sup> The calls sought to be admitted were characterized as uncharged misconduct admissible under Rule 404(b).<sup>296</sup>

Generally, the State sought through these calls to demonstrated that Mr. Kellam was the “leader of the enterprise.”<sup>297</sup> The State argued that the calls showed the “power and faith given to Kellam by other members of the organization, but also as an implicit acknowledgement of the enterprise’s activities.”<sup>298</sup>

Mr. Kellam, through counsel, opposed the motion.<sup>299</sup> Mr. Kellam argued that “the State has ample evidence with which to prove a racketeering enterprise without resorting to superfluous uncharged misconduct.”<sup>300</sup> He argued that the

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<sup>292</sup> A1572.

<sup>293</sup> A1558-1559.

<sup>294</sup> A146-155.

<sup>295</sup> A147.

<sup>296</sup> A151; D.R.E 404.

<sup>297</sup> A152.

<sup>298</sup> A150.

<sup>299</sup> A156-166.

<sup>300</sup> A158.

State had no need for the extra evidence and that it would unnecessarily prolong the proceedings.<sup>301</sup> Moreover, he argued that evidence of drug dealing was irrelevant to the case and would confuse the jury.<sup>302</sup> Mr. Kellam went through each batch of wiretap calls and texts and explained why the evidence was irrelevant, cumulative to testimony, and prejudicial.<sup>303</sup>

At a pretrial hearing on August 23, 2017, the judge decided the motion. The Court found that the evidence was material to the issue and the ultimate fact in dispute. It found the evidence was relative to motive, and identity Kellam as the “boss man.”<sup>304</sup> The judge also found that the prejudice was not as bad as perhaps presumed, “because just about all of this the jury is going to hear in another format.”<sup>305</sup> Finally, the judge found that because the charge was racketeering, that the association must be proved in fact.<sup>306</sup> The State’s motion was granted.

### ***Midtrial litigation***

After counsel went through all the calls and worked on redactions, the defense sought essentially a reargument on September 13, 2017. Mr. Kellam, through counsel, pointed out that the time bracket on the racketeering indictment

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<sup>301</sup> A159.

<sup>302</sup> *Id.*

<sup>303</sup> A161-163.

<sup>304</sup> A175.

<sup>305</sup> A177.

<sup>306</sup> A178.

ended on January 31, 2015 (even though the last alleged act was on December 14, 2014).<sup>307</sup> All the wiretap calls and messages were from March 2015 and later.<sup>308</sup>

Mr. Kellam argued that the State really planned to use the calls as affirmative evidence of the racketeering charges, not as subsequent bad acts.<sup>309</sup> Mr. Kellam did not oppose the calls relating directly to the murder case.<sup>310</sup>

The State proposed amending the indictment, but the judge did not think that would be fair to the defense.<sup>311</sup>

The defense argued that under *DeShields v. State*,<sup>312</sup> the State had no need for the evidence and there was ample other proof available.<sup>313</sup> The judge replied “you never know what is too little or too much in the jury’s eyes.”<sup>314</sup> This was a reference to Waples being found guilty at trial and Bethea being found not guilty at his trial.<sup>315</sup> The State argued that all the witnesses have their own legal and credibility issues, and that the wiretap evidence “goes to the association.”<sup>316</sup>

The defense urged that this is not really a pure *Getz*<sup>317</sup> analysis because the

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<sup>307</sup> A1189.

<sup>308</sup> A1190.

<sup>309</sup> A1192.

<sup>310</sup> *Id.*

<sup>311</sup> A1194.

<sup>312</sup> 706 A.2d 502 (Del. 1988)

<sup>313</sup> A1195.

<sup>314</sup> A1196.

<sup>315</sup> *Id.*

<sup>316</sup> A1198.

<sup>317</sup> *Getz v. State*, 538 A.2d 726 (Del. 1988).

State was trying to use the evidence to prove an association, not anything to do with the murders or home invasions.<sup>318</sup> The Court ruled the evidence was admissible.<sup>319</sup>

### *Use of the wiretap calls at trial*

When the first calls were played for the jury, the audio was incomprehensible. The Court dismissed the jury for a day, so the parties could work together on transcripts.<sup>320</sup> When the trial resumed, the Court instructed the jurors that the audio is the evidence and the transcripts were aids to the jury.<sup>321</sup> The transcripts were marked as court exhibits.

The first batch of calls,<sup>322</sup> from March 2015 tells the story of Waples and Robinson losing their gun in Philadelphia, which was problematic for them because they are drug dealers. Robinson says to Mr. Kellam, “remember the gun Jack [Vanvorst] gave us? That s—t got took, yo.”<sup>323</sup> Robinson bemoans the fact that he cannot go home because losing the gun will cause a fight with his brother Waples<sup>324</sup> Robinson asks Mr. Kellam to intercede on his behalf with Waples.<sup>325</sup>

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<sup>318</sup> A1199.

<sup>319</sup> A1200.

<sup>320</sup> A1182.

<sup>321</sup> A1210.

<sup>322</sup> A2006-2038.

<sup>323</sup> A2006.

<sup>324</sup> A2012.

<sup>325</sup> A2017.

Mr. Kellam said, “just tell him what you just told me.”<sup>326</sup> Finally, Mr. Kellam relents and agrees to call Waples.<sup>327</sup>

On that call, Waples complained about his careless brother Robinson to Mr. Kellam.<sup>328</sup> Waples was really upset because he had just gotten an “8-ball,” and now he felt naked on the streets.<sup>329</sup> An 8-ball refers to an eighth ounce of cocaine.<sup>330</sup> Then Mr. Kellam called Robinson back to tell him he had made the call.<sup>331</sup> Robinson called Mr. Kellam back with an update on his plans to go get his gun back.<sup>332</sup>

Mr. Kellam updated Vanvorst on the lost gun. Vanvorst responded, “if I knew they were going to be careless with it, I would have kept it.”<sup>333</sup>

Next, the State played a call where Waples called Kellam to tell him he was going to sell drugs with Snead. Mr. Kellam warned Waples to be wary of getting bad deals from Snead.<sup>334</sup>

Next, the State played a call between Vanvorst and Mr. Kellam where Vanvorst announced he was going to get a snub nose handgun in exchange for

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<sup>326</sup> A2019.

<sup>327</sup> A2029.

<sup>328</sup> A2032.

<sup>329</sup> A2033.

<sup>330</sup> A1214.

<sup>331</sup> A2034.

<sup>332</sup> A2036-2037.

<sup>333</sup> A2038.

<sup>334</sup> A2039.

drugs.<sup>335</sup> Mr. Kellam replies, “oh yeah, we need that.”<sup>336</sup> However, Vanvorst testified that he did obtain the gun and Mr. Kellam did not ever have it.<sup>337</sup>

Then, the State played a call between Vanvorst and Mr. Kellam where Vanvorst is bemoaning the fact that he lost a lot of money at the casino.<sup>338</sup> Mr. Kellam calls him stupid, and Vanvorst says he is “trying to express my feelings.”<sup>339</sup> Mr. Kellam tells Vanvorst, “I don’t even want to be your friend no more, man.”<sup>340</sup> Later that night, Vanvorst texts Mr. Kellam that he should just run his truck into a tree. Mr. Kellam replies, “go ahead maybe it will knock some sense into you.”<sup>341</sup> Then Mr. Kellam texts, “I know where to send the goons next time they come thru.”<sup>342</sup> Vanvorst took the “goon” reference to mean Robinson and Waples, but he did not take it seriously.<sup>343</sup>

The next batch of calls pertained to things heating up with the murder investigation, although the calls only peripherally involve Mr. Kellam. These calls were not objected to by the defense. Snead calls Mr. Kellam on April 21, 2015 and

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<sup>335</sup> A2040.

<sup>336</sup> *Id.*

<sup>337</sup> A1281-1282.

<sup>338</sup> A2042.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> A2045.

<sup>342</sup> A2044.

<sup>343</sup> A1318-1319.

begins, “we got a serious f---ing problem.”<sup>344</sup> Snead explains to Mr. Kellam that the police had been to Waples’ and Robinsons’ house. Mr. Kellam does not say much.<sup>345</sup> The remaining calls are between Snead and Waples and demonstrate their escalating levels of anxiety about the police investigation.<sup>346</sup> Kellam is not involved in any of these calls – just Waples and Snead. Snead was never arrested in this case.

At the conclusion of the wiretap evidence, the judge instructed the jury that the “subsequent wiretap recordings” were admitted for the limited purpose of deciding whether the calls are evidence of a common scheme supporting the racketeering charge, as well as “deciding Mr. Kellam’s culpability in directing others to commit the charged crimes.”<sup>347</sup>

### **Robinson recants – then un-recants**

On December 28, 2017, Mr. Kellam, through counsel, filed a motion for a new trial<sup>348</sup> based on two letters written by Mr. Robinson.<sup>349</sup> The letters generally stated that Robinson was forced to give evidence against Mr. Kellam by the State, and that Mr. Kellam did not order Robinson to kill or rob anyone. He went on to

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<sup>344</sup> A2046.

<sup>345</sup> *Id.*

<sup>346</sup> A2047-2052.

<sup>347</sup> A1244-1245.

<sup>348</sup> A1865-1886.

<sup>349</sup> A1881-1885.

say that he was naïve and vulnerable due to concern about his infant daughter.

However, before the hearing on the motion, Robinson, now represented by new counsel, filed an affidavit recanting everything he said and asserting that his trial testimony was truthful.<sup>350</sup> The court held a hearing on the motion and decided to put Mr. Kellam in a separate courtroom to watch the proceedings on a video monitor. This was due to perceived threats by Mr. Kellam and his family against Robinson, although they all essentially are family members.<sup>351</sup> Mr. Robinson testified and maintained it was Mr. Kellam who instructed him to write the recantation letters.<sup>352</sup>

The judge denied the motion for new trial.<sup>353</sup> As noted, Mr. Kellam was sentenced and filed a timely notice of appeal.

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<sup>350</sup> A1911-1912.

<sup>351</sup> A1915-1919.

<sup>352</sup> A1958-1959.

<sup>353</sup> A1978-1982.

## ARGUMENT

### **I. THE TRIAL JUDGE ERRED BY PERMITTING THE ADMISSION OF IRRELEVANT AND PREJUDICIAL WIRETAP RECORDINGS AND TEXT MESSAGES.**

#### **A. Question Presented**

Whether the trial judge erred in permitting the State to admit wiretap calls and texts which postdated all charged offenses, including the Racketeering charge. This issue was preserved when the defense opposed the State’s Motion *in Limine* on August 21, 2017.<sup>354</sup> It was further preserved when the court held a further hearing on the issue during trial on September 13, 2017.<sup>355</sup>

#### **B. Standard and Scope of Review**

This Court reviews a trial judge’s evidentiary rulings on an abuse of discretion standard.<sup>356</sup>

#### **C. Merits of Argument**

##### ***Applicable legal precepts***

The legal framework is axiomatic and well-established. Evidence must be relevant to be admissible.<sup>357</sup> To be relevant, the evidence must be material and probative. Evidence is material if it is “offered to prove a fact ‘of consequence’ to

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<sup>354</sup> A156-166.

<sup>355</sup> A1188-1203.

<sup>356</sup> *Zebroski v. State*, 715 A.2d 75, 79 (Del. 1998).

<sup>357</sup> D.R.E. 401.

the action.<sup>358</sup> Evidence is probative if it affects the probability that the fact is as the offering party asserts it to be.<sup>359</sup>

Character and propensity evidence is inadmissible, unless, by operation of Rule 404(b), it may be admissible for another purpose.<sup>360</sup> The test for admissibility is the *Getz* rubric, which articulates six factors for consideration:

- (1) The evidence must be material to an issue or ultimate fact in dispute;
- (2) the evidence must be introduced for a purpose sanctioned by D.R.E. 404(b) or another purpose not inconsistent with the basic prohibition against such evidence;
- (3) the evidence proving the prior crime must be plain, clear, and conclusive;
- (4) the prior crime(s) must not be too remote in time;
- (5) the probative value of the evidence must be balanced against its unfairly prejudicial effect; and
- (6) the jury must be instructed regarding the limited purpose for the introduction of the evidence.<sup>361</sup>

Acts subsequent to the charged crimes may be admissible if for a material purpose, such as consciousness of guilt.<sup>362</sup> Whether prior or subsequent, the evidence must meet the “threshold test of relevancy.”<sup>363</sup>

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<sup>358</sup> *Getz v. State*, 538 A.2d 726, 731 (Del. 1988).

<sup>359</sup> *Id.*

<sup>360</sup> D.R.E 404(b).

<sup>361</sup> *Trowbridge v. State*, 647 A.2d 1076, 1077 (Del. 1994) (citing *Getz v. State*, 538 A.2d 726 (Del. 1988)).

<sup>362</sup> *Getz* at 730 fn. 3.

<sup>363</sup> *Getz* at 731.

Other acts evidence requires a balancing of probative value against unfair prejudice. This Court adopted a set of nine factors for consideration:

(1) the extent to which the point to be proved is disputed; (2) the adequacy of proof of the prior conduct; (3) the probative force of the evidence; (4) the proponent's need for the evidence; (5) the availability of less prejudicial proof; (6) the inflammatory or prejudicial effect of the evidence; (7) the similarity of the prior wrong to the charged offense; (8) the effectiveness of limiting instructions; and (9) the extent to which prior act evidence would prolong the proceedings.<sup>364</sup>

***The wiretap calls and texts were improperly admitted***

The State's motion *in limine* did not establish any purpose for admitting the wiretap calls, other than to argue that it needed to prove an association in fact in order to prove the Racketeering charge.<sup>365</sup> Although the State listed a number of 404(b) admissibility triggers (modus operandi, opportunity, intent, preparation, etc.) it did not seriously argue how these factors enabled admissibility. That is not surprising because these phone calls do not demonstrate any activity on Mr. Kellam's part that would show he had a modus operandi, intent, or plan to do anything. They establish instead that Robinson and Waples are drug dealers who use guns and that Vanvorst has a gambling problem – and that these individuals would call Mr. Kellam and tell him about their problems.

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<sup>364</sup> *Deshields v. State*, 706 A.2d 502, 506-07 (Del. 1998).

<sup>365</sup> A152.

The Court's finding that the calls were evidence of motive because they identify Kellam as the "alleged boss man" and common scheme because "he puts them to work they do his bidding"<sup>366</sup> was erroneous. There is nothing in any of the calls demonstrating Mr. Kellam ordered anyone to do anything. People call him to complain about their problems, such as losing their gun or blowing money at a casino. None of the calls demonstrate a consciousness of guilt<sup>367</sup> or any other legitimate reason for admitting subsequent bad acts.

Moreover, the proposed evidence did not pass muster under the *DeShields* rubric. The State had no need for additional and gratuitous evidence about the Racketeering charge; there was plenty of available proof. The trial featured a parade of live witnesses who testified that Mr. Kellam directed them to commit three home invasions over the course of a year. The State did not demonstrate its need for the evidence of phone calls that occurred months after the State's end dated for the Racketeering charge. There was ample available other proof of the charged offenses. The wiretap evidence was dissimilar to the charged offenses in that it had nothing to do with Mr. Kellam directing anyone to commit any offenses at all and certainly not murder or home invasions.

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<sup>366</sup> A175-176.

<sup>367</sup> See, e.g., *Lovett v. State*, 516 A.2d 455, 468 (Del. 1986).

At the second hearing on the issue, the Court agreed to hear further argument. The gist of the defense argument was that the acts were not really *Getz* material but instead affirmative evidence of an association – an irrelevant association because it occurred months after the association was alleged to have occurred.<sup>368</sup> The State essentially argued that their witnesses had credibility problems and hearing it right from Mr. Kellam’s mouth would help the State prove an association.<sup>369</sup> That is not a good enough reason to admit phone calls from 2015 to prove an association from 2014. Vouching for flawed witnesses is not a permissible use of other acts evidence under the *Getz/DeShields* rubric. The Court followed the State’s lead by basing its decision on the verdicts of trials of the codefendants – one guilty and one not guilty.<sup>370</sup> The verdicts in other cases is not a legitimate basis upon which to admit evidence and the Court’s use of these data points was erroneous.

***The instruction given was insufficient to cure the unfair prejudice***

The judge instructed the jury that the evidence was to be used to decide “Mr. Kellam’s culpability in directing others to commit the charged crimes.”<sup>371</sup> But the calls had nothing to do with the charged crimes, and they do not show Mr. Kellam

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<sup>368</sup> A1198-1199.

<sup>369</sup> A1197-1198.

<sup>370</sup> A1196.

<sup>371</sup> A1245.

directing them to do anything. Although the judge instructed the jury not to use the evidence as proof that Mr. Kellam probably committed the charged offenses, there was really no other use for the wiretap calls.

Moreover, it is hard to imagine the jury could plausibly follow an instruction to listen to the calls but not infer a criminal disposition to Mr. Kellam. As this Court recently held in a concurring opinion, when an instruction does not give the jury a logical way of thinking about what it had just heard, it is inadequate.<sup>372</sup> In any event, as the concurrence noted, “the naïve assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.”<sup>373</sup>

The State tried Mr. Kellam on a pure accomplice liability theory – that he was a general that directed soldiers to do the work. In a three-week trial, the State put on witness after witness to testify to that effect against Mr. Kellam. The State’s case should have risen or fallen on that admissible evidence. The judge’s decision to permit the State to further shore up its case with gratuitous and irrelevant phone calls and texts from the following year was erroneous and deprived Mr. Kellam of his right to a fair trial.

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<sup>372</sup> *Phillips v. State*, 154 A.3d 1146, 1162 (Del. 2017)(CJ Strine, concurring).

<sup>373</sup> *Id.*, citing *Krulwich v. United States*, 336 U.S. 440 (1949).

## **CONCLUSION**

For the foregoing reasons, Appellant Steven Kellam respectfully requests that this Court reverse the judgment of the Superior Court.

### **COLLINS & ASSOCIATES**

*/s/ Patrick J. Collins*

Patrick J. Collins, ID No. 4692  
716 North Tatnall Street, Suite 300  
Wilmington, DE 19801  
(302) 655-4600

Attorney for Appellant

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