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Case Number 224,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN KELLAM,	)	
	)	
Appellant,	)	No. 224, 2024
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY
DUC 1506014357

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

Constitutional Provisions

Statutes and Court Rules

Secondary Materials

Exhibits

NATURE OF PROCEEDINGS

Before this Honorable Court is a cross-appeal of Steven Kellam's First Petition for Postconviction Relief. The Honorable Francis J. Jones, Jr. issued the Superior Court's Memorandum Opinion and Order on May 22, 2024.[1] Therein, the Superior Court granted Mr. Kellam's motion in part as it vacated two Murder First Degree convictions (and corresponding life sentences). The Superior Court denied the remaining claims for relief. Here, Mr. Kellam challenges two claims that were denied while the State challenges the claim that was granted.[2]

Mr. Kellam filed a *pro se* postconviction motion on September 9, 2019.[3] On October 15, 2021, postconviction counsel filed Mr. Kellam's Amended Opening Brief alleging constructive amendments to the indictment. On October 31, 2022 and May 10, 2023, postconviction counsel filed further briefing alleging improper jury instructions on both felony murder and accomplice liability.[4]

This is Mr. Kellam's Opening Brief challenging the postconviction court's denial of his claims regarding constructive amendments to the indictment and the missing 11 Del. C. § 274 jury instruction.

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[1] Exhibit 1 is the Superior Court's decision below.
[2] See Notices of Appeal filed by Mr. Kellam and by the State.
[3] A1.
[4] Exhibit 2 is Mr. Kellam's briefing below including the Amended Opening Brief filed on October 15, 2021; the Reply Brief dated October 31, 2022; the Addendum/Amendment Opening Brief filed October 31, 2022; and the Reply Brief filed May 10, 2023.

SUMMARY OF THE ARGUMENT

Mr. Kellam raises two arguments, denied erroneously by the postconviction court:

(1) The postconviction court committed reversable error when it held that the changes made to Mr. Kellam's indictment were merely variances. The Superior Court lacked jurisdiction to try and sentence Mr. Kellam in 2017 – a structural error that persists even to this day – because the State made substantive, constructive amendments to the only True Bill that was ever authorized by the Grand Jury without seeking any Re-Indictment and without securing a valid waiver of Mr. Kellam's constitutional rights to a Grand Jury. All of Mr. Kellam's convictions and sentences must be vacated and he is entitled to a new trial.

(2) The postconviction court committed reversable error when it held that trial counsel was not ineffective by failing to object to the incomplete definition of accomplice liability given to Mr. Kellam's jury which did not include an instruction on Mr. Kellam's individual state of mind as required by 11 *Del. C.* § 274. Any reasonable attorney would have objected to the erroneous jury instructions and, had the jury been so instructed, the outcome of trial would have been different because Mr. Kellam would have been acquitted. All of Mr. Kellams convictions and sentences must be vacated and he is entitled to a new trial.

STATEMENT OF FACTS

After trial, Steven Kellam (Petitioner) was sentenced to a term of imprisonment of two life sentences plus 769 years.[5] He had been convicted by a jury of thirty-eight criminal offenses, including two homicides and several home invasions and robberies, in a sprawling indictment that originally included eight defendants and eighty-one counts.[6]

The trial revolved around three events: the January 13, 2014 murders of Cletis Nelson and William Hopkins during a home invasion; the December 11, 2014 assault on Milton Lofland and Connie Stewart during a home invasion; and December 14, 2014 shooting of Azel Foster during a home invasion.[7] Testimony at trial consisted largely of co-defendants turned witnesses.

In closings and throughout trial, the State argued that Mr. Kellam was the general of an army of criminals, directing them in a world of drugs, violence, and prostitution. The State argued that Mr. Kellam was an accomplice who solicited, aided and conspired in the offenses charged.[8] The defense strategy "was to point out the glaring inconsistencies in the testimony regarding just about every topic;"

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[5] A23.
[6] A1.
[7] A576.
[8] A1517.

"I argued that every key witness in the case was getting a deal from the State in exchange for his or her testimony; "my strategy was to obtain not guilty verdicts."[9]

The Original Indictment

On June 22, 2015, the first indictment in the case was returned by the Grand Jury.[10] Count 1 alleged Criminal Racketeering in violation of 11 *Del. C. s.* 1503(a).[11] Count 2 alleged Conspiracy to Commit Racketeering in violation of 11 Del. C. s. 1503(d).[12] It was alleged that Petitioner did participate in a criminal enterprise through a "pattern of racketeering activity."[13] The "pattern of racketeering activity" was alleged in five sub-paragraphs to Count 1. In this first indictment, the State relied upon five predicate events to establish a pattern:

(1) the January 13, 2014 murders of Cletis Nelson and William Hopkins;

(2) the May 18, 2014 home invasion of Isaiah Phillips;

(3) the August 22, 2014 home invasion of Ashley Moore;

(4) the December 11, 2014 home invasion of Milton Lofland; and

(5) the December 14, 2014 home invasion of Azel Foster.[14]

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[9] Exhibit 3 affidavit dated November 16, 2023.
[10] A1.
[11] A37.
[12] A37.
[13] A37.
[14] A37.

The original indictment included independent charges that corresponded to all of the alleged predicate events.[15]

The Subsequent Indictments

An Amended Indictment was filed on September 1, 2017; the second Amended Indictment was filed on September 15, 2017; a third Amended Indictment was filed on September 19, 2017; and a corrected version of the third Amended Indictment was filed on September 21, 2017.[16] It was the third Amended Indictment on which Petitioner went to trial.[17]

Each Amended Indictment was qualified as exactly that: an amended indictment. They were not re-indictments. There was no subsequent indictment presented to the Grand Jury at any point.[18] Only one True Bill was ever returned by the Grand Jury and that was the original indictment dated June 22, 2015.[19] Further, Petitioner never waived his rights to be presented to the Grand Jury which are guaranteed by the *United States Constitution* and the *Delaware Constitution*.[20]

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[15] A37.
[16] A1.
[17] A1.
[18] A1.
[19] A1.
[20] A1.

Beginning with the first amended indictment, for every subsequent indictment, and for the indictment upon which Petitioner proceeded to trial, the language in Count 1 Criminal Racketeering was modified in a material way. Instead of alleging five predicate events serving as the basis for "pattern of racketeering activity," these indictments alleged only three predicate events:

(1) the January 13, 2014 murders of Cletis Nelson and William Hopkins;

(2) the December 11, 2014 home invasion of Milton Lofland; and

(3) the December 14, 2014 home invasion of Azel Foster. [21]

Additionally, the subsequent indictments eliminated the actual criminal charges which resulted from the events of May 18, 2014 and August 22, 2014. In the original indictment, those charges were listed as Counts 27-40 (pertaining to the home invasion of Isiah Phillips on May 18, 2014) and Counts 41-46 (pertaining to the home invasion of Ashley Moore on August 22, 2014). Those charges are eliminated from the subsequent indictments including the one submitted to the trial jury.[22]

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[21] Compare A37 June 22, 2015 Indictment to Subsequent Indictments at A73-A176.

[22] Compare A37 – June 22, 2015 Indictment to Subsequent Indictments at A73-176.

The January 13, 2014 Killings of Cletis Nelson and William Hopkins

On January 13, 2014, Cletis Nelson and William Hopkins were killed during a home invasion robbery.[23] Cannon testified that Nelson was living with Edward Cannon and they sold drugs together and Rachael Rentoul testified that she was in a relationship with Nelson who was her drug dealer. Rentoul, also a prostitute, had a client named Carlton Gibbs. Gibbs was friends with Kellam, Stratton, Richardson, Waples and Bethea

A few days prior, on January 10, 2014, Shamir Stratton, Damon Bethea, Richard Robinson, and Rhamir Waples visited Stratton's cousin, Mr. Kellam.[24] The men agreed to meet at a party at the Millsboro VFW.[25] They left to go to Mr. Kellam's home where he lived with John Snead.[26] The four out of town men stayed there for the weekend.[27] They returned to the VFW, and, on their way, stopped at a liquor store. The out-of-towners drove with a different cousin by the name of Tom.[28] Stratton got into a fight and was struck in the head with a bottle causing him to bleed.[29] Stratton went to the hospital and got staples.[30] Snead

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[23] A155.
[24] A812 thru 16.
[25] A817 thru 19, A2822 thru 823 and 1132.
[26] A823 thru 225.
[27] A827 thru 28.
[28] A836.
[29] A841 thru 50 and 1142 seq. 1147.
[30] A850 to 851 and 1147.

identified one of Stratton's assailants as Hopkins[31]. Later, Snead and Hopkins go to fighting[32]. Snead threatened Hopkins saying "you're a dead man.[33]

Coincidentally, Gibbs and Rentoul linked up with Mr. Kellam, Stratton, Richardson, Waples and Bethea to hang out[34]. The group started drinking and Rentoul allegedly told the men about the drugs and the money she had seen in Cannon's home.[35]

The testifying co-defendants asserted that Mr. Kellam wanted to go and get the money and kill Hopkins; however, the co-defendants admitted to being angry at Hopkins about the fight and that Rentoul was angry and jealous over Nelson's interactions with another woman.[36] Rentoul led the group to Cannon's home.[37] Allegedly Stratton asked Kellam what the men should do about the people in Cannon's home and Kellam said "kill 'em."[38] The men took money off Hopkins and searched the home for money and striking Hopkins in the head with their guns as they did so.[39] When asked, Hopkins stated there was no more money in the

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[31] A855 to 60 and 1158.
[32] A800, 802, 807, 863, 865, 1158 and 1281.
[33] A802, 870, 1284 thru 85.
[34] A886 thru 87.
[35] A734 thru 35 781, 888, 1290 thru 94, 1298.
[36] A735, 785, 907, 1007, 1173-74, 1179, 1322.
[37] A736, 895-96, 1303.
[38] A907, 1007, 1174, 1179, 1323, 1327-28. State that Robinson offered contradictory testimony saying that Kellam gave instruction to kill Hopkins at the Siesta Motel.
[39] A1190-91.

house and Robinson and Waples started shooting Hopkins.[40] They found Nelson in another room and brought him into the living room, making him lay on the floor, shooting him in the head when he tried to look back.[41]

The December 11, 2014 Home Invasion

In this incident the co-defendants testified that they broke into Milton Lofland's home, who was a known drug dealer, searching for money and drugs, by kicking in the door.[42] After breaking in, the men searched the house seeking money, including tearing open Christmas presents[43]. Lofland told them that there was no money in the house[44]. While Lofland and his girlfriend were struck by the men with their guns, they were not shot nor were any shots fired[45]

The December 14, 2024 Home Invasion

On December 14, 2014 four men, including Robinson and Waples, went to Azel Foster's home and kicked open the door yelling "State Police"[46]. Foster went to his bedroom and closed the door behind him[47]. Foster heard a pop as a man kicked his bedroom door and a gun fire exchange ensured with Foster firing four

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[40] A1190-91.
[41] A1192-93, 1202, 1308, 1312-13.
[42] A1234-A1250.
[43] A1234-A1250.
[44] A1240.
[45] A1234-A1250.
[46] A1047.
[47] A1032-A1050.

shots and Robinson allegedly firing five times.[48] Foster was struck in the shoulder by one of the bullets.[49]

Mr. Kellam would not be arrested until June of 2015.[50]

Jury Instructions

At the close of Mr. Kellam's trial, the judge instructed the jury on the elements of all forty-seven charges.[51] When instructing the jury on the elements of felony murder, the jury was charged with an incorrect statement of the law: "in order to find the defendant guilty of murder in the first degree, you must find...the person's death occurred in the course of or in furtherance of the defendant's commission of a felony"[52] [emphasis added]. The "in furtherance of" language was from a pre-2004 version of the statute.[53] The then and now current statute omits the "in furtherance of" language.[54] Ultimately, the jury would convict Mr. Kellam of all counts including the two counts of felony murder.[55]

A prayer conference was held prior to the administration of the jury instructions.[56] As the trial court said during the prayer conference, they "covered a

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[48] A1257-58 and direct testimony of Azel Foster.
[49] Direct testimony of Azel Foster.
[50] A2.
[51] A1429-1494
[52] A1442.
[53] 2003 11 *Del. C.* § 636; A1442.
[54] 11 *Del. C.* § 636.
[55] A1612.
[56] A1401.

lot of ground in a short period of time."[57] The discussion shows that all parties were aware of and concerned with the distinctions between being charged as a principal tried for his own conduct and an accomplice being held accountable for the conduct of a co-defendant.[58] The parties and the trial court discussed the accomplice liability instructions of 11 *Del. C.* § 271, *et seq*, but none present, neither at the prayer conference nor in the time allotted for revision after, noticed the absence of a 11 *Del. C.* § 274 instruction.[59]

The court read the jury the revised instructions to the jury.[60] As Kellam was charged on a theory of accomplice liability, the judge gave the jury an 11 *Del. C.* § 271 accomplice liability instruction.[61] Because the State relied heavily on testimony of individuals who had taken plea deals in association with their involvement in the charged incidents, the judge also gave the jury an accomplice-testimony instruction.[62]

Absent from sixty-five pages of jury instructions was 11 *Del. C.* § 274's instruction on the individualized consideration of Kellam's culpability for *his own* mental state *and his own* accountability for aggravating factors.[63] General *mens rea*

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[57] A1417.
[58] A1403.
[59] A1401-1425.
[60] A1425.
[61] A1431-34.
[62] A1478-82. See *Bland v. State*, 263 A.2d 286 (Del. 1970).
[63] A1423-94.

requirements are brought up as the charges are listed,[64] but unlike the specific accomplice-testimony and accomplice-liability instructions, there is no specific discussion of the additional requirements for offenses with different degrees and involving 2 or more persons. The jury was instructed as to a general *mens rea* consideration but not specifically as to the § 274 test.[65] While § 274 incorporates § 271 by reference, the reverse is not true, thus § 274 is not incorporated by reference either.

Trial Counsel's Affidavits on Postconviction Relief

Trial counsel submitted three affidavits touching on the arguments before the postconviction court and now on appeal.[66] He said that:

- "As the State whittled down its case prior to trial by jettisoning two of the five alleged incidents, I considered whether the case still qualified as a racketeering case. I decided it did qualify, because three incidents remained – three incidents in which the grand jury found probable cause and indicted. Therefore, I concluded the racketeering counts were still valid and did not move to dismiss."[67]

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[64] *See generally,* A1435-57.
[65] A1476.
[66] Exhibit 3 includes trial counsel's affidavits dated January 12, 2022; November 16, 2023; and April 8, 2024.
[67] Exhibit 3 affidavit dated January 12, 2022.

- "I did not request a 274 instruction. This was intentional. There were three main reasons I did not request the instruction. The first is that this was an all-or-nothing case…my strategy was to obtain not guilty verdicts. I did not want some compromise lesser-included offense verdict." "The second reason I did not request a 274 instruction is that there was no factual basis to do so. The only lesser-included instruction of felony first degree murder is felony second degree murder. That offense requires the State to prove the killings were conducted with a negligent mental state. There was no basis in the evidence to argue that." "Finally, I strongly believed that any resort to lesser-included offenses would have undermined my credibility with the jury."[68]
- "The reasons for not requesting a § 274 instruction and the associated lesser-included offenses on the non-felony murder charges are much the same." "The home invasions were not dividable into degrees because they are based on predicate crimes of robbery and assault – where mental state is not a factor. As to the aggravated factor of a firearm, it is too fanciful to contemplate that Mr. Kellam was an accomplice but was not responsible for the firearms used. It just makes no sense based on the facts of the three home invasions and the accompanying crimes. Either the jury was going to

[68] Exhibit 3 affidavit dated November 16, 2023.

believe Mr. Kellam was the mastermind controlling the others or they were not. Lesser-included offenses made no sense in this trial."[69]

The Superior Court Vacates the Felony Murder Convictions and Sentences

In the Superior Court's Memorandum Opinion and Order,[70] the postconviction court vacated the two felony murder convictions because the jury was instructed on the wrong definition of felony murder. At the same time, the postconviction court denied Mr. Kellam's claims: (1) that the changes to the indictment were impermissible, constructive amendments; and (2) that trial counsel was ineffective by failing to request the missing § 274 instruction, without which the jury could not intelligently perform its duty.

[69] Exhibit 3 affidavit dated April 8, 2024.
[70] Exhibit 1.

ARGUMENT

I. THE SUPERIOR COURT LACKED JURISDICTION TO TRY AND SENTENCE MR. KELLAM IN 2017 – A STRUCTURAL ERROR THAT PERSISTS EVEN TO THIS DAY – BECAUSE THE STATE MADE SUBSTANTIVE, CONSTRUCTIVE AMENDMENTS TO THE ONLY TRUE BILL THAT WAS EVER AUTHORIZED BY THE GRAND JURY WITHOUT SEEKING ANY RE-INDICTMENT AND WITHOUT SECURING A VALID WAIVER OF MR. KELLAM'S CONSTITUTIONAL RIGHTS TO A GRAND JURY. ON POSTCONVICTION, THE SUPERIOR COURT MADE AN ERROR OF LAW WHEN IT HELD THAT THE CHANGES MADE TO MR. KELLAM'S INDICTMENT COMPLIED WITH SUPERIOR COURT RULE 7. ALL OF MR. KELLAM'S CONVICTIONS AND SENTENCES MUST BE VACATED AND HE IS ENTITLED TO A NEW TRIAL.

Question Presented

Did the postconviction court commit reversible error when it found that the amendments to the only True Bill in this case were tantamount to variances that did not require the re-convening of the Grand Jury or a valid waiver, thereby denying Mr. Kellam his unqualified constitutional right to an to be indicted by a Grand Jury? *(Error Preserved in the Record at Exhibit 1 page 29, Exhibit 2 page 15 of Mr. Kellam's Amended Opening Brief, and at Oral Argument September 25, 2023.)*

Standard of Review

The standard on appeal of a court's denial of a defendant's motion for postconviction relief is generally whether it abused its discretion.[71] The abuse of discretion standard is also applied to the Superior Court's decision whether to order a hearing.[72] When deciding legal or constitutional questions, the Supreme Court applies a *de novo* standard of review.[73] Further, the Supreme Court reviews ineffective assistance of counsel claims *de novo*.[74]

Merits of the Argument

Petitioner was convicted of racketeering based upon some combination of only three of the five predicate events submitted to the Grand Jury. However, it is impossible to tell if the Grand Jury would have returned a True Bill if the original indictment only identified three predicate events (instead of five predicate events). Because we have no way of knowing *which* of the five predicate events the Grand Jury found to exist, and because we have no way of knowing *how many* of the five predicate events the Grand Jury found to exist, there is no way to know if

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[71] *Ploof v. State*, 75 A.3d 811 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362 (Del. 2011)). See also *Starling v. State*, 130 A.3d 316 (Del. 2015).
[72] *Harris v. State*, 410 A.2d 500 (Del. 1979).
[73] *Ploof v. State*, 75 A.3d 811 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362 (Del. 2011)).
[74] *Ray v. State*, 280 A.3d 627 (Del. 2022) (citing *Starling v. State*, 130 A.3d 316 (Del. 2015)).

Petitioner was convicted of the same Count 1 and Count 2 with which he was indicted. What if the Grand Jury relied upon either or both of the two predicate events that were eliminated from the charging document submitted to the jury at trial? What of the Grand Jury relied upon those two predicate events exclusively? What if the Grand Jury did not rely upon any of the three predicate events submitted to the trier of fact? What if the Grand Jury relied on only one of the predicate events put to the trier of fact? There is only one conclusion: it is substantially likely that Petitioner was convicted of an infamous crime for which he was not indicted.

It is not even as if Petitioner was tried on the underlying charges that served as the basis for the excised predicate offenses. In the original indictment identifying five predicate events, the list of five included offenses related to home invasions of Isiah Phillips on May 18, 2014 and of Ashley Moore on August 22, 2014. The conduct related to May 18, 2014 was charged in Counts 27 through 40. The conduct related to August 22, 2014 was charged in Counts 41 through 46. All of those counts were removed from the case submitted to the jury.

There can be only one conclusion: we have no way of knowing *which* predicate offenses the Grand Jury found to exist when it returned the True Bill. We have no way of knowing *how many* predicate offenses the Grand Jury found. We have no way of knowing *which* predicate offenses the trial jury found. We are certain that

the trial jury did not have the same predicate events and independent charges that were before the Grand Jury. The State eliminated two of the five predicate offenses from the indictment before the jury was charged[75] and this leads to an inevitable result: it is substantially likely that Petitioner went to trial on felony charges that were not indicted.

The postconviction court held that the federal Grandy Jury clause is not a cognizable claim in State court.[76] Further, the court held that, even if the claim were cognizable, the amendments themselves were permissible variances – not constructive amendments.[77] Finally, applying Delaware law, the postconviction court held that trial court "did not err in permitting the State to amend the indictment to remove two of the five predicate events for Racketeering. The amendment did not change the material elements of the charge, especially given that Delaware law permits an indictment to list alternative means with respect to an element of a crime. Moreover…the original indictment already placed Mr. Kellam on notice that he would have to defend against the three remaining predicate events, thus sufficiently enabling him to prepare a defense. Mr. Kellam cannot show the amendment violated Delaware law."[78] As a result, the postconviction

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[75] A385.
[76] Exhibit 3 at page 34.
[77] Exhibit 3 at page 35.
[78] Exhibit 1 at page 40.

court held that the trial court did have jurisdiction to try and sentence Mr. Kellam and this claim for relief was denied.[79]

Undersigned counsel has found no authority to the contrary of the postconviction court's conclusion that the Grand Jury clause has never been applied to the States. However, Superior Court Rule 7 and the Delaware Constitution provide the same protections derived from the same common law and so the federal analysis of a constructive amendment is informative in understanding and applying Delaware's protections. Even if the federal Grand Jury clause does not apply to the States, the postconviction court's conclusions that the amendments were not "constructive" and that the amendments did not violate Delaware law are wrong. In fact, the trial court allowed the State to make an amendment to the indictment that materially changed the offense charged by altering the complex of facts that were presented to the Grand Jury establishing a "pattern of racketeering activity." This also prejudiced Mr. Kellam's substantial rights because the altering of the complex of facts denies his Grand Jury right and places him at risk of double jeopardy.

The *Fifth Amendment to the United States Constitution* and *Article I Section 8 of the Delaware Constitution* guarantee Petitioner's right to have this case

[79] Exhibit 1 at page 40.

presented to Grand Jury before the State may proceed to trial against him. "At its common law roots, an indictment could only be amended by the Grand Jury that had returned the True Bill. However, common law evolved to allow judicial amendments so long as those amendments did not affect the substance of the indictment. Thus, Superior Court Criminal Rule 7(e) states 'the court may permit an indictment or an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."[80]

On the Federal level, consistent with Petitioner's rights in Delaware, the Fifth Amendment to the United States Constitution prohibits constructive amendments and prejudicial variances to an indictment. "Constructive amendments and variances are related issues that stem from the Fifth Amendment's requirement that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.[81] "A constructive amendment results when the terms of an indictment being, in effect, altered by the presentation of evidence and jury instructions which modify essential elements of the offense charged such that there is a substantial likelihood that the defendant

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[80] *State v. Gregory Ligon*, 170 A.3d 147 (Del. Super. 2017). See *State v. Blendt*, 120 A.2d 321 (Del. Super. 1956) (finding that Delaware has no controlling statute or rule as to the Court's power to make amendment to an indictment and the question is governed by common law).

[81] *United States v. Rios*, 830 F.3d 403, 427 (Ct. App. 6th Cir. July 21, 2016).

may have been convicted of an offense other than the one charged in the indictment."[82] "A variance occurs when the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment."[83]

"There are two types of constructive amendments: first, where there is a complex of facts presented at trial distinctly different from those set forth in the charging instrument and second where the crime charged in the indictment was substantially altered at trial so that it was impossible to know whether the Grand Jury would have indicted for the crime actually proved."[84]

It matters not whether the federal Grand Jury clause applies because Superior Court Rule 7 and the Delaware Constitution provide the same protections derived from the same common law. To quote Mr. Spruence: "I want this convention to know, and the people of Delaware to know, that I hold my liberties at the mercy of no man... I want no law to be made - no constitution made – that shall subject me or puts me at the mercy of any attorney general. More than that, I do not want it to be in his power to transfix me before the public gaze as a violator of the law, and bring me to the bar of public opinion at his own sweet will. I want

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[82] *United States v. Rios*, 830 F.3d 403, 427 (Ct. App. 6th Cir. July 21, 2016).
[83] *United States v. Rios*, 830 F.3d 403, 427 (Ct. App. 6th Cir. July 21, 2016). *Stirone v. United States*, 361 U.S. 212 (1960).
[84] *United States v. Davis*, 854 F.3d 601 (Ct. App. 9th Cir. Apr. 14, 2017).

to put a curb in his mouth that before he shall open it to make a public accusation against me, he shall make it before a grand jury, with his witnesses there to make out a prima fascia case. I want this done before he shall have the power to drag me before the bar of public opinion, much less before he shall drag me before the judges for trial as to my guilt or innocence."[85] A curb bit is a leverage tool used in the management of a strong and powerful horse, willful and not always sensitive to the bit or in high levels of training. As the Court below acknowledges, the curb of a grand jury is an essential bit of tack in our judicial system[86].

Regardless of the source of authority applied, the result is the same: the amendments to the indictment changing the "pattern of racketeering activity" materially changed the offense charged so that (1) it cannot be known whether or not the Grand Jury would have indicted for the crime actually proved, and (2) Mr. Kellam's substantial rights to a Grand Jury and against double jeopardy were prejudiced.

One of the essential elements of a RICO charge is a "pattern of racketeering activity".[87] Because the Delaware statute represents an adoption of the federal RICO statute, Delaware Courts have consistently found that federal case law is

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[85] Delaware Constitutional Debates Vol. I P591.
[86] Exhibit 1 at Page 29.
[87] 11 Del. C. § 1503.

instructive in interpreting the Delaware statute.[88] The statute defines a pattern as 2 or more incidents of conduct that are a racketeering activity, are related to the affairs of the enterprise, the last event occurred within 10 years of the prior event, and are not so closely related to each other and connected in point of time and place that they constitute a single event.[89] As the Court explained in *Keller v. State*[90] and *Johnson v. State*,[91] material elements must be presented to the Grand Jury and evaluated according to the specific methods or tests proscribed for determining whether or not that element meets the threshold burden of proof. The context and attendant circumstances can have a significant impact on the materiality of the aspect of the element presented. While a metal table and a metal chair are both heavy and be used to cause serious injury, whether or not they are a deadly weapon depends on a number of factors the same way whether or not a series of events constitutes a pattern depends on its own factors.

A pattern of racketeering activity must be shown through predicate acts that are both related and show a threat of continuity.[92] While a pattern can span up to 10 years the fundamental question is the relatedness of those independent

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[88] *State v. Morris*, 1995 Del. Super. LEXIS 421 *6; *White v. State,* 243 A.3d 381 (Del. 2020).
[89] 11 Del. C. § 1502(5).
[90] *Keller v. State*, 425 A.2d 152 (Del. 1981).
[91] *Johnson v. State*, 711 A.2d 18 (Del. 1997).
[92] *State v. Morris*, 1995 Del. Super. LEXIS 421 *6.

activities. Relatedness is a highly fact intensive question which requires the State to prove they have the same similar purposes, results, participants, victims or other methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated or independent events.[93] Continuity is divided into two kinds, closed-ended, referring to a series of related predicate acts over a period of a substantial period of time, and open-ended continuity.[94] And the analysis of both of these is temporal[95]. In determining whether or not the series of events constitutes closed ended continuity the courts look at factors that include the number and variety of predicate acts and length of time over which they were committed, the number of victims, the number of schemes involved and the occurrence of distinct injuries[96]. More specifically, the (1) number of unlawful acts, (2) the length of time over which the acts were committed, (3) the similarity of the acts, (4) the number of victims, (5) the number of perpetrators, and (6) character of the unlawful activity.[97]

Open-ended continuity is found in a small number of predicate acts occurring over a short period of time. And they must show that the threats

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[93] *State v. Mack*, 2021 Del. Super. LEXIS 635 *26.
[94] *State v. Morris*, 1995 Del. Super. LEXIS 421 *6.
[95] *IOTEX COMMUNS, INC. v. Defries* at *28.
[96] *IOSTEX* at *31 *Vicom Inc. v. Harbridge Merchant Service* 7 Cir. 20 f.3d 771, 781-82.
[97] IOTEX at *31; *Barticheck v. Fidelity Union Bank/First Nat'l State*, 3rd Cir. 832 F.2d 36 (1987).

themselves involve threats of long-term racketeering activity or regular way of doing business.[98] External factors may be considered to determine whether or not this a regular way of business.[99] The pivotal question is: do these acts by their nature project a threat of future repetition?[100]

Here, the method of showing the continuity of the predicate acts was material to determining whether or not there was a pattern and if those acts were part of the pattern. The pattern presented to the Grand Jury was that of 5 burglaries occurring every so many months, whereas the pattern that was presented to the trial jury involved a double homicide burglary, and eleven months later two burglaries that occurred within weeks of each other. The timing between predicate events was substantially different from the pattern presented to the grand jury to the pattern presented to the petit jury.

In looking at open-ended continuity, the acts and intended circumstances must be evaluated to determine whether or not there is a threat of future repetition.[101] In removing the predicate acts and their attendant circumstances, the nature of the January incident with the double homicide of Nelson and Hopkins was no longer being shown in close proximity to a series of burglaries, rather it

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[98] *State v. Morris*, 1995 Del. Super. LEXIS 421 *at 8.
[99] *Id.*
[100] *Germinaro v. Fid. Nat'l Title Ins. Co.*, 737 Fed. Appx. 96, 102 (3rd Cir. 2018).
[101] *State v. Morris* at *8.

was now separated by an eleven month gap from two later burglaries with no other crimes to follow, despite Kellam not being arrested until June the following year. That long separation of time is significant to the temporal aspect of relatedness, as well as to the threat of repetition of that criminal activity. It begs the question of whether or not the Grand Jury would have considered that first crime to be sufficiently related and continuous as to be part of the same RICO indictment and whether or not the two remaining predicate acts would have been sufficient to constitute a pattern of ongoing activity. Had they not found the acts sufficiently related, the State would not have received the protective covering of a RICO charge that prevented severance of Mr. Kellam's charges – which in turn would have greatly impacted his trial strategy.

The two later acts were within a very short period of each other, less than 10 days apart. Kellam was not arrested until June of 2015. The fact that there were so many months without a repeated incident following the December burglaries, taken with how far removed the January incident was calls into question whether or not the Grand Jury would have found that those two incidents occurring so close together constituted an ongoing future threat or would have found them to be isolated incidents.

In this case the indictment that was presented to the grand jury contained five predicated events that spanned the course of a year, only the first of which

involved murders. Notably in the State's theory of the case, Kellam is never presented as being directly involved in any of these matters, he is always cast in the role of that as a distant supervisor orchestrating things from a distance. Of the five incidents initially presented to the grand jury, only one of them involved actual murders. That of the January 13, 2014 murders of Cletis Nelson and William Hopkins. The others, while constituting armed home invasions, did not result in anyone's death. The last incident, that of the December 14, 2014 home invasion of Azel Foster, did involve a gun fight between a father protecting his young children around Christmas and Kellam's co-defendants.

The murders of Cletis Nelson and William Hopkins were undeniably brutal. The image of a father risking his life in the protection of his children at Christmas cannot help but evoke strong emotion. The layering of such potent emotion is powerful and provocative. However, the nature of the January 13 incident and the December 14 incident are so very different when the emotion is removed. That no other similar incidents occurred following the December 14 incident, despite the fact that Defendant was not arrested until June 2015. Of those five incidents, the January 13 is distinguishable, not just because of the tragic death of two individuals, but because of all of the facts leading up to that night. The January 13 incident is described as being the culmination of various conflicts that occurred earlier in the day with romantic rivalries and insults and hostilities that were

exchanged between co-defendants and the decedents earlier. The parties involved included jaded lovers and romantic rivals. The State's description of those facts and circumstances leading up to the invasion and murder of Nelson and Hopkins describes an event not motivated just by money but of hard feelings, jealousy and rivalries. No such similar pattern or intended circumstances were described for any of the other four incidents of that original jury indictment, and yet the continuous nature of events of January 13, to May 18, to August 22, to December 11, and then finally ending December 14 provides a smooth transition from what was described as a crime of passion to the illusion of an enterprise. This evolution is what was presented to the grand jury and the grand jury was never asked which predicated events they relied upon in order to find probable cause for a RICO charge.

As the Court below noted, only one true bill was ever returned by the grand jury on June 22, 2015. That true bill came after the State's presentment of a compelling story with a shocking opening, a crescendo and the climax of a terrorized family. The story presented to the trial jury was too abridged, with too many plot points removed for it to be considered the same story presented to the grand jury.

The State's theory of the case proceeded on the idea that burglarizing drug dealers was this crew's regular way of doing business and had they not been

caught they would have continued to do so in the future. In essence they made an open-ended continuity claim.

The nature of that pattern is subjected to two pronged tests, the relatedness test and the continuity test. The predicate acts as they are to be presented by the State must pass each test. In all three of those tests with continuity being determined by an open-endedness test or a closed-endedness test the facts and timing of the predicate offenses and their interplay is essential.

Here, the method of showing the relatedness and continuity of the predicate acts was material to determining whether or not there was a pattern and if those acts were part of the pattern. The pattern presented to the Grand Jury was that of burglaries occurring every so many months, whereas the pattern that was presented to the trial jury involved a double homicide burglary, and eleven months later two burglaries that occurred less than 10 days apart. The timing between predicate events was substantially different. In looking at open-ended continuity the acts and intended circumstances must be evaluated to determine whether or not there is a threat of future repetition. In removing the predicate acts and their attendant circumstances, the double homicide was no longer in close temporal proximity to the December burglaries, rather it was now separated by an eleven-month gap with no additional incidents following for at least 6 months prior to Kellam's arrest in June 2015.

That long separation of time is significant to the temporal aspect of relatedness as well as to the threat of repetition of that criminal activity. It begs the question of whether or not the Grand Jury would have considered that first crime to be sufficiently related and continuous as to be part of the same RICO indictment and whether or not the two remaining predicate acts would have been sufficient to constitute a pattern of ongoing activity. The two later acts were within a very short period of each other, less than 10 days apart. Kellam was not arrested until June of 2015. The fact that there were so many months without a repeated incident following the December burglaries taken with how far removed the January incident was makes calls into question whether or not the Grand Jury would have found that those two incidents occurring so close together constituted an ongoing future threat or would have found them to be isolated incidents.

The context of the predicate acts is material to determining whether or not they are a pattern or isolated and independent events and if they pose a future threat. Two acts do not equal five acts, divining a pattern from two points is much more difficult than a pattern from five points. The January incident was filled with additional motives and a complex narrative among codefendants that was not present among the later incidents.

As the Court below held, the narrowing of a grand jury indictment is not inherently prejudicial, not even with respect to a RICO charge. However, partially

closing the window of time being examined is far different from cutting out the center story and splicing the ends together. Abridging To Kill a Mockingbird by chopping everything in between the arrest of Tom Robinson and his jury conviction is not abridging, it is rewriting.

It is not enough that the grand jury may have mostly relied upon the two December events in order to return a true bill. If even one individual relied on one December event and the August event, or the May and August event but had questions and did not concur as to the December events, that is substantial and material and constitutes as material alteration of the indictment. It is not enough that some may have agreed on certain predicated events and others may have agreed on other predicate events, there must be a clear pattern and show that same pattern to the jury. A pattern does not exist independent of the acts.

The amendments to the Indictment charged a different version of Racketeering by changing the "pattern of racketeering activity." This ran afoul of Mr. Kellam's Delaware Grand Jury and Double Jeopardy Protections and afoul of Superior Court Criminal Rule 7. He is entitled to a new trial.

II. THE POSTCONVICTION COURT ERRED BECAUSE TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO THE INCOMPLETE DEFINITION OF ACCOMPLICE LIABILITY GIVEN TO MR. KELLAM'S JURY WHICH DID NOT INCLUDE AN INSTRUCTION ON MR. KELLAM'S INDIVIDUAL STATE OF MIND AS REQUIRED BY 11 DEL. C. § 274. ANY REASONABLE ATTORNEY WOULD HAVE OBJECTED TO THE ERRONEOUS JURY INSTRUCTIONS AND, HAD THE JURY BEEN SO INSTRUCTED, THE OUTCOME OF TRIAL WOULD HAVE BEEN DIFFERENT BECAUSE MR. KELLAM WOULD HAVE BEEN ACQUITTED. ALL OF MR. KELLAMS CONVICTIONS AND SENTENCES MUST BE VACATED AND HE IS ENTITLED TO A NEW TRIAL.

Question Presented

Did the post-conviction court commit reversible error when it found that trial counsel's failure to object to an incomplete definition of accomplice liability did not fall below an objective standard of reasonableness, thereby denying Mr. Kellam his unqualified right that his jury be instructed with an accurate statement of the law? *(Error Preserved in the Record at Exhibit 1 page 66, Exhibit 2 page 12 of Addendum Amendment Opening Brief dated October 31, 2022 and page 6 of Reply dated May 10, 2023, and Oral Argument September 25, 2023).*

Standard of Review

The standard on appeal of a court's denial of a defendant's motion for postconviction relief is generally whether it abused its discretion.[102] The abuse of

[102] *Ploof v. State*, 75 A.3d 811 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362 (Del. 2011)). See also *Starling v. State*, 130 A.3d 316 (Del. 2015).

discretion standard is also applied to the Superior Court's decision whether to order a hearing.[103] When deciding legal or constitutional questions, the Supreme Court applies a *de novo* standard of review.[104] Further, the Supreme Court reviews ineffective assistance of counsel claims *de novo*.[105]

To claims of ineffective assistance of counsel, the Supreme Court applies the two-step analysis of *Strickland v. Washington*: "to establish that his Sixth Amendment right to effective assistance of counsel was violated, a postconviction relief movant must show, first, that his counsel's representation fell below an objective standard of reasonableness and, second, that the deficiencies in counsel's performance caused him substantial prejudice."[106]

Merits of the Argument

Because Delaware does not distinguish between principal and accessories under accomplice liability,[107] there is a two-step analysis that the jury must make in order to find a defendant guilty on a theory of accomplice liability where the charged offense is one divided into degrees.[108] First, they must determine if the

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[103] *Harris v. State*, 410 A.2d 500 (Del. 1979).
[104] *Ploof v. State*, 75 A.3d 811 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362 (Del. 2011)).
[105] *Ray v. State*, 280 A.3d 627 (Del. 2022) (citing *Starling v. State*, 130 A.3d 316 (Del. 2015)).
[106] *Ray v. State*, 280 A.3d 627 (Del. 2022) (citing *Strickland v. Washington*, 466 U.S. 668 (1984) and citing *Green v. State*, 238 A.3d 160 (Del. 2020)).
[107] *Allen v. State*, 970 A.2d 203 (Del. 2009).
[108] *Id.; Johnson*, 711 A.2d at 31.

defendant was an accomplice to a criminal offense.[109] Second, they must determine what degree of the offense the defendant committed, which requires an individualized consideration of the defendant's mental state and culpability for aggravating facts or circumstances.[110] It is undisputed that Kellam was charged on a theory of accomplice liability.[111] He did not receive a § 274 instruction. His trial counsel did not request one. Instead, his trial counsel stated in the affidavits that this omission was intentional and in pursuit of an all-or-nothing trial strategy.

The postconviction court correctly held that, in Mr. Kellam's case, the § 271 instruction on its own did not adequately instruct the jury on the individualized consideration required under § 274.[112] 11 Del. C. § 274 provides "when, pursuant to § 271 of this title, 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's *own culpable mental state* and with that person's *own accountability for an aggravating fact or circumstance.*"[113] This analysis applies to Mr. Kellam's convictions for Murder First Degree, Home Invasion, Assault, and Robbery.

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[109] *Johnson*, 711 A.2d at 31.
[110] *Id.*
[111] A1431.
[112] *Johnson v. State*, 711 A.2d 18, 30 (Del. 1998).
[113] 11 Del. C. § 274 (emphasis added).

However, the postconviction court committed reversible error when it found that trial counsel's failure to correct the jury instructions did not fall below an objective standard of reasonableness. In so holding, the postconviction court said: "in my view, what Mr. Kellam fails to recognize is that with any lesser included offense instruction there must be a rational factual basis in the evidence to support the instruction. 'An accomplice level of liability instruction is not required unless requested for the same reasons as a lesser included offense instruction.' Such an instruction can be given only if there is a rational factual basis in the evidence to support it."[114] In fact, this violated Mr. Kellams constitutional rights to counsel pursuant to the Sixth Amendment and Article I § 7.

"The reasonableness of counsel's challenged conduct must be judged on the facts of the particular case. A determination that defense counsel's conduct was 'the result of reasonable professional judgment' or 'within the wide range of professional competent assistant' will defeat an ineffective assistance claim."[115] "A lawyer's decision to refrain from objecting to a faulty jury instruction or requesting a clarifying one can be perfectly reasonable if it is the product of reasonable professional judgment and strategic considerations."[116]

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[114] Exhibit 1, decision below, at page 70-71 and citing *State v. Dickinson*, 2012 WL 3573943 (Del. Super. Aug. 17, 2012).
[115] *Ray v. State,* 280 A.3d 627 (Del. 2022)
[116] *Ray v. State,* 280 A.3d 627 (Del. 2022).

It was not reasonable professional judgment in Mr. Kellam's case. How could it be? Whether trial counsel intended to seek a lesser included offense or not, the jury still had to make an initial, independent determination of Mr. Kellam's guilt as an accomplice – including every element of every offense which includes his individual state of mind as an accomplice.

The primary purpose of jury instructions is to define the principles of law that the jurors must apply to decide the facts.[117] In *Ray*, the Supreme Court stated that "the trial court's decision to introduce the concept of accomplice liability carried with it the responsibility for explaining that concept so that the jury could intelligently consider its ramifications for Ray's guilt or innocence." Likewise, the Court in Mr. Kellam's case introduced the concept of accomplice liability when it approved the jury instruction pursuant to 11 *Del. C.* § 271. It follows that the Court then had a duty to include the instruction pursuant to 11 *Del. C.* § 274.[118]

The Delaware Supreme Court has said that "in evaluating the propriety of a jury charge, the jury instructions must be viewed as a whole. A jury instruction is not a ground for reversal if 'it is reasonably informative, not misleading and does not undermine the jury's ability to intelligently perform its duty. Although a party is not entitled to a particular jury instruction, a party does have the unqualified right

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[117] *Manlove v. State,* 901 A.2d 1284 (Del. 2006).

[118] But, see *contra, Dickinson v. State*, 8 A.3d 1166 (Del. 2010) (stating matters of jury instruction requests can, in some case, be reasonable trial strategy).

to have the jury instructed with a correct statement of the substance of the law."[119] The relevant questions are: Were the jury instructions wrong as a matter of law? And did the errors undermine the jury's ability to "intelligently perform its duty in returning a verdict?"[120] As the *Ray* Court stated, failing to spell out the principles of § 274 undermines the jury's ability to intelligently decide factual issues material to a felony-murder conviction.[121] So too does it undermine the jury's ability to assess individual state of mind or aggravating factors as to Home Invasion, Robbery, and Assault.

Even if it is about trial strategy, forgoing the § 274 instruction is a bad strategy that fell below an objective standard of reasonableness in this case. Trial counsel should have requested it. The instruction also would have been harmonious with Mr. Kellam's trial strategy. In Mr. Kellam's case there were hours of contradictory testimony, during which various witnesses took responsibility for different parts of the crimes. Being present for a drunken discussion about robbing a person is not tantamount to directing. And failing to be aware of the dangerous nature of his cousins or friends does not make Mr. Kellam reckless or liable for their drunken and sadistic actions. As a result, had the jury been properly instructed, the outcoming at trial would have been different because

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[119] *Lloyd v. State,* 152 A.3d 1266 (Del. 2016).
[120] *Chance*, 685 A.2d at 354.
[121] *Id.* at *37.

Mr. Kellam would have been convicted of fewer or lesser charges. Even if the jury thought Mr. Kellam was somehow involved in the enterprise, the jury could have been convinced of Mr. Kellam's involvement but not of his leadership or intentions and found him guilty of criminal negligence, negligence, or neither. The options presented and order in which those options are presented has a strong effect on people's contextual evaluation of the information presented to them.[122] Had the full and complete instructions been given to a jury that clearly was fastidious in its reading of the instructions, the evidence presented and defense counsel's strategy could have resulted in a finding of criminal negligence. Thus, a *Chance* instruction was not only appropriate, but necessary for justice.

Mr. Kellam's case is distinguishable from cases like *Erskine v. State.*[123] In *Erskine*, the Court found it reasonable trial strategy to forgo a § 274 instruction where the evidence only supported an intentional state of mind. However, Mr. Kellam's case does not present an intentional state of mind as the only option. Here, even if the jury believed that Mr. Kellam intended to commit home invasions and robberies, the jury could have reasonably found that Mr. Kellam did not intend to cause anyone serious physical injury or death – and that those resultant crimes

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[122] Wandi Bruine de Bruin and Gideon Keren, *Order Effects in Sequentially Judged Options Due to the Direction of Comparison*, 92 Org.'l Behavior & Human Decision Processes 1-2, 91 (2003).
[123] *Erskine v. State*, 4 A.3d 391 (Del. 2010).

were born from lesser states of mind such as criminal negligence. After all, as trial counsel stated, there was inconsistent evidence that Mr. Kellam ever gave a kill order.[124] And, as discussed herein, there were independent motives abound for the shootings of Hopkins and Nelson. The outcome of trial would have been different had the jury been instructed on § 274 because the jury could have easily found that Mr. Kellam did not have the requisite mental state for the assaults or the homicides.

Trial counsel's failure to request a § 274 instruction fell below an objective standard of reasonableness and that there is a reasonable probability that the outcome of the trial would have been different but for those errors.[125] The postconviction court committed an error of law by finding that trial counsel was not ineffective.

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[124] Exhibit 3 – Second Supplemental Trial Counsel Affidavit dated November 16, 2023.

[125] *Ray v. State,* 280 A.3d 627 (Del. 2022) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

CONCLUSION

Wherefore, Mr. Kellam prays this Honorable Court reverse the Superior Court's Order on two points only: as to the constructive amendment and as to the missing 11 Del. C. § 274 jury instruction. Further, Mr. Kellam prays that his convictions and sentences be vacated and that his case be remanded to the Superior Court for a new trial.