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Case Number 224,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN KELLAM,	)	
Defendant-Below	)	
Appellant/ Cross Appellee,	)	
	)	**No. 224, 2024**
v.	)	
	)	**On Appeal from the**
STATE OF DELAWARE,	)	**Superior Court of the**
Plaintiff-Below	)	**State of Delaware**
Appellee/ Cross Appellant.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

/s/ Kathryn J. Garrison
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Dated: October 28, 2024

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NATURE AND STAGE OF THE PROCEEDINGS

On June 22, 2015, a Sussex County grand jury indicted Steven Kellam, Rhamir Waples, Richard Robinson, Damon Bethea, Shamir Stratton, Carlton Gibbs, Rachael Rentoul, and Jacquelyn Heverin with 81 criminal counts stemming from the January 13, 2014 home invasion, robbery, and murders of Cletis Nelson and William Hopkins; the May 18, 2014 home invasion and robbery of Isaiah Phillips; the August 22, 2014 home invasion and attempted robbery of Ashley Moore; the December 11, 2014 home invasion and attempted robbery of Milton Lofland and assault of Connie Steward; and the December 14, 2014 home invasion, attempted robbery and attempted murder of Azel Foster. A2 at DI 2;[1] A37-72. Specifically, Kellam was indicted for Criminal Racketeering, Conspiracy to Commit Racketeering, two counts of Murder First Degree (felony murder), Conspiracy First Degree, five counts of Home Invasion, three counts of Robbery First Degree, five counts of Conspiracy Second Degree, two counts of Assault Second Degree, two counts of Reckless Endangering First Degree, three counts of Wearing a Disguise During the Commission of a Felony, three counts of Attempted Robbery First Degree, Assault Third Degree, Attempted Murder First Degree, Possession of a firearm by person prohibited (PFBPP), and 49 counts of possession of a firearm during the commission

[1] "DI" refers to items on the Superior Court criminal docket in this case (A2-22; B1-8).

of a felony (PFDCF). *Id.* Kellam was scheduled to be tried with his codefendant, Carlton Gibbs, however, the State later agreed to sever Gibbs's case from Kellam's. *See* A250-51.

On January 19, 2016, Kellam filed a motion to declare the death penalty unconstitutional. A6 at DI 42. The Superior Court deferred scheduling trial while awaiting this Court's decision in the pending certified case, *Rauf v. State*.[2] A7 at DI 48; A9-10 at DI 71. This Court held Delaware's death penalty statute unconstitutional on August 2, 2016.[3]

On February 23, 2016, Kellam filed a Motion to Sever Charges[4] and a Motion to Suppress Wiretap Evidence. A8 at DI 50, 51; A177-88; A267-354. The Superior Court denied Kellam's motion to suppress on June 29, 2016[5] and his motion to sever, after oral argument, on November 23, 2016.[6] A8 at DI 53; A10 at DI 72, 74; A228-66, 369-84.

On August 16, 2017, the State filed a Motion in Limine, in which it moved to admit evidence of uncharged drug sales activity and other bad acts discussed in

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[2] 145 A.3d 430, 433 (Del. 2016).

[3] *Id.*

[4] Kellam sought to sever the counts related to the murders of Hopkins and Nelson from the remaining charges. A183, 186.

[5] The motion to suppress was decided by a separate judge by special assignment. A8 at DI 53.

[6] *Kellam v. State*, 2016 WL 3672241 (Del. Super. Ct. June 29, 2016).

telephone conversations between Kellam and others intercepted during a wiretap investigation. A12 at DI 92; B51-61. The Superior Court granted the motion on August 23, 2017. A12 at DI 94. The same day, the State indicated it would sever the PFBPP charge from the indictment, enter a *nolle prosequi* for the Conspiracy First Degree charge, and file an amended indictment. *Id.*

On September 1, 2017, the State filed an amended 58-count indictment, which did not include the Conspiracy First Degree and PFBPP counts and the charges stemming from the May 18, 2014 home invasion and robbery of Isaiah Phillips and the August 22, 2014 home invasion and attempted robbery of Ashley Moore. A13 at DI 102; A73-99. Jury selection began on September 5, 2017, and trial lasted nine days. A13 at DI 105. During trial, the State filed two amended indictments and a corrected, amended indictment (Corrected Amended Indictment). A14 at DI 111, 112, 114. *See* A100-76. The final Corrected Amended Indictment contained 47 counts and charged Kellam with Criminal Racketeering, two counts of Murder First Degree (felony murder), three counts of Home Invasion, two counts of Robbery First Degree, three counts of Conspiracy Second Degree, two counts of Assault Second Degree, two counts of Attempted Robbery First Degree, Assault Third Degree, Wearing a Disguise During the Commission of a Felony, and 30 counts of PFDCF. A155-76. On September 25, 2017, the jury convicted Kellam on all counts except for three counts of PFDCF related to possession of a weapon by an unknown male

during the home invasion and attempted robbery of Milton Lofland. A1612-1621.

On December 28, 2017, Kellam filed a motion for a new trial. A14 at DI 125. The Superior Court held an evidentiary hearing on March 16, 2018, and denied the motion. A15 at DI 134. On March 23, 2018, the court sentenced Kellam to two life sentences plus 770 years of Level V incarceration, suspended after 769 years for one year of Level III probation. A16 at DI 139; A24-31. Kellam appealed.

On appeal, Kellam claimed the trial judge erred when he permitted the State to admit wiretap calls and texts that postdated the charged offenses. A550-55. He also argued the limiting instruction given by the Court about the calls and texts was insufficient to cure unfair prejudice. A554-55. This Court found the Superior Court did not abuse its discretion in admitting the wiretap evidence and affirmed on the basis of the lower court's pertinent bench rulings.[7] A558. The Court also found the Superior Court did not commit plain error in giving the limiting instruction.[8] *Id.*

On August 28, 2019, Kellam filed a *pro se* Motion for Postconviction Relief and requested appointment of counsel. A19 at DI 178, 179. The Court appointed counsel to Kellam, but on February 26, 2021, postconviction counsel entered his appearance as substitute counsel. A20 at 183, 186, 187. Counsel filed an amended Motion for Postconviction Relief (Amended PCR Motion) on October 15, 2021. B1

[7] *Kellam v. State*, 2019 WL 2484748 (Del. June 13, 2019).

[8] *Id.*

at DI 195. Trial counsel filed an affidavit responding to Kellam's ineffective assistance of counsel claims and the State filed a response to the Amended PCR Motion. B2 at DI 201, 205. Thereafter, Kellam filed a motion to amend the Amended PCR Motion, which the Superior Court granted. B3 at DI 213, 214, 216. Kellam also filed a reply to the State's response to his amended motion. B3 at DI 215. The State filed a response to Kellam's amendment to his Amended PCR Motion and Kellam filed a reply to the State's response. B3-5 at DI 217, 219, 232.

On September 25, 2023, the Superior Court held oral argument. B5 at DI 230; B380-405. After receiving post-argument supplements from the parties and two supplemental affidavits from trial counsel, the court granted in part and denied in part Kellam's motion for postconviction relief.[9] B5-6 at DI 234, 236, 237, 242, 244. In so holding, the court dismissed Kellam's two felony murder convictions and six related PFDCF convictions.[10]

Kellam appealed and the State cross appealed. Kellam filed a timely Opening Brief. This is the State's Answering/Opening Brief on Cross Appeal.

[9] *State v. Kellam*, 317 A.3d 285 (Del. Super. Ct. 2024).

[10] *Id.* at 329.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The Superior Court did not err in finding the amendment to the indictment removing two predicate events from the racketeering charge violated neither the federal nor state constitutions. However, the court should have found the claim procedurally barred under Superior Court Criminal Rule 61(i)(3). In any case, the court correctly found that the Fifth Amendment Grand Jury Clause does not apply to the States and that the indictment amendment did not violate the Fair Notice Clause of the Sixth Amendment. The amended indictment contained all of the necessary elements of racketeering and fairly informed Kellam of the charge. For the same reasons, the court correctly held that the amendment to the racketeering charge did not violate Delaware law.

II. Appellant's second claim is DENIED. The Superior Court did not abuse its discretion in finding trial counsel was not ineffective for failing to request an 11 *Del. C.* § 274 instruction about Kellam's *mens rea* liability as an accomplice or for his liability for aggravating factors in the felony murder, home invasion, robbery, and assault charges. The charges either did not logically support a section 274 instruction based on the elements of the crimes or such an instruction was not rationally supported by the evidence. Trial counsel's decision not to request section 274 instructions was not objectively unreasonable.

III. The Superior Court abused its discretion in finding trial counsel was ineffective for failing to object to outdated language in the felony murder instruction. Trial counsel's failure to object to the language was not objectively unreasonable given that it was not likely to have misled the jury and, arguably, increased the State's burden. Nor was Kellam prejudiced by trial counsel's failure. There was not a sufficient likelihood that, but for the incorrect language, the jury would have reached a different verdict on the felony murder and related PFDCF charges.

STATEMENT OF FACTS

The Nelson and Hopkins Murders — January 13, 2014

On January 13, 2014, Cletis Nelson (Nelson) and William Hopkins (Hopkins) were killed during a home invasion robbery. Nelson had been released from the prison work release program on Christmas Eve, December 24, 2013, and was living at his friend Edward Cannon's (Cannon) mobile home on Harmon Hills Road. A599; B74-77. The three men sold drugs together. B77-79.

Nelson met Rachael Rentoul (Rentoul) after he was released from prison, and the two dated. B94-96. Rentoul was a prostitute who had a drug problem. She had been using cocaine daily for over 15 years, also used heroin, and sometimes used both at the same time. B88-96. Rentoul became "friends" with Jackie Heverin (Heverin), whom Rentoul recruited into prostitution as a way for Heverin to fund her heroin and cocaine addictions. A713-25, 763-64; B97. Nelson was their drug dealer. A725.

On January 10, 2014, Shamir Stratton (Stratton) and three of his cousins came to visit Stratton's cousin, Kellam. Stratton and his cousin Damon Bethea (Bethea) lived in Pennsauken, New Jersey. Stratton drove, and picked up Bethea and his two young cousins, Richard Robinson (Robinson) and Rhamir Waples (Waples), from

Philadelphia.[11] A812-16. Robinson and Waples were brothers and they were young, 18 and 17 years old, respectively. A816-17, 1119.

The four New Jersey/Philadelphia men ended up in Delaware on Friday, January 10, 2014, because Stratton had called Kellam, and Kellam told him there was a party at the VFW in Millsboro. A817-19, 822, 1132. Among the four of them, they only had enough money for gas to Delaware, so Stratton was prepared to do a "lick" (a robbery), and that is how he convinced the other cousins to go. A819-20, 1133-34. They agreed to meet at the VFW. A823. When Kellam arrived, they left with him and went to Pine Ridge trailer park, where Kellam lived with John Snead (Snead). A823-25. The four men were staying there for the weekend. A827-28. They got to the home at about midnight, hung out, drank beers, and went to bed. A828.

The next morning, Kellam brought at least three handguns from his room, including a black .40, a silver .32 or .380, and a .22—all loaded. A830-31, 1014-17, 1152-54. Snead was in and out of the home all day. At some point, Kellam and the four men went to Kellam's sister's home on Mount Joy Road in Millsboro. A833, 1139. Another cousin, Tom, came by and drove Stratton, Waples, Robinson and Bethea to the liquor store. A836. Tom went inside and bought vodka while they

[11] Kellam and Bethea were not related to Robinson and Waples—the two pairs were cousins of Stratton on opposite sides of Stratton's family. A817.

waited in the car. *Id.* A woman came out of the liquor store and started talking to the men. The woman was Rentoul. A836. Stratton got her number. *Id.*

That night, they went back to the VFW, along with Kellam and his sister. A839. This time, the VFW was crowded. A840, 1142. Stratton got into an altercation and ended up with a wound to his head from a bottle, but he did not know who had hit him. A841-50, 1142-47. Everyone went back to Kellam's house, where Stratton noticed he was bleeding. A847-50, 1147. Stratton went to Beebe Hospital and got seven staples. A850-51, 1147.

The next day, Snead told Stratton he might know who had hit him, and had Stratton walk down the road with him and up to two men sitting in a car. A855-60, 1158. Snead asked Stratton if he recognized either of the men, one of whom was Hopkins. *Id.* Stratton did not. *Id.* Later that day, Kellam and the four men left for Kellam's sister's house. A800, 802, 807, 863, 1281. Before they reached the main road, they saw Snead and Hopkins fighting. A865, 1158. They got out of the car, and Stratton took Robinson's gun and waved it around, pointing it at Hopkins before Robinson took it back. A1281-83. Robinson and Waples both had guns in their hands. A800, 807, 866-67, 1159-61. It was decided that Snead, who was obviously under the influence, would fight Hopkins one-on-one, which they did. A800, 1161. Snead was so intoxicated he could barely stand up, so Hopkins roughed him up easily. A804, 868-69. Snead told Hopkins, "You're a dead man. You're going to

see the clouds." A1284-85. Someone called the police and everyone left. A802, 870.

At around 10:30 p.m., Stratton, Waples, Richardson and Bethea all went to the Milford Wawa with Kellam, and then Kellam talked with Snead briefly near a Milford apartment complex. A874-84, 1072, 1166. Kellam, Stratton, Bethea, Waples and Richardson then went to Long Neck, to meet up with Carlton Gibbs (Gibbs). A884-87, 1169.

In the meantime, Rentoul had spent the night with her boyfriend, Nelson, who was friends with Hopkins and stayed at Cannon's mobile home. B76, 98. In the morning, Rentoul saw that Nelson had calls and texts from another woman. B98. Rentoul was angry, so she had a friend pick her up. B98-99, 119-120.

Rentoul then arranged a client for Heverin. The client, Gibbs, paid for a hotel room for the three of them at the Sea Esta Motel in Long Neck. A726-27; B100-02, 121-23. At the motel, Rentoul ran out of heroin, and Gibbs gave her money to buy more. B103, 106. Rentoul went back to Cannon's mobile home to buy heroin. B80, 103-04, 106. While there, she saw Cannon helping Nelson count his drug money. B81-82, 104-05. Sometime after 9:30 p.m., Rentoul returned to the Sea Esta Motel. B107-08.

Gibbs had called friends, who happened to be Kellam, Stratton, Richardson, Waples and Bethea, to come to the hotel and hang out. A886-87; B108.

Coincidentally, Stratton had been texting Rentoul during the day, and she had asked him to go to Long Neck, but he did not expect to see her there. A733, 887; B108-09. They all started talking and drinking. A888.

Rentoul told the men about the drugs and money she had seen in Cannon's mobile home. A734-35, 781, 1290-94, 1298; B110, 124. Kellam wanted them to go get the money and kill Hopkins. A907, 1007, 1173-74, 1179, 1322. The men were angry at Hopkins about the fight, (A735), and Rentoul was angry at Nelson about the other woman (A785). Kellam crafted the plan. A778-80, 889-91. Rentoul agreed that she would show them where the mobile home was located. A1303; B111.

When they left the hotel, they took three cars: (1) Heverin rode with Rentoul; (2) Kellam drove Robinson, Waples, Bethea and Stratton in his car; and (3) Gibbs drove his truck. A895-96. Rentoul drove Heverin to the mobile home and parked in the back. A736; B112. The men from the motel followed her, but kept going when she pulled into the driveway. B112. Rentoul went inside, bought heroin, and talked to Nelson. B113-14. Rentoul and Heverin eventually went back to the motel. B115-17, 126.

The men in Kellam's car parked at a friend's, Gerald Deshields' (Deshields), house on Mount Joy Road and waited. Kellam got into Gibbs' truck. A897, 1176. Ten to fifteen minutes later, Snead pulled up in his car. A898. Kellam got into

Snead's car for a while before Snead left. A898-900. Kellam then walked to the driver's window of his car and handed Stratton, who was in the driver's seat, three guns—a .40, a .22 semi-automatic, and a .380. A901-02, 1301-04.

Kellam told Stratton to ride with him, and they got into Gibbs' truck. A903. Gibbs turned onto Mount Joy Road, made a few turns, and stopped in front of a Cannon's and Nelson's mobile home, about half a mile from where they started. A903-05. Kellam told Stratton, "This is where you all go," and told them where to park nearby. A904.

Stratton returned to Kellam's car where his cousins were waiting. A906. On speakerphone, Stratton asked Kellam what he wanted them to do with the people in the mobile home, and Kellam said "kill 'em."[12] A907, 1007, 1179, 1323, 1328.

Stratton drove the three men to Cannon's mobile home, and parked where he was told to park. Robinson, Waples, and Bethea got out of the car with the guns and went to the mobile home. A908, 1177-79. They decided to avoid a possible shootout by sneaking in through a window. A1180. Robinson told Bethea to get "one of the dudes" to open the door and let them in. *Id*. To make sure they knew the robbery was serious, Robinson gave Bethea the .40 and took the .22 revolver. A1181.

[12] Robinson did not remember this phone call and testified that Kellam told him to kill Hopkins as they left the Sea Esta Motel. A1174, 1327-28.

Robinson hoisted Bethea through the window and waited with Waples behind the bushes. A1182.

Bethea grabbed Hopkins by the dreadlocks and came to the back door to let the other two men inside. A1184-85. When asked about money, Hopkins told them it was in his jacket. A1188. Robinson got the money and put it in his pocket. A1189. They asked where he had the heroin, and Hopkins told them it was in the shed. *Id*. But Robinson was not interested in the heroin, so Robinson and Waples started searching the mobile home for more money. A1190. Bethea just stood to the side. A1191. After Robinson and Waples searched the couch, they hit Hopkins in the head with their guns a few times. *Id*. They asked him again where they could find money. Hopkins said there was no money in the house. *Id*. Robinson and Waples then started shooting Hopkins. *Id*.

Bethea, who was standing to the side, looked in the other room and saw Nelson. A1192. They made Nelson come into the living room and lay on the floor. A1193, 1202. Nelson tried to look up, Waples shot him point-blank in the head, and then Bethea shot him in the back of the head. A1193, 1202, 1308, 1312-13.

Stratton heard gunshots. A909. Robinson and Waples came running out of the front door of the mobile home and got into the car. A910, 1204. They said Bethea was right behind them, but Stratton was nervous and left. A910, 1204, 1206. Stratton threw Robinson's and Waples' guns out of the car. A1208, 1315, 1319.

The three men went back to Deshields' house, where they told Kellam and Gibbs that they left Bethea. A910-13, 1206, 1208. Kellam and Gibbs went and got Bethea. A1209. When they returned, Kellam asked for all the money, and split it, about $2,500–3,500, amongst them, reserving $500 for Rentoul and Heverin. A918-19, 1215. Stratton, Waples, Richardson, and Bethea then packed up their things and headed back north. A920, 926, 1219. Kellam returned with Gibbs to the Sea Esta Motel and they gave Rentoul her and Heverin's share of the money. A741, 788; B118, 125-26.

Cannon discovered Nelson's and Hopkins' bodies when he came home in the early morning hours, but he did not call the police because he was wanted for walking away from work release. B83-87. Later that night, Nelson's brother Terrence Nelson, went to the mobile home looking for Nelson and discovered the bodies. He called 911. A599-03, 607-13.

The medical examiner determined that Hopkins suffered ten gunshot wounds—six to the left arm, three to the head, one to the left hip, one to the upper right arm and one to the left hand—and recovered eight bullets from the body. B62-64. Nelson suffered two fatal gunshot wounds to his head—one to the right side of his forehead and one to his neck, which penetrated his brain—and six gunshot wounds concentrated in the mid-to-lower-right side of his back, which exited his lower chest. B65-71, 73. The gunshot wound to Nelson's right forehead was

accompanied by stippling, which indicated the shot was fired from within 18 inches to two feet of Nelson's head. B71. The medical examiner recovered 10 bullets from Nelson's body. B72. The examiner recovered two different caliber bullets from each man. B70.

The Lofland Home Invasion — December 11, 2014

In December 2014, Robinson, Waples and their cousin Tyreek "B-Hop" Waples (B-Hop) came down from Philadelphia to do another robbery. A1221-23. At this time, Kellam was living in a house near Delaware State Police Troop 4 in Georgetown. A1223; B182. Jackson Vanvorst (Vanvorst) (Kellam's best friend and also a drug dealer) (B197)), was at the house with Kellam, Robinson, Waples, and B-Hop when they planned to rob Milton "Fat Dice" Lofland (Lofland), a known drug dealer. B147, 183-84. Kellam gave Robinson and Waples handguns, and B-Hop had a shotgun.[13] A1227. Kellam told them Lofland had money and drugs, and to kick the door in and take whatever was there. A1234; B183.

Lofland lived on Sandy Drive, in Millsboro, with his girlfriend, Connie Steward (Steward). B152-53. On December 11, 2014, at about 11:45 p.m., Steward and Lofland went to bed. B136-37. Lofland heard someone trying to get in the front door. B136. The intruders ran around back and kicked in the back door. B137. By

[13] B-Hop did not take the shotgun to the Lofland robbery. A1235-36.

the time Steward got up, four black men, dressed in black, with black masks, gloves and boots, were coming down the hallway with guns, asking "where was it at." B137, 150, 153. One of the men kicked or punched Steward in the face, told her to shut up, and then hit her in the head with a gun. A1239; B138. Lofland told them there was no money in the house. A1240. One of the men hit Lofland in the head with a gun three or four times. A1239; B138.

Two men, Robinson and Waples, stayed in the back with Steward and Lofland, and searched her room. B139-40, 184-85. Two men, B-Hop and a friend of Snead's (Snead's friend),[14] ransacked the house, including tearing open the Christmas presents. B139, 142-43. The men did not find any money, but they stole Steward's watch and two would-be Christmas gifts—a DVD player and a pair of sneakers. B148-49. After they left, Steward called 911. B151.

The Foster Home Invasion — December 14, 2014

Kellam decided he also wanted to rob Azel Foster (Foster), a purported drug dealer. A1249-50; B183-85, 192. He told Robinson that there would be drugs and money in the house, but that they should be careful, because Foster owned a gun. A1250; B185. Foster had been a well-known drug dealer during his teens and twenties, until he was convicted and incarcerated. B129. Foster knew Kellam from

[14] Snead's friend was never definitively identified. B193.

when he was "in the game." B135. In December 2014, Foster was living on Cordrey Road in Sussex County, with his fiancée and his two children, 10 and four years old. B127. Tamika Turlington (Turlington), Kellam's friend and sometimes girlfriend, had lived near Foster, and showed Kellam where Foster lived. B195.

Kellam had Vanvorst buy a gun for one of the men to use in the robbery. B1869, 191. Vanvorst purchased a .32 revolver that opened at the top, had no ammunition, and did not work, and gave it to Kellam. A1254; B186-87. On Sunday, December 14, 2014, Kellam, Robinson, Waples, Snead, B-Hop and Snead's friend were at Kellam's house, where they planned to rob Foster. A1030, 1032-34, 1046, 1250; B188, 193. Snead's friend was given the non-working .32 revolver. A1252-53; B193-94, 196. Robinson had a .38 special, Waples had a Glock, and B-Hop had a shotgun, all guns that Kellam had given them. A1226-27, 1253. Kellam, Robinson, Waples, B-Hop and Snead's friend went to Foster's. A1255.

At about 10:30 p.m., Foster was putting his younger child to bed when he heard a noise at the front door. B130. He looked down the hallway toward the door and saw figures outside. B131. He grabbed his pistol from his nightstand and told his fiancée to grab his daughter and get under the bed. *Id*. Foster went into the hallway, and the intruders kicked open his front door. A1256. Robinson, Waples, B-Hop and Snead's friend were wearing all black, including masks and hoods, and were yelling "State Police." A1047. (Kellam stayed outside and watched from

across the street. A1036.) Foster went into his bedroom and closed the door behind him. B133. A man kicked his bedroom door and Foster heard a "pop." B131. Foster fired four shots and Robinson fired back five times, emptying his revolver. A1257-58; B131, 133. The intruders fled without getting any money. B132, 189. Foster had been struck in the shoulder by one of the bullets, which went through his body and out his back. B132, 134. His fiancé called 911.[15] B134.

The Wiretaps

On March 13, 2015, police obtained a wiretap order to monitor Kellam's communications on two cell phone numbers. B154-55. The wiretaps began on March 17, 2015. B178. Within the first week, the police developed probable cause to obtain a wiretap order for one of Vanvorst's phone lines, and soon thereafter, for two other men. B156-58.

In March and April 2015, police intercepted phone calls between Kellam and several different participants in the home invasions—Robinson, Waples, and Vanvorst. Among other things, they discussed a gun that Robinson had received from Vanvorst, which had been stolen; and Vanvorst obtaining a "snub nose" in exchange for "a sixteenth" for Kellam. B9-40, 162-71. In one text, Kellam wrote

[15] Foster was arrested and charged with PFBPP and Possession of Ammunition by a Person Prohibited. B127-28. He agreed to cooperate with the investigation, pled guilty to the ammunition charge, and was sentenced to a year of Level II probation. B128.

to Vanvorst, "I know where to send the goons the next time they come through." B43-44, 172. At trial, Vanvorst testified that he knew the "goons" were Robinson and Waples. B190.

On April 21, 2015, two detectives went to Philadelphia to try to speak to Waples and Robinson. B173-75]. They were not successful, but left their cards with family members. *Id.* Before the detectives had left the city, Kellam received a call from Snead. B175-76. Snead told Kellam, "Yo, bro, we have a serious . . . problem," because his nephew had just called and Delaware State Police had been at his door. B179. There was another call moments later. B176. The police then obtained approval to place a wiretap on Snead's phone. Delaware State Police detectives interviewed Waples on April 24, 2015. B177. Just after that interview, police intercepted several calls between Snead and Waples about the interview. B46-49, 179-81.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR IN FINDING AN AMENDMENT TO THE RACKETEERING CHARGE DID NOT VIOLATE FEDERAL OR DELAWARE LAW.

Question Presented

Whether an amendment to the indictment removing predicate crimes from the racketeering charged violated the federal and state constitutions.

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.[16] "[F]actual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous."[17] Questions of law are reviewed *de novo*.[18]

Merits of the Argument

In his postconviction relief motion, Kellam claimed that the State violated the Fifth and Sixth Amendments to the United States Constitution and Article I, Sections 7 and 8 of the Delaware Constitution because it tried and convicted him based on an amended indictment that was different from the one presented to the grand jury. B212. He argued that because (1) racketeering requires the State to prove he

[16] *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008) (citation omitted).

[17] *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008).

[18] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013); *Gattis,* 955 A.2d at1280-81.

engaged in a "pattern of racketeering activity" consisting of two or more incidents; (2) the racketeering charge in the original indictment identified five predicate events—the Nelson and Hopkins murders; the Isaiah Phillips home invasion; the Ashley Moore home invasion; the Lofland home invasion; and the Foster home invasion—and; (3) the racketeering charge in the Correct Amended Indictment only identified three predicate events—the Nelson and Hopkins murders; the Lofland home invasion; and the Foster home invasion—it was impossible to know which two of the predicate events the grand jury relied upon in indicting him for racketeering. B214-16. The State, in turn, argued that Kellam's claim was procedurally barred under Superior Court Criminal Rule (Rule) 61(i)(3) and that it was meritless. B273-83.

The Superior Court found Kellam's claim was not procedurally barred, noting, "the jurisdictional issue is fundamental under the exceptions of Rule 61(i)(5)."[19] The court then denied the claim on its merits, holding (1) Kellam's Fifth Amendment claim was not cognizable because the United States Supreme Court has never applied the Grand Jury Clause to the States; and (2) the changes to the racketeering charge in the re-indictments violated neither the Sixth Amendment's

[19] *Kellam*, 317 A.3d at 305.

Notice Clause or Delaware law.[20] Kellam argues the Superior Court erred in finding his claim meritless. Kellam's argument is unavailing.

A. Kellam's Claim is Procedurally Barred.[21]

Kellam failed to raise this claim prior to or during trial, or on direct appeal. Therefore, it is procedurally barred. Under Rule 61(i)(3), a defendant who fails to raise any claim in the proceedings leading to conviction is barred from later bringing a new claim for relief unless he can show: (A) cause for the default; and (B) actual prejudice.[22] To establish cause sufficient to overcome the procedural default bar of Rule 61(i)(3)(A), a defendant must show that an external impediment prevented him from constructing or raising the claim either at trial or on direct appeal.[23] In order to meet the second prong of Rule 61(i)(3)(B), a defendant must demonstrate actual prejudice resulting from the alleged and previously unasserted error.[24] Kellam alleged neither a cause for his default, nor prejudice therefrom.

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[20] *Id.* at 309-12.

[21] "[T]his Court may affirm on the basis of a different rationale than that which was articulated by the trial court." *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995); *accord Colon v. State*, 900 A.2d 635, 638 n.12 (Del. 2006).

[22] *Outten v. State*, 720 A.2d 547, 556 (Del. 1998); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[23] *Younger*, 580 A.2d at 556; *accord Ruffin v. State*, 2019 WL 719038, at *2 (Del. Feb. 19, 2019).

[24] *Younger*, 580 A.2d at 555-56.

Rule 61 also provides exceptions to the procedural bars.[25] Under Rule 61(i)(5), the procedural bars do not apply to a claim that: (i) asserts a lack of jurisdiction; or pleads with particularity that (ii) new evidence exists suggesting the movant is actually innocent in fact; or (iii) a new rule of constitutional law retroactively invalidates his conviction.[26] Kellam argued below that the Rule 61(i)(3) procedural bar did not apply to this claim because the amendments to the indictment deprived the Superior Court of jurisdiction. B211. As noted above, the Superior Court seemed to agree that the jurisdiction exception applied. But the court erred in so finding.

"Subject-matter jurisdiction properly comprehended . . . refers to a tribunal's 'power to hear a case,' a matter that 'can never be forfeited or waived.'"[27] However, the United States Supreme Court held in *United States v. Cotton*, that a defective indictment does not deprive a court of jurisdiction.[28] And the federal circuit courts have interpreted *Cotton*'s holding to encompass indictments that are factually

[25] *See* Super. Ct. Crim. R. 61(d)(2), (i)(3), (i)(5).

[26] Super. Ct. Crim. R. 61(d)(2), (i)(5).

[27] *Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

[28] 535 U.S. at 631; *see United States v. Hedaithy*, 392 F.3d 580, 588 (3d Cir. 2004) (acknowledging *Cotton*'s holding).

insufficient or that omit an essential element from a charge.[29] Similarly, this Court has held that "the failure of an indictment or information to allege an essential element of the offense charged is not considered a jurisdictional defect."[30]

Kellam's claim that the Corrected Amended Indictment was defective in his case because it did not sufficiently allege an element of his racketeering charge, *i.e.*, it lacked all of the predicate offenses originally charged, does not amount to a defect that would have deprived the Superior Court of jurisdiction. Therefore, his claim is procedurally barred under Rule 61(i)(3) and none of Rule 61(i)'s exceptions apply.

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[29] *See, e.g., United State v. Brown*, 752 F.3d 1344, 1353-54 (11th Cir. 2014) ("The omission of an element may render the indictment insufficient . . . , but it does not strip the district court of jurisdiction over the case."); *United States v. Scruggs*, 714 F.3d 258, 263 (5th Cir. 2013) (finding that although another court holding rendered allegations in information no longer sufficient to allege crime of honest-services fraud, "[t]his is simply not a jurisdictional argument"); *United States v. George*, 676 F.3d 249, 260 (1st Cir. 2012) (finding that although information was factually insufficient, that did not divest the district court of subject matter jurisdiction over the case). Some circuits have even gone so far as to hold that defects in an indictment do not deprive a court of subject matter jurisdiction "even when the defect is a failure to state a federal offense." *United States v. Muresanu*, 951 F.3d 833, 839 (7th Cir. 2020); *accord United States v. DeVaughn*, 694 F.3d 1141, 1149 (10th Cir. 2012); *but see Brown*, 752 F.3d at 1351 (noting that a district court lacks subject matter jurisdiction when an indictment charges a crime that does not exist under the United States Code).

[30] *Fountain v. State*, 288 A.2d 277, 279 (Del. 1972); *accord Ortiz v. State*, 2020 WL 873593, at *1 n.3 (Del. Feb. 21, 2020); *Downer v. State*, 543 A.2d 309, 310 (Del. 1988).

B. The Superior Court Correctly Held that the Indictment Amendment Did Not Violate Federal Law.

The Superior Court did not err in finding the Grand Jury Clause of the Fifth Amendment[31] does not apply to the States. A violation of the Grand Jury Clause can occur when the indictment is amended by the government, the court, or constructively in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense that is different from that alleged in the grand jury indictment.[32] However, the United States Supreme Court has never applied the Grand Jury Clause to the states.[33] "[T]he legality of an amendment to an indictment is primarily a matter of state law."[34]

Nor did the Superior Court err in holding that the amendments to Kellam's racketeering charge did not violate the Fair Notice Clause of the Sixth Amendment.

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[31] *See* U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.").

[32] *See United States v. Miller*, 471 U.S. 130, 142-45 (1985) (reaffirming the idea that an indictment is unconstitutionally amended when it is so altered as to charge a different offense from that found by the grand jury); *United States v. Scarfo*, 41 F.4th 136 (3d Cir. 2022) (noting that "[a] constructive amendment occurs when the court broaden[s] the possible bases for conviction from th[ose] which appeared in the indictment" (quoting *United States v. McKee*, 506 F.3d 225, 229 (3d Cir. 2007))).

[33] *See Johnson v. State*, 711 A.2d 18, 23 (Del. 1998) ("The United States Supreme Court has never held . . . that the Fifth Amendment concepts of a 'grand jury' are applicable to the states by virtue of the Fourteenth Amendment incorporation doctrine." (citing *Hurtado v. California*, 110 U.S. 516, 538 (1884); *Alexander v. La*, 405 U.S. 625, 635 (1972) (Douglas, J. concurring))); *accord Dixon v. May*, 2021 WL 1226438, at *6 (D. Del. Mar. 31, 2021).

The Sixth Amendment provides that in all criminal prosecutions, the accused shall be informed of the nature and cause of the accusations against him.[35] The United States Supreme Court has held that the fair trial provisions of the Sixth Amendment apply to the States through the Fourteenth Amendment.[36] To pass constitutional muster, an indictment must "contain [] the elements of the offense charged and fairly inform[] a defendant of the charge against him which he must defend, and . . . enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense."[37]

To the extent Kellam claimed and is claiming that the amendment to the racketeering charge violated his right to fair notice, his claim is unavailing. *See* Opening Br. at 25-28 (arguing that "regardless of the source of authority," "the

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[34] *United States ex. rel Wojtycha v. Hopkins*, 517 F.2d 420, 425 (3d Cir. 1975), *quoted in Dixon*, 2021 WL 1226438, at *6; *accord Dixon v. State*, 2015 WL 2165387, at *2 (Del. May 7, 2015); *Mott v. State*, 9 A.3d 464, 465 (Del. 2010); *Johnson*, 711 A.2d at 23.

[35] U.S. Const., amend. VI.

[36] *Dixon*, 2021 WL 1226438, at *6 (noting that the Sixth Amendment fair notice requirement applies to the States through the Fourteenth Amendment (citing *In re Oliver*, 333 U.S. 257 (1948)); *accord Crawford v. Pennsylvania*, 714 F. App'x 177, 179 (3d Cir. 2017).

[37] *Hamling v. United States*, 418 U.S. 87, 118 (1974) (citing *Hagner v. United States*, 285 U.S. 427 (1932); *United v. Debrow*, 346 U.S. 374 (1953)); *accord United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007).

amendments to the indictment . . . materially changed the offense charged").[38] The amended indictment contained all of the necessary elements of racketeering and fairly informed Kellam of the charge.

A racketeering conviction requires proof of three elements: "(1) that the defendant was associated with an enterprise; (2) that the defendant conducted the enterprise through a pattern of racketeering activity . . . ; and (3) that the defendant's conduct or participation in the pattern of racketeering was intentional."[39] The Delaware Criminal Code defines a "pattern of racketeering activity" as "2 or more incidents of conduct" that "constitute racketeering activity," that "are related to the affairs of the enterprise," and that do not constitute a single event (the "predicate events").[40] "Racketeering activity" includes, *inter alia*, any activity constituting a felony under the Delaware Code.[41]

To prove racketeering, in addition to intent, the State must prove two necessary elements: the existence of an enterprise and the presence of a pattern of

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[38] *Cf. United States v. Daraio*, 445 F.3d 253, 261 (3d Cir. 2006) ("[T]he concerns raised by a variance argument are the fairness of the trial and the protection of the defendant's right to notice of the charges against her and her opportunity to be heard.").

[39] *White v. State*, 243 A.3d 381, 398 (Del. 2020) (citing 11 *Del. C.* § 1503).

[40] 11 *Del. C.* § 1502(5)a.

[41] 11 *Del. C.* § 1502(9)b.

racketeering beyond a reasonable doubt.[42] Here, the indictment approved by the grand jury alleged that Kellam "while being . . . associated with an unnamed organization, an enterprise as defined by Title 11, § 1502(3), did knowingly conduct or participate in the conduct of the affairs of the enterprise, through a pattern of racketeering activity," which "consisted of two or more" incidents of conduct (the predicate events), listed as: (1) "Home Invasion, Murder in the First Degree, and [PFDCF], against Cletis Nelson and William Hopkins" (the Nelson and Hopkins murders); (2) "Home Invasion, Robbery First Degree, Assault Second Degree, Reckless Endangering First Degree, [PFDCF], against Isaiah Phillips" (the Phillips home invasion); (3) "Home Invasion, Attempted Robbery First Degree, and [PFDCF] against Ashley Moore" (the Moore home invasion); (4) "Home Invasion, Assault Second Degree, Attempted Robbery First Degree, [PFDCF], against Milton Lofland" (the Lofland home invasion); and (5) "Home Invasion, Attempted Robbery First Degree, Attempted Murder First Degree, Reckless Endangering First Degree, and [PFDCF], against Azel Foster" (the Foster home invasion). A38-39. It should also be noted that the original indictment also separately charged the crimes constituting each of the underlying predicate events. A40-71. The Corrected Amended Indictment submitted to the jury at trial contained the same language, but

[42] *Stroik v. State*, 671 A.2d 1335, 1340 (Del. 1996).

only listed three predicate events: (1) the Nelson and Hopkins murders; (2) the Lofland home invasion; and (3) the Foster home invasion. A156-57. The individual charges underlying the Phillips and Moore home invasions were also removed from the Corrected Amended Indictment. *Compare* A37-72 *with* A155-76.

The fact that the version of the indictment submitted to the jury contained less predicate events does not amount to a Sixth Amendment violation. The original indictment and the amended indictments each alleged all of the necessary elements. And, even though the State dropped two of the home invasion incidents from the indictment submitted to the jury, both indictments clearly put Kellam on notice that he was going to have to defend himself against the racketeering charge, which always included as predicate events the charges stemming from the Nelson and Hopkins murders and the Lofland and Foster home invasions.[43] A defendant cannot show his substantial rights were prejudiced by the absence of charges alleged against

[43] *See United States v. Schoenhut*, 576 F.2d 1010, 1021-22 (3d Cir. 1978) ("A variance does not prejudice a defendant's substantial rights . . . if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial." *quoted in Daraio*, 445 F.3d at 262).

him in an original indictment.[44] Moreover, "[t]he listing of multiple means of committing a statutory offense is a recognized and accepted practice."[45]

Similarly, The United States Supreme Court has held (albeit within the Fifth Amendment context) that "where an indictment charges . . . the commission of one offense in several ways, the withdrawal from the jury's consideration of . . . one alleged method of committing it does not constitute a forbidden amendment of the indictment."[46] And federal courts have consistently found that changes after indictment to racketeering and other conspiracy charges that remove predicate

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[44] *See Miller*, 471 U.S. at 134-35 (finding no notice-related violation concerns from government's removal of part of indictment that alleged prior knowledge of burglary, noting "there can be no showing here that Miller was prejudicially surprised at trial by the absence of proof concerning his alleged complicity in the burglary"); *United States v. Zauber*, 857 A.2d 137, 151 (3d Cir. 1988) (finding no Sixth Amendment violation when RICO case was tried on a 90-count indictment, which, by the time of trial had been reduced to six counts).

[45] *Richardson v. State*, 673 A.2d 144, 146 (Del. 1996) (citing *Griffin v. United States*, 502 U.S. 46, 51 (1991)). *Cf. Turner v. United States*, 396 U.S. 398, 420 (1970) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged."); *United States v. Conley*, 92 F.3d 157, 163 (3d Cir. 1996) ("It is clear that when a jury returns a general verdict of guilty on a multi-object conspiracy count, the conviction will stand over Fifth Amendment due process objections so long as there is sufficient evidence to support any one of the objects of the conspiracy." citing *Griffin*, 502 U.S. at 56-57)).

[46] *Miller*, 471 U.S. at 145 (citing *Salinger v. United States*, 272 U.S. 542, 548-49 (1926)). *See also id.* at 140 (finding no Fifth Amendment violation when "[defendant's] complaint [wa]s not that the indictment failed to charge the offense for which he was convicted, but that the indictment charged more than was necessary").

events or overt acts, or that otherwise narrow the conspiracy do not violate the Fifth or Sixth Amendments.[47]

Accordingly, the removal of two of the listed predicate events from the racketeering charge did not violate Kellam's right to fair notice under the Sixth Amendment and the Superior Court did not err in so deciding.

C. The Superior Court Correctly Held that the Indictment Amendment Did Not Violate Delaware Law.

Superior Court Criminal Rule 7(e) permits amendment of an indictment "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."[48] The purpose of the rule

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[47] *See, e.g.*, *United States v. Hornick*, 491 F. App'x 277, 286-87 (3d Cir. 2012) (finding court's narrowing of conspiracy's time frame in jury instructions did not constructively amend indictment); *United States v. Weinstock*, 1998 WL 344047, at *6 (6th Cir. May 27, 1998) ("[I]f the evidence offered at trial proves a narrower scheme than the one alleged in the indictment, then the variance is not fatal." (internal quotations and citations omitted)); *Zauber*, 857 F.2d at 150-51 (finding no unconstitutional amendment to reduced-count indictment because the remaining counts sufficiently alleged a racketeering conspiracy); *United States v. Ledbetter*, 2015 WL 5117979, at *6 (S.D. Ohio Sept. 1, 2015) (noting predicate acts of racketeering are surplusage, not essential elements of the charged conspiracy, thus, changes to them do not support constructive amendment or variance claims). *Cf. United States v. Rios*, 830 F.3d 403, 427 (6th Cir. 2016) (noting that the overt act element of a racketeering conspiracy charge may be satisfied by an overt act not specified in the indictment without violating the Fifth Amendment's prohibition on constructive amendments); *United States v. Pumphrey,* 831 F.2d 307, 309 (D.C. Cir. 1987) ("[E]xcess allegations in an indictment that do not change the basic nature of the offense charged need not be proven and should be treated as mere surplusage.").

[48] Super. Ct. Crim. R. 7(e).

is to give a defendant: (1) notice of the charges against him so that he can prepare an adequate defense; and (2) protection from double jeopardy.[49] "[T]he principal test for determining the appropriateness of an amendment under the Delaware Constitution [focuses] on the extent to which the amendment substantively changes the material elements of the crime alleged in the original indictment."[50] Thus, a judge may amend an indictment as to matters of form, but not as to matters of substance "as long as '. . . no new, additional or different charge is made thereby and the accused will not otherwise suffer prejudice as to substantial rights.'"[51] Additionally, it is generally accepted that a court may permit amendment of the indictment to charge a defendant with a lesser-included offense to an original charge.[52]

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[49] *Tingle v. State*, 2003 WL 141269, at *2 (Del. Jan. 17, 2003); *accord Keller v. State*, 425 A.2d 152, 155 (Del. 1981).

[50] *Coffield v. State*, 794 A.2d 588, 592 (Del. 2002).

[51] *Keller*, 425 A.2d at 155 (quoting *State v. Blendt*, 120 A.2d 321, 324 (Del. Super. Ct. 1956)).

[52] *See State v. Grossberg*, 1998 WL 278391, at *1 (Del. Super. Ct. Apr. 13, 1998) ("Because a lesser included offense is, by definition, composed exclusively of some, but not all, of the elements of the offense charged, it would never constitute a 'different' offense, and seldom an 'additional' offense within the meaning of Rule 7(e)." (quoting *Virgin Islands v. Bedford*, 671 F.2d 758, 765 (3rd Cir. 1982))); *accord Rogers v. State*, 2003 WL 22957024, at *2 (Del. Dec. 12, 2003) (finding Superior Court properly exercised discretion in permitting State to amend indictment to charge defendant with lesser-included offense of original charge).

Here, the 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 (intent, the existence of an enterprise, and the presence of a pattern of racketeering activity), especially given that Delaware law permits an indictment to list alternative means with respect to an element of a crime.[53] Moreover, as discussed above, the original indictment already placed Kellam on notice that he would have to defend against the three remaining predicate events, thus sufficiently enabling him to prepare a defense.[54]

Kellam argues that "[i]t is impossible to tell if the Grand Jury would have returned a True Bill if the original indictment only identified three predicate events" because "there is 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." Opening Br. at 22 (emphasis in original). Contrary to Kellam's argument, however, we do know the answer to those questions because the grand jury separately indicted Kellam for all of the crimes

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[53] *See Richardson*, 673 A.2d at 147 ("It was a historical practice and continues to remain a common practice to list in one count of an indictment alternative means with respect to an element of a crime.").

[54] *Cf. Norwood v. State*, 2003 WL 29969, at *3 (Del. 2003) ("If the original indictment, when viewed with the amendment, is sufficiently certain and understandable to enable the defendant to prepare his defense, the defendant will not be prejudiced.").

underlying each of the five predicate events. Kellam also argues that the amendment substantively changed the Racketeering charge because "[a] pattern of racketeering activity must be shown through predicate acts that are both related and show a threat of continuity," but when the State removed two of the predicate events from the charge, "[t]he timing between predicate events was substantially different from the pattern presented to the grand jury" because the Nelson and Hopkins murders were now separated by 11 months from the later Lofland and Foster home invasions. Opening Br. at 29, 31-32. He also asserts that, given the former and because the circumstances giving rise to the murders were different from those surrounding the later home invasions, it is impossible to know whether the jury would have found a pattern of racketeering activity once the Phillips and Moore home invasions were removed from the mix. *Id.* at 31-37.

This Court, however, has cited with approval the United States Supreme Court's discussion of the federal RICO statute's structural elements in *Boyle v. United States*, in which that court stated, *inter alia*: "[N]othing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by period of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique."[55] Thus, legally speaking, it does not matter that the

[55] 556 U.S. 938, 948 (2009), *quoted in Lloyd v. State*, 152 A.3d 1266, 1272 (Del. 2016).

crimes were somewhat different or that they were separated in time by a larger gap. As such, amending the indictment to remove the Phillips and Moore predicate events did not substantively change the nature of the racketeering offense. In any case, an indictment is a finding of probable cause.[56] Here, the petit jury found Kellam guilty beyond a reasonable doubt of a racketeering charge that did not contain the Phillips and Moore events. It is hard to reconcile an argument that a grand jury was unlikely to find probable cause to indict because without those two events the State failed to prove a pattern and continuity when a petit jury convicted Kellam of the same crime while applying a more stringent standard of proof.

In sum, the amendment to Kellam's indictment removing two of the five predicate events did not violate Delaware law[57] and the Superior Court did not err in so deciding.

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[56] *Joy v. Super. Ct.*, 298 A.2d 315, 316 (Del. 1972).

[57] *Cf. Metelus v. State*, 2018 WL 6523215, at *3 (Del. Dec. 10, 2018) (finding no abuse of discretion in allowing indictment to be amended when defendant did not argue that the amended indictment charged an additional or different offense or that her defense would have differed).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING TRIAL COUNSEL NOT INEFFECTIVE FOR FAILING TO REQUEST 11 *DEL. C.* § 274 ACCOMPLICE LIABILITY INSTRUCTIONS.

Question Presented

Whether trial counsel was ineffective for failing to request 11 *Del. C.* § 274 instructions about Kellam's *mens rea* liability or liability for aggravating factors for the felony murder, home invasion, robbery, and assault charges.

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.[58] "[F]actual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous."[59] Questions of law are reviewed *de novo*.[60]

Merits of the Argument

Kellam argued in postconviction that his trial counsel was ineffective for failing to request an instruction under 11 *Del. C.* § 274 with respect to his liability as an accomplice for the felony murder, home invasion, robbery, and assault counts. *See* B317-18, 385-86. The Superior Court denied the claim, finding trial counsel's strategy to forego the instruction not objectively unreasonable and that Kellam had

[58] *Gattis*, 955 A.2d at 1281.

[59] *Burrell*, 953 A.2d at 960.

[60] *Neal*, 80 A.3d at 941; *Gattis,* 955 A.2d at1280-81.

failed to demonstrate prejudice therefrom.[61] Kellam claims on appeal that the court erred in so deciding. Opening Br. at 38-45. His claim is unavailing.

When a crime is divided into degrees based on (1) differing mental states or (2) a "person's own accountability for an aggravating fact or circumstance," and the State proceeds under an accomplice liability theory under section 271,[62] section 274 requires the jury to decide the requisite mental state of the accomplice, if it may differ from the principal, and/or, where appropriate to the charge, his accountability for the aggravating fact or circumstance.[63] "An accomplice level of liability instruction is not required unless requested for the same reasons as a lesser included offense instruction."[64] Such an instruction can be given only if there is a rational factual basis in the evidence to support it.[65] And just as one may waive his right to

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[61] *Kellam*, 317 A.3d at 326-28.

[62] 11 *Del. C.* § 271 (providing that a person is liable for the conduct of another when "intending to promote or facilitate the commission of the offense the person . . . aids, counsels or agrees or attempts to aid the other person in planning or committing it").

[63] *Allen v. State*, 970 A.2d 203, 214 (Del. 2009); *see Chance v. State*, 685 A.2d 351 (Del. 1996).

[64] *State v. Dickinson*, 2012 WL 3573943, at *6 (Del. Super. Ct. Aug. 17, 2012), *aff'd*, 2013 WL 1296263 (Del. Mar. 28, 2013)

[65] *See Erskine v. State*, 4 A.3d 391, 395-96 (Del. 2010) (noting that a fundamental underpinning to all jury instructions is that there must be a factual basis to support the instruction); 11 *Del. C.* § 206(c) ("The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense.").

lesser offense instructions available under other statutory provisions, one can choose as a strategic matter to avoid possible conviction of lesser offenses under section 274.

Here, the State proceeded under an accomplice-liability theory for all of the charges except racketeering and conspiracy. *See* A1403. Trial counsel did not request and the trial court did not give a section 274 instruction. Trial counsel asserted in his affidavits, however, that he had several valid strategic reasons for not requesting the instruction—(1) he was pursuing an "all or nothing" defense strategy; (2) there was no factual basis to pursue such an instruction; and (3) he believed arguing an alternative theory that his client was guilty of lesser-included offenses would have undermined the credibility of his defense that the State had not proven its case that Kellam was the mastermind behind the crimes. B420-22, 458-61. Trial counsel's decision was not objectively unreasonable. Nor could Kellam show his was prejudiced therefrom.[66] The charges either did not logically support a section 274 instruction based on the elements of the crimes or the instruction was not rationally supported by the evidence.

[66] To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (applying *Strickland v. Washington*, 466 U.S. 668, 688 (1984), standard to Delaware).

First Degree Felony Murder

First degree felony murder requires a *mens rea* that the death was caused recklessly,[67] while second degree felony murder requires a *mens rea* of negligence.[68] Therefore, a section 274 instruction could have theoretically legally applied. But trial counsel's failure to request it was not ineffective assistance.

The State's theory in this case was that Kellam was the head of an organization that robbed drug dealers; that he directed others to commit, and helped to plan, home invasions of dealers, one of which resulted in Nelson's and Hopkins' deaths; and that Kellam supplied the guns for the robberies. A1502, 1508, 1515, 1517, 1527, 1531-33, 1588. Both Nelson and Hopkins died from multiple gunshot wounds. A1521. Kellam's defense was that he was not in charge of the organization, that the accomplices' testimony about Kellam's involvement was unreliable, and that it was more likely that Snead ordered the robberies and murders and Gibbs supplied the guns. *See* A1557, 1562-63, 1565-66, 1569-71, 1575, 1579-81.

[67] *See* 11 *Del. C.* § 636(a)(2) (providing that a person is guilty of first degree murder when "[w]hile engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person recklessly causes the death of another person").

[68] 11 *Del. C.* § 635(2) (providing that a person is guilty of second degree murder when "[w]hile engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person, with criminal negligence, causes the death of another person").

Based on the State's theory and Kellam's chosen defense, there simply was no rational factual basis to support an argument that Kellam negligently caused Hopkins' and Nelson's deaths.[69] Either Kellam was not involved in directing the robberies and murders, in which case he was not guilty, or he was involved, in which case he was guilty of recklessly causing their deaths. A person cannot send others with guns to rob drug dealers and yet be unaware that by doing so he is creating a substantial risk that death will result.[70] Moreover, trial counsel had no strategic reason to request the lesser-included offense instruction because it was not consistent with Kellam's defense.[71]

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[69] *See Lawrie v. State*, 643 A.2d 1336, 1341 (Del. 1994) (explaining that the evidence must support a jury verdict convicting the defendant of the lesser crime rather than the indicted one to justify a lesser-included offense instruction (citing *Ward v. State*, 575 A.2d 1156, 1159 (Del. 1990)).

[70] *See Lawrie*, 643 A.2d at 1341 ("As explained in the 1973 commentary to the Delaware Criminal Code, 'in the case of criminal negligence the actor is unaware of the risk his conduct is creating, whereas in the case of recklessness he is aware.'" (quoting Del. Crim. Code with Commentary at 31)).

[71] *Cf. Chrichlow v. State*, 2012 WL 3089403, at *2 (Del. Jul. 30, 2012) (finding trial counsel not ineffective for failing to pursue an accomplice "level of liability" jury instruction because it would have undermined his "all or nothing" approach and would have weakened his case); *Dickinson*, 2012 WL 3573943, at *7 (finding trial counsel's choice not to request lesser-included offense accomplice liability instruction was reasonably professional trial conduct because the instruction was inconsistent with defendant's "all or nothing" defense).

Home Invasion

A section 274 instruction was not appropriate for Kellam's three home invasion charges based on his mental culpability because home invasion is not a crime divided into degrees on that basis. Potentially, however, the Court could have instructed the jury on Kellam's accountability for the aggravating factor—that one of the participants was armed with a deadly weapon.[72] *See* A160, 167, 172. To convict Kellam of home invasion, the State had to prove that (1) he "intended to promote or facilitate the commission of conduct" resulting in home invasion; (2) he "aided, counseled, or agreed to aid" the other defendants in planning or committing the home invasion; and (3) one of the defendants knowingly entered or remained unlawfully in a dwelling that was occupied with intent to commit a felony therein, a codefendant committed one of the listed felonies, and a codefendant was armed with a deadly weapon at the time.[73] A160, 167, 172, 390-91. If the evidence rationally supported a finding that Kellam did not know a participant was going to be armed with a gun, he theoretically could have been acquitted of home invasion under the reasoning in *Allen v. State*.[74]

[72] *See* 11 *Del. C.* § 826A (repealed Sept. 16, 2019); *Allen*, 970 A.2d at 213-14.

[73] *See* 11 *Del. C.* § 826A(a) (repealed Sept. 16, 2019); 11 *Del. C.* § 271.

[74] 970 A.2d at 213-14.

Even so, trial counsel was not ineffective for failing to have requested such an instruction. Because home invasion is not a crime divided by degrees, a section 274 instruction was redundant to trial counsel's all or nothing defense. If the jury believed Kellam's defense that he was not the mastermind behind the home invasions, it would have acquitted him of home invasion. And the evidence did not rationally support a conclusion that Kellam could have been involved in the planning of the home invasions without having knowledge that guns were to be used. The use of guns was a detail inextricably intertwined in the planning process.

Moreover, Kellam cannot show prejudice from the Superior Court's failure to give a section 274 instruction for the home invasion element of possession of a deadly weapon. The court did instruct jurors for the PFDCF charges that Kellam had to know his codefendant possessed a deadly weapon for him to be guilty of those charges. A382. The jury convicted Kellam on all but three of those charges,[75] indicating it believed he knew his codefendants possessed the weapons. As such, Kellam cannot show the result of his trial would have been different had the jury been given a similar instruction for the home invasion charges.

[75] The jury acquitted Kellam of the PFDCF charges stemming from the possession of a firearm by an unknown male during the home invasion and attempted robbery of Milton Lofland. A1617-19. But the jury convicted Kellam of the other PFDCF charges stemming from that incident. *Id.*

Robbery and Attempted Robbery

A section 274 instruction was not appropriate as to *mens rea* for Kellam's robbery and attempted robbery charges because all degrees require the same *mens rea*—intentional conduct.[76] The relevant aggravating factor that increased the robbery charges from second degree to first degree in this case was that a participant in the crime displayed what appeared to be a firearm. *See* A162, 164, 173. As with home invasion, the evidence did not rationally support a lesser-included offense conviction for robbery second degree based on the idea that Kellam was unaware that one of his codefendants was going to display a firearm during the Nelson and Hopkins homicides and the Foster robbery. Trial counsel's failure to request such an instruction was not objectively unreasonable. Moreover, as with the home invasion charges, the jury's convictions of Kellam on all but three of the PFDCF charges indicated it believed Kellam knew his codefendants had firearms. Thus, Kellam cannot show prejudice from his counsel's failure to request a section 274 instruction for the robbery charges.

[76] *See Richardson*, 3 A.3d at 237 (noting court had previously held Richardson's robbery and attempted murder charges did not warrant a section 274 instructions because all of the underlying offenses required the same *mens rea*); 11 *Del. C.* §§ 831 & 832.

Assault

Kellam was charged with three counts of assault—(1) assault second degree for a codefendant intentionally or recklessly causing physical injury to Lofland by means of a deadly weapon (A170); (2) assault third degree for a codefendant intentionally or recklessly causing physical injury to Steward (A171); and (3) assault second degree for a codefendant intentionally or recklessly causing physical injury to Foster by means of a dangerous instrument (A174). No section 274 instruction would have been appropriate for the Steward assault because no lesser culpability other than innocence was appropriate. Theoretically, the court could have instructed the jury for the second-degree assault charges that Kellam could instead be guilty of assault third degree if the jury assessed that (1) his mental culpability for the Lofland and Foster assaults was criminal negligence instead of intentional or reckless, or (2) the evidence supported a finding that Foster or Lofland were not assaulted with a deadly weapon or dangerous instrument.[77] But the evidence clearly established that Foster was injured by a gunshot wound and that Lofland was hit in the head with a gun. A1239; B132, 134, 138. And the circumstances of those incidents did not warrant a finding that the defendants had acted with criminal negligence in shooting

[77] *See* 11 *Del. C.* § 611(2) (providing a person is guilty of third degree assault if "[w]ith criminal negligence [he] causes physical injury to another person by means of a deadly weapon or a dangerous instrument").

at Foster or hitting Lofland over the head with a gun.[78] Thus, trial counsel was not ineffective for failing to request a section 274 instruction for the second-degree assault charges.

[78] *See* footnote 70, *supra*.

III. THE SUPERIOR COURT ABUSED ITS DISCRETION IN FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO OUTDATED LANGUAGE IN THE FELONY MURDER JURY INSTRUCTION.

Question Presented

Whether the Superior Court erred in finding trial counsel ineffective for failing to object to outdated language in the felony murder jury instruction. This issue was preserved in the record below in the parties' postconviction briefs (B317-26, 368-73, 383-85, 424-34, 447-49) and in the Superior Court's May 22, 2024 decision granting in part and denying in part Kellam's motion for postconviction relief.[79]

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.[80] "[F]actual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous."[81] Questions of law are reviewed *de novo*.[82]

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[79] *Kellam*, 317 A.3d at 320-23.

[80] *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008) (citation omitted).

[81] *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008).

[82] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013); *Gattis,* 955 A.2d at1280-81.

Merits of the Argument

Kellam was charged and convicted as an accomplice on two counts of first degree (felony) murder. *See* A1652, 1655-56, 1662-64, 1847-48. The Superior Court instructed the jury as to accomplice liability and felony murder. *See* A1652-56, 1662-65. Kellam claimed in his postconviction motion that trial counsel was ineffective for failing to object to the felony murder instructions, which defined felony murder with outdated law. *See* B317-26. Kellam's argument was based on this Court's recent decision in *Ray v. State*, in which the court found trial and appellate counsel ineffective for failing raise the issue of a flawed felony murder instruction.[83] The Superior Court found trial counsel ineffective in Kellam's case for the same reasons espoused in *Ray*, finding:

> In my view, the defective felony murder instruction given in this case runs afoul of *Ray* and falls within the rationale of our Supreme Court in that case. To use the language of *Ray*, the instruction may have improperly cleared a new path for the jury to find that Mr. Kellam was guilty of first degree felony murder. The instruction told the jury that Mr. Kellam could be held responsible for first degree felony murder even upon a finding that he had not caused the victims' deaths if it determined that his accomplices had done so. This allowed the jury to hold Mr. Kellam responsible for the crimes of his accomplices.[84]

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[83] 280 A.3d 627, 640 (Del. 2022).

[84] *Kellam*, 317 A.3d at 323. *See Ray*, 280 A.3d at 644 ("The instruction also improperly cleared a new path to a finding that Ray was guilty of first-degree murder. In particular, the instruction told the jury that Ray could be held responsible for first-degree felony murder even upon a finding that he had not caused Melancon's death if it determined that his 'accomplice' had done so.")

The court erred in so deciding. *Ray* is distinguishable from Kellam's case. And trial counsel's failure to object to the instruction was not objectively unreasonable, nor was Kellam prejudiced by the outdated language.

Prior to 2004, Delaware's felony murder statute provided that when "[i]n the course of *and in furtherance of* the commission or attempted commission of a felony or immediate flight therefrom, the person recklessly causes the death of another person" that person is guilty of first degree murder.[85] In 2003, in *Williams v. State*,[86] "this Court held that the felony murder statute 'not only requires that the murder occur during the course of the felony but also that the murder occur to facilitate commission of the felony.'"[87] However, in direct response to *Williams*, the General Assembly amended the felony murder statute in 2004.[88]

At the time of Nelson's and Hopkins' murders, the statute provided that a person is guilty of felony murder if "*[w]hile engaged in* the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person recklessly causes the death of another person."[89] In *Ray*, this Court found

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[85] *Comer v. State*, 977 A.2d 334, 338 (Del. 2009) (quoting 11 *Del. C.* § 636(a)(2) (emphasis added)).

[86] 818 A.2d 906 (Del. 2003).

[87] *Chao v. State*, 931 A.2d 1000, 1000 (Del. 2007) (citing *Williams*, 818 A.2d at 913.

[88] *See Comer*, 977 A.2d at 338.

[89] 11 *Del. C.* § 636(a)(2) (emphasis added).

trial and appellate counsel ineffective for failing to raise the issue of a flawed felony murder jury instruction that was incorrectly based, in part, on the old felony murder statute.[90] The court reversed Ray's felony murder and related firearm convictions and ordered that he be given a new trial on those charges.[91]

Ray is distinguishable from Kellam's case in one key respect. Ray's instruction contained language about his potential role as an accomplice without providing further context.[92] There, the Superior Court had denied the State's request for an accomplice liability instruction.[93] Here, however, the court approved the State's accomplice liability theory and instruction and, thus, the accomplice liability language in the felony murder instruction was appropriate and not misleading. Notwithstanding that distinction, the Superior Court erroneously reversed Kellam's felony murder and related PFDCF convictions using the very same reasoning espoused by this Court in *Ray*. But contrary to the outcome in *Ray*, trial counsel in this case was not ineffective for failing to object to the outdated felony murder language.

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[90] 280 A.3d at 640.

[91] *Id.* at 631.

[92] *See id.* at 637, 639–40.

[93] *Id.* at 639.

A. Trial Counsel's Failure to Object to the Flawed Instruction Was Not Objectively Unreasonable.

Here, although Kellam's indictment contained the proper statutory language (A157-58) and the trial court instructed the jury as to the charge itself with the proper statutory language (A398, 1442), the court instructed the jury as to the definition of the second element of felony murder with outdated language (A398).[94] In his supplemental affidavit, trial counsel acknowledged that he failed to notice the incorrect instruction and he had "no excuse" for that failure. B420. Trial counsel's admission does not warrant a conclusion that his failure amounted to ineffective assistance of counsel. As the United States Supreme Court emphasized in *Harrington v. Richter*, "*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind," because "[a]fter an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an

[94] In contrast, in *Ray*, the Court incorrectly instructed the jury about the charge itself using outdated language *and* in defining the elements of the charge. *See Ray*, 280 A.3d at at 636-37.

unfavorable outcome."[95]

Certainly, in a perfect world, one of the parties or the court[96] should have noticed and suggested removal of the outdated language from the felony murder instruction.[97] But, unlike in *Ray*, the flawed jury instruction here was not likely to have misled the jury and, arguably, as discussed below, it increased the State's burden. Thus, trial counsel's failure to object to the instruction was not objectively unreasonable.

B. Kellam Was Not Prejudiced by Trial Counsel's Failure to Object to the Flawed Felony Murder Jury Instruction.

In Delaware, a defendant is "entitle[d] to a 'correct statement of the substance of the law."[98] However, this Court will only reverse a case "if the alleged deficiency in the jury instructions undermined ... the jury's ability to 'intelligently perform its

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[95] *Harrington v. Richter*, 562 U.S. 86, 109 (2011). *Cf. Frazier v. Sec'y Pennsylvania Dep't of Corr.*, 663 F. App'x 211, 214 (3d Cir. 2016) (citing *Richter* and finding "Frazier suggests that in conducting this deficiency inquiry, we must ascertain counsel's actual motivation for every challenged action. This runs contrary to precedent and common sense.").

[96] The Superior Court had the incorrect, outdated language in its pattern jury instruction for around 18 years after the law was changed.

[97] *See Ray*, 280 A.3d at 641-42 (finding "defense counsel did not bring their professional judgment . . . to bear" when they did not recognize that the felony murder instruction in Ray's case contained an incorrect statement of the law).

[98] *White v. State*, 243 A.3d 381, 405 (Del. 2020) (quoting *Miller v. State*, 224 A.2d 592, 596 (Del. 1966)).

duty in returning a verdict.'"[99] Thus, "a trial court's instruction 'will not serve as grounds for reversible error if it is reasonably informative and not misleading, judged by common practices and standards of verbal communication.'"[100] "In undertaking this evaluation, the jury instructions must be viewed as a whole."[101]

Incorrect jury instructions might also implicate a defendant's due process right to a fair trial.[102] "A jury instruction that omits or materially misdescribes an essential element of an offense as defined by state law relieves the state of its obligation to prove facts constituting every element of the offense beyond a reasonable doubt, thereby violating the defendant's federal due process rights."[103] However, the United States Supreme Court has held that instructional errors that misstate an element of an offense are still subject to harmless error review.[104]

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[99] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983) (quoting *Newman v. Swetland*, 338 A.2d 560, 562 (Del. 1975)), *quoted in Guilfoil v. State*, 2016 WL 943760, at *6 (Del. Mar. 11, 2016); *accord Probst v. State*, 547 A.2d 114, 119 (Del. 1988)).

[100] *White*, 243 A.3d at 405 (quoting *Probst*, 547 A.2d at 119 (cleaned up)).

[101] *Probst*, 547 A.2d at 119; *see Boyde v. Cal.*, 494 U.S. 370, 378 (1990) ("[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)), *quoted in Dawson v. State*, 581 A.2d 1078, 1105 (Del. 1990).

[102] *See Francis v. Franklin*, 471 U.S. 307, 313 (1985) (citing *In re Winship,* 397 U.S. 358, 364 (1970)).

[103] *Smith v. Horn*, 120 F.3d 400, 415 (3d Cir. 1997) (citing *Carella v. California,* 491 U.S. 263, 265 (1989) (per curiam) (other citations omitted)).

[104] *See Pope v. Illinois*, 481 U.S. 497, 501-03 (1987); *Rose v. Clark*, 478 U.S. 570, 579-81 (1986); *see also Furrowh v. State*, 1990 WL 168281, at *1 (Del. Oct. 2, 1990) ("Even when an error was made in jury instructions, it alone will not be grounds for

Furthermore, due process only *per se* prohibits an instruction that lessens the State's burden of proof, not one that increases or does not change it.[105] As noted by the Superior Court in Ray's case, the outdated felony murder language "placed a higher burden on the State to establish [Ray's] guilt beyond a reasonable doubt for Felony Murder than was required by the post-amendment, applicable version of the statute."[106] This Court rejected that reasoning as justification for upholding Ray's conviction but, as noted above, Ray's instruction also contained inappropriate accomplice-liability language. And it was that language that decreased the State's burden of proof, not the outdated felony murder language.[107] The instruction in Kellam's case did not contain the same defect because the State was permitted to

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ordering a new trial unless it was so prejudicial as to deprive defendant of a fair trial." (citing *Pope*, 481 U.S. at 502; *Rose*, 478 U.S. 570)).

[105] *Cf. Tyson v. Superintendent Houtzdale SCI*, 976 F.3d 382, 392 (3d Cir. 2020) (noting that due process requires the government to prove each element of an offense beyond a reasonable doubt, and "'[t]his bedrock, axiomatic and elementary principle' principle prohibits a jury instruction that lessens the prosecution's burden of proof" (quoting *Francis*, 471 U.S. at 313)).

[106] *State v. Ray*, 2021 WL 2012499, at *10 (Del. Super. Ct. May 19, 2021). *Cf. Comer v. State*, 977 A.2d at 340 (noting that General Assembly was targeting Delaware Supreme Court's "expanded reading of the felony murder statute in *Williams*" when it amended the statute and explained in synopsis that "the new statutory language, 'while' engaged in felonious conduct meant 'only that the killing must be directly associated with the predicate felony as one continuance occurrence'; rather than requiring that the killing affirmatively help facilitate the predicate felony" (citing 74 Del. Laws. ch. 246, §§ 1, 2 (2004))).

[107] *See Ray*, 280 A.3d at 644 ("[D]eletion of the accomplice-liability references [] would have benefitted Ray's defense.").

proceed on a theory of accomplice liability. Thus, the outdated language alone did not create a reasonable likelihood that the jury convicted Kellam based on a lesser burden or some other unconstitutional basis.

Here, the proper language provided that Kellam was guilty of felony murder if one of Kellam's accomplices recklessly caused Nelson's and Hopkins' deaths "while engaged in the commission of, or an attempt to commit, or during the flight after committing or attempting to commit a felony." A1441-42. The incorrect language provided that Nelson's or Hopkins' deaths had to have occurred "in the course of and in furtherance of the commission of a felony, attempt to commit a felony, or the defendants immediate flight after committing the felony." A398. The phrases "while engaged in" committing and "in the course of" committing mean essentially the same thing. The only real distinction between the two elements is the phrase "in furtherance of." Thus, a jury considering whether Kellam was guilty of felony murder under the incorrect standard might have additionally pondered whether one of the accomplices killed Hopkins and Nelson "in furtherance of" the home invasion or robbery. But such language was still "reasonably informative and not misleading, judged by common practices and standards of verbal communication." The language was "incorrect" in the sense that it was an imprecise

statement of the law, but it did not omit or *materially* misstate an element.[108] If anything, it might have caused the jury to believe it had to find that the purpose of the killing was to facilitate the underlying felony, as this Court found in *Williams*.[109] But that interpretation would have increased the State's burden of proof and did not prejudice Kellam.[110]

The Third Circuit has noted that to establish a reasonable probability of a different outcome in jury instruction cases, the court "look[s] to the record to determine whether the instruction interfered with the jury's assessment of the evidence to the extent that, but for the incorrect statements of law, there is a substantial likelihood that a different verdict would have been reached."[111] Given the similarities of the two instructions Kellam's case—the correct version and the

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[108] *See Miller*, 224 A.2d at 596 ("[A] defendant has no right to an instruction in a precise form. He is entitled only to a correct statement of the substance of the law."); *Dawson*, 581 A.2d at 1105 ("Jury instructions do not need to be perfect." (citing *Whalen v. State*, 492 A.2d 552, 559 (Del. 1985))); *cf. California v. Roy*, 519 U.S. 2, 5 (1996) (noting that instruction error in that case could be described as a "misdescription of an element" of the crime, which was subject to harmless error analysis).

[109] 818 A.2d at 913.

[110] *See, e.g., Polsky v. Patton*, 890 F.2d 647, 651-52 (3d Cir. 1989) (finding that where charge given was functional equivalent of a charge of malice, court's omission of malice instruction was harmless error, noting "a charge that contains the essence of the language omitted is harmless"); *See id.* at 652 (finding omission in jury instruction that was in Polsky's favor was "patently harmless").

[111] *Tyson*, 976 F.3d at 397 (citing *Harrington*, 562 U.S. at 112).

incorrect version, but for the incorrect language, there is not a substantial likelihood that a different verdict would have been reached. In other words, there is no chance, based on the evidence presented at trial, that the jury would have acquitted Kellam of felony murder had it been given the correct instruction, nor that it improperly convicted him of those charges solely because of the incorrect language.[112] The Superior Court erred in granting this claim.

[112] *Cf. Neder v. United States*, 527 U.S. 1, 17 (1999) ("[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.").

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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DATED: October 28, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN KELLAM,	**)**	
Defendant-Below	**)**	
Appellant/ Cross Appellee,	**)**	
	)	**No. 224, 2024**
v.	**)**	
	)	**On Appeal from the**
STATE OF DELAWARE,	**)**	**Superior Court of the**
Plaintiff-Below	**)**	**State of Delaware**
Appellee/ Cross Appellant.	**)**	

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DATE: October 28, 2024