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Case Number 224,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN KELLAM,	)	
Defendant-Below	)	
Appellant/ Cross Appellee,	)	
	)	**N. 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 OD DELAWARE

KELLAM'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

The State and the Court below misapplied the case law from the wrong RICO statute to Mr. Kellam's jurisdictional challenge to his amended indictment. The State wrongly argues that removing predicate acts is the equivalent of removing surplusage from the indictment because the predicate acts are themselves not material elements to the indictment. The State relies on case law for the wrong RICO statute, citing to RICO conspiracy and not RICO substantive. Kellam was charged with RICO substantive, which requires that the pattern be proven through predicate acts as a material element of the case. RICO conspiracy does not. RICO substantive requires a number of tests to establish whether or not the predicate acts forma pattern for RICO purposes, which would have a different result if the grand jury had been presented with this new fact pattern. The State also argues that this challenge is barred as indictment defects are not jurisdictional flaws. Again the State relies on the wrong law, as this Court and the Constitution of the State of Delaware state that the court's ability to hear a criminal case is based on the grand jury indictment.

The State argues that the absence of an accomplice liability instruction is not prejudicial or harmful to the case. The State relies on the discretion of counsel to chose trial strategy and notes that the inclusion or not of lesser included offenses is a matter of trial strategy. This disregards this Court's holding in *Ray* as well as the statutory mandate that whenever a § 271 instruction is given and the crime can be

divided into degrees based on the defendant's own mental state, then a § 274 instruction must also be given. Failing to do so was an error as a matter of law and was prejudicial to Mr. Kellam.

The State's cross-appeal on the felony murder convictions resurrects arguments settled by this Court in Ray and by the court below. The State asserts that because accomplice liability was already a part of the case, the 'in furtherance' language raised the State's burden of proof, and because there was no prejudice the inclusion of the wrong language in the jury instructions was harmless error. The State attempts to distinguish *Ray* from *Kellam* but overlooks the parallels at the heart of the case: the introduction of an alternate path to conviction, the incomplete accomplice liability instruction, the testimony of a guilty co-defendant, and the absence of a strategic reason for not correcting the error. That accomplice liability was a part of this case from the beginning makes the issue worse as it further primed the jury for conviction based on the acts of an accomplice and not the defendant's individual mens rea.

REPLY ARGUMENTS ON APPEAL

II. THE COURT ERRED IN FINDING THAT THE STATE'S AMENDMENTS WERE NOT A SUBSTANTIVE AMENDMENT IN VIOLTION OF FEDERAL AND DELAWARE LAW.

A. Appeals Based on Jurisdiction are Not Procedurally Barred Under Delaware Law.

The State incorrectly relies on federal law to assert a procedural bar in Delaware state courts against Mr. Kellam's first claim.[1] The State acknowledges, as was held by the Court below, that procedural bars to Rule 61 appeals do not apply to claims based on a lack of jurisdiction.[2] As noted by the Court below, the legality of Grand Jury indictments is largely a matter of state law.[3] Federal courts are courts of limited jurisdiction and state courts are courts of general jurisdiction,[4] meaning that the limitations on a federal court's jurisdiction do not naturally flow to a state court. The case law cited by the State points to a federal shift away from certain limitations on the United States Supreme Court's ability to hear a case. Citing to *Bain*,[5] the *Cotton* Court explained that for a long period the Supreme Court could

[1] The State does not assert a procedural bar with regards to the remaining claim on appeal, nor to the State's claim on cross-appeal.
[2] State's Ans. Br. at 24; Super. Ct. Crim. R. 61(i)3, (i)(5).
[3] *State v. Kellam*, 317 A.3d 285, 309 (Del. Super. Ct. 2024), (Citing *United States ex. Rel Wojtycha v. Hopkins*, 517 F.2d 420, 425 (3rd Cir. 1975)).
[4] *McKnight v. Hartford Ins. Co.*, 2005 U.S. Dist. LEXIS 8583 at *2.
[5] *Ex parte Bain,* 7 S. Ct. 781 (1887).

only review a criminal conviction if the writ of habeas corpus was jurisdictional.[6] As that restriction no longer exists on the United States Supreme Court the Supreme Court restricted the definition of a jurisdictional error and indicated that claims brought on defective indictments should be brought under Federal Rule of Criminal Procedure 52(b)'s plain-error test.[7] This standard allows the federal courts to correct mistakes in an indictment, even those not raised at trial, that would otherwise have been forfeited.[8] Delaware does not presently have a parallel rule.

The Delaware State Courts on the other hand still hold with the *Bain* Court's reasoning in construing the Delaware Constitution to require a valid indictment by a Grand Jury for a court to have jurisdiction.[9] Recent holdings by this Court have not indicated any shift to the contrary.[10] The State attempts to tie the federal reasoning to Delaware through a series of cases based on *Fountain.*[11] *Fountain*'s holding was based on the 1953 version of the Del. Super. Ct. Crim. R. 12(b)(5) that contain a provision allowing the Superior Court to "retain jurisdiction of a case until a new

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[6] *United States v. Cotton*, 535 U.S. 625, 630 (2002).
[7] *Id.* at 631.
[8] *Id.*
[9] *Johnson v. State*, 711 A.2d 18, 28 (1998); *Spruance v. State*, 1997 Del. LEXIS 150 at *2.
[10] *Grimes v. State*, 2020 Del. LEXIS 252 at *8 (Holding the amended indictment was not deemed to be a substantive change and therefore not an issue for jurisdiction).
[11] State's Ans. Br. at 25, (Citing *Fountain v. State* 288 A.2d 277, 279 (Del. 1972)).

information is filed".[12] R. 12(b)(2) specifically stated that "[l]ack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the Court at any time during the pendency of the proceeding."[13] However R. 7(a) explicitly stated that the Superior court may only proceed on investigation if jurisdiction was affirmed through a grand jury indictment or waiver of such.[14] R. 6(h), titled "Filing", makes clear that in this context "filing" refers to the process of re-indicting an individual to cure a defective indictment.[15]

The exception to filing a new indictment was outlined in R. 7(d) and (e) that stated respectively: "Surplusage. The Court may […] strike surplusage from the indictment." And "The Court may permit […] amendment […] if no additional or different offense is charged and if her substantial rights would not be prejudiced.[16] The contemporary case law held that an indictment was necessary for jurisdiction.[17]

The language of the old rule cited by *Fountain* stated that where there was an issue with the indictment, the Superior Court could keep the case while awaiting refiling with the Grand Jury. Cases following *Fountain* reinforce this idea by conditioning their reasoning on "curable" defects that can be addressed through an

[12] *Fountain v. State*, 288 A.2d 279 (Del. 1972).
[13] Exhibit 1 at 13.
[14] Exhibit 1 at 5.
[15] Exhibit 1 at 3.
[16] Exhibit 1 at 6.
[17] *Smokes v. City of Wilmington*, 282 A.2d 634 (Del. Super. Ct. 1971).

amendment.[18] This Court has explicitly said that *Fountain* is not to be read as eliminating jurisdictional challenges based on a defective indictment.[19]

Recent references to *Fountain* by this Court underscore this distinction by restating its holding as referring to an *essential fact* rather than as to a charging element of an offense.[20] The distinction between an *essential fact* and an *essential element* is discussed more fully below.

The State's arguments in favor of a procedural bar are based on inapplicable federal law and outdated and incorrectly read state law. The State's authority is inapplicable and the Court below's reasoning holds true. Because Mr. Kellam's indictment was substantively amended to change the crimes with which he was charged and not re-presented to the Grand Jury, the defect is an incurable jurisdiction challenge, which is fundamental.[21] Mr. Kellam's claim is not procedurally barred.

B. The Superior Court Incorrectly Applied RICO Conspiracy Law to the Substantive RICO Elements.

Mr. Kellam agrees with the State on most of their legal analysis of the standards for review, protections that are afforded to a defendant by both the federal and state constitution, as well as to the definition of what constitutes a variance rather

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[18] *Downer v. State*, 543 A.2d 309, 311 (Del. 1988); *Haskins v. State*, 1991 Del. LEXIS 277 at *3.
[19] *Downer*, 543 A.2d at 311.
[20] *Miller v. State*, 2020 Del. LEXIS 45.
[21] *Kellam*, 317 A.3d at 305.

than an unconstitutional amendment to an indictment. There remains on this matter two points of discrepancy: (1) what it means for a pattern to be an essential charging element of a substantive RICO charge, and (2) that dropping two predicate offenses from the middle of the indictment substantively changed the alleged pattern into a new pattern.

1. Appellant, State, and the Court below agree on the standards for review, nature of the federal and state constitutional rights implicated, and the legal definition of a variance.

The Court below, the State, and Mr. Kellam all agree that the Grand Jury Clauses of both the United States Constitution and the Delaware Constitution prohibit constructive amendments and prejudicial variances to an indictment.[22] The parties all also acknowledge that while the United States Supreme Court has yet to apply the Grandy Jury Clause to the individual states, and that this Court has not yet chosen to do so, a substantive amendment to a Grand Jury Indictment that presents a new or different charge not presented to the Grand Jury violates Delaware law.[23] A substantive amendment, as the Court below noted and the State affirmed, occurs when an essential element of the charged offense is modified, where as a variance occurs when the indictment's charging terms are unchanged.[24]

[22] *Id.* at 308; State's Ans. Br. at 26, 33; Op. Br. at 24.
[23] *Kellam*, 317 A.3d at 308; State's Ans. Br. at 32-33, Op. Br. at 37.
[24] *Kellam*, 317 A.3d at 310; States Ans. Br. at 27.

Both the State and the Court Below further concede that such a modification would be a violation of Mr. Kellam's 6th amendment rights to Fair Notice, which does apply to the States.[25] The parties also agree that an essential element of a RICO charge includes "(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."[26] However, there seems to be some confusion as to what it means for a "pattern" to be an essential element.

2. The Superior Court failed to note the distinction that RICO conspiracy does not require any predicate acts be alleged and substantive RICO requires a pattern of at least two predicate acts be alleged.

There are two primary types of RICO charges: RICO conspiracy and RICO substantive.[27] RICO conspiracy's sole focus is the unlawful agreement to commit one of the substantive offenses identified in the RICO statute.[28] Substantive RICO requires the State to prove that the defendant committed 2 or more predicate acts of racketeering that form a pattern.[29] Because RICO conspiracy only requires an agreement, not an action, the State does not have to prove *any* predicate acts by the

[25] States Ans. Br. at 27; *Kellam,* 317 A.3d at 36.
[26] State's Ans. Br. at 28, (Citing *White v. State*, 243 A.3d 381, 398 (Del. 2020)); *Kellam,* 317 A.3d at 310.
[27] *United States v. Ledbetter*, 2015 U.S. Dist. LEXIS 116397 at *17.
[28] *Id.*
[29] *Id.*

defendant, or even that *any* predicates were ever committed by anyone.[30] The agreement is the essential element for RICO conspiracy, and any specific acts brought by the State or cut from the indictment are not essential elements of the indictment.[31] Kellam was not charged with RICO conspiracy.[32]

This distinction is important because all of the case law cited by the State to show that eliminating predicated offenses does not change the charging element are RICO conspiracy cases or conspiracy cases brought under non-RICO theories.[33] In each of these cases the essential element is the agreement, not the pattern.

RICO substantive does require that the State allege predicate acts.[34] It is not enough to allege random acts, they acts must form a pattern that must pass a "continuity plus" relationship test which examines the relationship number of

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[30] *Id*.
[31] *Id*.
[32] A38-40, 156. Kellam was originally charged with RICO conspiracy in the original indictment, but the State dropped this charge from the amended indictment. As Kellam was not tried on RICO conspiracy whether or not the amended indictment was a violation of due process rights with regards to that charge is immaterial.
[33] *United States v. Zauber*, 857 A.2d 137 (3d Cir. 1988) (Defendant was charged on RICO conspiracy.); *United States v. Conley*, 92 F.3d 157 (3d Cir. 1996) (Defendant was charged with conspiracy); *United States v. Hornick*, 491 F. App'x 277 (3d Cir. 2012) (Defendant was charged with RICO conspiracy.); *United States V. Weinstock,* 1998 WL 344047 (6th Cir. May 27, 1998) (Defendant charged with conspiracy.); *Ledbetter*, 2015 U.S. Dist. LEXIS 116397 (Defendant charged with RICO conspiracy.); *Cf. United States v. Rios*, 830 F.3d 403 (6th Cir. 2016) (Defendant charged with RICO conspiracy.); *United States v. Pumphrey*, 831 F.2d 307 (D.C. Cir. 1987) (Defendant charged with conspiracy.).
[34] *Zauber*, 857 A.2d at 149.

unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity when determining if a pattern existed.[35] This is broken into a two pronged test of relatedness and continuousness.[36] The continuousness prong is split into a two-step inquiry about the continuity of the alleged predicate acts.[37] The first step asks whether the nature of the past acts creates a threat of continued future activity—this is "open-ended" continuity.[38] If the alleged pattern fails this test the next step is to ask if alleged acts happened over a substantial period of time but have now concluded, "closed-ended" continuity.[39] Acts that only extend over a few weeks or months and do not threaten future conduct do not qualify, the concern is long-term criminal conduct.[40] While each Circuit varies slightly in its standard for "substantial period of time", the Third Circuit has consistently held that periods lasting less that 12 months do not qualify.[41] Given that the alleged acts occurred less than 12 months apart, they would fail the closed-ended continuity test.

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[35] *Id*.
[36] *Young v. West Coast Industrial Relations Ass'n*, 763 F. Supp. 64, 71 (D. Del. 1991).
[37] *Id.*
[38] *Id.*
[39] *Id*. at 72.
[40] *Id*. at 73.
[41] *Id.*; *Meade v. Guar. Bank*, 2013 U.S. Dist. LEXIS 139404 at *23; *Preferred Tax Serv. V. The Tax Auth., Inc.,* 2006 U.S. Dist. LEXIS 18652 at *11.

As noted by the State, this Court holds that the essential elements of Delaware's substantive RICO statute, under which Kellam was charged, that the State must prove are the presence of an enterprise and a pattern of racketeering.[42] This Court further emphasized that the pattern was a separate element apart from the rest and that to prove it the prosecutor must show through the individual racketeering activities the existence of a pattern.[43] This Court went on to explain that the immense number of iterations of fact scenarios make determining the existence of pattern a fact specific question.[44] Delaware code implies that each individual racketeering activity must be evaluated to determine whether it fits into the "continuity plus" pattern. It requires that the activities "are not so closely related to each other and connected in point of time and place that they constitute a single event".[45]

When evaluating if alleged acts form a RICO pattern and not just ordinary conspiracy, courts refer back to the intent of the statute.[46] The purpose of the statute was to combat "long-term criminal conduct" and the "danger posed by organized crime-type offenses."[47] Careful scrutiny is necessary because of how easy it is to shape a pattern out of a series of allegations that may not actually rise to the standard

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[42] *Stroik v. State* 671 A.2d 1335, 1340 (Del. 1996).
[43] *Id.* at 1341.
[44] *Id*. at 1342.
[45] 11 *Del. C*. § 1502(5)(a)(3).
[46] *Yuciaipa Am. All. Fund I. L.P. v. Ehrlich*, 204 F. Supp. 3d 765, 775 (D. Del. 2016).
[47] *Id*.

intended.[48] The patterns proposed need to be reviewed with close scrutiny to ensure that only those RICO claims that really fit within the intent of the statute go forward.[49] That the acts are attributed to a defendant operating as a part of long-term association that exists for criminal purposes.[50] While a single fraudulent scheme can be enough to establish a RICO pattern, if that scheme is short lived and directed at a limited number of people there is usually something more required.[51]

Recently in *Lloyd*, while considering the meaning of "enterprise" in RICO jury instructions, this Court noted the importance of looking at jury instructions in the whole.[52] This Court then recommended that the Third Circuit's model instruction be examined when developing state instructions.[53] Reading those instructions it becomes apparent that each step of the "pattern" instructions moves from the general to the specific:

"To establish this element, the government must prove each of the following beyond a reasonable doubt:

> First: That (name) committed at least two of *the* acts of racketeering activity alleged in *the* indictment and that *the* last act of racketeering

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[48] *Id.*
[49] *Id.*
[50] *Id.* at 781.
[51] *Id.*
[52] *Lloyd v. State*, 152 A.3d 1266, 1271, 1273 (Del. 2016).
[53] *Id*.

activity occurred within ten years […] after *the* commission of *a* previous act of racketeering activity;

Second: That *the* acts of racketeering activity were related to each other, meaning that there was a relationship between or among *the* acts of racketeering activity […];

Third: That *the* acts of racketeering activity amounted to or posed a threat of continued criminal activity […]; and

Fourth: That (name) conducted or participated, directly or indirectly, in *the* conduct of *the* enterprise's affairs "Through" *the* pattern of racketeering activity."[54]

It is a well-established rule of law that the definite article "the" limits references to the specific subject it precedes, whereas "a" generalizes so that any such designated subject may do.[55] The specific acts listed by the State matter and it is the interaction of those specific acts that form *the* pattern—a specific pattern, formed from specific acts and their relationship to each other. This fact specific analysis is reflected in the jury instructions given to Mr. Kellam's jury: "connected

[54] Third Circuit Court of Appeals, *Racketeer Influenced and Corrupt Organizations (RICO) (18 U.S.C. sec. 1962, 1963) (Jan 2024) Model Jury Instructions* (last visited Nov. 25, 2024), https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions.

[55] *Band's Visit Nat'l Tour LLC v. Hartford Fire Ins. Co.*, 307 A.3d 387 (Del. Super. Ct. 2023).

with each other" and not just a series of "separate, isolated or disconnected acts."[56] To determine whether or not the offenses are related the jury was asked to determine if the acts in relation to each other had same or similar purposes, results, participants, victims, or methods. Factors can include "*the* number of unlawful acts, *the* length of time over which *the* acts were committed, *the* similarity of *the* acts; *the* number of victims; *the* number of perpetrators; and *the* character of *the* unlawful activity."[57]

The United States Supreme Court adopted the dictionary meaning of a pattern, an "arrangement or order of things" more than a number alone, but the relationship between the alleged predicate acts that makes a pattern.[58] It is the weighing of these factors that determines if a pattern exists and defines which acts are part of that pattern—each individual act is to be evaluated for its relationship with the other acts. 18 U.S.C. §1961, upon which 11 Del. C. § 1502 was based, only gives the minimum number of predicate acts for a pattern, but it assumes that a RICO pattern is something beyond just the number of act.[59] It is not the speed of a horse's hoof falls, but rather the rhythm that determine the gait.

By removing the May and August acts the number of events was changed, the length of time over which the acts occurred was put into question, the similarity was

[56] A423. Emphasis added.
[57] A423-24. Emphasis added.
[58] *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238 (1989).
[59] *Id.*

decreased. Properly severing the January changes the number and identity of the perpetrators, the length of time, the number of acts, and the type of victims.

The original indictment listed the predicate acts as:

(1) "Home Invasion, Murder in the First Degree, and [PFDCF], against Cletis Nelson and William Hopkins";

(2) "Home Invasion, Robbery First Degree, Assault Second Degree, Reckless Endangering First Degree, [PFDCF], against Isaiah Phillips";

(3) "Home Invasion, Attempted Robbery First Degree, and [PFDCF} against Ashley Moore";

(4) "Home Invasions, Assault Second Degree, Attempted Robbery First Degree, [PFDCF], against Milton Lofland"; and

(5) "Home Invasion, Attempted Robbery First Degree, Attempted Murder First Degree, Reckless Endangering First Degree, and [PFDCF], against Azel Foster. A38-39.

By striking the middle predicate offenses, the State changed the rhythm of the predicate acts. It rightly now reads:

(1) "Home Invasion, Murder in the First Degree, and [PFDCF], against Cletis Nelson and William Hopkins";

(2) .....……;

(3) …….……;

(4) "Home Invasions, Assault Second Degree, Attempted Robbery First Degree, [PFDCF], against Milton Lofland"; and

(5) "Home Invasion, Attempted Robbery First Degree, Attempted Murder First Degree, Reckless Endangering First Degree, and [PFDCF], against Azel Foster. A156-157.

Another way of writing this would be with just the dates. The original indictment might read:

(1) January 13, 2014;

(2) May 18, 2014;

(3) August 22, 2014;

(4) December 11, 2014;

(5) December 14, 2014.

The amended would then read:

(1) January 13, 2014;

(2) ……..…….;

(3) ……;

(4) December 11, 2014;

(5) December 14, 2014.

The change in the timing of the pattern is obvious and this newly created separation changes the relationship of the predicate acts with each other. The

difference in purpose[60] becomes stark when January's crimes are more distantly separated from December's. As previously discussed and undisputed by the State, the motives for the murders were mixed and involve things like jealousy and revenge.[61] Witnesses testified at trial to being cheated on, anger at being beaten, and being under the influence of a mixture of drugs and alcohol.[62] These formed the basis of the seeming mob mentality to attack Nelson and Hopkins, the drugs and money merely being the catalyst not the purpose. It is difficult to see a drunken and high conversation coming from a motel bathroom brought on by anger and jealousy into as the sort of organized enterprise, with long-term criminal conduct, envisioned by congress and later by our legislature.

The State paints the picture that Mr. Kellam went with the primary attempt to order a killing, something that was not replicated in any of the later crimes.[63] Whereas the home invasions that occurred almost a full year later are represented as being a purely criminal business model with no such similar homicidal motives alleged.[64] Even if the argument could be made that the quartiary purpose of the January events was a robbery, murder is a very different result from a burglary. The

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[60] *United States v. Bergrin*, 650 F.3d 257, 270 (3rd Cir. 2011) (Holding that the relatedness prong may be satisfied where all the predicate acts were committed for the same or similar purpose.).
[61] A734-355, 781-85, State's Ans. Br. at 12.
[62] *Id*.
[63] *See generally*, State's Ans. Br. at 16-19.
[64] *Id*.

participants are not the same. Two of the primary drivers of the first incident do not make a reappearance at the later ones, with Rentoul and Heverin being conspicuously absent. A new character is introduce in the form of Jackson Vanvorst for the later incidents, who was not present during the January narrative.[65] Robinson describes his trip to Delaware as if it were a social call.[66] That does not sound like a regular way of doing business. With one set of incidents 11 months apart and nothing until the parties were arrested 7 months later, it is difficult to say that this projected a risk of crime into the future. If the pattern is to be examined as just the two December incidents, then that is a very narrow set of points and poses even less of a risk of threat into the future and even less of an enterprise. It is entirely reasonable that the Grand Jury would have viewed the minimum of 2 predicate acts, absent any meaningful assertions of future threats, as insufficient to establish open-ended continuity.

The victims of the reduced predicate acts are not the same. Drug dealers is the label for some of them, but not all. In the first instance the group knew that the people in the trailer had both drugs and money on hand—Rentoul testified to having just seen it.[67] She did a reconnaissance mission to verify this and could attest as to who

[65] B183-84.
[66] A1221-23.
[67] B98-99.

was there in the trailer.[68] The victims involved were two single men, counting the proceeds of their drug enterprise. In the second instance one party was a known active drug dealer, but no one stopped into his home to verify what he did or didn't have. No allegations were made against his girlfriend who was also a victim.

Finally in the last robbery they broke into the home of someone who they did not know to be a current drug dealer. Foster was a former drug dealer who was now a small business owner.[69] There the victims included small children, right before Christmas. The careful planning that was allegedly done in preparation for the January crimes was conspicuously absent here. That Mr. Kellam would know an intimate detail such as whether or not Foster kept a gun in his home, but not if he was an active dealer with cash seems to suggest that there were other motives for that robbery. An inconsistency of fact that the Grand Jury should be able to weigh in light of the now more limited fact pattern. To more closely examine whether or not the facts form a true pattern or are being made to fit the RICO mold.

If the January events are properly separated out from the December incidents, which happened days apart, rather than the factually distinct January incident from 11 months earlier, then the dynamics of the alleged pattern change even further.

[68] B112-14.
[69] A1545.

The December activities on their own do not show a threat of continuing into the future. The courts have repeatedly cited *H.J. Inc.* in stating that while two is the minimum for a pattern, two is not necessarily enough.[70] In cases like *Cannistraro*, where the State alleged only three predicate acts over a period of several years, the Court relied on the continuous obstruction of justice (falsification of testimony, bribery, and destruction of records) to connect the acts together and form a patter.[71] The existence of that secondary pattern was the basis for showing a threat of continued future activity.[72] It showed a sophisticated relationship among the defendants aimed at concealing and protecting over a 6-year period.[73] Whereas a single victim, a single injury, and a single short-lived scheme with only two active perpetrators is insufficient.[74] The wire taps do not show enough of a secondary scheme to elevate the December incidents from a short-lived scheme with only a few active perpetrators to an ongoing enterprise threatening future activity. At best it shows an association of convenience—not a criminal business.

Nor can the State rely on the facts of the dropped acts to shore up these holes and substantiate the pattern—the underlying charges were dropped as well and all facts that might be known from them remain unproved.

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[70] *Nunes v. Fusion GPS*, 531 F. Supp. 3d 993, 1011 (D. Va. 2021).
[71] *United States v. Cannistraro*, 800 F. Supp. 30 (D.N.J. 1992).
[72] *Cannistraro*, 800 F. Supp. at 75-77.
[73] *Id.*
[74] *Rose v. Barktle*, 871 F.2d 331, 364 (3rd Cir. 1989).

Every court thus cited has held the test for continuity and relatedness to be a difficult concept that cannot have a brightline test. It is very fact specific and impossible to be reduced to a formula.[75] Where the minutiae of the fact pattern matters, it is inappropriate to allege that the analysis by the Grand Jury would have inevitably had the same result when almost half of the predicate acts were eliminated.

And whether or not two predicate acts a few days apart is enough to establish an enterprise's "regular way of doing business" is a very different question from whether or not 5 predicate acts over the course of almost a year shows their regular business activity.

The threat of ongoing activity is not present as it sounds like the activity is all centered around whether or not Robinson and Waples were coming into town.[76] This is too sporadic to be considered regular, with the language relied upon by the State suggesting that Mr. Kellam was not in control or even confident of the regularity upon while they might do so. At best, this was an association of convenience, not one of any formal organization.

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[75] *Cannistraro*, 800 F. Supp. at 73.
[76] B43-44, 172; *Shahin v. Darling*, 606 F. Supp. 2d 525, 538 (Del. D. Ct. 2009) (Stating that where the predicate acts all centered around the conclusion of specific stages of civil litigation which had a natural termination there was a lack of continuity).

Further, the Third Circuit has cautioned against reading the statute any more broadly than it already is, noting that its already encompassing nature, if opened to garden variety crimes would swallow state civil and criminal law whole.[77] The intent was not to make it so that every case is a RICO case.[78] Not every set of crimes is a pattern, and not every pattern is a RICO pattern.

A change in the rhythm of the relationship means that while the acts have remained the same, the pattern is not the same. Horses have three gaits each with its own rhythm. Four beats is a walk, two beats is a trot, and three beats is a canter—four hooves but different gaits depending on the order and rhythm in which the horse puts them on the ground. As the Supreme Court said, the "arrangement or order of things" matters.[79] If the pattern presented to the grand jury is not the same pattern presented to the petit jury, then that is a change to an essential charging element, the equivalent of swapping out a table for a chair,[80] and is a substantive change that is unconstitutional under both the United States Constitution and the Delaware Constitution. The grand jury was not asked to observe this gait and made their finding on the soundness of the State's case by observing a different gait entirely.

[77] *Annulli v. Panikkar*, 200 F.3d 189, 200 (3rd Cir. 1999).
[78] *Id.*
[79] *H. J. Inc.*, 429 U.S. 238 (1989).
[80] *Johnson v. State*, 711 A.2d 18, 21 (Del. 1998).

Mr. Kellam is entitled to a new trial and a re-indictment by the Grand jury with the correct charging instrument.

3. The Superior Court Erred in holding that the constructive amendment was not prejudicial to Kellam's defense.

While it is not necessary to show prejudice to the defendant as the amendment to the grand jury indictment was unconstitutional on its face and invalidates the trial court's jurisdiction over the matter, this amendment is prejudicial to Mr. Kellam's substantial rights. As the State notes, one of the purposes of the grand jury indictment is to give Mr. Kellam notice so that he can prepare an adequate defense.[81] As discussed above, the change of one pattern for another amounts to a different charge by a different charging element, and the substitution of one pattern for another is not a matter of a lesser included offense for a higher. Had the State presented both patterns to the Grand Jury and asked for a determination of a RICO finding on each pattern separately then this would be a case of alternative means being presented. That is not what the State did.

The State justifies their substitution by asserting the separate indictment of each of the five acts as proof the Grand Jury relied on all of the acts and therefore each of the acts.[82] Again, it is not about the number of acts, but about the *relationship*

[81] State's Ans. Br. at 33, (Citing *Tingle v. State*, 2003 WL 141269, at *2 (Del. Jan. 17, 2003)).
[82] State's Ans. Br. at 35.

between the acts. The State's reliance on *Boyd* to diminish the weight of the temporal aspect of relatedness is misplaced.[83] *Boyd*'s challenge had to do with the definition of an "enterprise" not with the elements of a "pattern". The *Boyd* Court gave no indication that it's rejection of additional structural requirements for an enterprise were meant to diminish all of their other case law on the fact specific nature of a pattern's relatedness and continuous elements.

The State then asserts that the sole purpose of the indictment is to act as a finding of probable cause and to put Mr. Kellam on notice of that events with which he might or might not be charged.[84] However, this argument ignores the special protection that a RICO indictment affords the State's case. The fact that the grand jury returned a RICO indictment for the listed predicate acts was the entire basis for the Trial Court's denial of Mr. Kellam's motion to sever the January incidents from the rest of the charges.[85] The RICO link among the acts was also the primary basis for the Court below's denial of Mr. Kellam's severance claim.[86]

Joining the January murders to the December burglaries prejudiced Mr. Kellam's jury against him and the RICO seal on that joinder cut off his one remedy against it: severance. Without the RICO protection for the State's case, secured

[83] State's Ans. Br. at 35.
[84] State's Ans. Br. at 36.
[85] A259-260.
[86] *Kellam*, 317 A.3d at 316.

through the grand jury indictment, Mr. Kellam's entire defense strategy would have been different. His ability to prepare an adequate defense was impinged making the RICO indictment prejudicial and in violation of Delaware law. To permit the use of a RICO indictment to shore up a weak case against defense tools such as severance is taking the curb from the prosecutor's mouth and placing it in the defendant's, restricting him to the lamest of walks.

II. THE SUPERIOR COURT ABUSED ITS DISCRETION IN NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO REQUEST § 274 ACCOMPLICE LIABILITY INSTRUCTIONS.

As the Court below stated, 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?"[87] Their questions were right, but their answers were incorrect. This Court's reasoning in *Ray* answers both clearly and correctly—yes.

The Trial court is responsible for jury instructions and counsels' job is to call attention to instructions they feel are applicable and why.[88] If a trial court allows the concept of accomplice liability into the case, then they carry the responsibility for explaining that concept to the jury in a way that allows the jury to properly weigh the defendant's guilt or innocence.[89] This Court held that counsel's failure to object to inadequate instructions did not meet an objective standard of reasonableness.[90] The fact that Mr. Ray's counsel's failure was unintentional and Mr. Kellam's counsel's was intentional does not change the objective standard.[91] The burden on

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[87] *Id.* at 324, (Citing *Chance v. State*, 685 A.2d 351, 354 (Del. 1996).).
[88] *Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2001).
[89] *Ray v. State*, 280 A.3d 627, 641 (Del. 2022).
[90] *Id.*
[91] *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).

the Courts was the same, the incorrectness of the instructions was the same, the failures were the same, the ineffectiveness is the same. This is a question of law.

A. A Chance Instruction is Required by Law When Accomplice Liability is a Part of the Theory of the Case.

Given the heavy emphasis on accomplice liability and the testimony offered by co-defendants who accepted plea deals and openly admitted their culpability, a § 274 instruction was necessary to ensure that the jury's focus was on Mr. Kellam's individual mental state and not that of his co-defendants'. The failure to give the § 274 instruction presented a similar issue as the "in furtherance" language, the path to conviction through accomplice liability was opened but not properly redirected to instruct the jury to focus on Mr. Kellam's individual mens rea, which is a key element of those specific crimes. Independent convictions of each offense beyond a reasonable doubt do not cure the error, as the error does not have to do with a higher threshold, but the elements.

The State has asserted, as the Court below did, that there was not sufficient record evidence to support a § 274 instruction.[92] Even if true, see discussion below, this argument is unavailing, for as this Court noted in *Ray*, where there was *no* record evidence to support an accomplice liability instruction, the issue is not about the evidence but about the jury's proper instruction as to accomplice liability.[93] This

[92] State's Ans. Br. at 39.
[93] *Ray*, 280 A.3d at 645.

failure to inform the jury of the *individualized* determination they are required to make as to culpability for any aggravating factor or circumstances undermined the jury's ability to intelligently decide factual issues.[94] The damage to the confidence in the fairness and integrity of Mr. Kellam's trial is such that had this issue been raised on direct appeal this Court would have found plain error and reversed his improper convictions. Mr. Kellam is entitled to a mistrial.

B. The Defendant's Right to a Chance Instruction is Not Dependent on the Factual Record.

The Court below and the State rely on a series of Delaware cases that hold a Chance instruction is waivable and its appropriateness is dependent upon a rational factual basis in the record for it as well as the exception created in 11 Del. C. § 206(c), (*Method of prosecution when conduct constitutes more than 1 offense*).[95] While this is persuasive on its face, it ignores the established principles of "whole statute interpretation".[96] The criminal code must be read as a whole and not in parts,

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[94] *Id.* At 645.

[95] State's Ans. Br. at 38, both citing *Erksine v. State*, 4 A.3d 391 (Del. 2010); *State v. Dickinson*, WL 3573943 (Del. Super. Ct. Aug. 17, 2012); *Lawrie v. State*, 643 A.2d 1336 (Del. 1994); *CF Chrichlow v. State*, 2012 WL 3089403 (Del. Jul. 30, 2012).

[96] *Coastal Barge Corp. v. Coastal Zone Industrial Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985) ("If a statute is reasonably susceptible of different conclusions or interpretations, it is ambiguous…Ambiguity may also arise from the fact that giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature.").

with the rhythm of each section harmonizing with the whole.[97] The Court's role is to explain the legislative intent without rewriting the statute to fit a particular policy position.[98] Reading *Ray* in conjunction with these cases harmonizes any potential dissonance between §§ 206(c) and 271 and 274 and resolves the inherent conflict between the line of cases cited by the State and *Chance*'s progeny.[99]

Reading § 206(c) in conjunction with § 206(a) suggests that the limitations of this section are intended to apply to included charges based on the defendant's *personal* conduct: "When *the* same *conduct* of a defendant may establish…".[100] As noted earlier, "the" is a limiting article intended to emphasize the particular, specific subject following it—here, that defendant's specific act.[101] Whereas 11 Del. C. § 274 is triggered when the defendant's individual *mental state* and not his conduct is the element at issue. While the *Ray* opinion does not expressly address the § 206(c) exception, it does hold that its requirement of a "rational basis in the evidence" does not apply to accomplice liability cases.[102] The logical conclusion from this holding

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[97] *Taylor v. Diamond State Port Corp.,* 14 A.3d 536, 538 (Del. 2011).
[98] *Diamond*, 14 A.3d at 542.
[99] *Chance v. State*, 685 A.2d 351 (Del. 1996); *Johnson*, 711 A.2d 18; and *Allen V. State*, 970 A.2d 203 (Del. 2009).
[100] 11 *Del. C*. § 206(a). (Emphasis added.).
[101] *Band's Visit Nat'l Tour LLC v. Hartford Fire Ins. Co.*, 307 A.3d 387 (Del. Super. Ct. 2023).
[102] *Ray*, 280 A.3d at 645; *Demby v. State*, 744 A.2d 976, 979-80 (Del. 2000) ("When a jury is instructed that it can find a defendant guilty under an accomplice liability theory, the court must inform that jury that it is to make an individualized determination of culpability.").

is that the §206(c) exception does not apply to accomplice liability cases where the defendant's mental state is an element of the included charges. Under this line of reasoning Mr. Kellam's jury instructions were incorrect as a matter of law and the jury's ability to assess his individual mental state was undermined by counsel's objective failure to request the § 274 instruction. Mr. Kellam is entitled to a new trial.

C. Mr. Kellam's Record is Resplendent with Rational Factual Basises.

Even if a rational basis in the record were necessary, the State's position overlooks a multitude of disputed facts that provide a rational basis for lesser convictions. It is impractical to attempt to list all of the factual circumstances that support Mr. Kellam's position, and so the following are minimal examples of some of the evidence available on this matter.

1. Felony murder.

The State attempts to separate out the harm from a failure to request a § 274 instruction from the harm from an incorrect felony murder instruction.[103] This is inappropriate. This Court has held that jury instructions need to be reviewed as a whole.[104] The need to review instructions as a whole when reviewing compounding errors was underscored in this Court's recent holding in *Ray*. There the Court noted that what started as an error to instruct the jury on a correct statement of law, flowed

[103] State's Ans. Br. at 48-49.
[104] *Lloyd*, 152 A.3d at 1266.

through to the failure to properly instruct the jury on accomplice liability.[105] The two matters were inherently intertwined as the concepts built upon each other.[106] The incorrect felony murder instruction directed the jury to look at the actions and intentions of the accomplices, and no direction was given asking them to refocus on Mr. Kellam's individual mental state. As a result the jury did not have the proper context to evaluate the conflicting trial testimony.

The State's evidence at trial consisted largely of co-defendants who admitted that they were high while discussing the intended robbery of Hopkins and Nelson.[107] Witness testimony contradicted each other as to who was a proponent of the robbery[108] and the same witness's testimony was inconsistent one day to the next with Stratton specifically admitting that he could not remember the events of that night without paperwork prepared in advance.[109] Even one of the shooters admitted that he gave inconsistent testimony over various police interviews as to where the guns came from when it would serve him.[110]

Where there is a dispute as to whether or not Mr. Kellam provided the guns or even knew about the guns, the State cannot assert as an undisputed fact that Mr.

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[105] *Ray*, 280 A.3d at 642-644.
[106] *Id.*
[107] B114; A734; A1309.
[108] B107-112, 124; A735, 791; A889.
[109] A1012.
[110] A1315.

Kellam 'sent' armed men to a robbery. What is obvious from the witness testimony is that at least one accomplice committed a murder *in furtherance* of the robbery. The State's case was built upon the idea that Mr. Kellam was guilty as an accomplice of this crime. If his co-defendant was guilty of this crime and he is guilty of his accomplice's actions taken in furtherance of the felony then Mr. Kellam is guilty of that crime. Failing to give the § 274 instruction caused the jury's evaluation to stop here and did not ask them to consider what individual knowledge Mr. Kellam possessed prior to finding him guilty under this theory.

2. Home Invasion.

The State asserts that it is not rational that Mr. Kellam could have been involved with the planning of the robberies without knowledge of the involvement of the guns as they were an integral part of the planning process. And yet two of the State's witnesses assert that guns were not brought up during the planning process at the hotel.[111] Yet another asserts that at least one of the guns came from someone other than Kellam.[112]It is entirely plausible that in the high and chaotic environment in which these matters were discussed that Mr. Kellam was not aware of all details of the planning process. Had the jury been asked to consider Mr. Kellam's individual mental state with regards to this aggravating factor, they could have concluded that

[111] A107-112; A781.
[112] A1330-31.

he was involved with the chaotic planning process by may not have been in involved the conversations involving guns.

3. **Robbery**.

Here again, the State is dismissive of the conflicting testimony regarding Mr. Kellam's knowledge of the circumstances of the crimes. Mr. Kellam was not present for the murders of Nelson and Hopkins and testimony was not universally in support of his involvement in the planning of a robbery involving guns.[113] Key witness Robinson testified that his original testimony to the police about participants in the robberies was a lie that he corrected only because it no longer helped someone he cared about.[114] Additionally he mentions guns that originated with people other than Mr. Kellam.[115] While it is apparent that Kellam's co-defendant's were aware that guns would be present, it does not logically follow that Mr. Kellam knew guns would be involved. Where Mr. Kellam was again not present for the robberies it is entirely plausible that he did not know about the guns until after the fact.

[113] A1330-31.
[114] A1348-1349.
[115] A1349-1350.

SUMMARY OF THE ARGUMENTS IN RESPONSE TO STATE'S CROSS-APPEAL

Cross-Appellant's Claim is DENIED. The Superior Court did not abuse 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 objectively unreasonable given that Mr. Kellam was entitled to a correct statement of law and the misstatement of outdated law misled the jury opening up another path to conviction. That accomplice liability was already a part of Mr. Kellam's trial enhanced the harm to him as it increased the likelihood that the jury focused on his accomplices' guilty minds. But for the jury instructions' incorrect language there is a substantial likelihood that the jury would have reached a different verdict.

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO OUTDATED LANGUAGE IN THE FELONY MURDER JURY INSTRUCTION.

A. 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. Preserved at B317-26.

B. Standard of Review

This Court reviews the Superior Court's holdings for postconviction relief for abuse of discretion.[116] Facts finding is not disturbed on appeal if based in competent evidence and not clearly erroneous.[117] Questions of law are reviewed *de novo.*[118]

C. Merits of the Argument

The Court below understood and correctly applied this Court's holding in *Ray* to Mr. Kellam's felony murder claim. As the Court below noted, Mr. Kellam's and Mr. Ray's case are parallel in many ways.[119] Both trials weighed heavily on the testimony of guilty co-defendants,[120] both received an incorrect statement of law in their felony murder instruction, neither received a complete instruction on

[116] *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008).
[117] *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008).
[118] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013).
[119] *Kellam*, 317 A.3d at 320.
[120] *Ray*, 280 A.3d at 640.

accomplice liability, both were convicted of felony murder, and both received more than a life sentence.[121]

1. Mr. Kellam Has an Unqualified Right to a Correct Statement of Law.[122]

The State acknowledges that Mr. Kellam's felony murder instruction was not a correct statement of law.[123] Their justification for this failure is the same defense rejected by this Court in *Ray*.[124] The State attempts to distinguish Mr. Kellam's case from Mr. Ray's by noting that Mr. Ray's request for an accomplice liability instruction was denied by the Trial Court after introduction of the concept with no basis for accomplice liability in the record.[125] Whereas, the State argues, Mr. Kellam's case was built around a theory of accomplice liability and his jury received a 271 instruction.[126]

The principle reflected in *Ray* is that of misleading jury instructions.[127] The misdirection in Mr. Ray's instructions were admittedly more clear, as the theory of accomplice liability was totally absent from his case, but that principle is the same.[128] The *Ray* instructions were problematic for two reasons.

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[121] *Id*. at 631.
[122] *Id.* at 640.
[123] State's Ans. Br. at 51, A398.
[124] State's Ans. Br. at 51;
[125] State's Ans. Br. at 50.
[126] State's Ans. Br. at 51.
[127] *Ray*, 208 A.3d at 640.
[128] *Id.* at 639.

First, they introduced the idea of accomplice liability as a path to conviction without a factual basis for it in the State's case. "In furtherance" suggests that this murder was a part of the plan of the underlying felony and so an accomplice having agreed to the felony, also agrees to the actions taken by his co-defendants in furtherance of that felony. It becomes an action that is part of the overall felonious plan.

The statute properly read does not make the same connection. The correct statute asks simply: did the murder occur during the felony? This is a stand-alone concept and does not automatically tie an accomplice of the underlying felony to any murder committed by other participants during the felony. Under the correct statute, being charged under an accomplice liability theory, the jury would have had to ask (1) was Mr. Kellam an accomplice to the felony? (2) was Mr. Kellam an accomplice to the murder that occurred during the commission of the felony? The "in furtherance" language eliminates that second question. Under that charge, if Mr. Kellam was an accomplice to the felony then he is liable for the actions of his co-defendants taken as part of, or *in furtherance of*, that plan. And if the murder was done in furtherance of that plan, then he is liable for the murder. This is an alternate route to conviction not contemplated by the general assembly. Otherwise they would have written it that way.

Second, Mr. Ray's instructions lacked the proper context of either a 271 or 274 instruction. Failing to give those instructions meant that the jury was told they could convict Mr. Ray for the crimes of his accomplices, but not told the conditions on which they could do so. The "in furtherance of" language introduced a new mens rea element to the charge. It asked the jury to consider the purpose for which the murder was being committed and if that purpose was the underlying felony. To the extent that this element is absent from the revised statute, the State is correct, this is an element that they were not required to prove and therefore increased the number of elements they needed to prove. That is a false understanding of the instruction's effect.

Jury instructions provide the framework by which a jury judges the facts of a case. The jury cannot apply the law if the jury is not told the law. A juror does not know if a law is outdated, they only know that the law was presented to them by the court to be applied to the facts. And the jury does think about the instructions and how they apply to the facts. It can be inferred that Mr. Kellam's jury thought at length about the interplay of relationships among the parties from their question to the court: "please explain on page 38 item (c) what is meant by the State must show that the enterprise had an existence beyond that which is necessary to commit each of the acts charged."[129]

[129] A1602.

The State argues that because the correct language was given in the indictment and in the Court's charge instruction, they received the correct statement of the law in two places, making the incorrect statement in one place irrelevant.[130] This is not a sound argument. The incorrect language was in the most critical of areas of the jury instructions, the very definition of the felony murder statute precede by the words "I will explain the elements of the offense".[131] This was an immediate signal that where the jury may have had confusion or questions before, they can now have an explanation—these elements were to explain and frame felony murder. And they did so incorrectly.

The State further argues that because the State's case proceeded on a theory of accomplice liability, the reference to such in the felony murder instructions was appropriate.[132] The instruction does not ask if Mr. Ray's intent was to further the underlying felony, but rather as this Court noted, it places emphasis on the accomplice's intention.[133] State argues that the trial case was abundant with facts and theories supporting an accomplice liability angle of prosecution, further noting that Mr. Kellam did receive an appropriate § 271 instruction but not a § 274 instruction. This is compounds the problem because, as discussed earlier, where § 271 is

[130] State's Ans. Br. at 51.
[131] A388.
[132] State's Ans. Br. at 54.
[133] *Ray*, 280 A.3d 644.

referenced § 274 is required.[134] Where accomplice liability is brought up and the offense in question is one that can be divided into degrees, it is mandated that the jury be instructed on the proper consideration of the defendant's own mental state.[135] This is not a matter of trial strategy, but of Delaware law.[136]

In some ways what happened in this instance is worse than that of Mr. Ray's case, because unlike Mr. Ray, Mr. Kellam's jury was heavily directed to look at the actions and intentions of the co-defendants through out the lengthy trial. They were told that Mr. Kellam was the general of this enterprise and responsible for the actions of those he commanded.[137] Jury instructions are vital in helping the jurors to process the vast amount of information presented to them at trial. When asked to deliberate, Mr. Kellam's jury received instructions that incorrectly directed their focus from his individual mens rea, to that of the co-defendant. In essence, it changed an essential element of the offense.

Trial Counsel admits that there was not strategic a decision behind his failure to object.[138] The deference given to counsel's strategic decisions during the course of trial is based on the assumption that counsel used reasonable professional

[134] *Demby*, 744 A.2d at 979.
[135] *Id.* at 980.
[136] *Id.*
[137] A1545-1550.
[138] B420

judgement.[139] To avoid the distorting effects of hindsight, the court should reconstruct the circumstances surrounding counsel's conduct, and from there determine if his perspective was reasonable under professional standards at the time.[140] But you cannot distort what was not there to begin with. Trial Counsel admits that he simply failed to notice the erroneous language.[141] A reasonably competent attorney would not have done so.[142]

The prejudice of this introduction was made manifest by the State's broken promise from their opening trial arguments. The State told the jury from the start that they would never hear of Mr. Kellam directly committing any of these crimes, but rather that he should be found guilty based on the actions of those he 'commanded'.[143] The State promised the jury that they would be instructed on accomplice liability, because this was the theory on which he was being prosecuted.[144] The State said from the start that Mr. Kellam could be found guilty based on the actions and guilt of his co-defendants.[145] The erroneous jury instructions reaffirmed that the jurors could find Mr. Kellam guilty solely by looking at his relationship to his co-defendants and their guilt, without the need to consider

[139] *Ray*, 208 A.3d at 641.
[140] Id.
[141] B420
[142] *Ray*, 208 A.3d at 642.
[143] A583-84.
[144] *Id.*
[145] *Id.*

his own individual mindset. This is misleading and prejudicial. This falls below the *Strikland* standards and is objectively ineffective assistance of counsel.[146]

As previously discussed, the facts of this case along with the motives for the murders were hotly contested and it is impossible to have confidence that had the jury been properly instructed they would have come to the same conclusion. This undermines the integrity of the trial—Mr. Kellam was prejudiced. The State's Ans. Br. at footnote 96 seems to suggest that a holding in Mr. Kellam's failure would open the gates to 18 years-worth of post-conviction appeals based on jury instructions containing outdated language. If such cases exist that meet the standards this Court has set, then yes, that is a possibility. That is also justice and fear of more work should not be a factor in deciding the right of Mr. Kellam's case. He has a right to a new trial.

[146] *Id.* at 641-42.

CONCLUSION

For the foregoing reason, the judgment of the Superior Court should overruled regarding the RICO and § 274 claims and affirmed on the felony murder claims.

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Dated: December 5, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN KELLAM,	**)**	
Defendant-Below	**)**	
Appellant/ Cross Appellee,	**)**	
	)	**N. 224, 2024**
v.	**)**	
	)	**On Appeal from the**
STATE OF DELAWARE,	**)**	**Superior Court of the**
Plaintiff-Below	**)**	**State of Delaware**
Appellee/ Cross Appellant.	**)**	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.

2. This brief complies with type-volume requirement of Rule 14(d) because it contains 9,628 words, which were counted by MS Word.

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