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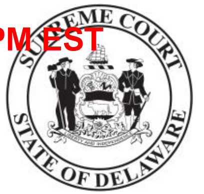

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE WHITE,	)	
	)	
Defendant Below –	)	
Appellant,	)	Supreme Court No. 467, 2019
	)	
v.	)	On appeal from Superior Court
	)	ID No. 1006004227
	)	
	)	
THE STATE OF DELAWARE,	)	
Plaintiff Below –	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

A New Castle County grand jury handed down a multiple count, multiple defendant indictment, which included charges against Dwayne White on November 13, 2017. The indictment charged a number of offenses, including Racketeering (alleging 19 predicate criminal offenses), Conspiracy to Commit Racketeering, Attempted Murder First Degree, Conspiracy First Degree (two counts), Drug Dealing and Aggravated Possession and other offenses. Defendant was re-indicted a number of times, with the final re-indictment occurring on June 14, 2019.[1]

White proceeded to a joint jury trial with co-defendants Eric Lloyd and Damon Anderson beginning on June 3, 2019. On June 14, 2019, a jury found White guilty of the following charges: Racketeering, Conspiracy to Commit Racketeering, Conspiracy First Degree (two counts), Drug Dealing Heroin, Aggravated Possession of Heroin, Conspiracy Second Degree (10 counts), Drug Dealing Cocaine, Money Laundering, Criminal Solicitation, Aggravated Act of Intimidation, Bribing a Witness, Attempt to Evade or Defeat Tax and Tampering with Physical Evidence. As to the Racketeering conviction, the jury found the following predicate acts: (1) Drug Dealing Heroin (2) Aggravated Possession of Heroin, Tier 5 or higher (3) Drug Dealing Cocaine (4) Money Laundering (5)

[1] A21-43.

Criminal Solicitation (6) Conspiracy First Degree (7) Aggravated Act of Intimidation (8) Aggravated Act of Intimidation (9) Bribing a Witness (10) Conspiracy Second Degree (11) Conspiracy Second Degree (12) Conspiracy Second Degree (13) Conspiracy Second Degree (14) Conspiracy Second Degree (15) Possession of a Firearm by a Person Prohibited (16) Attempt to Evade or Defeat Tax (17) Tampering with Evidence (18) Conspiracy First Degree.

On October 18, 2019, White was sentenced to an aggregate 50 year L5 period of incarceration followed by various levels of probation.[2] At sentencing, White's conviction for Conspiracy to Commit Racketeering was merged with the Racketeering conviction, and his conviction for Aggravated Possession of Heroin merged with his conviction for Drug Dealing Heroin.[3]

Defendant appealed his convictions to the Delaware Supreme Court. This is Defendant's opening brief.

[2] Exhibit 1.
[3] A254, 255.

SUMMARY OF ARGUMENT

I. The Superior Court committed plain error by sentencing White for both Conspiracy in the First Degree (Counts 4 & 23) and Racketeering/Conspiracy to Commit Racketeering because the former were included offenses of the latter.

II. The Superior Court committed plain error in violation of 11 Del. Code Section 521 by sentencing White for multiple counts of Conspiracy (First and Second Degree) where the multiple underlying substantive felonies were the object of the same agreement of a continuous conspiratorial relationship as identified in Defendant's convictions for Racketeering and Conspiracy to Commit Racketeering.

III. The Superior Court committed plain error by instructing the jury in a way that allowed it to convict White of multiple conspiracy offenses based upon an accomplice theory of liability in violation of his right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution.

IV. Plain error in convicting White of Conspiracy Second Degree (Count 16) to commit the underlying charge of Drug Dealing as set forth in Count 16.

V. The Superior Court committed plain error by failing to bar the State from eliciting testimony from attorney Joseph Benson regarding the scope of his representation of members of the alleged criminal enterprise, as well as his communications with White.

VI. In sentencing White, the Superior Court abused its discretion, and violated Supreme Court Administrative Directive 76, and relied upon factual predicates which are either false, impermissible, or lack minimum indicia of reliability.

STATEMENT OF FACTS[4]

The State presented evidence that between January, 2015 through January, 2019, the co-defendants were involved in an illegal drug dealing enterprise. Eric Lloyd built and managed the illegal cocaine operation beginning in early 2015, until he transferred control of the operation to Dwayne White before he was incarcerated on federal charges in 2017. The control of the enterprise was transferred from Lloyd to White at a meeting at 8th & Union Grill restaurant. In addition to the operation of a drug dealing enterprise, activity included placing apartments, cell phones and vehicles in the names of others in order to conceal the activity of the enterprise. It also included efforts to arrange bail for arrested associates in order to reduce the threat of cooperation.

For the Conspiracy to Commit Racketeering offense, the existence of an enterprise included co-defendant association and business dealings with G&B Real Estate, T&B Homes and NTCZA, LCC. The association of members was demonstrated through photographs, rap videos, surveillance, trips they went on (Miami, Atlanta, Las Vegas), communications by phone, texts and emails. It also

[4] In a teleconference on May 31, 2019, White's attorney confirmed that his strategy was to concede guilt to the drug dealing, conspiracy to commit drug dealing and racketeering as supported by the predicate acts, but to deny all involvement in the conspiracy to commit murder and related charges. A59, 60. He implemented this strategy by conceding guilt to certain offense in White's opening statement (A63-65, 76, 78) and summation. A158, 161, 168, 206. At sentencing, White's counsel reminded the court that Defendant demonstrated acceptance of responsibility by not contesting the evidence, or the charges, relating to most of the offenses he was facing. A223, 231, 238.

included subgroups called "The Four Horsemen of Riverside" and "Big Screen Boys."

The predicate offenses included drug dealing cocaine and heroin as shown in surveillance by police, wiretapped calls involving members - including White - arranging deals, meetings for transactions, and drugs and other paraphernalia recovered from the execution of search warrants. Included in the evidence recovered from White's residence was a ledger reflecting drug sales and money owed to White. Associates of the enterprise also testified to the details of the drug operation involving White.

Markevis Stanford was originally part of the group of individuals involved in numerous criminal activities, but was ultimately labeled a "rat." A subsequent music video containing a rap "dis" from Ryan Bacon was leveled against Stanford, as was a sex tape made with Stanford's girlfriend by Bacon and Dion Oliver. The sex tape was put on the internet and referred to as "Big Screening" by individuals calling themselves "the Big-Screen boys." Markevis Stanford responded to these videos with back-and-forth shootings and robberies.

On May 19, 2017, Markevis Stanford, Maurice Cooper, and Safeer Ryle were involved in what police referred to as a huge shootout in the Riverside housing projects in Wilmington Delaware. Stanford was located later that day, as was Safeer Ryle, and Stanford's girlfriend, Keyonna Perkins, all of whom were

charged with drug and firearms offenses. Following a hearing in the Court of Common Pleas, Markevis Stanford's bail was reduced when the charges related to the firearm seized on the day of the shootout were dismissed. Stanford was subsequently released from custody on June 3, 2017 after posting bail. Safeer Ryle remained in custody.

In 2017, White joined a violent feud with Markevis Stanford by members of the enterprise by enhancing an existing bounty on the life of Stanford.

On June 6, 2017, co-defendant Markevis Stanford was in the area of routes 896 and 40 in Newark, Delaware when a person or person shot at him multiple times. Stanford was not hit. Later that afternoon, Stanford was in the area of sixth and Spruce streets in the city of Wilmington when, once again, a person or persons began shooting at him multiple times. As he was being fired upon, Stanford hid behind a vehicle that was occupied by Shaylynn Banner, her son, six-year-old Jashown Banner, Shaylynn's mother, Deborah Banner, and Shaylynn's two-year-old daughter, Jordan Hacket. A bullet intended for Stanford traveled through the Banner's vehicle, striking Jashown Banner in the head causing paralysis and brain damage. The suspect vehicle in the shootout was Michael Pritchett's white truck, which was seen fleeing through Southbridge and down Route 9 followed by Maurice Cooper's Cadillac Deville.

On the day that Jashown Banner was struck by the bullet intended for Stanford, Keyonna Perkins was kidnapped and shot dead in a park in Elkton Maryland. Keyonna Perkins' cell phone was used by her kidnappers to send a text message to Stanford in an effort to lure him to the area of Routes 896 and 40 where he could be killed.

During the course of their investigation, the State located a prison phone call from Safeer Ryle to his girlfriend. During the call, Markevis Stanford entered the phone conversation on a three way call and stated that his girlfriend, Keyonna Perkins, was taken and he was shot at twice that day by "Dot" and other individuals. "Dot" refers to "M Dot," the street name associated with Michael Pritchett. On June 7, 2017, Michael Pritchett was arrested while traveling on Route 1.

White tried to arrange for attorney Joseph Benson to represent Pritchett, but his fee was too high. Instead, White attempted to bribe the Banner family. On June 22 and June 23, 2017, White, made contact with the family of Jashown Banner in person and via telephone several times. Defendant offered the Banner family $20,000 in cash if they would go to the office of Joseph Benson, Michael Pritchett's intended attorney, and provide a statement that Pritchett was not involved in the shooting of the child. According to Joshua Potts, the father of

Jashown Banner, defendant and Jeffrey Bullock met with him once at the hospital where his child was being treated.

As the FBI task force continued their investigation during the month of July 2017, it was discovered that Dwayne White was a high-end drug trafficker who had substantial resources from the drug operation. Additional investigative measures confirmed that co-defendant Eric Lloyd, a known drug trafficker who at the time was serving a federal violation of probation sentence, had used Pritchett's attorney for his criminal cases and to set up his LLCs and real estate transfers. Additionally, the FBI Taskforce established a history between Markevis Stanford and those involved in drug activity in the Riverside Housing Projects.

The State subsequently obtained a wiretap for White's cellular phone from August to September of 2017, during which details of the elaborate drug enterprise were uncovered. During the wiretapped calls, White phoned prisoners and spoke of intimidating or killing Markevis Stanford. During the calls, White offered $5,000.00 to any inmate who could "take out" Stanford at the James T. Vaughn Correctional Center. According to the wiretap investigation, White also threatened Richard Ellington for messing with [co-defendant] Lloyd's money on a baseball bet, and exchanged large quantities of cocaine, heroin and money with numerous co-defendants. Co-defendant, Eric Lloyd was also found to have been orchestrating the drug operation through e-mails he was sending from federal prison.

A search warrant was executed on September 7, 2017 at 1139 East 14th St. in Wilmington, which is the residence of White, his wife, Nyeesha White, and Edward Gatlin. When police entered the residence, the three were inside, along with an infant and a 12 year old child. Upon searching the residence, police located the following: A safe hidden inside of a wall cavity containing 3 boxes of clear plastic sandwich bags, which are commonly used to package cocaine, a box of freezer bags, a digital scale coated with an off-white substance that field tested positive for cocaine, an empty pill bottle, a pharmacy sized bottle of promethazine with codeine cough syrup, and an empty black canvas bag that had the strong odor of cocaine. A pair of sweatpants containing the offender's ID and a large amount of United States Currency. (Several additional IDs belonging to the offender were also located in several areas of the home.), 3 cellular phones, a shopping bag containing a large amount of United States Currency, 3 shoeboxes and a plastic shopping bag - each containing a large amount of United States Currency - a drug ledger with over a quarter-million dollars owed to the offender for drug debts, a money counter and a bag containing financial paperwork related to an LLC and real estate, a 2016 tax document for the Defendant and Nyeesha White, reflecting a combined gross income of approximately $42,700.00.

Located in a basement room where Edward Gatlin was sleeping were 2 cellular phones and a small bag containing 2 bags of heroin and 2 prescription pills.

The offender's 2015 Ford Taurus was also searched. The officers recovered a Wells Fargo bank deposit receipt for $5,000.00 from the vehicle.

The total amount of currency located in White's home was $26,220.00, which was seized as part of this investigation. It was also discovered that the White's girlfriend, Alia Grier, obtained an apartment at the Whitney Apartments in Claymont for White to utilize and for which he paid for with cash and money orders. Police searched this apartment as well and located cocaine residue, scales, pots, bags, and rubber bands, all of which are used for a drug operation.

Then, on October 25, 2017, police executed a warrant for White, his wife, Nyeesha White, and co-defendant Edward Gatlin at 1139 East 14th Street

On October 27, 2017, officers with the Task Force and Delaware State Police executed a warrant for co-defendant Damon Anderson at 17 Oakley Court in Newark, DE. At the time, the co-defendant Anderson had a sealed, Rule 9 warrant for his arrest for a racketeering offense. Police entered the home and made contact with the co-defendant Anderson and his girlfriend, Rahsheyda Dennis. The officers obtained a search warrant for the residence and the following items were recovered: 5 cellular phones, ID cards for co-defendant Anderson and

paperwork consisting of bills, business paperwork, receipts, and bank slips in White's name, a box of clear plastic sandwich bags, commonly used to package drugs.

Upon searching Anderson's Jeep Cherokee, the officers located $240.00, 2 cellular phones, and additional paperwork for the White's business, Anago Cleaning Service.

Cellular phone evidence confirmed that Michael Pritchett was on Facetime calls with White around, and after, the time of the shooting of Jashown Banner.

The State presented evidence of Eric Lloyd's handling of his drug business, dealing mainly with cocaine and marijuana, and using real estate to launder money. Lloyd was found to have advised others to use FaceTime, as it could not be tracked on wiretaps, and to keep a job "on paper" so that it could be hidden "in plain sight while doing drug deals."

Co-defendant Eric Lloyd was also seen on video at Greenville Place Apartments with Darryl Kelley, entering and exiting the apartment complex with a shopping bag. (Shayvette Sharp-Hunter had an apartment at Greenville Place.) Co-defendant Lloyd was also seen with a trunk full of cash and utilizing Facetime to display bricks of cocaine from an apartment. He also exchanged a brick of cocaine with Donte Sykes in the parking lot of the law office of Joseph Benson. Co-

defendant Lloyd also asked Sykes to deliver $36,000.00 to Benson to settle up the debt that Sykes owed to Lloyd.

Through wiretap calls and surveillance, police were able to confirm that White was notified that a police search was about to occur at the home of William Wisher. Wisher's home contained a gun and 50 logs of heroin. Prior to police converging on the home to perform the search, several enterprise associates removed the drugs and firearm from the home which were then given to Eric Moore and Demichael Showell. Eric Moore was arrested in a later search warrant where heroin, marijuana, and a handgun were recovered by police.

In October, 2017, Nyeesha White, was arrested for her conduct on a wiretap. When Nyeesha White was arrested, her $24,000 bail was posted with money orders in increments of $1,000. The money orders matched the date of those signed out to co-defendant Talib Al-Atharee, who was on White's drug ledger for some of the largest amounts and is on casino video exchanging a large amount of money with White.

Nyeesha White was also found to have engaged in a real estate transaction in Maryland, where co-defendant Talib Al Aatharee wrote a $10,000.00 check to co-defendant Shayvette Sharp, who then purchased a home for cash, split rental income with White and Nyeesha White, and then titled the property to co-

defendant Eric Lloyd for free. There was no Delaware tax record for this transaction involving Nyeesha White, Shayvette Sharp, and Eric Lloyd.

Following the State indictments, White phoned the wife of Tyrone Roane, on suspicion that he was cooperating with police. White was able to obtain a sealed copy of Roane's plea agreement from the courthouse, which he then discussed via prison calls with Darryl Kelly and Tawayne Powell. White advised that he would send them the plea paperwork and wanted them to "spread the word." A copy of the plea agreement was posted on the internet by Isaac Maddrey alongside "emojis" of rats. A search of Maddrey's phone revealed that he had received the plea paperwork from Xavier Wilson. Wilson reportedly received the plea paperwork from another party, who had received it from Darryl Kelley, the presumed recipient from White. The ostensible purpose for publishing the sealed court paperwork was to intimidate Roane.

Three associates of the enterprise (William Wisher, Tyrone Roane and Dontae Sykes) testified as to their direct involvement in the enterprise with Lloyd and White, and the crimes that were committed. They cooperated after being charged with criminal offenses.

Tyrone Roane testified that he sold drugs for the enterprise, as well as his interaction with White for that purpose. He discussed the feud with Markevis

Stanford and how the bounty began and progressed and how the hostility escalated. He discussed White's involvement in trying to bribe Jashown Banner's family in order to help Pritchett. Roane was present when Lloyd transferred power to White at the 8th & Union restaurant in 2017.

William Wisher pled guilty and was sentenced to 21 years of incarceration, but was seeking a reduction for his substantial assistance. He stated that Lloyd was head of the enterprise and that he was involved in dealing cocaine for him. He described the meeting at 8th & Union restaurant when the operation was transferred to White. He described that under White he began selling heroin.

Wisher testified about a drug deal involving White for heroin and cocaine. The deal was heard on a wiretap including the details of where the meet was to occur. A search warrant was executed, but associates learned of the pending search and removed drugs and guns from the house.

Dontae Sykes testified as a State's witness. He is in federal custody facing federal charges in the death of Keyonna Perkins, and is facing the death penalty if convicted. He is hoping to benefit by his cooperation and assistance. He discussed the drug operation when Lloyd was head of the operation. He testified about the investment properties obtained to launder money. He was present at 8th & Union restaurant meeting when power to operate the enterprise was transferred to White.

Sykes was familiar with the feud with Markevis Stanford. He testified in detail about the bounty and White's involvement in increasing the bounty on Stanford's life. He was also aware of White's plan to bribe the family of Jashown Banner.

Detective Barnes and Special Agent Haney provided details of money laundering to conceal drug activity. This included gambling at casinos, sports betting, use of money orders, purchase of high end items, and the purchase and passing of real estate properties. The State presented evidence of White's gambling activity in the total amount of 1.3 million dollars from 2015 to 2017.

No taxes were paid on any of the revenue generated by the criminal activity detailed by the State.

ARGUMENT I

THE SUPERIOR COURT COMMITTED PLAIN ERROR BY SENTENCING WHITE FOR BOTH CONSPIRACY IN FIRST DEGREE (COUNTS 4 & 23) AND RACKETEERING/CONSPIRACY TO COMMIT RACKETEERING BECAUSE THE FORMER WERE INCLUDED OFFENSES OF THE LATTER.

1. Question Presented

Did Superior Court commit plain error by sentencing White for both Conspiracy (Counts 4 & 23) and Racketeering/Conspiracy to Commit Racketeering because the former were included offenses of the latter. Defendant did not raise this objection at sentencing. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Standard and Scope of Review

When a defendant has failed to preserve an issue for appeal, the Court will apply the plain error standard.[5] Under that standard, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[6] Plain error is "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in

[5] Del. Supr. Ct. R. 8.

[6] *Doherty v. State*, 21 A. 3d 1, 2 (Del. 2011) (quoting *Turner v. State*, 5 A.3d 612, 615 (Del. 2010).

their character, and which clearly deprived an accused of a substantial right, or which clearly showed manifest injustice."[7]

Defendant rejects any argument that he waived this claim by not raising this issue below.[8] There is a distinction between "waiver" and "forfeiture" for appellate review purposes. "[W]aiver is accomplished by intent, [but] forfeiture comes through neglect."[9] Waiver is the "intentional relinquishment or abandonment of a known right."[10] Counsel's failure to object constitutes a forfeiture, subject to plain error review.[11]

3. Merits of Argument

White was charged with Racketeering, which included an allegation that he "*did associate with an enterprise to conduct or participate in the conduct of the affairs of the enterprise, through a pattern of racketeering activity, or [by] . . .* ***conspiring to commit the murder of another*** *. . .*"[12] (emphasis added).

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[7] Id.

[8] *Williams v. State, 98 A.3d 917 (Del. 2014) (Distinguishing between tactical decisions and oversight).*

[9] *United States v. Carrasco-Salazar, 494 F.3d 1270, 1272 (10th Cir. 2000), quoting United States v. Staples, 202 F.3d 992, 995 (7th Cir. 2000).*

[10] *United States v. Olano, 507 U.S. 725, 733 (1993).*

[11] *United States v. Teague, 443 F.3d 1310, 1314 (10th Cir. 2006)(holding that in cases of forfeiture, the defendant may obtain appellate review on a plain error standard).*

[12] A21-25.

The term "Racketeering" is defined to include . . . "*to conspire to engage in*" . . . " [a]ny activity constituting any felony which is chargeable under the Delaware Code . . ."[13]

The charge of Racketeering included predicate act 6, alleging that White committed Conspiracy First Degree by agreeing to commit First Degree Murder or Attempted Murder against Markevis Stanford, and did commit an overt act in pursuance of the conspiracy. The charge included a second specific act of Conspiracy First Degree in predicate act 20, alleging an attempt to commit First Degree Murder and did commit an overt act in furtherance of that conspiracy.

White was also charged with Conspiracy to Commit Racketeering, alleging that "*when intending to promote or facilitate the affairs of the enterprise referred to in count one of this indictment . . . did agree with [other codefendants]. . .that at least one, or another, or all them would engage in conduct constituting the felony of Criminal Racketeering. . . and that at least one, or another, or all of them did commit an overt act in furtherance of the conspiracy, as set forth in paragraphs 1 through 21 of Count One of this indictment.*"[14]

At the State's request, Defendant's conviction for Conspiracy to Commit Racketeering was merged with his conviction for Racketeering at sentencing.[15]

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[13] 15 Del. C. Section 1502(9)(b).
[14] A26.
[15] A254, 255, State's sentencing memorandum, DKT 82, A181.

Count 4 of the indictment charged White with Conspiracy First Degree which substantially mirrored Racketeering predicate act 20. Count 23 charge White with Conspiracy First Degree which substantially mirrored Racketeering predicate act 6.[16]

White could not be convicted of both sets of offenses (Racketeering/Conspiracy to Commit Racketeering and Conspiracy First Degree-2 Counts) because 11 Delaware C. section 206 prohibits convicting a defendant of more than one offense where one offense "is established by the proof of the same or less than all of the facts required to establish the commission of the" second offense.[17] In other words, an offense may be described as "merged" in another if all of its elements are necessarily included in the commission of the other offense. All of the offenses included and duplicated "conspiracy" elements which should merge under Section 206.

Section 206 effectively codifies the test laid out by the United States Supreme Court in *Blockburger v. U.S.*,[18] for determining whether to offenses are the same for double jeopardy purposes.[19] Under this test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each

[16] A28, 37.
[17] 11 Del. C. §206 (a) (1), (b) (1).
[18] *Blockburger v. U.S.*, 284 U.S. 299 (1932)
[19] *Stigers v. State*, 674 A.2d 477, 482 (Del. 1996) (noting that "this Court has generally employed the *Blockburger* test," which "is consistent with 11 Delaware code section 206").

provision requires proof of a fact the other does not."[20] However, if the other provisions of the criminal code and accompanying legislative history evidence a clear legislative intent to allow (or prohibit) convictions under two separate statutes, that legislative intent controls.[21]

Under a *Blockburger* or Section 206 analysis, the Conspiracy First Degree counts are included offenses of Racketeering and/or Conspiracy to Commit Racketeering because all of its elements are necessarily included in the commission of the other offense(s) as the charges are written. The Racketeering elements of *conspiring to commit murder,* as well as the specific allegations in predicate acts 6 and 20, are substantially identical to the essential elements of the Conspiracy First Degree counts. The counts of Racketeering and/or Conspiracy to Commit Racketeering include all of the same elements found in the Conspiracy First Degree counts. Therefore, the Conspiracy First Degree counts merge with the Racketeering/Conspiracy to Commit Racketeering Offenses for purposes of sentencing.

Furthermore, since the State agreed that the Conspiracy to Commit Racketeering conviction merged with the Racketeering conviction for purposes of

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[20] *Blockburger,* 284 U.S. at 304.
[21] *Mills v. State,* 201 A.3d 1163 (2019).

sentencing, it logically follows that the same must be true for the Conspiracy First Degree counts.

Stroik v. State provides that a substantive conviction and a conspiracy conviction under Delaware RICO do not merge.[22] The Court reasoned that a violation of 11 Del Code 1503(a) does not require an agreement and can be achieved through the acts of one person. This case is distinguishable from *Stroik* because the Racketeering offense as alleged required agreement and had to be achieved by the acts of more than one person.

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[22] *Stroik v. State*, 671 A.2d 1335 (Del. 1996), abrogated on other grounds, *Lloyd v. State*, 152 A.3d 1266 (2016).

ARGUMENT II

THE SUPERIOR COURT COMMITTED PLAIN ERROR IN VIOLATION OF 11 DEL. CODE SECTION 521 BY SENTENCING WHITE FOR MULTIPLE COUNTS OF CONSPIRACY (FIRST AND SECOND DEGREE) WHERE THE MULTIPLE UNDERLYING SUBSTANTIVE FELONIES WERE THE OBJECT OF THE SAME AGREEMENT OF A CONTINUOUS CONSPIRATORIAL RELATIONSHIP AS IDENTIFIED IN DEFENDANT'S CONVICTIONS FOR RACKETEERING AND CONSPIRACY TO COMMIT RACKETEERING.

1. Question Presented

Did Superior Court commit plain error by convicting White of multiple counts of conspiracy (first and second degree) where the multiple underlying substantive felonies were the object of the same agreement of a continuous conspiratorial relationship as identified in his convictions for racketeering and conspiracy to commit racketeering. Defendant did not raise an objection on this issue. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Standard and Scope of Review

When a defendant has failed to preserve an issue for appeal, the Court will apply the plain error standard.[23] Defendant repeats and incorporates by reference the law relating to the plain error standard of review set forth in Argument I herein.

[23] Del. Supr. Ct. R. 8.

3. Merits of Argument

11 Delaware Code Section 521(a) provides as follows:

> If a person conspires to commit a number of crimes, the person is guilty of only one conspiracy, so long as the multiple crimes are the object of the same agreement of continuous conspiratorial relationship. The person may be convicted of the degree of conspiracy which includes the most serious offense which the person is found guilty of conspiring to commit.

The charge of Conspiracy to Commit Racketeering, which incorporates the Racketeering offense, contemplates a continuing conspiracy subsuming the individual conspiracy counts. The individual conspiracy first and second degree counts merely breakdown the comprehensive conspiracy to commit racketeering offense into smaller parts of the overall conspiracy. The evidence presented by the State is that White conspired to commit racketeering involving a continuing criminal enterprise involving multiple and varied felonies.

Under Section 521, White can only be guilty of conspiracy to commit racketeering since the multiple substantive crimes charged are the object of the same comprehensive, continuing agreement. It is improper "piling on" to convict White of separate conspiracy offenses which are subsumed under the continuing conspiracy envisioned by the conspiracy to commit racketeering charge.

ARGUMENT III

THE COURT COMMITTED PLAIN ERROR BY INSTRUCTING THE JURY IN A WAY THAT ALLOWED IT TO CONVICT WHITE OF MULTIPLE CONSPIRACY OFFENSES BASED UPON AN ACCOMPLICE THEORY OF LIABILITY IN VIOLATION OF HIS RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. Question Presented

Did Superior Court commit plain error by its failure to properly instruct the jury in violation of White's right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. Defendant did not object to the jury instructions as given by the trial court. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Standard and Scope of Review

When a defendant has failed to preserve an issue for appeal, the Court will apply the plain error standard.[24] Defendant repeats and incorporates by reference the law relating to the plain error standard of review set forth in Argument I herein.

3. Merits of Argument

The Fifth Amendment to the United States Constitution guarantees a criminal defendant the due process right to a fair trial, including accurate jury

[24] Del. Supr. Ct. R. 8.

instructions. This fundamental right extends to individual state actions through the due process clause of the Fourteenth Amendment.

A fair hearing in a fair tribunal, including correct jury instructions, is a basic requirement of due process. Stated another way, due process requires that a criminal defendant be given a fair trial before a jury, which has been accurately instructed on the law applicable to the case. Jury instructions are sufficient when read as a whole, they accurately state the law, do not mislead the jury and permit each party to argue its theory of the case. Where an inaccuracy in the instructions may lead to confusion that undermines either the jury's ability to reach a verdict or the Supreme Court's confidence in their ability to do so fairly under the circumstances, the Court must reverse.[25] Where a jury has rendered a verdict based upon erroneous or incomplete jury instructions, the proceedings violate due process.[26]

This claim involves jury instructions which allowed the jury to erroneously apply accomplice liability to find defendant guilty of multiple counts of felony conspiracy. Specifically, did the accomplice liability instruction mistakenly influence the jury's determination of defendant's guilt for multiple felony conspiracy offenses?

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[25] *Banther v. State*, 884 A.2d 487 (Del. Supreme 2005).
[26] *Beck v. Alabama,* 100 SCt. 2382 (1980).

The general rule is that all elements of a crime be listed in a single instruction which provides a complete statement of the elements of the crime charged. The rule requiring that all elements of a crime be listed in a single instruction was violated in this case by the location, and apparent comprehensive application, of the accomplice liability instruction toward the end of the instructions. The accomplice liability instruction did not specify which substantive offenses it applied to, therefore it was likely interpreted by the jury to apply to all offenses, including the conspiracy offenses.

Here, the jury was instructed on the elements of the multiple felony conspiracy offenses pending against the defendant. The jury was later instructed regarding accomplice liability toward the end of the instructions separate from the instructions for each criminal offense. The error is that the jury was not instructed that the accomplice liability instruction only applied to certain specified offenses. The jury was not advised that accomplice liability did not apply to the conspiracy counts.

In other words, the placement of the accomplice liability instruction at the end of the instructions likely led the jury to believe that it applied to every offense, including the felony conspiracy offenses. Conversely, there was no direction that the accomplice liability instruction did not apply to the felony conspiracy offenses. Therefore, the jury was likely misled to believe that it could consider defendant

guilty of one or more of the felony conspiracy offenses based upon accomplice liability. The net effect was instructions which likely confused and misled the jury when read as a whole.

Accomplice liability and conspiracy are not one and the same crime as they require different proof. The crime of conspiracy is distinct from the crime which is the object of the conspiracy.[27] The charge of conspiracy is a separate offense, requiring proof of different elements than those elements in the principal crime.

The conspiracy in the first degree statute reads:

> A person is guilty of conspiracy in the first degree when, intending to promote or facilitate the commission of a Class A felony, he:
>
> (1) agrees with another person or persons that they or one or more of them will engage in conduct constituting the felony or an attempt or solicitation to commit the felony; or
>
> (2) agrees to aid another person or persons in the planning commission of the felony or an attempt or solicitation to commit the felony, and he or another person with whom he conspired commits an overt act in pursuance of the conspiracy.[28]

The conspiracy in the second degree statute is the same as conspiracy in the first degree except it involves the commission of a non–Class A felony.[29]

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[27] *Steel v. State*, 151 A.2d 127, 130 (Del.1959).
[28] 11 Del. C. §513
[29] 11 Del. C. §512.

Conspiracy requires an agreement, an element which is not present in the statutory language defining accomplice liability.

11 Del. Code Section 271, entitled "Liability for the conduct of another" provides as follows:

> A person is guilty of an offense committed by another person when:
>
> () acting with the state of mind that is sufficient for commission of the offense, he causes an innocent or irresponsible person to engage in conduct constituting the offense; or
>
> (3) intending to promote or facilitate the commission of the offense he:
>
> a. solicits, requests, commands, import tunes or otherwise attempts to cause the other person to commit a; or
> b. aids, counsels or agrees or attempts to aid the other person in planning or committing it;....[30]

Conspiracy is different than accomplice liability. "Co-conspirator and accomplice liability are different forms of criminal conduct. A conspiracy requires an agreement between co-conspirators, but the object of the conspiracy need not be accomplished. For accomplice liability, no prior agreement is required, but the underlying crime must have occurred."[31]

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[30] 11 Del. C. §271

[31] *Manlove v. State*, 901 A.2d 1284, 1288 and) (Del. 2006).

An agreement is not an essential element to find accomplice liability. In *State v. Travis*,[32] the Superior Court stated that the "use of the [disjunctive] *or* instead of the conjunctive *and*" in the accomplice statute "implicitly recognized accomplice liability based on [a defendant's] unilateral decision to aid in the commission of an offense." In *Banther v. State*,[33] the Court agreed that the use of the disjunctive *or* in the accomplice liability statute allows the jury to find that a defendant either "aided" or "counseled" another without actually "agreeing" to do so in advance.

An accomplice may act unilaterally, without a pre-existing agreement, by spontaneously deciding to aid, counsel, or attempting to aid another, or by agreeing to aid a principal in planning or committing a crime.[34]

The accomplice liability instruction, as given, allowed the jury to convict White of numerous conspiracy offenses based upon an accomplice theory of liability. The placement of the accomplice liability instruction, separate and apart from the applicable substantive offenses, likely confused the jury leading it to convict the defendant for conspiracy based upon unilaterally acting without a pre-existing agreement to aid, counsel or attempt to aid. The trial judge's instruction on

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[32] *State v. Travis*, 1992 WL 147996, at*2, affirmed on other grounds, *Travis v. State*, 637 A.2d 829 (Del. 1993)
[33] *Banther v. State*, 884 A.2d 487 (Del. 2005)
[34] *State v. Travis*, supra.

accomplice liability likely misled the jury into thinking that they could convict the defendant of conspiracy as an accomplice to the conspiracy.

A confusing or inaccurate instruction requires reversal. The accomplice liability jury instruction as given undermined the jury's ability to intelligently perform its duty and requires reversal of Defendant's conspiracy convictions.

ARGUMENT IV

PLAIN ERROR IN CONVICTING WHITE OF CONSPIRACY SECOND DEGREE (COUNT 16) TO COMMIT THE UNDERLYING CHARGE OF DRUG DEALING AS SET FORTH IN COUNT 16.

1. Question Presented

Did Superior Court commit plain error by convicting White of Conspiracy Second Degree (Count 16), a count in the indictment which did not state a criminal offense. Defense counsel did not preserve this claim. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Standard and Scope of Review

When a defendant has failed to preserve an issue for appeal, the Court will apply the plain error standard.[35] Defendant repeats and incorporates by reference the law relating to the plain error standard of review set forth in Argument I herein.

Merits of Argument

Count 16 charges White with committing Conspiracy 2nd Degree on or between January 27, 2017 and October 11, 2017 by intending to promote or facilitate the commission of Drug Dealing *as set forth in Count 16.*[36] In other

[35] Del. Supr. Ct. R. 8.
[36] A34.

words, Count 16 incorporates itself, but does not set forth the charge of Drug Dealing. The reference to drug dealing does not identify the drug it involves (heroin, cocaine, marijuana, etc.) While this charge immediately follows Drug Dealing Cocaine (count 15), it is improper for the jury to guess or assume that count 16 relates to a conspiracy to commit drug dealing as set forth in Count 15. In short, this count does not state a valid criminal offense and should be vacated as void.

ARGUMENT V

THE SUPERIOR COURT COMMITTED PLAIN ERROR BY FAILING TO BAR THE STATE FROM ELICITING TESTIMONY FROM ATTORNEY JOSEPH BENSON REGARDING THE SCOPE OF HIS REPRESENTATION OF MEMBERS OF THE ALLEGED CRIMINAL ENTERPRISE AS WELL AS HIS COMMUNICATION WITH WHITE.

1. Question Presented:

Did unfair prejudice stemming from certain testimony elicited from Joseph Benson in violation of DRE 401-403 constitute plain error. White's counsel did not preserve this claim.

2. Standard and Scope of Review:

When a defendant has failed to preserve an issue for appeal, the Court will apply the plain error standard.[37] Defendant repeats and incorporates by reference the law relating to the plain error standard of review set forth in Argument I herein.

3. Merits:

This claim relates to the improper direct examination of attorney, Joseph Benson, in a way that suggested that he was the "go to" attorney for members of the alleged enterprise, and that any individual represented by him must have been associated with the alleged enterprise.[38]

Attorney Benson's direct testimony regarding how material under a protective order was inadvertently provided to his client, Ziare Miller, was not

[37] Del. Supr. Ct. R. 8.
[38] A56-80, 93-97.

objectionable. However, the prosecutor exceeded the scope of that issue to elicit improper testimony regarding his representation of certain individuals, as well as his communication with White.

In response to the prosecutor's examination, Benson admitted he knew Eric Lloyd and Dwayne White.[39] The prosecutor further elicited that his associate (Andrew Ahern) represented Dontae Sykes, and that he represented Tyrone Roane, William Wisher, Markevis Stanford, Michael Pritchett and Ziare Miller in 2017.[40] Query: Except for Ziare Miller, what was the relevance of eliciting that Benson represented the other individuals, all of whom were subjects of this criminal investigation and alleged members of the enterprise?

The prosecutor further elicited that Benson was the registered agent of NCTZA, LCC.[41] The court ruled that this was admissible.[42] Again, what was the relevance of Benson's status as registered agent for the LLC?

Next, the State played a recording of a call between White and Benson.[43] At the time, Benson was representing Michael Pritchett. White inquired about the case. Benson stated, "I'll let you know. I'll keep you in the loop. You know that.

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[39] A65 The State previously agreed it would not elicit testimony of Benson's prior representation of Lloyd and White. A95.
[40] A101-104 After discussion, defense counsel did not object to this testimony. A99.
[41] A94. Eric Lloyd was the owner of NCTZA, LCC. The State agreed not to elicit from Benson that this was Eric Lloyd's LLC. A89. The representation seems disingenuous considering it later intended to present proof that this was Lloyd's LLC.
[42] A89.
[43] A112, 113, Exhibit-207.

As soon as I hear, you will hear, buddy. Trust me. You are the first one, before even Michael knows?"[44]

Benson explained that the conversation related to whether or not he was going to be permitted to represent Pritchett as a result of a motion filed by the State.[45] On redirect, the prosecutor suggested that White was interested in Pritchett's discovery.[46] Benson denied that suggestion, and reiterated that it related to whether he would be able to continue to represent Pritchett, or whether White and his friends would need to retain another attorney for Pritchett. The prosecutor then asked the objectionable question as who was going to pay for that representation.[47] The objection was sustained.

The testimony referenced herein was not relevant to any issue other than to suggest that Benson was the attorney for the members of the enterprise, and to reinforce the existence of a criminal enterprise based upon his representation of a number of its members. His status as registered agent for an LLC, eventually tied to Eric Lloyd, served that same purpose. Finally, his communication with White regarding Michael Pritchett reinforces the State's claim that Defendant was the head of the enterprise. The jury was also able to infer that the purpose of the conversation was to obtain Pritchett's discovery, as suggested by the State. Even if

[44] A113.
[45] A113-114.
[46] A123.
[47] A124.

some or all of this evidence was relevant under DRE 401 and 402, it should have been excluded to avoid the danger of unfair prejudice, confusion of the issues, or misleading the jury under DRE 403.

This plain error created unfair prejudice by making it more likely that the jury would find the existence of a criminal enterprise by virtue of Benson's representation of some of its alleged associates. White's communication with Benson unfairly reinforced his association with the enterprise. The overall inference from this evidence was to reinforce the existence of a criminal enterprise in which Benson was the attorney of choice. It is unfair to make this inference based upon an individual's choice of attorney.

ARGUMENT VI

IN SENTENCING WHITE, THE SUPERIOR COURT ABUSED ITS DISCRETION, AND VIOLATED SUPREME COURT ADMINISTRATIVE DIRECTIVE 76, AND RELIED UPON FACTUAL PREDICATES WHICH ARE EITHER FALSE, IMPERMISSIBLE, OR LACK MINIMUM INDICIA OF RELIABILITY.

1. Question Presented

Did the trial judge abuse his discretion by violating Supreme Court Administrative Directive Number 76, and relying upon factual predicates which are either false, impermissible, or lack minimum indicia of reliability in the sentence of White? While Defendant did not assert a formal objection, counsel contested the existence of aggravating circumstances to support a sentence beyond SENTAC guidelines.[48] To the extent that counsel's comments do not constitute an objection, then the interest of justice exception to the Supreme Court Rule 8 applies because this claim involves plain error depriving the Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 7 of the Delaware Constitution.

2. Standard and Scope of Review

In *Erwin v. State*,[49] this Court explained the standard of review for sentencing decisions, as follows:

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[48] A226-233.
[49] *2019 WL 6833859 (Del. 2019)*

> "It is well-established that appellate review of sentences is extremely limited."[50] Our review of a sentence generally ends upon a determination that the sentence is within the statutory limits prescribed by the legislature. *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992). If the sentence falls within the statutory limits, "we consider only whether it is based on factual predicates which are false, impermissible, or lack minimal reliability, judicial vindictiveness or bias, or a closed mind."[51] "A judge sentences with a closed mind when the sentence is based upon a preconceived bias without consideration of the nature of the offense or the character of the defendant." Id.

3. Merits

On September 15, 1987, the Supreme Court issued Administrative Directive Number 76.[52] That directive implemented the sentencing guidelines that had been developed by SENTAC, and provided that:

> 2. Any judge who finds a particular sentencing standard inappropriate in a particular case because of the presence of aggravating or mitigating or other relevant factors need not impose a sentence in accordance with the standards **but such judge shall set forth with particularity the reasons for the deviation**...(emphasis added)
>
> 3. The sentencing standards are considered voluntary and non-binding; thus, no party to a criminal case has any legal or constitutional right to appeal to any court a statutorily authorized sentence which does not conform to the sentencing standards.

[50] *Kurzmann v. State*, 903 A.2d 702, 714 (Del. 2006) (citation omitted).
[51] *Kurzmann*, 903 A.2d at 714.
[52] A260, 261.

In *Benge v. State,*[53] the Court reiterated the meaning of the Administrative Directive as follows:

> This Court's Administrative Directive... requires that reasons be given for deviations from SENTAC's sentencing guidelines because this Court *does* have appellate jurisdiction to review criminal sentences on the basis of alleged: unconstitutionality; factual predicates which are either false, impermissible, or lack minimum indicia of reliability; judicial vindictiveness, bias, or sentencing with a "closed mind;" and any other illegality. Except for these constitutional and legal constraints, it is well-established that appellate review of criminal sentences is limited in Delaware to a determination that the sentence is within the statutory limits. Delaware, unlike the federal and several state jurisdictions has not provided for appellate review of criminal punishments that deviate from sentencing guidelines.

Thus, the trial court must explain its reasons for doing so, but it is authorized to exceed the SENTAC guidelines without making any factual findings beyond those reflected in the jury's verdict.

Violation of Supreme Court Administrative Directive 76

A Class B felony carries a L5 range from 2-25 years. The Sentac presumptive sentence for a person convicted of a Class B felony is 2-5 years at L-5. (First two years is minimal mandatory incarceration). In this case, the Defendant received sentences for Class B offenses far in excess of the maximum range of the Sentac presumptive sentence guidelines.

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[53] *Benge v. State,* 862 A. 2d 385 (Del. 2004), citing *Siple v. State*, 701 A.2d 79, 82-83 (Del. 1997)

The Sentac presumptive sentence for Conspiracy First Degree (Class G felony) is up to 15 months L5. For both counts of Conspiracy First Degree, the court exceeded the guidelines and imposed the maximum 5 year L5 sentence.

The Superior Court failed to adequately specify the reasons for imposing sentences so far in excess of SENTAC guidelines for multiple Class B and G felony convictions, as well as for the application of Section 4204(k). The Superior Court failed to sufficiently cite any aggravating circumstances, except a reference to the State's suggested aggravating circumstances to support departure from the guidelines.[54] Moreover, the Superior Court failed to list any aggravating circumstances in the sentencing order.[55] Finally, to the extent that the Court adopted the State's aggravating circumstances, there was an insufficient factual predicate to adopt and rely upon the alleged aggravating circumstances.

The failure of the Court to specify its reasons for deviating from SENTAC guidelines in such a significant manner is inconsistent with the letter and spirit of Administrative Directive 76 and constitutes an abuse of discretion. In certain circumstances, relief is called for when Administrative Directive 76 is violated.[56]

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[54] (*"I do think a sentence over the presumptive guidelines is warranted in this case. And I think, on balance, that the State has not completely, but accurately, set forth the aggravating factors, which includes prior violent criminal conduct, the 2012 Possession with Intent."*) A253. *As provided herein, White contests the factual predicate for the State's aggravating factors.*

[55] Exhibit 1.

[56] See, *State v. Frink,* ID No. 0307001199 (Order) Johnston, J., April 23, 2008 (Del. Super. 2008). Exhibit 2.

The failure to comply with Sentac guidelines supports a claim that the sentence was arbitrary and an abuse of discretion because it far exceeds the applicable guidelines without any meaningful departure justification in the record in violation of Supreme Court issued Administrative Directive Number 76,

There was an insufficient factual predicate to find aggravating circumstances as alleged by the State.

In its sentencing memorandum, the State urged the court to find the following aggravating circumstances:[57] (1) prior violent criminal conduct; (2) Undue depreciation of Offense; (3) Lack of Remorse; (4) Vulnerability of Victim (as to the Bribing a Witness charge); Excessive Cruelty (as to the Conspiracy First Degree and Aggravated Act of Intimidation). The State advanced factual predicates to support these circumstances which were either false, impermissible, lacked minimum indicia of reliability, or did not fit the SENTAC definition of the applicable aggravating factor.

Prior Violent Criminal Conduct

Prior violent criminal conduct constitutes an aggravating factor if the defendant "has demonstrated, by his prior criminal history, a propensity for

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[57] A174-180.

violent criminal conduct."[58] White has one prior violent felony conviction (Possession with Intent to Deliver a Narcotic). It is arguable whether one prior felony conviction constitutes a "propensity for violent conduct." The State presented White's arrests for charges that were eventually dismissed in order to pad this category. Arrests not leading to convictions are not evidence of prior violent criminal conduct and should not be considered as an aggravating circumstance. It would be an abuse of discretion for Superior Court to rely on White's arrests for charges that were dismissed as aggravating circumstances.

Undue depreciation of offense

This aggravating factor is defined under SENTAC that [it] would unduly depreciate the seriousness of the offense to impose a sentence of other than total confinement. This category supports L5 incarceration in cases where the SENTAC guidelines recommend less than L5. This category merely supports a L5 sentence. It does not support a L5 sentence in excess of guidelines, or the excessive length of the L5 sentence imposed in this case. White's Class B felony convictions mandate a minimum two year L5 sentence for each count, therefore this factor does not apply.

Lack of Remorse

[58] A271, 2019 SENTAC Benchbook, pg. 133.

This aggravating factor is defined under SENTAC that the "offender has demonstrated a total lack of remorse or acceptance of responsibility with regard to the offense." The facts contradict a claim of White's total lack of remorse or acceptance of responsibility.[59] Prior to trial, White's counsel advised the court that the only charges that were being contested were conspiracy to commit murder and attempted murder.[60] In the opening and closing statements, counsel essentially conceded his guilt on the non-contested charges.[61] During trial, White did not contest or object to the evidence relating to the non-contested charges. In short, the overwhelming evidence is that White accepted responsibility for the non-contested charges. There is no basis to consider lack of acceptance of responsibility as an aggravating factor.

Superior Court found that there was some evidence of remorse, and acknowledged that he White did not contest the drug charges.[62] Therefore, there is no basis to find a "total" lack of remorse as required to consider this an aggravating factor.

Vulnerability of Victim (As to the Bribing a Witness Charge)

[59] A249.
[60] A59, 60.
[61] A63-65, 76, 78; A223, 231, 238.
[62] A253.

"Vulnerability of victim" means that the "defendant knew, or should have known, that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability or ill health." The victim(s) of this charge is not Jashown Banner, but his mother, father and grandmother. They do not fit the definition of "extreme youth, advanced age, disability, or ill health." Therefore, this category does not apply and should not have been considered as an aggravating circumstance.

Excessive Cruelty (As to Conspiracy First Degree and Aggravated Act of Intimidation)

"Excessive cruelty is defined as those facts surrounding the commission of a violent felony which demonstrate such a callousness and cruelty towards the victim as to shock the conscience of the court." The application of this category is an aggravating factor is misdirected. The facts which are claimed to demonstrate callousness and cruelty to the victim are inherent in the elements of the offense itself.

Other Sentac violations.

In this case, Defendant's prior 2012 felony conviction was an aggravating factor used by the Court to enhance his sentence for multiple offenses. The 2019 SENTAC Benchbook provides that . . ." [w]hen an offender is sentenced on multiple charges, only the primary charge should carry an enhanced penalty based

on prior criminal history. All other charges should receive penalties consistent with or lower than the presumptive sentence for the offense, unless aggravated by some factor specific to the individual charge."[63] Sentences "for other current charges shall be calculated based on zero criminal history."[64]

The 2019 SENTAC Benchbook further provides that for sentences of incarceration conditioned by 11 Del. C. 4204(k), the "reason for the departure must be stated on the record and included in the sentencing order."[65] In this case, the Court did not comply with SENTAC policy by stating the reason for the imposition of sentences pursuant to 11 Del. C. 4204(k), or by stating the reasons in the sentencing order. It bears re-emphasing that "[b]ecause such sentences add significant complexity to the management of the population of incarcerated offenders, and, if used indiscriminately, would substantially increase the prison population, Section 4204(k) should be used by judges only in exceptional circumstances."[66]

Factual predicates which are either false, impermissible, or lack minimum indicia of reliability.

The prosecutor also seemed to suggest that the defendant/his crew were responsible for a record number of shootings and gun violence in Wilmington:

[63] A264, SENTAC Benchbook 2019, How to Use This Book, p. 23).
[64] A266, SENTAC Benchbook 2019, Statement of Policy No. 7.
[65] A268.
[66] (SENTAC Benchbook 2018, Statement of Policy, No. 29, 30).

> "Just yesterday was actually the two-year anniversary of the indictment in this case. That year, Wilmington saw a record number of shootings and gun violence. This crew engaged in the business of crime, was arrested, and it dramatically dropped without surprise."[67]

There is no factual predicate to support the prosecutor suggestion that the defendant/his crew were responsible for the record number of shootings and gun violence in Wilmington, and that their arrest was the reason for the reduction.

> "These facts are bad, and what's worse is the impact it has on others directly touched by the violence of the drug trade, the opioid crisis and *the generations that look up to Dwayne White and his associates."*[68]

There is no factual predicate to support the claim that this affected "the generations that look up to Dwayne Wade and his associates."

> "There is a reason Dwayne Wade and Eric Lloyd weren't offered pleas, because today, the State wanted to present and ask for the maximum sentence available to the court, to the judicial system, a system which he and they have exploded [exploited] for decades."[69]

Defendant has one prior felony conviction in 2012. There is no factual predicate to support the claim that he has exploited the system for "decades."

Concurrent sentencing

In its sentencing memorandum, the State requested that White's sentence for aggravated act of witness intimidation run concurrent with his sentence for conspiracy first degree (to commit the murder of Markevis Stanford while he was

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[67] A206
[68] A217.
[69] A219, 220

imprisoned).[70] The Superior Court rejected the State's request without stating a reason for its denial. The Superior Court exhibited a closed mind, and abused its discretion, by denying the state's request to run both sentences concurrently.

The circumstances support an order for the drug dealing offenses and conspiracy first degree offenses to run concurrent with the racketeering sentence pursuant to 11 Del. Code Section 3901(d). As a practical matter, he is receiving multiple sentences for essentially the same criminal conduct. For instance, many of his sentences were for offenses which also served as predicate acts for the Racketeering offense. Concurrent sentencing is justified under these circumstances.

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[70] A182.

CONCLUSION

Defendant respectfully requests this Court to reverse Defendant's convictions and/or sentence based upon the individual or cumulative plain errors identified herein which affected Defendant's substantial rights and were so clearly prejudicial as to jeopardize the fairness and integrity of the trial process, and depriving White of a constitutionally reliable outcome.

/s/ Michael W. Modica
MICHAEL W. MODICA, ESQUIRE
Bar ID # 2169
Attorney for Dwayne White
Wilmington, DE 19899
(302) 425-3600

Dated: February 25, 2020

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

DWAYNE L WHITE

Alias: See attached list of alias names.

DOB: 01/27/1983
SBI: 00459087

CASE NUMBER:
N1710006768

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:
IN19-04-1261
RACKETEERING(F)
IN19-04-1264
CONSP 1ST(F)
IN19-04-1265
DDEAL TIER 4(F)
IN19-04-1276
DDEAL TIER 4(F)
IN19-04-1283
CONSP 1ST(F)
IN19-04-1289
DEFEAT TAX(F)
IN19-04-1285
BRIBE A WITNESS(F)
IN19-04-1284
AGG.ACT/INTIMI.(F)
IN19-04-1266
CONSP 2ND(F)
IN19-04-1267
CONSP 2ND(F)
IN19-04-1271
CONSP 2ND(F)
IN19-04-1273
CONSP 2ND(F)
IN19-04-1274
CONSP 2ND(F)
IN19-04-1275
CONSP 2ND(F)
IN19-04-1277
CONSP 2ND(F)
IN19-04-1278
MONEY LAUNDER(F)
IN19-04-1280
CONSP 2ND(F)
IN19-04-1282
CRIM SOLIC 1ST(F)
IN19-04-1290
TAMP W PHY EVID(F)

COMMITMENT
Nolle Prosequi on all remaining charges in this case
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE
APPROVED ORDER 1 November 12, 2019 14:17

CERTIFIED AS A TRUE COPY
ATTEST: KENNETH P. CREEDON
PROTHONOTARY
BY K. Nelson

EXHIBIT 1

STATE OF DELAWARE
VS.
DWAYNE L WHITE
DOB: 01/27/1983
SBI: 00459087

SEE NOTES FOR FURTHER COURT ORDER-TERMS/CONDITIONS

SENTENCE ORDER

NOW THIS 18TH DAY OF OCTOBER, 2019, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN19-04-1261- : TIS
RACKETEERING

The defendant is to pay a fine in the amount of $25000.00 plus all surcharges and fees (see attachment).

Effective October 25, 2017 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for 20 year(s) at supervision level 5

- Pursuant to 11 Del.C.4204(K), the level 5 shall be served without benefit of any form of early release.

AS TO IN19-04-1264- : TIS
CONSP 1ST

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

AS TO IN19-04-1265- : TIS
DDEAL TIER 4

- The defendant is placed in the custody of the Department of Correction for 10 year(s) at supervision level 5

- No probation to follow.

AS TO IN19-04-1276- : TIS
DDEAL TIER 4

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

AS TO IN19-04-1283- : TIS
CONSP 1ST

STATE OF DELAWARE
VS.
DWAYNE L WHITE
DOB: 01/27/1983
SBI: 00459087

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

AS TO IN19-04-1289- : NON-TIS
DEFEAT TAX

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Pursuant to 11 Del.C.4204(K), the level 5 shall be served without benefit of any form of early release.

AS TO IN19-04-1285- : TIS
BRIBE A WITNESS

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Pursuant to 11 Del.C.4204(K), the level 5 shall be served without benefit of any form of early release.

AS TO IN19-04-1284- : TIS
AGG.ACT/INTIMI.

- The defendant is placed in the custody of the Department of Correction for 10 year(s) at supervision level 5

- Suspended after 5 year(s) at supervision level 5

- For 6 month(s) supervision level 4 **DOC DISCRETION**

- Followed by 18 month(s) at supervision level 3

- Hold at supervision level 5

- Until space is available at supervision level 4 **DOC DISCRETION**

AS TO IN19-04-1266- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN19-04-1284 .

AS TO IN19-04-1267- : TIS

STATE OF DELAWARE
VS.
DWAYNE L WHITE
DOB: 01/27/1983
SBI: 00459087

CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN19-04-1266 .

AS TO IN19-04-1271- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN19-04-1267 .

AS TO IN19-04-1273- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN19-04-1271 .

AS TO IN19-04-1274- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN19-04-1273 .

AS TO IN19-04-1275- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

STATE OF DELAWARE
VS.
DWAYNE L WHITE
DOB: 01/27/1983
SBI: 00459087

Probation is concurrent to criminal action number IN19-04-1274 .

AS TO IN19-04-1277- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN19-04-1275 .

AS TO IN19-04-1278- : TIS
MONEY LAUNDER

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN19-04-1277 .

AS TO IN19-04-1280- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN19-04-1278 .

AS TO IN19-04-1282- : TIS
CRIM SOLIC 1ST

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN19-04-1280 .

AS TO IN19-04-1290- : TIS
TAMP W PHY EVID

STATE OF DELAWARE
VS.
DWAYNE L WHITE
DOB: 01/27/1983
SBI: 00459087

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN19-04-1282 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
DWAYNE L WHITE
DOB: 01/27/1983
SBI: 00459087

CASE NUMBER:
1710006768

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant to 11 Del.C. 4101 without further hearing.

Should the defendant be unable to complete financial obligations during the period of probation ordered, the defendant may enter the work referral program until said obligations are satisfied as determined by the Probation Officer.

NOTES

Have no contact with indicted co-defendants; have no unlawful contact with Nyeesha White and Rasheed White.

Forfeit all U.S. currency and property seized in connection with this case.

The Defendant shall relinquish interest in all LLCs.

The Level 5 sentence and probation in Criminal Action Number IN19-04-1284 are concurrent to Criminal Action Number IN19-04-1283.

____
JUDGE RICHARD R COOCH

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	ID No. 0307001199
SYLVESTER FRINK,	)	
	)	
Defendant.	)	

ORDER

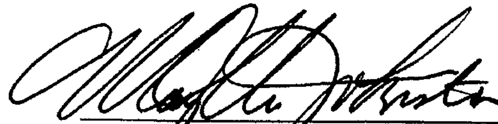
1. On October 2, 2003, defendant Sylvester M. Frink pled guilty to Trafficking in Cocaine. Although defendant was eligible to be sentenced to a mandatory life sentence as an habitual offender pursuant to 11 *Del. C.* § 4214(b), the State offered a plea to 12 years at Level 5 (the first 3 years are mandatory), suspended after 100 months for 3 years at Level 4 Home Confinement, suspended after 6 months for 18 months at Level 3. Defendant was sentenced according to the plea agreement. Other charges were nolle prossed, including Possession with Intent to Deliver Cocaine, which carried a 15-year minimum mandatory sentence.

2. At the time of defendant's offense, the SENTAC presumptive sentence for Trafficking in Cocaine was 3 to 5 years at Level 5. Effective July 2004, the minimum mandatory sentence was reduced from three years to two years.

4. The sentencing judge did not state any reasons, either on the written order or in court at the time of sentencing, for deviating from the SENTAC sentencing guidelines.

THEREFORE, the Court finds that defendant Sylvester M. Frink's sentence dated October 2, 2003 shall be modified to conform to the SENTAC guidelines in place at the time of sentencing.

IT IS SO ORDERED this 23rd day of April, 2008.



The Honorable Mary M. Johnston