BLD-171

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **24-1744**

RUSSELL M. GRIMES,
Appellant

v.

STATE OF DELAWARE, et al.

(D. Del. Civ. No. 1:21-cv-00069)

Present: BIBAS, MATEY, and CHUNG, Circuit Judges

Submitted are:

(1) Appellant's motion for a certificate of appealability;

(2) Appellant's first motion for appointment of counsel;

(3) Appellant's second motion for appointment of counsel

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied because jurists of reason would not debate that he has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For substantially the reasons stated by the District Court, jurists of reason would not debate the District Court's determination that Appellant's double jeopardy claims lack merit. See Ohio v. Johnson, 467 U.S. 493, 502 (1984); Bravo-Fernandez v. United States, 580 U.S. 5, 12 (2016). Jurists of reason also would not debate that Appellant's claims based on amendment of the indictment are not cognizable and lack merit. See Estelle v. Gamble, 502 U.S. 62, 67 (1991); United States v. Daraio, 445 F.3d 253, 259-60 (3d Cir. 2006). Finally, reasonable jurists would agree that state courts have no constitutional obligation to correct inconsistent verdicts of

the type Appellant alleges. See United States v. Powell, 469 U.S. 57, 65 (1984). Appellant's motions to appoint counsel are denied.

By the Court,

s/ Cindy K. Chung
Circuit Judge

Dated: September 5, 2024
Tmm/cc: Russell M. Grimes
Kathryn J. Garrison, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
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September 5, 2024

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Russell M. Grimes
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RE: Russell Grimes v. State of Delaware, et al
Case Number: 24-1744
District Court Case Number: 1-21-cv-00069

ENTRY OF JUDGMENT

Today, **September 05, 2024** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/Timothy, Case Manager
267-299-4953

cc: Randall C. Lohan

EXHIBIT B

Grimes v. May

United States District Court for the District of Delaware

March 28, 2024, Decided; March 28, 2024, Filed

C.A. No. 21-69 (MN)

Reporter
2024 U.S. Dist. LEXIS 56075 *; 2024 WL 1328904

RUSSELL M. GRIMES, Petitioner, v. ROBERT MAY, Warden, and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Defendant.

Subsequent History: Appeal filed, 04/23/2024

Prior History: *Grimes v. May, 2023 U.S. Dist. LEXIS 4067, 2023 WL 143908 (D. Del., Jan. 10, 2023)*

Core Terms

robbery, first-degree, indictment, menacing, aggravated, retrial, same offense, convicted, merits, double jeopardy, defaulted, jeopardy, direct appeal, exhausted, offenses, sentence, insufficient evidence, state court, post-conviction, adjudicated, clearly established federal law, procedural default, asserts, successive prosecution, procedurally barred, charges, demonstrates, cognizable, passenger, counts

Counsel: **[*1]** Russell M. Grimes, Petitioner, Pro se.

Matthew C. Bloom, Deputy Attorney General, Delaware Department of Justice, Wilmington, DE - Attorney for Respondents.

Judges: Maryellen Noreika, UNITED STATES DISTRICT JUDGE.

Opinion by: Maryellen Noreika

Opinion

MEMORANDUM OPINION

/s/ Maryellen Noreika

NOREIKA, U.S. DISTRICT JUDGE

Petitioner Russell M. Grimes ("Petitioner") has filed a Petition and an Amended Petition for a Writ of Habeas Corpus Pursuant to *28 U.S.C. § 2254* ("Petition"). (D.I. 1; D.I. 7). The State filed an Answer in opposition, to which Petitioner filed a Reply. (D.I. 10; D.I. 13). Petitioner also filed a Motion for Summary Judgment. (D.I. 19). For the reasons discussed, the Court will deny the Petition and will deny the Motion for Summary Judgment as moot.

I. BACKGROUND

On August 26, 2011, a masked man entered the First National Bank of Wyoming in Felton, Delaware (the "Bank"), displayed what appeared to be firearm, ordered the Bank manager to exit her office, and told the tellers to empty the cash drawers. During the robbery, the man jumped over a counter in the Bank and blood was later discovered on the ceiling above that counter. The man placed the money from the cash drawers into a satchel and exited the Bank. These events **[*2]** were recorded on the Bank's security cameras. The money taken from the Bank contained dye packs, a security device designed to stain money taken from the Bank, and "bait bills," bills for which the bank had recorded and maintained serial numbers in case of theft. Over $54,000 was taken from the Bank.

When the suspect exited the Bank, he entered a black SUV. An employee of the Bank who ran outside during the robbery testified that she saw the SUV driving away from the Bank and that the SUV was emitting "pink, red smoke" which indicated to her that the dye pack had gone off. Officer Keith Shyers of the Harrington Police Department ("Officer Shyers") also observed the SUV, and testified that he saw a black male "hanging out [of] the window" of the SUV and a "red poof" that "looked like some kind of paint."

Because the vehicle was traveling at a high rate of speed and he thought something was suspicious, Officer Shyers turned around and began following the SUV. Officer Shyers then heard a call that went out over the radio dispatch for a robbery that had just occurred at the Bank. Officer Shyers was the first officer to begin pursuing the car and was the lead vehicle for much of the pursuit. **[*3]** A few minutes into the pursuit, the SUV stopped at an intersection and the passenger got out of the vehicle and began firing shots at the pursuing officers. Officer Shyers testified that he was approximately 20 to 30 feet from the passenger and that the passenger was a black male wearing a grey hooded sweatshirt.

The passenger then got back in the SUV and a high-speed pursuit ensued involving officers from the Delaware State Police, Harrington Police Department, and Felton Police Department. At various points during the pursuit, the passenger popped up through the sunroof and fired shots at the officers. The left rear tire of Officer Shyer's vehicle was shot and he abandoned his vehicle and jumped into another officer's car to continue the pursuit.

Corporal Scott Torgerson, an assistant shift supervisor for the Delaware State Police ("Corporal Torgerson"), who was driving a fully-marked Crown Victoria, took over as the lead vehicle in the pursuit. The passenger continued to fire shots at the officers from the sunroof. The SUV drove around spike strips that had been set in its path and Corporal Torgerson continued to pursue it. Shortly thereafter, the driver lost control of the SUV and **[*4]** it came to rest in a ditch with its back tires stuck. The driver and the passenger both exited the SUV and began fleeing and Corporal Torgerson fired shots at them. The driver of the SUV was shot in the leg by Corporal Torgerson and was later identified as [Russell] Grimes. The passenger of the vehicle escaped on foot.

*State v. Grimes, 2019 Del. Super. LEXIS 354, 2019 WL 3337897, at *2 (Del. Super. Ct. July 23, 2019)* (cleaned up). The police later identified Petitioner's accomplice as William S. Sells III. *See 2019 Del. Super. LEXIS 354, [WL] at *1-3.*

Following his arrest, Petitioner filed a pre-indictment motion to proceed *pro se*. (D.I. 11-1 at Entry No. 3). The Delaware Superior Court conducted a self-representation hearing and granted the motion. (D.I. 11-1 at Entry No. 8; D.I. 11-30).

On November 7, 2011, Petitioner was indicted on one count each of first-degree robbery, first-degree conspiracy, second-degree conspiracy, possession of a firearm during the commission of a felony ("PFDCF"), possession of a firearm or ammunition for a firearm by a person prohibited ("PFBPP PABPP"); six counts of aggravated menacing; and five counts of attempted first-degree murder. (D.I. 11-28). Petitioner and Sells were tried together in May 2013. *See Grimes v. State, 113 A.3d 1080 (Table), 2015 Del. LEXIS 224, 2015 WL 2231801, at *1 (Del. 2015)*. During the trial, the State moved to amend the indictment to change the robbery victim's **[*5]** name. *See Grimes v. State, 237 A.3d 68 (Table), 2020 Del. LEXIS 252, 2020 WL 4200132, at *2 (Del. 2020)*. The indictment originally named Rose Marie Hase, a bank teller, as the robbery victim and other employees — including Vicki Ebaugh, the bank manager — as victims of the six counts of aggravated menacing. *See id.*; *Grimes, 2019 Del. Super. LEXIS 354, 2019 WL 3337897, at *1*. At trial, Ebaugh testified that she assisted the armed robber with emptying the drawers and Hase testified that she was merely present. *See Grimes, 2020 Del. LEXIS 252, 2020 WL 4200132, at *2*. The Superior Court allowed the amendment under *Delaware Superior Court Criminal Rule 7(e)*. (*See id.*; (D.I. 11-20 at 3-17)). The jury found Petitioner guilty of first-degree robbery, second-degree conspiracy, PFDCF, PFBPP PABPP, and five counts of second-degree reckless endangering (as lesser included offenses of attempted first-degree murder). *See Grimes, 2020 Del. LEXIS 252, 2020 WL 4200132, at *1*. The jury acquitted Petitioner of first-degree conspiracy and all six counts of aggravated menacing. *See id.* The Superior Court imposed an aggregate sentence of Level V incarceration for 64 years, followed by probation. (D.I. 11-29). Sells was also convicted and sentenced. *See Sells v. State, 109 A.3d 568, 570 (Del. 2015)*.

Petitioner and Sells appealed separately. *See Grimes, 2015 Del. LEXIS 224, 2015 WL 2231801, at *1*; *Sells, 109 A.3d at 570*. In January 2015, the Delaware Supreme Court overturned Sells' convictions because the Superior Court erroneously denied him the right to exercise a peremptory strike under *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*. *See Sells, 109 A.3d at 582*. The Delaware **[*6]** Supreme Court then ordered supplemental briefing in Petitioner's appeal because his use of peremptory challenges had been similarly restricted. *See Grimes, 2015 Del. LEXIS 224, 2015 WL 2231801, at *1*. The Delaware Supreme Court vacated Petitioner's

convictions and remanded the case for a new trial. *See id.*

On remand, Sells resolved his charges by entering a negotiated guilty plea. *See State v. Sells, 2017 Del. Super. LEXIS 588, 2017 WL 8788856, at *1 (Del. Super. Ct. Oct. 11, 2017)*. Petitioner was retried in November 2016. (D.I. 11-1 at Entry No. 247). The State re-used the amended indictment from Petitioner's first trial. *See Grimes, 2019 Del. Super. LEXIS 354, 2019 WL 3337897, at *1*; (D.I. 11-9 at 53). Petitioner did not object to using the amended indictment from his first trial. *See Grimes, 2020 Del. LEXIS 252, 2020 WL 4200132, at *2*. The jury convicted Petitioner of first-degree robbery, second-degree robbery, PFDCF, PFBPP PABPP, and five counts of second-degree reckless endangering. *See Grimes v. State, 258 A.3d 147 (Table), 2021 Del. LEXIS 257, 2021 WL 3441348, at *1 (Del. 2021)*. The Superior Court imposed an aggregate sentence of 53 years at Level V, followed by probation. *See id.* Petitioner appealed, and the Delaware Supreme Court affirmed the Superior Court's judgment on June 12, 2018. *See Grimes v. State, 188 A.3d 824 (Del. 2018)*.

On August 3, 2018, Petitioner field a *pro se* motion for postconviction relief pursuant to *Delaware Superior Court Criminal Rule 61* ("*Rule 61* motion"). (D.I. 11-1 at Entry No. 274; D.I. 13-1 at 38-59). On July 23, 2019, a Superior Court Commissioner issued a Report and Recommendation **[*7]** that Petitioner's *Rule 61* motion be denied as procedurally barred. (D.I. 12-15 at 51-73); *see Grimes, 2019 Del. Super. LEXIS 354, 2019 WL 3337897, at *6*. On October 16, 2019, the Superior Court adopted the Commissioner's Report and Recommendation and denied Petitioner's *Rule 61* motion. (D.I. 1-1 at 21-23); *see Grimes, 2019 Del. Super. LEXIS 354, 2019 WL 3337897, at *4*. The Delaware Supreme Court affirmed that decision on July 21, 2020. *See Grimes, 2020 Del. LEXIS 252, 2020 WL 4200132, at *4*.

In October 2023, Petitioner filed a motion for correction of illegal sentence, which the Superior Court denied. *See Grimes v. State, 2024 Del. LEXIS 88, 2024 WL 1069967, at *2 (Del. Mar. 11, 2024)*. Petitioner filed another motion for correction of illegal sentence in November 2023, which the Superior Court denied after construing it to be a motion for reargument from its denial of Petitioner's October 2023 motion for correction of illegal sentence. *See id.* Petitioner appealed that decision. On March 11, 2024, the Delaware Supreme Court affirmed the Superior Court's November 2023 decision. *See id.*

II. GOVERNING LEGAL PRINCIPLES

A. The Antiterrorism and Effective Death Penalty Act of 1996

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "to reduce delays in the execution of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism." *Woodford v. Garceau, 538 U.S. 202, 206, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003)*. Pursuant to AEDPA, a federal court may consider a habeas petition filed by a state prisoner **[*8]** only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *28 U.S.C. § 2254(a)*. AEDPA imposes procedural requirements and standards for analyzing the merits of a habeas petition in order to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone, 535 U.S. 685, 693, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)*.

B. Exhaustion and Procedural Default

Absent exceptional circumstances, a federal court cannot grant habeas relief unless the petitioner has exhausted all means of available relief under state law. *See 28 U.S.C. § 2254(b)*; *O'Sullivan v. Boerckel, 526 U.S. 838, 842-44, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999)*; *Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)*. AEDPA states, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

The exhaustion requirement is based on principles of comity, requiring a petitioner to give "state courts one full opportunity to resolve any constitutional issues by

invoking one complete **[*9]** round of the State's established appellate review process." *O'Sullivan, 526 U.S. at 844-45*; *Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000)*. A petitioner satisfies the exhaustion requirement by demonstrating that the habeas claims were "fairly presented" to the state's highest court, either on direct appeal or in a post-conviction proceeding, in a procedural manner permitting the court to consider the claims on their merits. *See Bell v. Cone, 543 U.S. 447, 451 n.3, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005)*; *Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989)*.

A petitioner's failure to exhaust state remedies will be excused, and the claims treated as "technically exhausted", if state procedural rules preclude him from seeking further relief in state courts. *See Coleman v. Thompson, 501 U.S. 722, 732, 750-51, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)* (such claims "meet[] the technical requirements for exhaustion" because state remedies are no longer available); *see also Woodford v. Ngo, 548 U.S. 81, 92-93, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006)*. Although treated as technically exhausted, such claims are procedurally defaulted for federal habeas purposes. *See Coleman, 501 U.S. at 749 (1991)*; *Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000)*. Federal courts may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice resulting therefrom, or that a fundamental miscarriage of justice will result if the court does not review the claims. *See McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999)*; *Coleman, 501 U.S. at 750-51*. To demonstrate cause for a procedural default, a petitioner must show that "some objective factor **[*10]** external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)*. To demonstrate actual prejudice, a petitioner must show that the errors during his trial created more than a possibility of prejudice; he must show that the errors worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id. at 494*.

Alternatively, if a petitioner demonstrates that a "constitutional violation has probably resulted in the conviction of one who is actually innocent," *Murray, 477 U.S. at 496*, then a federal court can excuse the procedural default and review the claim in order to prevent a fundamental miscarriage of justice. *See Edwards v. Carpenter, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000)*; *Wenger v. Frank, 266 F.3d 218, 224 (3d Cir. 2001)*. The miscarriage of justice exception applies only in extraordinary cases, and actual innocence means factual innocence, not legal insufficiency. *See Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)*; *Murray, 477 U.S. at 496*. A petitioner establishes actual innocence by asserting "new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial," showing that no reasonable juror would have voted to find the petitioner guilty beyond a reasonable doubt. *Hubbard v. Pinchak, 378 F.3d 333, 339-40 (3d Cir. 2004)*; *see also Reeves v. Fayette SCI, 897 F.3d 154, 157 (3d Cir. 2018)*.

C. Standard of Review

When **[*11]** a state's highest court has adjudicated a federal habeas claim on the merits,[1] the federal court must review the claim under the deferential standard contained in *28 U.S.C. § 2254(d)*. Pursuant to *28 U.S.C. § 2254(d)*, federal habeas relief may only be granted if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or the state court's decision was an unreasonable determination of the facts based on the evidence adduced in the state court proceeding. *28 U.S.C. § 2254(d)(1)* & *(2)*; *see Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*; *Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001)*. The deferential standard of *§ 2254(d)* applies even when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied. *See Harrington v. Richter, 562 U.S. 86, 98-101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*. As explained by the Supreme Court, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id. at 99*.

A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case

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[1] A claim has been "adjudicated on the merits" for the purposes of *28 U.S.C. § 2254(d)* if the state court decision finally resolves the claim based on its substance, rather than on a procedural or some other ground. *See Thomas v. Horn, 570 F.3d 105, 115 (3d Cir. 2009)*.

differently than [the Supreme Court] has on a set of materially indistinguishable **[*12]** facts." *Williams, 529 U.S. at 413*. The mere failure to cite Supreme Court precedent does not require a finding that the decision is contrary to clearly established federal law. *See Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002)*. For instance, a decision may comport with clearly established federal law even if the decision does not demonstrate an awareness of relevant Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.* In turn, an "unreasonable application" of clearly established federal law occurs when a state court "identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of a prisoner's case." *Williams, 529 U.S. at 413*; *see also White v. Woodall, 572 U.S. 415, 426, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014)*.

When performing an inquiry under *§ 2254(d)*, a federal court must presume that the state court's determinations of factual issues are correct. *See 28 U.S.C. § 2254(e)(1)*; *Appel, 250 F.3d at 210*. This presumption of correctness applies to both explicit and implicit findings of fact and is only rebutted by clear and convincing evidence to the contrary. *See 28 U.S.C. § 2254(e)(1)*; *Campbell v. Vaughn, 209 F.3d 280, 286 (3d Cir. 2000)*; *Miller-El v. Cockrell, 537 U.S. 322, 341, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)* (stating that the clear and convincing standard in *§ 2254(e)(1)* applies to factual issues, whereas the unreasonable application standard of *§ 2254(d)(2)* applies to factual decisions). State court factual determinations are **[*13]** not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010)*.

Conversely, if the state's highest court did not adjudicate the merits of a properly presented claim, the claim is reviewed *de novo* instead of under *§ 2254(d)*'s deferential standard. *See Breakiron v. Horn, 642 F.3d 126, 131 (3d Cir. 2011)*; *Lewis v. Horn, 581 F.3d 92, 100 (3d Cir. 2009)*. *De novo* review means that the Court "must exercise its independent judgment when deciding both questions of constitutional law and mixed constitutional questions." *Williams, 529 U.S. at 400* (Justice O'Connor concurring). "Regardless of whether a state court reaches the merits of a claim, a federal habeas court must afford a state court's factual findings a presumption of correctness and . . . the presumption applies to factual determinations of state trial and appellate courts." *Lewis, 581 F.3d at 100* (cleaned up).

III. DISCUSSION

Petitioner's timely filed Petition asserts the following three grounds for relief: (1) the amendment of his indictment and his retrial on the charge of first-degree robbery violated his right to be protected against double jeopardy (D.I. 7 at 4-5); (2) he was denied his due process right to a fair trial because: (a) the indictment was not presented to the grand jury in its amended form, which means he **[*14]** was convicted and sentenced for a charge unsupported by probable cause; and (b) his conviction of a greater offense and acquittal of a lesser offense violated the requirement that his guilt must be found beyond a reasonable doubt (D.I. 7 at 6-7); and (3) the amendment of the indictment divested the Delaware Superior Court of subject matter jurisdiction, thereby depriving Petitioner of his due process right to notice of all charges made against him (D.I. 7 at 8).

A. Claim One: Double Jeopardy

In Claim One, Petitioner asserts that amending the indictment to align the victim of the first-degree robbery offense (Vicki Ebaugh) with the victim of the aggravated menacing offense (Vicki Ebaugh), and his retrial on the first-degree robbery charge after his acquittal on the aggravated menacing charge, violated his right to be protected against Double Jeopardy for four reasons: (a) the retrial constituted a successive prosecution after acquittal (D.I. 7 at 15); (b) the amendment of the indictment subjected him to multiple prosecutions for the same offense after jeopardy had attached (D.I. 7 at 5, 15); (c) the State violated the doctrine of issue preclusion[2] by retrying him for first-degree robbery **[*15]** after his acquittal on the aggravated

[2] In his Petition, Petitioner uses the term "collateral estoppel" rather than "issue preclusion." The Supreme Court cases cited in this Opinion interchangeably use the terms "collateral estoppel" and "issue preclusion." Nevertheless, in *Yeager v. United States*, the Supreme Court indicated a preference for using the term "issue preclusion" in the instant context. *See Yeager v. United States, 557 U.S. 110, 119, 129 S. Ct. 2360, 174 L. Ed. 2d 78 at n.4 (2009)* ("Currently, the more descriptive term "issue preclusion" is often used in lieu of "collateral estoppel."). Given this, when quoting the Supreme Court decisions, the Court uses the term used by the Supreme Court in the particular decision but, when conducting its own analysis and discussion of Petitioner's arguments, the Court uses the term "issue preclusion".

menacing charge (D.I. 7 at 16; D.I. 13 at 7); and (d) the amendment of the indictment was multiplicitous and placed Petitioner at risk of receiving multiple sentences for the same offense in violation of the *Double Jeopardy Clause* (D.I. 7 at 5, 14). *See generally* (D.I. 13 at 7).

The record reveals that Petitioner exhausted state remedies for Claim One by presenting variations of the sub-arguments on direct appeal and post-conviction appeal. On direct appeal, Petitioner argued that the *Double Jeopardy Clause* barred his retrial on the charge of robbing Vicki Ebaugh when he was already acquitted of the lesser offense-included offense of menacing her. (D.I. 11-8 at 11). Citing the *Fifth Amendment*, Petitioner contended that, "[t]his is a classic case of Double Jeopardy jurisprudence in which there has been a second prosecution for the offense after an acquittal." (D.I. 11-8 at 9). Petitioner also argued that the State was collaterally estopped from prosecuting him for first degree robbery after he was acquitted of aggravated menacing. (D.I. 11-12 at 5).

The Delaware Supreme Court rejected both of Petitioner's arguments on direct appeal. The Delaware Supreme Court denied Petitioner's **[*16]** "classic" double jeopardy argument after determining that Petitioner's situation involved "a single — as distinguished from a successive — prosecution." *Grimes, 188 A.3d at 827*. The Delaware Supreme Court explained that Petitioner "was indicted for first-degree robbery and aggravated menacing at the same time, and his retrial for first-degree robbery was still — under the *Ball [v. United States, 163 U.S. 662, 672, 16 S. Ct. 1192, 41 L. Ed. 300 (1896)]* rule — part of the same, continuous prosecution." *Id. at 828*. The Delaware Supreme Court also rejected Petitioner's collateral estoppel argument, holding that Petitioner's acquittal on the aggravated menacing charge did not have an issue-preclusive effect on the State's ability to retry him for first-degree robbery. *See id. at 828-29*.

On post-conviction appeal, Petitioner argued that the amendment to the indictment "changed the complexion of the indictment" and placed him "in jeopardy twice" because he "now was charged twice for the same offense under separate statutes." (D.I. 11-19 at 19). He asserted that the amendment "unconstitutionally created a dynamic wherein [his] acquittal for aggravating menacing of . . . Ebaugh carried no preclusive effect." (D.I. 11-19 at 20). The Delaware Supreme Court denied the argument as procedurally barred under *Rule 61(i)(4)* for being formerly **[*17]** adjudicated on direct appeal. *See Grimes, 2020 Del. LEXIS 252, 2020 WL 4200132, at *2*.

This record demonstrates that the Delaware Supreme Court adjudicated the merits of all four sub-arguments in Claim One. *See, e.g., Jackson v. Metzger, 2020 U.S. Dist. LEXIS 94782, 2020 WL 2839214, at *5 (D. Del. June 1, 2020)* (stating that, although *Rule 61(i)(4)* effectuates a procedural default under Delaware law, the application of *Rule 61(i)(4)* "does not result in procedural default for federal habeas purposes. Rather, the fact that the claim was formerly adjudicated means that it was decided on the merits."). Thus, Petitioner will only be entitled to relief if the Delaware Supreme Court's decision to deny Claim One was contrary to, or an unreasonable application of, clearly established federal law under *§ 2254(d)(1)*.

1. Successive Prosecution and Multiple Prosecutions for Same Offense

The *Double Jeopardy Clause* protects a defendant against: (i) a second prosecution for the same offense after acquittal; (ii) a second prosecution for the same offense after conviction; and (ii) multiple punishments for the same offense. *See North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)*.

Of particular relevance to Claim One is the fact that the *Double Jeopardy Clause* prohibits the successive prosecution of a defendant for a greater or lesser included offense when he has already been tried and acquitted on the other. *See Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); Lockhart v Nelson, 488 U.S. 33, 39, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988)* (explaining that the **[*18]** *Double Jeopardy Clause* "affords the defendant who obtains a judgment of acquittal [. . .] absolute immunity from further prosecution for the same offense."); *United States v. Scott, 437 U.S. 82, 91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978)* (the "law attaches particular significance to an acquittal."); *Arizona v. Washington, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)* ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation."). The *Double Jeopardy Clause*, however, does not prohibit the State from joining greater and lesser-included offenses within a single indictment and prosecuting them both in the

same trial.[3] *See* Ohio v. Johnson, 467 U.S. 493, 500, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1977). Additionally, pursuant to the concept of "continuing jeopardy" formulated in Ball, 163 U.S. at 672, the Double Jeopardy Clause does not bar retrial for the same offense when a defendant successfully appeals and obtains a reversal of his conviction. *See* Price v. Georgia, 398 U.S. 323, 326, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970) (explaining that the Ball Court "effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course."). Although an acquittal terminates initial jeopardy, a conviction still subject to direct appeal is not final. *See* Justices of Bos. Mun. Ct. v. Lydon, 466 U.S. 294, 308, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984). Situations where a retrial is viewed as a continuation of the initial prosecution include: (1) retrial after a mistrial **[*19]** was granted on the defendant's motion (unless the government intended to provoke the mistrial request), Oregon v. Kennedy, 456 U.S. 667, 678-79, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982); (2) retrial after a mistrial was justified by "manifest necessity," such as trial error that cannot be corrected or the jury's inability to reach a verdict, Illinois v. Somerville, 410 U.S 458, 464, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973); and (3) retrial after the defendant's conviction was reversed because of trial error, Ball, 163 U.S. at 671-72, because his guilty pleas was involuntary, United States v. Tateo, 377 U.S. 463, 464, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964), or because the conviction was against the weight of the evidence, Tibbs v. Florida, 457 U.S. 31, 47, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982).[4] As the United States Supreme Court explained in Bravo-Fernandez v. United States, 580 U.S. 5, 137 S. Ct. 352, 196 L. Ed. 2d 242 (2016):

> This "continuing jeopardy" rule neither gives effect to the vacated judgment nor offends double jeopardy principles. Rather, it reflects the reality that the criminal proceedings against an accused have not run their full course.

Id. at 18-19.

In Claim One (a) and (b), Petitioner asserts that the amendment of his original indictment "plac[ed him] in jeopardy twice for the same offense" because it "aligned" a lesser offense of aggravated menacing and a greater offense of first-degree robbery.[5] (D.I. 7 at 4-5). He also argues that "the adjudication of the second direct appeal was in fact and in law, a second form of Double Jeopardy," namely, "a successive prosecution for 1st **[*20]** degree robbery following an acquittal for aggravated menacing." (D.I. 7 at 17-18).

To the extent Petitioner generally asserts that amending an indictment to include both greater and lesser included offenses *per se* violates the Double Jeopardy Clause, the argument is unavailing. The Double Jeopardy Clause does not prohibit a state from charging a defendant with greater and lesser included offenses in one indictment and prosecuting those offenses in a single trial.[6] *See* Johnson, 467 U.S. at 500.

To the extent Petitioner argues that his acquittal for the aggravated menacing of Ebaugh barred his retrial on the greater offense of robbing her, because the aggravated menacing and first-degree robbery charges "are the same offense for double jeopardy purposes, per Delaware law," the argument is similarly unavailing. (D.I. **[*21]** 7 at 15). When addressing this argument in Petitioner's direct appeal, the Delaware Supreme Court

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[3] Nevertheless, "in the event of a guilty verdict on the more serious offenses," the trial court presumably will "have to confront the question of cumulative punishments as a matter of state law." Johnson, 467 U.S. at 500 ("While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution.").

[4] The narrow exception to the Ball "continuing jeopardy" rule is when the reviewing court has found the evidence legally insufficient. *See* Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). The Burks exception is premised on the idea that reversal based on insufficiency of the evidence, rather than legal error, has the same effect as a judgment of acquittal. *See* Tibbs, 457 U.S. at 40.

[5] Petitioner states:

> After the trial court allowed the amendment to place petitioner in a double jeopardy calculus, meaning, after the amendment, instead of Robbery 1st of Rose Marie Hase and aggravated menacing of Vicky Ebaugh which was the sufficient way the grand jury presented its true bill. After the change Petitioner Grimes faced the unconstitutional dynamic of fighting a robbery 1st of Vicky Ebaugh and aggravated menacing of Vicky Ebaugh.

(D.I. 7 at 5, 16)

[6] The Court addresses Petitioner's argument that the amendment created a multiplicitous indictment later in the Opinion. *See infra* at Section III.A.3. The Court also addresses Petitioner's related argument that the Superior Court improperly permitted the amendment of the indictment later in the Opinion. *See infra* at Section III.B.

acknowledged that the prohibition against double jeopardy bars a second *successive* prosecution for a greater offense after the defendant has been acquitted on a lesser-included offense. *See Grimes, 188 A.3d at 827*. Nevertheless, citing the relevant Supreme Court decisions, the Delaware Supreme Court concluded that double jeopardy considerations did not bar Petitioner's retrial on the first-degree robbery charge here because: (1) the State was authorized to charge first-degree robbery and aggravated menacing together in the amended indictment, *see Johnson, 467 U.S. at 500-01*; (2) Petitioner was subject to continuing jeopardy from his first trial through his second trial because first-degree robbery and aggravated menacing were both charged in the amended indictment, and the reversal of his first-degree robbery conviction was not "final" for double jeopardy purposes, *see Lydon, 466 U.S. at 308, 326*; *Ball, 163 U.S. at 672*; *Brown, 432 U.S. at 168*; and (3) Petitioner's retrial after his convictions were overturned on direct appeal due to an error during jury selection did not constitute a successive prosecution, *see Price, 398 U.S. at 329*. *See Grimes, 188 A.3d at 826-828*. The Delaware Supreme Court correctly concluded:

> [W]hile [Petitioner] believes that acquittals **[*22]** should have the same double-jeopardy effect on retrials that they have on successive prosecutions, *Johnson* and *Price* show that "there is a difference between separate, successive trials of greater and lesser offenses, and the different situation[s] in which both are tried together." For double-jeopardy purposes, "it makes all the difference."

Grimes, 188 A.3d at 828 (cleaned up).

Based on the foregoing, the Court concludes that the Delaware Supreme Court's denial of Claim One (a) and (b) was neither contrary to, nor based on unreasonable application of, clearly established federal law.

2. Issue Preclusion

The *Double Jeopardy Clause* also incorporates the doctrine of issue preclusion and protects defendants from being forced to relitigate issues of ultimate fact that jury decided at a previous trial. *See Bravo-Fernandez, 580 U.S. at 12*; *Ashe v. Swenson, 397 U.S. 436, 443-46, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)*. "[P]rinciples of collateral estoppel [. . .] are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict." *United States v. Powell, 469 U.S. 57, 68, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)*. A defendant who raises issue preclusion under the *Double Jeopardy Clause* bears the heavy burden of showing that "the issue whose relitigation he seeks to foreclose was actually decided by a prior jury's verdict of acquittal." *Bravo-Fernandez, 580 U.S. at 12*. When the same jury reaches irreconcilably inconsistent verdicts on the **[*23]** question that the defendant seeks to prevent a second jury from considering, and the conviction is later vacated for legal error unrelated to the inconsistency, the "principles of collateral estoppel [. . .] are no longer useful." *Powell, 469 U.S. at 68*; *see Bravo-Fernandez, 580 U.S. at 17-18*. In such cases, retrial is permitted because it cannot be determined why the jury returned an acquittal and, relatedly, the defendant cannot meet the burden of demonstrating that the jury necessarily decided the point at issue in his favor. *See Bravo-Fernandez, 580 U.S. at 18-24*; *Powell, 469 U.S. at 68-69*.

On direct appeal, Petitioner argued that the "principles of double jeopardy are subsumed by the broader doctrine of collateral estoppel which means that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." (D.I. 11-12 at 5). In Claim One (c) of his Petition, Petitioner contends that his aggravated-menacing acquittal had an issue-preclusive effect on the State's ability to retry him for first-degree robbery. According to Petitioner: (1) under Delaware law, the two offenses of aggravated menacing and first-degree robbery merged into the same offense because the offenses happened during the same **[*24]** occurrence (*Id.* at 7); (2) the fact that his convictions from his first trial were vacated "meant that all of the convictions were wiped out," leaving his acquittal in place (D.I. 11-14 at 6-7); and (3) by retrying him for first-degree robbery, the State was re-prosecuting him "for a charge whose exact same elements ha[d] previously been adjudicated in an acquittal." (D.I. 11-14 at 7). In sum, Petitioner appears to argue that the *Double Jeopardy Clause* barred the second prosecution for first-degree robbery because he believes that his acquittal on the lesser-included offense of aggravated menacing constitutes an acquittal on the greater offense. (D.I. 11-2 at 5).

The Delaware Supreme Court was not persuaded by Petitioner's argument that his acquittal should be "credited" over the conviction and treated as the "jury's true verdict." *Grimes, 188 A.3d at 829*. After explaining that "issue preclusion is predicated on the assumption that the jury acted rationally," the Delaware Supreme

Court held that the principle of issue preclusion did not apply in Petitioner's case because the jury's irreconcilable verdict made it "impossible to discern which verdict the jurors arrived at rationally." *Grimes, 188 A.3d at 829*. This conclusion was premised on a straight-forward **[*25]** application of the rationale set forth in *Powell* and *Bravo-Fernandez*. Therefore, the Court concludes that the Delaware Supreme Court's denial of Claim One (c) was not contrary to, and also did not involve, an unreasonable application of clearly established federal law.

3. Multiplicity

Multiplicity is the charging of a single offense in separate counts of an indictment. *See United States v. Carter, 576 F.2d 1061, 1064 (3d Cir. 1978)*. "A multiplicitous indictment risks subjecting a defendant to multiple sentences for the same offense, an obvious violation of the *Double Jeopardy Clause*'s protection against cumulative punishment." *United States v. Kennedy, 682 F.3d 244, 255 (3d Cir. 2012)*. Notably, multiplicitous charges alone do not violate a defendant's right to be protected against double jeopardy; it is the resulting multiple convictions or punishments that potentially violate the *Double Jeopardy Clause*. *See Johnson, 467 U.S. at 500* ("While the *Double Jeopardy Clause* may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution."). The traditional test for determining if the cumulative punishment imposed for multiple offenses violates double jeopardy is the same-elements test set forth in *Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)*. *See Brown, 432 U.S. at 166* (noting that the "established test for determining whether two offenses **[*26]** are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger*."). Pursuant to *Blockburger*, a court must analyze "whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993)*. The rule articulated in *Blockburger* is a "rule of statutory construction to help determine legislative intent;" the rule is "not controlling when the legislative intent is clear from the face of the statute or the legislative history." *Garrett v. United States, 471 U.S. 773, 778-79, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985)*. In the typical multiplicity case, two different statutes define the "same offense" because one is a lesser-included offense of the other. *See Rutledge v. United States, 517 U.S. 292, 297, 116 S. Ct. 1241, 134 L. Ed. 2d 419 & n.6 (1996)*.

In Claim One (d), Petitioner contends that the State created a multiplicitous indictment when it changed the name of the victim for the first-degree robbery charge to "align" with the name of the victim for one of the aggravated menacing charges. On post-conviction appeal, the Delaware Supreme Court denied this argument as formerly adjudicated under *Rule 61(i)(4)*, asserting that it had already ruled on the underlying double jeopardy argument when it affirmed Petitioner's conviction for first-degree robbery in his second **[*27]** direct appeal. Given the Delaware Supreme Court's reliance on *Rule 61(i)(4)*, the Court must treat Claim One (d) as though it was adjudicated on the merits.

The Court does not need to engage in the *Blockburger* analysis to determine if the amended indictment was multiplicitous because, pursuant to well-settled Delaware law, aggravated menacing is a lesser-included offense of first-degree robbery. *See Poteat v. State, 840 A.2d 599, 606 (Del. 2003)* (concluding that "the General Assembly intended for Aggravated Menacing to be a lesser-included offense of Robbery in the First Degree."). Nevertheless, since Petitioner was not convicted of (nor sentenced for) two separate offenses involving the same conduct, any multiplicity issues surrounding the amended indictment did not result in violating Petitioner's right to be free from double jeopardy. During his original trial in 2013, Petitioner was convicted of only one count of first-degree robbery, and he was acquitted of all six counts of aggravated menacing. At his 2016 retrial, Petitioner was no longer facing any of the aggravated menacing charges because of the 2013 acquittals and, again, he was convicted of only one count of first-degree robbery. Given these circumstances, the Court concludes that Claim One **[*28]** (d) lacks merit and does not warrant relief under *§ 2254(d)*.

B. Claim Two (a): Not Cognizable and Procedurally Barred

In Claim Two (a), Petitioner argues that he "was convicted and sentenced for a charge in which there was no probable cause determination" because the indictment was not presented to the grand jury in its amended form. (D.I. 7 at 6). The *Fifth Amendment* right to a grand jury indictment does not apply to State

criminal prosecutions,[7] therefore, "the legality of an amendment to an indictment is primarily a matter of state law." *United States ex. rel Wojtycha v. Hopkins, 517 F.2d 420, 425 (3d Cir. 1975)*. Claims based on errors of state law are not cognizable on federal habeas review, and federal courts cannot re-examine state court determinations on state law issues. *See Estelle v. McGuire, 502 U.S. 62, 67-8, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)*; *Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984)*; *Riley v. Taylor, 277 F.3d 261, 310 n.8 (3d Cir. 2001)*. Thus, as a threshold matter, the Court concludes that Claim Two (a) does not present an issue cognizable on federal habeas review.

Claim Two (a) is also procedurally barred. On post-conviction appeal, Petitioner argued that he was not provided notice of the amendment to the indictment which, in turn, misled him about the charges for which he needed to prepare a defense. (D.I. 11-19 at 14-19). The Delaware Supreme Court characterized Petitioner's argument as asserting that the amended indictment **[*29]** violated his right to a fair trial, and denied the argument as procedurally defaulted under *Rule 61(i)(3)* due to Petitioner's failure to present the argument during his first trial, first direct appeal, second trial, and second direct appeal. *See Grimes, 2020 Del. LEXIS 252, 2020 WL 4200132, at *1*.

By applying the procedural bar of *Rule 61(i)(3)* to Claim Two (a), the Delaware Supreme Court articulated a "plain statement" under *Harris v. Reed, 489 U.S. 255, 263-4, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1984)*, that its decision rested on state law grounds. This Court has consistently held that *Rule 61(i)(3)* is an independent and adequate state procedural rule effectuating a procedural default. *See Lawrie v. Snyder, 9 F. Supp. 2d 428, 451 (D. Del. 1998)*. Thus, the Court finds that Claim Two (a) is procedurally defaulted.

Having determined that Claim Two (a) is procedurally defaulted, the Court cannot review the Claim's merits absent a showing of cause for the default, and prejudice resulting therefrom, or upon a showing that a miscarriage of justice will occur if the claim is not reviewed. Petitioner does not assert any reason for his default of Claim Two (a). Petitioner's failure to establish cause eliminates the Court's need to consider prejudice. Additionally, the miscarriage of justice exception to the procedural default doctrine does not excuse Petitioner's default, because Petitioner has not provided new **[*30]** reliable evidence of his actual innocence.

Based on the foregoing, the Court will deny Claim Two (a) for failing to present an issue cognizable on federal habeas relief and, alternatively, as procedurally barred from habeas review.

C. Claim Two (b): Failure to Establish Proof of Guilt Beyond Reasonable for First-Degree Robbery

In Claim Two (b), Petitioner argues that his acquittal on the aggravating menacing charge necessarily prevents establishing the elements for first-degree robbery, thereby demonstrating that the State did not establish his guilt for first-degree robbery beyond a reasonable doubt. (D.I. 7 at 6). The record reveals that Petitioner presented this argument to the Delaware Supreme Court on post-conviction appeal in terms of double jeopardy/issue preclusion, due process, and inconsistent verdicts. (D.I. 11-19 at 21). The Delaware Supreme Court viewed the argument as essentially reasserting the double jeopardy claim that it had denied in Petitioner's second direct appeal, and dismissed the argument as barred under *Rule 61(i)(4)* for being formerly adjudicated. Consequently, to the extent Claim Two (b)'s "absence of proof beyond a reasonable doubt" argument asserts a double jeopardy violation, **[*31]** the Court denies it for the same reasons set forth in Section III.A. of this Opinion.

Nevertheless, in his Reply, Petitioner states that he presented Claim Two (b) to the Delaware Supreme Court as an insufficient evidence argument. Given the Delaware Supreme Court's failure to consider it as such, Petitioner argues that the Court should review his insufficient evidence allegation on its merits. The Court is not persuaded. A review of the record reveals that Petitioner did not "fairly present" his insufficient evidence argument to the Delaware Supreme Court. The clearly established federal law governing insufficient evidence claims is the standard set forth by the Supreme Court in *Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*. *See Eley v. Erickson, 712 F.3d 837, 847 (3d Cir. 2013)* ("The clearly established federal law governing Eley's [insufficient evidence] claim was determined in *Jackson*."). Pursuant to *Jackson*, the relevant question is "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found

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[7] *See Apprendi v. New Jersey, 530 U.S. 466, 499, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (1994)*; *Rose v. Mitchell, 443 U.S. 545, 557 n.7, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979)*; *Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884)*.

the essential elements of the crime beyond a reasonable doubt." *Jackson, 443 U.S. at 319*. Although Petitioner cited to *Jackson* and used the phrase "no person may be convicted of an offense unless each element of the offense is proved beyond **[*32]** a reasonable doubt" when he presented Claim Two (b) to the Delaware Supreme Court on post-conviction appeal, he actually argued that the inconsistency between the two verdicts (acquittal for aggravated menacing and conviction for first-degree robbery) meant all elements of first-degree robbery were not found beyond a reasonable doubt. (D.I. 11-19 at 21). Importantly, in *Powell*, the Supreme Court cautioned that sufficiency of the evidence review "should not be confused with the problems caused by inconsistent verdicts." *Powell, 469 U.S. at 67*. As the *Powell* Court explained:

> Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was insufficient.

Id.

Here, Petitioner did not argue on post-conviction appeal that the evidence was legally insufficient or that the trial court incorrectly instructed the jury on the burden of proof. In other words, Petitioner did not fairly present a "true" insufficient evidence argument to the Delaware Supreme Court. Given these circumstances, the Court concludes that Petitioner **[*33]** did not exhaust state remedies for the "true" insufficient evidence argument he asserts in Claim Two (b).

At this juncture, any attempt by Petitioner to raise Claim Two (b)'s insufficient evidence argument in a new *Rule 61* motion would be barred as untimely under *Delaware Superior Court Criminal Rule 61(i)(1)* and denied as procedurally defaulted under *Rule 61(i)(3)*. *See DeAngelo v. Johnson, 2014 U.S. Dist. LEXIS 113252, 2014 WL 4079357, at *12 (D. Del. Aug. 15, 2014)*. Thus, the Court must excuse as futile Petitioner's failure to exhaust state remedies, but still treat the insufficient evidence argument in Claim Two (b) as procedurally defaulted.

Petitioner has not provided any cause for his failure to fairly present the insufficient evidence argument to the Delaware Supreme Court on post-conviction appeal.[8] In the absence of cause, the Court will not address the issue of prejudice. Additionally, the miscarriage of justice exception to the procedural default doctrine does not excuse Petitioner's default, because Petitioner has not provided new reliable evidence of his actual innocence. Accordingly, the Court will deny the insufficient evidence argument in Claim Two (b) as procedurally barred from habeas review.

D. Claim Three: Subject Matter Jurisdiction

In Claim Three, Petitioner contends that the amendment of the indictment divested the Superior **[*34]** Court of subject-matter jurisdiction over his case which, in turn, also violated due process. (D.I. 7 at 8). As previously discussed with respect to Claim Two (a), the legality of an indictment is an issue of state law. *See supra* at Section III.B. The issue of the Superior Court's subject matter jurisdiction is also a matter of state law, because a Delaware state court's jurisdiction is determined by the Delaware Constitution and the Delaware Code. *See Del. Const. art. IV, 7*; *10 Del. C. § 541*; *United States v. Kerley, 416 F.3d 176, 182 (2d Cir. 2005)* ("[S]ubject matter jurisdiction . . . is wholly an issue of state statutory law. The application — or misapplication of state subject matter jurisdiction rules raise no constitutional issues, due process or otherwise."). Therefore, the Court will deny Claim Three for failing to assert an issue cognizable on federal habeas review.

Nevertheless, even if Claim Three could be construed as presenting an issue cognizable on federal habeas review, it is procedurally barred. The record reveals that Petitioner exhausted state remedies for Claim Three by presenting it to the Delaware Supreme Court on post-conviction appeal, both as a free-standing claim and as a way to trigger *Rule 61(i)(5)*'s exception to the procedural default bar of *Rule 61(i)(3)*. *See Grimes, 2020 Del. LEXIS 252, 2020 WL 4200132, at *2*; (D.I. 11-19 **[*35]** at 7). The Delaware Supreme Court denied Claim Three's lack-of-subject-matter-jurisdiction argument as procedurally defaulted under *Rule 61(i)(3)* because Petitioner did not raise the argument during his first trial, second trial and second appeal, and Petitioner did not demonstrate that his failure to raise the absence

[8] In his Reply, Petitioner attempts to present a vague argument that there was insufficient evidence to support his conviction by alleging that the trial transcripts have been altered. (D.I. 13 at 6). Since Petitioner did not present this same allegation to the Delaware Supreme Court on post-conviction appeal, his current assertion does not cure his failure to satisfy the "fair presentation" requirement of the exhaustion doctrine.

of subject matter argument triggered *Rule 61(i)(5)*'s miscarriage of justice exception for the default. *See Grimes, 2020 Del. LEXIS 252, 2020 WL 4200132, at *1*.

Rule 61(i)(5) provides:

> The bars to relief in *paragraphs (1)*, *(2)*, *(3)*, and *(4)* of this subdivision shall not apply either to a claim that the court lacked jurisdiction or to a claim that satisfies the pleading requirements of subparagraphs (2)(i) or *(2)(ii) of subdivision (d)* of this rule.

Given the language in *Rule 61(i)(5)*, one could argue that the Delaware Supreme Court adjudicated the merits of Petitioner's lack-of-subject-matter-jurisdiction argument when determining that he did not trigger *Rule 61(i)(5)*'s exception to *Rule 61(i)(3)*'s bar. To the extent the Court should view the Delaware Supreme Court's determination regarding Petitioner's failure to meet *Rule 61(i)(5)*'s exception as constituting an adjudication of Claim Three's merits, the Court finds that the Delaware Supreme Court's analysis in rejecting the argument actually supports the Court's threshold determination that Claim Three asserts **[*36]** an issue of state law that is not cognizable in this proceeding. For instance, after explicitly identifying and then applying Delaware law, the Delaware Supreme Court determined that amending the indictment by changing the names of the victims did not constitute a substantive change, did not prejudice Petitioner, and did not divest the Superior Court of jurisdiction over his case. *See Grimes, 2020 Del. LEXIS 252, 2020 WL 4200132, at *3*.

Conversely, to the extent the Delaware Supreme Court's consideration as to whether Petitioner's lack-of-subject-matter-jurisdiction argument could satisfy *Rule 61(i)(5)*'s exception to *Rule 61(i)(3)*'s bar did not constitute an adjudication of Claim Three on the merits for the purposes of *§ 2254(d)(1)*, the Court defers to the Delaware Supreme Court's final holding that Claim Three was procedurally defaulted under *Rule 61(i)(3)* and further concludes that Claim Three is procedurally barred.[9]

[9] The Court concludes that Claim Three is procedurally barred because: (1) Petitioner does not assert any reason for his failure to present Claim Three during his first and second trials or during his appeals after his first and second trials; (2) in the absence of cause, the Court does not need to address the issue of prejudice; and (3) the miscarriage of justice exception to AEDPA's procedural default rule does not excuse Petitioner's procedural default, because he has not provided any new reliable evidence of his actual innocence.

Based on the foregoing, the Court will deny Claim Three for failing to assert an issue cognizable on federal habeas review and, alternatively, as procedurally barred.

IV. PENDING MOTION

During the pendency of this proceeding, Petitioner filed a Motion for Summary Judgment. (D.I. 19). The Motion re-asserts in summary form the arguments Petitioner presented in his Petition. **[*37]** Having already determined that none of the Claims in the Petition warrant relief, the Court will dismiss as moot the Motion for Summary Judgment.

V. CERTIFICATE OF APPEALABILITY

A district court issuing a final order denying a *§ 2254* petition must also decide whether to issue a certificate of appealability. *See* 3d Cir. L.A.R. 22.2 (2011); *28 U.S.C. § 2253(c)(2)*. A certificate of appealability is appropriate when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *28 U.S.C. § 2253(c)(2)*; *see also Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*. In addition, when a district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. *See Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*.

The Court has concluded that the instant Petition does not warrant relief. Reasonable jurists would not find this conclusion to be debatable. Accordingly, the Court **[*38]** will not issue a certificate of appealability in this case.

VI. CONCLUSION

For the reasons discussed, the Court will deny the

instant Petition and deny as moot the pending Motion for Summary Judgment. The Court also declines to issue a certificate of appealability. The Court will enter an Order consistent with this Memorandum Opinion.

ORDER

At Wilmington, this 28th day of March 2024, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Petitioner Russell M. Grimes' Petition for a Writ of Habeas Corpus Pursuant to *28 U.S.C. § 2254* (D.I. 1; D.I. 7) is DISMISSED, and the relief requested therein is DENIED.

2. The Motion for Summary Judgment (D.I. 19) is DENIED as moot.

3. The Court declines to issue a certificate of appealability because Petitioner has failed to satisfy the standards set forth in *28 U.S.C. § 2253(c)(2)*.

/s/ Maryellen Noreika

The Honorable Maryellen Noreika

United States District Judge

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Cole v. Arkansas

Supreme Court of the United States

February 4-5, 1948, Argued ; March 8, 1948, Decided

No. 373

Reporter
333 U.S. 196 *; 68 S. Ct. 514 **; 92 L. Ed. 644 ***; 1948 U.S. LEXIS 2789 ****; 14 Lab. Cas. (CCH) P51,261; 21 L.R.R.M. 2418

COLE ET AL. v. ARKANSAS

Prior History: CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

Petitioners were tried and convicted of a violation of § 2 of a state statute. Their convictions were affirmed by the Supreme Court of Arkansas on the ground that they had violated § 1, describing a separate and distinct offense. *211 Ark. 836, 202 S. W. 2d 770*. This Court granted certiorari. *332 U.S. 834*. Reversed and remanded, p. 202.

Disposition: *211 Ark. 836, 202 S. W. 2d 770*, reversed.

Core Terms

convictions, violence, unlawful assemblage, concert

Case Summary

Procedural Posture
Defendants sought certiorari review of orders from the Supreme Court of Arkansas, which affirmed theirs convictions for violating 1943 Ark. Acts 193, § 1.

Overview
Defendants were charged by information with violating 1943 Ark. Acts 193, § 2, but they were convicted of violating § 1 of the same act. The state supreme court affirmed the convictions, but on certiorari review, the court reversed and remanded the convictions. The court held that defendants' rights to due process of the law was violated because they were clearly convicted of an offense for which they were not charged. The court further held that the state supreme court improperly upheld defendants' convictions under § 1 although the state supreme court determined that defendants were charged with and tried for violating § 2.

Outcome
The court reversed and remanded defendants' convictions.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Disruptive Conduct > Riot > General Overview

HN1[↓] **Disruptive Conduct, Riot**

See 1943 Ark. Acts 193, § 2.

Criminal Law & Procedure > ... > Crimes Against Persons > Terrorism > General Overview

HN2[↓] **Crimes Against Persons, Terrorism**

See 1943 Ark. Acts 193, § 1.

Criminal Law & Procedure > ... > Disruptive Conduct > Riot > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Terrorism > General Overview

HN3[↓] **Disruptive Conduct, Riot**

Under any reasonable construction 1943 Ark. Acts 193, § 1 creates separate offenses, as does 1943 Ark. Acts 193, § 2, and an indictment that alleges crimes covered by a part of § 1 does not impose upon a defendant a duty to defend under § 2 or against threat provisions of § 1.

PART THREE

Exhibit C

WestlawNext

Grimes v. State
Supreme Court of Delaware May 12, 2015 113 A.3d 1080 (Table) 2015 WL 2231801 (Approx. 2 page(s))

113 A.3d 1080 (Table)
Unpublished Disposition
This unpublished disposition is referenced in the Atlantic Reporter.
Supreme Court of Delaware.

Russell M. GRIMES, Defendant–Below, Appellant,
v.
STATE of Delaware, Plaintiff–Below, Appellee.

No. 416, 2013. Submitted: May 4, 2015. Decided: May 12, 2015.

Court Below: Superior Court of the State of Delaware, in and for Kent County. Cr. ID 1108023033A.

Before STRINE, Chief Justice; HOLLAND and VALIHURA, Justices.

ORDER

LEO E. STRINE, JR., Chief Justice.

*1 (1) This is an appeal by defendant Russell Grimes, who was tried and convicted at the same trial as William S. Sells, III, his co-defendant. In an earlier opinion, this Court held that the judgment of convictions entered against Sells had to be vacated because his ability to use his peremptory challenges had been improperly restricted.[1] In that opinion, this Court determined that the State had failed to establish a *prima facie* case for a reverse-*Batson* violation by Sells, who had used two of his three peremptory challenges to strike white jurors.[2] Thus, this Court found that the Superior Court erred by denying Sells the right to use a peremptory strike on the ground that Sells failed to articulate a non-discriminatory reason for exercising his peremptory strike.[3]

(2) After that decision, this Court ordered supplemental briefing in this case, because Grimes' exercise of peremptory challenges was restricted in the same manner, and our opinion addressed strikes made by both Grimes and Sells, which the Superior Court had improperly aggregated.

(3) We have considered the supplemental briefing carefully. Although the State has tried hard to distinguish the cases, we fail to see any plausible basis on which to treat Grimes differently than Sells. The Superior Court's encroachment on their use of peremptory challenges was identical in all respects, including as to its ultimate effect: the seating of a juror after their peremptory strike (made first by Grimes and then joined in by Sells) against that juror was disallowed. As a result, for the reasons set forth in our decision in *Sells v. State*, we vacate the judgment of convictions entered against Grimes on July 25, 2013 and remand for a new trial.[4]

IT IS SO ORDERED.

All Citations

113 A.3d 1080 (Table), 2015 WL 2231801

Footnotes

1 *See Sells v. State*, 109 A.3d 568 (Del.2015).

2 *Id.* at 579.

3 *Id.*

4 Because we reverse on this ground, there is no need to address the other arguments made by Grimes on appeal. The Court is grateful to Colm F. Connolly, Esquire, for serving *pro bono* as *amicus curiae* to provide the Court with supplemental briefing on the reverse-*Batson* issue.

Exhibit C

SELECTED TOPICS

Criminal Law
Review
Denial of Prosecution Peremptory Challenge of Alternate Juror

Secondary Sources

JURY SELECTION ERRORS ON APPEAL
39 Am. Crim. L. Rev. 1391
...Claims that errors were made during jury selection are among the most common of all grounds for criminal appeals. Yet appellate courts, both state and federal, seem profoundly confused about how to an...

THE CONSTITUTION, PEREMPTORY CHALLENGES, AND UNITED STATES V. MARTINEZ-SALAZAR
22 Whittier L. Rev. 843
... The Constitution of the United States of America protects a federal criminal defendant by guaranteeing both a "trial, by an impartial jury," and that he shall not be "deprived of life, liberty, or prop...

§ 2390. Preliminary proceedings—Trial jury selection
24 C.J.S. Criminal Law § 2390
...With regard to jury selection, generally, a defendant's use of a peremptory strike to remove a prospective juror, whom the trial court should have removed for cause, is subject to harmless error review...

See More Secondary Sources

Briefs

BRIEF FOR THE UNITED STATES
1999 WL 618377
U.S. v. Martinez-Salazar
United States Supreme Court Petitioner's Brief.
August 13, 1999
... The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 140 F.3d 653. The judgment of the court of appeals was entered on May 28, 1998. A petition for rehearing was denied on October 7, 1...

BRIEF FOR THE RESPONDENT
1999 WL 1051280
U.S. v. Martinez-Salazar
United States Supreme Court Respondent's Brief.
October 14, 1999
... At the Respondent's voir dire proceeding, the district court submitted a form to all prospective jurors. J.A. 93-94. On the questionnaire, prospective Juror G then wrote that "I would favor the prosec...

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE FEDERAL DEFENDER ASSOCIATION AMICI CURIAE IN SUPPORT OF RESPONDENT
1999 WL 732150
U.S. v. Martinez-Salazar
United States Supreme Court Amicus Brief
October 04, 1999
... The National Association of Criminal Defense Lawyers, the Public Defender Service for the District of Columbia, and the Federal Defender Association submit this brief as amici curiae in support of the...

See More Briefs

Trial Court Documents

U.S. v. McQuinn

2002 WL 34392434
U.S. v. McQuinn
United States District Court, E.D. Virginia.
June 03, 2002

...Paul J. McNulty, United States Attorney for the Eastern District of Virginia, and Robert E. Trono, Assistant United States Attorney, and the defendant, ATARAH MCQUINN, and the defendant's counsel, purs...

Medical Laboratory Management Consultants v. American Broadcasting Cos, Inc.

1998 WL 35174273
Medical Laboratory Management Consultants v. American Broadcasting Cos, Inc.
United States District Court, D. Arizona
December 23, 1998

...FN1. A cytotechnologist is a medical laboratory technologist who examines cells under a pathologist's supervision in order to diagnose cancer or other diseases. FN2. John and Carolyn Devaney are Medica...

In re Aleris Intern., Inc.

2009 WL 8158953
In re Aleris Intern., Inc.
United States Bankruptcy Court, D. Delaware.
February 12, 2009

...Aleris International, Inc. and its affiliated debtors in the above referenced chapter 11 cases, as debtors and debtors in possession (collectively, the "Debtors"), having proposed and filed the follow...

See More Trial Court Documents

Grimes v. State

Supreme Court of Delaware

May 16, 2018, Submitted; June 12, 2018, Decided

No. 73, 2017

Reporter
188 A.3d 824 *; 2018 Del. LEXIS 272 **; 2018 WL 2945943

RUSSELL GRIMES, Appellant, v. STATE OF DELAWARE, Appellee.

Subsequent History: Post-conviction proceeding at *State v. Grimes, 2019 Del. Super. LEXIS 354, 2019 WL 3337897 (Del. Super. Ct., July 23, 2019)*

Motion granted by, Decision reached on appeal by *Grimes v. State, 2021 Del. LEXIS 257 (Del., Aug. 5, 2021)*

Prior History: **[**1]** Upon appeal from the Superior Court of the State of Delaware.

Grimes v. State, 113 A.3d 1080, 2015 Del. LEXIS 224, 2015 WL 2231801 (Del., May 12, 2015)

Disposition: AFFIRMED.

Core Terms

robbery, first-degree, aggravated, greater offense, acquitted, convicted, menacing, double jeopardy, indicted, lesser offense, lesser-included, retrying, jeopardy, vacated, lesser included offense, first trial, manslaughter, prosecute, purposes, forbids

Counsel: Russell Grimes, Pro se, Smyrna, Delaware.

John Williams, Esquire (argued), Delaware Department of Justice, Dover, Delaware, Counsel for Appellee.

Craig A. Karsnitz, Esquire (argued), Young Conaway Stargatt & Taylor, LLP, Georgetown, Delaware, Amicus Curiae on behalf of Appellant.[1]

Judges: Before STRINE, Chief Justice; SEITZ and TRAYNOR, Justices.

[1] We appointed Craig A. Karsnitz to serve as amicus curiae, and we are grateful for his pro bono service.

Opinion by: TRAYNOR

Opinion

[*825] **TRAYNOR**, Justice:

If a defendant is convicted by a jury of one offense, but acquitted—in the same verdict—of a lesser-included offense, and the conviction on the greater offense is vacated on appeal, does the acquittal on the lesser offense prevent the State, under the *Double Jeopardy Clause*, from retrying the defendant for the greater offense? We conclude that it does not.

Russell Grimes was accused of participating in a bank robbery. He was indicted for first-degree robbery, aggravated menacing, and other related charges. At trial, the jury convicted him of first-degree robbery, but acquitted him of aggravated menacing. He appealed, and based on an error that occurred during jury selection, we vacated his first-degree robbery conviction and remanded for a new trial.[2] A jury **[*826]** again convicted him of first-degree **[**2]** robbery.

Grimes contends that retrying him for first-degree robbery after he was acquitted of aggravated menacing violated the *Double Jeopardy Clause*. In *Poteat v. State*, we said that "Aggravated Menacing is a lesser-included offense of Robbery in the First Degree,"[3] and on that basis, Grimes argues that his acquittal on a lesser-included offense prevented the State from retrying him for a greater offense.[4]

[2] ***Grimes v. State, 113 A.3d 1080 (Del. 2015)*** (unpublished table decision).

[3] *840 A.2d 599, 601 (Del. 2003)*.

[4] *Poteat* concerned whether, under the *Double Jeopardy*

The *Double Jeopardy Clause of the Fifth Amendment* provides that no person shall "be subject for the same offence to be twice put in jeopardy."[5] The term "same offence" includes not only the same charge, but also any offense that subsumes all the elements of that charge (a greater offense) and any offense whose elements are entirely subsumed by that charge (a lesser-included offense). So when the *Double Jeopardy Clause* says that it forbids twice putting a defendant in jeopardy for the "same offence," it "forbids successive prosecution" not only for the same charge, but also "for a greater [or] lesser included offense."[6]

Grimes was tried at his first trial for first-degree robbery, convicted of that charge, and, after we vacated that conviction, tried for that same charge again. That in itself poses no double-jeopardy problem, **[**3]** because as the U.S. Supreme Court held in *Ball v. United States*, the *Double Jeopardy Clause* does not prevent a defendant from being retried for an offense if he succeeds in having his conviction vacated.[7] The defendant is viewed as being in "continuing jeopardy" while his challenge plays out, and a retrial following vacatur is considered part of the same, ongoing jeopardy, not a successive prosecution for the same offense.[8]

Grimes contends that because he was acquitted at his first trial of aggravated menacing—a lesser-included offense and, therefore, the "same offence," for double-jeopardy purposes, as first-degree robbery—the finality of that acquittal **[*827]** trumps the normal operation of the *Ball* rule. Both he and the amicus believe this result is compelled by a straightforward application of the maxim that "the *Double Jeopardy Clause* prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense."[9]

But that passage, which is taken from the U.S. Supreme Court's decision in *Ohio v. Johnson*, was speaking to how events played out in *Brown v. Ohio*, a case where a defendant was indicted and convicted on one offense and then, after that prosecution had **[**4]** ended, indicted again in a new prosecution for a greater offense.[10] There is no question that if Grimes had been tried at his first trial solely for aggravated menacing and been acquitted, the State could not then have indicted him anew on first-degree robbery; as the Court said in *Brown*, an acquittal "forbids successive prosecution . . . for a greater [or] lesser included offense."[11] But Grimes

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Clause, aggravated menacing must merge with first-degree robbery at sentencing, not whether a prosecution for one bars a successive prosecution for the other, but we will assume for this appeal, as does Grimes, that *Poteat* applies equally in both contexts. *See United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993)* ("We have often noted that the [Double Jeopardy] Clause serves the function of preventing both successive punishment and successive prosecution, but there is *no* authority . . . for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term 'same offence' (the words of the *Fifth Amendment* at issue here) has two different meanings—that what is the same offense is yet not the same offense." (citation omitted)).

[5] *U.S. Const. amend. V*. Grimes makes passing reference to the analogous protections under the Delaware Constitution, but both he and the amicus otherwise rely exclusively on the federal *Double Jeopardy Clause* and cases construing it. So will we. *See Ortiz v. State, 869 A.2d 285, 291 n.4 (Del. 2005)* ("[C]onclusory assertions that the Delaware Constitution has been violated . . . [are] waived on appeal."), *overruled on other grounds by* ***Rauf v. State, 145 A.3d 430 (Del. 2016)*** (per curiam).

[6] *Blake v. State, 65 A.3d 557, 561 (Del. 2013)* (quoting *Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)*).

[7] *163 U.S. 662, 672, 16 S. Ct. 1192, 41 L. Ed. 300 (1896)*.

[8] *Price v. Georgia, 398 U.S. 323, 326, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970)* (recognizing that, in *Ball*, the Court "effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course").

[9] *Ohio v. Johnson, 467 U.S. 493, 501, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984)*.

[10] *See id.* (discussing *Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)*).

[11] *Brown, 432 U.S. at 169*. So it was in *Blake v. State, 65 A.3d 557 (Del. 2013)*, where we relied on *Brown* to hold that the State violated the *Double Jeopardy Clause* when it reindicted Blake for trafficking in cocaine and heroin after a jury had already convicted him on lesser possession offenses. The original jury had hung on whether he had trafficked in cocaine, but rather than retry him for that charge on the same indictment, *see Richardson v. United States, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984)* ("[W]ithout exception, the courts the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."), the State obtained a new indictment charging him not only with that offense, but also with trafficking in heroin—a charge which had been

seeks that same double-jeopardy effect within the context of a single—as distinguished from a successive—prosecution. He believes his aggravated menacing acquittal not only forbids the State from initiating a new prosecution for any greater or lesser included offense, but also forbids the State from completing its prosecution of the first-degree robbery charge on the original indictment.

We cannot agree. Giving acquittals that kind of intra-prosecution double-jeopardy power would be inconsistent both with the teachings of *Johnson* and with the Court's earlier decision in *Price v. Georgia*.[12]

In *Johnson*, the defendant was indicted for two greater offenses (murder and aggravated robbery) and two lesser offenses (involuntary manslaughter and grand theft). He volunteered to plead guilty to **[**5]** the lesser offenses and then, after his pleas were accepted and he was sentenced, argued that the finality of those convictions barred the state from continuing to prosecute him for the greater offenses. As with Grimes, there is no doubt that if Johnson had been indicted with only the two lesser offenses and pleaded guilty to them, those convictions would have barred the state from starting up a second prosecution for any greater or lesser offenses. But the Court thought it "obvious" the same was not true when "all four charges were embraced within a single prosecution."[13] Trial proceedings are not, the Court observed, "like amoebae, . . . capable of being infinitely subdivided, so that a determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to **[*828]** continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded."[14] That is no less true here. Grimes was indicted for first-degree robbery and aggravated menacing at the same time, and his retrial for first-degree robbery was still—under the *Ball* rule—part of the same, continuous prosecution. He cannot subdivide that prosecution **[**6]** by charge to use his acquittal on aggravated menacing to "prevent the State from completing its prosecution on the remaining charge[]."[15]

Nor could we square that result with *Price v. Georgia*.[16] In *Price*, the defendant was acquitted at his first trial of a greater offense (first-degree murder) and convicted of a lesser-included offense (voluntary manslaughter). The lesser-included conviction was vacated on appeal, and the state sought to retry him. By Grimes's reasoning, the first-degree-murder acquittal should have cut the state off from continuing to prosecute the voluntary manslaughter charge because voluntary manslaughter is, for double-jeopardy purposes, the "same offence" as first-degree murder. But based on a straightforward application of the *Ball* rule, the Court saw no double-jeopardy problem with retrying him. "The concept of continuing jeopardy implicit in the *Ball* case," the Court said, "would allow [a] retrial for voluntary manslaughter after his first conviction for that offense had been reversed"[17] — regardless of the fact that Price had been acquitted at his first trial of what, for double-jeopardy purposes, was the "same offence."[18] It is true that Price was acquitted **[**7]** of the greater offense and retried on the lesser, while Grimes was acquitted of the lesser offense and retried on the greater, but for double-jeopardy purposes, "the sequence is immaterial."[19]

So while Grimes believes that acquittals should have the same double-jeopardy effect on retrials that they have on successive prosecutions, *Johnson* and *Price* show that "there is a difference between separate, successive trials of greater and lesser offenses, and the

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included in the original indictment, but which had been voluntarily dismissed prior to the first trial and never presented to the first jury.

[12] *398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970)*.

[13] *467 U.S. at 501*.

[14] *Id.*

[15] *Id. at 502*. An acquittal can, in the right case, have issue-preclusive effect on a state's ability to continue a prosecution on a remaining charge, *see Yeager v. United States, 557 U.S. 110, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009)*, but as we will explain, this is not such a case.

[16] *398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970)*.

[17] *Id. at 329*.

[18] *See United States v. Jose, 425 F.3d 1237, 1245-46 (9th Cir. 2005)* (making essentially this same point). The amicus touts another Ninth Circuit case—*Wilson v. Czerniak, 355 F.3d 1151 (9th Cir. 2004)*—which held that an acquittal for a lesser-included offense prevented a retrial on a greater offense that had resulted in a hung jury. But as the Ninth Circuit has observed, *Jose* and *Wilson* are "almost impossible to reconcile," *Lemke v. Ryan, 719 F.3d 1093, 1103 (9th Cir. 2013)*, and based on *Johnson* and *Price*, we believe *Jose* got the better of the argument.

[19] *Brown, 432 U.S. at 168*.

different situation in which both are tried together."[20] For double-jeopardy purposes, "[i]t makes all the difference."[21]

Grimes also contends that his aggravated-menacing acquittal has issue-preclusive effect on the State's ability to continue prosecuting him for first-degree robbery. Because aggravated menacing is a lesser-included offense of first-degree robbery, he believes his acquittal definitively resolved that he is not guilty of engaging in the conduct necessary to be convicted of first-degree robbery.

[*829] It is true that "in criminal prosecutions, as in civil litigation, . . . 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between **[**8]** the same parties in any future lawsuit.'"[22] But the problem for Grimes is that when the jury acquitted him of aggravated menacing, it simultaneously convicted him of first-degree robbery—an outcome that, in Grimes's own view, is irreconcilable.

"[I]ssue preclusion is 'predicated on the assumption that the jury acted rationally,'" but when a jury returns an irreconcilable verdict, "it is impossible to discern which verdict the jurors arrived at rationally."[23] Grimes would have us credit the acquittal over the conviction—treating the acquittal as the jury's true verdict and the conviction as just a "windfall to the [State] at the [his] expense"—but as we have recognized, it is "equally possible" in a scenario like this "that the jury, convinced of guilt, properly reached its conclusion on the [greater] offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense."[24] When a jury produces an irreconcilable verdict, "it is unclear whose ox has been gored,"[25] so without having any way to know "which verdict the jury 'really meant,' . . . principles of issue preclusion are not useful."[26]

Contrary to Grimes's view, the fact that we later vacated **[**9]** the first-degree robbery conviction because of an error during jury selection does not erase the inconsistency in the jury's verdict. That error had nothing to do with the jury's delivery of an inconsistent verdict, so our vacatur of the first-degree robbery conviction did not "turn the jury's otherwise inconsistent and irrational verdict into a consistent and rational verdict."[27]

The judgment of the Superior Court is therefore affirmed.[28]

End of Document

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[20] *United States v. DeVincent, 632 F.2d 155, 158 (1st Cir. 1980)*.

[21] *Jose, 425 F.3d at 1243*.

[22] *Bravo-Fernandez v. United States, 137 S. Ct. 352, 356, 196 L. Ed. 2d 242 (2016)* (quoting *Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)*). The Court deems this "the issue preclusion component of the *Double Jeopardy Clause*." *Id.*

[23] *Id. at 360* (first quoting *United States v. Powell, 469 U.S. 57, 68, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)*; then quoting *Powell, 469 U.S. at 64*).

[24] *Tilden v. State, 513 A.2d 1302, 1306 (Del. 1986)* (quoting *Powell, 105 S. Ct. at 477*).

[25] *Powell, 469 U.S. at 65*.

[26] *Bravo-Fernandez, 137 S. Ct. at 360* (quoting *Powell, 469 U.S. at 68*).

[27] *Id. at 364-65* (quoting *People v. Wilson, 496 Mich. 91, 852 N.W.2d 134, 151 (Mich. 2014)* (Markman, J., dissenting)).

[28] In addition to first-degree robbery, Grimes was also convicted of a companion firearms charge, but his challenge to that conviction rests solely on his challenge to the underlying robbery conviction. Because we affirm his robbery conviction, we reject this challenge as well.

Grimes v. State

Supreme Court of Delaware

June 12, 2020, Submitted; July 21, 2020, Decided

No. 494, 2019

Reporter
2020 Del. LEXIS 252 *; 237 A.3d 68; 2020 WL 4200132

RUSSELL GRIMES, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.

Notice: PUBLISHED IN TABLE FORMAT IN THE ATLANTIC REPORTER.

Subsequent History: Case Closed September 11, 2020.

Prior History: **[*1]** Court Below: Superior Court of the State of Delaware. Cr. ID No. 1108023033A (K).

Grimes v. State, 113 A.3d 1080, 2015 Del. LEXIS 224 (Del., May 12, 2015)

Core Terms

indictment, robbery, first-degree, teller, first trial, post conviction relief, bank manager, aggravated, menacing, double-jeopardy, divested, robber

Case Summary

Overview
HOLDINGS: [1]-Defendant's double-jeopardy claim was procedurally barred, Del. Super. Ct. R. Crim. P. 61(i)(4), because the instant court previously addressed, and rejected, defendant's argument that double-jeopardy principles prevented the State from retrying him for first-degree robbery after he was acquitted of the lesser-included offense of aggravated menacing in his first trial; defendant could not obtain re-examination of a previously adjudicated claim by refining the claim; [2]-The trial court did not err in permitting amendment of the indictment, and was not divested of jurisdiction because the amendment of the indictment, which changed the name of the robbery victim, did not prejudice defendant's defense and did not result in defendant being charged with different or additional offenses.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Postconviction Proceedings > Findings of Fact & Conclusions of Law

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Standards of Review, Abuse of Discretion**

An appellate court reviews a trial court's denial of postconviction relief for abuse of discretion, although the appellate court reviews questions of law de novo. Both a trial court and an appellate court on appeal first must consider the procedural requirements of Del. Super. Ct. R. Crim. P. 61 before considering the merits of any underlying postconviction claims.

Criminal Law & Procedure > Postconviction Proceedings

HN2[] **Criminal Law & Procedure, Postconviction Proceedings**

Del. Super. Ct. R. Crim. P. 61(i)(3) bars claims for postconviction relief that were not raised during the proceedings leading to a judgment of conviction, unless the movant can show cause for the procedural default and prejudice from a violation of the movant's rights.

Criminal Law & Procedure > Postconviction Proceedings

HN3[] **Criminal Law & Procedure, Postconviction Proceedings**

Del. Super. Ct. R. Crim. P. 61(i)(4) bars reconsideration of claims that were previously adjudicated.

Criminal Law & Procedure > Postconviction Proceedings

HN4[] **Criminal Law & Procedure, Postconviction Proceedings**

A defendant cannot obtain re-examination of a previously adjudicated claim by refining or restating that claim.

Criminal Law & Procedure > Postconviction Proceedings

HN5[] **Criminal Law & Procedure, Postconviction Proceedings**

Del. Super. Ct. R. Crim. P. 61(i)(5) provides that the procedural bars do not apply to a claim that the trial court lacked jurisdiction.

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > Amendments & Variances

HN6[] **Indictments, Amendments & Variances**

Under Delaware law, a trial court may amend an indictment at any time prior to verdict as long as no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Judges: Before VAUGHN, TRAYNOR, and MONTGOMERY-REEVES, Justices.

Opinion by: Gary F. Traynor

Opinion

ORDER

Upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant below-appellant, Russell Grimes, has appealed the Superior Court's denial of his first motion for postconviction relief under *Superior Court Criminal Rule 61*. For the reasons set forth below, we affirm the Superior Court's judgment.

(2) In May 2013, a Superior Court jury found Grimes, who chose to represent himself, guilty of first-degree robbery, second-degree conspiracy, possession of a firearm during the commission of a felony, possession of a firearm or ammunition by a person prohibited, and five counts of second-degree reckless endangering as lesser-included offenses of attempted first-degree murder. The jury found Grimes not guilty of first-degree conspiracy and six counts of aggravated menacing. The jury found Grimes's co-defendant, William S. Sells, guilty of multiple crimes, including first-degree robbery. The charges arose from a bank robbery and subsequent car chase with police in which Grimes was the driver of the getaway car. On appeal, **[*2]** this Court held that there were errors in the jury-selection process and reversed and remanded both cases for new trials.[1]

(3) After a new trial, a Superior Court jury found Grimes guilty of first-degree robbery, second-degree conspiracy, possession of a firearm during commission of a felony, possession of a firearm or ammunition by a person prohibited, and five counts of second-degree reckless endangering. On appeal, Grimes and *amicus curiae*, as requested by this Court, argued that retrying Grimes for first-degree robbery after he was acquitted of the lesser-included offense of aggravated menacing (the same victim—a bank manager—was named in both counts of the amended indictment) in the first trial violated the *Double Jeopardy Clause*. This Court held that the *Double Jeopardy Clause* did not prevent the State from retrying Grimes for first-degree robbery after he was found guilty of first-degree robbery and acquitted of the lesser-included offense of aggravated menacing in the first trial.[2]

(4) On August 3, 2018, Grimes filed a timely motion for postconviction relief. He argued that the indictment was illegally amended during the first trial and that this illegal amendment violated the *Double Jeopardy Clause* and his right to a fair trial. He later amended **[*3]** the motion to add a claim that the illegal amendment of the indictment divested the Superior Court of subject matter jurisdiction.

(5) A Superior Court Commissioner recommended denial of Grimes's postconviction motion. The Commissioner concluded that the double-jeopardy claim was previously adjudicated on Grimes's second appeal and was therefore procedurally barred by *Rule 61(i)(4)*. As to Grimes's remaining claims concerning the amendment of the indictment during the first trial, the Commissioner found those claims barred by *Rule 61(i)(3)* because Grimes did not previously challenge the amendment of the indictment, did not establish cause for his failure to do so, and did not establish prejudice. The Commissioner further held that amendment of the indictment did not divest the Superior Court of jurisdiction, and that amendment of the indictment was not illegal. After a *de novo* review of the Commissioner's report and recommendation, the Superior Court denied Grimes's motion for postconviction relief. This appeal followed.

(6) *HN1*[↑] We review the Superior Court's denial of postconviction relief for abuse of discretion, although we review questions of law *de novo*.[3] Both the Superior Court and this Court on appeal first **[*4]** must consider the procedural requirements of *Rule 61* before considering the merits of any underlying postconviction claims.[4] On

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[1] *Grimes v. State, 113 A.3d 1080, 2015 WL 2231801 (Del. May 12, 2015)*; *Sells v. State, 109 A.3d 568 (Del. 2015)*. Sells subsequently pleaded guilty to first-degree robbery and other charges.

[2] ***Grimes v. State, 188 A.3d 824 (Del. 2018).***

[3] *Claudio v. State, 958 A.2d 846, 850 (Del. 2008)*.

appeal, Grimes argues that the substantive amendment of the indictment during his first trial divested the Superior Court of jurisdiction over the first-degree robbery charge and violated double-jeopardy principles.

(7) The indictment originally named a bank teller as the victim of the first-degree robbery charge against Grimes and Sells. Other bank employees, including the bank manager, were named as victims of the aggravated menacing charges. At the beginning of the first trial, the manager testified that, as directed by the armed robber, she assisted with the emptying of the teller drawers. The teller originally named in the first-degree robbery charge testified that she was present when the armed robber emptied the teller drawers.

(8) The State moved to amend the indictment under *Superior Court Criminal Rule 7(e)* to name the bank manager instead of the teller as the victim in the first-degree robbery count. Grimes, whose defense was that he did not commit the robbery and was forced to act as the getaway driver, objected to the amendment on the basis that he only asked the teller, not the bank manager, **[*5]** if she saw anyone help the robber flee.[5] He also requested a mistrial. Sells also objected to the amendment. The Superior Court held that the amendment was permissible under *Rule 7(e)* and denied Grimes's motion for a mistrial. Neither Grimes nor Sells argued that the Superior Court erred in amending the indictment in their first appeals. Grimes also did not make this argument during his second trial[6] and second appeal.

(9) As the Superior Court recognized, Grimes's claims regarding the amendment of the indictment are barred by *Rule 61(i)(3)* because he did not raise those claims in his first appeal, second trial, or second appeal. *HN2*[↑] *Rule 61(i)(3)* bars claims for postconviction relief that were not raised during the proceedings leading to a judgment of conviction, unless the movant can show cause for the procedural default and prejudice from a violation of the movant's rights. Grimes does not attempt to establish cause for the procedural default or prejudice.

(10) *HN3*[↑] Grimes's double-jeopardy claim is barred by *Rule 61(i)(4)*, which bars reconsideration of claims that were previously adjudicated. This Court previously addressed, and rejected, Grimes's argument that double-jeopardy principles prevented the State from retrying him for first-degree **[*6]** robbery after he was acquitted of the lesser-included offense of aggravated menacing in his first trial.[7] Grimes now repackages that claim to argue that amendment of the indictment violated double-jeopardy principles because it resulted in the same person being named the victim of the first-degree robbery charge as well as the lesser included offense of aggravated menacing. *HN4*[↑] A defendant cannot obtain re-examination of a previously adjudicated claim by refining or restating that claim as Grimes does here.[8]

(11) *HN5*[↑] To overcome these procedural bars, Grimes appears to rely upon *Rule 61(i)(5)*, which provides that the procedural bars do not apply to a claim that the trial court lacked jurisdiction.[9] Grimes argues that the improper amendment of the indictment divested the Superior Court of jurisdiction. This claim is without merit.

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[4] *Younger v. State, 580 A.2d 552, 554 (Del. 1990)*.

[5] Grimes asked both witnesses if the robber was by himself in the bank, and they answered yes.

[6] The bank manager testified at Grimes's second trial, but the teller originally identified in the first-degree robbery count of the indictment did not. Grimes had the opportunity to cross-examine the bank manager, but did not ask her any questions during the second trial.

[7] *See supra* n.2.

[8] *Skinner v. State, 607 A.2d 1170, 1773 (Del. 1992)*.

[9] *Rule 61(i)(5)* also provides that the procedural bars do not apply to a claim that satisfies *61(d)(2)(i)* (new evidence that creates a strong inference of actual innocence) or *(d)(2)(ii)* (a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or this Court, applies to the movant's case and renders the conviction invalid), but Grimes does not invoke these provisions.

(12) *HN6*[↑] "Under Delaware law, the Superior Court may amend an indictment at any time prior to verdict as long as 'no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.'"[10] The Superior Court concluded that changing the name of the robbery victim from the teller originally named in the indictment to the bank manager was permissible **[*7]** because it did not result in additional or different offenses charged and that Grimes's substantial rights were not prejudiced. This Court upheld a similar amendment in *Coffield v. State*.[11]

(13) In *Coffield*, the Superior Court permitted amendment of the indictment to change the name of the first-degree robbery victim from a convenience store employee who was forced to lie on the floor at gunpoint to the convenience store employee who was forced to hand over the money to the robber. This Court held that "where no other prejudice to the defendant exists, the name of the alleged human victim is not an essential element of the crime of Robbery First Degree and the amendment of that portion of the indictment does not violate an individual's right under the Delaware Constitution to be charged for that felony by a grand jury indictment."[12] The Court also concluded that the defendant was not prejudiced by the amendment because both indictments put him on notice that he was charged with robbing an individual at a convenience store on a particular day and that the defense was aware that the originally named victim and newly named victim were both present at the time of the crime and could **[*8]** be called as witnesses.

(14) As in *Coffield*, the amendment of the indictment in this case did not result in Grimes being charged with different or additional offenses.[13] Nor was he prejudiced by the amendment. Both the bank teller and bank manager were named as victims of the crimes in the bank in the original indictment so Grimes knew they were both witnesses to the robbery. Grimes elicited testimony from both witnesses in the first trial that the robber acted by himself in the bank, which was favorable to his defense that he did not participate in the bank robbery. In the second trial, he did not call the teller as a witness or try to obtain any testimony from the bank manager. Changing the name of the robbery victim did not prejudice Grimes's defense. The Superior Court did not err in permitting amendment of the indictment, and was not divested of jurisdiction.[14] Nor did the Superior Court err in finding that Grimes's postconviction claims were procedurally barred under *Rule 61* and denying his motion for postconviction relief.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Gary F. Traynor

Justice

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[10] *Owens v. State, 919 A.2d 541, 545-46 (Del. 2006)* (quoting *Super. Ct. Crim. R. 7(e)*).

[11] *794 A.2d 588 (Del. 2002)*. *See also Cuffee v. State, 2014 Del. LEXIS 487, 2014 WL 5254614, at *3 (Del. Oct. 14, 2014)* (affirming the Superior Court's amendment of indictment that changed the name of the victim of the theft count).

[12] *Coffield, 794 A.2d at 593*.

[13] This is unlike the case that Grimes relies upon—*U.S. v. Williams, 412 F.2d 625 (3d Cir. 1969)*—in which the district court's amendment of the indictment changed the offense that the defendant was charged with from illegal possession of a firearm not registered under the *National Firearms Act* to illegal possession of a firearm for which no tax been paid. Because the amendment was substantive, the Third Circuit concluded that the district court lost jurisdiction to impose any penalty in the absence of a grand jury indictment. *Williams, 412 F.2d at 628*.

[14] The Superior Court had jurisdiction over all of the felonies, including first-degree robbery, that Grimes was charged with. *Del. Const. art. IV, § 7*; *10 Del. C. § 2701(c)*; *11 Del. C. § 541*.

End of Document

PART FOUR

Exhibit D

2019 WL 3337897
Only the Westlaw citation is currently available.

Superior Court of **Delaware**,
In and for Kent County.

STATE of Delaware
v.
Russell M. **GRIMES**, Defendant.

July 23, 2019

RK11-09-0249-01, RK11-09-0250-01, RK11-11-0244-01 through RK11-11-0249-01, RK11-11-0260-01

Upon Defendant's Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61

Attorneys and Law Firms

Susan G. Schmidhauser, Esq., Deputy Attorney General, Department of Justice, for the **State of Delaware.**

Russell M. **Grimes**, Pro se.

COMMISSIONER'S REPORT AND RECOMMENDATION

FREUD, Commissioner

*1 On May 28, 2013, the Defendant **Russell** M. **Grimes** ("**Grimes**") was found guilty following a jury trial, during which he represented himself *pro se*, to one count of Robbery in the First Degree; one count of Possession of a Firearm During Commission of a Felony; one count of Possession of a Firearm by a Person Prohibited; and five counts of Reckless Endangering. He was acquitted of six counts of Aggravated Menacing and one count of one count of Conspiracy in the First Degree. His co-defendant William S. Sells ("Sells") was also found guilty at the same trial of Robbery in the First Degree and Possession of a Firearm During the Commission of a Felony with several other charge including Aggravated Menacing. A timely appeal was filed and the **Delaware** Supreme Court remanded the matter back to this Court due to errors made during the jury selection.

During **Grimes's** first trial the State moved to amend the Grand Jury's Indictment to change the name of the Robbery victim from Rose Marie Hase ("Ms. Hase") to Vicki Ebaugh ("Ms. Ebaugh"). Both women were tellers at the bank and both had been listed as victims of Aggravated Menacing during the course of the Robbery during which the robbers had threatened all the tellers. The evidence at trial showed that Ms. Ebaugh was in fact the teller from whom the money was taken during the robbery. The Court allowed the amendment. At his second trial the amended Indictment was again used without any objection by **Grimes**, who again proceeded *pro se*. At the conclusion of the second trial the jury again found **Grimes** guilty of one count of Robbery in the First Degree; one count of Possession of a Firearm During Commission of a Felony; one count of Possession of a Firearm by a Person Prohibited; one count of Conspiracy in the Second Degree and five counts of Reckless Endangering on November 16, 2016.[1] The State moved to declare **Grimes** an Habitual Offender. The Court declared **Grimes** an Habitual Offender and sentenced him to a total of sixty-four years at Level V incarceration with credit for time served suspended after fifty-three years, fifty of which were pursuant to 11 ***Del.*** C. § 4214(c).

Grimes filed a timely *pro se* appeal to the State Supreme Court in which he alleged that because the jury acquitted him of the lesser included offense of Aggravated Menacing at his first trial that the conviction for Robbery in the First Degree at his second trial constituted a violation of the Double Jeopardy clause of the United State Constitution. The Supreme Court denied **Grimes's** appeal and affirmed his conviction and sentence.[2] Next, **Grimes** filed a motion for Postconviction Relief, *pro se*, on August 3, 2018 and an accompanying memorandum in support. Subsequently, **Grimes** amended his motion.

FACTS

Following are the facts as set forth by the **Delaware** Supreme Court in its opinion in **Grimes's** co-defendant Sell's initial appeal from their joint trial:

*2 On August 26, 2011, a masked man entered the First National Bank of Wyoming in Felton, **Delaware** (the "Bank"), displayed what appeared to be firearm, ordered the Bank manager to exit her office, and told the tellers to empty the cash drawers. During the robbery, the man jumped over a counter in the Bank and blood was later

Exhibit B

discovered on the ceiling above that counter.[4] The man placed the money from the cash drawers into a satchel and exited the Bank. These events were recorded on the Bank's security cameras. The money taken from the Bank contained dye packs, a security device designed to stain money taken from the Bank, and "bait bills," bills for which the bank had recorded and maintained serial numbers in case of theft. Over $54,000 was taken from the Bank.

When the suspect exited the Bank, he entered a black SUV. An employee of the Bank who ran outside during the robbery testified that she saw the SUV driving away from the Bank and that the SUV was emitting "pink, red smoke" which indicated to her that the dye pack had gone off. Officer Keith Shyers of the Harrington Police Department ("Officer Shyers") also observed the SUV, and testified that he saw a black male "hanging out [of] the window" of the SUV and a "red poof" that "looked like some kind of paint."

Because the vehicle was traveling at a high rate of speed and he thought something was suspicious, Officer Shyers turned around and began following the SUV. Officer Shyers then heard a call that went out over the radio dispatch for a robbery that had just occurred at the Bank. Officer Shyers was the first officer to begin pursuing the car and was the lead vehicle for much of the pursuit. A few minutes into the pursuit, the SUV stopped at an intersection and the passenger got out of the vehicle and began firing shots at the pursuing officers. Officer Shyers testified that he was approximately 20 to 30 feet from the passenger and theat the passenger was a black male wearing a grey hooded sweatshirt.

The passenger then got back in the SUV and a high-speed pursuit ensued involving officers from the **Delaware** State Police, Harrington Police Department, and Felton Police Department. At various points during the pursuit, the passenger popped up through the sunroof and fired shots at the officers. The left rear tire of Officer Shyer's vehicle was shot and he abandoned his vehicle and jumped into another officer's car to continue the pursuit.

Corporal Scott Torgerson, an assistant shift supervisor for the **Delaware** State Police ("Corporal Torgerson"), who was driving a fully-marked Crown Victoria, took over as the lead vehicle in the pursuit. The passenger continued to fire shots at the officers from the sunroof. The SUV drove around spike strips that had been set in its path and Corporal Torgerson continued to pursue it. Shortly thereafter, the driver lost control of the SUV and it came to rest in a ditch with its back tires stuck. The driver and the passenger both exited the SUV and began fleeing and Corporal Torgerson fired shots at them. The driver of the SUV was shot in the leg by Corporal Torgerson and was later identified as **[Russell] Grimes**. The passenger of the vehicle escaped on foot.

The SUV was registered to Sophia Jones ("Jones"). Jones was Sells' girlfriend. Jones and Sells shared an apartment and had a child together. Jones testified that she did not know who was driving the SUV at the time of the bank robbery because she had not seen the SUV in over a week, but that the last time she had seen the SUV, Sells had been driving it. She testified that Sells had the SUV because he was trying to sell it.

After the robbery, police officers searched the apartment that Jones and Sells shared and asked her questions. Jones gave the officers Sells' cell phone number and told them that Sells' best friend was named "**Russell**." On August 28, Jones contacted the police and inquired about getting her SUV back. The officers then asked Jones if Sells had contacted her, and she replied that he had called her, inquired about his son, and asked whether the police had been to the apartment because he had heard about the SUV being in an incident with **Grimes**.

*3 On September 6, 2011, Sells was found barricaded in a room at the Shamrock Motel. The SWAT team deployed tear gas grenades, smoke grenades, stringball grenades,[5] and stun grenades into the room through a small bathroom window that opened to the outside in order to get Sells to exit the room, but those efforts were unsuccessful. The officers used so many of the various types of grenades that Sergeant Ennis testified that he had "no idea how [Sells] stayed" in the room.[6]

When the standoff ended and Sells was taken into custody, United State currency was collected from three separate locations of the motel room: in the living room, in the bathroom, and outside the motel underneath the bathroom window. Many of the bills that were collected as evidence at the motel were torn and burned. Some of the money that was collected in the living room area of the motel room also appeared to be stained with a red dye. Sells' defense counsel elicited testimony on cross examination that the red stains on the currency could have been caused by some of the explosives, which discharge red dye. A large red stain also appeared on one of the walls of the motel room. Around 50 bills were collected from the motel room ranging in

denominations from $1 to $50. The total value of the money collected was at most $769. [7]

Witnesses testified that Sells had used $475 of money with a red dye stain to purchase cigarettes, and that 34 of those bills matched bait bills that were taken from the Bank. One of Sells' female companions also testified that Sells used $3,500 in cash to purchase a car and that some of that money had red on it. That money was never recovered. [3]

[4] The testimony of a Senior Forensic DNA Analyst revealed that the samples taken from inside the Bank were not consistent with either **Grimes** or Sells.

[5] Stringball grenades were described by Sergeant Ennis as "a rubber softball [that] has small little tiny rubber balls that are inside of it; when it explodes, the rubber balls fly around."

[6] The officers completely exhausted their supply of grenades and a helicopter had to deliver additional grenades.

[7] Detective Daddio testified that $31 was found outside the motel room, the living area had $44 and one-half of a $50 bill. In the bathroom there was $418 recovered and an additional $226 in partial bills.

GRIMES'S CONTENTIONS

In his motion, **Grimes** raised three grounds for relief:

Ground one: Illegally Amended Indictment.

> Trial judge during first trial amended indictment on the 3rd day in error creating a myriad of structural errors that continued through out the second trial.

Ground two: Double Jeopardy.

> When the trial court amended the indictment it created double jeopardy in violation of state and federal constitutions.

Ground three: Due Process right to fair trial.

> By amending the indictment in violation of Superior Ct. Rules the trial court carried on an illegal prosecution denying defendant a fair trial as the error carried on through the second trial.

On January 11, 2019 **Grimes** amended his motion to add a fourth ground:

Ground four: Subject Matter Jurisdiction.

> By substantively and constructively amending the indictment other than by the grand jury that returned it the Superior Court lost jurisdiction and thereby sentenced movant illegally as to Robbery 1st and its companion PFDCF charge as it did not have jurisdiction as to these offenses.

DISCUSSION

Under **Delaware** law, the Court must first determine whether **Grimes** has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims. [4] Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final. [5] **Grimes'** motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is **Grimes's** initial motion for postconviction relief, the bar of Rule 61 (i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

***4** Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights. [6] The bars to relief are inapplicable to a jurisdictional challenge or "to a claim that satisfies the pleading requirements of subparagraph (2)(i) or (2)(ii) of subdivision (d) of Rule 61. [7] To meet the requirements of Rule 61(d)(2) a defendant must plead with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted [8] or that he pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United State or **Delaware** Supreme courts, applies to the defendant's case rendering the conviction invalid. [9] **Grimes's** motion pleads neither requirement of Rule 61(d)(2).

Grimes's second ground for relief alleging a Double Jeopardy violation is simply a restatement of the argument he previously raised in his direct appeal. Rule 61 (i)(4) bars any ground for relief that was formerly adjudicated unless reconsideration of the claim is warranted in the interest of justice.[10] **Grimes** raised this claim before on direct appeal and the Supreme Court found it meritless. **Grimes** has made no attempt to argue why reconsideration of this claim is warranted in the interest of justice. The interest of justice exception of Rule 61(i)(4) has been narrowly defined to require that the movant show that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish" him.[11] **Grimes** has made no attempt to demonstrate why this claim should be revisited. This Court is not required to reconsider **Grimes's** claims simply because they are "refined or restated."[12] For this reason, this ground for relief should be dismissed as previously adjudicated under Rule 61(i)(4).

Grimes's remaining grounds for relief all essentially allege that the Court erred in allowing the State to amend the Indictment during his first trial which allegedly caused "structural errors" in his second trial and somehow caused this Court to lack jurisdiction. None of these claims have been previously adjudicated. Consequently they fall into the bar of Rule 61 (i)(3). **Grimes** is barred by Rule 61 (i)(3) from raising them absent a clear demonstration of cause for his neglect and prejudice. In this case, **Grimes** represented himself at trial and on appeal and thus does not have the standard argument made in most postconviction motions: the claim that their attorney was ineffective. **Grimes's** claims in his postconviction motion could have been raised at his initial trial, at his second trial and on direct appeal. It is clear that he was aware of any alleged error with the indictment at least during his second trial and when he filed his direct appeal from that conviction. Nevertheless, he failed to raise the issue concerning the amendment of the Indictment during his first trial and use of the same amended indictment during his second trial. He has made no attempt whatsoever to establish even the remotest cause for his failure to do so, nor has he demonstrated any prejudice arising out of the alleged violation. As such, these claims should be dismissed as procedurally barred by Rule 61(i)(3).

Grimes attempts to salvage his claims with a "hail Mary pass" in his amended motion where he claims the amended Indictment somehow divested this Court of jurisdiction. Consequently, he argues by alleging a jurisdictional flaw he escapes the procedural requirements. Unfortunately, for **Grimes** he is sorely mistaken. Not only did the amended indictment not divest this Court of jurisdiction but his underlying argument is incorrect as well. As noted by the State, **Grimes** case is directly on point with the **Delaware** Supreme court's ruling in *Coffield v. State.*[13] In *Coffield*, the State moved to change the name of the victim in the Robbery indictment just prior to trial. The Court however, did not rule on that motion until the close of the State's case. The **Delaware** Supreme Court determined that "the amendments neither charged separate offenses nor worked discernable prejudice on the Appellant, and therefore fell within the bounds of the trial judge's discretion under Superior Court Rule 7(e)."[14]

*5 In **Grimes's** first trial, the State also moved to amend the indictment at the beginning of the trial and the Court permitted the amendment well prior to the close of the State's case. **Grimes** alleges that changing the victim's name changes an essential element of the crime. However, the *Coffield* court determined that the victim's name is not an essential element of the crime of Robbery in the First Degree. The *Coffield* court also determined that the original indictment did provide adequate notice since both the originally named victim and the victim in the amended indictment were both present during the robbery. Therefore, the defense was aware that both of these witnesses could be called as witnesses and the defense had equal access to both of them. That is factually the same as in this case with **Grimes**. Both Ms. Ebaugh and Ms. Hase were listed as victims of the Aggravated Menacing charges which occurred at the same time as the robbery. The only issue was who the money was taken from. **Grimes** had an opportunity to question both of the witnesses or call them as witnesses in his case.

Furthermore, **Grimes** has failed to recognize that the indictment was amended during the first trial in May 2013. He was tried, convicted and the conviction was overturned. During the second trial in November 2016, no additional amendments occurred. Prior to and during the second trial, **Grimes** never objected to the amendment of the indictment which had occurred years earlier. He also never sought to introduce any testimony from Ms. Hase. She testified at the first trial, as a witness to the robbery and as a victim of the Aggravated Menacing. However, since **Grimes** was not convicted of the Aggravated Menacing charges after the first trial, Ms. Hase did not testily during the second trial. However, Ms. Ebaugh testified in both trials. While **Grimes** alleges that his trial strategy was effected by the amendment of the indictment, he has not offered any such proof.

Grimes also alleges that his due process rights were violated because the indictment that was amended in the May 2013 trial was used in the November 2016 trial. There was no objection from **Grimes** prior to or during the November 2016 trial. Therefore, any objection has been waived by his failure to raise the issue during the second trial. Additionally the amendment of the indictment was lawful based on *Coffield*. [15]

Grimes alleges that the Court did not have subject matter jurisdiction since the indictment was amended to change the name of the alleged Robbery in the First Degree victim. **Grimes** relies on *U.S. v. Williams* [16] where the court held that when the indictment was amended in a matter of substance, that the indictment expires and the court could not impose a sentence, even when the parties agreed to the amendment. The crux of **Grimes's** argument relies on a finding that amending the indictment, to reflect the name of the bank employee from whom the money was forcibly take, is a bank employee to another is a substantial change and thus voids the indictment. As noted above *Coffield v. State* [17] which is directly on point with the facts in the **Grimes** case, clearly holds that the change of a victim's name under the circumstances of this case is not a substantive change. The **Delaware** Supreme court determined that "the amendments neither charged separate offenses nor worked discernable prejudice on the Appellant, and therefore fell within the bounds of the trial judge's discretion under Superior Court Rule 7(e)." [18] Clearly the amendment of the indictment was proper and permissible. The Trial Court did not err when it granted the State's motion to amend the indictment during the first trial.

Grimes's attempt to justify his claims at this late date by making broad accusations fails. A careful reading of **Grimes's** arguments, the State's well-reasoned reply, and the transcript of this case, reveal that **Grimes's** arguments are meritless and based on supposition, conjecture, and innuendo. **Grimes** has failed to overcome in any way the bars of Rule 61. As such, his motion should be dismissed.

CONCLUSION

*6 After reviewing the record in this case, it is clear that **Grimes** has failed to avoid the procedural bars of Superior Court Criminal Rule 61 (i). Consequently, I recommend that **Grimes's** postconviction motion be ***dismissed*** as procedurally barred by Rule 61(i)(3) and (4) for failure to prove cause and prejudice, and as previously adjudicated.

All Citations

Not Reported in Atl. Rptr., 2019 WL 3337897

Footnotes

1 The delay in the second trial was due in large part to **Grimes** absconding while out on bond.

2 ***Grimes*** *v. State*, 188 A.3d 824 (**Del**. 2018).

3 *Sells v. State*, 109 A.3d 568, 571-572 (**Del**. 2015).

4 *Bailey v. State*, 588 A.2d 1121, 1127 (**Del**. 1991).

5 Super. Ct. Crim. R. 61(i)(1).

6 Super. Ct. Crim. R. 61(i)(3).

7 Super. Ct. Crim. R. 61(i)(5).

8 Super. Ct. Crim. R. 61(d)(2)(i).

9 Super. Ct. Crim. R. 61(d)(2)(ii).

10 Super. Ct. Crim. R. 61(i)(4).

11 *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996) (quoting *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990)).

12 *Riley v. State*, 585 A.2d 719, 721 (Del. 1990).

13 794 A.2d 588 (Del. 2002).

14 *Coffield* at 590.

15 794 A.2d 588 (Del. 2002).

16 412 F.2d 625 (3rd Cir. 1969).

17 794 A.2d 588 (Del. 2002).

18 *Coffield* at 590.

PART FIVE

Exhibit E

changes on the indictment.

THE COURT: Okay. We'll see you here at 3:00.

(The luncheon recess is taken at this time.)

* * * * *

Courtroom No. 4
3:00 p.m.

* * * * *

THE COURT: Does anybody have a copy of the order where we changed the indictment?

MS. SCHMIDHAUSER: I apologize, your Honor.

THE COURT: There's no reason you should, except with Lindsay out, things are just a little...

MS. SCHMIDHAUSER: I can get you a copy of it.

THE COURT: I just figure if you're going to refer to it, you're going to have to refer to it in more detail.

MS. SCHMIDHAUSER: Well, you indicated exactly in that order, your Honor, the exact language, so I used your exact language that you had put in the order.

THE COURT: Okay.

MS. SCHMIDHAUSER: So that's not really the issue. Your Honor, however, going through the indictment

yet again has pointed out two additional corrections which I'm seeking permission before I submit the corrected indictment.

THE COURT: Okay.

MS. SCHMIDHAUSER: And, again, it is pursuant to Rule 7 which says that the Court may permit an indictment to be amended at any time before the verdict or finding if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.

The first, your Honor, is to Count 1, to conform with the testimony that's been provided. Vickie Ebaugh as well as the other witnesses made it clear that Vickie was the one who actually opened all the cash register drawers, so I would like to replace Rosemarie Hase's name with Vickie's name to conform with the testimony that's been presented to the Court.

I don't believe that changes any substantial rights of the defendants since every bank teller is listed as a victim in the indictment. They all are bank employees. It doesn't change anything.

THE COURT: It's Vickie Ebaugh?

MS. SCHMIDHAUSER: Vickie Ebaugh, that's correct.

DEFENDANT GRIMES: Your Honor, I object to that, Vickie Ebaugh being the robbery victim, because when Mrs. Hase was on the stand, I specifically asked her the questions regarding the robbery and the elements that robbery first carry, and she answered that question. I didn't ask Vickie Ebaugh the same question.

THE COURT: Rosemarie Hase was the sixth witness, so that was still the first day, I think.

MS. SCHMIDHAUSER: Correct. She was one of the drive-through window tellers.

THE COURT: Okay. I'm going to have to take a minute and put all the notes together. The testimony of Vickie Ebaugh first refers to the camera in the bank where she identified then she not identified the robber as wearing a mask. He went through the gate out of the office. Demanded cash. Through the teller lines. Jumped the counter. She noted that she helped empty the drawers. The robber was pointing the gun for the money. Took dollars from Drawer No. 2.

Mr. Grimes asked her about when she noticed the robber first coming in. She said it was when the assistant said, Oh, my God. You then, Mr. Grimes, then asked her if the robber was acting on his own or by himself.

"I mean with anybody else or by himself?" And she said he was by himself inside. Mr. Windett had her describe how far away she was.

Okay. So that was the Ebaugh testimony.

DEFENDANT GRIMES: Your Honor, I think my argument basically is on Ms. Hase answering the question.

THE COURT: I'm sorry, what?

DEFENDANT GRIMES: When I was examining Ms. Hase, basically the only question that I didn't ask was during the immediate flight from the robbery, did anybody help him, which I didn't say as far as Mrs. Ebaugh was concerned because it didn't have anything to do with the robbery first.

MR. BEAUREGARD: Does your Honor want to hear from me at all?

THE COURT: No. I want to find out what Mr. Grimes' position is.

Rosemarie Hase testified the individual came in waiving a gun. Described what he was wearing. The robber jumped the counter and she moved away. And again Mr. Grimes said no one was with the robber. She saw no one else. She thought the robber was wearing sunglasses. Couldn't see his eyes. That was the cross-examination from

you.

DEFENDANT GRIMES: I asked specifically about during the flight from after robbing Mrs. Hase, was anybody helping at that point either, and she said no.

THE COURT: She said she saw no one other than the robber.

DEFENDANT GRIMES: All right. Then they'll be no problem, I guess, then, if there's not going to be an issue.

THE COURT: That's the note that I have.

DEFENDANT GRIMES: I mean, is that going to be some kind of issue when it comes time for closing arguments? Because if it's not, then I have no objection, but if it's going to be -- I mean, I don't know.

Mrs. Schmidhauser?

THE COURT: I can't tell you what closing argument is going to be about, but you asked her if there was anybody with the robber and she said she saw no one. That's Ms. Hase.

MS. SCHMIDHAUSER: And the jury hasn't been told who the specific victim listed in the indictment of the robbery is.

THE COURT: Yes. And Ms. Ebaugh said what

she said, and she was pretty clear about what she was confronted with.

MS. SCHMIDHAUSER: And that she's the one who opened all the drawers.

THE COURT: Yes.

DEFENDANT GRIMES: Because the indictment says "during the commission of the crime or immediate flight therefrom." My thing is as far as robbery first is concerned, it can still be robbery if in the immediate flight from the robbery, you do something you're not supposed to. So if we're not going to have that as an issue, I have no objection.

THE COURT: Well, nobody yet has put you in anything but the car going down the road when the chase was going on that I recall.

MS. SCHMIDHAUSER: That's correct, which is the immediate flight therefrom.

DEFENDANT GRIMES: That's not immediate flight therefrom.

THE COURT: Well, sure, it is. Well, certainly, that can be the argument.

DEFENDANT GRIMES: That can be the argument, so therefore, I have an objection, then, to the indictment

being amended.

THE COURT: But the witness to the flight is not Ms. Ebaugh.

MS. SCHMIDHAUSER: Or Ms. Hase.

THE COURT: Yes. It's all the police.

DEFENDANT GRIMES: All right. Well, I have an objection.

THE COURT: With the possible exception of the one person who saw -- the one woman who walked outside from the bank, but she's not involved in this at all and she saw the car go by.

MS. SCHMIDHAUSER: Correct.

DEFENDANT GRIMES: So I have an objection.

THE COURT: And your objection is based upon what?

DEFENDANT GRIMES: That I asked the question as far as to Ms. Hase about the immediate flight therefrom: Did anybody help the robber at that point? And she said no.

THE COURT: And so did Ms. Ebaugh.

DEFENDANT GRIMES: But I didn't ask Ms. Ebaugh that question, your Honor.

THE COURT: Well, you got that answer from her.

DEFENDANT GRIMES: No, I asked two questions that was specific questions: Commission of the crime and immediate flight therefrom. I only asked the immediate flight therefrom question when I was talking to Ms. Hase because she's the robbery victim. That's what I understand.

THE COURT: Whatever your intentions were when you asked the questions, you asked the same questions of each one of them and got the same answers from both Hase and Ebaugh.

DEFENDANT GRIMES: All right.

THE COURT: Which is to say that no one, neither of them, saw you involved at all.

DEFENDANT GRIMES: All right. Well, I would just want to preserve my objection.

THE COURT: All right. You can maintain your objection.

Now, does Mr. Sells have any point in this?

MR. BEAUREGARD: He does, your Honor, obviously. Obviously, when you came in here, you were asking for different documentation. I thought we were coming here just simply for the matter of conforming the order to the indictment.

THE COURT: Well, whatever you thought, this

is what we're dealing with now.

MR. BEAUREGARD: Okay. And so, limited to what I have in front of me, your Honor, it seems that the order didn't say that we could come here and start changing the indictment.

THE COURT: Well, this is a new request for a new amendment.

MR. BEAUREGARD: I understand that, and we oppose it. We object to it. I mean, we prepared for a certain victim according to the allegations that are made in the indictment, and now all of a sudden, it's changed without any notice.

THE COURT: What has changed? That's what I'm getting to.

MR. BEAUREGARD: The name of the teller, your Honor.

THE COURT: Well, I understand that, that there's a different nomenclature, but nothing has changed that I know of.

MR. BEAUREGARD: Well, just the name of the teller, which means the facts surrounding that particular teller is what's changed. That's all, your Honor. It's sort of you have an assault charge or there's a fight that

goes on and then all of a sudden, we put a different name in there because we find out someone else got hit or someone else got -- you know. It should have been decided sometime before we started the trial who the victims are.

THE COURT: There are a lot of things that would have been preferable a month ago, but they didn't happen. And that's not necessarily anybody's fault because that's the way criminal cases go frequently.

Ms. Schmidhauser.

MS. SCHMIDHAUSER: Your Honor, the State's position is it doesn't change any of the facts the parties knew all along. They knew all of the people in the bank, all of the tellers, and that a certain amount of money was taken from the bank.

The issue is Ms. Hase specifically testified that no money was taken from her teller drawer. And, actually, that testimony was fairly consistent among all of the tellers, and that Vickie Ebaugh, as the branch manager, made it clear that she's the one who opened each of the drawers; therefore, she would be the appropriate direct victim.

THE COURT: I guess I don't see how any one of the women at the bank wouldn't be appropriate to fit into

the block.

MS. SCHMIDHAUSER: And my only issue was that I wouldn't want an argument --

THE COURT: You don't need to stand unless you want to, Mr. Grimes.

DEFENDANT GRIMES: I was just waiting for her to finish.

THE COURT: That's fine.

MS. SCHMIDHAUSER: I wouldn't want an argument to be made from the defense saying it listed Rosemarie Hase and you all remember she said that no money was taken from her drawer, she was never asked to open her drawer, and her drawer was never touched. Because that's the testimony as it stands.

DEFENDANT GRIMES: Okay. So now that you heard the testimony of the victim and now you don't like her testimony, so now it's like, okay, we want to change the indictment now because she's not the person. That's not fair.

THE COURT: Well, you can conform the indictment to the testimony, to the evidence if it doesn't change anything. And I --

DEFENDANT GRIMES: But it's a material

defect, your Honor, because we all prepared for one person. So when the one victim gets up there and it's a bull's-eye on that victim because that victim is the victim, some of the other victims are dealing with aggravated menacing charges, and you got a different way you are going to come about to them because they are victims of aggravated menacing, I mean, it is material.

That is material. I mean, come on. It does change. It changes a lot to say that the trial started and, oh, the person we, for 21 months, that we said got robbed, oh, they didn't get robbed. You should have knew that already.

THE COURT: No, and that's the point. All of them got robbed.

MS. SCHMIDHAUSER: Correct.

DEFENDANT GRIMES: Okay. So why are you trying to change the indictment?

THE COURT: Well, you just heard the reason, to contain closing argument. And maybe that's an insufficient reason and I'm willing to listen to that, but I don't see any change in what the defense is confronting.

MS. SCHMIDHAUSER: And I believe, your Honor, that's the standard that the Court rules that out.

THE COURT: Yes. Given the circumstances that have existed in this case for at the very, very least, months, the selection of Vickie Ebaugh or Rosemarie Hase was really fairly arbitrary, and it could have been any one or any number of all the women in the bank. I mean the use of force as the State has put forth to this point was upon every single one of them.

MS. SCHMIDHAUSER: Correct. Your Honor, if you're more comfortable leaving it -- I was just trying to clean it up.

THE COURT: Well, I'm really more considering whether the indictment should be --

MS. SCHMIDHAUSER: -- all?

THE COURT: Rosemarie Hase, Vickie Ebaugh, the whole list of every single woman who was in that bank with an "and/or" at the end.

MS. SCHMIDHAUSER: All of the listed victims in the aggravated menacing, they are all the bank tellers.

THE COURT: Yes. Then that would be it, yes.

MS. SCHMIDHAUSER: Actually minus two, the two in the back. Whatever the Court directs, your Honor.

THE COURT: I don't see the defense as confronting any more if every name is listed or just one.

Am I missing something here, Mr. Beauregard?

MR. BEAUREGARD: Only that I think your Honor just suggested to the State how to phrase their indictment. I mean, that's my impression of what you just said. I mean, they make an application to change one name to another and your suggestion is --

THE COURT: I'm not making a suggestion. I'm saying I don't know that it would have made any difference if that's the way it had been.

MR. BEAUREGARD: Well, I mean, if the State is saying whatever the Court wishes, then the Court can leave it the way it is because it is encompassing one of those people. It could be anyone, like the Court just said.

MS. SCHMIDHAUSER: Your Honor, with the Court's permission, the State would add all of the bank tellers who were behind the teller line at the time. Before I changed any of it, your Honor, I was coming to the Court for permission.

DEFENDANT GRIMES: If the indictment's going to be changed, your Honor, to that right there, I request a mistrial.

THE COURT: Okay. Fine. Pursuant to Rule 7(e), I find that no additional or different offense is

charged with the substitution of the name "Vickie Ebaugh" for the name "Rosemarie Hase" in Count 1 of the indictment because no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.

So the indictment, Count 1, will be amended to read: Did threaten the immediate use of force upon Vickie Ebaugh with the intent to compel the said Vickie Ebaugh to deliver up property," et cetera.

And the motion for mistrial is denied.

DEFENDANT GRIMES: Mr. Who?

THE COURT: I'm sorry?

DEFENDANT GRIMES: Mr. Who? Oh, mistrial. Mistrial. I couldn't hear you. I apologize, your Honor.

THE COURT: No trouble.

MS. SCHMIDHAUSER: Your Honor, Count 21 in the indictment, and this only pertains to Mr. Sells, it's a possession of a firearm during the commission of a felony.

THE COURT: Yes.

MS. SCHMIDHAUSER: At the end, it says "during the commission of the felony of attempted murder as set forth in Counts 1 through 5." Essentially, well, those are just the incorrect numbers. The attempted murder charges are 14 through 18, so I'm asking just to replace the

numbers "1 through 5" with "14 through 18."

THE COURT: Any position on that?

MR. BEAUREGARD: We oppose, your Honor.

THE COURT: I'm sorry?

MR. BEAUREGARD: I said we oppose.

THE COURT: On what basis?

MR. BEAUREGARD: We believe that the changes are material, to change the actual charges from 1 through 5 to 14 through 18.

THE COURT: Okay. I don't find, again, that there is any problem with the -- I'm going to use the same language. I don't find that there is any additional or different offense charged and no substantial rights prejudiced, and so the amendment is granted.

So Count 21 will read: "Did possess a firearm, handgun, during the commission of a felony of attempted murder as set forth in Counts 14, 15, 16, 17 and 18 of this indictment" in lieu of 1, 2, 3, 4 and 5.

MS. SCHMIDHAUSER: Thank you, your Honor. Your Honor, the only other issue that is still outstanding, and I didn't know about it until I arrived at court today, but the court rules require if any party is going to have an expert testify, that the expert report has to be provided to

PART SIX

Exhibit F

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE STATE OF DELAWARE	:	ID NO 1108023033 (GRIMES) 1108023648 (SELLS) 1109005194 (SELLS)
v.	:	INDICTMENT BY THE
RUSSELL M. GRIMES WILLIAM S. SELLS III	:	GRAND JURY

The Grand Jury charges RUSSELL M. GRIMES and WILLIAM S. SELLS III with the following offense(s):

COUNT 1 — K11-09-0249 (GRIMES)
K11-10-0177 (SELLS-1108023648)

ROBBERY FIRST DEGREE, a felony, in violation of Title 11, Section 832 of the Delaware Code of 1974 as amended.

RUSSELL M. GRIMES and WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, when in the course of committing theft, did threaten the immediate use of force upon Rosemarie Hase with the intent to compel the said Rosemarie Hase to deliver up property consisting of United States Currency, and in the course of the commission of the crime or the immediate flight therefrom, he displayed what appeared to be a deadly weapon or represented by word or conduct that he was in possession or control of a deadly weapon, a handgun.

COUNT 2

K11-09-0260 (GRIMES)
K11-10-0190 (SELLS-1108023648)

CONSPIRACY SECOND DEGREE, a felony, in violation of Title 11, Section 512 of the Delaware Code of 1974 as amended.

RUSSELL M. GRIMES and WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, with intent to promote or facilitate the commission of a felony, did agree with each other to engage in conduct constituting the felony of Robbery 1st Degree and one or more conspirators did commit an overt act in the furtherance of said conspiracy by committing Robbery 1st Degree as set forth in Count 1 of this Indictment, which is herein incorporated by reference.

COUNT 3

K11-09-02450 (GRIMES)
K11-10-0178 (SELLS-1108023648)

POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, a felony, in violation of Title 11, Section 1447A of the Delaware Code of 1974, as amended.

RUSSELL M. GRIMES and WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, did possess a firearm, during the commission of the felony of Robbery 1st Degree as set forth in Count 1 of this indictment.

COUNT 4 K11- (SELLS-1108023648)

POSSESSION OF A FIREARM OR FIREARM AMMUNITION BY PERSON PROHIBITED, a felony, in violation of Title 11, Section 1448 of the Delaware Code of 1974 as amended.

WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, did knowingly purchase, own, possess or control a firearm or ammunition after having been convicted of a felony or a crime of violence involving physical injury in Criminal Action No. IK060901496001 in the Superior Court of the State of Delaware in and for Kent County on August 1, 2007, of the charges of Burglary 3rd Degree.

COUNT 5 K11-10-0188 (SELLS-1108023648)

WEARING A DISGUISE DURING THE COMMISSION OF A FELONY, a felony, in violation of Title 11, Section 1239 of the Delaware Code of 1974 as amended.

WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, did knowingly and unlawfully wear a hood, mask or other disguise during the commission of Robbery 1st Degree as set forth in Count 1 of this Indictment, which is herein incorporated by reference.

COUNT 6

K11-09-0252 (GRIMES)
K11-10-0180 (SELLS-1108023648)

AGGRAVATED MENACING, a felony, in violation of Title 11, Section 602 of the Delaware Code of 1974 as amended.

RUSSELL M. GRIMES and WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, by displaying what appeared to be a deadly weapon, a handgun, did intentionally place Cynthia Evans in fear of imminent physical injury.

COUNT 7

K11-09-0253 (GRIMES)
K11-10-0182 (SELLS-1108023648)

AGGRAVATED MENACING, a felony, in violation of Title 11, Section 602 of the Delaware Code of 1974 as amended.

RUSSELL M. GRIMES and WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, by displaying what appeared to be a deadly weapon, a handgun, did intentionally place Joni Maio in fear of imminent physical injury.

COUNT 8

K11-09-0254 (GRIMES)
K11-10-0183 (SELLS-1108023648)

AGGRAVATED MENACING, a felony, in violation of Title 11, Section 602 of the Delaware Code of 1974 as amended.

RUSSELL M. GRIMES and WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, by displaying what appeared to be a deadly weapon, a handgun, did intentionally place Lindsay Chasanov in fear of imminent physical injury.

COUNT 9 K11-09-0255 (GRIMES)
K11-10-0184 (SELLS-1108023648)

AGGRAVATED MENACING, a felony, in violation of Title 11, Section 602 of the Delaware Code of 1974 as amended.

RUSSELL M. GRIMES and WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, by displaying what appeared to be a deadly weapon, a handgun, did intentionally place Vickie Ebaugh in fear of imminent physical injury.

COUNT 10 K11-09-0256 (GRIMES)
K11-10-0185 (SELLS-1108023648)

AGGRAVATED MENACING, a felony, in violation of Title 11, Section 602 of the Delaware Code of 1974 as amended.

RUSSELL M. GRIMES and WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, by displaying what appeared to be a deadly weapon, a handgun, did intentionally place Jessica Gedney in fear of imminent physical injury.

COUNT 11 K11-09-0257 (GRIMES)
K11-10-0186 (SELLS-1108023648)

AGGRAVATED MENACING, a felony, in violation of Title 11, Section 602 of the Delaware Code of 1974 as amended.

RUSSELL M. GRIMES and WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, by displaying what appeared to be a deadly weapon, a handgun, did intentionally place Maryann Emig in fear of imminent physical injury.

COUNT 12

K11-09-0258 (GRIMES)
K11-10-0189 (SELLS-1108023648)

THEFT, a felony, in violation of Title 11, Section 841 of the Delaware Code of 1974 as amended.

RUSSELL M. GRIMES and WILLIAM S. SELLS III on or about the 26th day of August, 2011, in the County of Kent, in the State of Delaware, did take with the intent to appropriate property consisting of United States Currency belonging to 1st National Bank of Wyoming and valued at $1,500.00 or more.

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Russell Grimes — PETITIONER
(Your Name)

VS.

State of Delaware — RESPONDENT(S)

PROOF OF SERVICE

I, Russell Grimes, do swear or declare that on this date, 11/11/24, 2024, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Attorney General Delaware D.O.J.
Caravel State Building
820 N. French Street, Wilmington, De. 19801

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 11/11/, 2024

Russell Grimes
(Signature)

EFiled: Mar 12 2020 03:42PM EDT
Filing ID 64824708
Case Number 494,2019

APPENDIX

EXHIBIT A