



## **I. Issue**

The issue before the Court is whether the Court should grant the State’s Motion for Reargument pursuant to Superior Court Civil Rule 59(e).<sup>1</sup>

## **II. Factual and Procedural Background**

Defendant Jermaine Zachary (hereinafter “ the Defendant”) has been arrested and indicted on one count of Murder in the First Degree, two counts of Attempted Robbery in the First Degree, one count of Conspiracy in the Second Degree, and two counts of Possession of a Firearm during the Commission of a Felony. These charges stem from the apparent robbery and shooting death of Robert Watkins (hereinafter “Watkins”) on September 25, 2009, in Dover, Delaware. The State alleges that the Defendant conspired with the shooter responsible for Watkins’ death to rob Watkins and a female companion.<sup>2</sup>

The State filed the instant Motion for Reargument concerning the Court’s July 17, 2013 Order granting the Defendant’s motion in *limine*. The Defendant filed the motion to exclude a series of text messages exchanged between the Defendant and the user of a prepaid cellular phone with the number 202-236-4884 (hereinafter “the

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<sup>1</sup> Where the Superior Court Rules of Criminal Procedure do not provide for a particular procedure in a criminal case, the Superior Court Rules of Civil Procedure govern. Del. Super. Ct. Crim. R. 57(d). There is no Superior Court Criminal Rule governing motions for reargument. Accordingly, Superior Court Civil Rule 59(e) is the controlling standard. *See* Del. Super. Ct. Civ. R. 59(e).

<sup>2</sup>The alleged shooter has not been charged in regards to Watkins’ death. Thus, the Court will refrain from naming this individual.

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202 number”), whom the State alleges to be Watkins’ shooter. Specifically, the Defendant challenged the admissibility of the following exchange:

Sent to 202-236-4884 at 12:24 p.m.: ‘Kum Rob Dub \$RootOfAllEvil’  
Received from 202-236-4884 at 12:24 p.m.: ‘Were u at’  
Sent to 202-236-4884 at 12:25 p.m.: ‘Murda im about a shoot dice \$RootofAllEvil’  
Received from 202-236-4884 at 12:25 p.m.: ‘He shootn now’  
Sent to 202-236-4884 at 12:28 p.m.: ‘were u at \$RootofAllEvil’  
Received from 202-236-4884 at 12:29 p.m.: ‘Felton’  
Sent to 202-236-4884 at 12:29 p.m.: ‘Oh I ant even gonna start shootn then \$RootofAllEvil’  
Received from 202-236-4884 at 12:29 p.m.: ‘Ight’  
Sent to 202-236-4884 at 12:48 p.m.: ‘Yo u still dwn there he got like 1500 on em \$RootOfAllEvil’

The Court granted the Defendant’s motion to exclude the foregoing exchange on the grounds that the text messages sent by the 202 number could not be properly authenticated pursuant to D.R.E. 901(b).<sup>3</sup> Relying in part on the persuasive reasoning of a similar Pennsylvania Superior Court case, this Court concluded that the State failed to meet its burden of authentication due to the complete absence of circumstantial evidence corroborating the State’s claims that the alleged shooter was the author of the text messages sent by the 202 number to the Defendant.<sup>4</sup> The Court notes that although the burden on the State is not great under 901(b), the Court’s function is as a gatekeeper, insuring that the gate has a vigilant guard on duty.

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<sup>3</sup> *State v. Zachary*, 2013 WL 3833058, at \*2-3 (Del. Super. Ct. July 16, 2013).

<sup>4</sup> *Id.* (citing *Commonwealth v. Koch*, 39 A.3d 996, 1002-05 (Pa. Super. Ct. 2011)).

The State filed its Motion for Reargument on August 2, 2013, seeking to reargue the Court's ruling with respect to the Defendant's motion in *limine*. The State again contends that the text messages are relevant and can be properly authenticated. Specifically, the State argues that the text messages can be properly authenticated under the business records exception to the hearsay rule.<sup>5</sup>

The Defendant responds that this Court should deny the State's Motion on two separate grounds: first, the Defendant contends that the State's motion is time barred; second, the Defendant argues that even if the Motion was timely filed, the Motion fails on the merits because the State is simply rehashing the same arguments it made concerning the Defendant's motion in *limine*.

### **III. *Standard of Review***

This Court will grant a motion for reargument filed pursuant to Superior Court Civil Rule 59(e) "only if the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."<sup>6</sup> A motion for reargument is not an opportunity for a party to rehash arguments already decided by the Court or to present new arguments not previously raised.<sup>7</sup>

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<sup>5</sup>See D.R.E. 803(6).

<sup>6</sup> *Strong v. Wells Fargo Bank.*, 2013 WL 1228028, at \*1 (Del. Super. Ct. Jan. 3, 2013) (citing *Kennedy v. Invacare, Inc.*, 2006 WL 488590, at \*1 (Del. Super. Ct. Jan. 31, 2006)).

<sup>7</sup> *Kennedy*, 2006 WL 488590, at \*1; *Hennegan v. Cardiology Consultants, P.A.*, 2008 WL 4152678, at \*1 (Del. Super. Ct. Sept. 9, 2009) (citing *Denison v. Redefer*, 2006 WL 1679580, at \*2 (Del. Super. Ct. Mar. 31, 2006)).

#### **IV. Discussion**

The Defendant first contends that because the Court lacked jurisdiction to grant the State's request for an extension to file its Motion for Reargument, the Motion is time barred. Superior Court Civil Rule 59(e) states that a "motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision."<sup>8</sup> The rule is "crystal clear."<sup>9</sup> Superior Court Civil Rule 6(b) states that the Court "may not extend the time for taking any action under Rules. . .59(b), (d), and (e)."<sup>10</sup> Under this rule, the Superior Court "has divested itself of the power to enlarge the time for a motion for reargument."<sup>11</sup> Stated differently, the Delaware Supreme Court has held that Rule 6(b) removes the power to grant extensions for motions filed pursuant to any of the rules enumerated in Rule 6(b).<sup>12</sup> This lack of power is jurisdictional.<sup>13</sup> Accordingly, if the Superior Court grants extensions of time for motions filed pursuant to these enumerated rules, such extensions are "of no legal significance and a nullity."<sup>14</sup>

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<sup>8</sup> Del. Super. Ct. Civ. R. 59(e).

<sup>9</sup> *Strong*, 2013 WL 1228028, at \*1 (citing *White v. Riego*, 2005 WL 516850, at \*1 (Del. Super. Ct. Mar. 3, 2005)).

<sup>10</sup> Del. Super. Ct. Civ. R. 6(b).

<sup>11</sup> *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 n.1 (Del. 1969).

<sup>12</sup> *See Preform Bldg. Components, Inc. v. Edwards*, 280 A.2d 697, 698 (Del. 1971).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

This Court's Order granting the Defendant's motion in *limine* was decided on July 17, 2013. Pursuant to Rule 59(e), the State's Motion for Reargument could be filed no later than July 24, 2013. On July 23, 2013 the State requested an extension of time to file its Motion for Reargument, which this Court granted. On August 2, 2013 the State filed its Motion, beyond the July 24 deadline but pursuant to the Court's extension. Such extension, in retrospect, was of no legal significance under Rule 6(b) and beyond this Court's jurisdiction to grant.

Even if the extension of time was valid and the State's Motion was not time barred, the Motion fails on the merits. The State cites to authority from other jurisdictions supporting its contention that text messages can be admitted under the business records exception to the hearsay rule.<sup>15</sup> This argument fails to address this Court's concerns expressed in its Order excluding the text messages sent from the 202 number.<sup>16</sup> The State again fails to present any circumstantial evidence corroborating its allegations that the alleged shooter sent the text messages from the 202 number, and the content of the conversation remains "somewhat cryptic."<sup>17</sup> The State's business records argument also raises hearsay-within-hearsay concerns: even

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<sup>15</sup> See *State v. Blake*, 974 N.E.2d 730, 740-41 (Ohio Ct. App. 2012) (holding that testimony of phone company employee provided adequate foundation to authenticate text message exchange under the business records exception); *Long v. Commonwealth*, 2011 WL 6826377, at \*2 (Ky. Dec. 22, 2011) ("it is self-evident that cell phone account records are business records").

<sup>16</sup> *State v. Zachary*, 2013 WL 3833058, at \*2-3 (Del. Super. Ct. July 16, 2013)

<sup>17</sup> *Id.* at \*3.

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if the record of the text message exchange is admitted as a business record, the contents of the texts sent from the 202 number fail to fall within a recognized hearsay exception.<sup>18</sup> The State's Motion is simply a rehashing of the same arguments it made before: that the text messages can be properly authenticated. Again, this Court fails to find the State's argument persuasive.

### ***V. Conclusion***

Even if the State's Motion for Reargument is time barred, the Motion fails on the merits. The State has failed to establish that this Court overlooked controlling legal principles or misapprehended the law or facts in such a way that would change the outcome of the Defendant's motion in *limine*. Under the pretext of the business records exception, the State merely rehashes its same arguments that the text messages can be properly authenticated. This argument fails. Accordingly, the State's Motion for Reargument is DENIED.

IT IS SO ORDERED.

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Resident Judge

WLW/dmh

oc: Prothonotary

xc: R. David Favata, Esquire

William J. Rhodunda, Jr., Esquire

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<sup>18</sup> See D.R.E. 805.