



IN THE SUPREME COURT OF THE STATE OF DELAWARE

OTIS PHILLIPS

**Defendant Below
Appellant,**

vs.

STATE OF DELAWARE

**Plaintiff Below
Appellee.**

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**NO. 497, 2015 & 500, 2015
CONSOLIDATED**

ON APPEAL FROM THE SUPERIOR COURT OF DELAWARE

APPELLANT'S REPLY BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On April 29, 2016 Appellant filed his opening brief on Appeal, the State's Answering brief was filed August 19, 2016. This is Appellant's Reply Brief.

SUMMARY OF THE ARGUMENT

II. Appellant's case prejudiced by the Court's failure to grant motion to sever charges of gang participation.

III. Hearsay testimony of co conspirator in Gang Participation case should not have been permitted regarding charge of Capital Murder.

STATEMENT OF FACTS

Appellant adopts the statement of facts as presented in Appellant's Opening Brief and supplemented in the Answering Brief of Appellee.

ARGUMENT II

TRIAL COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO SEVER

Question Presented

Whether the Superior Court erred by denying Appellant's Motion to Sever Gang Participation from Murder First degree? (A62, A107 in Passim)
(B36)

Standard and Scope of Review

The decision to grant or deny a motion for severance is reviewed as an abuse of discretion. Jenkins v State, 230 A.2d 262 (Del. 1967)

ARGUMENT

Appellee argues no abuse of discretion/ no prejudice to defendant, appellant disagrees. Otis Phillips was facing Capital Murder charges, by combining the gang participation charges the State utilized D.R.E. § 801 (d)(2)(E) as an avenue to avoid the defendant's right to confront the witnesses against him.

Offenses should only be tried together " where offenses are of the same general character, involve a similar course of conduct and are alleged to have occurred within a relatively brief span of time" Younger v State, 496 A.2d 546

(Del. 1985) Appellant alleges Murder First Degree and Gang Participation do not meet that criteria.

In further support of Appellant's position, this Court need look no further than the State's argument before the trial court.

“ Here we have indicted all of these guy's under gang participation, the primary activity being drug dealing. So what Otis - what Seon Phillips, Pluck, has told this witness during the drug dealing activities of the gang, which is part of gang participation, is co defendant statement under 801 (d)(2)(e), your honor”
B36.

Clearly the gang participation indictment was away to circumvent the right to confrontation. U.S.C.A. const. amend. VI guarantees the right to confront your accusers. In Barrow v. State, 749 A.2d 1230 (Del. 2006), the co defendant's out of court statement, which was presented to the jury in the absence of the co defendant caused a partial reversal of Barrow's conviction. In Barrow, the co defendant was charged with conspiracy to commit both robbery and murder, yet this court relying in part on the United States Supreme Court opinion in Lilly v Virginia, 527 U.S. 116 (1999), said his absence depriving Barrow the right to cross examination was reversible error, in part. It would appear the State

would distinguish this case from Barrow, merely because the prosecutors in Barrow did not rely on D.R.E § 801 (d)(2)(E).

In State v. Cohen, 604 A.2d 846 (Del. 1992) this court found that the State's Death Penalty Statute did not violate U.S.C.A. const. amend XIV or U.S.C.A. const. amend. VIII, this position of course was reversed by this Court in Rauf v. State 2016 WL 4224252 (Del. August 2, 2016). Appellant would pray this court recognize that the use of a Gang Participation charge to allow what would other wise be clear hearsay is a violation of Appellant's right to confront his accuser.

ARGUMENT III

ALLEGED CO CONSPIRATOR STATEMENT RELATED TO GANG PARTICIPATION ADMITTED IN TRIAL FOR CAPITAL MURDER VIOLATED THE CONFRONTATION CLAUSE U.S.C.A. Const. Amend. VI

QUESTION PRESENTED

Was allowing the testimony of a co conspirator in gang participation case to testify as to what was otherwise hearsay in a Capital Murder case a violation of the Confrontation Clause, U.S.C.A. const. amend. VI? (A146 - A153)

Standard and Scope of Review

The Court reviews an infringement of Constitutional Rights de Novo
Pierce v. State 911 A.2d 793 (Del. 2006)

MERITS OF ARGUMENT

Appellant adopts the argument previously expressed in Argument II

CONCLUSION

The use of testimony not subject to cross examination regardless of statutory laws and rules of evidence should never be permitted to trump upon an individuals right to confront his accusers. Otis Phillips was charged with a crime for which he faced the Ultimate Penalty, death. Hearsay under any circumstance should not have been allowed. This Court and our legislature recognize that Death is different Capano V. State, 889 A.2d 968 at 990. The side door violation of defendant's right to confront his accusers should not be allowed. To the extent that the State relied heavily in part on this hearsay testimony to convict Otis Phillips , his conviction should be reversed.

/s/ Anthony A. Figliola, Jr.

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