IN THE SUPREME COURT OF THE STATE OF DELAWARE

DASHAWN AYERS, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	§ § § § § § § § §	No. 646, 2013 ID No. Below: 1208001950, Criminal Action Nos. IK12090023W, IK12090024W and IK12090025W

APPELLANT'S REPLY BRIEF

BENJAMIN A. SCHWARTZ
Delaware Bar ID No. 4145
SCHWARTZ & SCHWARTZ,
ATTORNEYS AT LAW, P.A.
1140 South State Street
Dover, Delaware 19901
(302) 678-8700
mail@BenSchwartz.com
Attorney for the Appellant

Trial Court: Superior Court of Delaware, in and for Kent County

Filed: April 10, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes, Rules and Other Authorities

ARGUMENT

I. Jones and Crawford do not support the proposition that all statements of co-conspirators are non-testimonial.

The State cites Jones v. State, 940 A.2d 1 (Del. 2007) to support the proposition that statements of a co-conspirator are *per se* non-testimonial. In the Jones decision, at pages 12 into 13, this Court wrote, "as the U.S. Supreme Court recognized in Crawford [v. Washington, 541 U.S. 36 (2004) at 56], statements made in furtherance of a conspiracy are nontestimonial." The State extrapolates that to mean that "Here, Brooks' wiretapped conversations which were introduced at trial are nontestimonial because they are statements made in furtherance of a conspiracy." Answering Brief at page 11. Defendant respectfully submits that the State's argument grossly oversimplifies the analysis.

If we go back to Crawford and read that sentence in context, we see that it does not actually support the proposition for which it is cited. Justice Scalia, at page 50, under Section III, writes that there are two inferences we can draw about the Sixth Amendment. First, under Subsection A at pages 50-51, he writes that we may infer that the primary purpose of the Confrontation Clause was to curb the use of *ex parte* examinations in criminal cases. In that section, he writes that "we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at

trial depends upon 'the law of Evidence for the time being.' Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." (Int.Cit.Om.) In writing that, it is clear that the Court's intent was to unhitch the Confrontation Clause wagon from the Rules of Evidence horse. It would thus be completely inconsistent for the U.S. Supreme Court to intend for its opinion to be used to suggest that a hearsay exception can be used as the litmus test of constitutionality.

The second inference Justice Scalia draws under Subsection B at pages 53-56, is that the Framers of the Constitution in 1791 would not have accepted the notion that a trial court may simply substitute a hearsay exception from the Federal Rules of Evidence for present unavailability and prior opportunity to cross-examine. The Court is plainly saying that even where there may have been some then-existing hearsay exception (business record or a co-conspirator's statement), the Framers would not have condoned reliance on that hearsay exception in lieu of cross-examination of the declarant *if the statement was testimonial.* He is not saying that all statements of co-conspirators are non-testimonial.

In sum, this Court cannot, as the State suggests, simply decide that the statements were co-conspirator statements, and permit that to be the end of the analysis. Rather, the correct analysis is to determine whether the statements were

testimonial. If so, then was there a deprivation of the right to confront the witnesses? If not testimonial, then were the statements properly admitted under DRE 801(d)(2)(e)? This analysis is more fully set forth in Mr. Ayers's Opening Brief.

II. This Court did not abrogate the face-to-face confrontation requirement of the Delaware Constitution in all cases when it decided the McGriff cases.

The State claims that in the McGriff opinions, a pair of Delaware Supreme Court cases concerning admission of child rape victim statements under the Tender Years Statute, this Court rejected the idea that the Article I, Section 7 of the Delaware Constitution imposes a literal face-to-face confrontation requirement. See State's Answering Brief at Page 13. If one reads the McGriff decisions, one sees that this Court was actually very careful to uphold the "face to face" confrontation right of the defendant.

In the first opinion, McGriff v. State, 672 A.2d 1027 (Del. 1996), at page 1030, this Court wrote that "[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (Int. Cit. Om.). The Court then reversed the defendant's conviction because defense counsel was not permitted to participate in *voir dire* of the child rape victim before the trial court declared her unavailable. Id. at 1030-1031.

In the second McGriff opinion, the case returned to this Court on appeal from a new non-availability hearing and reconviction. McGriff v. State, 781 A.2d 534 (Del. 2001). The Court wrote, "we conclude that the Delaware tender years statute satisfies the 'face to face' requirement of the Delaware Constitution through its protection of the right of 'face to face' cross examination on both the issue of

the child's availability and the subsequent determination of trustworthiness of the proffered out-of-court statements." Id. at 541. So in fact, this Court reaffirmed the face-to-face requirement in the Delaware Constitution.

The State in its Answering Brief should have more specifically argued that the second McGriff decision established that this Court generally reads the face-to-face language of Article I, Section 7 in conjunction with the "law of the land" reference at the end of that Section. Ayers is, after all, making the pitch in his Opening Brief that a strict reading of the face to face language is in order.

Of course, unlike in Ayers's case, in McGriff the State had a compelling interest in protecting the child rape victim from further injury that would result from face to face confrontation of the abuser. McGriff, 781 A.2d at 542 ("The State has an interest in protecting young children from testifying."). Here, there is no compelling State interest whatsoever that would militate in favor of placing any limitation on the Defendant's face to face confrontation right. The State has no compelling interest in safeguarding the declarants on the wiretaps. For that reason, in this case, this Court should not read the Article I, Section 7 face to face confrontation right as being limited by the law of the land language at the end of Section 7.

In his Opening Brief, Appellant argued that this Court ought not to apply the "law of the land" limiting language to the face to face confrontation right. Clearly,

doing so will have repercussions in child rape cases where innocent children may be further harmed by having to face their perpetrators. Perhaps, if this Court is not inclined to issue a blanket proclamation strictly construing the face to face language, it will consider adopting a rule that requires strict construction of the face to face language, except where a compelling state interest requires application of the law of the land limitation.

In sum, this Court cannot and should not rely on the McGriff decisions to answer Mr. Ayers's plea for strict enforcement of his right to face-to-face confrontation.

III. Blockburger was violated, the General Assembly did not intend this result, and there should be no resentencing on merged charges.

The State concedes defendant should not have been sentenced on both drug charges. It then argues that there is no Blockburger violation because Drug Dealing requires an element that Aggravated Possession does not, it fails to identify what element Aggravated Possession requires that Drug Dealing Does not, and it further argues that the two charges should have merged for purposes of sentencing. Answering Brief at pages 16-19.

In taking this position, the State simply ignores the Blockburger rule and the plain text of the statute, which mandates that the defendant be guilty of only "a Class B felony" (singular). The statute does not authorize multiple convictions that will merge for purposes of sentencing, leaving the defendant with multiple felonies on his record.

The defendant respectfully submits that this Court must reverse his conviction on the lesser included offense. If this case must then be remanded for resentencing, the defendant requests that this Court remand with instructions that "any post-appeal sentence imposed ... may not exceed the sentence originally imposed for the conviction which remains..." Hunter v. State, 420 A.2d 119, 132 (Del. 1980).

In sum, defendant Ayers should have his Aggravated Possession conviction reversed. If he is to be resentenced on the remaining charges, then the Court's remand should include instructions precluding the trial judge from increasing his sentence.

Conclusion

Mr. Ayers is asking this Court to reverse his convictions – not only on the lesser included Aggravated Possession where his double jeopardy rights were violated – but on all the offenses because of multiple violations of his constitutional rights. Thank you for giving this appeal a fair evaluation.

SCHWARTZ & SCHWARTZ

By:_____
BENJAMIN A. SCHWARTZ
Delaware Bar ID No. 4145
1140 South State Street
Dover, Delaware 19901
(302) 678-8700
mail@BenSchwartz.com
Attorney for the Appellant