

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OTIS PHILLIPS]	
]	
Defendant Below]	
Appellant]	
]	
v]	CASE NO. 497 & 500, 2015
]	Consolidated
STATE OF DELAWARE]	
]	
Plaintiff Below]	
Appellee]	

ON APPEAL FROM THE SUPERIOR COURT OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On or about July 8, 2012 Otis Phillips was arrested for the Murders of Herman Curry and Alexander Kumara and subsequently indicted on February 28, 2013 on Charges of Gang Participation, Conspiracy First Degree, Murder First Degree (3 counts), PFDCF (6 counts), At Murder, Reckless End 1st, & Assault 1st. (A1)

Jury Selection began September 29, 2014. (A17) On November 21, 2014, the Jury found Otis Phillips Guilty of Gang Participation, Murder 1st, Murder 2nd, Manslaughter, Reckless End 1st, Assault 3rd, Assault 2nd, Conspiracy 1st & PFDCF (5 counts) (A1).

On September 4, 2015, Otis Phillips was sentenced to death on the single count of Murder First Degree (A32) Murder Second Degree, Life (A33) on the remaining counts, Appellant received a total of One Hundred Thirty Years (A33)

A timely notice of Appeal was filed on September 16, 2015. This is Appellant's Opening Brief on Appeal.

SUMMARY OF ARGUMENT

1. Severance of charges and defendants should have been granted.
2. Judge should have granted recusal motion removing himself from penalty phase.
3. Admission of co conspirator's statements violated Appellant's right to confrontation.
4. Introduction of Plea Agreements violated Defendant's right to confrontation.
5. Witness testimony on defendant failure to testify warranted a mistrial.
6. Death Penalty fails test of Proportionality.
7. Delaware Death Penalty Statute is Unconstitutional.
8. The granting of State's Motion in Limine to admit evidence of forfeiture by wrongdoing was an abuse of discretion.
9. Answer to Jury question was coercive.
10. Motion to Dismiss for delay in Prosecution had merit.

STATEMENT OF FACTS

Appellant was indicted 10/22/12 and re indicted 02/18/13. Counsel was appointed to represent Appellant on January 7, 2013. (A2)

On March 3, 2014. Appellant filed a Motion to Dismiss alleging undo delay so that the State could build separate charges which would prejudice Appellant's ability to defend himself against the Murder Charge for which the State was seeking a penalty of death. (A32 - 40) On August 20, 2014, the Motion was denied, citing no prejudice to defendant. (A5)

On October 1, 2013, the State filed a Motion to Admit Evidence of Forfeiture by wrong doing. (A6)(A41 - A46) Defense objected (A47 - A53) The Court granted the State's Motion on July 9, 2014 (A54 - A61).

Defense filed a Motion to Sever the Charges alleging undo prejudice on March 27 2014 (A62 - A64)(A265 - A270).

The State filed several ex parte Motions for protective orders during the course of the proceedings. Defense sought relief from the protective order, on May 14, 2014 (A9) and again on August 26, 2014 (A12). A Motion for relief from the protective order was filed on September 5, 2014 (A14).Relief from the protective order was granted but the defense was not given access to the initial motions filed by the State. Defendant argued that the inability to answer the ex

parte filings affected the courts impartiality since it would be the finder of fact on the question of sentencing. (A65) Appellant, after Notice of Appeal was filed, was able to secure the ex parte motions. (A66 - A83) On September 16, 2014 , Appellant filed a Motion to exclude the death penalty (A15)(A21 - 217).

Trial testimony began October 20, 2014. Corporal Gordon of the WPD was called by the State (A83) Gordon testified that he spoke with a gentleman by the name of Herman Curry. Gordon claimed Curry told him he witnessed a shooting involving the Sure Shots .Curry stated one of the shooters was Pluck's brother.(A84) On cross, Gordon stated he did no follow up, turning the information over to the Detective in charge. (A85)

Prior to the State calling Maria Du Bois, it was divulged for the first time that Ms. Du Bois was receiving funds from the State for her testimony. It was further developed that the funds referred to were from her placement in witness protection (A 86 - A-89) Appellant chose not to exam Ms. Du Bois on the issue of payments from the State for her testimony. (A90 - A95)

During examination of Michael Young, the State over the objection of defense counsel solicited information that Otis Phillips was a gang member that carried a gun to cause fear and intimidation. Young had no direct knowledge of this fact.(A96,97)

The issue of statements made by Kelmar Allen was brought to the court's attention prior to his testimony. Counsel for co defendant raised issues of Brady violation while appellant's counsel argued it was hearsay.(A98 - A 101)

At the beginning of his direct examination, Kelmar Allen in response to the State's questioning stated he was in witness protection. Defense objected and requested a mis trial. The State had previously been instructed the issue could not be raised unless breached by the defense. (A102 - A 108)

Kelmar Allen was permitted to testify. The defense immediately objected to his testimony as being hearsay.(A109 - A112) The witnesses's knowledge as opposed to what he heard was again challenged by the defendant .(A113- A116)

Counsel for co - defendant questioned Kelmar Allen about his agreement to testify which included witness protection. (A117) This was an area avoided by counsel for Otis Phillips. During the cross examination counsel for Jeffrey Phillips elicited testimony that Allen feared the Phillips brothers. Counsel for Otis Phillips objected.(A118)

During the cross examination of Kelmar Allen, counsel for Otis Phillips avoided the issue of witness protection. (A119 - A134) On redirect the issue of Allen testifying as hearsay again became an issue. (A134 - A136)

During the testimony of Ricardo Brown, Mr. Brown conducted an emotional outburst in the presence of the jury. Counsel for both defendants moved for a mis trial (A137 - A139)

During the State's questioning of Clayon Green, a State's witness again gave a non responsive answer that drew a defense request for a mis trial. The motion was denied and the court ordered the jury to disregard the answer. (A140) Green also stated if you want to know what happened ask Otis. Objection along with request for mis trial followed. (A140)

The State moved to introduce certified convictions of named members of the Sure Shots, without calling the witnesses to the stand. Defendant objected to the admission as hearsay, denying Otis Phillips his right to confrontation. (A141 - A145) On November 7, 2014, Counsel for Otis Phillips, in a Motion joined by counsel for Jeffrey Phillips moved for a mis trial based upon repeated violations of the Confrontation Clause. U.S.C.A. Const.Amend. 6 & Del.C. Ann. Const. Art .7 (A146 - A153) Argument on this issue took place in the Courtroom and also dealt with the issue of certified convictions being entered to prove an element of the charges against defendants. (A154 - A159)

In response to issues of severance, the State on April 24, 2014 argued that Otis Phillips had not demonstrated the defenses would be antagonistic. (A160 - A173) The issue of antagonistic defenses were more in line with antagonistic approaches, Counsel for Otis Phillips did not want to touch the issue of witness protection (A 106,107). Counsel for Jeffrey Phillips explored the witness protection issue. (A117)

The real issue of Antagonism arose in the closing argument of Counsel for Jeffrey Phillips, where he turned into a second prosecutor and counsel for Otis Phillips could not address his remarks. (A174 - A177)

On the first day of deliberations, two notes were received from the jury regarding deliberations. All parties agreed that the note one should go unanswered. As to the second note, there was a disagreement over the information to be given in the court's answer. Defense requested the jury instructions regarding deliberations be given. The State requested the jury be told that the twelve sitting jurors must render the verdict and they could not be replaced. The Court over defense objection honored the States' request. (A178 - A211)

Based upon the State's ex parte Motions for protective orders, defense moved to have the Trial Judge removed from the Penalty phase. (A212 - A215) Defense Motion was denied after brief argument. (A 216, 217).

Supplemental Opinions regarding denial of Defense Motions to Sever and subsequent denial of repeated requests for mistrial was issued on September 3, 2015 nearly nine months after the trial ended. (A218 - A244)

Following sentencing, the ex parte motions were unsealed. One motion in particular was troubling in that implicated Appellant in a plot to murder the Prosecutor. (A71 - A75). In reviewing the Motion it would appear the source of the information was unreliable. (A245 - A252) The ex parte motion given to the ultimate sentencing authority was highly prejudicial.

Subsequent to the sentencing of Otis Phillips, the United States Supreme Court ruled the Florida Death Penalty Statute unconstitutional. Hurst v Florida, 136 S.Ct. 616 (2016), Otis Phillips had previously submitted a Motion to strike the death penalty. (A213 - A215)

ARGUMENT 1

THE TRIAL COURT ABUSED IT'S DISCRETION BY DENYING THE DEFENDANT'S MOTION FOR SEVERANCE

QUESTION PRESENTED

Did the Trial Judge Abuse his Discretion when he denied Appellant's Request for Separate Trial and Severance of Charges ? (A62, A107 in Passim)

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)

MERITS OF ARGUMENT

Severance of Defendants

A defendant is entitled to a fair trial. When two defendants are joined together for a trial and they have antagonistic defenses a fair trial is not possible and a severance should be granted. Bradley v. State, 559 A2d 1234 (Del 1989)

Prior to trial, defendant Otis Phillips filed a motion to sever the defendant's charges and moved for a severance of defendant's, joining co defendant's pre trial motion and on the record during trial. This was based on the premise that, among other things, the defendants would have antagonistic defenses. The motion was denied.

As the trial proceeded, the defendants clearly had antagonistic defenses and the defendants moved for a mistrial and a severance. The motion was denied.

During the trial, the State indicated that some of their witnesses had entered the witness protection program. The defendants' requested that the State provide them with the witness protection agreements and a calculation of to the financial benefits received by each defendant for the program.

Counsel for each defendant had differing views on how to proceed. Counsel for Jeffrey Phillips was of the opinion that the fact that the witnesses were in the witness protection program showed that they were receiving something in return for their testimony. Furthermore, they wanted to introduce evidence of the value of the benefits received as it would emphasize that the value was so great that it could lead the witnesses to change their testimony in favor of the State.

Counsel for Otis Phillips was of a different view. They argued that evidence that the witnesses were in the witness protection would be construed by the jury that Otis Phillips was a dangerous person who would murder the witnesses, and therefore the witnesses lives were in jeopardy and they had to be put in the witness protection program. Additionally, it would support the State's theory of the case; that Phillips murdered witnesses involved in other crimes. The fact that the State

invested thousands of dollars to protect witnesses emphasized their allegation that Phillips was a dangerous person.

After a conference with the Court, it was decided that the State would not bring the issue to the attention of the jury unless it was brought out through cross examination by the defense.

Witnesses Dubois, Allen, Young and Bennett had entered the witness protection program and received financial benefits from the State.

When Dubois testified, counsel did not raise the issue that she was in the witness protection program.

When witness Young testified, counsel did not raise the issue that he was in the witness protection program.

When witness Allen testified, the prosecutor asked him about the terms of the plea agreement, the sentence and then asked him what benefits he received from the State. The witness responded that he was in the witness protection program. This fact was almost immediately solicited by the direct examination by the State. Both defendants objected and requested mistrials.

The Court denied the motion and gave a curative instruction stating “ladies and gentlemen, the witness has testified that he currently has some involvement in the witness protection program. There’s no evidence before you that the

defendants personally made threats, directly or indirectly, against the witness. The fact that a witness received the benefit of the program may only be considered by you for the purpose of judging the credibility of the witness, it should not be considered by you in determining the guilt of the defendants”

Phillips submits that a curative instruction was insufficient. This was clearly information that the parties had agreed not to put in front of the jury. It was highly prejudicial and harmful. Otis Phillips requested a mistrial because the State had elicited this testimony and felt that a curative instruction would not be sufficient to remedy the damage done.

In United States v Partin, 552 F.2d 621 (5th Cir. 1977), the court noted that disclosure of the fact that a government witness is participating in the witness security program is a matter that must be handled delicately. The defense has a right to show that a witness, while in the program, has received substantial benefits, see United States v. Librach, 536 F.2d 1228, 1231 (8th Cir. 1976); United States v. Muckenstrum, 512 F.2d 568, 569-70 (5TH Cir. 1975); United States v. Howell, 514 F.2d 710, 715 (5th Cir., 1975), cert. Denied. Harris v. United States, 423 U.S. 914, 96 S.Ct. 220 (1975), Allen v. United States, 423 U.S. 987, 96 S.Ct. 396, (1975); At the same time; however, there often is a danger that the jury will infer that the defendant himself was the source of the threat.

Librach, 1231 - 32 n.4 Although that risk may be to some extent unavoidable, the prosecution should not be allowed to exploit it. See United States v. Librach, 536 F.2d at 1231-32 & n. 6.

This however was not the only instance which demonstrated that the defendants' had antagonistic defenses. During the cross-examination of Kelmar Allen, the co-defendant's attorneys elicited testimony that Allen had changed his previous statements because he was afraid of being harmed by Otis Phillips and didn't want Phillips to know that he was talking to the police. This would not have occurred had the defendant been tried separately. These questions clearly demonstrated to the jury that Phillips was a dangerous person who was harm witnesses against him.

Another attack against Phillips was made by his co defendants's attorney during his closing when he argued, "How do we know the state of mind of Otis Phillips? We know the state of mind of Otis Phillips was intentional conduct. That is the best example of intent; walking up to someone, tapping them on the shoulder, firing two shots, and then to believe some of the witnesses, Curry falls to the ground, he shoots him another time for good matters, or Curry, starts running and he shoots him another time, and he continues to shoot at him. Of particular concern, is that these comments were made after counsel for Otis

Phillips had already made their closing arguments, and therefore, they were not given an opportunity to respond to the arguments made by the codefendant.

A motion to grant or deny a motion for severance rests within the sound discretion of the trial court. Younger v. State, 496 A.2d 546 (Del. 1985); Lampkins v. State, 465 A.2d 785(Del. 1983); Bates v. State, 386 A.2d 1139 (Del. 1978).

Here, it is clear that Otis Phillips and Jeffrey Phillips had antagonistic defenses. The codefendant directly and indirectly took positions that were contrary and prejudicial to defendants defense. Additionally, attacks in Final Argument by counsel for co defendant did not afford Appellant responsive comments to the jury. Comments to the Jury by Appellant's Counsel against co defendant were finger pointing which invited the comments of co defendants counsel, unfortunately they went unanswered.. This would not have happened had the defendants been tried separately. Additionally defendants differed on how to answer questions from the jury.(A 178 - A211). Appellant was denied his right to a fair trial.

Severance of Charges

Appellant was indicted on two Charges of Murder I, Attempted Murder I, two counts of Possession of a Firearm During the Commission of a Felony, and

two counts of Possession of a Firearm by a Person Prohibited and various other underlying charges. An underlying conviction which made him a person prohibited was possession of a Deadly Weapon During the Commission of a Felony. Phillips was also indicted on a charge of gang participation, which involved crimes committed by many other individuals. Phillips requested severance of the two charges of Possession of a Deadly Weapon by a Person Prohibited, as well as the Gang Participation Charge.

Pursuant to Superior Court Criminal Rule 14, the Court may order separate trials of the counts in an indictment if the Defendant is prejudiced by the joinder of offenses. Generally speaking, the prejudice to the Defendant is the risk that the jury will convict the Defendant on the other charges in the indictment if he hears evidence of Defendant's prior convictions. The prejudice is that it puts Defendant's character in issue and evidence of the prior conduct that is otherwise inadmissible.

Here, evidence of the prior conviction show that the defendant was a felon and in fact used a gun previously during the commission of a crime. Possession of a gun was a central element in this case.

Furthermore, Phillips was prejudiced by evidence concerning the gang participation charge. It permitted the jury to hear evidence about the conduct of

others that could be attributed to Phillips. Furthermore, it would allow the state to introduce evidence about the conduct of these other people that otherwise would not be admissible.

The impact of a conviction under the gang participation statute, is that it raises the penalty of the crime to a higher felony level. For instance, penalizing a class E felony as if it was a class D felony. In a capital murder case, the penalty cannot be enhanced to something greater than death. Therefore, enhancing the penalty would not be the reason for the State to seek a conviction under the gang participation statute. By joining this charge to the case, it permitted the state to introduce evidence about other people and other crimes that would not otherwise be admissible.

Here, the state claimed that the defendants were involved in a drug distribution scheme and that the Seon (Pluck) Phillips was the leader. There was substantial testimony concerning the inter-workings and operations of this drug distribution scheme. The evidence, however, did not point to Otis Phillips being involved in the drug distribution scheme and, in fact, the evidence showed that he had left the state of Delaware and moved to New York in 2008. The State's star witness, Kelmar Allen, testified that he had only seen Otis Phillips on two occasions. Evidence of the drug dealing activities never would have been

permitted in the murder case had it been tried separately. Additionally, the state was able to introduce evidence of a surveillance film of a showing a fight between men and a convenience store in Seaford, Delaware. By all accounts, Otis Phillips was not present when that occurred. Evidence of that fight would never have been permitted in the murder case had it been tried separately.

The State was able to introduce evidence of the criminal convictions of the other participants over the hearsay objection of the defendants on the grounds that it was proof of the conspiracy by co-conspirators.

The State was permitted to introduce out-of-court hearsay statements of individuals despite the fact that they did not testify on the grounds that they were statements by co-conspirators.

The effect was to deprive Phillips of his constitutional right to confront the evidence against him. As a result, the failure to sever the charges prejudice the jury against him, and permitted the introduction of evidence that otherwise would not have been admissible.

Clearly the totality of the circumstances shows an abuse of discretion on the part of the Trial Judge.

ARGUMENT II

TRIAL JUDGE 'S FAILURE TO RECUSE HIMSELF FROM PENALTY PHASE
AFTER RECEIVING EX PARTE INFORMATION DAMAGING TO
APPELLANT, INFORMATION NOT OTHERWISE ADMISSIBLE REQUIRES
A VACATION OF THE DEATH SENTENCE

QUESTION PRESENTED

Should Appellant's Motion to Recuse Trial Judge From Sentencing Hearing
been granted ? (A212 - A217)

Standard and Scope of Review

The Court reviews trial court's denial as an abuse of discretion. Younger v
State, 496 A. 2d 546 (Del. 1984)

MERITS OF ARGUMENT

During the course of the case, the state made ex parte applications to the
court for a protective order. The contents of the applications were not disclosed to
the defense and in fact, the defense did not know when this information was given
to the court.

The first ex parte plication was made on July 24, 2013. In this application,
the State requested that they permitted to delay the productions of statements made
by defendant Kelmar Allen to the defense. In support of the motion, the stated that
the motive behind the Eden Park murder was to eliminate Herman Curry

because he was a witness to murder that took place in 2008 and Otis Phillips was charged in this indictment with that murder. The application stated that the members of the Sure Shots gang executed witnesses who were going to testify against them and used violence against Kelmar Allen.

The second ex parte motion for a protective order was filed on July 24, 2013, to protect Michael Young because he would be exposed to risk of harm if his statement was produced in the ordinary course of business. Furthermore, that the defendants in this case were known to use violence against witnesses.

The third ex parte motion for protective order was filed on November 22, 2013. In that motion, the State claimed that they received a statement from a prison inmate who told them that one of the co defendants, a member of the Sure Shots gang, Ron Phillips, was planning to have the prosecutor, in this case, murdered.

Initially, Phillips submitted that there was no reason that these motions. Simply put, the motions should have been presented to the court and counsel and the court, after having considered the responses decide to grant or deny the motions. Motions to get discovery extensions typically are not done ex parte.

Defense counsel were not provided with copies of the motions, they were completely unaware of the existence of these motions. Therefore, they were not

able to respond, reply or dispute the allegations made by the State. If they had, they could have disputed the allegations in the motions.

For instance, Kelmar Allen was in the witness protection program and therefore his safety was not an issue. Otis Phillip, was in jail, and therefore would not pose any threat to those individuals.

The most obvious reason for the killing of Curry was in retaliation for the shooting hours earlier in a nightclub where Kirt Williams was killed. Curry was present and was affiliated with the people involved in the shooting. Additionally, there was scant evidence that the motive behind the Curry murder was to eliminate him as a witness to the Christopher Plummer homicide that occurred in 2008. Otis Phillips had not been charged with that murder, nor was there evidence that he knew he was a suspect. The prosecution was asking the judge to grant relief based upon the allegation, which was the subject of this trial. Therefore, in essence, they were asking the judge to make a call on whether Phillips killed Curry to silence him as a witness to justify the delay in producing the discovery. Consequently, when the judge made the final decision in the case he had already made his conclusion based upon this motion. The defense should have had an opportunity to respond to this motion and advance arguments on Phillip's behalf.

The motion concerning the alleged plan to kill the prosecutor was particularly damaging because it involved someone participating in the criminal justice system and in this particular case. The judge, as a participant in the case also was likely to feel concerned and threatened. This statement allegedly made by Ron Phillips was a hearsay statement, and would not be permitted under the rules of evidence. This statement was promoted by Peter Kostyshyn. Kostyshyn is a convicted felon and was involved in a felony perjury case in the State of Delaware. He has been involved in numerous frivolous lawsuits in the Delaware Court system. In fact, the State of Delaware filed a legal action against him in Superior Court for making false claims', alleging that he had committed more than 1600 violations of the Delaware False Claims and Reporting Act. Subsequently, the State of Delaware received a judgment in excess of \$9 million against Kostyshyn for making these false claims. Defense counsel should have had an opportunity to present these arguments to the court.

Defense counsel should have had an opportunity to dispute and defend against these alleged claims and point out the obvious weaknesses and inconsistencies in the claims. However, since they did not receive the motions they could not make those arguments to the court.

Furthermore, and most importantly, the trial judge in a capital murder case, has a different role. He is the ultimate decision-maker on the question of whether the defendant should get life for death. His role is to act as a juror, or more properly, stated, a super juror in the case. His decision obviously was based in part, upon the allegations in the secret motions made by the State prior to trial. By granting the motion, he had already made a decision that Phillips was a dangerous person and a threat to harm witnesses and the prosecutor. At this point, we do not know whether there was simply written motions, or they were accompanied by oral argument.

To serve as a disqualifying factor, the alleged bias or prejudice of the judge “must stem from an extrajudicial source”. Jackson v. State, 684 A2d 745 (Del. 1996, Los v. Los, 595 A2d 381 (Del. 1991) In Yost v. Johnson, 591 A2d 178 (Del. 1991), the court held that the trial judge committed legal error and violated the parties due process rights when it ruled on the basis of an ex parte communication with the Virginia court, that it had subject matter to decide the case. In the courts of Delaware, persons are to be accorded the most scrupulous adherence to the constitutional mandate of due process. The hallmark of due process is notice and opportunity to be heard. Perrine v. Federal Court, 47 A.2d 479 (Del 1946). Due process in judicial proceedings implies action in conformity

based upon evidence, after a full hearing, upon notice to the party or parties affected an opportunity to be heard. The judge should not engage in substantive ex parte communications concerning the merits of an issue pending before the court.

Phillips v Delmarva Power and Light Company, 206 A.2d 281 (Del. 1956)

The trial judge has a fundamental duty to notify the parties of all intended communication in advance and to permit all parties to meaningfully participate in the discussion. Anything less, does not comport with basic principles of due process. Beverly v. Beverly, 489 A.2d 433 (Del 1985).

In a criminal proceeding, any private communication, contact, or tampering, directly or indirectly about the matter pending is for obvious reasons deemed presumptively prejudicial. Maddox v. United States, 146 U.S. 140 (1892)

In this case, the judge is in the role of the juror and ex parte communications with him constituted error. The communications were patently intending to be unfavorable to the defendant and were prejudicial.

ARGUMENT III

ALLEGED CO CONSPIRATOR STATEMENTS 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 ? (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

Prior to trial, defense counsel had been provided previous statements given by Kelmar Allen to the police. From a review of the statements, it appeared that his information was not based upon personal knowledge but rather upon what he heard from other people. Prior to the start of his testimony, defense counsel noted their objections. The state responded that they had no plans to elicit hearsay testimony from this witness.

During the trial, Allen testified that he was transporting illegal drugs for Seon Phillips and that Seon Phillips told him he would pay him \$500 for the trip.

The defense objected on the grounds that it was hearsay and the state responded that it was not hearsay because it was a statement of a co-conspirator during the commission of a conspiracy. This was followed by additional objections to Seon Phillips out of court statements. Subsequently, the state asked Allen about an incident involving a fight in a convenience store in Seaford, Delaware and how he heard about it. Clearly, soliciting hearsay testimony, Defense counsel again objected.

On July 7, 2012, Kelmar Allen, Jeffrey Phillips and other men (not including Otis Phillips) were involved in a fight and shoot out in a nightclub. Kirt Williams was killed. Herman Curry was present at the nightclub. In the early morning hours, Kelmar Allen met with Seon Phillips and other men and discussed what occurred. Supposedly they made plans to retaliate. Otis Phillips was not present at the meeting. Despite the fact that Seon Phillips did not testify, Allen was able to testify over defense objection as to what he heard Seon Phillips and others say. This testimony dealt directly with the charge of Murder, Allen was not a conspirator to the Murder Charge. The statements that he made, over defense objection, involved who did the shooting.

Kelmar Allen testified that while he was on the front porch of the house miles away from Eden Park he overheard Seon, who was standing on the sidewalk

in front of the house talking on a cell phone. Not only did he testify that he could hear what Seon was saying; he could also hear what the person of the other end of the line was saying. This testimony was very harmful as the conversation allegedly involved Seon and Otis Phillips having a conversation as the crime was occurring. The defense could not cross examine Seon Phillips, about this conversation because he was not presented by the State at the trial. Kelmar Allen was a witness whose credibility was certainly suspect as he was a convicted felon, a witness receiving benefits for his testimony and one who admitted giving false statements to the police previously in connection with this case.

The Sixth Amendment of the United States Constitution guarantees that in all criminal prosecutions, the accused shall enjoy the right to confront the witnesses against him. The issue of a co-conspirators out-of-court statement implicating co defendants in an intentional murder case has been addressed by the United States Supreme Court. In Lilly v Virginia, 527 U.S. 116 (1999) and adopted by the Delaware Supreme Court in Barrow v. State, 749 A.2d 1230 (Del. 2000). In Barrow, three men were involved in the robbery of a gun shop. One of the co-conspirators made a statement that he was a lookout in the robbery and implicated the other two men. On appeal, the intentional Murder conviction was reversed because the defendants were deprived of the right of confrontation. In Maryland

v. Gray, 497 U.S. 836 (1990), the Court stated, “the combined effect of these elements of confrontation-physical presence, oath, cross examination, and observation of demeanor by the trier of fact, serves the purpose of the confrontation clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. “ Citing Kentucky v. Stincer, 482 U.S. 730 (1987).

The argument that Allen, was a co conspirator and could testify as what would otherwise be deemed hearsay, D.R.E. 801 (d)(2)(E) is mis placed. Allen was not a conspirator to Murder. The State intentionally tried the gang participation charge with the Murder charge in an attempt to avoid the Confrontation issue. A ploy the trial court allowed in denying defense Motion to sever. A ploy this Court should not allow.

ARGUMENT IV

INTRODUCTION OF CO DEFENDANT PLEAS WITHOUT PRODUCING CO DEFENDANT TO TESTIFY VIOLATED APPELLANT'S CONFRONTATION RIGHTS UNDER THE SIXTH AMENDMENT U.S.CA. Const. Amend.VI

QUESTION PRESENTED

Was the introduction of co defendant plea agreements without the defense having the ability to cross examine the co defendant as to the content and reason for the plea a violation of the sixth amendment . (A 141 - A145)

Standard and Scope of Review

Alleged Constitutional violations pertaining to a trial court's evidentiary rulings are reviewed de novo. Warren v. State, 774 A.2d 246 (Del. 2001)

MERITS OF ARGUMENT

In, Allen v. State, 878 A 2d 447(Del. 2005) this court dealt with the issue now raised. The court found that where a co defendant fails to testify there is no justifiable basis for introducing the guilty plea into evidence. Allen at 451 .

In Allen the defense alleged:

- 1) agreement was not relevant to prosecution
- 2) improperly bolstered testimony of another
- 3) denied defendant his constitutional right to confront an accuser
- 4) created a highly probability of speculation as to why the co defendant entered into the plea agreement

The court reversed Allen's conviction based solely on the introduction of co defendant pleas. In the case at hand the plea of the co defendants to gang participation unfairly prejudiced Appellant.

ARGUMENT V

MIS TRAIL SHOULD HAVE BEEN GRANTED WHEN STATE WITNESS COMMENTED ON APPELLANT'S FAILURE TO TESTIFY

QUESTION PRESENTED

Did comment by State's witness, during cross examination by counsel for Jeffrey Phillips, that if you want the truth ask Otis, violate Appellant's right to remain silent under the constitution. U.S.C.A Const. Amend V(A140)

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

The defendant has a constitutional right to testify or not testify. Clayton Green was testifying on behalf of the prosecution. During cross examination by Counsel for Jeffrey Phillips he was asked whether he had any concern about giving a statement to the police. The witness responded that he was afraid of the defendants, and the made a challenging remark, "if you think I'm lying, ask Otis and what's his name if I'm lying". Both counsel objected and requested mistrials. It is clear that with this challenge by the witness he was calling out the defendants to testify and the defendants have a right not to testify.

In Ben - Yisrayl v Davis, 431 F.3d 1043 (7th Cir. 2005) prosecutor's comment " let the defendant tell you " was a Fifth Amendment violation.

A comment on defendant's silence by a co defendant was deemed a Fifth Amendment violation in U.S. v Templeman, 481 F.3d 1263 (10th Cir. 2007)

The court gave instruction to the jury to disregard the answer. This statement by the defendant implicates a fundamental constitutional right of the defendant, and therefore the curative instruction did not remedy the situation, a mistrial should have been granted.

ARGUMENT VI

THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE FAILS A PROPORTIONALITY REVIEW

QUESTION PRESENTED

Whether the death sentence imposed herein can survive the scrutiny of constitutional review for proportionality (A32,33)

Standard and Scope of Review

When a death sentence is imposed, this Court is required to independently review the totality of the evidence in aggravation and mitigation which bears upon particular circumstances or details of the offense and the character and propensity of the defendant and determine whether the sentence of death is “ disproportionate to the penalty recommended in similar cases.” 11 Del. C. § 4209 (g)(2)(a)

MERITS OF ARGUMENT

Appellant must first concede that a sentence of death after a Jury recommendation for death has not yet been overturned by this court.

The concept of proportionality review in death penalty cases has two aspects. The first aspect is known as substantive proportionality review which looks to whether the punishment is excessive for a particular case. The second aspect is procedural proportionality which examines whether, when compared to

factually similar cases involving the same offense, a defendant's death by execution is excessive. State v Marshall, 613 A.2d 1059 (NJ 1992).

In Gregg v. Georgia, 428 U.S. 153 (1976), the U.S. Supreme Court spoke of the useful function of proportionality review and characterized it as assuring that “ no death sentence will be affirmed unless in similar case throughout the State the death penalty has been imposed generally “ supra at 205. This procedural proportionality objective has been recognized in Delaware as one of the goals of our death penalty statute. 11 Del.C. § 4209

As this court stated in Pennell v. State, 604 A.2d 1368 (Del. 1991), the law requires the Court to determine whether “ imposition of the death penalty... in each case is disproportionate to the penalty recommended in similar cases arising under the Delaware capital punishment statute. Pennell at 604.

In Pulley v Harris, 465 U.S. 37(1984) the Court stated

This sort of proportionality review presumes that the Death sentence is not disproportionate to the crime in the traditional sense. It purports to insure instead whether the penalty is nonetheless unacceptable in a Particular case because it is disproportionate to the punishment imposed in other convicted of the same crime.

It is the Appellant's position that this Court's proportionality review should therefore seek to insure that the death penalty is administered in a rational, non

arbitrary and evenhanded manner, fairly and reasonable consistency State v Marshall , supra at 1376.

In Pennell, this Court measured the universe of Delaware death penalty cases. The Court defined the universe of case as all first degree murder case that went to penalty hearings since 1985. Once the Universe has been measured , the next step is to locate case within the universe which are similar to the case under consideration. Pennell, at 1376. This is not an easy task to accomplish as this Court has noted that a definitive comparison of “ universe “ of case is almost impossible. Red Dog v. State, 616 A.2d 298 (Del. 1992)

Appellant asserts that the trial process was so flawed as to deny him due process., that subsequent penalty hearing was full of bias prior to the evidence being presented. A proportionality review for this case would be impossible.

Failure to Sever both Charges and Defendants led to highly antagonistic defenses beyond finger pointing. Repeated violations of the confrontation clause and unsolicited reference as to defendant’s failure to testify. Damaging ex parte communications between prosecution and trial judge all contributed to a failure of due process.

Accordingly, Appellant asserts that the evidentiary and structural errors were so severe that rather than undertake the mandated proportionality review, this

Court has no choice but to vacate the conviction and sentence as being manifestly unjust and so lacking in reliability that it renders such an analysis useless.

ARGUMENT VII

IMPOSITION OF DEATH PENALTY UNDER 11 DEL.C. §4209 (c) & (d) IS UNCONSTITUTIONAL

QUESTION PRESENTED

Is the Delaware Death Statute Unconstitutional based upon the ruling in Hurst v. Florida, 136 S.Ct. 616 ? (2016) (A 213 -A215)

Standard and Scope of Review

Questions of Constitutional law are reviewed de Novo.

Pierce v. State , 911 A.2d 793 (Del. 2006)

MERITS OF ARGUMENT

In light of the United States Supreme Court's decision in Hurst v Florida, 136 S.Ct 616 (2016), Appellant requests this Court declare his Sentence of death unconstitutional .

Delaware's Statutory Scheme in Death Cases

Delaware is a recommendation state, in which the jury's vote as to aggravating and mitigating evidence is advisory to the sentencing judge. For the case to go to the sentencer, the jury must find unanimously beyond a reasonable doubt the existence of a statutory aggravating factor. 11 Del. C. § 4209 (c)(3) (a)(1) Then the jury votes as to whether the aggravating evidence outweighs the

evidence in mitigation. Once they have done so, the jury is discharged. 11 Del.C. § 4209 (c)(3)(a)(2) The sentencing judge, after considering the evidence and the jury's recommendation, determines whether, by a preponderance of the evidence, the aggravating evidence outweighs the mitigating evidence. The jury's recommendation is not binding upon the court. 11 Del.C. § 4209 (d)

In accordance with the United States Supreme Court's decision in Ring v Arizona, 536 U.S. 584 (2002), the General Assembly amended our statute to require the jury to find at least one aggravating circumstance beyond a reasonable doubt. Brice v State, 815 A.2d 314 (Del. 2003). As such, under our hybrid scheme, it is the jury that determines death eligibility by the unanimous finding of a statutory aggravator, while "the sentencing judge retains exclusive responsibility or weighing the aggravating and mitigating factors, and for the ultimate sentencing decision." Brice v State

Florida's Statutory Scheme in Death Cases

Florida's statute, with respect to advisory juries, is substantially similar to Delaware's, although when rendering his or her independent judgment, the sentencing judge must give the jury's recommendation "great weight." Tedder v. State, 322 So.2d 908 (Fla. 1975)

In Florida, the jury's advisory vote encompasses the following:

ADVISORY SENTENCE BY THE JURY. - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5); (enumerates aggravating factors)

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death. Fla. Stat § 921.141(1)(2010)

After receiving the advisory vote, the judge then determines the sentence by operation of the following statute:

FINDINGS IN SUPPORT OF SENTENCE OF DEATH

Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as

enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the Aggravating circumstances.

As such, in Florida, it is the judge that determines whether the statutory aggravator has been established. Notably, however, in Mr. Hurst's case, the jury was instructed that it must find one aggravating circumstance beyond a reasonable doubt if it were to recommend death.

Although the remaining death penalty states have varying statutory schemes, only three states are recommendation or "judicial override" states: Alabama, Florida, and Delaware.

Hurst Declares Florida's Statute Unconstitutional Under Ring

Overruling some earlier cases, the Hurst Court, by an 8-1 vote, held that Florida's scheme in which the judge alone finds that "sufficient aggravating circumstances exist" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances" to be violative of the 6th Amendment and Ring.

The court held that the judge in Hurst had based her sentencing decision on her own fact finding, just as the judge did in Ring, and found Florida's statute thereby unconstitutional.

Beyond Ring: the Hurst Court Denounces the Advisory Jury System

The Hurst Court noted several infirmities associated with the advisory jury system that go beyond its narrower holding that Florida's law violates Ring. It noted, "Florida does not require the jury to make the critical findings necessary to impose the death penalty." In Hurst, the Court went on to note with disapproval that "the trial court alone must find the facts...that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Hurst Finally, in finding Florida's statute Unconstitutional, the Court held, "it is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of aggravating or mitigating factors." Hurst citing Walton v Arizona, 497 U.S. 639 (1990) denounced the statutory practice of the judge alone conducting the weighing process of aggravating and mitigating evidence.

Argument: Delaware's Advisory System is Unconstitutional

It is clear that Delaware's statute comports with Ring, in that a statutory aggravator must be found by the jury. But Delaware's statute does not comply with Hurst. If the Hurst Court had only held that it was the failure of the Florida statute to require a jury finding of one statutory aggravator, then Delaware's statute could remain intact. But, as noted, the Court used broad

language to denounce schemes in which the judge makes the findings required to impose the death penalty-as opposed to findings required to render someone eligible for death. Moreover, the Court's language decried the judge's independent finding of aggravating and mitigating factors, not just the statutory aggravator. In other words, Hurst finds unconstitutional both the judicial finding of facts that render one eligible for death, as well as judicial findings of facts necessary to impose death.

That is precisely what sentencing judges do in Delaware. Whether they give great weight to the jury recommendation, or eschew it completely, judges in Delaware are statutorily required to make independent findings as to whether aggravating evidence outweighs mitigating evidence. Because juries in Delaware do not find nonstatutory aggravators or any mitigators with specificity, there is no way to know whether the judge's weighing process is at all similar to the jury's weighing. In essence, the judge is left with a numerical vote, but no insight into the jury's determination of aggravators and mitigators-it is completely left to judge. Even if the judge wanted to give great weight to the jury's findings, and they often do, it is a hollow exercise when the judge is left with a tally of votes rather than a specific finding of facts. Fact finding should be left to juries-and must be under Hurst.

After Hurst, such a scheme abrogates the defendant's right under the Sixth Amendment.

ARGUMENT VIII

GRANTING STATE'S MOTION IN LIMINE BASED UPON FORFEITURE BY WRONGDOING WAS AN ABUSE OF DISCRETION

QUESTION PRESENTED

Was the admission of Curry's Hearsay statement an abuse of discretion when granted when admitting as evidence Curry's statement ? (A47 - A53)

Standard and Scope of Review

The decision to admit evidence is reviewed as an abuse of discretion.
Cabrera v. State, 840 A.2d 1256, (Del. 2004)

MERITS OF ARGUMENT

The State filed a pre trial Motion alleging that the out of court Statement of Herman Curry be admitted. State alleged that Curry was murdered in July 2012 by Otis Phillips to prevent Curry from testifying against Phillips in the Murder of Christopher Palmer, a murder that occurred in 2008.(A41 - A46)

In it's Motion the State made unsupported allegations against Otis Phillips. The State alleged Otis fled the State to avoid prosecution. Yet the State produced no evidence of that fact nor any evidence that Otis Phillips knew he was wanted for the Murder of Christopher Palmer. The state's main argument rested on the fact that witnesses to Herman Curry's murder identified Otis Phillips as a suspect, in Curry's murder. Curry had made a statement against Otis Phillips regarding

statement against Phillips regarding the Palmer Murder. At the time the State filed it's motion, the defense had not seen the statement.

Additionally the State alleged Jeffrey Phillips, co defendant, made a statement that Otis wanted to kill Curry because Curry was trying to take him down for Christopher Palmer's Murder. Regarding the statement of Jeffrey Phillips defense argued that the use of Jeffrey Phillips to support their motion in essence if granted, would permit the jury to find guilt based upon a prior judicial determination. Giles v California, 554 U.S. 353 (2008)

The proposed D.R.E 804 (b) (6) statement plainly carried a risk of unfair prejudice to Appellant. A risk that substantially outweighed its probative value. To use Jeffrey Phillips statement as a basis to admit the statement of Curry required the trial Judge to pre determine that a Conspiracy existed between Otis and Jeffrey. A determination best left to a jury. Further since there was substantial evidence that Otis killed Curry it overly prejudiced Appellant regarding the Murder of Palmer.

Further, the admission of Curry's statement was highly prejudicial to Appellant. It clearly not only contributed to his Murder Second conviction regarding Christopher Palmer, it adversely effected his penalty hearing. It allowed the jury to buy into the State's theory that Curry was killed to prevent his

testimony. An aggravator that may have weighed heavily in the juries recommendation.

Detective Curley the Chief Investigating Officer in the Murders of Curry and Kumara testified that the Eden Park Shootings (Curry and Kumara) were planned in retaliation for a murder that occurred the prior evening. He further testified that from his investigation Otis Phillips was not present during the planning. (A271 - A273)

There was insufficient evidence to allow Curry's statement. It clearly was more prejudicial than probative. Further it was not needed for the Eden Park Murders. The introduction clearly hindered Appellant's chances at the Penalty hearing, that is the unproven allegation that he killed a witness.

ARGUMENT IX

JUDGES ANSWER TO JUROR QUESTION WAS OVERLY COERCIVE

QUESTION PRESENTED

Was the Judge's answer to Jury question responsive or overly co coercive.?

(A 178 - A211)

Standard and Scope of Review

Review of instruction to Jury is reviewed as an abuse of discretion.

Wright v State, 953 A.2d 144 (Del. 2008)

On the first day of jury deliberations, the court received a note from a juror. The juror stated he/she was not satisfied with process, believing it did not facilitate justice. The juror requested that he/she be removed. The note was given to a bailiff, it did not come from the jury foreman. Shortly thereafter, the judge received a second jury note from the foreman. The second note seemed to indicate that one juror was upsetting the other jurors . The judge's response to the second note was to read the jury instruction and add that a juror could not be replaced once deliberations had begun.

Counsel for Appellant at first agreed to the added language (A 199) but following the objection of Counsel for co defendant, Appellant joined in the objection (A206) .

Appellant concedes that the statement is correct as to Delaware Law but argues that it was coercive and premature.

A charge to a jury may not be overly coercive, the jury should be admonished not to surrender their honest convictions. Brown v. State, 369 A.2d 682 (Del. 1976) In this case, Appellant argues the charge was overly coercive in that it left the impression that these twelve individuals must render a verdict. The charge did not include the admonition that the individual jurors should not surrender their honest convictions.

Counsel objected to charge as given and therefore did not deem it necessary to request the admonition.

ARGUMENT X

DELAY IN TRIAL FOR MURDER OF HERMAN CURRY AND ALEXANDER KUMARA WAS PREJUDICIAL

QUESTION PRESENTED

Where Appellant's Constitutional Right's Under U.S. Const. Amend VI violated in delaying Murder Indictment ? (A32 - A34)

Standard and Scope of Review

The Court reviews allegations regarding Constitutional violations de Novo. Pierce v State, 911 A.2d 793 (Del. 2006)

MERITS OF ARGUMENT

A defendant enjoys the right to a speedy trial. The key issue is the raising of that right. The right to a speedy trial not only helps ensure that all accused persons (will) be treated according to decent and fair procedures, but also protects society's interest in providing a speedy trial. Middlebrook v State, 802 A.2d 268 (Del. 2002)

Appellant was arrested July 8, 2012. On November 16, 2012, Counsel filed a Motion to Dismiss for failure to prosecute. (A276 - A279) The filing of a Motion to Dismiss is premised upon right to a speedy trial. Fensterer v State, 493 A.2d 959 (Del. 1985). The filing of Appellant's initial motion solidifies his demand for a speedy trial.

On March 18, 2013, Appellant filed a Second Motion to Dismiss. In the States response to the Motion it was made clear the delay was due to an investigation related to gang participation. In short, the State delayed a Murder prosecution so unrelated charges could be added to indictment. (A 35 - A37)

In State v Fischer, 285 A. 2d 417 (Del. 1971) the Supreme Court emphasized that dismissal is warranted where the delay is due to “ conscious prosecution choice which gives the impression, perhaps unwarranted, of unfair manipulation of the system”. Here the Murder prosecution was delayed so the State could proceed on unrelated charges.

Appellant is aware of the requirement that he be able to show the unnecessary delay resulted in prejudice to the defendant. State v McElroy, 561 A.2d 154 (Del. 1989). The prejudice is event in the record. Hearsay testimony from alleged co conspirator, witnesses purchased by the State and evidence of prior bad acts of Defendant were brought before the jury under the disguise of gang participation.

The right to a speedy trial is a more vague concept than other procedural rights and it is impossible to determine with precision when the right has been denied. Thus any inquiry into a speedy trial claim necessitates a functional analysis on a case by case basis. Harris v State, 956 A.2d 1273 (Del. 2008)

The test for determining violation of defendants' speedy trial right requires balancing of length of delay, reason for delay, defendant's assertion of right and prejudice to defendant. Whalen v State, 492 A.2d 552 (Del. 1985)

Length of Delay

Appellant, Otis Phillips, t was arrested for Murder First Degree on July 8, 2012. Otis Phillips was indicted by sealed indictment October 22, 2012. Appellant would concede as to the original indictment there was no delay. The issue of delay comes into play with the re indictment dated February 18, 2013 which is 225 days from date of arrest. The record is clear that the case against Otis Phillips for the Murders of Curry and Kumara were fairly strong on the date of arrest. The delay was attributable to the State so they could tack on unrelated charges.

Reason for Delay

In response to defendant's second motion to dismiss the State made it clear it was for the sole purpose of developing separate charges. (A35 - A37)

Assertion of Right

Appellant asserted his right upon filing his initial Motion to Dismiss.

Fensterer v State, 493.A.2d 959 (Del. 1985)

Prejudice to Defendant

The prejudice to the defendant, in the case at bar, cannot be measured merely by time. The prejudice lies in allowing the State additional time to develop evidence of other crimes.(28 Page Indictment, A 280 - A308)

The State elected to seek the death penalty for the Murders of Curry and Kumara. The incident took place on July 8, 2012. The record is clear on that date Appellant was arrested, the State had eyewitnesses. Any charge not related to that date were superficial. The delay in developing those charges led to the delay in prosecuting the July 8, 2012 offenses. The prejudice was granting the State time to develop the unrelated offenses. The evidence of those unrelated charges is the prejudice to Appellant.

The issue of prejudice should be viewed in the light of the request for Death. Death in its finality, differs more from life imprisonment than a 100 year prison term differs from only one year or two. Woodson v North Carolina, 428 U.S 280 (1976) The State's interest in judicial economy should not be allowed to impact a Capital Case. Appellant cannot imagine any rational argument that the allegation of additional charges related to gang participation did not prejudice defendant's case at both the guilt phase and in particular the Penalty Phase.

The delay in trying the July 8, 2012 charges was a tactical move on the part of State delaying justice and causing reversible error.

CONCLUSION

The State's mission to proceed under Gang Participation resulted in prejudicial delay regarding the July 8, 2012 murders. The State's delay allowed the development of underlying charges which the State hoped would allow them to get before a jury unsupported allegations, hearsay and prior bad acts. Bad acts placed before the judge and jury through indictment, testimony from paid witnesses and plea agreements not subject to cross examination.

Appellant was forced to accept the trial tactics of co defendant's counsel, even though they differed from his defense strategy. Appellant was forced to watch counsel for Jeffrey Phillips point the finger at him during closing argument, without an opportunity to respond.

The Court in answering a jury question, inserted a statement of the law, which correct, but was pre mature. The answer was in effective a limited Allen Charge when there was no indication that the jury was hung. The charge should not have been given. Further, an Allen charge must include language that a juror should not surrender their beliefs.

The decision to deny severance of both charges and defendants was clearly prejudicial. The decision was a one of tactics by the State so prejudicial information could be introduced, that might otherwise been suppressed by the

court. This tactic was pursued from the start, sealed indictments, ex parte motions and the final blow the 28 page re indictment.

This case could and should have been tried separately within a reasonable time from July 8, 2012. The delay was to add unrelated charges. The prejudice is clear.

The undue prejudice during the trial phase carried into the penalty phase, the impact on the jury recommendation can only be speculative. All jury findings in criminal actions must be beyond a reasonable doubt. 11 Del.C. § 301.

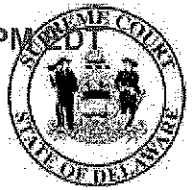
Based upon all arguments presented by Appellant prejudice is obvious and justice demands a reversal.

/s/ Anthony A. Figliola, Jr.

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

OTIS PHILLIPS,
DEFENDANT BELLOW,
APPELLANT,

v.

STATE OF DELAWARE,
APPELLEE.

NO:

TO: Elizabeth McFarlan, Esquire
Office of the Attorney General
820 N. French Street, 5th Floor
Wilmington, DE 19801

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that Otis Phillips, Defendant Below-
Appellant, does hereby appeal to the Supreme Court of the State of Delaware from
the Judgement of Conviction of the Superior Court entered on September 4, 2015.

The decision sought to be reviewed is the conviction in case number
1210013321.

The order being reviewed is the judgement of conviction that resulted
in a sentencing on September 4, 2015, by The Honorable Calvin Scott of the
Superior Court of the State of Delaware, in and for New Castle County. The
name and address for the Plaintiff Below, Appellee is:

Elizabeth McFarlan, Esquire
Office of the Attorney General
820 N. French Street, 5th Floor
Wilmington, DE 19801

The party against whom the appeal is taken is the State of Delaware.

Please take notice the Appellant hereby designates the transcript in accordance with rule 7(c)(6) and 9(e)ii in the following manner:

The transcript of the trial commencing September 29, 2014-December 4, 2014 and the sentencing hearing on September 4, 2015. The approximate cost of the transcript is \$11,000.00.

/s/ Michael C. Heyden
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/s/ Anthony Figliola
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Dated: September 15, 2015