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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN BERRY, Defendant Below- Appellant, v. STATE OF DELAWARE, Plaintiff Below- Appellee.	)	No. 357, 2024 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE ID No. 2307003037

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

REPLY BRIEF

COLLINS PRICE & WARNER

Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

Dated: March 14, 2025

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Kevin Berry, through the undersigned attorney, replies to the State's Answering Brief as follows:

ARGUMENT

I. THE TRIAL JUDGE ERRED IN ADMITTING DARNELLA SPADY'S § 3507 STATEMENT; SHE WAS NOT A TURNCOAT WITNESS, BUT RATHER WAS UNDER THE INFLUENCE OF HEROIN AND REMEMBERED NOTHING OF THE INCIDENT OR HER STATEMENT.

Revisiting* McCrary v. State *would not offend the principle of* stare decisis*, but rather, would serve that principle.

In 1970, the sponsor of HB 781 assured his fellow representatives that the new law "will in no way affect the rights – the constitutional rights of defendants."[1] In the Senate, the Senate Attorney explained for a witness's prior statement to be admitted, the witness "must be present in court, subject to being examined and cross-examined. Now, there is one safeguard for the defendant in that respect."[2]

For the past 50 years, this Court has attempted to adhere to the text and legislative intent of 11 *Del. C.* § 3507 while safeguarding defendants' constitutional right to confrontation. In *Johnson v. State*, for example, this Court endorsed "a case by case approach with emphasis on each case's particular facts is appropriate in determining whether there has been a violation of the Confrontation

[1] A434.
[2] A461.

Clause due to a lack of effective cross-examination."[3] Years later, this Court reiterated that the out-of-court statement will only be admissible if the witness testifies about the events, the statement, and whether they are true.[4] And, to preserve the defendant's Sixth Amendment rights, the declarant must be subject to cross-examination on both the event and the statement. As this Court observed, "the statute becomes meaningless if there is no opportunity to test the truth of the statements offered."[5]

Mr. Berry's case illustrates how the pendulum has swung too far after *McCrary v. State*.[6] Previewing his attempt to lay a foundation for Darnella Spady's § 3507 statement, the prosecutor noted,

> Well, according to the Supreme Court's opinion in *McCray* [sic], her answers don't necessarily matter. I just need to ask the proper questions and make her available for cross-examination. But I expect she's going to qualify as what the court referred to as "a turncoat witness."[7]

When deciding to admit the statement, the trial judge had little choice but to agree: "but under *McCrary*, I agree with the State that the Supreme Court had laid it out that this testimony meets the threshold. So it's admissible."[8]

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[3] *Johnson v. State*, 338 A.2d 124, 128 (Del. 1975).
[4] *Ray v. State*, 587 A.2d 439, 444 (Del. 1991).
[5] *Id.*
[6] 293 A.3d 442 (Del. 2023).
[7] A172-173.
[8] A204.

Post-*McCrary*, the prosecutor only has to ask a few questions of the declarant about the event perceived and the statement given. It makes no difference what the answers are. If the witness utters any words in response, the prior statement must be admitted. The judge has no discretion. And, as happened in Mr. Berry's trial, the voluntariness element can easily be met by putting the detective on the stand to testify that he or she did not force or coerce the witness to speak.

The State asserts that Mr. Berry's claim on appeal violates principles of *stare decisis* because it would require *McCrary* to be overturned.[9] But § 3507 jurisprudence has been ongoing for 50 years. It would not offend *stare decisis* to simply return to the longstanding principles informing § 3507 law. That is to say, return to the well-established process of case-by-case analysis to determine if Confrontation Clause rights are jeopardized. That has been the law since 1975. The statute should be interpreted narrowly because admission of pure hearsay is in derogation of the common law. That has also been the law since 1975.[10] Moreover, the factfinder should hear the witness state whether the out-of-court statement is true, a requirement that has long been in place – until 2023.

Mr. Berry's case provides a stark example of the lack of Confrontation Clause guardrails after *McCrary*. Darnella Spady did not recall the event or her

[9] Ans. Br. at 14-16.
[10] *Keys v. State*, 337 A.2d 18, 21-22 (Del. 1975).

statement because she was perennially high on heroin. She was not a turncoat witness. To be sure, she did not want to be in court initially and wanted to "plead the Fifth." But when specific questions were asked of her, she repeatedly and credibly testified that due to her heroin addiction, she had no recall.

Darnella Spady was not a turncoat witness. She was not a prison informant who suddenly realized the moment of testimony was upon her and decided to recant. She was, sadly, a drug-addled bystander who lived in a haze of heroin.

Cross-examination of Spady was impossible. Many avenues of challenge to her version of events were left unasked, as explained in the Opening Brief.[11] As the prosecutor and judge agreed, the entire case hinged on one witness – Darnella Spady.[12] But that was not entirely true. The entire case hinged on the § 3507 statement of Darnella Spady. There was no real trial testimony due to her lack of recall, and certainly no meaningful opportunity for cross-examination.

Under the vast majority of § 3507's existence, Spady's statement would not have been admissible, because the trial judge would have had a role in finding that Spady legitimately lacked any recall of the events or the statement due to heroin addiction. But the judge has no role anymore, so long as the prosecutor asks the required questions. It is difficult to imagine a trial scenario in which the out-of-

[11] *See*, Op. Br. at 43-44.
[12] A362-363.

court statement is not admissible under current law. It will not offend *stare decisis* if Confrontation Clause protections are restored.

Even under* McCrary*, the trial judge erred in admitting Spady's statement because the required foundation was not laid.

The foundation for Spady's statement was not properly laid even under *McCrary*. It did not touch upon the events perceived. There were only two questions directed to that issue. In the first, the prosecutor showed screenshots from security camera video at the Lucky Stop. Spady identified herself in the screenshots; she was the one pushing a stroller.[13] Second, the prosecutor asked, "and that's when YG was killed, right?" and Spady responded, "I guess so."[14]

The State disagrees. The State asserts that the testimony need only touch upon the event, not the event as perceived by the witness.[15] The State describes the prosecutor as valiantly trying to break through Spady's "façade" by asking "descriptive questions."[16] The State accuses Spady of "trying to thwart the prosecutor's examination" – something that had to be counteracted through asking descriptive questions in an effort to elicit answers.[17]

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[13] A187-188.
[14] A188.
[15] Ans. Br. at 32.
[16] Ans. Br. at 32-34.
[17] Ans. Br. at 32-33.

No. The question asking Spady if that was her on the video brings us no closer to touching on the events perceived. Spady agreed she was on the video. She was distinctive after all, as she was pushing a baby stroller.[18] The leading question, "and that's when YG was killed, right?" drew only an "I guess so" from Spady.[19] She was not asked if she was present for the killing, or witnessed the killing, or anything of the sort.

Under the State's formulation, all the prosecutor must do is ask a few leading questions and the touching-on requirements for admissibility have been met. The answers do not matter. That would be followed by brief testimony from the detective stating he or she did not force the witness to give a statement, and the foundation has been laid.

That foundational methodology would stretch § 3507 so far that any prior statement would be admissible, with no discretion for the judge to rule otherwise. That is a far cry from narrowly interpreting the statute because it is in derogation of the common law.

In Mr. Berry's case, the prosecutor failed to elicit any testimony that touched upon the events purportedly perceived by Darnella Spady. The prosecutor instead

[18] A187.
[19] A188.

supplied the necessary foundation by asking leading questions. On that alternative ground, this Court should reverse.

CONCLUSION

For the foregoing reasons, as well as those discussed in the Opening Brief, this Court should reverse Mr. Berry's convictions and sentence, and remand for a new trial.

COLLINS PRICE & WARNER

/s/ Patrick J. Collins
Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

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