



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERALD ROBERSON,	)	
	)	
Defendant—Below,	)	
Appellant	)	
	)	
v.	)	No. 16, 2025
	)	
	)	
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff—Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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**I. REVERSAL IS REQUIRED BECAUSE 11 DEL.C. §3514 VIOLATES DELAWARE’S CONFRONTATION CLAUSE AS RECOGNIZED IN ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION.**

The State, in its Answering Brief, seeks to minimize the importance of the specific and unique “face to face” textual language in the Delaware Constitution. The “face to face” language was significant enough for Pennsylvania to amend its Constitution to remove the “face to face” language in order for closed circuit video testimony to occur in Pennsylvania, and it should be noted that Pennsylvania has a Constitution that the Delaware Constitution is, in large part, based on.<sup>1</sup> As one example in the State’s Answer, the State argues that “Delaware courts, unless compelled to do otherwise, have expressed a preference to interpret our state constitution in a manner consistent with the Federal Constitution.” St. Ans Br. At 24. However, in *Jones v. State*, this court not only specifically did not interpret the Delaware Constitution consistent with the Federal Constitution on a search and seizure matter, this Court also discussed the similarities between the Delaware and Pennsylvania Constitutions as to search and seizure.<sup>2</sup> *Jones* also discusses the

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<sup>1</sup> *Commonwealth v. Lamont*, 308 A.3d 304, 309 (Pa. 2024)(“The Pennsylvania Constitution was amended in 2003 removing the face to face language.”); *Jones v. State*, 745 A.2d 856, 865, 866 (Del. 1999)(“Delaware’s Declaration of Rights was based upon a similar provision in the Pennsylvania Declaration of Rights.”); *See also*, Randy J. Holland, *The Delaware State Constitution*, pg. 13, 2<sup>nd</sup>. Ed., 2017. (“Like the rest of the 1792 Constitution, Delaware’s Bill of Right’s closely followed the Pennsylvania Bill of Rights, and several sections were in fact identical.”)

<sup>2</sup> *Id.* at 866.

several categories in which this Court has granted greater rights than the United States Constitution including as to the right of confrontation.<sup>3</sup>

The State also seeks to minimize the importance of *State v. Van Arsdall* as it pertains to interpretation of Delaware's confrontation clause.<sup>4</sup> In *State v. Van Arsdall*, this Court, after remand from the United States Supreme Court, held that "Cross-examination on bias is an essential element of the right of an accused under the Delaware Constitution to meet the witnesses in their examination."<sup>5</sup> In its holding, this Court used language unique to the Delaware Constitution (to meet the witnesses in their examination) to find that the Delaware Constitution is more robust than the federal constitution as to confrontation.<sup>6</sup> Although the instant case is not a bias case, the instant case is a cross-examination case, and the *Van Arsdall* Opinion does also discuss the importance of cross-examination in the context of confrontation.<sup>7</sup>

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<sup>3</sup> "For example, we have held that the Delaware Constitution provides greater rights than the United States Constitution in the preservation of evidence used against a defendant, the right of confrontation, the right to counsel, and the right to trial by jury." *Id.* at 863

<sup>4</sup> St. Ans. Br. At 21

<sup>5</sup> *State v. Van Arsdall*, 524 A.2d 3, \*7 (Del. 1987).

<sup>6</sup> *Id.*

<sup>7</sup> "indeed, the main and essential purpose of cross-examination is to secure for the opponent the opportunity of cross examination." *Id.* at 6 citing J. Wigmore, *Evidence* § 1395 (3<sup>rd</sup> Ed. 1940).

It also should also be noted that since trial occurred in this matter, two States have found that the use of closed circuit video violates their State’s “face to face” ideals, and those States are New Hampshire and Iowa. In *State v. Warren*, earlier this year, the New Hampshire Supreme Court found that the New Hampshire Constitution requires face to face confrontation as opposed to closed circuit video.<sup>8</sup> The Court acknowledged that an exception to the face-to-face requirement are hearsay statements with particularized guarantees of trustworthiness or that fall within firmly rooted hearsay exceptions.<sup>9</sup> Despite those exceptions, the New Hampshire Supreme Court found closed circuit video testimony where the defendant is not seen by the witness, to be violative of the New Hampshire Constitution.<sup>10</sup>

In *State v. White*, the Iowa Supreme Court similarly held that the Iowa Constitution guarantees face-to-face confrontation.<sup>11</sup> The Court specifically held that “[b]ecause the witnesses were prevented from seeing White when they testified against him, there was no face-to-face confrontation. This violated White’s right of

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<sup>8</sup> *State v. Warren*, 337 A.3d 265, 272, 274 (N.H. 2025) (“where the witness testified from a location outside the presence of the defendant and could not see the defendant while she was testifying, there was no face to face meeting, thereby violating the plain meaning of Part1, Article 15.”)

<sup>9</sup> *Id.* at 274

<sup>10</sup> *Id.* (“Although we are sympathetic to the trial court’s concern for the child witness, we have no authority to ignore the plain language of the State Constitution and override the accused’s constitutional right to face-to-face confrontation.”)

<sup>11</sup> *State v. White*, 9 N.W.3d at \*9 (Iowa 2024)

confrontation under article 1, section 10 of the Iowa Constitution.”<sup>12</sup> The Iowa Supreme Court also remarked that “[m]ost adults and many children understand that it is always more difficult to tell a lie about a person to his face than behind his back. And if a person does lie about a person to his face, the lie will often be told less convincingly.”<sup>13</sup>

The State’s Answer cites *McGriff* and *Ayers* which are two cases that are inapplicable to this appeal because they involve the admission of hearsay at trial.<sup>14</sup> Appellant does not challenge the admission of statements that fall under firmly rooted hearsay exceptions. This Court has already held, for example, that the excited utterance hearsay exception does not violate the confrontation clause as it was around when the face to face language was placed in the 1792 Delaware Constitution.<sup>15</sup> This, however, is an *11 Del. Code 3514* case in which Appellant challenges the use of closed circuit video testimony at trial that violated his right to

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* citing *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988)(internal punctuations omitted).

<sup>14</sup> *McGriff v. State*, 781 A.2d 534, 538 (Del. 2001); *Ayers v. State*, 97 A.3d 1037, 1040 (Del. 2014).

<sup>15</sup> *Gannon v. State*, 704 A.2d 272, 278 (Del. 1998)(“The ‘spontaneous declaration’ exception to the hearsay rule was part of the evidentiary ‘common law of the land’ when both that phrase and the right of ‘face to face’ confrontation were simultaneously written into the Delaware Constitution of 1792. Therefore, we hold that the admission of a properly qualified excited utterance into evidence at trial does not violate the confrontation rights afforded to an accused since 1792 by Article 1, Section 7 of the current Delaware Constitution of 1897.”)

meet the available witness face to face pursuant to the plain textual language of the Delaware Constitution.

Further, this Court draws an important distinction in *McGriff* between a 3513 case and a 3514 case: “The Delaware tender years statute, as construed in *McGriff* 1, does afford the right of “face to face” cross-examination at the hearing conducted by the trial court pursuant to *11 Del. C. § 3513*. At that hearing the child may be deemed “unavailable” on certain enumerated grounds but the Court must also conclude that the “child’s out-of-court statement is shown to possess particularized guarantees of trustworthiness.”<sup>16</sup> *Id.* citing *11 Del. C. § 3513(b)(2)*. In the instant case, Mr. Roberson was not afforded a pre-trial hearing to meet the accuser face to face because the instant case is an *11 Del. C. 3514* case.

Finally, the State’s argument that “any violation of the Confrontation Clause was harmless beyond a reasonable doubt” is misplaced.<sup>17</sup> First, the evidence in this case was based on the statement of the accused and did not include physical or medical findings or other corroboration. Second, the *11 Del. C. 3507* prior statement only comes in after, foundationally, the accused first testifies in violation of Mr. Roberson’s Delaware Constitutional right to meet his accuser face to face; therefore, this should not be a consideration in this appeal.

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<sup>16</sup> *McGriff v. State*, 781 A.2d 534, 540, 541 (Del. 2001).

<sup>17</sup> St. Ans. Br. at 36

Accordingly, reversal is required because the closed circuit testimony in this trial violated Mr. Roberson's Delaware Constitutional right to meet his accuser face to face, and *11 Del. Code § 3514* violates the Delaware Constitution by not providing a mechanism for an accused to meet his or her accuser face to face.

**II. IN THIS CLOSE CASE WHICH HINGED ON THE JURY'S CREDIBILITY DETERMINATION, THE PROSECUTOR JEOPARDIZED THE FAIRNESS AND INTEGRITY OF THE TRIAL BY IMPERMISSIBLY VOUCHING, ELICITING SYMPATHY FOR THE COMPLAINANT, AND ENCOURAGING THE JURY TO DRAW IMPERMISSIBLE INFERENCES.**

The commentary by the prosecutor at Closing in this case did more than simply have the jury “ask themselves why N.R. would fabricate accusations that Roberson sexually abused her” as suggested by the State’s Answer.<sup>18</sup> The commentary, instead, allowed the jury to draw inferences from the investigation and decision to testify that were improper. The commentary regarding the accused’s efforts to report the alleged incident, be medically evaluated for it which included a frog position, be humiliated, then testify about it, in and of itself, is not evidence. This Court addressed a similar issue in *State v. Heald* in which the prosecutor in that case stated that the “system worked” with regard to the therapist reporting the alleged assault to law enforcement. This Court held that it could “be interpreted as the prosecutor vouching for the justness of Heald’s arrest and prosecution.”<sup>19</sup> This Court in *Heald* also found the comment by the prosecutor that “it looked like this was probably one of the more painful things this ten-year-old had ever

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<sup>18</sup> Ans. Br. at 41

<sup>19</sup> *Heald v. State*, 251 A.3d 643, 654 (Del. 2021).

had to have done in her life” was among other improper comments made at Closing.<sup>20</sup>

The instant case was a close credibility case in which the evidence essentially consisted of the statement or statements of the accused. The improper inferences regarding how the jury should view the accused’s decision to speak to law enforcement, have a medical evaluation and testify at trial, might have had an effect on the jury’s verdict.

Accordingly, the State’s prosecutorial misconduct at Closing constitutes plain and reversible error.

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<sup>20</sup> *Id.* at 654, 655

## **CONCLUSION**

For the reasons and upon the authorities cited herein, the undersigned counsel respectfully submits that Gerald Roberson's convictions and sentences must be reversed.

Respectfully submitted,

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