EFiled: Feb 19 2018 01:49PM EST
Filing ID 61704055
Case Number 73,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RUSSELL M. GRIMES,	)	
	)	
Defendant Below-Appellant,	)	
	)	No. 73, 2017
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

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

REPLY BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

Craig A. Karsnitz (#907)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
110 West Pine Street
P. O. Box 594
Georgetown, DE 19947
(302) 856-3571
ckarsnitz@ycst.com
Amicus Curiae

DATE: February 19, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

INTRODUCTION

The State's Answering Brief Responding to *Amicus Curiae* ("State's Response") fails to confront the double jeopardy challenge on this appeal. The retrial of Grimes for first degree robbery was unconstitutional, and his convictions for first degree robbery and possession of a firearm during the commission of a felony ("PFDCF") should be overturned. The State's Response does not address the arguments raised in the Opening Brief of *Amicus Curiae* ("Opening Brief"), and the State's arguments, which misconstrue basic double jeopardy principles, are otherwise unavailing. Each argument will be addressed in turn.

ARGUMENT

I. *Poteat v. State* Directly Supports Grimes's Appeal.

The State argues that *Poteat v. State*, 840 A.2d 599 (Del. 2003) "is a sentencing merger decision that is no assistance to Grimes' attempt to utilize double jeopardy as a sword to prevent his retrial for first degree robbery." State's Response at 1. The State adds that "Poteat is a sentencing merger case based upon the third double jeopardy protection against multiple punishments for the same offense," that "Poteat does not involve the first double jeopardy protection against a successive prosecution for the same offense after acquittal," and that "[t]he cases

applying Poteat make clear that its holding is limited to sentencing merger circumstances." *Id.* at 14-15.[1]

The State's attempt to distinguish *Poteat* is wrong. It is undisputed that *Poteat* is a merger decision, and that *Poteat* did not involve the double jeopardy protection against a successive prosecution after acquittal. Neither point is relevant. *Poteat* matters because it concluded that aggravated menacing is a lesser-included offense of first degree robbery, and that the government may not impose punishment for both without violating double jeopardy. That holding applies just as equally to a successive prosecution as it does to a merger decision, and the State's argument to the contrary is plainly mistaken. *See United States v. Dixon*, 509 U.S. 688, 696 (1993) ("The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.") (emphasis supplied); *United States v. Ursery*, 518 U.S. 267, 273 (1996) ("The protection against multiple punishments prohibits the Government from 'punishing twice, or attempting a second time to punish criminally for the same offense.'") (quoting *Witte v. United*

[1] The State repeats that "[t]he first double jeopardy protection against successive prosecutions has no application to Grimes because Grimes was convicted, not acquitted, of first degree robbery in the first 2013 trial." State's Response at 14-15. As explained previously, this argument is irrelevant to Grimes's appeal, which is based on his prior acquittal for aggravated menacing, and on which the prior conviction for first degree robbery has no bearing. *See* Opening Brief at 4-5.

States, 515 U.S. 389, 396 (1995)); *Brown v. Ohio*, 432 U.S. 161, 166 (1977) ("If two offenses are the same under th[e] [*Blockburger*] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings.") (emphasis supplied) (citations omitted); *see also Boyd v. Boughton*, 798 F.3d 490, 494 (7th Cir. 2015) (explaining that the Supreme Court has established that *Blockburger* is "the test applicable to all varieties of double-jeopardy cases").[2]

As the State acknowledges, the Double Jeopardy Clause protects against every single one of the following: (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." State's Response at 13 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). What constitutes the "same offense" for each of these scenarios does not change based on the scenario in question. Whether prosecuted in the same trial or in a successive

[2] In *Poteat*, this Court found no need to apply the *Blockburger* test because the legislature has made clear that aggravating menacing is a lesser-included offense of first degree robbery. *See Poteat*, 840 A.2d at 605. The *Blockburger* test is an aid to statutory construction for reaching the same goal of determining what constitutes the "same offense" for double jeopardy. *See id.*

prosecution, aggravated menacing remains a lesser-included offense of first degree robbery, and first degree robbery remains a greater offense of aggravated menacing, and each is treated as the "same offense" for double jeopardy. *See Brown*, 432 U.S. at 169 ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.").

The State's attempt to distinguish *Poteat* because it was a merger decision is wrong and should be rejected. Likewise, this Court should give no credit to the State's argument that cases relying on *Poteat* "make clear" that *Poteat*'s holding is "limited to sentencing merger circumstances." State's Response at 15. The cases cited by the State do no such thing,[3] nor could they, for the reasons stated above. *Poteat*'s holding that aggravated menacing is a lesser-included offense of first degree robbery is no less applicable to a successive prosecution than it is to a merger decision, and it is directly applicable to Grimes's appeal.

[3] Three of the four cases cited by the State simply involved *Poteat*'s application to first degree robbery and aggravated menacing convictions, without expressing any limitation on the application of *Poteat*'s holding to other double jeopardy contexts, while the remaining case did not apply *Poteat*'s holding at all. *See Johnson v. State*, 5 A.3d 617, 620 n.13 (Del. 2010) (citing *Poteat* only for its explanation that the *Blockburger* test need not apply in the face of clear legislative intent regarding the "same offense" analysis).

II. Unassailable Case Law Support Grimes's Appeal.

Without addressing the double jeopardy principles cited in the Opening Brief, the State asserts that "[n]one of the cases cited by amicus or Grimes present the inconsistent jury verdict scenario wherein a defendant is attempting to use an earlier acquittal on the lesser included [offense] allegation as a double jeopardy sword to prevent a retrial after appellate reversal of [a greater offense] conviction," and that "[t]he reason no such factually and legally similar decisions are cited is that the argument of amicus and Grimes involves none of the three recognized protections afforded by the double jeopardy clause." State's Response at 16. The State writes that *amicus curiae* has relied on *dicta* in *Ohio v. Johnson*, 467 U.S. 493 (1984) for the proposition that "the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense," *id.* at 16 (quoting *Ohio v. Johnson*, 467 U.S. at 501), and that the decision of *Brown v. Ohio*, 432 U.S. 161 (1977) "is also of no assistance to Grimes because he, unlike [the appellant in *Brown*], was found not guilty of aggravated menacing in the initial 2013 trial." *Id.* at 18-19. The State concludes: "None of the other cases cited by amicus or Grimes present the factual and legal circumstances posed by Grimes' case. The reason for such a void is that Grimes' case does not present a double jeopardy violation." *Id.* at 19.

The State's remarks have no relevance to Grimes's appeal. *Amicus curiae* explained in the Opening Brief that "[t]his appeal presents a straightforward application of the principle that 'the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense.'" Opening Brief at 1 (quoting *Ohio v. Johnson*, 467 U.S. at 501 (1984)). The State is correct that *Ohio v. Johnson* did not involve a double jeopardy violation based on the subsequent prosecution of a greater offense following an acquittal for a lesser-included offense. But that does not matter. *Amicus curiae* did not cite *Ohio v. Johnson* for its holding, but for its articulation of a well-established double jeopardy principle. Far from being mere *dicta* loosed in an isolated case (from the United States Supreme Court), that principle pervades American case law and makes perfect sense under the most basic double jeopardy analysis.

As the United States Supreme Court explained elsewhere, "it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.'" *Green v. United States*, 355 U.S. 184, 188 (1957) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)). As this Court has observed, "[t]he concept of one not being placed in jeopardy twice for the same offense goes as far back as early Greek and Roman canon law," and "the

draftsman of the United States and the Delaware Constitutions expressly included the common law rule that a person must not be put in jeopardy twice for the same offense." *Bailey v. State*, 521 A.2d 1069, 1074 & 1074 n.5 (Del. 1987) (observing in the footnote that "[t]raditionally, in a criminal prosecution, a plea of *autrefois acquit* or *autrefois convict* is a good defense"); *see also* Autrefois Acquit, *Black's Law Dictionary* (10th ed. 2014) (defining "autrefois acquit" as "[a] common-law plea in bar of arraignment asserting that the defendant has been acquitted of the offense"). Moreover, the law treats greater and lesser-included offenses as the "same offense" for double jeopardy purposes. *See Brown*, 432 U.S. at 168; *Ex parte Nielsen*, 131 U.S. 176, 189 (1889) ("It is familiar learning that there are many cases in which a conviction or an acquittal of a greater crime is a bar to a subsequent prosecution for a lesser one."); *Blake v. State*, 65 A.3d 557, 561 (Del. 2013) ("Double Jeopardy 'forbids successive prosecution and cumulative punishment for a greater and lesser included offense.'") (quoting *Brown*, 432 U.S. at 169).

The State has not explained why these double jeopardy principles do not apply to Grimes's appeal, because it cannot. And while the logic of Grimes's appeal should speak for itself, the State is also wrong that *amicus curiae* has not pointed to a factually and legally similar case. The Opening Brief cited *Wilson v. Czerniak*, 355 F.3d 1151 (9th Cir. 2004), where the Ninth Circuit granted a

petitioner relief under 28 U.S.C. § 2254, prohibiting retrial for a greater offense after acquittal of a lesser-included offense because, "[h]aving once been acquitted of the lesser included offense of intentional murder, [the petitioner] may not be retried on charges of aggravated felony murder." *Wilson*, 355 F.3d at 1157. This case was not addressed in the State's Response. Had it been, the State would have not only faced trouble distinguishing its prohibition of a retrial following a prior acquittal on a lesser-included offense,[4] but also circumventing the decision's straightforward answer to the State's demand for a factually and legally similar case, along with its unsubstantiated theory about a "void" in the case law:

> Nor does the fact that the Supreme Court has not ruled on the exact fact pattern of this case prevent us from granting relief. For us to overturn a state court decision on habeas review, the Supreme Court need not have addressed a factually identical case so long as it has clearly determined the applicable law. It is not surprising that the Supreme Court has not addressed a factually similar case, especially because juries do not often acquit on one count and then hang on greater inclusive offenses in the same trial. The unusual circumstances of this case, however, do not discharge a state court from its obligation to reasonably apply existing Supreme Court precedent, nor do they paralyze our ability to overturn a state court's unreasonable application of that law.

[4] In *Wilson*, the state sought retrial after a hung jury for the greater offense, not after a reversed conviction for the greater offense after appeal, but this procedural difference has no effect on the bar against retrial after an acquittal on the lesser-included offense. *See Wilson*, 355 F.3d at 1156 ("Here, jeopardy plainly did not terminate on the three hung counts in Wilson's trial. [This is equivalent to the jeopardy on the first degree robbery offense for Grimes.] However, jeopardy has terminated on [the lesser-included offense of] intentional murder. It is *that* termination of jeopardy which constitutes the 'original jeopardy' that bars the 'double jeopardy' presented by a retrial.") (emphasis in original).

Wilson, 355 F.3d at 1156 (citation omitted).

Beyond labeling the U.S. Supreme Court's recitation of an established double jeopardy principle as *dicta* and mistakenly stating that neither Grimes nor *amicus curiae* has cited a legally and factually applicable case, the State has provided no reason to question the merits of Grimes's appeal. This Court should reject the State's arguments, which fail to address the unassailable principles of constitutional law recited in the Opening Brief.

III. Jury Lenity May Not Be Used to Cast Aside an Acquittal.

For reasons already given, the Court should reject the State's argument that jury lenity somehow carves out an exception to the constitutional protection against double jeopardy after a jury's acquittal. *See* Opening Brief at 6-9. Instead of addressing the point that jury lenity applies only to upholding inconsistent convictions and cannot be used to overturn an acquittal (which is not reversible), the State has simply repeated what it asserted before. *Compare* State's Response at 19-20, *with* State's Answering Brief at 16-17. *Amicus curiae* rests on prior argument for this issue.

IV. The PFDCF Violation Should Be Overturned.

For reasons already given, the Court should overturn Grimes's PFDCF conviction if the Court determines that his first degree robbery conviction violates the Double Jeopardy Clause. *See* Opening Brief at 10. The State does not dispute

this point, but argues only that "[t]he converse is also true." State's Response at 21. *Amicus curiae* rests on prior argument for this issue.

CONCLUSION

The State has not responded to the arguments raised in the Opening Brief, and it has otherwise given no reason to question that Grimes's conviction for first degree robbery, following his acquittal for the lesser-included offense of aggravated menacing, is unconstitutional. Because it is a straightforward double jeopardy violation to prosecute a greater offense after a jury's acquittal for a lesser-included offense, Grimes's first degree robbery conviction should be overturned, along with the accompanying PFDCF conviction.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Craig A. Karsnitz

Craig A. Karsnitz (#907)
110 West Pine Street
P. O. Box 594
Georgetown, DE 19947
(302) 856-3571
CKarsnitz@ycst.com
Amicus Curiae

Date: February 19, 2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RUSSELL M. GRIMES,	)	
	)	
Defendant Below-Appellant,	)	
	)	No. 73, 2017
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This Brief complies with the typeface requirement of Rule 13(a)(i) as it has been prepared in Times Roman 14-point typeface using Microsoft Word 2010.

2. This Brief complies with the type-volume limitation of Rules 14(d) and 28(d) as it contains 2,405 words, counted by Microsoft Word 2010, and does not exceed one-half the maximum length authorized for a party's reply.

/s/ Craig A. Karsnitz
Craig A. Karsnitz (#907)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
110 West Pine Street
P. O. Box 594
Georgetown, DE 19947
(302) 856-3571
CKarsnitz@ycst.com
Amicus Curiae

DATE: February 19, 2018

CERTIFICATE OF SERVICE

I, Craig A. Karsnitz, Esquire, hereby certify that on February 19, 2018, I caused a copy of the foregoing document to be served on the following in the manner indicated below:

BY FILE & SERVEXPRESS

John Williams, Esq.
Department of Justice
102 West Water Street
Dover, DE 19904-6750

BY U.S. MAIL

Russell M. Grimes, SBI#227158
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

/s/ Craig A. Karsnitz
Craig A. Karsnitz (# 907)