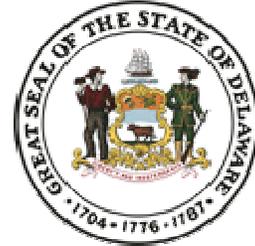


**OFFICE OF THE PUBLIC DEFENDER**

LAWRENCE M. SULLIVAN, PUBLIC DEFENDER OF THE  
STATE OF DELAWARE



**COMPENDIUM OF RECENT CRIMINAL-LAW  
DECISIONS FROM THE UNITED STATES SUPREME  
COURT AND THE DELAWARE SUPREME COURT**

**Cases Summarized and Compiled by  
Nicole M. Walker, Esquire**

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## **DELAWARE SUPREME COURT CASES OCTOBER 2006 THROUGH DECEMBER 2006**

### **DUPREE V. STATE, (10/3/06): ROBBERY FIRST DEGREE**



Defendant appealed three robbery-first-degree convictions. He went to a clothing store and told the employee he had a gun, the employee never saw the gun and did not believe he had one. Dupree went into a video store, never displayed a gun but told clerk, “I’m going to start shooting you and you’re going to get shot.” He got money from the register. Finally, at Pep boys, he grabbed his belt buckle and told the clerk ringing up his items that he would shoot her. She did not believe him and called her boss.

Dupree argued that the convictions amounted only to robbery second degree as they were merely “threats to use force.” Affirming the convictions, the Court held that the statutes correctly recognized a difference in degree between a threat to punch and a threat to shoot.

### **FAHMY V. STATE, (10/5/06): 3507/HEARSAY/BRUTON/SUFFICIENCY OF THE EVIDENCE**

Fahmy and his codefendant, Morgan, picked the victim up in their car. All were drinking. The victim was told that they were going to meet up with some girls. They walked in to the woods and the victim was shot (not fatally) in the back of the head. The victim turned and heard a second shot which appeared to come from Fahmy. The victim took off.

Fahmy’s first argument was that the trial court erred by allowing a 3507 statement by the victim to be admitted into evidence after it was played in open court. However, no objection was made below. The Court held that, even after *Flonery*, the trial court retains discretion to allow 3507 recordings to be given to the jury. Thus, there was no denial of fair trial.

Fahmy’s second argument was that the testimony of Morgan’s girlfriend, Osorio, consisted of hearsay and denied him his rights to confrontation. Again, Fahmy did not object at trial. The Court found that the testimony regarding conversations that Morgan, the codefendant, had with the victim consisted only of Osorio’s observations that prior to the shooting, Morgan was “angry” with the victim. Thus, it was not hearsay. There also was no *Bruton* violation because Morgan said nothing to inculcate Fahmy.

Finally, the Court held that there was sufficient evidence to convict Fahmy even though: 1) the victim had been drinking the night he was shot; 2) he made inconsistent statements; and 3) Osorio had memory problems.

### **DRUMMAND V. STATE, (10/5/06): RACIAL PROFILING**

Drummand, a black male, sold cocaine to a confidential informant as part of a controlled buy. After obtaining information regarding this sale, police attempted a motor vehicle stop. Dupree fled. At one point his 13-year-old cousin got out of the car and attempted to flee with a black bag that the informant stated contained a set of scales and drugs. Defendant later stopped. Dupree argued that he was investigated, charged and convicted of drug charges as the result of racial profiling.

To make a *prima facie* case of selective prosecution Dupree was required to show that: 1) the policy had a discriminatory effect; and 2) it was motivated by a discriminatory purpose. According to the Court, Dupree did not establish that either the effect or the motivation for the investigation were discriminatory. Instead, the record demonstrated that the location of the buy was targeted as the result of an on-going 1 ½ year investigation and on several arrests made in the area.

### **JACKSON V. STATE, (10/10/06): PAROLE VIOLATION**



Jackson received sentences in the mid 1980's and was released on "parole" in 1998. Unfortunately, he picked up new offenses in 1999. In the 1999 order, the court erroneously placed in the sentencing order that Jackson was "discharged" from his earlier "probationary period." In 2003, the parole board issued a warrant for a *parole violation* stemming from the 1999 convictions. Following a hearing in 2005, Jackson's *parole* was revoked and he was ordered to serve the remainder of his 1985-1986 sentences in jail.

Jackson argued that the Board of Parole had no authority to re-impose the Level V sentence because the trial court had preempted jurisdiction when it deemed him on probation rather than parole. In affirming his sentence, the Court held that the Superior Court's action based on an error in fact had no legal effect.

### **CEPHAS V. STATE, (10/16/06): ASSAULT SECOND DEGREE/PREGNANCY \*reissued 12/15/06 eliminating the Doctor's name\***

Cephas was convicted of assault second degree for allegedly hitting a pregnant woman. Despite testimony from the treating doctor, Dr. Jennifer Barlow, that the victim was actually afflicted with a complete hydatiform mole, which contains no fetal tissue whatsoever, the trial court denied Cephas' motion for judgment of acquittal. The

Supreme Court was appalled that a fourth year obstetrical and gynecological resident “could not, or would not, provide a definition” for the term “pregnant.” On that basis, the doctor was not qualified to testify as to whether the victim was pregnant. The Court adopted the common meaning of “pregnancy” - “containing unborn young within the body.” Defendant’s conviction was **reversed** and an assault third degree conviction was entered.

### **McGEEHAN V. STATE, 10/16/06: VIOLATION OF PROBATION/ DUE PROCESS**

McGeehan was ordered by the court to attend Crest Weekend Intervention Program for 4 consecutive weekends after he tested positive for cocaine. Because he failed to show up for the first weekend, claiming he was “ill,” his probation was violated. McGeehan claimed that he was not afforded due process at his violation hearing as he was not given proper notice; did not have counsel and was not aware that he had to provide medical documentation to establish that he had been ill.

The Court held that McGeehan had notice because he was told before the TASC hearing he had tested positive for cocaine and he had signed an intervention contract the day before the hearing. Further, he was not entitled to counsel because he did not contest the violation at the TASC hearing and there were no complex reasons that might make revocation of a violation inappropriate. Finally, because probation is an act of grace, the lack of medical documentation was properly considered.

### **GUARDARRAMA V. STATE, 10/17/06: MOTION FOR JUDGMENT OF ACQUITTAL/RIGHT TO PUBLIC TRIAL**



Police executed a warrant on residence wherein Ashley, Walter and Guardarrama resided. In the second floor rear bedroom, police found: crack cocaine, small plastic bags and defendant’s state id in a nightstand; plastic bags on the floor and dresser; and cocaine outside a window. The bedroom belonged to a female but police noticed male clothing on the floor. Two small bags of crack were also found on Guardarrama at the station. Ashley testified that drugs belonged to the defendant and Walter and that she had seen the defendant purchase and resell drugs. A drug expert testified that the drugs in Guardarrama’s pants may or may not have been for resale. Guardarrama was acquitted of trafficking but found guilty of PWITD, maintaining and possession of paraphernalia.

After trial and on appeal, Guardarrama argued that the jury must have found that he did not possess or know of the cocaine in the nightstand when it acquitted him of trafficking in cocaine; thus, he could not be convicted of PWITD that cocaine. The Court held that a rational trier of fact could have concluded that the cocaine in his pocket was

for delivery. The verdict could also be explained by jury lenity. On a different issue, the Court held that there was no error in banning Defendant's mother from the courtroom after she intimidated a witness.

### **STATE V. WALLS, 10/17/06: MODIFICATION OF SENTENCE**



The State appealed the trial court's March 31 and April 3, 2006 orders which modified Walls' 2002 sentences. The trial court denied Walls' first 3 motions for modification but wrote "the court will retain jurisdiction." On the final motion, the court modified her sentence. The State argued that pursuant to Rule 35 (b) that the trial court no longer had jurisdiction. Held: the trial court has its own "inherent authority" to modify sentences beyond what Rule 35 (b) allows. Thus, the modification was affirmed.

### **BLAND V. STATE, 10/17/06: SENTENCING**

Bland was sentenced on a burglary second degree offense. The transcript demonstrated that the judge sentenced him to five years, the "first year of this will be mandatory." By contrast the written sentencing order imposed a two-year minimum mandatory term. The trial court denied Bland's modification motion. On appeal, the State essentially conceded that the oral pronouncement controlled and the sentence was required to be amended to correct the error that resulted from "oversight or omission."

### **WEBB V. STATE, 10/18/06: PROSECUTORIAL MISCONDUCT/ EVIDENCE OF PRIOR BAD ACTS**



Webb was convicted of rape first degree after conceding he was the father of his girlfriend's 13-year-old daughter's child. On appeal, the Court held that a prosecutor's questioning the victim, in preparation for trial, with typed-up questions and answers does not amount to improper coaching. Second, there was no error as a result of the prosecutor's objectionable questions about the victim's school grades and plans for the future because they were not highly inflammatory and they were withdrawn. On the other hand, the State's question to Webb as to whether he ever said that the victim should have an abortion was highly inflammatory. But, because the prosecutor stated his motive was to establish consciousness of guilt and because the court immediately issued a curative instruction, any prejudice was eliminated. Finally, because Webb had testified that he had sex with the victim "by accident" and after a *Getz* analysis, the victim was permitted, on rebuttal, to testify that she had sex with Webb several times.

**HASSAN-EL V. STATE, (10/26/06) FELONY MURDER/ JURY INSTRUCTIONS/3507**  
**\*\*7/13/06 OPINION WITHDRAWN- SUBSTITUTE OPINION-SAME HOLDINGS**



Defendant was convicted of felony murder, murder second degree, possession of a firearm during the commission of a felony, attempted robbery first degree and conspiracy second for his part in the attempted robbery of an ice cream truck. At trial, the State introduced, *via* 3507, a video of a witness' interrogation in which police expressed their opinion regarding his credibility. Also, Defendant requested instruction that he could only be guilty of felony murder if his intent as an accomplice was equivalent to the state of mind required of the principle. At the time, felony-murder statute required that the murder be in the "course of and *in furtherance* of the commission or attempted commission of a felony[.]"

**Felony Murder:** 1) The homicide occurred in the furtherance of the attempted robbery. By shooting the ice cream man, they cleared the way to commit robbery. That they then chose not to commit the robbery is irrelevant. The result may have been different if the underlying felony had been actual robbery, not attempted robbery.

**Jury instruction:** "[I]f the 'accomplice' intended to commit the underlying felony[...], then he or she is also guilty of any 'consequential crime' that is committed, [...], as long as the consequential crime was a foreseeable consequence" of the underlying felony.

**3507:** Introduction of a videotape of a witness' interrogation under 3507 impermissibly allowed the jury to consider and be influenced by statements by police that expressed their own opinions regarding the witness' credibility. It was harmless error beyond reasonable doubt because a limiting instruction was given.

**HERRING V. STATE, (10/30/06): MIRANDA/PEDIGREE INFORMATION**

Herring was convicted of robbing a victim at gunpoint. After he was apprehended, police obtained his pedigree, or booking, information. It was only after they obtained that information that they gave him his *Miranda* warnings. Defendant argued that a subsequent search warrant executed on his home was illegal as it was based on the pedigree information he gave police without the benefit of his *Miranda* warnings. The booking-type information falls under a well recognized exception to *Miranda* contained in *Laury v. State*. Thus, Herring's convictions were affirmed.

## **LOCKE V. STATE, 10/31/06: SUFFICIENCY OF THE EVIDENCE/ CONSPIRACY**



Locke and two others went to a house in Wilmington. Locke opened the screen door while one of his codefendant's kicked the back door open. At trial, an officer testified that Defendant entered the home briefly. However, Locke and his codefendants testified that he never entered. Locke was found delinquent on burglary second degree, theft over \$1,000, conspiracy second degree and criminal mischief under \$1,000.

On appeal, Locke argued there was not sufficient evidence to support this ruling. The Court held that the burglary charge was supported by the officer's testimony. Further, the conspiracy charge was supported by evidence that he knew that the group was going to commit a crime in the home and the accomplice liability theory. Affirmed.

## **GARCIA V. STATE, 10/31/06: DRE 402/ DRE 403/DRE 404/GETZ ANALYSIS**

After conducting a controlled buy, police executed a search warrant on the home of Garcia, her son and Ortiz. Police found \$52 on Ortiz and other cash in the house, 3.3 gms of cocaine in basement rafters, baggies and a digital scale. Garcia purportedly stated, "whatever they find put it on me, I'll say it's mine." At trial she denied this. She also testified, "I don't know what was happening in my house because sometimes – most of the time I'm not at my house ... [b]ecause I work every day." In order to impeach this testimony, and over defense objection, the State was permitted to ask the defendant if she had been present for a search of her home in 2003. Garcia was convicted of Maintaining a Dwelling.

On appeal, the Court held that this evidence was relevant to contradict Garcia's testimony that she was clueless as to the activities going on in her house. It was not unduly prejudicial because the prosecutor did not ask why the search was conducted and she testified that she did not receive any charges as a result of it. No *Getz* analysis was necessary because Garcia opened the door and the evidence was admitted solely as rebuttal.

## **ANKER V. STATE, 10/31/06: DRE 403/ DRE 404b/ DRE 702-EXPERT TESTIMONY**

Anker, a real estate attorney, did not deposit the money of several of his clients into their escrow accounts as required. As a result, their mortgages were not getting paid. When they called his secretary, who was his daughter, to complain, she told them that it was the bank's fault. Anker appealed his conviction of 9 counts of felony theft and conspiracy resulting from this conduct.

On appeal, the Court held that evidence that the unpaid mortgages were paid by the Lawyer's Fund for Client Protection was not unduly prejudicial and was relevant to show that Anker did not pay them. Further, evidence that Anker: lied to the Delaware Supreme Court; failed to pay taxes for several years; and failed to pay insurance settlements to his clients were all admissible to rebut his defense that his daughter tricked him. Also, the escrow checks made out to the IRS showed motive. The trial court gave limiting instructions. There was no plain error that the victims testified that their credit ratings had been affected.

Finally, exclusion of psychiatric experts was not error. Dr. Kaye's proposed testimony that Anker was vulnerable to his daughter was within the jury's common knowledge. Similarly, Dr. Shore's testimony that, after the charges were brought, Anker suffered an adult disorder and depression was commonly understood.

### **LUSARDI V. STATE, 11/1/06: VIOLATION OF PROBATION**



While on probation, Lusardi tested positive on three occasions for illegal drugs. At a violation of probation hearing, his female probation officer testified that he was supervised by a male officer when he gave his urine specimen. She also produced the lab report which contained the positive test results. Lusardi claimed he was taking prescription medication. The court found him in violation.

On appeal, the Court distinguished this case from the recent case of *Collins v. State*. In *Collins*, there was no first hand knowledge of the defendant's conduct presented. Here, however, the probation officer oversaw the testing which produced the test results. Thus, there was sufficient competent evidence to revoke the probation.

### **PIERCE V. STATE, (11/8/06): DOUBLE JEOPARDY-MULTIPLICITY/JURY INSTRUCTIONS**



While on a tour of an apartment, Pierce grabbed the female leasing agent by the neck. He took her in the bathroom and attempted to penetrate her. He was unsuccessful, so he moved her from the tub to the toilet, tried again and failed. He took her into a bedroom and was successful. He took her back to the bathroom and again raped her. After he received a phone call, Pierce obtained the victim's "I.D." and left. The whole incident lasted about 10-15 minutes. He was charged with 2 counts of rape first degree, 2 counts of attempted rape first degree and misdemeanor theft.

On appeal, Pierce argued that the second attempted rape and second rape were multiplicitous in violation of the Double Jeopardy Clause. He argued that his conduct was one continuous course of conducted because of the close spatial and temporal proximity. The Court held there were sufficient gaps between events for the jury to believe they were separate acts and that he had formed new intent after each act.

The 2 rape charges and 2 attempted rape charges alleged that the defendant facilitated the crimes by “commission or attempted commission of assault third degree, terroristic threatening, or unlawful imprisonment.” Defense counsel requested a “single theory unanimity instruction” requiring the jury to agree unanimously as to which of the three alternatives were employed. The Court held that the instruction was inappropriate because the underlying actions are not conceptually different.

**GUY V. STATE, 11/16/06: JURY INSTRUCTIONS/SUPPRESSION OF EVIDENCE/DRE 403/HEARSAY/FELONY MURDER/DRE 901/MISTRIALS**



Guy, Hassan-El’s codefendant, appealed his murder and other convictions from his role in the attempted robbery of an ice cream truck. A .25 caliber projectile, .25 caliber casing, a 9 mm casing and a 9 mm projectile were all later found in the ice cream truck. Zayas told police he waved the truck down at the defendants request and because he wanted to exchange a soft drink. Defendants knocked him out of the way when they attempted to rob the truck. Police found a pager after a search of Guy’s home.

- 1) **Jury instructions:** Guy was not entitled to Federal instruction on reasonable doubt because Delaware’s instruction is a correct statement of the law. Guy was not entitled to an instruction on third party culpability and an accomplice testimony instruction because there was no evidence in the record that Zayas participated in the attempted robbery or fatal shooting. Finally, he was not entitled to an instruction informing the jury of his right under 11 *Del.C.* §274 to individualized determination of his own culpable mental state and accountability because a generic instruction on individual culpability was given.
- 2) **Motion to suppress:** Guy signed a broad written consent for the search of his home. He was present for the search and never revoked his consent. Thus, the State’s seizure and subsequent use of phone numbers on his pager did not violate his right to be free from an unlawful search.
- 3) **DRE 901 (a) authentication:** The .9mm bullet and .25 caliber bullet were admissible as they were properly authenticated through the testimony of the police and a supervisor of the Jack and Jill ice cream company. Police testified they were looking for and found the items. The supervisor testified they found

one of the items in the truck later. The .25 caliber bullet found in Guy's apartment matched the manufacturer and size of ones found in the truck.

- 4) **Mistrial:** Guy was not entitled to a mistrial simply because the State failed to properly redact certain questions in a videotaped statement of Zayas. He was questioned, "What'd [Hassan-El] tell you he did with the gun?" Any error was cured when the court stopped the tape and issued a curative instruction.
- 5) **DRE 403:** The trial court did not err in allowing the jury to view the crime scene during the day when the crime occurred at night. The court instructed the jury that the purpose was only for them to get a better idea of the dimensions. Also, they viewed photos of the scene taken the night of the crime.
- 6) **Felony Murder:** The same analysis was applied and same result achieved as in the Hassan-El case.
- 7) **Hearsay:** Under the impression that its officer was unavailable, and with no objection, the State presented his police report. It was later learned the officer was available, so the State put the officer on the stand to rebut Guy's father's testimony. No error because the police report was struck from the record.

#### **QUINTERO V. STATE, 11/22/06: CONFRONTATION CLAUSE/HEARSAY/VOUCHING/MISTRIAL**



Quintero was convicted of felony drug charges. On appeal he argued that the court violated his right to confrontation and permitted improper vouching through allowing inadmissible hearsay by the police that his companion was working with them. The Court held that the Confrontation Clause was not violated as Quintero had an opportunity to confront and cross examine the officer as to his statements. Further, the statement simply did not meet the definition of hearsay. There was not improper vouching as the companion never testified. Finally, any error from the officer's testimony that he knew Quintero from prior arrest photos was cured by the trial court's curative instruction.

#### **BUTCHER V. STATE, 11/22/06: FLOWERS HEARING/ IDENTIFICATION**



The Court remanded Butcher's original appeal for the trial court to conduct a proper *Flowers* hearing to determine if the confidential information could materially aid a

mistaken-identity defense. In a proper *Flowers* hearing: 1) only the judge is present with the court reporter and questions the informant; 2) if physical presence of informant impossible, then telephone or video interview is appropriate; 3) as a last result, the State must obtain an affidavit. On remand, the trial court again mishandled the hearing when it allowed the prosecutor and police officer to be present at the hearing. But, because the record supported the court's findings, there was no reversible error.

Also, it was not "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" to allow the witness to identify Butcher from a single photo. The determination was based on the totality of the circumstances.

### **MONROE V. STATE, 12/1/06: PAT DOWN SEARCH/RIGHT TO PRESENT WITNESSES/RIGHT TO CROSS EXAMINATION**

Police stopped Monroe because his car registration was expired. He had no proof of insurance. Police checked his criminal history and found he had prior weapons offenses. He was asked to step out of the car so the car could be impounded. He did not respond when asked if he had drugs or weapons. So, police conducted a pat-down search and felt something hard. When the officer lifted Monroe's shirt and saw a gun handle, Monroe attempted to flee. Police wrestled him to the ground and found ammunition on him. The Court held that Monroe's criminal history, expired registration, demeanor and failure to answer a question amounted to reasonable articulable suspicion to conduct the pat down.

Further, the trial court did not commit error by denying Monroe the opportunity to present the testimony of a witness to show that the officers lied during their testimony or to have access to the radio dispatches. This evidence was irrelevant to the suppression hearing. Finally, starting the trial the day after the suppression hearing did not deprive him of a fair trial simply because no transcript of the suppression hearing existed.

### **HICKS V. STATE, 12/6/06: IMPEACHMENT/NEWLY DISCOVERED EVIDENCE/DRE 609**

Hicks appealed his felony drug convictions. At trial, the State's expert used profane language in front of the prosecutor and bailiff because he was upset about waiting all day to testify. He initially denied this to the court, then he admitted it. He was then ordered to apologize. Hicks was not permitted to impeach the expert on this under DRE 609 because it was a "collateral matter." On appeal, Hicks relied on *In re Hillis* arguing that the witness being ordered to apologize to the prosecutor and bailiff was an implicit finding and sanction for contempt. The Court distinguished *Hillis* in that the assistant public defender in *Hillis* was "insolent," "sarcastic," and "disrespectful" offering no apology to the court. [Clearly an erroneous decision]. Hicks failed to make the requisite showing of obstruction of justice.

After trial, an individual who had been at the scene of the drug offenses sent an affidavit saying the crack was hers. On remand by the Court, Hicks requested a new trial due to newly discovered evidence. The Court held there was no error in denying this

request because: 1) there was little probability the evidence would have changed verdict; 2) it could have been discovered before trial; and 3) the evidence was merely impeaching.

Further, the introduction of a State's witness' 1999 misdemeanor drug conviction was not permissible under DRE 609 and the court properly conducted a balancing test.

**SUTHERLAND V. STATE, 12/11/06: PROBABLE CAUSE FOR ARREST/MIRANDA/NEGLIGENT DRIVING/DISCOVERY**



Police learned there had been an accident and that a white Mercury had fled the scene. The Mercury was found a mile north on the shoulder. There was significant front-end damage and the air bags had been deployed. Sutherland was in the driver's seat, did not know what happened and smelled of alcohol. After she was taken into custody, she failed field sobriety tests. At the station, she waived her *Miranda* rights and admitted having 6 beers and two glasses of wine before the accident and hitting an unknown object. This was sufficient probable cause for arrest.

Further, applying the *Seibert* factors, (542 U.S. 600 (2004)), the Court held that administering *Miranda* midstream eliminated the taint of earlier statements she made without the benefit of *Miranda*. The timing and setting of two interrogations were different, the initial questions were limited, there was a significant break; the second interrogation was not a continuation of the first.

Also, there was sufficient evidence that she was driving negligently. She admitted to drinking and falling asleep and had no idea what she hit. Finally, the State's last minute production of video tape did not warrant suppression. The court allowed for continuance, which was not accepted.

**JOE V. STATE, 12/13/06: PDWDCF**

Police searched for Joe after responding to a call of a possible theft. When they saw Joe, police approached him. Joe turned and walked in the opposite direction. Police told him to stop and put his hands on the car. He complied but dropped a small plastic baggy containing what appeared to be marijuana. This occurred 42' away from a playground. Upon a pat down, police found a "push dagger." They later found two bags of marijuana in the police car after Joe was taken into custody and another was found in his sock.

On appeal, Joe argued that his PDWDCF charge should have been dismissed. He argued that the State failed to prove the requisite *mens rea*. Since the underlying felony for the PDWDCF charge, possession within 300 feet of a park, was a strict liability offense, he argued, there was not the requisite *mens rea* for the PDWDCF offense. The Court rejected this argument holding that the offense of PDWDCF is clear and

unambiguous. A felony means “any crime or offense specifically designated by law to be a felony.” Thus, whether or not the felony is based on strict liability is irrelevant.

### **MARTIN V. STATE, 12/20/06: PROSECUTORIAL MISCONDUCT/FORM OF OBJECTION**



Martin appealed his felony drug convictions. At trial, Martin testified. On cross examination, the prosecutor asked, “Mr. Martin, this isn’t the first time that you’ve been in trouble?” Defense counsel promptly responded, “Excuse me?” The jury was excused and a sidebar followed. The prosecutor said the record showed Martin was previously sentenced to robbery 1<sup>st</sup>. However, it turned out the report actually showed that the robbery 1<sup>st</sup> was *nolle-prossed*. The line of questioning was not further pursued.

Applying the recently articulated *Baker* analysis, the Court held there had been prosecutorial misconduct. There was no evidence in the record to support a good faith belief that Martin had previously been convicted of a crime. However, the Court ably avoided a reversal when it found that defense counsel’s prompt “**EXCUSE ME?**” response and subsequent sidebar **WAS NOT AN OBJECTION**. Thus, a plain error standard was applied. Because the State’s evidence was overwhelming, the error was not “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.” **MORAL OF THE STORY: ALWAYS SAY “OBJECTION” EVEN WHEN THE JUDGE WANTS EVERYONE TO JUST GET ALONG!!!!**

### **LOPEZ V. STATE, 12/22/06: CONTINUANCE REQUESTS/INSTRUCTION ON LESSER INCLUDED OFFENSE**

Lopez lived with his niece, nephew, and other family members. The victim was a 12-year-old friend of the niece who was spending the night. The nephew asked the victim to give Lopez a blowjob. She did. She disclosed the incident a year later. Trial was scheduled for February 2, 2006. On January 12, 2006 the prosecutor and defense filed a joint continuance request because the State wanted to accommodate the police officer who was in training and the defense want to “investigate a possible alibi.” This request was denied. Defense counsel filed two more requests as they had identified the alibi witness but could not locate him. They were denied and trial was held on February 2, 2006. The court has discretion to deny continuance requests. Applying the two-pronged test of *Secrest v. State*, 679 A.2d 58 (Del. 1996) the Supreme Court upheld the denials of the continuance request because the defense neither provided a time frame for the continuance, nor demonstrated that the attorney was diligent in preparing for the presentation of defense testimony. It was only 3 weeks from trial and the attorney was only “investigating a possible alibi.” Further, there was no prejudice because the State had a strong case.

While Lopez was charged with rape second degree, he sought an instruction on the lesser-included offense of unlawful sexual contact. This was denied. The Court held that it would be inconsistent for the jury to acquit on the rape and convict on unlawful sexual contact. The evidence was that the victim put her mouth around Lopez's penis. This is "sexual intercourse" for purposes of rape second degree. Thus, the trial court was not required to give a lesser included offense instruction.

**JOHNSON V. STATE, (12/22/06): MISTRIAL/PREJUDICIAL UNSOLICITED TESTIMONY**



Both Johnson and Jones were arrested on various drug charges following a call from a concerned citizen and a motor vehicle stop. Jones pled to possession of drug paraphernalia and testified at Johnson's trial that none of the drugs found were his. Unresponsive to questioning, two officers testified that Johnson was known to police. The trial court struck both statements and gave curative instructions. On appeal, Johnson argued he should have received a mistrial. The Court held that Johnson did not establish a manifest necessity for a mistrial. The statements were only vague and infrequent and were cured by instruction. Further, the testimony of Jones rendered this not a close case.