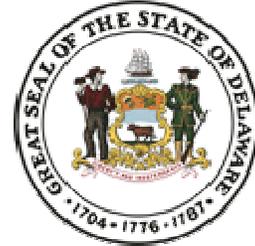


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LAWRENCE M. SULLIVAN, PUBLIC DEFENDER OF THE
STATE OF DELAWARE



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

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



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**DELAWARE SUPREME COURT CASES
JANUARY 2007 THROUGH MARCH 2007**

**STATE V. THOMAS, SUPERIOR COURT, JURDEN, J. (Mar. 29, 2007):
PROBATION-ADMINISTRATIVE SEARCH**

****GRANTED****

Officer Stoddard and Probation Officer Dupont patrolled Monroe St. in an unmarked police vehicle for several weeks. They repeatedly saw Smallwood sitting or standing with people outside of 418 N. Monroe. Each time they drove by, Smallwood quickly went into the house and peered out the door. D was never seen outside the residence. The officers learned that D lived at that address and was on Level II probation. Dupont received permission to perform an administrative search of the house and recovered evidence leading to drug and weapons charges.

The court held that P.O., pursuant to department regulations, was required to have sufficient grounds to believe D possessed contraband or was violating probation. Dupont lacked this knowledge. Further, D had no prior drug convictions; was not observed in any suspicious activity; and was never even observed outside her residence.

**KEMSKE V. STATE, (Jan. 2, 2007): SEXUAL EXPLOITATION OF A
CHILD/EXPECTATION OF PRIVACY/SEVERANCE OF CHARGES**

D was convicted of sexual exploitation and invasion of privacy when found in possession of a videotape of his wife's 12-year-old daughter stripping and taking a shower and several computer files containing child pornography. The Court found that the State established a *prima facie* case that the film was for "sexual stimulation or gratification" because the film was hidden with the child pornography. Further, even though D and the child lived in a trailer in which the bathroom door did not close, she did have an expectation of privacy in the shower.

Finally, the trial court did not err in failing to *sua sponte* sever the invasion of privacy and exploitation charges from his 25 child pornography counts. The child pornography offenses were relevant to *mens rae* of the exploitation offense.

**HARTMAN V. STATE, (Jan. 8, 2007): GUILTY PLEA/ PRO SE
REPRESENTATION**

D filed a motion to withdraw his guilty plea to 5 counts of rape 3d degree prior to sentencing. He argued that he was pressured to enter the plea by his family and his attorney; he was on medication at the time; and his attorney failed to explain the evidence that would not have been admissible. The trial court did not abuse its discretion in finding D's assertions unsubstantiated and denying his request under Super.Ct.Crim. Rule 32 (d).

D also requested that he be permitted to represent himself on appeal. The Supreme Court had remanded that request for a hearing on the matter. Despite D's claims, a hearing was held where he was found competent to waive his right to counsel.

MANLEY/STEVENSON V. STATE, (Jan. 3, 2007): ACCOMPLICE LIABILITY INSTRUCTION/AGGRAVATING CIRCUMSTANCE

Both D's received a new penalty hearing on remand after being convicted of murdering a witness in a theft trial against Stevenson. At the new hearing, for background purposes, the trial court read the jury the accomplice-liability instruction given to the original jury. The Court found this instruction did not undermine the jury's ability to perform its duty. Nothing in the jury's findings indicated that they interpreted the instruction as allowing them to impose vicarious liability for aggravating circumstances for either D. The nature of the aggravating circumstances was such that they would be found regardless of the status of the accomplice.

Secondly, the *Edmund/Tison* line of cases was not violated. These cases hold that one cannot be sentenced to death because he aided a felony in the course of which a murder is committed by others if he did not kill, attempt to kill or intend to kill. However, major participation in the felony plus indifference to human life would subject one to death penalty. Here, the jury found that each Co-d either intentionally killed or intentionally aided in the killing. Thus, both were eligible for the death penalty.

Finally, the trial court properly denied Manley's motion for judgment of acquittal as to 2 statutory aggravators. There was sufficient evidence to support a conclusion that Manley was aware of the victim's status as a witness and that he was the shooter as he was seen with Stevenson at the scene of the crime. Also, that the shooting was the result of substantial planning is supported by the fact a note was found that had the name of another witness to the theft crime and his address.

SUTHERLAND V. STATE, (Jan. 9, 2007): ARREST/MIRANDA/ NEGLIGENCE/DISCOVERY

About $\frac{3}{4}$ mile from the scene of a car accident, D was seen in a car that matched the description of one that fled the scene, the car had front end damage and air bags were deployed. Upon questioning, D stated she did not know what happened. She smelled of alcohol, slurred her speech, had a flush face, was surrounded by beer cans, failed field tests and admitted she had been drinking. She was later taken to the station and was given her *Miranda* rights. She then gave a video statement admitting drinking that night and had hit an unknown object in middle of road. The Court upheld the trial court's decision that there was probable cause to arrest D on a DUI.

D's statement at the scene was not coerced. There was also a sufficient break in time and setting between her statement at the scene and her later videotaped statement given after receiving her *Miranda* warnings. The trial court was correct that the statements were admissible.

The facts supported a conclusion that D had been negligent. Trial court correctly denied her motion for judgment of acquittal.

Finally, while the State violated its discovery obligation by failing to produce D's statement until the day of trial. The error was harmless.

**SOLIMAN V. STATE, (Jan. 10, 2007):SPECIFIC UNANIMITY INSTRUCTION/
INCONSISTENT VERDICTS/ACCOMPLICE LIABILITY**

D was charged with conspiracy 3d and promoting prison contraband when he had his Co-d obtain from the infirmary: Muslim oil, 3 scarves, a letter, pictures and prescription pills. Co-d pled guilty to misdemeanor promoting prison contraband and conspiracy. D was convicted of conspiracy 3d but acquitted of promoting prison contraband.

The Court held that the trial court's failure to give a specific unanimity instruction as to which item was being transported was not plain error. The State argued that the only contraband at issue was the Muslim oil. D's verdict was not fatally inconsistent as the jury could reasonably find the Co-d committed the actual overt act but that the two were still involved in a conspiracy. Further, the trial court was not obligated to issue an instruction telling the jury that there is an inherent untrustworthiness in an accomplice's testimony.

**BOOZE V. STATE, (Feb. 13, 2007):SEARCH WARRANT/PROSECUTORIAL
REMARKS/ADMONISION OF COUNSEL**

D antagonized two sets of neighbors over a long period of time. He damaged property, insulted them, tapped their phones and surveilled them. The police conducted surveillance and subsequently executed a search warrant on D's house. They found: numerous weapons and ammunition, military literature, fireworks, spray paint and surveillance videos. D's appealed his stalking conviction.

Trial court's finding of probable cause to support the search warrant was upheld. The circumstances permitted one to infer that D was the one antagonizing the neighbors although he had never been arrested for his conduct before. It was reasonable for police to believe they would find the contraband alleged in the warrant. Failing to put in affidavit that there had been vandalism of D's property was not an omission of material information.

The prosecutor's comments during opening and closing were not error. The State did not vouch for its witnesses when it stated, "you will hear that as soon as the defendant was arrested, that the behavior stopped, that [the victims] have never had a problem since." Also, stating "we know" and "we caught him" referenced evidence. Thus, it was an argument of a legitimate and logical inference from the evidence and did not cross line of demarcation between proper and improper.

During trial, the court had admonished defense counsel in front of the jury. The court later asked him if a cautionary instruction was warranted. The attorney stated it was not. Thus, D waived this issue.

**WALKER V. STATE, (Feb. 15, 2007): SELF REPRESENTATION/
RELEVANCE/HEARSAY**

During trial proceedings D filed a motion to proceed *pro se*. The record did not indicate that it was ever seen by a judge before trial. His attorney continued filing motions on his behalf and D never raised the issue at any of the critical stages of the trial process. On the 8th day of trial, D raised the issue again and it was denied. Failing to reassert request was a waiver. Thus, there was no abuse of discretion to deny his request made at trial.

It was not error for a witness to testify that D said he liked semiautomatic handguns and had one at home. It was relevant as it went to probability that D threatened V with a semiautomatic. Also, the State's motion to exclude V's statement made one week after shooting and 4 days before death while he was sedated and had difficulty understanding questions was correctly granted as it was hearsay.

**PETITION FOR WRIT OF MANDAMUS, JAMES COOKE, (Feb. 16, 2007):
MANDAMUS PROCEDURES/DECISION TO PURSUE "GBMI"
STATE'S REQUEST DENIED**

During capital murder case, D wanted his attorneys to argue only that "he didn't do it." However, based on the State's overwhelming evidence, the attorneys sought to focus on saving the client's life and argue "Guilty, But Mentally Ill." However, guilt would not be conceded. The State filed a petition to Supreme Court requesting "a *per se* rule that a defense attorney is prohibited from advancing a mental illness defense in the guilt phase if the defendant is opposed to that approach."

The defendant has authority over pleading guilty, waiving a jury, testifying or taking an appeal. However, Counsel bears principal responsibility for the conduct of the defense, including what arguments to pursue and what defenses to develop. The State argued that the decision to present a GBMI defense was akin to the decision to enter a guilty plea. Thus, only the client can decide whether to present a GBMI defense.

While the Court did not decide the case on its merits, it did discuss the USSC case of *Florida v. Nixon* which held that "a concession of guilt is not the functional equivalent of a guilty plea." The State is still obligated to meet its burden. D also reserves the right to cross examine witnesses; to exclude prejudicial evidence; and to appeal. In *Nixon*, the Court concluded that D's attorney acted appropriately in presenting a defense that involved a concession of guilt even though the client did not agree.

Ultimately, the Court concluded that a writ of mandamus proceeding was not the proper procedural context in which to decide the issue. The State had failed to

“demonstrate that it had a clear legal right to require the trial judge to preclude Cooke’s defense attorneys from presenting evidence that would support a GBMI verdict.” Thus, the State’s petition was denied.

**SMITH V. STATE, (Feb. 16, 2007): COMPETENCY/INVOLUNTARY STATEMENT
REVERSED**

D, 14 years old, was alleged to have sexually molested his 3-year-old cousin. D and his mom went to the station to speak to police. The officer testified that he told D and mom that he was a suspect of sexual misconduct. However, mom testified that the officer refused to tell her what the investigation was about, that she could not be with her son and that he never mentioned a lawyer.

D was questioned for 45 minutes. He had problems reading, so detective read him his rights. D responded “uh uh” then printed his name on the form. The detective repeatedly told D he knew what happened. D did not respond and bent over looking at floor. Finally, the detective stated: “The only way we’re walking out of here is if you’re straight up and honest with me and we deal with this and then I can help you.” D confessed. Later, at a competency hearing, it was learned that D was mildly mentally retarded with poor verbal skills. On appeal, the Court upheld decision that D was competent.

The trial court did err, however, in failing to suppress the statement. The Supreme Court reviewed the taped statement with the benefit of evidence from the competency hearing. It found that the *Miranda* warnings were not simplified, in fact they were confusing; D was trying to remain silent; D on second grade level; he couldn’t sign his name; and his mom was not with him.

PHELAN JACKSON, (Feb. 21, 2007): REFERENCE TO PROBATION AT TRIAL

D was charged with attempted assault 2nd, 2 counts of reckless endangering and related offenses. Prior to trial, the parties stipulated that D’s probationary status would be disclosed to jury with a limiting instruction. However, PO testified that D was known to carry weapons. There was no objection. On appeal, D argued that the comment unduly prejudiced D’s argument that PO’s are street thugs. The Court held that the comment was unforeseen, unsolicited, isolated, case was not close and the comment was not germane to any central issue in dispute. Thus, there was no plain error.

FRANCO V. STATE, (Feb. 21, 2004): RESTITUTION HEARING

A restitution hearing was held after D pled guilty to misdemeanor theft and conspiracy 3d. D sought to question V regarding the fact that they had been smoking marijuana earlier on the day of the incident and that V had threatened D after the incident. The court found both issues to be irrelevant.

On appeal, the Court held that D is not entitled to same confrontation and CX rights during sentencing procedures as in trial. However, the trial court did err in preventing D from questioning about the threats made by V. This was harmless as its admission still would have left “no room for the judge to entertain a reasonable doubt as to the proper amount of restitution.”

SCOTT V. STATE, (Feb. 22, 2007): NIGHTTIME SEARCH WARRANT/CROSS EXAMINATION

In their home, D killed V after stabbing her 11 times. After D was in custody, the State obtained and executed a nighttime search warrant of the home. In the warrant, the officers failed to put in the exact language of the sample warrant contained in 11 *Del.C.* § 2310 (c). On appeal, the Court held that this language was not required as the warrant expressly authorized a search in the nighttime. The trial court also properly applied the four corners test and found exigent circumstances to support the warrant. These circumstances included: evidence was in plain view; members of V’s family wanted to enter the house and trace evidence was subject to risk of loss if not seized as soon as possible.

The trial court did err in denying cross examination of a State witness on the fact that she entered the diversion program. While this fact was inadmissible under *D.R.E.* 609 (a) as it was not a criminal conviction, it was admissible under *D.R.E.* 616 as it went to potential bias. The error was harmless because of overwhelming evidence.

MOYE V. STATE, (Feb. 22, 2007): PROSECUTORIAL REMARKS

D was convicted of 3 counts of rape 4th degree based on the testimony of V, DNA and physical evidence of sexual abuse. During jury summation, the prosecutor referred to V’s testimony as “uncontradicted.” D objected on the ground that this was a comment on D’s right to remain silent. The trial court found that the term “corroborated by the evidence” should have been used instead and issued a curative instruction. On appeal, the Court held that the trial court was not required to *sua sponte* declare a mistrial as D specifically requested and received a curative instruction.

PERKINS V. STATE, (Feb. 26, 2007): EXPERT TESTIMONY/ CURATIVE INSTRUCTION/BURDEN OF PROOF/DEFENSES/LIO’S

D was convicted of murder. He and V had been arguing in D’s apartment. V was found dead from a gunshot wound in a downward trajectory from the back of her head. D’s print was found on a box of .38 cal. ammo. The gun was never found. D testified that V had the gun, there was a struggle and then D accidentally shot V.

EXPERT TESTIMONY: The Court held that the medical examiner’s testimony that his opinion as to the cause of death was within a “reasonable medical probability” rather than “reasonable medical certainty” was not error as the terms are legally interchangeable and indistinguishable.

CURATIVE INSTRUCTION: The issue of D raping V was excluded from trial. During closing, however, the prosecutor argued that D “made [V] sick [after sex], she threw up and somehow when she did that, he was enraged.” D did not object. It was not plain error when the court failed to *sua sponte* issue a curative instruction. The inference was logical from the evidence.

BURDEN OF PROOF: Prosecutor’s question of D’s witness as to why he failed to test hair sample for gunshot residue did not improperly suggest D had burden of proof.

DEFENSES: The evidence did not support self defense. D never testified that his own life was in danger. He said he got control of the weapon then tried to run away and the gun accidentally went off. Also, there was no evidence of accident because D purposely took the gun away from V to defend himself.

LIO: D expressly rejected LIO instructions. Under the “party autonomy” doctrine, the burden to request a LIO is on counsel. The doctrine is constitutional .

THOMPSON V. STATE, (Feb. 27, 2007):”PRIVATE PLACE”/BRADY/ LOSS OF EVIDENCE

D was convicted of violation of privacy for climbing through the ceiling of the men’s bathroom at a restaurant and peering in to the ladies’ room. D argued that the public bathroom was not a “private place” for purposes of the statute. The Court held that while the public had access to the bathroom, when one uses it, closes and locks the door they “may reasonably expect to be safe from casual or hostile intrusion or surveillance.” The trial court did commit harmless error in failing to instruct the jury on the definition of “private place.”

The State did not reveal that it unsuccessfully attempted to recreate the crime at its office and successfully recreated it at the restaurant. The Court did not find, but assumed, it was not work product and ruled failure to disclose was harmless error.

The State failed to produce, as requested by D a month before trial, a tape of a call between a witness and a police officer. The recording had been lost. The Court held that because the loss was an accident and the degree of harm was slight because the parties to conversation were both at trial, the trial court’s issuance of a *Deberry* instruction was proper-no mistrial was necessary.

PRINCE V. STATE, (Feb. 27, 2007): SEARCH WARRANT

D was convicted of drug offenses after police executed a search warrant of his house and car. They found heroin and \$1700. A 1992 Lexis was seized. The warrant was the result of a tip received on Jan. 6. On Jan. 21, they conducted surveillance and obtained evidence of drug sales. On Jan. 27, police obtained a search warrant. D argued that the warrant was based on stale information. Relying on *Windsor v. State*, which held

that the passage of 9 days between learning the location of the drugs and procuring a warrant did not make information stale, the Court rejected D's argument.

HENRY V. STATE, (March 2, 2007): "HIGH CRIME AREA"

D was convicted of drug offenses after police conducted surveillance on a street corner and later seized evidence. Police had been conducting surveillance, at least in part, because it was a "high crime area." At trial, the court denied D's motion to preclude reference to the fact that the neighborhood was a "high crime area." Affirmed on appeal, as the information was relevant to explain why surveillance was being conducted.

POTTS V. STATE, (Mar. 5, 2007): CONSENT DEFENSE

V agreed with D to a fist fight. While fighting, a third person came out of the blue and swung at V. She hit the ground then D cut her face. D was later convicted of assault second degree and possession of a deadly weapon during the commission of a felony. At trial, V testified she intended to fight D one on one. Trial court properly denied D's request for a consent instruction. V did not consent to a third party assisting and the involvement of the weapon.

**DEEDS V. STATE, (Mar. 5, 2007): DISORDERLY CONDUCT/
INDICTMENT**

A fight ensued at school and D was accused of hitting V in the face. However, D and several witnesses denied this. D admitted to cussing at V. D was found delinquent on disorderly conduct and acquitted of offensive touching. This decision was upheld because profane language, in certain situations, constitutes disorderly conduct under section 11 *Del.C.* § 1301 (1) (b). A rational trier of fact could conclude D's calling V a "bitch" and yelling at girls in school would "incite an immediate breach of the peace." That D was originally charged under section 11 *Del.C.* § 1301 (1) (a) is not significant as "a defendant may be convicted of an offense not charged in the indictment or information if that crime is included in an offense that is charged."

RAYMOND V. STATE, (Mar. 6, 2007): ASSAULT 2D DEGREE

While being arrested, D pushed an officer out of the way and began to flee. A scuffle lasted about 5 minutes. The officer suffered two broken bones in his hand. D testified that he did flee but once police stopped him, they beat him head to toe. And, he never touched any of the officers as his hands were underneath him and he was simply trying to defend himself. D argued there was no evidence he caused injury or how the injury occurred. The trial court correctly found that the testimony of V alone was sufficient to establish physical injury. Intent was also demonstrated from evidence that D was angry and refused to comply.

JONES V. STATE, (March 6, 2007): *BATSON*

D, an African American, was convicted of murder and related offenses. He appealed several issues. The Court remanded only on a *Batson* issue.

During jury selection, the State used 6 of 8 peremptory strikes on minorities. The State argued that 4 minorities were struck because of their criminal records; one struck because she was a teacher; and one was struck because she was a psychologist. D was denied the opportunity to review their criminal records. Only 3 of 12 jurors and 1 of 4 alternates were African American. The Court found D had established a *prima facie* case of discrimination because the State used 75% of its peremptory strikes on minorities—double the percentage of minorities in the original jury pool. Thus, the State was required to give race neutral reasons for each.

The trial court failed to perform an evaluation of the evidence that tended to show race was or was not the real reason for the strikes. The matter was remanded because “the cold record” cannot replace the credibility determinations and a clear articulation by the trial court of its decisions in response to the *Batson* challenges. The trial court is permitted to review whether the prosecutor would have challenged juror for nondiscriminatory reasons even if there was racial discrimination.

FULLERTON V. STATE, (Mar. 8, 2007):PROSECUTOR COMMENTS

Police searched 16-year-old D’s house and found D on a bed in a room. D dropped six .32 caliber bullet casings onto a dresser and police found a revolver under the mattress where D was sitting. D smelled of alcohol and had slurred speech. During closing, the State referenced the fact that police responded to a call of “shots fired.” The trial court properly found this information was admissible under *D.R.E.* 403 to establish the context of why officers were present; plus it did not directly implicate D on the charges of PDWBPP and possession of alcohol by an underage person. Normally, it is preferred that the term “upon information received” be use.

HARTMAN V. STATE,(March 9, 2007), SELF REPRESENTATION

****REVERSED****

In Jan. 2006, during pretrial proceedings, D sent a letter to the court asking for substitute counsel or to represent himself. He stated, “I believe I have the right to defend myself.” In Feb. 2006, D’s attorney asked the court to address the issue. At case review, he asked again for it to be addressed. The court said would be addressed on the day of trial. On the day of trial, D stated, “I don’t think I will lose. I’m not guilty of these charges...I will prove that as soon as I’m calling his witnesses and it’s my turn to cross examine.” The court found him not competent to represent himself because he lacked legal training and had unrealistic expectations.

Trial court did not apply the proper test, which is: that D has made knowing and voluntary waiver of right; and the court must inform D of the risks inherent in going forward in a criminal trial without assistance of counsel. Here, D unequivocally answered the court's questions. Legal knowledge is irrelevant to the determination. Harmless error does not apply, so the case was reversed.

COLE V. STATE, (March 12, 2007):AGREEMENTS/3507/ AUTHENTICATION

AGREEMENT: Co-d was identified as being involved in a murder that took place at 1348 Lancaster Avenue. D told his attorney that Co-d was not there, so he would plea if the State dropped prosecution of Co-d. Over his attorney's advice, D spoke with DAG. An agreement was sought for D to confess to the 1348 Lancaster Avenue charges and give a statement regarding crimes that occurred at 105 E. 23rd Street if the State would not seek the death penalty in the prosecution of the 105 E. 23rd Street crimes. However, the DAG said he would not waive the death penalty until he heard D's statement. Both D and his attorney thought the DAG would only use the statement in considering that penalty. D then gave details of involvement in both sets of charges. D then pled to the Lancaster Avenue charges.

The State then indicted D on the new murder charges and sought death penalty. D moved to suppress the fruits of the statement and moved to preclude the death penalty. These motions were denied. Originally, the Supreme Court remanded the case for the trial court to make factual determinations regarding the agreement. The trial court found that the agreement was only to not to violate *D.R.E.* 410 and there was no violation. Also, there was no detrimental reliance because D acted out of a moral imperative.

The Court found that the trial court's factual findings and credibility determinations were supported by the record, so there no abuse of discretion. However, the Court did have serious misgivings regarding the trial court's finding and was concerned about the State being less than candid. Further, the issue would not have arisen had the agreement been in writing. A strong dissent argued that the ambiguity of the agreement should have been resolved in D's favor.

3507: There was no confrontation violation when a witness could not remember the substance of a conversation he heard between D and Co-d and an officer was permitted to testify pursuant to 11 *Del.C.* §3507 regarding what the witness had previously told him.

AUTHENTICATION: The State properly authenticated a window screen under *D.R.E.* 901 prior to it being entered into evidence. The burden of authenticity is easily met and any inconclusive link in the chain of custody diminishes the weight but does not render evidence inadmissible.

WEDDINGTON V. STATE, (Mar. 14, 2007): SUPPRESSION HEARING-LIMIT ON CROSS EXAMINATION

At suppression hearing, officer testified he was conducting surveillance as the result of reports of drug sales. He saw D engage in several “hand-to-hand” drug transactions, talk on his cell phone, go inside a house, come out and meet someone, then receive something. The officer then pulled D’s car over, removed D and asked him if he was carrying anything. D admitted he had heroin. D argued the “hand-to-hand” never occurred. Further, the officer’s affidavit for an arrest warrant never mentioned any transactions. The officer said it was not contained because he did not want to compromise a federal/state investigation. The judge stopped D’s cross examination on that issue. On appeal, the Court held that D ably highlighted the inconsistency and he was not prevented from fully exploring the issue.

STATE V. ROLLINS, (Mar. 14, 2007): PEDESTRIAN STOP

Police patrolled in high crime area, pulled car over curb and into courtyard to surprise would-be drug dealers. A woman then yelled “five-0.” At that point, D put his right hand in his pocket, withdrew it and walked away from police. Police then told him to come over to the car, grabbed his arm and brought him to the car because they thought he was “looking for a way out.” D was patted down for weapons and found nothing. He was then asked if he had anything he was not supposed to; D responded “no.” There was dispute as to whether D consented to the subsequent search that revealed cocaine. The trial court erred in granting D’s suppression motion when it considered each of the factors in isolation versus within the totality of the circumstances. Thus, the first pat down was legitimate. The matter was remanded for determination as to whether there was consent for the second search.

SAVINON V. STATE, (Mar. 15, 2007): POSSESSION

Police set up a drug buy and purchased 27 grams of cocaine for \$1,200. There was a second transaction as well. A third buy was arranged for 4 ounces of cocaine. D told the buyer that he would have to go to NY to get it. Police then saw D leave his building, go to his car, remove a package and get in on the passenger side. They then followed him to the George Washington Bridge where D headed in the direction of NY. On his way back, police stopped D for speeding. After a consent search, they located 4 ounces of cocaine in the console. D was convicted of trafficking and related offenses. On appeal, D argued the State failed to present sufficient evidence that he had “dominion and control” over the drugs found in the vehicle in which he was a passenger. The Court held that D’s proximity to the drugs plus “evidence linking the accused to an ongoing criminal operation” was sufficient evidence of possession.

PATRICK V. STATE, (Mar. 15, 2007): RESISTING ARREST/ ATTEMPTED BURGLARY

D matched a description of individual sought by police. They attempted to stop him, but he fled. While fleeing from police, D tried to enter a house. He was charged with resisting arrest. He was also charged with attempted burglary where the State alleged the crime D intended to commit in the house was the ongoing resisting arrest. D argued that the crime of resisting arrest was over when he tried to enter the house. However, the Court held that resisting arrest, as opposed to escape, is an ongoing offense. Ongoing evasion is a continuing offense.

FULLER V. STATE, (Mar. 19, 2007): DISCOVERY

The State was permitted to cross examine D on a pre-recorded statement he made. D did not know the tape existed until trial, even though he had made specific requests for that evidence. V was shot at by several men standing on a corner and received medical treatment. He identified D as one of the men who shot him. In a videotaped statement D denied involvement. Thus, he argued the failure to inform him of the evidence affected his decision as to whether or not to testify. On appeal, the Court noted that careful parsing of police reports would have revealed the existence. However, the State must respond “specifically and accurately” to specific requests. Thus, the State did failed to meet its discovery obligations per Sup.Ct. Rule 16. However, significant independent evidence existed so there was no substantial prejudice to D.

SHAW V. STATE, (Mar. 23, 2007): DUI

Police saw D speed down a highway, crash into barriers and flip over. D came out of the car, was visibly injured and emanated a smell of alcohol. Due to the injury, the officer only administered the alphabet test and stopped him after the letter “B.” No chemical test was done but D admitted he had a drink earlier that night, was on prescription medication and had smoked marijuana 2 days earlier. The Court held that these factors taken together were sufficient to allow a rational factfinder to conclude D was under the influence at the time he was driving.

**MORGAN V. STATE, (Mar. 29, 2007): 3507/ATTEMPTED MURDER/REFERENCE TO “CSI” T.V. SHOWS
REVERSED**

D was convicted, via accomplice liability, of attempted murder of V. The alleged motive was revenge for V’s solicitation of a female friend, Osorio, for sex and for stealing her CD player. Days after this, D and Co-d picked V up and he returned the CD player. D was not involved in any discussions between V and Osorio. Afterward, D drove Co-d and V to meet up with girls. All three were drinking. They stopped at the woods, V asked where the girls were, D told him “over there.” V was then shot in the back of the head by Co-d.

3507: At trial, Osorio significantly down played her relationship with D. During her DX, the State put on Det. Teresa Williams to provide a 3507 statement. She supposedly had a conversation with Osorio months earlier where Osorio told her the full extent of her relationship with D. However, the conversation was not recorded nor reported in any reports and was revealed to D for the first time at trial. Osorio did not remember the conversation. The detective's testimony was an "interpretive narrative" and motive was intrinsic to the State's case. Thus, it was reversible error to allow the detective's testimony.

SUFFICIENCY OF THE EVIDENCE: There was more than motive plus presence at the scene. The State presented sufficient evidence for D to be found guilty of attempted murder.

"CSI": Finally, the Court found error in the State's comment in closing: "this is not CSI Las Vegas or CSI New York where police do all sorts of different tests all the time. It's fact specific. In this case it wouldn't have worked. So why do it?" The statement was not supported by any record evidence of the tests that were available or why performing those tests would have been to no avail. Thus, if a timely objection had been made, it should have been sustained. However, the error was not plain.

GUERERRI V. STATE, (Mar. 29, 2007): EMERGENCY EXCEPTION TO WARRANT REQUIREMENT

Police responded to a "shots fired" call. When they arrived on the scene, they saw an SUV with shotgun damage parked on the lawn, shell casings in street, pellets that had struck the home and broken a storm window. Neighbors told police they believed there were people in the house. There was no answer to a phone call or to knocks on the doors and windows. Officers kicked open the front door and went in with weapons drawn in order to search for a person in need of emergency assistance. D and his roommate told them everything was fine. However, police went down to the basement then smelled and saw marijuana plants. They obtained a warrant to search the house and vehicle.

The Court adopted the following test to determine whether the emergency doctrine exception to the warrant requirement is met: 1) reasonable belief that emergency has occurred or immediate need of assistance for protection of property or life; 2) not primarily motivated by intent to arrest and seize evidence; 3) some reasonable basis, approximating probable cause, to associate the emergency to the area to be searched. Here, the test was satisfied.

BROOKINS V. STATE, (Mar. 29, 2007): DEFAULT JUDGMENT/ NEW TRIAL BASED ON DNA ANALYSIS

D was convicted of murder in 1981. There had been no eyewitness testimony. Co'd's testimony implicating D was corroborated by expert, non expert testimony and physical evidence. Hairs were found on the back door of V's apartment and on a tissue

next to V's body-they matched D's head and pubic hair. A shoe print was similar to design and size of D's. There was also testimony that blood on vase belonged to D.

In 2004, a DNA report showed the blood on the vase was not D's but was V's. Pursuant to 11 *Del.C.* §4504, D filed a motion for a new trial. He then filed a motion for default judgment as the State's response to the first motion was untimely. The court never made an inquiry or decision on the continuance request. On appeal, the Court held that the trial court was "empowered to prevent a miscarriage of justice and to avoid undoing a conviction that was lawfully obtained by denying D's motion." On the motion for a new trial, D argued "it is clear that the testimony at trial that the blood on the vase was of [Brookins'] blood type was clearly erroneous, no reasonable juror could have convicted him." The Court held that the trial court properly denied the motion as there was other reliable and credible evidence implicating D: microscopic hair analyses, shoeprint evidence and Co'd's testimony.