CRIMINAL LAW: 2009 DELAWARE SUPREME COURT DECISIONS

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The Delaware Supreme Court issued forty-nine criminal law opinions in 2009. The article summarizes opinions addressing certain recurring evidentiary issues, issues of significance or first impression, and termination of sex offender registration requirements.

I. TRIAL EVIDENCE DECISIONS

A. Admission of Background Information Relayed from Dispatcher to Police Officer Was Prejudicial and Violated Defendant's Sixth Amendment Rights—*Sanabria v. State*

In *Sanabria v. State*,[1] the defendant was convicted of Burglary in the Second Degree. On appeal, the court ruled that the investigating officer's testimony about background information he received from the police dispatcher about the home's alarm, which had been offered to explain the officer's actions at the scene, was unfairly prejudicial and violated the defendant's Sixth Amendment rights under the Confrontation Clause.[2]

At trial, the investigating police officer testified about background information he received from the police dispatcher. The dispatcher told him a neighbor saw a man walking to the back of a home, and also that an alarm service had reported an alarm going off in the home. The officer walked to the back of the house, saw pry marks on the door, but noted the door was locked and the marks could be old. The officer returned to the front of the house. While he checked the front door, which was locked, the dispatcher told him that the alarm service noted motion in the foyer. The officer returned to the back of the house, where the door was now open. The neighbor yelled, "There he is," and the officer saw a man run across a neighboring yard. The officer could not catch the man, whom he described as Hispanic, wearing a multi-colored shirt and distressed jeans, and carrying a cloth bag. Another witness confronted Sanabria a short time later when he walked through her yard, looked through his bag and saw clothes and a zip lock bag inside. She told him to leave and called police. Police caught Sanabria a short time later, and he had a striped shirt inside a black nylon bag. There were no items reported missing from the home in question although two items had been moved on the first floor.[3]

On appeal, Sanabria claimed error in the trial court's decision to admit the background information from the police dispatcher about the alarm.[4] The State had offered the dispatcher statements into evidence not for the truth of the matter asserted, but as background to explain the actions of the police officer at the scene. The court initially noted that background information can be necessary to provide the jury with a complete factual picture.[5] The court held that when

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1. 974 A.2d 107 (Del. 2009).

2. *Id.* at 109-10.

3. *Id.* at 110-11.

4. *Id.* at 111.

5. *Id.* at 112 (citing Johnson v. State, 587 A.2d 444 (Del. 1991) (*en banc*); New York v. Resek, 821 N.E.2d 108, 109-110 (N.Y. 2004)).

the State seeks admission of third-party out-of-court statements as background information, not for its truth, the trial court must consider if there is an alternative way to admit the evidence.[6] Relying on its prior decision in *Johnson v. State*,[7] the court held that the police officer should testify that he simply acted based "upon information received."[8] In instances where there is no alternative to admitting the background information, it nevertheless should not be admitted if probative value of the State's third-party evidence is substantially outweighed by the prejudice to the defendant.[9]

Applying the balancing test to Sanabria, the court noted that the State had presented no physical evidence that Sanabria had entered the house, other than the homeowner's statement that certain items had been moved. The court noted that the homeowner's statement was unlikely, standing alone, to be sufficient to prove that Sanabria entered the house. The court ruled that the dispatcher's statements relaying the alarm company information were inadmissible as that evidence was used to prove the element of "entering a dwelling" for a burglary charge.[10] The court noted, for future reference, that when the trial court does admit a third-party statement consisting of background information, there must be a limiting instruction advising the jury that the third-party statement is only admitted for the purpose of providing background information, and is not admitted for the truth of the statement.

The court also held that the admission of the background information violated the defendant's rights under the Confrontation Clause of the Sixth Amendment because neither the alarm company representative nor the dispatcher testified.[11] The court stated that there was not a clear line between true background information, which is non-hearsay and only explains the conduct of the police, and hearsay statements which are testimonial and prohibited under *Crawford v. Washington*[12] without the ability to cross-examine the out-of-court declarant.[13] The court declared that "an officer cannot relate historical aspects of the case, such as reports by others that contain inadmissible hearsay, by arguing that they are necessary to explain the information upon which the officers acted."[14] The court concluded that the admission of the evidence was not harmless as there was no other evidence at the trial proving that the defendant entered the house, and reversed the Superior Court's judgment.[15]

B. *In Camera* Review of Victim's Therapist Records—*Burns v. State*

In *Burns v. State*,[16] the defendant was convicted on multiple counts of Second Degree Rape, Second Degree Unlawful Sexual Contact, and a single count of Continuous Sexual Abuse of a Child. On appeal, Burns challenged several

6. *Sanabria*, 974 A.2d at 112.

7. Johnson v. State, 587 A.2d 444 (Del. 1991) (*en banc*).

8. *Sanabria*, 974 A.2d at 113-14 (citing *Johnson*, 587 A.2d at 448; United States v. Maher, 454 F.3d 13, 20 (1st Cir. 2006) (quoting 2 Broun, et al., McCormick on Evidence § 249, at 103 (5th ed. 1999)).

9. *Sanabria*, 974 A.2d at 113-14.

10. *Id.* at 115-16 (citing Del. Code Ann. tit. 11, § 825).

11. *Id*. at 120.

12. 541 U.S. 36 (2004).

13. *Sanabria*, 974 A.2d at 119 (citing United States v. Maher, 454 F.3d 13, 23 (1st Cir. 2006)).

14. *Id.* at 120.

15. *Id.* at 120-21.

16. 968 A.2d 1012 (Del. 2009).

of the trial court's rulings including the denial of access to the victims' therapist records. The court held that Burns was entitled to an *in camera* review of the therapist records of the two complaining witnesses upon a plausible showing that the records were material and relevant.[17]

The police charged Burns with a number of sexual abuse charges based on the statements given by his two nieces. Burns' presence at a 2006 family gathering prompted his fourteen-year-old niece to remember instances years before when the defendant inappropriately touched her. Days later, she asked her sister if Burns ever inappropriately touched her, and he had. Once the abuse was reported, the girls were interviewed at the Children's Advocacy Center ("CAC").

Prior to trial, Burns moved to compel the production of the girls' therapist records, pursuant to Superior Court Criminal Rule 17, or for an *in camera* review of the records. Burns claimed that the therapist records would be used to impeach the two victims regarding inconsistencies between their CAC interviews and trial testimony. The Superior Court denied the request, finding that that the potential inconsistencies were speculation, and citing patient-therapist privilege.[18]

On appeal, the Supreme Court reviewed Burns' right to the factual information in the therapist records in light of *Pennsylvania v. Ritchie*.[19] In *Ritchie*, the United States Supreme Court held that a defendant was entitled to an *in camera* review of state Children and Youth Services records of his daughter, the victim.[20] The Delaware Supreme Court noted that while the patient's communications with a therapist are privileged, the privilege is weighed against the defendant's Confrontation Clause right to potentially relevant evidence.[21] The court found that the reasoning of the *Ritchie* decision applied to requests by defendants for records even if not held by a state agency, and that Burns was entitled, upon a proper showing, to an *in camera* review.[22]

The court then determined the necessary showing for such a review. Under Superior Court Rule 17, a defendant is required to: (1) "identify precisely the records he or she is seeking, and assert a 'compelling basis' for the request;" (2) "attempt to procure the consent of the victim for release of the records, before resorting to Rule 17;" and (3) demonstrate to the court, "with specificity, that the information he or she is seeking is relevant and material to his defense."[23] The court ruled that, under the last prong, Burns only was required to make a "plausible showing" that the records are "material and relevant."[24] The court declared that a more onerous standard would make it impossible for the defendant "to establish materiality and relevance with specificity."[25] The trial court also would be required to guard against defense fishing expeditions and could impose sanctions for abuse of the Rule 17 subpoena process.[26] The court ruled that Burns had met

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17. *Id.* at 1025.

18. *Id.* at 1014-15, 1022-23.

19. 480 U.S. 39 (1987) (plurality opinion).

20. *Id.* at 55-61.

21. *Burns,* 968 A.2d at 1024 (citing United States v. Nixon, 418 U.S. 683, 702 (1974); State v. Wood, 2007 WL 441953, at *4 (Del. Super. Feb. 18, 2000); DEL. R. EVID. 503(b)).

22. *Burns*, 968 A.2d at 1024 n.41 (citing Commonwealth v. Barroso, 122 S.W.3d 554, 558-61 (Ky. 2003); State v. Green, 646 N.W.2d 298, 304 (Wis. 2002); Goldsmith v. State, 651 A.2d 866, 874-75 (Md. 1995); State v. Cressey, 628 A.2d 696, 703-04 (N.H. 1993); State v. Kelly, 545 A.2d 1048, 1056 (Conn. 1988)).

23. *Burns*, 968 A.2d at 1025 (citing *Wood*, 2007 WL 441953, at *5-6).

24. *Id*. at 1025.

25. *Id.*

26. *Id.* at 1025-26.

his burden, and remanded the issue to the trial court to conduct an *in camera* review to determine if the factual content of the victims' therapy records would have changed the outcome of the trial.[27]

C. Evidence of Lack of Intoxication of Decedents in Fatal Crash Admissible Where Defense Claimed Victims' Dangerous Conduct Caused Collision—*Stickel v. State*

In *Stickel v. State*,[28] Stickel struck and killed two motorcyclists, and was tried for DUI and two counts of Vehicular Homicide in the First Degree. The court held that the trial court properly admitted toxicology reports showing that victims were not intoxicated.[29]

To convict Stickel of first degree vehicular homicide, the State had to prove that: "(1) Stickel was driving under the influence of alcohol or drugs at the time of the accident and (2) his criminally negligent driving caused the decedents' deaths."[30] Stickel admitted to drinking before driving. His blood alcohol was .108.[31] At trial, Stickel attempted to raise doubt whether his conduct caused the victim's deaths by putting the victim's behavior into question as the cause.[32] The speed limit in the area of the collision was 45 mph. Witnesses testified that the decedents were traveling at speeds ranging from 45 mph to 65 to 70 mph. Witnesses also differed on whether the decedents had been drag racing prior to the fatal crash. The State introduced at trial the toxicology reports of both decedents, which showed the absence of any drugs or alcohol for both men. The defense objected to the admission of this evidence as irrelevant and lacking probative value. The trial court ruled that the toxicology reports were probative because the jury was going to focus on the conduct of the decedents before the collision.[33] Stickel was convicted of DUI and two counts of the lesser-included offenses of second degree vehicular homicide.

On appeal, the court found that the toxicology reports were admissible as relevant to an issue raised by Stickel, namely whether the decedents were speeding, drag racing, or otherwise driving their motorcycles in a dangerous manner. The toxicology reports provided evidence for the jury to weigh when considering whether the defendant's conduct or the acts of the decedents caused the accident. The court affirmed Stickel's convictions, holding that the Superior Court did not abuse its discretion in admitting the reports.[34]

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27. *Id.* (citing *Ritchie*, 480 U.S. at 58 (remand by the United States Supreme Court to trial court for *in camera* review of contested records)). In other evidentiary issues, the court ruled that it was not an abuse of discretion for the trial court to deny a mistrial after the victim's father had a courtroom outburst while testifying. *Id.* at 1017. The court also affirmed the trial court's denial of the defense request to admit the victims' CAC videotapes into evidence under Del. Code Ann. tit. 11, § 3507. *Id.* at 1021.

28. 975 A.2d 780 (Del. 2009).

29. *Id*. at 785.

30. *Id.* at 783.

31. *Id*. at 781.

32. *Id.* at 782-83. The trial judge had ruled that the toxicology reports "have probative worth under Rules 401 and 402" and "should be admitted"… "because they [the jury] are going to be focusing on the conduct of the [decedents] in this case…and their driving, their perceptions, their alertness." *Id.* at 782.

33. *Id.* at 781-82. At trial, three witnesses testified that they did not see the decedents engage in any racing. Two witnesses did testify that they overheard an unidentified man at the scene state that he observed the decedents drag racing and doing "wheelies." *Id*. at 781.

34. *Id*. at 785.

D. Prior Rape Conviction of Complaining Witness Was Relevant and Admissible for Defendant's Claim of Self-Defense—*Kelly v. State*

In *Kelly v. State*,[35] Kelly was convicted of Assault in a Detention Facility in connection with a fight with another inmate. The court held that evidence of the complaining witness's prior rape conviction was admissible and relevant to the defendant's defense that he committed the assault out of fear that he would be raped.[36]

Defendant Kelly was serving a sentence at DCC for attempted burglary. Kelly was housed in a cell next to an inmate, Veru, who was serving a life sentence for rape. Kelly claimed that, during a recreation period, a fight broke out in the shower area and Veru grabbed the defendant's genitals and would not let go. After this initial altercation, Veru went to his cell and obtained a lock which he hid in a sock. Veru went to Kelly's cell and swung the sock near Kelly. The fight then resumed and Kelly knocked Veru to the ground and kicked him while he was down, until guards separated the two inmates. Kelly suffered little or no injuries while Veru suffered fairly serious injuries.[37]

At trial Kelly testified that, for about two months prior to this incident, Veru had made sexual advances toward Kelly. Kelly testified that, during the incident, Veru stated, "I'm going to make you my bitch."[38] Kelly testified that he acted in self-defense when he struck Veru. In support of his defense, Kelly sought to offer the evidence of Veru's rape conviction. The trial court allowed the defense to admit Veru's prior felony convictions but not the description of the crimes.[39]

On appeal, the Supreme Court noted that the facts of the fight were largely undisputed, and the jury had to decide who the aggressor was, whether Kelly believed Veru would sexually threaten him, and whether Kelly used unreasonable force.[40] For Kelly to establish a defense of justification under Del. Code Ann. tit. 11, § 464, he had to show that he had a subjective belief that force was necessary.[41] The court reasoned that the defendant's knowledge or awareness of the victim's past acts of violence influenced the defendant's reasonable belief to use force. The court analyzed the Veru's prior conviction under *Getz*,[42] and determined that the trial court should have admitted the evidence of Veru's prior rape conviction. The court found that the seventeen-year-old rape conviction was not too remote because Veru had been incarcerated since the conviction. The evidence was material to the defense of self-defense and, while prejudicial, had significant probative value.[43] The court reversed the judgment and remanded the case for a new trial.[44]

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35. 981 A.2d 547 (Del. 2009).

36. *Id.* at 551.

37. *Id.* at 549.

38. *Id.*

39. *Id*.

40. *Id*. at 550.

41. *Id.* (quoting Del. Code Ann. tit. 11, § 464).

42. Getz v. State, 538 A.2d 726 (Del. 1988).

43. *Kelly*, 981 A.2d at 551.

44. *Id*.

E. D.R.E. 807 Residual Hearsay Exception—*Purnell v. State*

In *Purnell v. State*,[45] Purnell was convicted of Murder in the Second Degree, Attempted Robbery in the First Degree, Conspiracy in the Second Degree, and other firearm offenses. The court found no error in the trial court's exclusion of a prior statement by a deceased witness that was made under circumstances that did not contain guarantees of trustworthiness.[46]

Purnell's charges related to the fatal shooting of Tameka Giles. Two young men confronted Mrs. Giles and her husband, Ernest, on a Wilmington street, and demanded money. Mrs. Giles refused, and one of the men shot her in the back as she began to walk away.

Mr. Giles was hysterical when police interviewed him at the hospital.[47] In a second police interview a few days after the shooting, the police began to suspect Mr. Giles was involved in the murder. The police treated Mr. Giles as a person of interest. The police found that Mr. Giles had a history of domestic violence against his wife, had lied about his reason for being in the neighborhood at the time of the shooting, and had possibly stolen his wife's $1,700 tax refund check. Mr. Giles first told police that he would not be able to identify either of the suspects unless they were dressed in the same clothing the perpetrators wore. While waiting on a photo array, police observed Mr. Giles making a number of cell phone calls. Mr. Giles then reviewed a photo array, not containing Purnell's picture, and stated that two of the pictures taken together closely resembled the offenders.

In a third interview ten days later, Mr. Giles stated that he had only seen one shooter from the side, and that suspect was wearing a hat. When shown a lineup, Mr. Giles identified a suspect who was not the defendant. Police later received information that Purnell had made incriminating statements about his involvement in the shooting, and arrested Purnell.[48]

Mr. Giles died four months prior to trial. At trial, pursuant to Delaware Rule of Evidence 807 ("Rule 807"), Purnell tried unsuccessfully to admit Mr. Giles' hearsay statements, in which he failed to identify Purnell as a suspect in the photo array. The trial court ruled that the statements did not possess sufficient guarantees of trustworthiness to be admissible under Rule 807, and excluded the statements.[49]

On appeal, the court reviewed the trial court's evidentiary ruling under Rule 807.[50] The court noted that Rule 807 must be narrowly construed by the trial judge so that the hearsay exception does not swallow the hearsay rule.[51] The

45. 979 A.2d 1102 (Del. 2009).

46. *Id*. at 1107-08.

47. *Id.* at 1103-04.

48. *Id.* at 1104-05.

49. *Id.* at 1106.

50. The residual hearsay exception in Del. R. Evid. 807 provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule, if the court determines that: (A) The statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence….

Del. R. Evid. 807.

51. *Id.* at 1107 (citing Cabrera v. State, 840 A.2d 1256, 1268 (Del. 2004) (citing Brown v. Liberty Mut. Ins. Co., 774 A.2d 232, 242 (Del. 2001))).

court held that, to admit evidence under Rule 807, "[t]he Court must be satisfied that there is a guaranty of trustworthiness associated with the proffered hearsay statement that is equivalent to the guaranties of trustworthiness recognized and implicit in the other hearsay exceptions."[52]

The court observed that Mr. Giles' statements were made several days after the event and after he had formed a motive to lie. Mr. Giles originally told the police he could not see the suspects, and then, after he became a person of interest, changed his version and purportedly identified one of the attackers.[53] The court found that there were no circumstantial guarantees of reliability implicit under Delaware Rules of Evidence 803 and 804 to support admission of Mr. Giles' statements.[54] Purnell claimed that Mr. Giles' hearsay statements were admissible because the police used Mr. Giles' tentative identification to obtain a search warrant related to the suspect Mr. Giles had identified.[55] The court rejected this argument noting that the standard for the issuance of a search warrant is less than the standard for the admission of evidence at trial.[56] The court concluded that the trial judge's ruling denying admission of the hearsay statements under Rule 807 was supported by the record.[57]

Purnell also claimed that the trial court improperly denied a mistrial when one of the jurors advised the panel that he was leaving for vacation the following day, and the panel believed that the case would end with a hung jury if they did not reach a verdict that day. Upon learning this, the trial court reminded the jurors of their oath, that only the judge could declare a mistrial, and instructed the jury to consider only the evidence and not the one juror's vacation plans. The jury returned a verdict later that day.[58] The court found no evidence in the record that the trial court's instruction was inherently coercive.[59] The trial court did not require the jury return a verdict by a specific time or day. The court concluded that the trial court had issued a prompt instruction that was a "meaningful and practical alternative to a mistrial."[60]

F. Causal Connection Requirement under Felony Murder Statute—*Comer v. State*

In *Comer v. State*,[61] Comer was charged with the death of Bakeem Mitchell, an innocent bystander killed by a ricocheted bullet in a shootout involving Comer and co-defendants Derrick Williams, Clifford Reeves, and Frank

52. *Id.* (quoting Stigliano v. Anchor Packing Co., C.A. No. 05C-06-263-ASB, 2006 WL 3026168, at *1 (Del. Super. Oct. 18, 2006) (citing Idaho v. Wright, 497 U.S. 805, 816 (1990)); *accord* Demby v. State, 695 A.2d 1152, 1156-57 (Del. 1997).

53. *Id.*

54. *Id*.

55. *Id*. at 1107-08.

56. *Id.* at 1108 (citing State v. Sisson, 883 A.2d 868, 876 (Del. Super. 2005) (affidavit for probable cause must set forth sufficient facts "for a judicial officer to form a reasonable belief that an offense has been committed and that seizable property would be found in a particular place to support a finding of probable cause"); DEL. CODE ANN. tit. 11, §§ 2306-07).

57. *Purnell*, 979 A.2d at 1108.

58. *Id.*

59. *Id.* at 1109 (citing Styler v. State, 417 A.2d 948 (Del. 1980)).

60. *Purnell*, 979 A.2d at 1109.

61. 977 A.2d 334 (Del. 2009).

Johnson. The court reversed Comer's conviction, holding that the jury instructions were deficient because they permitted the defendant to be convicted of felony murder without proof that he or one of his co-defendants fired the fatal shot.[62]

At trial, the evidence conflicted regarding who fired the fatal shot. At the time the victim was shot, witnesses observed Comer and co-defendants Reeves and Williams shooting at Johnson as Johnson drove his car the wrong way on Fifth Street. One witness testified that Comer ran and shot at Johnson's car as it passed. Other evidence indicated that Johnson shot at the defendants or shot Mitchell as part of a drive-by shooting. Comer's defense at trial was that there were two separate incidents on the street at the time of the shooting. Comer contended that he was involved only in shooting at Johnson's car, and that Johnson shot the victim. Comer was convicted on all charges except for one weapon offense.[63]

On appeal, Comer asserted that the trial court committed error when it charged the jury that it could convict Comer of murder even if it did not find that Comer or one of his co-conspirators fired the bullet that killed the victim.[64] The court traced the history of the felony murder statute and the prior decisions interpreting the statute. In *Weick v. State*,[65] the court held that the felony murder rule required "a causal connection between the felony and the murder," and "that the killing be performed by the felon, his accomplices, or one associated with the felon in his unlawful enterprise."[66] The court noted that the "agency theory" is still the rule under the Delaware felony murder statute, even after the statute was amended in 2004.[67] Prior to 2004, the court had adopted the majority rule that more than mere coincidence of homicide and felony was necessary; the homicide must be committed "in the course of and in furtherance" of the felony.[68] The court examined the 2004 amendment to the felony murder statute and determined that it did not eliminate the agency theory. While the 2004 amendment did remove the phrase "in the course of and in furtherance of" from the statute, the court found the synopsis of the bill did not address the *Weick* dual limitations of causation and agency.[69]

The court concluded that the jury instruction was incorrect because it allowed the jury to convict Comer on the felony murder count based only on his participation in the gun battle, without a determination whether any of the defendants fired the fatal shot. The trial court's instruction was contrary to the agency theory of felony murder which required the State to prove that the act of firing the fatal shot was committed by either the defendant or one with whom he acted in concert. The court ruled there was sufficient evidence to convict Comer of manslaughter, and the State could elect to retry Comer for felony murder or accept entry of judgment of a conviction on manslaughter.[70]

II. TERMINATION OF SEX OFFENDER REGISTRATION REQUIREMENTS

In two cases, *Heath v. State*,[71] and *State v. Fletcher*,[72] the court addressed the effect of a pardon and expungement on a party's sex offender registration obligations. In *Fletcher*, the court ruled as a matter of first impression that a

62. *Id.* at 343.

63. *Id.* at 336-37.

64. *Id.* at 337.

65. 420 A.2d 159, 162 (Del. 1980).

66. *Id.*

67 *Id*.

68. *Comer*, 977 A.2d at 338-39 (citing *Weick*, 420 A.2d at 162; Pennsylvania v. Redline, 137 A.2d 472, 476 (Pa. 1958)).

69. *Comer*, 977 A.2d at 340.

70. *Id.* at 343.

71. 983 A.2d 77 (Del. 2009).

72. 974 A.2d 188 (Del. 2009).

sentenced juvenile's status as a registered sex offender did not bar expungement by the Family Court and that a juvenile with an expunged record was no longer required to continue to register as a sex offender.[73] In *Heath*, another case of first impression, the court ruled that a defendant's unconditional pardon permitted Heath to deregister as a sex offender.[74]

In *Fletcher*, the court considered consolidated appeals by the State from Family Court orders granting expungements to juveniles who had been adjudicated delinquent of sex offenses. The State's argued that the juvenile's designation as registered sex offenders was a "material objection" under DEL. CODE ANN. tit. 10, § 1001(a), which prevented their adjudications from being expunged.[75] In reviewing the expungement statute,[76] the court found no definition for the term "material objection" sufficient to prevent an expungement application.[77] The court found that the expungement statute was not irreconcilably in conflict with the Sex Offender Designation and Registration Statutes.[78] The court noted that the expungement statute does not contain any language prohibiting application by sex offenders.[79] There is also no provision under the Sex offender registration statutes that limits the discretion of the Family Court to grant expungements for sex offenders.[80] The court declared that the two statutes were "easily harmonized" as a juvenile adjudicated delinquent of a sex offense will be required to register and be designated as a sex offender but he or she may, in the appropriate circumstances, obtain expungement of "all evidence of such adjudication."[81] The court noted that the purpose of the juvenile expungement statute had not changed in Delaware for over fifty years: "[t]he underlying purpose of allowing expungement is to afford a juvenile the opportunity of starting [] life 'anew' once having reached the age of majority and otherwise having come within the compliance requirements of the [expungement] statute."[82] The court also ruled that a juvenile who obtains an

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73. *Id.* at 194-96.

74. *Heath*, 983 A.2d at 82.

75. *Fletcher,* 974 A.2d at 192.

76. DEL. CODE ANN. tit. 10, § 1001(a)(c).

77. *Id.* at 193. The court cited the expungement statute which provides in part:

> (a) In any case wherein an adjudication has been entered upon the status of a child under 18 years of age and 3 years have elapsed since the date thereof and no subsequent adjudication has been entered against such child , the child or the parent or guardian may present a duly verified petition to the Court setting forth all the facts in the matter and praying for the relief provided for in this section; …
>
> (c) …if no material objection is made and no reason appears to the contrary, an order may be granted directing the Clerk of the Court to expunge from the records all evidence of such adjudication, excepting adjudications involving the following crimes: Second degree murder, first degree arson, and first degree burglary, and further directing that all indicia of arrest, including fingerprints and photographs, be destroyed.

DEL. CODE ANN. tit. 10, §§ 1001(a) and (c).

78. 974 A.2d at 193-94.

79. *Id*. at 194.

80. *Id.*

81. *Id*. at 193-94 (citing DEL. CODE ANN. tit. 10, § 1001(c); DEL. CODE ANN. tit. 11, §§ 4120-21).

82. *Fletcher*, 974 A.2d at 194 (quoting Martin v. State, 1986 Del. Fam. Ct. LEXIS 199, *3 (Del. Fam. Ct.)).

expungement order is not required to maintain registration as a sex offender.[83] The court stated that an expungement by definition lifts the disabilities of the conviction and erases the legal event of conviction or adjudication.[84]

In *Heath*, the defendant had pled guilty to a charge of Unlawful Sexual Contact in the Second Degree in 2000, and was obligated to register as a Tier II sex offender. Heath filed a petition for a pardon with the Delaware Board of Pardons, and the State did not object to the petition. The Governor granted an unconditional pardon. Heath then filed a petition in Superior Court requesting that he be dismissed from further sex offender registration requirements. The Superior Court denied his petition.[85]

On appeal, the court first noted that the Board of Pardons had determined that Heath did not pose a threat to the public and had recommended an unconditional pardon. The Governor chose to grant Heath an unconditional pardon.[86] Both parties had agreed that the continued registration created a civil disability for the petitioner that was equivalent to the restriction of a civil right. The court ruled that the unconditional pardon extinguished the underlying purpose for the petitioner's continued sex offender registration.[87] To the extent there was any conflict between the Governor's right to pardon and the sex offender registration requirements, the court, relying on its decision in *Fletcher*, found that the General Assembly did not intend the registration statute to supersede the pardon power of the Governor to grant unconditional pardons.[88]

III. OTHER SIGNIFICANT CASES

A. Right of Defendant to Contest Issue of Guilt under Sixth Amendment—*Cooke v. State*

In *Cooke v. State*,[89] the court held that the strategy of defense counsel, in arguing for a guilty but mentally ill verdict at trial when the defendant expressly opposed the strategy and claimed he was innocent of all charges, violated the proper functioning of the adversarial process and the defendant's rights under the Sixth Amendment and Due Process Clause.[90]

Cooke appealed from his conviction on eleven charges including rape in the first degree, burglary in the first degree, arson in the first degree, and two counts of murder in the first degree for which he was sentenced to death. The

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83. *Id.* at 196-97.

84. *Id.* at 196 (citing People v. Frawley, 98 Cal. Rptr. 2d 555, 559 (Cal. Ct. App. 2000); Stephens v. Van Arsdale, 608 P.2d 972, 983-84 (Kan. 1980)).

85. *Heath*, 983 A.2d at 79.

86. *Id*. at 80 (citing DEL. CONST. ART. VII, § 1, 2 (provision for the power of the Governor to grant pardons)).

87. *Id.* at 81.

88. *Id.* at 82 (quoting DEL. CODE ANN. tit. 11, § 4364 ("…except as otherwise provided by the Delaware Constitution, or expressly by any provision of the Delaware Code or any court rule, the granting of an unconditional pardon by the Governor shall have the effect of fully restoring all civil rights to the person pardoned.")).

89. 977 A.2d 803 (Del. 2009).

90. *Id*. at 845-47.

offenses were the result of a series of crimes that occurred in Newark in 2005. On April 26, 2005, a victim entered her apartment to find red writing on her walls stating "We'll be back" and "Stop messing with my men."[91] The victim provided police with a list of various items stolen from the apartment. On April 29, 2005, a second victim was awakened by a person in her bedroom shining a light. The man threatened to kill her and demanded money. The suspect obtained money and a credit card from the victim and various personal items including an iPod, and backpack. On May 1, 2005, Lindsey Bonistall, a twenty year University of Delaware student was present in her apartment when an intruder forcibly entered the premises. The intruder eventually attacked the victim by striking her on the head at least twice above her left eye and on her chin. The intruder then tied Bonistall's hands behind her back and gagged her by tying t-shirts around her mouth. The intruder then raped and murdered the helpless victim. He later started a fire in an attempt to conceal his crimes. The intruder also wrote on the walls of the apartment in blue marker with statements including "KKK," "More Bodies Are going to be turn in [sic] up Dead," "We Want Are [sic] weed back," "Give us Are [sic] drugs back" and "WHITE Power."[92]

The police investigation quickly led to Cooke based in part on recovery of the stolen backpack and iPod at Cooke's residence and an identification of Cooke on a bank surveillance tape using the second victim's credit card. Cooke also made three phone calls to the Newark 911 center in which he used a false name and tried to disguise his voice. During these calls, Cooke provided details of the crimes that were not publicly known. The police also obtained scrapings from the fingernails of Bonistall which contained the victim's and Cooke's DNA. Cooke was subsequently arrested on June 8, 2005, on the crimes perpetrated against the three victims. Cooke was then indicted by the grand jury on the charges including two counts of murder in the first degree and the State sought the death penalty on each murder charge.[93]

Within three months of Cooke's arrest, his defense counsel began to consider a defense of guilty but mentally ill. In October, 2006, defense counsel provided Cooke with a memorandum detailing that counsel and not the defendant would decide whether to pursue the guilty but mentally ill verdict. In a January 19, 2007 pretrial conference, defense counsel first informed the trial judge that the defendant did not agree with their strategy to seek a guilty but mentally ill verdict. Cooke wished to maintain his innocence on all charges. Cooke had also disclosed his disagreement with his attorneys during interviews with psychiatrists. During an interview with Dr. Turner, Cooke had admitted and denied the crimes, and also discussed his opposition to counsel's intent to proceed with a guilty but mentally ill defense. Defense counsel also informed the trial judge of their disagreement with Cooke the day before jury selection.[94]

During jury selection, the State moved to preclude defense counsel from arguing for a guilty but mentally ill verdict. During argument on this motion, Cooke stated that he needed to speak to the trial judge, but no discussion took place with the defendant at that time. The State's motion was denied by the trial court and the State later unsuccessfully petitioned for a writ of mandamus from the Supreme Court for review of that decision. The trial proceeded while the State's petition was before the Supreme Court.[95]

During the first day of trial, after the State's opening statement, defense counsel advised the trial court that the defendant was agitated and had wanted to address the trial judge. Defense counsel then presented an opening statement

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91. *Id.* at 810.

92. *Id*. at 808-11.

93. *Id*. at 811-12.

94. *Id*. at 812-15.

95. *Id*. at 816-18.

that sought a guilty but mentally ill verdict. The trial court then adjourned to another courtroom and allowed Cooke to speak. Cooke raised concerns that his attorneys would not ask the necessary questions of witnesses. Cooke also objected to his attorneys' decision to pursue a guilty but mentally ill verdict.[96]

The disagreement between Cooke and his counsel over the guilty but mentally ill strategy eventually led to a series of outbursts by Cooke during the trial, some in the presence of only the trial judge and some in the presence of the trial judge and jury. On February 6, 2007, Cooke was removed from the courtroom at the request of his counsel after a series of outbursts. After an outburst in front of the jury on February 15, 2007, Cooke was again removed from the courtroom and defense counsel moved for a mistrial. Defense sought a mistrial because Cooke had mentioned his disagreement with counsel regarding the guilty but mentally ill issue. The trial court denied the mistrial motion after finding that any prejudice from Cooke's conduct was "self-created."[97]

During the defense case, Cooke continued to tell the trial court about his disagreement with the defense counsel strategy. During the testimony of Cooke's brother, the State elicited testimony about Cooke's history as a drug dealer and a prior drug conviction in New Jersey. This testimony led to another outburst by Cooke about his counsel's guilty but mentally ill defense. Cooke was physically restrained in front of the jury and was removed from the courtroom. Defense counsel also called Dr. Alvin Turner as a witness who testified in part that Cooke had told him that he murdered Bonistall. Cooke advised the trial court that he wished to testify in his defense, against the advice and wishes of defense counsel. Defense counsel obtained leave from the trial judge to allow Cook to be seated during his testimony and to simply testify in narrative form without being questioned on direct examination. Cooke began his testimony protesting his attorneys' decision to pursue a guilty but mentally ill verdict. Cooke denied he was guilty of the offenses and denied that he was mentally ill. Cooke also expressed his displeasure with the rulings of the trial judge. Cooke further advised the jury that his legs were shackled while testifying.[98]

In rebuttal, the State presented evidence from Dr. Mechanick about the defendant's mental state and about home invasions committed by the defendant in New Jersey. Cooke was then allowed to testify a second time in response to the rebuttal evidence. Cooke began to testify about details of the New Jersey crimes that were not in evidence, contrary to the instructions of the trial judge, and was removed from the courtroom. The trial judge ruled that, because of his conduct, Cooke would not be permitted back in the courtroom for the remainder of the trial and would have to watch the proceedings from a television in the holding cell.[99]

During closing arguments, defense counsel argued that Cooke was mentally ill and requested a guilty but mentally ill verdict. Defense counsel also argued that Cooke's disagreement with his attorneys' strategy was evidence of his mental illness. The jury returned guilty verdicts against Cooke on all charges. In the penalty phase, defense counsel argued that Cooke's mental state was a mitigating circumstance, as well as a traumatic childhood, learning disabilities, and the impact of a death sentence on Cooke's family. The jury voted unanimously to recommend death, and the trial court later issued its decision agreeing with the jury's recommendation.[100]

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96. *Id*. at 818-21.

97. *Id.* at 821-27.

98. *Id*. at 828-35.

99. *Id*. at 836-38.

100. *Id*. at 839-40.

On appeal, the Supreme Court ruled that the decision of Cooke's trial counsel to pursue a guilty but mentally ill verdict violated Cooke's Sixth Amendment rights.[101] The court described the duty of defense counsel to "assist the defendant," and noted counsel's duty of loyalty and duty to avoid conflicts of interest.[102] The court stated that the defendant has the "ultimate authority" to make the fundamental decisions in his case which include the right to plead guilty, waive a jury, testify at trial, and appeal.[103] These fundamental decisions require the defense counsel to consult with the defendant and obtain his fully-informed and publicly-acknowledged consent.[104] The court found that defense counsel, by pursuing a guilty but mentally ill defense against the clear wishes of the client, deprived Cooke of his right to make the fundamental decisions about his case.[105]

The court declared that defense counsel had infringed Cooke's right to plead not guilty at his trial.[106] Cooke was competent to stand trial and chose to plead not guilty and contest his innocence at trial.[107] The court ruled that defense counsel overruled Cooke's right to plead not guilty by arguing that Cooke was guilty but mentally ill.[108] According to the court, the effect of counsels' decision was to deny Cooke assistance of counsel to pursue a not guilty verdict, and also, denied Cooke the right to require the State to prove its case beyond a reasonable doubt and the right to adversarial testing of the State's case.[109]

The court also ruled that defense counsel had negated Cooke's decision to testify in his own defense.[110] Although Cooke wanted to testify at trial, his counsel declined to call him as a witness. The trial judge called Cooke as a witness and he denied committing the charged offenses.[111] The court found defense counsel violated the defendant's right to testify at trial about his innocence when counsel introduced a confession that Cooke made to a doctor without obtaining a waiver of the psychotherapist-patient privilege.[112] Defense counsel also tried unsuccessfully, due to the religious privilege, to obtain testimony from Cooke's pastor about whether Cooke had admitted to the crimes.[113]

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101. *Id*. at 841.

102. *Id.* (citing Strickland v. Washington, 466 U.S. 668, 688 (1984); Faretta v. California, 422 U.S. 806, 820 (1975); Del. Lawyers' Rules of Prof'l Conduct R. 1.4(a)(1); Restatement (Third) of the Law Governing Lawyers 16 cmt. c (2000)).

103. *Cooke*, 977 A.2d at 841 (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)).

104. *Id.* at 842 (citing Florida v. Nixon, 543 U.S. 175, 187 (2004)).

105. *Id*. at 842.

106. *Id*. at 842-43.

107. *Id*. at 842.

108. *Id.* at 842-43.

109. *Id*. at 842.

110. *Id.* at 843-44.

111. *Id.* at 844.

112. *Id*. (citing Del. R. Evid. 503).

113. *Id*. (citing Del. R. Evid. 505).

The court next ruled that the decisions of defense counsel deprived Cooke of the right to an impartial jury.[114] The court noted that defense counsel chose a strategy which was in direct conflict with the decision of Cooke and led to frequent, predicted outbursts by the defendant in front of the jury.[115] The court also concluded that Cooke's jury trial right was compromised by defense counsel asking that he be removed from the courtroom, including portions of the trial addressing the guilty but mentally ill testimony.[116] The decision of defense counsel also affected the impartiality of the jury at the penalty phase since Cooke's convictions at the trial established a statutory aggravating circumstance as a matter of law.[117]

The court noted that the United States Supreme Court's decision in *Florida v. Nixon*,[118] did not apply as Cooke had adamantly opposed his counsel's choice to pursue a guilty but mentally ill defense.[119] In *Nixon*, the United State Supreme Court held that if a defendant is advised by counsel of a trial strategy and does not give "express consent," prejudice to the defendant is not presumed.[120] The *Nixon* Court ruled that "'[t]he reasonableness of counsel's performance, after consultation with the defendant yields no response, must be judged in accord with the inquiry applicable to ineffective-assistance of counsel claims,' that is, whether counsel's representation 'fell below an objective standard of reasonableness.'"[121] Unlike the defendant in *Nixon* who did not respond to counsel's decision to concede guilt at the trial stage of a capital case, Cooke repeatedly advised his attorneys of his complete disagreement with the strategy of pursuing a guilty but mentally ill defense.[122]

The court next addressed Cooke's ineffective assistance of counsel claims on direct appeal since the actions of trial counsel were not in dispute and were clearly set forth in the trial record.[123] The court ruled that the typical ineffective assistance of counsel claim would be analyzed under the two-pronged test in *Strickland v. Washington*.[124] However, the court relied on *United States v. Cronic*,[125] a companion case to *Strickland*.[126] In *Cronic*, the United States Supreme Court ruled that a defendant did not need to prove prejudice under the *Strickland* test, as prejudice is presumed "where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."[127] Applying *Cronic*, the *Cooke* court found

114. *Id*. at 845-46.

115. *Id.* at 845.

116. *Id.*

117. *Id*. at 846.

118. 543 U.S. 175 (2004).

119. *Cooke,* 977 A.2d at 847.

120. *Id*. at 846 (quoting *Nixon,* 543 U.S. at 179).

121. *Id.* at 846-47 (quoting *Nixon*, 543 U.S. at 178).

122. *Id.* at 847.

123. *Id.* at 848.

124. 466 U.S. 668 (1984).

125. 466 U.S. 648 (1984).

126. *Cooke,* 977 A.2d at 848.

127. *Id*. at 848 (quoting *Cronic*, 466 U.S. at 659-62).

a "two-fold breakdown in the adversarial system of justice" at Cooke's trial.[128] First, the court noted that defense counsel did not assist Cooke with his contention that he was innocent of all charges.[129] Second, the court ruled that trial counsel, by pursuing an inconsistent strategy of guilty but mentally ill, "failed to subject the prosecution's case to meaningful adversarial testing" and undermined the "requirement that the State prove Cooke's guilt — and his eligibility for the death penalty — beyond a reasonable doubt."[130] The court concluded that the conduct of Cooke's defense counsel was "inherently prejudicial, and [did] not require a separate showing of prejudice because Cooke's counsel negated his basic trial rights."[131]

The court also ruled that the trial court had an obligation to inquire into the propriety of representation provided to Cooke by his counsel.[132] The court noted that "[w]hen defense counsel decides to concede not only guilt, but also eligibility for the death penalty over the defendant's express objection, the trial judge has an obligation to inquire into the propriety of counsel's representation."[133] The court reversed the judgment of the Superior Court and remanded for a new trial.[134]

In a dissenting opinion, Chief Justice Steele and Justice Jacobs expressed fundamental disagreement with the majority's analysis that the ineffective assistance of counsel claim should be governed by *Cronic* and not *Strickland*.[135] The dissent stated that Cooke's defense counsel pursued an appropriate trial strategy that upheld all of Cooke's fundamental trial rights.[136] The dissent concluded that under *Strickland*, the conduct of the defense counsel complied with the Sixth Amendment right to effective assistance of counsel.[137] The dissent noted that in *Florida v. Nixon*,[138] the United States Supreme Court applied *Strickland*, not *Cronic*, to a review of defense counsel's failure to obtain express consent from the

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128. *Id.* at 849.

129. *Id*. at 849-50.

130. *Id.* at 850.

131. *Id*.

132. *Id*. at 850-52.

133. *Id.* at 852.

134. *Id*. at 857. In a separate issue, the court found no error in the trial court's denial of a motion to suppress evidence seized by police during a search of Cooke's residence. After Cooke had been identified as a suspect in the Bonistall murder, the police obtained a search warrant for Cooke's residence. Cooke was also wanted on an outstanding arrest warrant. The search warrant authorized a search for all paperwork and information, electronic or otherwise, that would indicate Cooke's whereabouts. During the search, the police identified several items of evidentiary value but outside the scope of the search warrant. Cooke's girlfriend who also lived at the property was present for the search, and later accompanied the detective to the police station for questioning. She subsequently returned with the police to the residence and consented to the police taking the additional items. Those items included a pair of shoes, a composition book, a cassette tape, three disposable cameras, a Nokia cell phone, and a bicycle. The record supported the finding of the trial court that the police obtained voluntary consent from Cooke's girlfriend for the search and seizure of the challenged items.

Id. at 853-57.

135. *Id*. at 857-58.

136. *Id*. at 858.

137. *Id.*

138. 543 U.S. 175 (2004).

defendant for a trial strategy.[139] In the dissent's view, the rule in *Cronic* was limited to cases "where counsel does nothing or next to nothing to discharge his duty to present a vigorous defense."[140] The dissent also concluded that trial counsel in Cooke's case satisfied the Sixth Amendment by conceding guilt as a trial tactic in the guilt phase to avoid increasing the chances of the death penalty at the penalty phase.[141]

B. Right to Missing Witness Instruction—*Hardwick v. State*

In *Hardwick v. State*,[142] Hardwick was tried on 36 counts of Rape in the First Degree, two counts of Attempted Rape in the Second Degree, and two counts of Continuous Sexual Abuse of a Child, arising from charges that he had sexual relations with his minor stepdaughter and her friend. The court held that the defense was not entitled to a missing witness instruction when State did not call the defendant's nephew as a witness and where the witness was out of state and not helpful to the prosecution's case.[143]

In 2004, Hardwick married, and moved in with his wife and her daughter. Hardwick's adult nephew sometimes stayed at the house as well. The State alleged that the defendant engaged in sex acts with the two girls in the home, when the girls were twelve and thirteen years old. There was inconsistent testimony about whether the defendant also sometimes engaged in group sex. Some of these encounters were alleged to have included the defendant's nephew.[144] In his police interview, the nephew denied that either he or Hardwick engaged in any sex acts.[145]

At trial, the defense subpoenaed Hardwick's nephew to testify, but did not do so pursuant to Del. Code Ann. tit. 11, § 3523, which pertains to out-of-state witnesses. The State had not yet determined if it would charge the nephew with any sex offenses.[146] The nephew did not appear, and the Superior Court denied Hardwick's request for a missing witness instruction.[147] Hardwick was convicted on 29 counts of rape and two counts of attempted rape.[148]

On appeal, Hardwick claimed that the missing witness instruction would have permitted him to argue that his nephew's testimony would be unfavorable to the State.[149] The court stated that "'[a] missing witness inference is permissible

139. *Cooke,* 977 A.2d at 859.

140. *Id*. at 860 (citing *Nixon*, 543 U.S. at 189; Bell v. Cone, 535 U.S. 685 (2002)).

141. *Cooke,* 977 A.2d at 860-64.

142. 971 A.2d 130 (Del. 2009).

143. *Id*. at 134-35.

144. *Id.* at 131-32.

145. *Id*. at 132.

146. *Id*.

147. *Id*. at 132-33. Although the State had not charged the nephew, the trial court appointed counsel to represent him. In denying the request for a missing witness instruction, the trial judge noted concerns about the witness' Fifth Amendment rights, possible jury speculation, and the Rule 403 balancing test. *Id*. at 132.

148. *Id*. at 133.

149. *Id*. The defendant asserted that the trial judge had violated his rights to a fair trial and to effective representation as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, and the Delaware Constitution, Article I, § 7. *Id*. The Supreme Court found that Hardwick's assertion of constitutional error was made in a cursory and unsupported manner and the claims were not fully and fairly presented. *Id*. (citing Ortiz v. State, 869 A.2d 285, 290-91 (Del. 2005)).

only where it would be "natural" for the party to produce the witness if his testimony would be favorable.'"[150] According to the court, it would not be natural for the State to call the defendant's nephew since his testimony would only highlight inconsistencies in the testimony of other State witnesses. The nephew's identity was equally known to both parties and the State, like the defense, would have needed to compel his appearance under the out of state witness procedures under DEL. CODE ANN. tit. 11, § 3523. Since it was not natural for the State to call this witness, the jury would not have improperly speculated about his failure to testify; therefore, the Superior Court did not abuse its discretion in denying Hardwick's request for a missing witness instruction, or in denying Hardwick's request to make a related argument to the jury.[151]

C. Sufficient Evidence for Maintaining a Vehicle Charge—*Brown v. State*

In *Brown v. State*,[152] the court held that the defendant could not be convicted of Maintaining a Vehicle for Keeping Controlled Substances, when there was no evidence of "affirmative activity" to utilize the vehicle in which he was traveling as a passenger.[153]

Brown was a passenger in a vehicle that had been stopped by members of the Governor's Task Force because one of the car's headlights was out. The car was operated by Curtis Boswell, who possessed $1,017 in cash and was subsequently arrested for traffic and non-drug offenses. The front seat passenger was detained on a non-drug warrant from another state. Brown, who had been seated in the rear of the car, was patted down and found in possession of twenty-two bags of marijuana. At trial, Brown was convicted of Possession with Intent to Deliver Marijuana and Maintaining a Vehicle for Keeping a Controlled Substance.[154]

Brown appealed the Superior Court's denial of his motion for judgment of acquittal for Maintaining a Vehicle for Keeping a Controlled Substance. The Supreme Court reviewed the evidence against Brown in comparison to the earlier decision in *Priest v. State*.[155] In *Priest*, the court vacated Priest's Maintaining a Vehicle conviction based on a passenger's mere presence in a vehicle.[156] The court noted that *Priest* requires that the State prove "some affirmative activity … to utilize the vehicle to facilitate the possession, delivery, or use" of the controlled substance.[157] The Supreme Court found that the trial judge erred by distinguishing *Priest*.[158] The court noted that the Maintaining a Vehicle charge requires "more than

150. *Id.* at 133 (quoting Wheatley v. State, 465 A.2d 1110, 1111 (Del. 1983)). The court noted that "the missing witness inference is rooted in notions of common sense, specifically that where a party fails to call an available witness with important and relevant knowledge, it may be that he has something to fear in the witnesses' testimony." *Id.* (quoting *Wheatley*, 465 A.2d at 1111).

151. *Id.* at 134-35.

152. 967 A.2d 1250 (Del. 2009).

153. *Id.* at 1254-55.

154. *Id.* at 1251-52. The officers who stopped the vehicle were part of "Operation Safe Streets" which is a statewide program manned by police and probation officers to apprehend non-compliant probationers. *Id.* at 1251 n.1 (citing Carrigan v. State, 945 A.2d 1073, 1077 n.13 (Del. 2008)).

155. 879 A.2d 575 (Del. 2005).

156. *Id*. at 576.

157. *Id*.

158. *Brown*, 967 A.2d at 1255.

merely proving that a defendant possessed or used a controlled substance while in a vehicle."[159] A review of the record did not show that Brown had exercised any control over the vehicle in order to establish the element of "keep or maintain" the vehicle. Brown was a passenger in the car who possessed marijuana but there was no evidence that he acted in concert with the driver of the car. The driver of the car was not charged with any drug offenses. There was also no evidence that Brown ever exercised any control over the operation of the car or directed its operation. The court held that the Superior Court erred as a matter of law in denying the judgment of acquittal on the Maintaining a Vehicle charge.[160]

The court also addressed the claim regarding the sufficiency of the trial court's instruction on Maintaining a Motor Vehicle offense.[161] The State had indicted Brown on the charge of "Use of a Vehicle for Keeping Controlled Substances."[162] The trial judge instructed the jury that "a person is guilty of Maintaining a Vehicle when he knowingly keeps, uses, or maintains any vehicle which is resorted to by persons using, keeping or delivering controlled substances … or which is used for keeping or delivering controlled substances."[163]

The Supreme Court found the instruction was not a correct statement of the law as the statute requires that a person "must keep or maintain a vehicle for the use of controlled substances or for the purpose of keeping or delivering controlled substances."[164] The trial court's instruction allowed for conviction based on mere use of the vehicle, which is a lower standard than keeping or maintaining a vehicle.[165]

D. Sufficiency of Evidence to Support Carrying a Concealed Deadly Weapon and Felony Resisting Arrest—*Dickerson v. State*

In *Dickerson v. State*,[166] the court affirmed the defendant's convictions of Carrying a Concealed Deadly Weapon on his own property, and for felony Resisting Arrest based on the defendant's use of force in resisting handcuffing by the arresting trooper.[167]

The police received a report from Dickerson's next door neighbor that the defendant had brandished a firearm at him in connection with an ongoing dispute. The responding trooper interviewed the neighbor, and then walked down a

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159. *Id.* at 1254. The court noted that *Priest* did permit the State to convict on a Maintaining a Vehicle charge based on a single instance of possession or use of a controlled substance. However, the court emphasized that the State was required to prove more than the defendant's mere possession of drugs in a vehicle. *Id*. at 1254 (citing *Priest*, 879 A.2d at 579; DEL. CODE ANN. tit. 16, § 4755(a)(5)).

160. *Brown,* 967 A.2d at 1255.

161. *Id*. at 1255-56.

162. *Id.* at 1255.

163. *Id.*

164. *Id.* at 1256 (citing DEL. CODE ANN. tit. 16, § 4755(a)(5)).

165. *Id.*

166. 975 A.2d 791 (Del. 2009).

167. *Id*. at 796-98.

dirt road to Dickerson's home. When the trooper knocked and identified himself, Dickerson responded with profanity and initially refused to open the door. The defendant then opened the door, but refused to show his hands or state whether he had any weapons. The trooper drew his handgun and ordered Dickerson to show his hands. Instead, the defendant began to walk toward his SUV which was parked near his home. The trooper became concerned that Dickerson was attempting to obtain a weapon from the vehicle and pinned him against the vehicle. Dickerson refused to comply with police commands to "stop resisting" and "give me your hands" and he struggled with the trooper. The trooper eventually was able to handcuff the defendant and a pat down search uncovered a .38 caliber pistol hidden in Dickerson's rear pocket.[168]

Dickerson was convicted at trial of Carrying a Concealed Deadly Weapon and felony Resisting Arrest.[169] On appeal, the court first reviewed Dickerson's claim that he had the right under DEL. CONST. art. I, § 20, to carry a concealed deadly weapon inside his home and could not be convicted of that charge.[170] The court ruled that, even assuming that the Delaware Constitution permitted the defendant to carry a concealed deadly weapon inside his trailer, the defendant was entitled to no such protection once he carried his pistol outside his home.[171] There was no evidence to support the defendant's argument that he was compelled by the police to leave his home, even if he believed that he was under arrest when the trooper arrived at the front door.[172]

The court next found sufficient evidence to support the defendant's felony conviction for resisting arrest.[173] The Resisting Arrest statute was amended in 2006 to add a new felony provision,[174] which requires the State to prove that the defendant "prevents or attempts to prevent an arrest by using force or violence towards a police officer attempting to effectuate an arrest."[175] Dickerson claimed that he did not resist arrest with "force or violence" and could not be convicted under the felony provision. The court found there was no evidence that the defendant struck or attacked the police officer,

168. *Id.* at 793.

169. *Id.*

170. *Id*. at 795.

171. *Id*. at 796. The court did not address the State's contention that *Smith v. State*, 882 A.2d 762 (TABLE), 2005 WL 2149410, at *3 (Del. Aug. 17, 2005) rejected any right to bear arms in a concealed manner. *Dickerson*, 975 A.2d at 795. *See Smith*, 2005 WL 2149410, at *3 ("[The Delaware Constitution] contains no language that entitles a person to conceal the weapon he carries. Rather, any such entitlement involves only a privilege to carry a concealed weapon-a privilege that is regulated by statute: 11 *Del. C.* § 1441.").

172. *Dickerson*, 975 A.2d at 796. Since the defendant had voluntarily left his trailer, the court did not address defendant's claim that under *State v. Stevens*, 833 P.2d 318, 319-20 (Or. Ct. App. 1992), a person cannot be convicted of carrying a concealed deadly weapon within one's own house. *Dickerson*, 975 A.2d at 795-96.

173. *Id.* at 798.

174. DEL. CODE ANN. tit. 11, § 1257(a).

175. The Resisting Arrest statute as amended now provides:

A person is guilty of resisting arrest with force or violence when:

> The person intentionally prevents or attempts to prevent a police officer from effecting an arrest or detention of the person or another person by use of force or violence towards said police officer, or
>
> Intentionally flees from a police officer who is effecting an arrest against them by use of force or violence towards said police officer, or

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so the question was whether the defendant's actions constituted "force." [176] The court noted the police officer's testimony that the defendant struggled during the handcuffing and pulled his hands away from the officer who was trying to restrain him.[177] Under the dictionary definition of "force," the court concluded that the defendant used "strength or power" that was sufficient to establish the charge.[178] The court noted that the defendant used force *towards* the officer, which permitted a rational jury to convict on the felony Resisting Arrest charge.[179]

E. Section 274 of Accomplice Liability Statute Applies to All Offenses which Can Be Divided into Degrees—*Allen v. State*

In *Allen v. State*,[180] the State proceeded against Allen under the theory of accomplice liability, and Allen was convicted of Robbery in the First Degree, Burglary in the Second Degree, and Aggravated Menacing. On appeal, court held that trial court erred in refusing Allen's request for a jury instruction under Del. Code Ann. tit. 11, § 274 on the issue of Allen's culpability as an accomplice for the aggravating fact that his co-defendant possessed a gun.[181]

The allegations against Allen arose from offenses occurring on three separate dates. In the first incident, the State alleged that Allen and co-defendants Howard and McCray robbed a bank. McCray, armed with a handgun, cut a hole in the roof of the bank, and entered the bank when it opened the next morning. Allen and Howard acted as lookouts. In the second incident, McCray climbed to the roof of a check cashing business, and entered the store the following morning when a manager arrived. Allen and the other defendant acted again as lookouts. In the third incident, McCray tried to cut open the roof of a Wal-Mart with a blow torch. Allen again acted as a lookout. McCray pulled a handgun on an employee who had observed what he was doing.[182]

At trial, the State relied on an accomplice liability theory to convict Allen of Robbery in the First Degree, Burglary in the Second Degree, and Aggravated Menacing. The aggravating factor in each of the offenses was the use of a

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> Injures or struggles with said police officer causing injury to the police officer. Resisting arrest with force or violence is a class G felony.
>
> A person is guilty of resisting arrest when the person intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of the person or another person or intentionally flees from a police officer.

Del. Code Ann. tit. 11, § 1257.

176. *Dickerson*, 975 A.2d at 798.

177. *Id.*

178. *Id.* (quoting Random House Unabridged Dictionary 748 (2d ed. 1993)).

179. *Id.*

180. 970 A.2d 203 (Del. 2009).

181. *Id*. at 213-14.

182. *Id.* at 207-09.

gun. The trial court refused Allen's request for a jury instruction under DEL. CODE ANN. tit. 11, § 274 regarding his own mental state and his accountability for the use of a gun.[183]

On appeal, the court reviewed the two-step process for determining accomplice liability under DEL. CODE ANN. tit. 11, §§ 271 and 274.[184] Section 271 provides that a person "is guilty of an offense committed by another person if an appropriate degree of complicity in the offenses can be proved."[185] Section 274 provides that the degree of the offense depends on the defendant's "culpable mental state" and "accountability for an aggravating fact or circumstances."[186] The court noted that its prior panel decisions were inconsistent on the issue of whether Section 274 applied only where the underlying offense could be divided into degrees with different mental states for each degree.[187] The court decided the *Allen* case *en banc* to reconcile its prior decisions.[188]

The court found that, under Section 274, when an offense is divided into degrees, each person is only guilty for the crime commensurate with his own mental culpability and accountability for an aggravating circumstance.[189] The court ruled that Allen was entitled to Section 274 instructions on the lesser-included offenses for Robbery in the First Degree, Burglary in the Second Degree, and Aggravated Menacing, because the jury was required to determine Allen's accountability of the aggravating factor for these crimes, namely, his co-defendant's gun.[190] The court reversed Allen's conviction, and also overruled all prior inconsistent panel decisions.[191]

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183. *Id.* at 209.

184. *Id.* at 210.

185. *Id.* (citing Chance v. State, 685 A.2d 351, 354-56 (Del. 1996); DEL. CODE ANN. tit. 11, § 271; DEL. CRIM. CODE WITH COMMENTARY 48 (1973)).

186. *Allen*, 970 A.2d at 210 (citing *Chance*, 685 A.2d at 356-58; DEL. CODE ANN. tit. 11, § 274).

187. *Allen*, 970 A.2d at 210-11 (*comparing* Herring v. State, 805 A.2d 872 (Del. 2002) *with* Johnson v. State, No. 517, 2007, 2008 WL 1778241 (Del. Apr. 21, 2008); Scott v. State, No. 545, 2007, 2008 WL 4717162, at *1 (Del. Oct. 28, 2008); Richardson v. State, No. 630, 2007, 2007 WL 2111092 (Del. July 24, 2007); Coleman v. State, No. 395, 1999, 2000 WL 1840511 (Del. Dec. 4, 2000)).

188. *Allen*, 970 A.2d at 210-11.

189. *Id.* at 213-14.

190. *Id.* at 214.

191. *Id.* (citing Johnson v. State, No. 517, 2007, 2008 WL 1778241 (Del. Apr. 21, 2008); Richardson v. State, No. 630, 2007, 2007 WL 2111092 (Del. July 24, 2007); Coleman v. State, No. 395, 1999, 2000 WL 1840511 (Del. Dec. 4, 2000)). In addressing other issues in the case, the court found no error in the trial court's decision to limit cross-examination of codefendant Howard to crimes within the scope of DEL. R. EVID. 609. *Allen*, 970 A.2d at 215. The court did rule that the prosecutor's closing argument regarding the defendant's financial condition was improper. *Id.* at 218-19. The parties also agreed that the trial court's kidnapping instruction was deficient under *Weber v. State*, 547 A.2d 948 (Del. 1988). *Id.* at 219.

APPENDIX
DELAWARE SUPREME COURT
CRIMINAL LAW OPINIONS – 2009

Allen v. State, 970 A.2d 203, 213-14 (Del. 2009) (trial court erred in refusing defense request for jury instruction under DEL. CODE ANN. tit. 11, § 274 on the issue of the defendant's culpable mental state as an accomplice).

Banther v. State, 977 A.2d 878, 881-87 (Del. 2009) (even though Superior Court correctly did not permit State to introduce evidence that defendant had planned *in advance* with co-defendant to kill victim, in compliance with Supreme Court's mandate from an earlier appeal, the evidence did support State's theory that defendant acted as an accomplice in the killing; testimony by co-defendant was not barred by doctrine of judicial estoppel; State could convict defendant without establishing whether he or the co-defendant actually killed the victim).

Betts v. State, 983 A.2d 75 (Del. 2009) (defendant's refusal to comply with the condition of his probation that he discuss the facts of his sexual offenses during counseling sessions constituted a violation of probation even if defendant originally entered a *no contest* plea).

Bezarez v. State, 983 A.2d 946 (Del. 2009) (where defendant in murder case claimed that his gun fired accidentally twice, State properly admitted evidence that defendant fired the same gun three weeks earlier).

Binaird v. State, 967 A.2d 1256, 1260-61 (Del. 2009) (trial court did not err in limiting cross examination that became argumentative of assault victim on the issue of level of his pain).

Brown v. State, 967 A.2d 1250, 1254-55 (Del. 2009) (passenger in a vehicle could not be convicted of Maintaining a Vehicle where there was no evidence of "affirmative activity" to utilize the vehicle).

Buchanan v. State, 981 A.2d 1098, 1102 (Del. 2009) (defendant's unlawful entry into his own home in violation of a court order could not be used as the predicate offense to establish burglary).

Burns v. State, 968 A.2d 1012, 1024-25 (Del. 2009) (trial court abused discretion in refusing to conduct an *in camera* review of the therapist records of the two child victims where defendant was charged with rape and related charges).

Campbell v. State, 974 A.2d 156, 163-69 (Del. 2009) (trial judge correctly admitted testimony about future drug deal by the defendant, and admitted testimony by downstream drug purchaser who identified purchased substance as methamphetamine).

Comer v. State, 977 A.2d 334, 343 (Del. 2009) (trial court instructions were deficient in permitting the defendant to be convicted of felony murder without proof that he or one of his co-conspirators fired the fatal shot during a street gun fight).

Cooke v. State, 977 A.2d 803, 845-47 (Del. 2009) (conduct by defense counsel in arguing that defendant was "guilty but mentally ill," which was contrary to the wishes of the defendant, violated the Sixth Amendment and the Due Process Clause).

Dabney v. State, No. 292, 2008, 2009 WL 189049, at *2 (Del. Jan. 14, 2009) (where one of defendant's convictions was reversed on appeal, trial judge who resentenced defendant on remaining convictions after appeal did not sentence defendant with a closed mind where judge heard from both attorneys and the defendant prior to resentencing defendant to less time than original sentence).

Dejesus v. State, 977 A.2d 797, 799-800 (Del. 2009) (defendant could not challenge violation of probation sentence when he later pled guilty to drug charge that formed the basis for the violation).

Dickerson v. State, 975 A.2d 791, 796 (Del. 2009) (defendant could be convicted of Carrying a Concealed Deadly Weapon based on possession of a handgun while he was entirely on his own private property).

Drumgo v. State, 976 A.2d 121, 124 (Del. 2009) (prosecutor's statements about defendant's testimony were disparaging and improper, but did not warrant reversal as defense counsel did not object and the case was not close).

Gibson v. State, 981 A.2d 554, 558-59 (Del. 2009) (reasonable evidentiary basis supported trial court's decision that defendant was competent to stand trial; jury could conclude that burglary at 7:00 p.m. in February occurred at nighttime).

Greene v. State, 966 A.2d 824, 828 (Del. 2009) (erroneous admission of defendant's incriminating statements in violation of *Miranda* was harmless error as testimony of victim was sufficient to sustain the conviction).

Hall v. State, 981 A.2d 1106, 1111-12 (Del. 2009) (trial court properly ruled that officer had reasonable suspicion to detain defendant observed in a known drug area and engaging in conduct consistent with the sale of illegal drugs).

Hankins v. State, 976 A.2d 839, 841 (Del. 2009) (trial judge correctly instructed the jury on the elements of murder first degree, and instructed on extreme emotional distress as part of the lesser included charge of manslaughter).

Hardwick v. State, 971 A.2d 130, 134 (Del. 2009) (trial judge did not abuse discretion in refusing to give missing witness instruction requested by defense when State did not call defendant's nephew as a witness and where the witness was out of state and not helpful to the prosecution's case).

Harper v. State, 970 A.2d 199, 202-03 (Del. 2009) (State properly cross-examined defendant, charged with multiple counts of sex-related crimes, about an unrelated incident in which he used a false name).

Harris v. State, 965 A.2d 691 (Del. 2009) (police officer's *de minimus* injuries suffered in scuffle with defendant did not constitute "physical injury" to support a conviction for Assault in the Second Degree).

Harris v. State, 968 A.2d 32, 37-38 (Del. 2009) (sufficient evidence supported defendant's conspiracy conviction as a lookout for robbery and attempted robbery).

Heath v. State, 983 A.2d 77 (Del. 2009) (defendant's unconditional pardon for conviction of Second Degree Unlawful Sexual Contact restored all civil rights and defendant was no longer required to register as a sexual offender).

Jackson v. State, 990 A.2d 1281, 1287-89 (Del. 2009) (trial court did not err in denying motion to sever defendant's three burglary charges where joinder was not prejudicial and probable cause existed for the defendant's arrest).

Jenkins v. State, 970 A.2d 154, 160 (Del. 2009) (police had probable cause to conduct strip search of suspect at police station who was arrested for a drug offense and whose clothing had strong smell of marijuana).

Johnson v. State, 983 A.2d 904, 917-22, 929, 931, 934-936, 938 (Del. 2009) (State could obtain by subpoena served on the prison, a copy of the defendant's letters to his girlfriend which were copied pursuant to prison policy; police officer was properly permitted to testify about details of defendant's prior rape conviction in penalty hearing; defendant's statements to his brother about the reason for entering plea were inadmissible hearsay; admission of unadjudicated prior misconduct evidence was plain, clear and convincing; defendant's prior conviction for Rape in the Fourth Degree constituted a prior conviction involving the use of force to establish an aggravating circumstance under DEL. CODE ANN. tit. 11, § 4209; death sentence was not disproportionate).

Kelly v. State, 981 A.2d 547, 550-51 (Del. 2009) (defendant who claimed that he assaulted fellow inmate who he thought was going to rape him should have been permitted to admit the prior rape conviction of the fellow inmate).

King v. State, 984 A.2d 1205 (Del. 2009) (nighttime search of probationer's home was reasonable where the probation officers utilized the factors promulgated by the department to ascertain the existence of reasonable suspicion).

Lecates v. State, 987 A.2d 413, 426 (Del. 2009) (trial judge properly found based on evidence in nonjury trial that defendant had knowledge of gun in car, had the ability to put the gun under his control, and the intent to possess the gun and constructively possessed the weapon).

Maddrey v. State, 975 A.2d 772, 778-79 (Del. 2009) (handguns found in a locked safe in defendant's bedroom, where drugs were recovered, were sufficiently accessible to sustain convictions for Possession of a Firearm During the Commission of a Felony and Possession of a Deadly Weapon by a Person Prohibited).

McNally v. State, 980 A.2d 364, 370 (Del. 2009) (State ballistics expert sufficiently testified to the principles and methodology used to reach his conclusions regarding similarity of gun casings).

Michaels v. State, 970 A.2d 223, 229, 231 (Del. 2009) (trial judge's curative instruction adequately cured any error by police officer's testimony about defendant's tear drop tattoo; defendants were not entitled to mistrial based on trial court asking prosecutor not to stand too close to testifying defendant).

Mitchell v. State, 984 A.2d 1194 (Del. 2009) (sufficient evidence supported inference that defendant possessed a gun where he made oral and written threats of violence to bank teller; prosecutor did not improperly elicit testimony about defendant's record when defendant volunteered his own conviction).

Norman v. State, 968 A.2d 27, 30-31 (Del. 2009) (police officers could not testify as lay witnesses for the purpose of identification of marijuana).

Norman v. State, 976 A.2d 843, 847 (Del. 2009) (in a capital case, State may use evidence of criminal conduct in another state to establish an aggravating circumstance under Delaware law; trial court improperly excluded evidence of defendant's lack of criminal responsibility under the law of the state where he committed the act because evidence was supportive of mitigating circumstance).

Parker v. State, 981 A.2d 551, 553-54 (Del. 2009) (trial judge erred in failing to instruct on Offensive Touching as a lesser-included offense of Robbery in the Second Degree).

Pennewell v. State, 977 A.2d 800 (Del. 2009) (defendant's act of dropping bag of marijuana to the ground did not constitute an act of concealment sufficient to support conviction for tampering with physical evidence).

Purnell v. State, 979 A.2d 1102, 1197-08 (Del. 2009) (statement of deceased witness which lacked any indicia of trustworthiness was not admissible under DEL. R. EVID. 807).

Robinson v. State, 984 A.2d 1198 (Del. 2009) (defendant's possession of a steak knife with a 4¾ inch blade was sufficient evidence to support conviction for Possession of a Deadly Weapon by a Person Prohibited).

Sanabria v. State, 974 A.2d 107, 115, 120 (Del. 2009) (police officer's testimony which repeated hearsay statements of police dispatcher unfairly prejudiced the defendant; alternatively, court held that admission of hearsay statements violated defendant's rights under the Sixth Amendment Confrontation Clause).

State v. Brower, 971 A.2d 102, 109-10 (Del. 2009) (trial court erred in ruling post-trial that it should have *sua sponte* instructed the jury on a lesser-included offense that was not requested by either party).

State v. Fletcher, 974 A.2d 188, 195-97 (Del. 2009) (Family Court may issue expungement order despite defendant's designation as a sex offender and juvenile with expunged record does not maintain status as registered sex offender).

Stickel v. State, 975 A.2d 780, 785 (Del. 2009) (trial court properly admitted toxicology reports showing that victims killed in accident caused by defendant were not intoxicated).

Torres v. State, 979 A.2d 1087, 1095-96 (Del. 2009) (trial court did not err in allowing prosecutor to question witness about possible penalty for perjury, and prosecutor did not improperly vouch for credibility of the same witness by stating the terms of the witness's plea agreement).

Weber v. State, 971 A.2d 135, 141-43 (Del. 2009) (trial court erred in declining to instruct the jury on Offensive Touching as a lesser included offense of Robbery in the First Degree).

Wehde v. State, 983 A.2d 82 (Del. 2009) (defendant was correctly sentenced as an habitual offender for fourth felony conviction on the charges of Rape in the Fourth Degree, Conspiracy in the Second Degree, and Sexual Solicitation of a Child, and his fifteen-year mandatory prison sentence was not an abuse of discretion or unconstitutional).

David Wright v. State, 980 A.2d 372, 378-79 (Del. 2009) (defendant's restraint of robbery victim was independent of the underlying robbery and sufficient to support a conviction for Second Degree Kidnapping).

Donald Wright v. State, 980 A.2d 1020, 1023-24 (Del. 2009) (defense counsel's tactical decision not to object to alleged prejudicial evidence in rape trial constituted a waiver of the right to appellate review of the issue).

Zugehoer v. State, 980 A.2d 1007, 1013-14 (Del. 2009) (defendant's multiple methods used to commit a single offense required merger of the three convictions of Home Improvement Fraud into one charge).