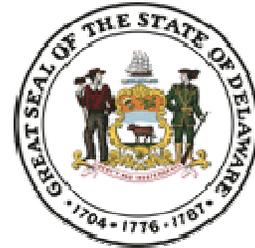

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**COMPENDIUM OF RECENT CRIMINAL-LAW
DECISIONS FROM THE DELAWARE SUPREME COURT**

Cases Summarized and Compiled by

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**DELAWARE SUPREME COURT CASES
OCTOBER 1, 2010 THROUGH DECEMBER 31, 2010**

**ROTEN V. STATE, (10/4/2010): VICTIM ANNOUNCES D'S PRIOR
CONVICTION IN COURT/ HABITUAL OFFENDER STATUS**

V, defendant's cellmate, announced in prison, that D was there for beating women. V also told this to the jury twice during trial. D did not object to the first statement by V to the jury but moved for a mistrial after the second one. The judge denied that motion but issued a curative instruction telling the jury to disregard that D was in prison and the reason he was in prison. D was then convicted of assault in a detention facility for having dumped boiling water on his cellmate, (V). On appeal, the Court concluded that the instruction was sufficient because the jury already knew D had previously committed a crime and this was not a close case.

D also appealed the trial court's declaration of him as a habitual offender. First, he argued that he was not given sufficient notice by the State. On the day of sentencing, the State said it had intended to file a motion to declare him H.O. but because of a snow storm was unable to do so. The judge continued the sentencing and allowed the State to file the motion. On appeal, the Court concluded this was acceptable as the statute allows the State to give notice anytime between conviction and sentencing. D also argued that the State failed to conclusively establish that his two prior out-of-state convictions supported H.O. status. The Court concluded that the evidence was sufficiently clear. Finally, when the judge allowed D the opportunity to present contesting evidence it did not shift the burden to D. **AFFIRMED.**

**TURNER V. STATE, (10/11/10): TIMING OF INTRODUCTION OF §3507
STATEMENT/ FAIR TRIAL & CLOSING ARGUMENT**

D was convicted of assault 2nd, PFDCF, and PFPP after a bench trial. During the State's direct examination, V testified that he did not know who shot him. On cross examination, V said that D was not the shooter. The State was then permitted, over D's objection, to introduce a statement under §3507 on redirect. On appeal, D raised two arguments. First, he argued that the judge left the bench in the middle of his closing argument and he was thus denied his rights to effective assistance of counsel and a fair trial. There was no objection made at trial and the record did not reveal that the judge left the bench. Thus, the Court rejected this argument.

D also argued that the State failed to lay a proper foundation for introduction of the §3507 statement and that it was erroneously permitted to be introduced after the State's direct exam. The Court concluded that the State laid the proper foundation because V was questioned as to both the events perceived and the out of court statement. However, the judge did err when he allowed the statement to be introduced after direct examination. Under *Smith v. State*, 669 A.2d 1, 8 (Del. 1995), the offering party must introduce the statement before the end of direct examination so as to not place a strategic burden on the D. Here, there was no prejudice because D's counsel only asked V four questions on cross-examination. **AFFIRMED.**

MONCAVAGE V. STATE, (10/19/10): IMPROPER PROSECUTORIAL COMMENTS/ SENTENCING



D pled guilty to failing to stop at the command of a police officer and no contest to resisting arrest. D was sentenced to four years in prison, suspended for 60 days at Level IV to be served at the VOP center and followed by one year of probation. On appeal, D argued there was prosecutorial misconduct when, at sentencing, the State mischaracterized his earlier, unrelated assault conviction and improperly explained the facts surrounding that conviction. The Court found that the characterization was consistent with the record before the judge and that the prosecutor misspoke when he stated that D was previously convicted of assault 2nd instead of assault 3rd. However, this error was immediately corrected on the record and by D's counsel. Thus, there was no misconduct.

D also argued that when the judge sentenced him, he relied on impermissible factors, had a closed mind and failed to announce the aggravating factors that supported his sentence. The Court rejected this argument as there was no evidence that the judge had a closed mind. He listened to D's expressions of regret and his attorney's pleas for lenience. The sentence was within the prescribed statutory limits and the judge properly noted the aggravating circumstances on the sentence order. **AFFIRMED.**

SAHIN V. STATE, (11/5/2010): INEFFECTIVE ASSISTANCE OF COUNSEL

D was convicted of 9 counts of Rape 1st and other offenses after a bench trial then sentenced to life + 138 years in prison. At trial, D's attorney told the judge, that based on his assessment of the case, D should have taken the plea that was offered by the State. Additionally, D asked for an interpreter at trial. On multiple occasions D's attorney told the judge, who was the trier of fact, that he did not believe his client needed an interpreter and that D used this as a way "play dumb" with the court.

The attorney's several comments undermined D's credibility. Almost the entire case was his word against that of the Vs who were prostitutes. The Court cited *Watson v. State*, 934 A.2d 901 (Del. 2007) and *Baker v. State*, 906 A.2d 139 (Del. 2006) holding that in a "he said, she said" case it is unfairly prejudicial to expose the fact-finder to any unrelated facts that may effect D's credibility. Here, the attorney's conduct fell below an

effective standard of reasonableness as described in *Strickland*. However, the record needs to be further developed in the context of a Rule 61 motion in order to allow the attorney to explain his conduct. The Court affirmed the convictions without prejudice to a Rule 61 Motion. It further ordered that the trial judge was precluded from providing any evidence in any Rule 61 proceedings. AFFIRMED.

RIVERA V. STATE,(11/10/2010): SEARCH WARRANT/ EXPERT TESTIMONY



The body of V, a female, was found in a river. V had lived with W who was previously married to D. D and W divorced because of D's violent sleep terrors. D claimed he was at home sleeping at the time of V's death. Police took pictures of lacerations on D's hand. There was a car outside D's house which he claimed he owned. It really was owned by his ex wife, (W). Police got a search warrant for the car based on the ME report, the distance of V's body from the crime scene, a neighbor's statement, evidence of a struggle at V's home, the lacerations on D's hand, and W's statements about D's aggressive nature. In the car, police found dirt, mud and blood matching V's DNA. D's motion to suppress this evidence because the warrant was not supported by probable cause was denied. The judge also prevented D from presenting an expert to provide an opinion that D was suffering a sleep terror at the time of V's death.

On appeal, D argued that the warrant was erroneously based on a contention that V was missing and that it omitted exculpatory facts. The Court found that the judge did not rely on a belief that V was missing. He relied on the four corners of the affidavit which, even with the exculpatory facts, was sufficient for probable cause. However, the Court noted that this was a close case and police cannot make unilateral decisions as to what facts are not material and should not be included in the affidavit.

The Court also ruled that there was no abuse of discretion in preventing the expert from testifying that D was suffering from a night terror at the time of V's death. The expert had not personally examined D and would only have been able to testify based on hearsay. He was permitted to testify, in general, that D had previously suffered night terrors and relay D's version of at the time of V's death. AFFIRMED.

LOPER V. STATE, (11/19/2010): TRAFFIC STOP/ MIRANDA

D was pulled over for speeding and had an expired insurance card. A passenger initially lied about his own identity. While detaining D, Police arrested the passenger for an outstanding warrant. Police asked D if he had anything illegal on him. D volunteered that he had "weed." Police reached in his pocket and found drugs including PCP. D was later convicted of various drug offenses. On appeal, D argued that (1) there was no

reasonable and articulable suspicion to detain him after the traffic stop; (2) police failed to give *Miranda* warnings; (3) there was no reasonable suspicion that he was armed; and (4) there was no consent for a pat down.

The Court ruled that, after a routine traffic stop, police may question the passenger about his identity and run a background check. D's detention as a result of the passenger's arrest was minimal and thus, reasonable. When ordered out of the car, D was not seized "a second time" so still reasonable. Even though D was detained and ordered out of his car, the Court found that he was not in "custody" for purposes of *Miranda* when police asked him if he had anything illegal. Thus, the search of his pocket was legal. AFFIRMED.

MOTT V. STATE, (11/22/2010): INDICTMENT/ NEW HOME CONSTRUCTION FRAUD



D appealed from his conviction for feloniously committing New Home Construction Fraud as defined in 11 *Del.C.* § 917. He claimed, for the first time, that his indictment had been defective because it did not allege the dollar amount he allegedly took. This was significant because if the amount was under \$1,000, the offense would have been a misdemeanor.

The Court concluded there was no plain error because D had been on notice that he was charged with a felony. The indictment noted the charge was a felony, the criminal history he received in discovery and the jury instructions also notified him that he was charged with a felony. Thus, there was no manifest injustice. AFFIRMED.

THOMAS V. STATE, (11/23/2010): TERRY STOP BASED ON ANOTHER OFFICER'S PROBABLE CAUSE TO ARREST

Det. #1 conducted surveillance and corroborated multiple factual representations by a past, proven reliable informant regarding D obtaining a shipment of drugs at one location then selling them at a second location. In following D, Det. #1 gave a radio dispatch which contained D's name, general description and destination. Det. #2 responded to the scene where D was headed. There were several people who matched D's description. Det. #2 walked up to one man, who just happened to be D, and conducted a pat down wherein he found drugs. Prior to trial, D filed a motion to suppress which was denied. D was convicted of various drug offenses.

On appeal, the Court concluded that Det. #2 was permitted to rely on Det. #1's probable cause to arrest D. Thus, Det. #2 had reasonable suspicion to stop each of the

individuals at the location that matched the general description given by Det. #1. That Det. #2 failed to ask D the questions required under 11 *Del.C.* § 1902 (a) did not matter because of the inevitable discovery rule. If the questions had been asked, Det. #2 would have learned D matched the name he had been given on the dispatch. Or, Det. #1 could have arrested him with her probable cause. **AFFIRMED.**

LEWIS V. STATE, (11/24/2010): MOTOR VEHICLE STOP



A past, proven reliable informant gave police a description of a black female wearing scrubs selling drugs in the Riverside area. Police conducted surveillance and saw D, who matched the CI's description get in a car with another person. Police saw nothing suspicious but followed her anyway. D failed to signal and police called others to pull her over because he did not have lights or sirens. She was stopped and told of the failure to signal and the drug investigation. She could not produce identification. D was asked to step out of car and patted down. When asked if police could search car, D responded, "Go ahead, your going to search it anyway." Police found drugs in the car, D was arrested and more drugs were found on her. She was charged with several drug related offenses. Her motion to suppress was denied, she was convicted and appealed.

First, D argued that the traffic stop was just a pretext for police to search her for drugs and unlawful under the Delaware Constitution. As it has repeatedly done, the Court sidestepped this issue concluding that the officer had a reasonable suspicion of illicit drug activity. This reasonable suspicion was based on the reliability of the CI, the area's high drug related nature, the description of the suspect and the location of her parked car. Because there was a lawful stop, her subsequent consent was also lawful. **AFFIRMED.**

JENKINS V. STATE, (12/6/2010): VOP EVIDENCE/DUE PROCESS

D, on probation for drug offenses, was arrested on new drug charges. Probation filed an administrative warrant based on these new offenses and technical violations. At the VOP hearing, one officer testified that he never saw D at the address which he had given probation. However, he did see him at a different address. Two controlled buys were conducted. Police found a key to the second address on D when he was arrested. A search warrant for that address was obtained and using D's key, police conducted a search which yielded a lease in D's name, drugs and paraphernalia. D filed a motion to suppress in his pending criminal case but not in the VOP. D was found in violation. Later, the suppression motion was granted in the pending charges.

D appealed his violation claiming: (1) there was insufficient evidence to support the violation; (2) he was denied his due process rights; and (3) the judge abused his

discretion by relying on impermissible factors and exhibited a closed mind when he sentenced D. The Court concluded that there was sufficient evidence because the officer's testimony regarding D's failure to change his address with probation was based on first hand observations and not hearsay. Also, the State provided evidence that D failed two drug tests. D's due process argument failed because, even though D did not receive written notice, he did receive actual notice that "uncharged misconduct" (the 2 drug buys) would be relied upon. The judge was allowed to consider any competent evidence that was before him, thus, he did not base his decision or sentence on "impermissible" factors. D presented no mitigating evidence and could not establish the judge had a closed mind. AFFIRMED.

SCOTT V. STATE, (12/6/2010): LIMITS ON COOKE



D was convicted of murder second degree and other charges after asserted an unsuccessful defense of Extreme Emotional Distress. His conviction was affirmed. Later, D filed a Rule 61 making several claims of ineffective assistance of counsel. These were all denied. D appealed this decision and added another claim based on the recent case of *Cooke v. State*. The case was remanded and the trial court denied that claim as well. Back on appeal, the Court made short work of the first 12 claims. However, it took time to elaborate on D's *Cooke* claim.

D claimed that at trial he wanted to assert a Not Guilty By Reason of Insanity verdict which counsel rejected. **Significantly, the Court concluded that the principle in *Cooke* does not apply whenever an attorney refuses to present a defense that the defendant demands.** Even if *Cooke* were to be construed broadly, D's failure to "claim[at trial] that his counsel admitted guilt in violation of his express wishes" would be fatal. AFFIRMED.

KEITA V. STATE, (12/7/2010): MOOTNESS/COLLATERAL CONSEQUENCES/ IMMIGRATION

D was convicted of misdemeanor drug offenses and sentenced to probation. Shortly thereafter, D was found in violation of his probation. His new sentence was to be discharged if immigration officials took him into custody. Subsequently, immigration did take him into custody. On appeal, D's sentence was completed. He sought to invoke an exception based on collateral consequences to overcome dismissal due to mootness.

To succeed, D was required to meet "the burden of demonstrating specifically a right lost or disability or burden imposed, by reason of the instant conviction which had

not already been lost or imposed by reason of his earlier convictions.” The Court concluded that D failed to meet his burden because he had already been subjected to deportation because of prior felony offenses. DISMISSED.

DICKINSON V. STATE, (12/8/10): ACCOMPLICE LIABILITY/ 11 DEL.C. § 274/ LEVEL OF LIABILITY INSTRUCTION

P set up a sting whereby co’d’s were led to believe they could find money in a hotel room. D drove co’d’s to a salvage yard parking lot which was next to the hotel. While D waited in the truck, the co’d’s took a shotgun and broke into the hotel room. They were then arrested by a SWAT team. After trial, D was convicted via accomplice liability of robbery 2d degree and burglary 3d degree. He was sentenced to life as an H.O.

On appeal, D argued that the judge erred by failing to *sua sponte* issue a §274 “level of liability” instruction. D did ask for an instruction that accomplices’ testimony be viewed with extreme caution. The Court held that the “level of liability” instruction is akin to a lesser-included-offense instruction. Thus, under the party autonomy rule, a failure to request such an instruction is considered a tactical decision by the defense attorney. Whether the attorney has made a tactical decision may not be clear in other cases. Therefore, the trial court should routinely ask in these types of cases whether defense counsel wishes a “level of liability” instruction. AFFIRMED.

MONROE V. STATE, (12/8/10): JUROR BIAS



D convicted on charges as the result of various burglaries. After the jury returned its verdict, one of the jurors informed the judge that she had seen D at her apartment complex. The judge notified D’s counsel and ordered D to stay away from the complex. D claimed at sentencing that he was not at the complex on the night the verdict was entered. He maintained that during the trial the juror knew he lived at the same apartment complex with his girlfriend. Thus, D believed, the juror must have been biased against him because she intentionally failed to inform the court of this and improperly influenced the jury. The judge left open the possibility of counsel to move for a new trial. Counsel later told the judge that no motion would be filed because he did not uncover any facts to support such a motion.

On appeal, D’s counsel filed a Rule 26 (c) brief. However, the Court determined there was an issue of merit and appointed new counsel. D argued that his right to a fair trial by an impartial jury under the *Sixth Amendment of the United States Constitution* and

Article I, §7 of the Delaware Constitution was infringed because of juror bias. The Court concluded that D did not make a proper legal argument or cite any authority to support his Delaware constitutional claim. Therefore, the Court declined to address it. It also found that because the juror did not see D at her apartment complex until after the verdict was returned, no bias could have occurred before or during the jury deliberations. Additionally, D's counsel had investigated the potential juror bias claim and independently concluded there was insufficient evidence to challenge the validity of the verdict. The Court held that the circumstances here were not inherently prejudicial and D failed to show actual prejudice, so his *Sixth Amendment* claim was rejected. AFFIRMED.

**HOLMES V. STATE, (12/9/10): HEARSAY/ LIMITING INSTRUCTION/
CHOICE OF EVILS**



V1 claimed that he offered D a ride, D then pulled out gun and told him to get out of car. D drove off and later called V1 to tell him where the car was located. D then went to the door of the home of V2 & V3, pointed a gun at V2 and demanded money. Vs then got away and D took off. D testified at trial that in the first incident he was trying to pay a drug debt and did not have a gun. As to the second incident he said he was buying drugs and feared for his safety. D was convicted of carjacking 1st, burglary 1st and related offenses. At trial, the judge permitted the State to introduce into evidence a newspaper article that allegedly described D's conduct at issue. The article was not offered for the truth of its content, but to allow the jury to infer that the D used the article, which he read and thought he knew "quite by heart", in an attempt to fabricate his story, either to the detectives or at trial.

On appeal, D argued that the judge erred by allowing the newspaper in to evidence. The Court concluded that this, in itself, was not necessarily error. However, it concluded that the judge's failure to provide a limiting instruction to the jury regarding the purpose of the evidence was error. It was harmless, however, because there was sufficient admissible evidence against D to sustain his convictions. D also argued that the judge erred in refusing to allow him to argue a choice of evils defense. The Court held that the D was not entitled to the instruction because he failed to demonstrate that he acted to avoid an imminent public or private injury. Assuming D did act to avoid imminent injury, D did not show that the situation was not created by his own fault. AFFIRMED.

FRITZINGER V. STATE, (12/13/10): EVIDENCE OF VICTIM'S PRIOR SEXUAL CONDUCT/ REFERENCE TO COMPLAINING WITNESS AS "VICTIM"

D lived with V1 & V2's mom for a period of time and had a child of their own. D moved out and lived with a new girlfriend. Meanwhile, custody of the three kids went to D. Later, D gave up custody. Over a year V1 & V2 never made any claims against D. However, they went to a custody hearing where they told the judge they wanted their sister to live with them. The judge said he did not have that power. Later that day V1 & V2 made claims for the very first time that D had sexually abused them. D was charged with several sex offenses. Under 3508, D sought to obtain information about V1's prior sexual conduct in order to establish the basis for why she might have knowledge of sexual terms etc. The judge denied this request and D's request for an instruction that the jury could not infer from V1's knowledge of sexual acts that her knowledge derived from D's conduct. At trial, upon D's request, the judge issued a cautionary instruction to the jury regarding an argument by the prosecutor in closing. However, in the instruction, the court referred to V1 & V2 as victims and not complaining witnesses. D was later convicted of sex offenses and sentenced to life plus 65 years in prison.

On appeal, the Court held that the judge's denial of a hearing mandated by §3508(a) was legal error. Such evidence can be admissible, but there must be a hearing. There must be a motion with an affidavit attached as to purpose of request; if offer of proof sufficient, judge shall have hearing; if judge determines the evidence is relevant, then she "may" issue an order defining the contours of the questioning relating to that evidence. This error prevented D from learning potentially valuable information regarding his defense and denied him his statutory right to that hearing.

The Court also held that the judge's reference to the jury that the complaining witnesses were "victims" implicitly told the jury that the judge believed that a crime has been committed, thereby denying D substantial rights to a fair trial. For a judge to communicate to the jury that witnesses were victimized, in a case where the defense is that the conduct about which the complaining witness testifies never occurred, prejudices that defendant unfairly.

The CIO in this case was the CIO in a case wherein the judge's former sister-in-law was raped. D filed a motion for recusal. While the judge made an appropriate record that she could be fair in this case, she failed to conduct the "objective" test before denying the motion. D learned after the trial that one of the persons who V1 said had sexually abused her before D was the same man convicted by a jury of raping the trial judge's former sister-in-law. Both the prosecutor and the trial court, who had reviewed the tape, were aware of this at trial. Thus, the case was remanded and the judge was to be reassigned to maintain public confidence in the impartiality of the judiciary. REVERSED and REMANDED.

**FOX V. STATE; ADAMS V. STATE & GRANT V. STATE, (12/20/2010):
JUVENILE SEX OFFENDER REGISTRATION**

Three cases were brought before the Delaware Supreme Court in order to obtain a clear ruling regarding the parameters of sex offender registration under 11 *Del. C.* § 4121(d) (6) and its applicability to juvenile defendants. The Court concluded that the language in the statute is clear. A juvenile felony-level offender is treated no differently than an adult felony-level offender in that he is not eligible for relief from registration. Only misdemeanor-level offenders are eligible for relief. AFFIRMED/REMANDED.

SOMMERS V. STATE (12/20/10): HABITUAL OFFENDER STATUS

D pled guilty to PFBPP. The trial court sentenced him to six years, eight months at level V, relying on 11 *Del. C.* 1448, which states that there is a minimum/mandatory sentence of five years to anyone guilty of PFBPP if they have two prior violent felony convictions.

D did not deny the two felony convictions; however, he claimed that only one should count against him because the first felony occurred before section 1448 was enacted. D argued that the first felony was deemed “violent” when 1448 was enacted and not at the time the offense occurred. The trial court rejected the argument that any pre-1996 conviction should be excluded as a predicate offense. On appeal, the Court held that D’s sentence “came within the terms of the unambiguous statutory requirement for an enhanced penalty.” AFFIRMED.

CHURCH V. STATE (12/22/10): DUI



W responded to a call regarding an accident. He found D on side of the road outside his car after it ran into a ditch. W said he smelled a “little odor of alcohol” and D was “a little unsteady.” P arrived thereafter and determined D had veered off a straight road, struck a mailbox, traveled across an oncoming lane and landed in a ditch. W was treating D but P said he smelled a strong odor of alcohol and D’s eyes were watery and bloodshot. At the hospital, P noticed D had wet himself. D then refused to take a field sobriety test. Based on P and W’s observations, D was convicted of his fourth DUI.

On appeal, D argued that the trial court erred when it denied his motion for judgment of acquittal. The Court noted that “[w]hen a defendant argues that the evidence is insufficient to support the verdict, the relevant inquiry is whether, considering the evidence in the light most favorable to the State, including all reasonable inferences to be drawn therefrom, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” It then concluded that all of the factors observed by P

and W as well as P's belief that D was under the influence were sufficient to allow a reasonable trier of fact to conclude that D did drive under the influence. AFFIRMED.

ELEY V. STATE (12/28/10):PROSECUTOR'S MISTATEMENT OF LAW/ CONSTRUCTIVE POSSESSION



P conducted lawful search of D's home. Between the mattress and box spring of D's bed, P found a gun and ammunition. P also found drugs in the kitch and D's room. D was charged with PDWPP and drug offenses. D claimed he was holding gun and ammo for his sister. D's sister corroborated. At trial, D obtained a proper instruction from the trial court that P must prove intent in a constructive possession case. However, during its rebuttal closing argument the prosecutor stated that the State did not need to prove intent with respect to PDWPP. The trial court denied D's motion for a mistrial. D was convicted by indictment of PDWPP and drug offenses.

On appeal, D argued that his PDWPP conviction should be reversed due to an incorrect statement of law to the jury by the prosecutor. The Court found that inconsistent definitions of constructive possession were given to the jury regarding the element of intent. The jury has an absolute right to a correct statement of the law. The prosecutor's statement was also analyzed under *Hughes*: "(1) the centrality of the issue affected by the alleged error; (2) the closeness of the case; and (3) the steps taken to mitigate the effects of the alleged error." The Court found the conflicting statement of law to not be harmless. REVERSED.

HAWKINS V. STATE (12/29/10): EXCITED UTTERANCE

D moved out of house she shared with her boyfriend (V), her cousin (W1) and her cousin's 4 year-old daughter (W2). The next day, W1 & W2 came home from running errands and found the door open. W2 ran in the house then back out of the house. She exclaimed, "Mommy, [D] stabbed [V]." D came out of the house with a steak knife in her hand and said, "You better call the fucking ambulance because I stabbed him, I'm tired of his shit." V's heart was pierced but he survived. At trial, D denied stabbing V. W2 could not testify because she was in therapy. And, V testified some unidentified guy stabbed him. After *voir dire* with W1, the court allowed her to testify about W2's statement, "Mommy, [D] stabbed [V]" because it qualified as an excited utterance exception to the general ban on hearsay. D was convicted of Assault Second Degree and PDWDCF.

On appeal, D argued that the trial court abused its discretion when it permitted the introduction of W2's statement. The Court noted that, "[t]o establish the admissibility

of an excited utterance under *D.R.E.* 803(2), the proponent must show that: (1) the excitement of the declarant was triggered by a startling event; (2) the statement was made while the excitement was continuing; and (3) the statement was related to the event.” Court found that W2’s statement satisfied these three elements. **AFFIRMED.**

HOENNICKE V. STATE (12/30/2010) : STATUTE OF LIMITATIONS ON SEX OFFENSES/EX POST FACTO

In 2009, 29-year-old V reported that between 1988 and 1992 his dad, D, sexually assaulted him regularly. D spoke with police voluntarily and admitted that he and V had wrestled naked and that D had shown V how to clean himself, but D adamantly denied ever intentionally touching V sexually. At trial, the only evidence presented was V’s testimony and D’s statement. D was convicted of 12 counts of USC 2d degree. On appeal, D raised two arguments that were rejected at trial.

D argued that the statute of limitations barred prosecution because it had run. The SOL at the time of the alleged offenses was 5 years. 11 *Del. C.* § 205(e). In 1992, the SOL was extended to permit prosecution of delineated sexual offenses after the 5 year general limitation if it commenced within 2 years of the initial disclosure of misconduct to an appropriate law enforcement agency. In 2003, the SOL as to the relevant offenses was completely struck and language was added that completely eliminated any limitation of time to prosecute. At that point, no alleged sex offenses had been disclosed. D argued that since this new “amendment” completely eliminated and replaced the prior amendment, its application in this case violated the Ex Post Facto Clause of the constitution. The Court rejected this argument concluding that since no disclosure had been made at the time of the 2003 amendment, the applicable SOL had not expired and thus, application of the amendment was not unconstitutional.

D also pointed out that in order to invoke the unlimited SOL, the State must allege in the indictment and prove that the prosecution is not “based upon the memory of the victim that has been recovered through psychotherapy unless there is some evidence of the corpus delicti independent of such repressed memory.” Here, the State did allege this in the indictment. However, as the Court itself noted, there was no mention by anyone at trial as to whether the allegations were the result of repressed memory. The Court agreed that the State was required to prove this. As a reason why he came forward, V stated that it was to “protect somebody else from it happening to them.” The Court found this was enough to meet the State’s burden because if it had been the result of repressed memory, V would have volunteered that information. **AFFIRMED.**