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

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**DELAWARE SUPREME COURT CASES
OCTOBER 1, 2012 THROUGH DECEMBER 31, 2012**

TUCKER V. STATE (10/1/2012): COLLATERAL ESTOPPEL/PFDCF/PDWBPP



D was acquitted by a jury of PFDCF, but in a separate bench trial he was convicted of PDWBPP. On appeal he argued that due to his prior acquittal, his conviction was barred by collateral estoppel and double jeopardy. In relying on its previous decision in *Godwin v. State*, the Court held that because the prior jury could have rationally decided to acquit D of PFDCF on a ground other than possession, collateral estoppel did not bar D's PDWBPP conviction.

AFFIRMED.

**MCCRAY V. STATE (10/10/2012): SUFFICIENCY OF EVIDENCE/
INEFFECTIVE ASSISTANCE**

D was convicted and sentenced as a habitual offender to a total of 9 years of Level V incarceration, to be suspended after 6 years for decreasing levels of supervision. D filed a motion for post-conviction relief which was denied by the Superior Court. D appealed the denial, asserting two claims of error. First he argued that there was insufficient evidence presented at trial to support his convictions of Maintaining a Dwelling for the Keeping of Controlled Substances. He also argued that his counsel provided ineffective assistance by failing to obtain his acquittal on all charges due to his counsel's inadequate preparation of the case, failure to challenge the defective indictment and failure to challenge the defective search warrant.

As to D's sufficiency of the evidence claim, the Court concluded it was without merit because there was sufficient evidence to support his conviction. D was found in the apartment where police discovered drugs, he had a key to the apartment, he had "buy money" in his possession, and he reported the apartment as his address at the time of his arrest. The Court also concluded that D's second claim was without merit, finding his allegation that his counsel was inadequately prepared to be conclusory and unsubstantiated. D did not demonstrate that his counsel's failure to challenge the indictment and search warrant resulted in any prejudice to him and since neither the indictment nor the warrant was defective, neither was subject to challenge.

AFFIRMED.

WINGFIELD V. STATE (10/15/2012): MOTION FOR MISTRIAL/INADMISSIBLE HEARSAY

While executing a valid search of a retail store, P1 discovered five live rounds of ammunition and a business card with D's name on it. P2 then found a live round during a search of D's home for which P1 was not present. D was then charged with Possession of Ammunition by a Person Prohibited. During its opening at trial, the State referred to the ammunition found in D's home. Later, during direct examination of P1, the State questioned P1 about that ammunition. The trial court sustained D's hearsay objection. The State withdrew the question then D moved for a mistrial based on the harm created by introduction of the hearsay evidence. Although the court agreed that the evidence found in D's home as well as the officer's testimony regarding such evidence were inadmissible, it denied the motion and instead issued a curative instruction. D was found guilty on one count of Possession of Ammunition by a Person Prohibited and appealed the trial court's denial of his motion.

The three factors the Court considered in deciding whether a mistrial should have been granted were the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error. The Court concluded that this was not a close case due to the ammunition found in the store and D's admission. It then found that although the alleged error was central to the issue of whether D knowingly possessed the ammunition at his home, it was irrelevant to the separate issue of whether he knowingly possessed the ammunition found at the store. Finally, the Court noted that the trial court had taken steps to mitigate the effects of the error by issuing a clear and prompt curative instruction which did effectively cure any error.

AFFIRMED.

MATTHEWS V. STATE (10/15/2012): WITNESS VOUCHING

D was charged with First Degree Robbery for robbing a bank. At trial, the State's evidence included: D's presence less than a mile from and within minutes of the bank; D matched the teller's description of the suspect; D's admission to police; a show up identification by the teller; and D's possession of the exact amount of money that had been stolen and the handwritten demand notes matching those used in the robbery. D was found guilty and sentenced to 25 years.

On appeal, D claimed that it had been plain error for the trial court to have permitted a detective to testify as to the reliability of show-up identifications because such testimony amounted to witness vouching. The detective had claimed that in every case in which he was involved where there was a show up identification, the defendant was convicted. The Court measured the strength of the total evidence against the alleged error and found such evidence to be overwhelming. It concluded that even if the admission of the detective's testimony was error, that it was harmless due to the significant amount of additional evidence against D.

AFFIRMED.

CROLL V. STATE (10/15/2012): EX POST FACTO CLAUSE/ TREATMENT PROGRAMS



D pled guilty to several offenses and received a sentence that required that he successfully complete treatment programs addressing issues of domestic violence, anger management and parenting. A subsequent appeal and motion for post-conviction relief were denied. After several unsuccessful motions seeking modification of his sentence to include a specific treatment program, the Superior Court eventually modified his sentence to require specifically that he receive sex offender treatment. D filed a “Motion Ex Post Facto” challenging the modified sentence order, but the Superior Court denied it on the grounds that it.

On appeal, D claimed that the modified sentencing order violated the *ex post facto* clause of the United States Constitution because it added sex offender treatment as a condition of the sentence. D had not agreed to such treatment as part of his plea bargain. Thus, D argued that his original guilty plea should be invalidated. The Court disagreed with D and found the *ex post facto* clause to be inapplicable.

Although the *ex post facto* clause prohibits the retroactive application of a law that imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, internal prison rehabilitation programs are not an element of punishment that attach to an inmate’s initial conviction. Therefore, such programs do not implicate the *ex post facto* clause. The Court also held that D’s claim that he was not receiving his choice of programs had no merit because an inmate has no constitutional right to participate in specific prison programs.

AFFIRMED.

GORDON V. STATE (10/24/12): VOP HEARINGS AND A PREPONDERANCE OF THE EVIDENCE

D pled guilty to several burglary charges. At a subsequent violation of probation hearing, the trial court concluded that D had violated his probation by returning a dirty urine sample, failing to attend a scheduled Aftercare appointment and failing to report for a weekend intervention. D appealed his VOP and raised four issues. Most notably he claimed that the trial court erred in accepting medical opinion testimony about urine testing from an unqualified witness. The Court explained that at VOP hearings, the State is only required to prove by a preponderance of evidence that a probationer has violated the terms of his probation. At D’s VOP hearing, this burden was met through D’s admission to missing scheduled appointments and his positive drug test. The Court

concluded that the Superior Court had properly relied on this evidence in finding that D had violated his probation and did not err in doing so. **AFFIRMED.**

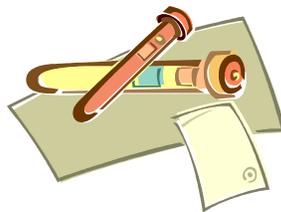
WILLIAMS V. STATE (10/26/2012): FIREARM

D was found guilty of Possession of a Firearm During the Commission of a Felony along with several other offenses. At trial the evidence presented by the State included: testimony from several witnesses that D possessed a gun; two recovered guns; and a statement by D that he had a gun on his person during the events in question. D moved for a judgment of acquittal on the grounds that the State had failed to prove beyond a reasonable doubt that the guns used met the definition of a “firearm.” The trial court denied his motion.

On appeal, D argued that the State’s case consisted of proving the existence of a gun by mere appearance and that it never introduced evidence to prove the object was “designed to discharge a projectile,” as is included in the definition of “firearm.” The Court disagreed and pointed to two of its prior cases where it held that such evidence was not absolutely necessary to prove the existence of a firearm. Rather, it found that the jury in this case had adequate evidence to rely upon to rationally determine that the object in question was a gun which included an opportunity to inspect the recovered weapons. Based on this evidence, a rational trier of fact could find beyond a reasonable doubt that D was guilty of Possession of a Firearm During the Commission of a Felony.

AFFIRMED.

HUNTER V. STATE (10/26/2012): BAC RESULTS/ PRESERVATION OF EVIDENCE



D was arrested for DUI and charged with Resisting Arrest and Assault due to his uncooperative and combative behavior towards police and medical personnel. After being tasered he was taken to a hospital where a blood test was administered. His BAC was .12. Because an expired blood test kit was used, D filed a pretrial motion to suppress the blood test results. An evidentiary hearing was held, but based on testimony that using an expired kit was immaterial to the results, D’s motion was denied. At trial testimony was presented that the blood test results had been improperly handled by the phlebotomist. Thus, D moved for a judgment of acquittal on the DUI charge arguing that the State had failed to prove the blood draw was administered correctly. D also requested that the Assault and Resisting Arrest charges be dismissed due to P’s failure to preserve the DVR recording of the events that occurred at the station when D was arrested. This motion was also denied but the court issued a missing evidence instruction to the jury.

On appeal, D argued that the trial court had erred by admitting his BAC results into evidence because: the test had been administered after its expiration date; and the kit's instructions not to vigorously shake the vial of blood had been disregarded. The Court relied on *Clawson v. State*, where it was held that admissibility of intoxilyzer test results center on the State providing an adequate evidentiary foundation for the test result's admission. After reviewing the circumstances surrounding D's blood test, the Court concluded that the two deviations from the manufacturer's required protocol in the administration of the blood test each rendered the BAC test inadmissible due to the lack of proper foundation and unreliability of the results. Thus, it reversed D's DUI conviction.

D also argued that the trial judge erred in failing to dismiss D's Assault and Resisting Arrest charges, basing his argument on *Johnson v. State's* holding that "the failure to gather and/or preserve case dispositive evidence will completely preclude a prosecution." Under a *Deberry* analysis the Court concluded: the recording would have been material to the preparation of D's defense and therefore would have been discoverable; the State had a duty to preserve the recording but had breached that duty; there was no bad faith; although the DVR recording would have been important to D's case, the remaining evidence presented to the jury was sufficient to support D's convictions. The Court held that the DVR recording's availability would not have been case dispositive, and that the missing evidence jury instruction was a sufficient remedy for the State's failure to preserve it. Therefore, it upheld D's two remaining convictions. **REVERSED IN PART, AFFIRMED IN PART.**

DAMIANI-MELENDZ V. STATE (10/26/2012): CUMULATIVE EVIDENCE/ HEARSAY/ WITNESS VOUCHING



D was convicted by a jury on numerous charges relating to a string of actual and attempted robberies occurring in various stores. At trial the State presented testimony of two police officers who each based their testimony on videotapes and photographs of the robberies. Several victims also testified to similar facts. D told the trial court that he agreed to allow one officer to give a summary of all the events at the beginning of trial. However, D did not make the same representation as to additional testimony by the officers at later points in the trial. Although the videos and photos were not presented to the jury D made no objection to any of the testimony.

On appeal, D argued, under a plain error standard, that the officers' testimony provided impermissible interpretations and opinions as to the robberies, and improperly

bolstered the videotapes, photographs and victims' testimony. This, according to D rendered the entire trial fundamentally unfair.

The Court concluded that neither officer's testimony constituted plain error. The summaries that were provided were permissible because the officer presenting them was uniquely qualified to highlight similar facts that linked the fourteen crimes together and because D had conceded at trial to allowing the officer to provide an overview of the crimes. As to the testimony that was based on videotapes, such testimony was admissible because it created no prejudice to D's rights and because the same facts were also testified to by the victims. Finally, the overwhelming amount of evidence against D was sufficient to support the jury's finding of guilt. In the absence of plain error, D's claims were deemed waived.

AFFIRMED.

RUSSEL V. STATE (11/5/2011): OUT-OF-COURT STATEMENTS/ 3507/ 3513: TENDER YEARS STATUTE

D was charged with numerous offenses relating to the sexual abuse of a child. At trial, the State was permitted to admit a statement made by the victim to a forensic interviewer at the Child Advocacy Center under the Tender Years hearsay exception, 11 *Del.C.* 3513. D objected arguing that the victim's in-court testimony did not touch on the events described in her out-of-court statement and was thus inadmissible. D also argued that when a child declarant is available to testify, the Tender Years exception has the same foundational requirements as is required for any out-of-court statement under 11 *Del.C.* 3507. The objection was overruled with the judge finding that the Tender Years exception establishes a lower threshold for admissibility of statements by a child declarant. D was convicted on all charges and his convictions were affirmed on appeal.

D filed a motion for post-conviction relief claiming his trial and appellate counsel were ineffective in failing to argue that the Tender Years hearsay statute requires the State to establish the same evidentiary foundation for admission of the victim's out-of-court statement as 3507 requires. The motion was denied and D appealed.

The Court explained that for a statement to be allowed into evidence under § 3507, the witness must testify about the events and the direct examination must touch both on the events perceived and the out-of-court statement itself. It then found that the victim, in testifying that she spoke with the forensic interviewer and that she told the truth, touched on the content of her out-of-court statement. In addition, she provided sufficient testimony, even without specifics, to meet the foundation requirements. Therefore, her statements were admissible under §3507 and it was not necessary for the Court to address the foundational requirements of the Tender Years exception. Because the out-of-court statement was admissible, D was not prejudiced by any failure of his counsel to argue against its admissibility. Therefore, his ineffective assistance claim was moot.

AFFIRMED.

THOMAS V. STATE (11/9/2012): DISPROPORTIONATE SENTENCES

D pled guilty to 12 different charges; a presentence investigation was conducted; and both counsel and D were given an opportunity to address the court prior to sentencing. The court sentenced D to a total of 58 years at Level V, suspended after 37 years. Part of his sentence included the maximum sentence of 25 years for racketeering, suspended after 12 years. On appeal, D argued that his racketeering sentence violated the Delaware Constitution's prohibition on "cruel" punishment. D noted that although *Crosby v. State* established a test for determining whether a sentence is in violation of the 8th Amendment's prohibition on "cruel and unusual" punishment, a different test should be used to determine whether a sentence is "cruel" under the Delaware Constitution. D asked the Court to prohibit sentences that lead to an inference of *disproportionality* rather than *gross disproportionality*, and argued that such an inference should arise whenever a defendant who has had a limited opportunity for rehabilitation is sentenced to the statutory maximum term.

In addressing D's arguments, the Court noted that proportionality is determined by the amount of time the offender will spend in prison, and the fact that a sentence is outside the SENTAC guidelines range does not make it disproportionate. Because D's sentence was to be suspended after serving 12 years, the amount of time he would spend in prison was less than half the maximum allowed for racketeering. Therefore it was disproportionate to the charge.

D also argued that the trial court failed to establish an adequate record to support its deviation from the SENTAC guidelines. The Court rejected that argument as the trial court findings were sufficient to support a departure from the SENTAC guidelines.

AFFIRMED.

COLLINS V. STATE (11/15/2012): OUT-OF-COURT STATEMENTS/ ALLEN CHARGE



D was charged with the shooting death of V. W1 & W2 each gave a statement to police identifying D as the shooter. At trial, W1 testified that she could not identify the shooter and may have lied to police. W2 testified that she could not identify the shooter and could not remember what she told police. At trial the State introduced the two out-of-court statements under 11 *Del. C.* § 3507 over D's objection that a proper foundation had not been laid for either statement. Later, the jury informed the court that it was deadlocked. The judge gave an *Allen* charge over D's objection that it was coercive as given. Two or more hours later, the jury returned guilty verdicts.

On appeal the Court concluded that the 3507 statements had been properly introduced as they had: been voluntarily made; been subject to cross examination; had touched on the events that the witnesses observed; and had touched on the content of their prior statements. The Court also held there was no abuse of discretion in issuing the *Allen* charge because the jury was considering a complex case based largely on circumstantial evidence and because the circumstances surrounding the deadlock gave the judge reason to believe that further deliberation would be helpful. Additionally, the judge specifically told the jury not to surrender their personal convictions for the sake of unanimity.

AFFIRMED.

DRUMMOND V. STATE (11/21/2012): UNLAWFUL CONDUCT AGAINST A CHILD BY A SEX OFFENDER/ BIFURCATED TRIAL

D, a registered sex offender, was charged with 2 counts of First Degree Rape and 1 count of Unlawful Conduct Against a Child by a Sex Offender. Prior to trial, D and the State moved to sever the charges because they believed D's registered sex offender status, an element of the unlawful conduct charge, would materially prejudice his defense against the rape charges. The trial court denied the joint severance motion on the grounds that "prior sexual misconduct is markedly pertinent to the consideration and understanding of whether or not a person has committed another sexual crime." D was tried on both offenses and the jury was told of D's sex offender status. D was found guilty on all counts and sentenced to life imprisonment for each of his two Rape convictions and fifty years for his Unlawful Conduct conviction.

On appeal, D argued that the trial court abused its discretion by denying the joint severance motion. While this appeal was pending, the Court reached a decision in *Monceaux v. State* that a trial court must use a bifurcated procedure in all future 11 *Del. C. § 777A* cases. The Court disagreed with the State's argument that *Monceaux* should not apply retroactively. It also disagreed with the State's claim that D had waived his argument for a bifurcated trial when he stipulated to his sex offender status prior to trial. It held that because D only made the stipulation after his motion for severance was denied, doing so did not constitute a waiver of his right to argue his entitlement to bifurcation on appeal.

REVERSED AND REMANDED.

HUBBARD V. STATE (12/3/2012): RIGHT TO JURY TRIAL/ JOINDER/RIGHT TO COUNSEL

D was charged with numerous offenses relating to two separate sexual assaults. After initial jury screening had begun but before any jurors were selected, D indicated that he wished to waive his right to a jury trial. The court allowed him to do so after finding, through extensive inquiry, that he was waiving his right knowingly and voluntarily. The judge issued a 40 page decision and found D guilty of all charges.

On appeal D raised three claims: (1) he was denied his constitutional right to a jury trial and his right to due process because the jury selection process was flawed and forced him to waive his right to a trial by jury, (2) the charges relating to the two different victims were improperly joined together for a single trial, and (3) his appointed counsel improperly testified against him.

In regards to his first argument, D claimed that he was forced to waive his right to a jury trial when the trial judge privately told jurors that they were likely to convict him and that his attorney allowed this to happen. The Court found these allegations to be unsupported by facts. The judge had properly conducted *voir dire*, and no jury member was ever selected. Once the judge learned that D wished to waive his right to a jury trial, an extensive colloquy was conducted to ensure that D was waiving his right knowingly, intelligently, and voluntarily. Thus, the court rejected D's first argument.

In Support of his improper joinder claim, D argued that the joinder of charges from the two separate sexual assaults was prejudicial because the large number of charges made it much more likely that a jury would convict him. Additionally, he would have testified in the case involving the first victim. The Court found that because the factual circumstances of each of the cases were so similar and more importantly because the State had D's DNA linking him to both cases, it was entirely proper under Rule 8(a) for the two cases to be tried together.

Finally, the Court found defense counsel's responses to the judge's questions about D's desire to fire him was not improper testimony against him.

AFFIRMED.

STAFFORD V. STATE (12/4/2012): SEARCH OF PASSENGER OF MOTOR VEHICLE/DELJIS/PROBABLE CAUSE OF CRIMINAL IMPERSONATION



Police legally stopped a car for a window tint violation. After discovering that the driver did not have a valid driving license, police intended to let D drive the car away, but first asked for his ID. D was unable to produce any ID and, instead, gave a false name. Police ran the name through DELJIS to no avail. Suspecting that D was lying about his ID, police cuffed and searched D prior to putting him in their cruiser. During the search a gun fell out of D's pants' leg. D was charged with numerous weapons offenses. Later, D moved to suppress the firearm, but his motion.

Following convictions, D appealed the denial of the motion. In support of his claim, D argued that as a passenger he had a right to be free from a police frisk unless there was a reasonable, articulable suspicion that he was armed and dangerous. While agreeing with D, the Court pointed out that a passenger can become a suspect by acting in

a manner that gives the police probable cause to suspect that he committed a crime. The Court also noted that D was not frisked merely because he was a passenger, but rather because police suspected him of criminal impersonation. Based on the officer's experience with criminal impersonation, the fact that D did not produce ID or anything else containing his name, and the absence of DELJIS information, the Court concluded that the officers had probable cause to believe that D had committed a crime. Thus, police had the authority to arrest D and, therefore, the authority to search him incident to arrest. Thus, the firearm was discovered during a lawful search and D's motion to suppress was properly denied.

AFFIRMED.

STATE V. ABEL (12/5/2012): PROTECTIVE PAT DOWN



While wearing clothing bearing a Hell's Angels insignia, D and another motorcyclist were both pulled over for speeding. D cooperated by handing his information to P and keeping his hands visible throughout the stop. However, when asked, he declined to tell P where he was headed. Upon questioning D responded that he did not have any weapons on him. But, when P told him he was going to pat him down, D admitted to having two guns on him. P located the weapons and placed D under arrest. He was charged with speeding and two counts of Carrying a Concealed Deadly Weapon. D filed a motion to suppress, arguing that "he did not exhibit any conduct or behavior that would create a reasonable suspicion that he was armed or dangerous" and "that an affiliation with a motorcycle gang, in and of itself," did not provide "a reasonable, articulable suspicion that an individual is armed and dangerous." The trial court agreed and granted his motion.

On the State's appeal, the Court conducted a totality of the circumstances test to determine whether, at the time of the pat down, P possessed a reasonable, articulable suspicion that D was armed and dangerous. The only factors the State could point to in support of its argument were D's affiliation with Hell's Angels and his refusal to tell P where he was headed. The Court concluded that these factors together did not amount to reasonable and articulable suspicion, particularly since D was cooperative, polite, and jovial throughout the traffic stop and there were no other indicators suggesting that D was armed. The Court found the trial court was correct and upheld its decision to suppress the evidence. **AFFIRMED.**

DISSENT: Examined the totality of the circumstances "as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances" and concluded

that D's conduct was consistent with being on gang business and therefore P had a reasonable concern for his personal safety that justified a protective search.

WILLIAMS V. STATE (12/10/2012): RIGHT TO SELF-REPRESENTATION

D was charged with Escape After Conviction after he failed to return to the Plummer Center where he was serving Level IV probation. During trial D asked for new counsel and requested to represent himself. This was denied. Trial proceeded and D was convicted. On appeal, D argued that the trial judge abused her discretion when she refused to allow him to proceed *pro se* during his trial.

In reviewing D's claim, the Court noted that while the right to proceed *pro se* may be curtailed after a trial begins, the trial judge must weigh the legitimate interests of the defendant against the prejudice that may result from the potential disruption of the proceedings already in progress. In addition, the record must reflect either the factual findings or the legal reasoning underlying the trial judge's denial of a defendant's mid-trial request to represent himself. In this case the trial court denied D's request to represent himself without conducting any colloquy with D. Instead, it responded to his request by telling him flatly that he would not be allowed to represent himself because he started with counsel and he would finish with counsel. The Court concluded that there was no basis on which to find a waiver of the right to self-representation, and also noted that starting a trial with counsel, without more, is not a basis to deny a defendant's right to self-representation.

REVERSED.

ROY V. STATE (12/12/2012): INEVITABLE DISCOVERY DOCTRINE STIPULATION/IRRELEVANT EVIDENCE



P responded to a 911 call of an assault in progress and saw D walking in the area. When P1 pulled his discretely marked cruiser alongside D, D raised his hand to his face and began walking in the opposite direction. P2 and P3 approached D in their cruisers and D did not attempt to flee or conceal his identity. P immediately placed their hands on D and directed him towards a cruiser. D was placed in handcuffs, and when asked if he had any weapons, responded that he had a knife. P took the knife from D and, for the first time, noticed that D's hands were covered in blood. D was arrested and taken to the

police station. D was thereafter convicted of Murder, PDWDCF, Assault, and Terroristic Threatening.

On appeal, D first argued that the police lacked articulable suspicion to detain him for an investigatory stop, and thereafter lacked probable cause to arrest him. Therefore, he argued, all evidence derived from the stop should have been suppressed. Secondly, he argued that even though he stipulated to the introduction of his drug usage at trial, the State erroneously failed to connect that drug usage to any of the purposes permitted by the *Delaware Rules of Evidence*.

In response to D's first claim, the Court agreed with D that although P had reasonable suspicion that a crime was committed near where D was detained, P had only an inchoate and unparticularized suspicion or hunch that D was involved in illegal activity. However, the Court concluded that although the initial detention and subsequent arrest were both illegal, the evidence seized during those actions would inevitably have been discovered because other P simultaneously discovered the body nearby. Therefore, such evidence was admissible at trial, and D's motion to suppress was properly denied. As to his second claim, the court held that because D made no objection to the manner in which the State presented evidence of his drug use at trial, such claim was waived, and there was no plain error to warrant a reversal.

AFFIRMED.

MCLAUGHLAN V. STATE (12/19/2012): GRAND JURY INDICTMENT



D was indicted by a grand jury on five counts of Rape Second Degree and went to trial after which the jury was “hung.” D was reindicted on eight identically-worded counts of Rape Second Degree. The new indictment did not link any specific incident to any specific count. D moved to dismiss the new indictment, claiming a lack of specificity and an appearance of prosecutorial vindictiveness. The trial court dismissed three of the counts and permitted the State to identify which alleged incidents corresponded to which of the remaining five counts. Following a jury trial D was found guilty on four of the five counts of Rape Second Degree.

D appealed his convictions arguing that the dismissal of three counts in the new indictment impermissibly allowed the petit jury to invade the role of the grand jury by deciding which evidence related to which of the remaining counts; and permitting the State to decide which counts would be dismissed amounted to improper substantive changes to the new indictment.

The Court noted that, prior to trial, D knew which of the five alleged incidents were associated with the five counts of Rape, and at trial the State specifically tied each alleged incident to a specific count. In addition, by finding D guilty of only four of the

five counts, the jury demonstrated its ability to confine its consideration of specific facts to each of the respective alleged incidents to which they related. The Court also found the trial court's dismissal of three counts of the indictment was to eliminate an appearance of vindictive prosecution and in doing so the court did not substantively change the new indictment. It was irrelevant which specific counts in the new indictment were dismissed, so long as the total number of Rape Second Degree counts was reduced to the number of counts in the original indictment.

AFFIRMED.

WALLACE V. STATE (12/31/2012): PROBATION HOME VISIT COMPLIANCE CHECKS



Members of the Governor's Task Force went to D's residence to conduct a routine home visit compliance check. Their specific purpose was to determine if he was still residing with his girlfriend despite a no-contact order. When they arrived, a probation officer (P.O.) announced himself and the 14-year-old son of D's girlfriend opened the door wide, which the GTF understood as an invitation to enter the premises. After being told that neither D nor his girlfriend were home at the time, the P.O. conducted a safety sweep to ensure that no one else was present. In D's bedroom, the P.O. saw, in plain view, what appeared to be a bag of cocaine. The P.O. then executed an administrative search of the residence and D's car parked in the driveway, in accordance with Probation and Parole Procedures. The GTF discovered many drugs, paraphernalia, guns, ammunition and cash. Prior to trial, D moved to suppress the evidence. The motion was denied. D was subsequently found guilty of drug and weapon charges.

On appeal, D argued that the trial court erred in denying his motion to suppress. Specifically, he claimed that the GTF did not have consent to enter the residence in the first instance, and second that, under Probation and Parole Procedures, the GTF was not permitted to enter the residence without reasonable suspicion. On remand, the trial court found that the 14 year old implicitly gave consent and that D had given consent by signing the conditions of supervision. Back on appeal, the Court agreed. Finally, application of Procedure 7.3 and 7.19 was constitutional in this case because the search was the result of suspicion that D was in violation of probation. Therefore, D's motion to suppress had been properly denied.

AFFIRMED.