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

**Cases Summarized and Compiled by  
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**IN THIS ISSUE:**

**Page**

**WHITTLE V. STATE, (10/8/13): IMPROPER PROSECUTORIAL COMMENTS/BOLSTERING .....1**

**ROBINSON V. STATE, (10/25/13): PFBPP/STIPULATION/LIMITING INSTRUCTION .....1, 2**

**HOLDER V. STATE, (10/25/13): *BRADY*/CAC TAPES/IMPEACHMENT .....2**

**PLOOF V. STATE, (10/30/13): DUTY TO INVESTIGATE MITIGATING CIRCUMSTANCES IN CAPITAL CASE/ INEFFECTIVE ASSISTANCE OF COUNSEL .....2, 3**

**NEAL V. STATE, (11/8/13): *BLAND* INSTRUCTION/804(b)(3)/INEFFECTIVE ASSISTANCE OF COUNSEL.....3**

**PETERSON V. STATE, (11/13/13): COLLATERAL ESTOPPEL/POSSESSION OF FIREARM BY A PERSON PROHIBITED .....4**

**JONES V. STATE, (11/13/13):FAILURE TO RE REGISTER AS S.O./ “RESIDENCE” .....5**

**SAUNDERS V. STATE, (11/20/13): *BRADY*/IMPROPER PROSECUTORIAL COMMENTS.....5, 6**

**SZUBIELSKI V. STATE, (11/26/13): IMPROPER PROSECUTORIAL COMMENTS/BURDEN SHIFTING .....6**

**GUY V. STATE, (11/27/13): *BLAND*  
INSTRUCTION/INEFFECTIVE ASSISTANCE  
OF POSTCONVICTION COUNSEL.....6, 7**

**DIAZ V. STATE, (12/11/13): CONFIDENTIAL INFORMANTS/  
*FLOWERS* HEARING .....7**

**HAMILTON V. STATE, (12/9/13): NON LEGAL EXPERT’S  
MISTATEMENT OF LAW/ BURGLARY .....7, 8**

**WORLEY V. STATE, (12/9/13): MISSING EVIDENCE  
INSTRUCTION .....8**

**STEVENSON V. STATE, (12/20/13): PROSECUTORIAL  
COMMENTS/ AUTHENTICATION/ WEARING A  
DISGUISE DURING THE COMMISSION OF A FELONY.....9**

**WHITHURST V. STATE, (12/20/13): PRISON PHONE CALLS/ 1<sup>ST</sup>  
AMENDMENT RIGHTS/REASONABLENESS OF SEIZURE .....10**

**THOMAS V. STATE, (12/20/13): COMMISSIONER’S  
AUTHORITY/SUPREME COURT JURISDICTION.....10, 11**

**DELAWARE SUPREME COURT CASES  
OCTOBER 1, 2013 THROUGH DECEMBER 31, 2013**

**WHITTLE V. STATE, (10/8/13): IMPROPER PROSECUTORIAL  
COMMENTS/BOLSTERING**

Based primarily on the testimony of 3 W's, D was convicted of murder 2<sup>nd</sup>, PFDCF, reckless endangering 1<sup>st</sup> and PFBPP. In closing, P stated at least 20 times that the W's were "right" or "correct." However, the testimony of the 3 W's was replete with contradictions and inconsistencies. D did not object.

On appeal, the Court reviewed for improper comments under a plain-error standard. It found that P "undoubtedly improperly vouched for the credibility of certain witnesses when he repeatedly asserted that various key W's were "right." These conclusions were beyond what could logically be inferred from the record. The words "right" and "correct" are the flipside of the same coin as the word "lie." Saying W is "right" is saying that W's testimony agrees with the facts of the case. P did attempt to link his conclusions to the record at certain times, he did so in the face of contradictions and other inconsistencies that would undermine that a specific W was right. The Court found plain error because there was little physical evidence and the Ws' credibility was central in this close case. The Court also noted that even if there had been no plain error, it may have reversed under the standard in Hunter which gives the Court discretion to reverse when the vouching is so repetitive. **REVERSED.**

**ROBINSON V. STATE, (10/25/13): PFBPP/STIPULATION/LIMITING  
INSTRUCTION**



Police arrested D and found on him crack, cash and a key to a house that had been under surveillance. A search of the house revealed a scale and plastic baggies on a kitchen counter and a revolver with 6 rounds of ammo in the oven. D said he found the gun in the alley and put it in the oven without using it. Prior to trial, D stipulated that he was a person prohibited. At trial, over D's objection, the judge instructed the jury that D had stipulated based on a prior felony conviction. D then requested and the judge agreed to give a limiting instruction. However, the judge failed to do so. D was convicted of drug charges and PFBPP.

On appeal, D argued that he was deprived of fair trial because the judge told the jury about his previous felony conviction without guidance. The Court found no prejudice because this was a crucial element of the offense which should not have been

kept from the jury. However, the judge should have given the limiting instruction. This error was harmless. **AFFIRMED.**

**HOLDER V. STATE, (10/25/13): BRADY/CAC TAPES/IMPEACHMENT**

V claimed that when she was 5 or 6 years old, D, who was 11 or 12 years old, sexually abused her. Allegedly, D and his brother also sexually abused V's sister. V made her report 5 years later. V and her sister were both interviewed by the CAC. V's statement was played at trial. The stepsister had no memory of any abuse. P gave D the sister's statement but had redacted her address. D argued the statement would have helped him but he could not call her as a witness because he did not have her address. Therefore, D argued, he was deprived of a fair trial because P violated *Brady v. Maryland*.

On appeal, the Court found that even if the evidence would have been favorable to D and was suppressed by P, the suppression was not prejudicial. The statement would not of been exculpatory and would have had almost no impeachment value because she did not dispute V's account - she simply did not remember. **AFFIRMED.**

**PLOOF V. STATE, (10/30/13): DUTY TO INVESTIGATE MITIGATING CIRCUMSTANCES IN CAPITAL CASE/ INEFFECTIVE ASSISTANCE OF COUNSEL**

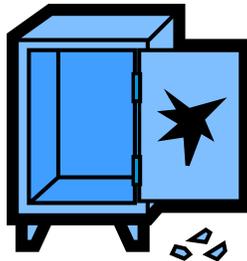
D was convicted of capital murder. In the penalty phase, P presented evidence of 2 statutory aggravators and attempted to establish 7 nonstatutory aggravators. D presented 12 mitigators which included his life history and his relationship with family members. The jury recommended a death sentence. The judge gave the jury's decision great weight and reached the same result after independently weighing the evidence. D's conviction and sentence were affirmed on direct appeal and he filed a motion for post-conviction relief. At a hearing, D highlighted the testimony of 6 former foster children who lived with D when he was a kid. They testified to sexual misconduct by father; physical misconduct by father on D and others; and verbal and physical abuse by mother on D and others. There was also evidence that the foster home was shut down involuntarily. Finally, additional evidence of D's military service was presented. A psychiatrist testified that in light of the tension between the parents, a disabled brother, the constant cycle of foster children, and abuse of D, it would not have been possible for him to develop normally.

D then appealed the denial of that motion. On appeal, the Court found that D received effective assistance of counsel in the trial phase. D had also argued that his attorneys were ineffective because they failed to uncover evidence that his father sexually abused foster children staying with D's family and also physically abuse D. The Court remanded the case for the post-conviction judge to reweigh the mitigators and aggravators in light of the subsequently discovered mitigators. After the judge reweighed the circumstances and reached the same decision, the Court addressed D's IAC claim as to the penalty phase.

The Court noted that counsel had received mostly positive evidence of D's childhood. However, the father called the attorney then said he needed to talk to his wife before deciding whether to discuss "it." The attorney speculated that "it" might refer to abuse but she never followed up. Additionally, the attorney stated that while she had reviewed a study of the foster home, she missed the part that said children were removed 2 times. The Court found this troubling. The majority found that the attorney's conduct fell below an objective standard of reasonableness. However, it was not prejudicial because the additional evidence regarding his military service added only a few more details and the abuse was not severe. **AFFIRMED.**

**DISSENT:** Concluded the majority inappropriately reconsidered the evidence and drew factual inferences that might be appropriate for sentencing judge to make but are inappropriate and irrelevant to the more constrained factual analysis required to determine prejudice. All that was necessary was a conclusion that a reasonable sentencing judge could choose to give D life because of the new evidence.

**NEAL V. STATE, (11/8/13): BLAND INSTRUCTION/804(b)(3)/INEFFECTIVE ASSISTANCE OF COUNSEL**



D and 3 Co-D's robbed 3 businesses. Police arrested them and found inside their car: spoils of the robberies, a handgun, masks, liquor bottles, cash and other items. D was indicted on 36 counts. The 3 Co-D's pled in exchange for their testimony against D. P presented testimony implicating D as playing a role in the inception, planning and execution of the robberies. But, 1 Co-D admitted telling police that D did not participate. D's attorney did not request a *Bland* instruction for the jury to be cautious when considering the accomplice's testimony. The judge did not give the instruction.

P did not call the other 2 Co-D's after learning they had made out-of-court statements exculpating D. D's attorney tried to call those Co-D's, however they invoked their 5<sup>th</sup> Amendment right. Their statements were not admissible under 3507. D presented no other evidence and was convicted of all counts. His conviction was affirmed on direct appeal. D then filed a post-conviction motion. He appealed that denial. On appeal, D argued his trial attorney was ineffective for not requesting a *Bland* instruction. D also claimed the trial attorney was ineffective for failing both to argue Co-D's statements were admissible under *D.R.E.* 804 (b) (3). D also argued P engaged in misconduct by interfering with Co-D's choice to testify. First, the Court concluded that P did not interfere with Co-D choice to testify, he merely reminded them of consequences of giving false testimony.

The Court also concluded that, under *Brooks v. State*, whenever an accomplice testifies, judges are required to give a modified *Bland* instruction even if D does not request it. Failure to do so is plain error. Counsel's failure to request the instruction fails to meet an objective standard of reasonableness. Here, counsel's ineffectiveness was not prejudicial due to overwhelming evidence against D.

The Court also reviewed the assistance provided by appellate counsel on direct appeal. Counsel should not raise every nonfrivolous claim but should select among them in order to maximize the likelihood of success. Thus, D was required to establish that the argument regarding the *Bland* instruction, which was not raised, was clearly stronger than the arguments that were raised. Due to the harmless nature of the failure to give a *Bland* instruction, appellate counsel was not ineffective. Similarly, there was no ineffective assistance of counsel for failing to argue that the Co-D statements were admissible hearsay under *D.R.E.* 804 (b) (3) as made against their interest because the statements were not "trustworthy" as required. **AFFIRMED.**

#### **PETERSON V. STATE, (11/13/13): COLLATERAL ESTOPPEL/POSSESSION OF FIREARM BY A PERSON PROHIBITED**



V was standing in the middle of the street while talking to someone inside a car when he saw someone turn the corner and walk toward him. V started to walk away because the person had a weapon. V then saw fire in his peripheral vision. He was shot in the back. Initially, V told police he did not see who shot him. Later, he said he could ID the shooter but did not know his name. Two weeks later, V gave the name "KAL" as the shooter and then ID'd D from a photo array as the shooter. D had a jury trial on PFDCF and assault 1<sup>st</sup>. Concurrently, he had a bench trial of PFBPP. D put on an alibi defense. While the jury acquitted him, the judge convicted him of PFBPP.

On appeal, D argued that the jury must have found D was not the shooter and possibly not even at the scene. Thus, P was collaterally estopped from seeking to convict him for PFBPP. The Court rejected P's argument that the identity of the shooter was the sole issue before at trial despite the fact that it was the only issue addressed on CX and in closing arguments. According to the Court, the general nature the verdict allowed for the possibility that the jury found D not guilty based on one or more alternative grounds. Therefore, the judge was not collaterally estopped from its finding. **AFFIRMED.**

**JONES V. STATE, (11/13/13):FAILURE TO RE REGISTER AS S.O./  
“RESIDENCE”**

D was convicted of a sex offense in New Jersey then moved to Delaware. He got a job through a foundation which allowed him to live in a house in exchange for repair work. The foundation director told D he needed to register as a sex offender. D did so and put down the house where he was “working” and living as his mailing and physical address. D acknowledged he was required to update his registration if he moved. At trial, D said that he stayed at the house for 12 to 14 nonconsecutive nights. Another resident said he never saw D there after the first night. D told the foundation director that he was basically staying at his mom’s house and only stayed at the other house for one day. The director testified that he had told D that he needed to register as homeless. He failed to do so and was charged with failing to reregister. D was found guilty.

On appeal, D argued that 11 *Del.C.* § 4120 did not require him to reregister unless he had a new residence. D also argued that even if he had to reregister, his failure was neither knowing or reckless because he subjectively believed he was not homeless and did not receive adequate notice to the contrary. The Court found that any change in residence including a cessation of residence automatically triggered a statutory duty to reregister. Also, there was substantial evidence for the trial judge to conclude that D was on notice that his residential information had changed and that he had a duty to reregister. **AFFIRMED.**

**SAUNDERS V. STATE, (11/20/13): BRADY/IMPROPER PROSECUTORIAL  
COMMENTS**



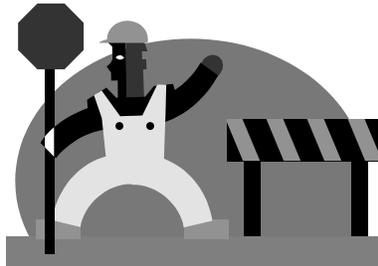
D was convicted of drug charges. On appeal, the State agreed that it had improperly suppressed until day of trial an audio tape of a police officer discussing with the CI the terms of his cooperation in this case. The State also agreed that it was *Brady* material.

D argued he was prejudiced because he would have taken a plea if he had been aware of the audio and, if he went to trial, he would have had a more effective CX. The Court rejected this because D rejected the plea offer despite knowing that the CI would testify and because defense counsel CX the CI extensively. Additionally, D did not re call

the CI to the stand after learning of the tape and there was significant evidence independent of the undisclosed statement to support the convictions.

Finally, the Court found that P's statement in closing that the CI's testimony was "completely candid" was improper. However, the error was harmless due to an immediate curative instruction. **Affirmed.**

**SZUBIELSKI V. STATE, (11/26/13): IMPROPER PROSECUTORIAL COMMENTS/BURDEN SHIFTING**



D was charged with assault after he sped away from police, lost control of his car and caused serious physical injury to a flagger in a construction zone. At trial, based on D's testimony that he had a mechanical problem, P asked D whether he had done anything since the crash to find out what was wrong with the car. Defense counsel objected. P also mentioned O.J. Simpson in CX when discussing whether it was a high or low speed chase. The issue at trial was state of mind. D argued that he was guilty of criminal negligence at worst. D was convicted and declared a habitual offender.

On appeal, D argued that P improperly shifted the burden to him when he asked about efforts to confirm that his car had suffered mechanical failure. The Court found that P's questioning and argument were appropriate given D's claim that he was not responsible for the accident due to mechanical failure. Additionally, the Court found: P's reference to O.J. Simpson was improper but not plain error; P's questioning whether D's actions were "wise" was not improper; and p's characterization of d's argument was inaccurate but was not plain error. **AFFIRMED.**

**GUY V. STATE, (11/27/13): BLAND INSTRUCTION/INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL**

D's convictions of intentional murder, felony murder, PFDCF and other offenses were affirmed on direct appeal. On a 3<sup>rd</sup> motion for post-conviction relief, D argued the judge erred in failing to give a modified *Bland* instruction and his previous appointed post-conviction counsel was ineffective.

On appeal, the Court concluded that D had raised the *Bland* issue in his direct appeal. At that time, the Court found that the trial court did not err in denying the instruction because there is no evidence to support a finding that the W actually participated as an accomplice with D. Thus, the Court was only required to address the

issue on this appeal if the interest of justice required. D argued that this hurdle is overcome because of the 2012 decision in *Brooks v. State* which, according to the D announced a “new rule” that required the instruction be given, whether or not it is requested, whenever a self-identified accomplice testifies. The Court held that *Brooks* did not alter or expand the definition of accomplice. Nor did the case apply retroactively. The Court found that the remainder of D’s claims were either time barred or conclusory. **AFFIRMED.**

**DIAZ V. STATE, (12/11/13): CONFIDENTIAL INFORMANTS/ FLOWERS HEARING**



A confidential informant, (“CI”), told police that an Hispanic male would be driving a Buick Rendezvous between Philadelphia and Wilmington, carrying cocaine in a hidden compartment. Police set up surveillance at the time and location provided by the CI. P spotted the car, followed it, stopped D, and took D into custody. Police then found drugs inside the car. D claimed the drugs belonged to his cousin or his cousin’s wife. Prior to trial, D sought disclosure of the CI’s identity. After a *Flowers* hearing, the trial court denied D’s motion for disclosure. D was later convicted of one count of drug dealing.

On appeal, D claimed the trial court abused its discretion when he denied his motion. Under *D.R.E.* 509, the State has a privilege to withhold the identity of a CI unless it appears the CI would provide testimony material to the defense. While there are some situations where a CI’s identification must be disclosed, that is not the case when a CI is used only to establish probable cause. Here, the CI was used to establish probable cause and additional circumstances did not support a conclusion that the CI may have information that would materially aid D. **AFFIRMED.**

**HAMILTON V. STATE, (12/9/13): NON LEGAL EXPERT’S MISTATEMENT OF LAW/ BURGLARY**

D lived with V on property V leased until their relationship grew rocky and D moved out. D left behind several items, including a PlayStation (“PS”). Additionally, several bills were in D’s name. At one point, D called V several times asking to meet at V’s house, but she said, “no.” D came over anyway but was told to leave. D asked for his PS, which V’s son retrieved. D pushed V down the stairs then shot her and her two sons multiple times. One of V’s sons died. At trial, the State presented the testimony of a doctor who opined that D was unable to use an EED defense due to voluntary

intoxication. The judge gave a curative instruction informing the jury that the W was providing his understanding of EED and, in fact, D was not precluded from asserting such a defense. D moved for a judgment of acquittal on a burglary charge, which the trial judge denied. D was convicted of murder 1<sup>st</sup>, attempted murder 1<sup>st</sup>, kidnapping 1<sup>st</sup>, burglary 1<sup>st</sup> and PFDCF.

On appeal, D argued the trial court erred when it allowed a non-legal expert to make a misstatement of law and failed to give a timely curative instruction; and that the State failed to prove every element of the burglary charge. The Court concluded that any error from the misstatement of law was cured by the curative instruction. Additionally, the State did establish every element of burglary, including that D knowingly *entered or remained unlawfully* in the house. A person remains unlawfully when he enters or remains on a premise when he is not licensed or privileged to do so. Though D previously resided in V's house, he did not have a license or privilege to be at the house during the shooting because V asked him to move out, and V and her family repeatedly demanded V leave that day. D did not have a privilege to be at the house merely because some utilities were in his name. **AFFIRMED.**

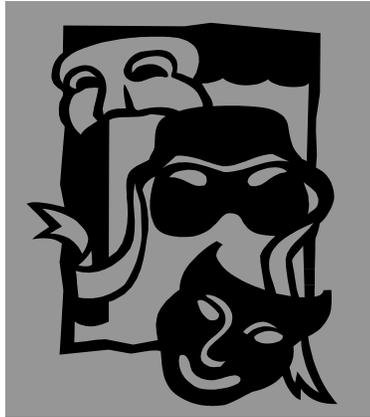
#### **WORLEY V. STATE, (12/9/13): MISSING EVIDENCE INSTRUCTION**



On his way to a liquor store, V was taunted by D. Once inside the store, D & V had a confrontation that turned physical. V went home and noticed his phone and pocketbook were missing. So, he went back to the store. D followed him in to the store and stabbed him. V later identified D in 2 separate police lineups as his attacker. Two other Ws saw D enter the store with a knife before the attack. Police viewed surveillance footage of the attack from inside the store, but were unable to make a copy of the tape. The tape was later written over. At trial, D requested a missing-evidence instruction based on the State's failure to preserve the tape. The trial court found that even though the State breached its duty to preserve evidence, D was not entitled to a favorable inference. The jury convicted D.

On appeal, the Court noted that a missing evidence instruction requires the jury to infer that, "had the evidence been preserved, it would have been exculpatory" to D. Applying a two-part analysis, the Court agreed with the trial court's decision. Even though the State breached its duty, the situation did not warrant a missing evidence instruction. The video, even if preserved, would not have undermined the separate W identifications. Therefore, it was not of consequence. Further, there was ample other evidence to sustain D's conviction. **AFFIRMED.**

**STEVENSON V. STATE, (12/20/13): PROSECUTORIAL COMMENTS/  
AUTHENTICATION/ WEARING A DISGUISE DURING THE COMMISSION  
OF A FELONY**



V1 & V2 were attacked at their house by 3 D's wearing ski masks. V1 was knocked out by a crowbar. V2 was attacked on the deck and D's demanded her jewelry. V1 awoke and shot at D's 4 times. D's took off leaving behind a new crowbar, a ski mask, and a jewelry box. Police traced the crowbar to a hardware store. Video from that store revealed the buyer and another owned a Crown Victoria. Police then learned that D1 lived with those 2 men. D1 went to a hospital under D2's name. Police obtained those medical records and video showing that D1 was the person who went to the hospital. At the scene, police found DNA consistent with D1. D1 was tried and convicted of robbery, assault, weapons offenses and Wearing a Disguise During the Commission of a Felony ("WDDCF").

On appeal, D1 argued that D made improper comments by arguing the patient at the hospital was treated for gunshot wounds to the hand and that D1 had bandages on his hand when arrested. The trial court had told the prosecutor that he could not argue that the patient was, in fact, D1. The Court found nothing improper as the prosecutor argued a legitimate inference from the record. D1 also argued that there was no evidence to support the inference that he was the patient because the medical records were not relevant and not properly authenticated. The Court found the medical records to be relevant and properly admissible because they have some tendency to show that D1 was shot shortly after the crime. Identity was the main issue at trial. The records were properly authenticated by W's testimony as to obtaining the records and to the evidence leading to a conclusion that D1 was the patient. Finally, D1 claimed the trial court erred in denying his Motion for Judgment of Acquittal for the WDDCF. The Court found that, on the record, a rational trier of fact could find D1 wore a hood or mask during the crime as both V's testified the attackers wore ski masks or a hood. **AFFIRMED.**

**WHITHURST V. STATE, (12/20/13): PRISON PHONE CALLS/ 1<sup>ST</sup>  
AMENDMENT RIGHTS/REASONABLENESS OF SEIZURE**



A long story short: V pulled up to a hotel drunk and flashing around money. Through a series of events that involved a few different people who were staying at the motel, D1 and D2 pinned V down in a motel room, beat him in the head with the gun, and rummaged through his pockets. W locked herself in the bathroom and peaked out. At trial, many Ws testified D engaged in W tampering by telling them not to come to court, threatening them, and encouraging them to forget. The State subpoenaed D's prison phone calls. At a suppression hearing, the trial court found the State had a legitimate reason for the subpoena. In the calls, D discussed W's not showing up to court. At trial, D admitted to witness tampering. He claimed he thought that was the best way to deal with the situation. He was then convicted of assault, robbery, burglary, weapons offenses and 3 counts of witness tampering.

On appeal, D claimed the State violated his 1<sup>st</sup> and 4<sup>th</sup> Amendment rights *via* the subpoena of his prison phone records. Probable cause is not needed for the State to seize prison phone call records because the prisoners are told the calls are recorded. However, the seizure must be reasonable. For a subpoena to be reasonable, and be lawful with respect to both the 1<sup>st</sup> and 4<sup>th</sup> Amendment, the Court must determine whether: (1) the seizure furthered an important/substantial government interest; and (2) the seizure was no greater than necessary to protect that interest. Here, there was a legitimate/substantial government interest with respect to witness tampering as that falls within the category of security concerns that the inmate is engaged in ongoing criminal activity. And, there was no indication the seizure was greater than necessary to further its investigatory efforts. D failed to point to any case law to support his claim that, before seizing the records, the State was required to provide corroboration that V was contacted about testifying. **AFFIRMED.**

**THOMAS V. STATE, (12/20/13): COMMISSIONER'S AUTHORITY/SUPREME  
COURT JURISDICTION**

D appealed a Superior Court Commissioner's denial of a motion for modification of a VOP sentence. The Supreme Court does not have jurisdiction of a Commissioner's order. A commissioner's order must first be "appealed" to a judge. Thus, the Clerk of the Court issued a notice to show cause why the appeal should not be dismissed for lack of jurisdiction. The State requested the matter be remanded for a VOP hearing as the commissioner did not have authority under 10 *Del.C.* §512(a)(4) to conduct a VOP

hearing. By extension, the commissioner lacked authority to deny D's motion for a modification of his VOP sentence. **REMANDED.**

**SUDLER V. STATE, (12/26/13): IMPROPER COMMENTS/ "THE GOLDEN RULE"**



V confronted D on her front porch. D claimed he had found her house key then left. V had been home for 5 hours and thought D took the key from inside her house. V called the police and later identified D. At trial, D argued the State failed to prove burglary because it failed to prove he entered the house. The State told the jury: "Whether it's an enclosed porch or not an enclosed porch, you should have a right not to have somebody come up and take your stuff off your porch. It's part of your house. It's part of your dwelling." D did not object and was later convicted of burglary and criminal trespass.

On appeal, D argued that the prosecutor violated the "Golden Rule" by using the pronoun "you." The Golden Rule prohibits a lawyer from asking a jury to imagine themselves in V's place. The Court found the trial court erred when it failed to prevent or cure the statements. However, it was harmless because the comment did not constitute plain error. **AFFIRMED.**