

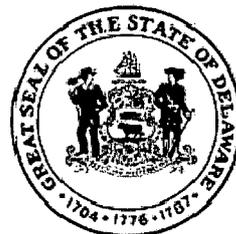
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**OFFICE OF THE PUBLIC DEFENDER**

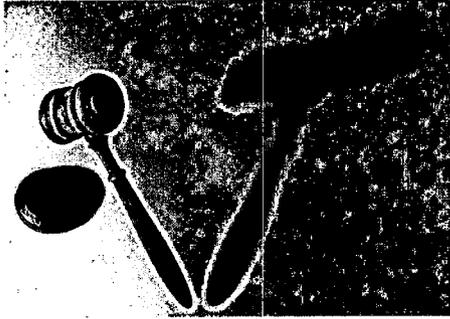
LAWRENCE M. SULLIVAN, PUBLIC DEFENDER OF THE  
STATE OF DELAWARE



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

**Cases Summarized and Compiled by  
Nicole M. Walker, Esquire and  
P. Ross A. Flockerzie, Law Clerk**

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**DELAWARE SUPREME COURT CASES  
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**SYKES V. STATE (JAN. 24, 2008): 5<sup>TH</sup> AMENDMENT/IMPARTIAL  
JURY/CHANGE OF VENUE/IMPROPER CONTACT WITH JURORS/  
PROPORTIONALITY OF DEATH PENALTY/8<sup>TH</sup> AMENDMENT**



D appeals his convictions of 2 counts of murder first degree, 2 counts of rape first degree and other felonies and misdemeanors.

D raped and killed by strangulation a 68 year old female. D placed V into her own suitcase and then put the suitcase in the trunk of V's car.

D was sentenced to death by lethal injection and makes 6 arguments on appeal:

1. **8<sup>th</sup> Amendment:** D argued that Delaware's death penalty amounts to cruel and unusual punishment and thus violates the 8<sup>th</sup> Amendment. The Court ruled that since D failed to raise the issue below, it would rest on prior holding that lethal injection does not violate the 8<sup>th</sup> Amendment. At the time of the decision, the U.S. Supreme Court was considering the issue so the Delaware Supreme Court ruled that the forthcoming decision would control. **\*Update\*** The U.S. Supreme Court decided on 4/16/08 that lethal injection is not cruel and unusual punishment and is in fact constitutional. Baze v. Rees, 128 S. Ct. 1520 (2006).
2. **5<sup>th</sup> Amendment:** D's right to remain silent was not infringed upon by the trial judge's improper instruction to the jury during the guilt phase that D had a right to allocute. The trial judge's curative instruction was a "meaningful and practical" alternative to a mistrial.
3. **Impartial Jury:** D was not denied his right to an impartial jury when the State used 4 of the first 6 peremptory challenges to strike racial minorities. The State used 8 total peremptory challenges and 4 were used to strike racial minorities. The trial judge found race-neutral reasons for striking the jurors. The Supreme Court remanded the case so the trial judge could make a determination regarding the validity of the State's reasons for striking the members in consideration of the totality of the circumstances. This accords with the second step of *Batson*. The trial judge found the State's challenges reasonable, credible, and race-neutral.

4. **Change of Venue:** Trial judge did not err by denying D's motion for a change of venue. D's argument that media articles were highly inflammatory and sensationalized were invalid as the Court determined the articles were merely informational. Due process does not require that jurors be ignorant to the facts of the case, only that they be impartial.
5. **Improper Contact with Jurors:** The trial court did not abuse its discretion when it allowed a juror to remain on the panel for the penalty phase after he had contact with a W at a little league game. The juror reported the interaction to the judge and stated he could remain impartial. D failed to show identifiable prejudice resulting from the juror remaining on the panel.
6. **Proportionality of the Death Penalty:** D's death penalty sentence is proportionate to those within the universe of cases wherein the death penalty was imposed after a hearing. The Court cites numerous cases with a death penalty sentence involving "cruel and outrageous deaths of defenseless, helpless persons." The Court also cites cases with a death penalty sentence where an elderly victim was raped and murdered by strangulation.

**FISHER V. STATE (JAN. 23, 2008): POSSESSION/LIO/MAINTAINING A DWELLING**

CI purchased cocaine in a residence from D with a marked bill. Police obtained a warrant for the residence and found D sitting in front of a coffee table with crack cocaine on the table. D had \$474 dollars in his pocket including the marked bill. D was convicted of possession of cocaine and maintaining a dwelling for keeping controlled substances. D argued that possession is a LIO of maintaining a dwelling.

In affirming, the Court issued a very strict decision simply holding that the elements required to satisfy possession and maintaining a dwelling are different. One can possess without maintaining a dwelling and one can maintain a dwelling without possessing.

**MCNAIR V. STATE (JAN. 23, 2008): DISCLOSURE OF CP'S IDENTITY/FLOWERS HEARING \*\*REVERSED\*\***



CI, a past proven reliable informant, called police claiming that he observed D selling heroin on the corner. According to the officer, the CI said he was taking off before police arrived. The State conceded that police had no reasonable suspicion or probable cause at that point. Police claim they approached D and he consented to a pat

down, but nothing was found. Police claimed that D then consented to the search of his car where drugs were found. Both D and an independent W testified that police approached, threw D against a wall, then on the ground and took keys out of his pocket. Police then used the alarm on the fob to find and open the car.

D filed a motion for a *Flowers* hearing on the ground that the CI may have witnessed what actually occurred. The trial court denied that motion and denied D's motion to suppress finding the officer more credible than D and his W. He subsequently received a life sentence as a habitual offender.

On appeal, the Court ruled that D made a prima facie case for a *Flowers* hearing. The case was reversed and remanded. The subsequent hearing revealed testimony from a credible CI that was more in line with the testimony of D and his W. D was offered and accepted a 5 year plea agreement; two of the years have already been served.

#### **MELLENDEZ V. STATE (JAN. 23, 2008): RIGHT TO PRESENT A MENTAL-HEALTH DEFENSE**

While incarcerated, D stabbed an inmate in the eye with a sharpened toothbrush. D was evaluated by Dr. Sheneman from the Delaware Psychiatric Center who concluded that D's mental state did not allow D to present an insanity or GBMI defense. Dr. Sheneman also stated that she was unable to interview other individuals who may have knowledge about the case and thus was unable to determine whether D had a rational motive for committing the act. The trial court ordered Dr. Donohue, a forensic pathologist at the Delaware Psychiatric Center, to complete the evaluation.

Dr. Donohue found that D did not qualify for an insanity or GBMI defense. Five days before trial, D moved for another psychiatric/psychological evaluation regarding D's ability to stand trial and D's mental state at the time of the offense. The Court found D competent to stand trial but did not address the request for an additional psychiatric/psychological evaluation. D did not reiterate a request for the additional evaluation. After a guilty verdict, D appealed arguing his right to present a mental-health defense was violated.

The Court held that D's right to present a mental-health defense was not violated. D had access to a psychiatrist's assistance and evaluation. The State obligation is "limited to provision of one competent psychiatrist." While some cases may require multiple evaluations, this case does not fall into that category for three reasons: (1) the two reports were not contradictory, (2) even if the psychiatric reports were conflicting, D could have called Dr. Sheneman to testify during trial, and (3) D did not reiterate his request for additional evaluation regarding a defense when the trial judge addressed his competency to stand trial. Further, he never provided notice he was going to pursue a mental-health defense; therefore, he waived his right to present such a defense.

**STATE V. KELLY (JAN. 23, 2008): STATUTE OF LIMITATIONS/CCP  
\*\*REVERSED\*\***

D was arrested in 1998 for DUI and for failing to obey a traffic device. D was to appear in JP Court and did not appear. A *capias* for D's arrest was issued and was outstanding for almost eight years. In 2006, D chose to transfer the pending charges to CCP. The State then filed an information in CCP charging D with the same crimes filed in JP Court. CCP granted D's motion to dismiss the information as the two-year SOL for filing a complaint in CCP ran in 2000 and this information was filed six years after the SOL expired.

The Superior Court affirmed stating that Senate Bill 334, signed into law in 2006, closed a loophole which allowed for dismissal if no information is filed in CCP within the original SOL period. The Superior Court reasoned that because the filings in this case were before SB334 was enacted, the information was correctly dismissed.

The Supreme Court reversed holding that in transferring his case from JP Court to CCP, D elected to be tried by information in CCP instead of by the original complaint and summons in JP Court. The information was thus not barred by the SOL.

**JOHNSON V. STATE (JAN. 9, 2008): SENTENCE MODIFICATION/BOOT  
CAMP \*\*REVERSED\*\***

D pled guilty to cocaine trafficking in 1998. D entered the Boot Camp Diversion Program. The law at the time required D to complete 6 months at Boot Camp followed by Level IV and/or Level III supervision for two and a half years. The General Assembly changed the law in 2005 to require only one and a half years supervision after Boot Camp. D filed to have his probationary period reduced. Superior Court denied the motion finding that it was not timely and finding that the sentence was appropriate.

On appeal, the Court found that the amended statute specifically explains that anyone in the first offender's program can petition to have their post Boot Camp period of supervision reduced. Therefore, the case was remanded.

**NEWMAN V. STATE (JAN. 8, 2008): RESISTING ARREST/JUSTIFICATION  
DEFENSE TO RESISTING ARREST**



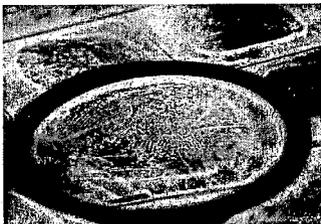
A controlled buy between D and an undercover officer was arranged. The officer drove, dressed in plain clothes but wearing a bulletproof vest with police markings on the back, to the location to meet D and when D came within a foot and a half of the car, the

officer got out. Two other officers approached the car to arrest D. D fled. He dropped a blue glassine bag containing fentanyl. Police tackled D who then placed an unidentified object into his mouth. D was convicted of resisting arrest and drug related offenses.

On appeal, D argued that the State provided insufficient evidence to find that D resisted arrest. He argued that a D must have knowledge of a peace officer's status to be convicted of resisting arrest. The Supreme Court reaffirmed its decision in Jackson v. State and held that all the State had to show was that D knew the men he was fleeing from were trying to take him into custody and that he intentionally resisted that effort.

In dicta, however, the Court explained that even though status knowledge is not necessary, D may use a lack of this knowledge as a defense of justification to resisting arrest. D can use force against another person when D believes that force is necessary to protect D against unlawful force by the other person.

### **MCCREY V. STATE (JAN. 3, 2008): MISSING EVIDENCE JURY INSTRUCTION**



D and another individual were found placing items into a backpack at a grocery store. They were approached by employees and brought to the manager's office. When D learned the police had been called, he allegedly brandished a knife which he waved around and used to lunge at employees. D maintained he produced a comb and not a knife. D and the other individual fled the store. Police caught up to and arrested D but found no knife or comb.

Police asked if a surveillance tape was available. Employees were not sure and said they'd call the next day if it was available. Employees did not call and police assumed there was no tape. There was a tape however, which showed D kicking open the office manager's door and running out with an object in his right hand. The tape was recorded over with new material three months later. D was convicted of 3 counts aggravated menacing, PDWDCF, 2 counts terroristic threatening, shoplifting, and conspiracy in the third degree.

D appealed the denial of the issuance of a missing evidence instruction. The Court held that a missing evidence instruction requires the jury to infer that the missing evidence would have been exculpatory to D. In this case, D was not substantially prejudiced by the missing videotape. An employee testified about the contents of the tape. However, the employee could not identify the object as a knife or comb. This was the central issue and a question for the jury.

**ALLISON V. STATE (JAN. 31, 2008): REFUSAL OF A NEW VENIRE AFTER IN-COURT ALTERCATION/ACCURACY OF JURY INSTRUCTIONS**

D robbed an audio store with a co-D. D's entered the store and pointed guns at the cashier. The D's then exited the store and entered a car driven by a third individual. D claims he was getting pizza when the robbery occurred and he returned to the vehicle to wait for his friends and had no part in the robbery. D was convicted of first degree robbery, PDWBPP, PFDCF, and conspiracy. On appeal, D argued a new venire should have been impaneled after he refused to stand for the judge and subsequently had an altercation with the prison.

In affirming, the Supreme Court noted that the trial court asked the panel if anyone was biased by witnessing D's altercation. Two prospective jurors were excused because they were concerned about D's conduct. The trial court further asked D if he would like a more specific question to be asked of the panel and D refused. The Supreme Court held that the trial court's actions were sufficient to cure any potential prejudice.

D also argued the robbery jury instruction allowed the jury to find D guilty even if "another participant" brandished a gun. The Court gave a further instruction however, explaining that D must have been involved to be found guilty of the crime. There was no error as the trial court gave a follow up instruction telling the jury that to convict D, it had to find that he displayed a weapon. The State did not pursue accomplice liability theory.

**JERRIN WRIGHT V. STATE (FEB. 7, 2008): JURY INSTRUCTION RE: ACCIDENT**



D had an altercation with Harris outside a bar. As D and Harris interacted, D brandished a gun and fired in the direction of Harris. The shots passed Harris and one bullet struck a bystander killing him. Harris testified D fired several times. Five casings were recovered from the scene. D was convicted of murder in the second degree and two counts of PFDCF. D appeals from the Superior Court's denial of his request for a jury instruction on the justification of accident.

The decision was affirmed because many shots were fired and the physical act of pulling the trigger was not an accident but was instead voluntary. To find D guilty of killing bystander, the jury had to find D either reckless or criminally negligent in firing his gun. If D was reckless or criminally negligent, then D is not entitled to an accident defense because "an accident defense is incompatible with recklessness or criminal negligence."

**CLIFFORD WRIGHT V. STATE (Feb. 11, 2008): *CORPUS DELICTI***



D bought cocaine from Cannon every other week for over a year. Cannon testified that on one day in particular, he met with D to sell him 1.6 grams of cocaine in exchange for \$100. Cannon testified he knew the substance was cocaine because he was familiar with it from selling it.

Later that day, D called Cannon to meet again for cocaine. D and another individual met Cannon to make the purchase. D was arrested and interrogated. D told police he did not use any of the cocaine, but delivered it to others. D was convicted of 2 counts of delivery of cocaine.

On appeal, D argued his motion for dismissal based on *corpus delicti* should have been granted. *Corpus delicti* prevents a prosecutor from proving an offense using only D's extrajudicial statements. D also claimed the State did not produce sufficient evidence to prove the substance purchased was in fact cocaine.

In affirming, the Court stated that to satisfy *corpus delicti*, the State must present some evidence of a crime, independent of D's confession, to support a conviction. The State provided this independent evidence through Cannon's testimony. The State showed that D delivered the cocaine he purchased from Cannon. This satisfies the *corpus delicti* doctrine with respect to delivery. The State also satisfied *corpus delicti* with respect to the substance being cocaine. Cannon's testimony, as someone familiar with the drug, that the cocaine was real, was sufficient circumstantial evidence to satisfy the *corpus delicti* doctrine with respect to identifying the substance.

**MASSEY V. STATE (FEB. 12, 2008): SEVERANCE/LIMITING INSTRUCTIONS**

D, while on probation and being a "person prohibited," was involved in an altercation with three other individuals. D produced a knife and each of the three individuals was injured. D was charged with attempted murder, first and second degree assault, PDWDCF, PDWPP, and carrying a concealed deadly weapon. There is dispute as to the specifics of the incident, but photographs were admitted showing the injuries suffered by the three individuals.

D was convicted of LIO's of second and third degree assault, along with the remaining offenses with which he was charged.

The Court rejected D's arguments on appeal as follows:

1. D argued that joinder of the PDWPP charge with his other offenses allowed the State to introduce unduly prejudicial evidence of prior convictions. D's prior convictions would have come in anyway because D elected to testify. Further, defense counsel told the jury of D's prior convictions as a strategic decision.
2. The photographs of the V's wounds did not warrant a limiting instruction as they were not unfairly prejudicial even though they were "gruesome" and "potentially inflammatory." They were probative as to the seriousness of the incident.
3. D argued for a limiting instruction regarding D's prior convictions. While the trial court refused to give this instruction, it gave a limiting instruction during opening remarks to the jury and after all evidence was presented. D cannot successfully appeal simply because one instruction was given in place of D's proposed instruction.
4. D contested the sufficiency of the law contained in the PDWDCF jury instruction. The proper procedural device is a motion for a new trial. D's motion fails on procedural grounds. While the Court noted D's claim failed on procedural grounds, it also found that it failed on the merits. The given instruction addressed the elements for finding D guilty of a felony and specifically first degree assault. D was convicted of second degree assault, thus, he argued the instruction was improper. The Court held the difference was harmless error. The jury convicted D of second degree assault clearly showing the jury understood second degree assault could be part of that charge even though the term "assault in the second degree" was left out of the official reading.

**SCARBOROUGH V. STATE (FEB. 26, 2008): PLEA AGREEMENTS**

**\*\* AFFIRMED in part, VACATED in part, and REMANDED\*\***

D was arrested on drug charges and agreed to "work" for the police in exchange for the State not filing for D to be sentenced as a habitual offender. There were two components to the plea: one written and disclosed to the court, and one oral and not disclosed to the court. Superior Court Rule 11(c) requires *in camera* disclosure of the entire plea agreement.

D wrote a letter to the prosecutor's office from prison with names of individuals D could provide information about and who are involved with drugs. The plea agreement followed. When it came time to perform the "work," the State was not satisfied with the names in D's letter because those names were people from Dover and who fell under another police jurisdiction.

On appeal, the Court applied contract principles to the written and oral portions of the plea agreement. Whether D performed his obligation under the agreement centered on the definition of "work." D contended "work" consisted of giving information to the

police regarding the people identified in D's letter. The State argued "work" consisted of assisting in Woodside. Because D did not work in Woodside because it was too dangerous, the State then filed to classify D a habitual offender.

The Court held that the State's actions in unreasonably demanding D work in Woodside, after it agreed to a plea bargain where Dover names were identified, resulted in the State's breach of the agreement. This breach excused D from performance. The appropriate remedy was to deny both the State's motion to declare D a habitual offender and D's motion to withdraw his guilty plea. This case was remanded for resentencing.

**DEMBY V. STATE (FEB. 28, 2008): CHAIN OF CUSTODY/ PRETEXTUAL TRAFFIC STOP**



D was driving a car when he was stopped by police for not wearing a seatbelt. Police testified that when driving behind D to pull him over, they saw D make a movement toward the center console. D had a suspended license. D and his passenger were arrested because they both had outstanding *capiases*.

Police searched the vehicle and recovered cocaine. There was a discrepancy between the weight of the cocaine when police conducted the search and when tests were conducted in the lab. The State did not present the officer or identify the officer who accepted the drugs in the evidence locker.

D appealed arguing both that the chain of custody was broken and therefore the drugs should not have been admitted at trial. The Court held the cocaine weight discrepancy goes to the weight of the evidence and not to its admissibility. Further, that the officer in the evidence locker was not present did not break the chain.

D also argued his traffic stop was pretextual in violation of both the Federal and Delaware Constitutions. The trial court denied this motion stating D was pulled over for his failure to wear a seatbelt which is a crime. On appeal, the Court refused to address the pretextual argument by concluding it was not fairly raised below.

**MANNA V. STATE (FEB. 29, 2008): CHARACTER WITNESSES  
\*\*REVERSED\*\***

D, along with two others, allegedly robbed a convenience store. The three robbers wore t-shirts around their heads and D was not alleged to have been armed. D argues he did not participate in the robbery, but heard about it later. D's father testified D was home when the robbery took place. D wanted to call character witnesses to testify that D had a reputation for honesty. The State argued D's credibility had not been

attacked, so D could not call character witnesses. The Court did not allow D to call any character witnesses after it erroneously applied an analysis under 608, the rule dealing with impeachment. The Court also did not issue a missing evidence instruction because certain notes used by police were unavailable. D was convicted of first degree robbery, wearing a disguise during the commission of a felony, and conspiracy in the second degree.

On appeal, D argued the trial judge's decision to disallow D from calling any character witnesses was an error as a matter of law. The Court reversed stating that D is permitted to introduce witnesses regarding a pertinent character trait to show it is unlikely D committed the crime. D was charged with robbery, a crime of dishonesty. D therefore was entitled to call character witnesses in his defense regarding his honesty and truthfulness. The Court found no error in trial court's refusal to give the missing evidence instruction.

### **STEWART V. STATE (MAR. 7, 2008): PROBABLE CAUSE**

D spoke with informant and arranged to sell a half kilogram of cocaine to informant. D arrived at meeting place and spoke with informant by phone. Informant, who was with police, stated D was in the blue Chrysler. Police double checked with informant that D was in the blue Chrysler and then blocked D's vehicle. D was arrested and 495 grams of cocaine were found on the passenger seat in the blue Chrysler.

Before trial, D moved to suppress because he was seized without probable cause in violation of both the Federal and State Constitutions. The trial court denied the motion. The Supreme Court affirmed that decision based on the totality of the circumstances. There was probable cause because police overheard some of the phone calls made to set up the deal including hearing the seller state the amount and price of cocaine to be sold.

D also argued his right of confrontation was denied because his seizure was based on hearsay. The Court explained that hearsay can be used to establish probable cause as long as the hearsay is sufficiently corroborated by other facts. The hearsay in this case was corroborated.

### **HUNTER V. STATE (MAR. 10, 2008): SEARCH & SEIZURE/PLAIN TOUCH EXCEPTION**

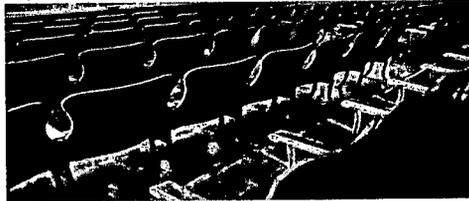


Informant contacted police with specifics about an upcoming drug deal, describing the location and the car the dealer would be driving. Police went to the area

and saw the described car. Even though they did not observe anything suspicious, police stopped the car. The officer conducted a pat-down of D and noticed a bulge in D's front left pant pocket which he recognized as bundles of heroin. Police claimed they asked D what the bulge was and D replied it was money. D claimed he was never asked about the contents of the bulge. Police removed the bulge from D's pants and it contained four bundles or 52 bags of heroin. D's motion to suppress was denied.

On appeal, D contended not that the pat-down was improper, but that the seized evidence was improperly removed under the "plain touch" exception. The plain touch exception allows an officer to seize contraband if it is immediately identifiable from plain sight or plain touch. The detective testified he knew immediately the bulge was heroin because of his experience with drug investigations. The Court ruled that under the circumstances, removal of "non-threatening" contraband was acceptable. Thus, the heroin seizure did not exceed the scope of the plain touch doctrine.

**CZECH V. STATE (MAR. 17, 2008): ALLOWING SUPPORT PERSON TO SIT W/CHILD WITNESS (FIRST IMPRESSION)/IMPROPER PROSECUTORIAL VOUCHING**



D was charged with 15 counts of first-degree rape and one count of continuous sexual abuse of a child for contact with his girlfriend's granddaughter. At trial, V, almost six years old, testified. The trial court, *sua sponte*, allowed V's mother to sit behind her on the witness stand. However, the State had only asked that V's mother be allowed to sit in the courtroom gallery. V, in taped interviews with CAC, stated D also molested her pre-teen cousin. In closing, the State argued five-year olds do not make stuff up about rape and do not exaggerate about rape. D was convicted of three counts of first-degree rape and acquitted of the other charges.

On appeal, D contended that allowing V's mother to sit behind V while testifying, prejudiced D, increased sympathy for V, and enhanced V's credibility. D argued that placing the support person with V on the stand should not have been done *sua sponte*. D further contended the trial judge abused her discretion by: not requiring a proper foundation be laid to establish "substantial need" for a support person and denying D's request for a curative instruction regarding the presence of the support person.

The Court agreed with D that the placement of the support person should not have been done *sua sponte*, and that a proper foundation should have been laid that there was a "substantial need" for the support person. Further, a curative instruction should have been given. The judgment was affirmed however, because V's testimony was inconsequential and only harmless error occurred.

The Court cited with approval, State v. T.E., 775 A.2d 686 (N.J. Super. Ct. App. Div. 2001). It essentially adopted 6 factors to be considered in this situation. The factors are used to balance D's interest against harm to the V. The Court found D's argument that plain error occurred when V stated in her taped interview that D had molested the victim's cousin to be without merit. The Court also affirmed the trial court's decision in finding no improper prosecutorial vouching. Statements made by the State regarding five-year olds not making stuff up about rape and not exaggerating were logical and proper inferences based on evidence presented at trial.

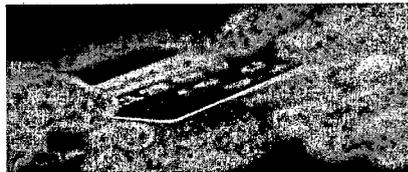
**CRISCO V. STATE (MAR. 24, 2008): THEFT BY FALSE PRETENSE/RECEIVING STOLEN PROPERTY**

D owned a motorcycle shop and acted as a middleman between customers wanting to buy and sell bikes. In 2006, D sold a bike to #2 with title and a frame from #1's bike and an engine from #3's bike. #3's bike was reported stolen in 2003. D was convicted of theft by false pretense and receiving stolen property.

D appealed arguing there was insufficient evidence to prove D knew the bike he sold to #2 was stolen. D also contended the Court erred in denying D's motion of acquittal or motion for a new trial. The Court affirmed by looking at the evidence in the light most favorable to the State and finding that it could be inferred from circumstantial evidence that D sold #3's bike knowing it was stolen.

There was also sufficient evidence to convict D of receiving stolen property as D satisfied the required elements: D intended to receive or retain #3's bike, intended to deprive #3 of his bike, and knew the bike was obtained by theft.

**WEINKOWITZ V. STATE (MAR. 27, 2008): FORGERY/UNLAWFUL CREDIT CARD USE/MISDEMEANOR THEFT**



D, a restaurant employee and server, was responsible for charging his customers' credit cards when they paid their bill. Customers however, complained of unauthorized charges on their cards soon after eating at the restaurant. The unauthorized charges were linked to D because they all had D's restaurant ID # on them. The restaurant ID # is required to log in to the restaurant's computer system and allows employees' transactions to be monitored. D's motion for acquittal was denied. D was convicted of second degree forgery, unlawful use of a credit card, and misdemeanor theft.

D appealed arguing his judgment of acquittal should have been granted because there was insufficient evidence because other employees had access to D's ID #. The Court affirmed by looking at the evidence in the light most favorable to the State and

explained that circumstantial evidence can suffice to convict D of these crimes. The Court pointed to D's ID # on all of the transactions, D signing reports verifying the fraudulent charges, and the customers identifying D as their server. The Court also dismissed D's argument that any other employee could have had access to D's ID # as "pure speculation" unsupported by any evidence.

**OAKLEY V. STATE (MAR. 31, 2008): TIME SERVED CREDIT  
\*\*REMANDED\*\***

When D was 14 years old, he was charged with manslaughter and other weapons and theft charges in 2006. D was in custody at the NCCDC until 2007 when he entered into a plea agreement with the State. D agreed to be adjudged delinquent in Family Court on the manslaughter charge and to plead guilty in Superior Court to the remaining charges. In sentencing, Family Court committed D to Dept. of Youth Rehabilitation Services until D was 18. D did not ask for credit for time served on that sentence. In Superior Court sentencing, D asked for 365 days of credit for his time at NCCDC because it would have an impact on that sentence. The trial court denied this request. Rather than giving D a four year sentence with credit for 365 days, the trial court imposed a three year sentence.

On appeal, D argued he should have been given credit for time served. The State argued that the Superior Court implicitly gave credit for time served by not sentencing D to another year. The Supreme Court explained that no credit was given for D's time served. The sentence from Superior Court includes no credit and D is thus entitled to credit for time served.

**MCKINLEY V. STATE (MAR. 31, 2008): DEPRAVED INDIFFERENCE TO  
HUMAN LIFE**

D led police on a high-speed traffic chase during which D ran several stop signs and red lights, drove on the wrong side of the road, ignored his passenger telling him to pull over, and, after applying his brakes, collided with another car killing the driver. D was estimated to be traveling between 93-100 mph during the chase and between 88-98 mph at the moment of impact. D's driving record includes 13 moving violations from 9 separate convictions, 2 license suspensions, attendance at 2 DMV counseling sessions, and attendance at a motor vehicle behavioral course. D was convicted of 2<sup>nd</sup> degree murder, 3<sup>rd</sup> degree assault, 1<sup>st</sup> degree reckless endangering, and driving during license suspension.

D appealed only the 2<sup>nd</sup> degree murder conviction arguing that he was reckless and should be found guilty of manslaughter because he did not exhibit "cruel, wicked and depraved indifference to human life" as required for 2<sup>nd</sup> degree murder. He argued that he: (1) was not under the influence of drugs or alcohol at the time of the accident as many D's were in cases cited by the Court as aggravating circumstances, (2) was applying the brakes before impact which shows a concern for others, and (3) presented expert

testimony that showed D is incapable of forming the required *mens rea* required for 2<sup>nd</sup> degree murder.

In affirming, the Court explained that drug or alcohol influence is not dispositive because that would prevent the conduct of sober D's who act extraordinarily egregiously from being considered when determining charges. The Court also explained D's pressing the brakes does not evidence a regard for human life because decreasing speed to between 88-98 mph is not "slowing down." Further, it shows D understood his speed was dangerous yet drove at that speed anyway. Lastly, D's chase included numerous violations which indicate a "cruel, wicked and depraved indifference to human life."

The State proved D was capable of forming the required *mens rea*. D told his passenger to put on her seatbelt because he did not want to get in trouble and proceeded to lead police on a high-speed chase. This shows D could form the required *mens rea* because he understood his actions.