

Welcome to LibertyWatch

**A Publication of the Pennsylvania Association of Criminal Defense Lawyers
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Welcome to LibertyWatch. Katharine R. Allen covered the Pennsylvania Supreme Court, the Pennsylvania Superior and Commonwealth Courts for the months of July and August, 2006. We are necessarily selective in our coverage and no newsletter can substitute for diligent research and innovative analysis.

The cases can be found in full at:

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Pennsylvania Supreme Court Decisions

Search & Seizure – **Custodial Interrogation** – **Plain Feel Doctrine** – *Cmwlt. v. Pakacki, No. 24 MAP (2004). Opinion by Eakin, J., concurring opinion by Baer, J., 7/18/06* – In reversing the Superior Court's determination that marijuana evidence was seized in violation of both *Miranda* and the "plain feel doctrine," the court held *Miranda* unnecessary where a trooper in a marked car flashed his lights and detained appellee who was walking down a country road. The court rationalized that the detention was akin to a *Terry* stop rather than a custodial interrogation because the officer had information appellee was a suspect in a shooting and had reason to perform a pat and frisk. The Court further held the Superior Court erred when it determined the trooper's seizure of a marijuana pipe violated the plain feel doctrine. The court concluded that *Miranda* was unnecessary as the stop was not coercive and the trooper was only asking a few questions and that the totality of the circumstances showed that the trooper knew the nature of the contraband during the pat and frisk despite the fact that he had to ask defendant "what's in your pocket" after patting him down.

Criminal Procedure – **Voir Dire** – **Jury Questionnaire** – **Sixth Amendment Implications** – *Cmwlt. v. Ellison No. 42 EAP (2005). Opinion by Baldwin, J., concurring opinion by Eakin, J., dissenting opinion by Saylor, J., 7/19/06* – In dismissing Appellant's contention that trial court's reliance on a jury questionnaire rendered *voir dire* cursory and thus prevented an adequate examination of jurors to determine their qualifications, the Court upheld the Superior Court's determination that the trial court's manner and scope of *voir dire* was adequate and comported with Sixth amendment requirements. Specifically the court held that where the trial court orally examined the *venire* as permitted by Pa.R.Crim. P.631 (D), advised them on the sexual nature of the crimes to be tried, questioned the *venire* about potential bias in the arena of sexual assault and allowed for appellant's objections during oral examination, it was not an abuse of discretion to disallow inclusion of the narrowly tailored "have you or anyone close to you ever been the victim of sexual assault" on the preliminary jury questionnaire and oral examination.

Sufficiency of Evidence – **Diminished Capacity; Evidence** – **Hearsay** – *Cmwlt. v. Mitchell, No. 309 CAP (2005). Opinion by Baer, J., concurring opinions by Saylor, J., Eakin, J., dissenting opinion by Castille, J., 7/19/06* – Affirming Appellant's directly appealed death sentence, the Court found that Appellant's articulate, coherent and extremely detailed confession and corresponding physical evidence sufficient to show a settled, deliberate and specific intent to kill. Further, the Court held that the jury could have properly rejected a theory of diminished capacity where the validity of expert opinion labeling appellant as "mentally ill" (i.e. fetal alcohol syndrome, congenital predisposition to neurological and

psychiatric abnormality) was seriously undermined during cross examination. Further, the trial court did not err in circulating to the jury, copies of the investigating detective's report in which he recounted Appellant's confession. In so holding the Court rejected Appellant's contention that by letting the jury read the report the court violated Pa.R.Crim.P. 646 in that it placed undue emphasis on this testimony over all other testimony presented. The Court noted that Rule 646 only prohibits the jury from access to such reports during deliberations, not trial, and as such neither the spirit nor text of the law was violated.

Sufficiency – **Burglary, Privilege Exception** – **Miranda** – **Confession after Invocation** – **Criminal Procedure** – **Composition of Jury, Batson** – **Evidence** – **Hearsay** - *Cmwltth. v. Edwards, No. 449 CAP (2005)*. *Opinion by Castille, J., 8/21/06* - Where appellant secured entry into the victim's home by lying about his reason for being there (stating he was there to pay for the PCP he had taken earlier), but the evidence showed that Appellant was actually planning to shoot and kill the victim, any license or privilege to enter exception was negated by deception and the evidence was sufficient to sustain Appellant's burglary conviction. Further, Appellant's confession to a detective after he had invoked his right to counsel did not violate *Miranda* because Appellant initiated a conversation with the police after he had invoked his right to counsel and volunteered that he "wanted to make peace with God". Further, although Appellant objected to the jury composition at trial, Appellant's claim that the jury was disparately white was waived where Appellant did not claim, either at trial or in his statement of appeal that he was denied the opportunity to establish the jury pool was not a fair representation of the community. Appellant's *Batson* claim also failed in that the prosecution met her burden in supplying a race neutral explanation for her dismissal of an African American juror, i.e. the juror was in the middle of Masters Degree exams and that the juror was a social worker who worked with troubled youths close to appellant's age. Further, Appellant's hearsay objection to witness testimony about Appellant's out of court statements that tended to establish a prior drug relationship between Appellant and the victim was misplaced as the testimony fell under the admission by a party-opponent exception (Pa.R.E. 803(25)) exception to hearsay. Lastly, the Court rejected Appellant's argument that the Commonwealth's Notice of Aggravating Circumstances (combining multiple deaths with the death of an unborn child) was too vague to apprise Appellant that the Commonwealth was pursuing a §9711(d)(11) aggravator. The Court held that where the aggravating circumstances are inherent in the crimes charged constructive notice has been given and gave Appellant sufficient time to prepare his defense against the (d)(11) aggravator. In so holding, however, the Court commented on the Commonwealth's imprecise notice and declared that the Commonwealth should endeavor for specificity.

Sentencing – **Stipulation of Aggravating Circumstances** - *Cmwltth. v. Frey, No. 475 CAP (2005)*. *Opinion by Newman, J., concurring opinion by Saylor, J., 8/22/06* - Here, Appellant, who had premeditatedly kidnapped and killed his estranged wife, entered a plea of guilty to murder, completed a written guilty plea, waived his right to a jury and stipulated to the aggravating circumstance of kidnapping, instructed his counsel not to present any mitigating evidence, and was subsequently found guilty and sentenced to death. The Court held imposition of the death penalty was constitutional and the trial court did not err in so imposing because the trial court was presented nothing against which to balance the aggravating circumstance when it reaching its judgment of sentence.

Appellate Procedure – **Commonwealth Withdrawal of Opposition to Appeal** - *Cmwltth. v. Wholaver, No. 458 CAP (2006)*. *Opinion by Saylor, J., 8/22/06* - Despite the Commonwealth's concern that Appellant's waiver of his Fourth Amendment claim under Pa.R.A.P. 1925(b) might have implications upon federal *habeas* review (See *Stone v. Powell*, 428 U.S. 465, 482 (1976))-conditioning the availability of federal *habeas* merits review of Fourth Amendment claim on **whether the state provided full and fair**

litigation of the claim), the Commonwealth could not withdraw, post-submission, its opposition to the waived Fourth Amendment claim (waived *inter alia* multiple issues on appeal). In so holding the Court stressed the bright line character of 1925(b) waiver and indicated that the Commonwealth's concerns about federal remedy could not provide sufficient basis for post-submission withdrawal.

Pennsylvania Superior Court Decisions

Statutory Construction â€” HIV â€” Reckless Endangerment â€” *Cmwlth. v. Cordoba*, No. 1747 MDA (2005). *Opinion by Bender, J., 7/7/06* â€” The lower court erred in finding that the Commonwealth failed to establish a *prima facie* case against of reckless endangerment against Appellee. In so holding the Court noted that consensual oral sex between the victim and appellee was a misnomer because Appellee concealed his positive HIV status from the victim and thus the victim could not make an informed decision as to the sexual activity. In addition, the court held as a matter of law that the evidence was sufficient to establish a *prima facie* case of reckless endangerment. Appellee's decision to have oral sex with the victim without informing him that Appellee was HIV-positive constituted a "gross deviation from the standard of conduct that a reasonable person would observe."

PCRA â€” Appellate Procedure â€” Ineffective Assistance of Counsel â€” *Cmwlth. v. Grosella*, No. 1910 MDA (2005). *Opinion by Stevens, J., 7/10/06* â€” The PCRA court erred in reinstating Appellant's direct appeal rights due to appellate counsel's alleged ineffectiveness in failing to pursue on direct appeal certain issues that were initially presented in Appellant's Pa.R.A.P. 1925(b) statement. The Court found reinstatement of appeals rights improper in that former appellate counsel did in fact preserve and perfect one issue for appeal and as such did not effectively abandon Appellant despite Appellant's wish that more of his 1925(b) issues were preserved. The Court advised that the PCRA should have considered Appellant's ineffective assistance of counsel claims under the auspices of PCRA and applied the traditional three-pronged ineffective assistance of counsel request.

Criminal Procedure â€” Court Interpreter; Evidence â€” Defective Video Tape; Sentencing â€” Due Process â€” Three Strikes Law â€” *Cmwlth. v. Lane*, No. 1602 EDA (2004). *Opinion by Tamilia, J., dissenting opinion by Joyce, J., 7/12/06* â€” Affirming Appellant's appeal from a sentence of life without parole imposed as a result of appellants convictions of *inter alia* robbery and aggravated assault the Court found the lower court properly applied the "three strikes rule."

Further, appellant's argument that his right to confrontation was violated due to complainant's use of an interpreter at trial (where complainant did not have an interpreter at preliminary hearing) was without merit in that use of an interpreter is in the broad discretion of the trial court which here, deemed it necessary at trial so to translate an obscure Indian dialect.

Appellant's argument that a faster-than-real-time surveillance tape slowed down for viewing at trial was evidence tampering was equally without merit where Appellant and counsel were given time to view the video tape and stipulated that "the tape is an accurate reproduction of the original [tape] and the tape was relevant.

Lastly, the trial court did not unconstitutionally sentence appellant to life even though the issue of Appellant's threat to public safety was not submitted to a jury as contemplated in *Aprendi* (as argued in the dissent) and the Judge, whom Appellant had aggravated during the trial, made the final determination to sentence Appellant to life instead of twenty-five years.

Criminal Procedure â€” Evidence â€” Confidential Informant; Coordinate Jurisdiction â€” *Cmwlth.*

v. McCulligan, No. 1736 EDA (2005). Opinion by Kelly, J., 7/13/06 – The trial court's reliance on the coordinate jurisdiction rule (judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions) was misplaced in that the court erred in denying Appellant's motion to suppress cocaine and drug paraphernalia evidence. The Court further held that the coordinate jurisdiction rule does not apply to issues, such as probable cause for a search warrant, that have not previously been litigated. Further, the trial court was in error when it denied Appellant's request to produce confidential informants whose information was used to procure the search warrants where Appellant requested production of the witnesses only for the purposes of challenging the propriety of the search warrant, appellant provided sufficient evidence to warrant disclosure, and it appears that Appellant knew the identity of the informants. The court intimated that in balancing the "blown cover" of one informant who was shown to have a feud with Appellant, the assertion that a second informant did not exist may have shifted the balance in favor of Appellant.

Appellate Procedure – Speedy Trial – *Cmwlth. v. Preston, No. 2122 EDA (2004). Opinion by Hudock, J., 7/13/06* – Despite dubious conduct by the Commonwealth's office The Court affirmed a court of common pleas denial of Appellant's petition for a *writ of certiorari* based on speedy trial violations. After multiple continuations due to the prosecutions failure to provide timely, full and correct discovery and unavailable prosecution witnesses, Appellant was convicted of possession of crack cocaine after his "run date" for trial had expired. The Court held that the prosecution's delay, while not "excusable," was not proved to be attributable to a deliberate effort to violate Appellant's right to a speedy trial. As such, the court concluded Appellant's rights were not violated where the prosecution showed due diligence in trying to prepared for trial, defense did not object when the trial was scheduled past the turn date, and "appellant's trial was not delayed for so lengthy a time as to require dismissal."

Note: The Court did throw defense a small bone in refusing to find the issue waived because counsel of record failed to realize that it was necessary to certify two separate transcripts from the same pre-trial hearing because the court reporter inexplicably created two separate transcripts.

Search & Seizure – Tampering – Fruit of the Poisonous Tree – *Cmwlth. v. Jones, No. 2321 EDA (2005). Opinion by McCaffery, J., dissenting opinion by Joyce, J., 7/14/06* – Appellant's conviction for tampering with evidence was affirmed despite the fact that the stop, detention and arrest were later found to be illegal at a suppression hearing. Despite the fact that all drugs and other evidence seized were inadmissible due to the illegality of arrest, the Court, citing the *Morales* Rule (*Cmwlth. v. Morales*, 669 A.2d 1003 (Pa. Super. 1996)- setting forth a three pronged test for establishing a conviction for tampering with evidence), held that the officer who illegally arrested Appellant's testimony was sufficient to convict Appellant of tampering with evidence regardless of the fact that all physical evidence from the arrest was inadmissible.

Revocation of Driving Privileges – *Cmwlth. v. Soder, et al., Nos. 688, et al, MDA (2005). Opinion by Del Sole, P.J.E., 7/14/06* – Where Appellant's driving privileges had been suspended in Pennsylvania for a repeated series of violations and Appellant obtained an international driving permit from Costa Rica and under the provisions of the United Nations Convention on Road traffic, Appellant was not entitled to operate a motor vehicle in the Commonwealth.

PCRA – Appellate Procedure – Timeliness – Mental Incompetence (Cruz) – *Cmwlth. v. Liebensperger, No. 1694 MDA (2005). Opinion by Joyce, J., 7/14/06* – Although Appellant's PCRA appeal was untimely on its face (forty-nine days after deadline for filing) the Court refrained from quashing

the appeal in this instance because the trial court had not properly advised Appellant of his right to appeal. However, the Court held Appellant's motion for post conviction relief based on *Cmwltth v. Cruz*, 578 Pa. 325, 852 A.2d (2004)- holding that Appellant was entitled to file a post conviction relief motion despite the untimeliness as Appellant was mentally incompetent and incapable of filing such a motion within the deadline - was untimely. Contrasting Appellant's case with the facts of *Cruz*, the Court noted that Appellant did not assert an estimate of the timing or duration of his alleged period of mental incompetence, nor did he allege, or did the record show, that his condition was of the type that may have recently improved or changed so that he had only recently returned to the degree of competence required to file a PCRA petition. As such, Appellant was unable to establish that he filed his petition within the sixty-day requirement of PCRA.

DUI "Implied Consent" Jagers "Look Back" *Cmwltth v. Smith, No. 1490 MDA (2005). Opinion by Tamilia, J., 7/14/2006* Here, Appellant was *inter alia* slumped in her car, smelling of alcohol, could not perform sobriety tests and refused to submit to a blood alcohol test after being read pre-*Jagers* (No. 227 WDA 2005) implied consent warnings. In light of the Superior Court's holding in *Jagers* in which the Court held police policy of stating only minimum penalties for refusal to consent was misleading and unfair and violated Due Process, fundamental constitutional concerns, the Court was constrained to remand Appellant's case for proceedings consistent with *Jagers*. However, the Court also held that the application of the ten-year "look back period" under 75 Pa.C.S.A. Â§3806(b), permitting the court to consider two 1995 DUI convictions was proper despite the fact that the law previously allowed for only a seven year review. The Court concluded there would be no *ex post facto* violation because the statute merely stiffens the penalty for a repetitive offense.

Search & Seizure "Flight" Reasonable Suspicion; PWID "Sufficiency" *Cmwltth. v. Brown, No. 2114 EDA (2005). Opinion by Popovich, J., 7/17/2006* Despite the fact that Appellant's stop was executed by police who were not in uniform and were driving an unmarked vehicle at 10 p.m. in a high crime area, the Court held Appellant's flight from the officers provided reasonable suspicion for a *Terry* stop because one officer claimed Appellant resembled somebody with an active county warrant and the police had an initial purpose to confirm or refute Appellant's warrant status. Further, the Court found evidence sufficient to convict Appellant of PWID where (after finding nothing on the person of Appellant) the police retraced the steps of Appellant's flight and recovered a Philly blunt cigar and clear plastic bag with cocaine that were dry despite recent rain and \$308, divided into tens and twenties was found on Appellant's person.

Probation Revocation "Sentencing" *Cmwltth. v. Malovich No. 1794 WDA (2005). Opinion by Colville, J., 7/17/06* Appellant absconded from his address and was found in possession of marijuana later by his probation officer. He had a history of bad behavior and attitude in court and failed to complete a substance abuse program through drug court. His probation was revoked and he was sentenced to incarceration that was the equivalent of total confinement. The Court rejected Appellant's argument that the trial court abused its discretion by sentencing him to re-confinement and held that there was no proof that the sentencing court was motivated by partiality, prejudice, bias or ill will, nor was the punishment unreasonable given Appellant's apparent unwillingness to change despite the numerous changes, drug treatment included, given to Appellant by the justice system.

Due Process "Jury Selection" Indigent Status *Cmwltth. v. Palm, No. 1945 MDA (2005). Opinion by Stevens, J., 7/17/2006* In an issue of first impression, the Court held that the trial court did not err in refusing to dismiss the jury panel based upon objection when defense counsel was identified as

a public defender. The Court concluded the DUI Appellant's argument that such identification violated equal protection of the laws was without merit and "any reference to counsel as the public defender is insignificant and does not violate equal protection."

Homicide by Vehicle â€” Mandatory Restitution â€” Direct Victim â€” *Cmwlt. v. Langston, No. 1047 WDA (2005). Opinion by Ford Elliott, P.J., concurring opinion by Bowes, J., 7/17/06* â€” The Court vacated an order denying Appellant's motion to modify the sentence/restitution Appellant was directed to pay as a result of Appellant's conviction for homicide by vehicle pursuant to 18 Pa.C.S.A. Â§1106(a). Appellant, while driving recklessly, struck a vehicle head-on. As a result, a man was killed and his pregnant wife rendered to a persistent vegetative state in which she gave birth to a healthy baby boy. Appellant was ordered to pay twenty-thousand dollars to the Crime Victim's Compensation fund to reimburse the fund for monies it paid to the baby's guardians. In rejecting any status as a "direct victim, the Court held that although the decedent's son had been victimized by appellant in the tragic loss of his parents due to Appellant's actions, he was not a victim for purposes of restitution as provided by statute.

DUI â€” Reasonable Suspicion â€” *Cmwlt. v. Little, No. 363 MDA (2005). Opinion by McCaffery, J., 7/20/06* â€” Here, Appellant was charged with DUI while the *Whitmyer* decision (542 Pa. 545, 668 (1995)) probable cause standard motor vehicle stops was still in effect. Subsequent to that and yet before his suppression hearing (the stop appears to have been provoked by a motor cycle engine revving) the legislature amended the applicable statute (75 Pa.C.S.A. Â§ 6308(b)) to reflect reasonable suspicion instead of probable cause. Appellant's assertion that *Whitmyer* should have prevailed was found without merit. In so holding the Court found the trial court's application of the relevant statute was proper in light of the facts of record. The Court also noted that Appellant failed to assert the Commonwealth failed to satisfy the reasonable suspicion standard that the statute requires.

Simple Assault â€” Self Defense â€” Sufficiency of Evidence â€” *Cmwlt. v. Emler, No. 898 WDA (2005). Opinion by McCaffery, J., 7/21/06* â€” In noting that Appellant's arguments against his convictions for simple assault, reckless endangerment and harassment ignored the correct standard of review (focusing upon evidence viewed in a light most favorable to *himself*, including evidence rejected by the trial court) and rather relied upon Appellant's discredited testimony at trial, the Court affirmed the evidence was sufficient to convict Appellant on all counts. Appellant had chased down turkey hunters near his land, initiated a struggle for their shotguns, choked one victim in and 'death grip', pointed the gun at another victim and later threatened to kill them. Further, in light of these facts the Court concluded there was not a scintilla of evidence to back up Appellant's arguments of self-defense of self and property.

Evidence â€” DUI â€” Corpus Delecti â€” *Cmwlt. v. Young, No. 1955 MDA (2005). Opinion by Stevens, J., 7/26/06* â€” In a DUI case where no one had actually seen Appellant driving the vehicle which had wrecked and Appellant escaped on foot, the trial court did not err in denying Appellant's *Writ of Habeas Corpus*. Appellant argued *habeas* should have been granted because the Commonwealth failed to establish he had in fact operated the vehicle as no one had witnessed him driving. The Court found Appellant's argument without merit and reiterated precedent establishing that although the Commonwealth was, in fact, required to show the *corpus delecti* before (Appellant drove the vehicle under the influence) before any admission connecting him to the act was allowed for consideration, the act itself could be proven wholly by circumstantial evidence. The Court concluded that here, where the car was registered to Appellant, the keys were in his pocket, he was identified by an eyewitness as an individual standing on the drivers side of the vehicle who attempted to flee the scene and was judged by the

apprehending officer to be intoxicated, the Commonwealth met its burden of proof.

Criminal Procedure â€” Rape â€” Prompt Complaint Instruction â€” *Cmwlth. v. Thomas, No. 2585 EDA (2005). Opinion by Stevens, J., 7/27/06* â€” In a case where a minor was raped and chose to telephone her cousin and reveal the trauma instead of informing her sleeping mother right away, the omission of a prompt complaint instruction to the jury did not amount to fundamental error, nor did its absence prejudice Appellant. In so doing, the Court stressed that the propriety of a prompt complaint instruction is to be determined on a case-by-case basis pursuant to a subjective standard based upon the age and condition of the victim.

Appellate Procedure â€” Rule 1925(b) Statement â€” *Cmwlth. v. Reeves, No. 1470 EDA (2005). Opinion by Klein, J., concurring opinion by Gantmant, J., 7/31/06* â€” In an appeal of judgment of guilt in securing execution of documents by deception, where, due to a vague 1925(b) Statement, the trial court reasonably thought Appellant was only complaining about the quantum of evidence and not the more specific issue of whether SEPTA was person under the terms of the applicable statute (18 Pa.C.S.A. Â§1440), the issue was waived for untimeliness. The Court reiterated the standard that a Rule 1925(b) statement must be detailed enough so that judge can write an opinion, yet not so lengthy that it does not meet the goal of narrowing down the issues previously raised to the few that are likely to be presented to the appellate court.

PCRA â€” Timeliness â€” After Discovered Evidence â€” *Cmwlth. v. Holmes, No. 1782 EDA (2005). Opinion by Popovich, J., dissenting opinion by Klein, J., 7/31/06* â€” The Court affirmed an order dismissing Appellant's second petition for post-conviction relief based on after discovered evidence despite the fact that the alleged evidence (in the form of an affidavit) was filed within the statutory time frame pursuant to 42 Pa.C.S.A. Â§9545(b)(2). The Court asserted that although an affidavit stating that Appellant was not the actual shooter in the murder for which he was convicted, was sworn to by an inmate who declared to have witnessed the shooting was filed within the correct time frame, Appellant failed to assert when he had first been told of the Affiant's knowledge and that there was no indication that the affidavit was drafted on the day it was dated. Therefore, the Court concluded, Appellant could not possibly prove that the claim was raised within sixty days of when it first could be presented. In addition, the Court noted that the affiant had been interviewed earlier and had not presented this information, intimating that the evidence could have been elicited at trial and was not, therefore, after discovered. Note: A strong dissent was noted by Klein.

Evidence â€” Hearsay â€” *Miranda* â€” Custodial Interrogation and Confession - *Cmwlth. v. Levanduski, No. 937 EDA (2004), Opinion by Gantmant, J., concurring opinion by Joyce, J., concurring/dissenting opinion by Musmanno, J., 8/2/06* - In a painstakingly detailed analysis of several hearsay exceptions- including "dying declaration", "excited utterance", "present sense impression", "state of mind", and "forfeiture by wrongdoing", the Court concluded that none of the exceptions posited applied and a letter written by the victim in which he was speculating on the murderous intentions of his wife and her boyfriend was improperly admitted at trial and should have been excluded as hearsay. However, the Court found the error was harmless error in that there was overwhelming evidence of her guilt, especially in the form of her confession. Affording the trial court broad discretion in its finding of fact, the Court further held that the police interrogation techniques both before and after Appellant was mirandized, did not violate Appellant's constitutional rights and the trial court properly denied Appellant's motion to suppress statements. Note: Excellent recitation of both sides of various hearsay exception arguments.

Homicide by DUI – **Due Process** – **Merger of Sentences** - *Cmwlth. v. Thur, No. 1763 WDA (2005)*. *Opinion by Colville, J., 8/4/06* - Citing *Mikulan*, 470 A.2d (Pa. 1983) and other prior DUI-law cases, the Court found no due process issues, federal or state, with current Pennsylvania DUI statutes, 75 Pa.C.S.A. §§3802, §3735, or §1547. In so doing, however, the Court found waived and did not address Appellant's unique assertion that §3802(c) requires that the blood analysis, not just the draw, be completed within two hours of driving. In dismissing Appellant's argument that the trial court's jury instructions on §3735 allowed the jury to impermissibly speculate as to BAC at the time of driving, the Court noted that, while harmless, the instruction was indeed wrong in that it instructed the jury to find the BAC was at least .08 at the time driving. Referring to earlier analysis, the Court stated that there is no requirement that the Commonwealth prove any particular BAC at the time of driving, only the BAC within two hours of driving and that the BAC and time only go to the weight of the evidence. However, the Court vacated Appellant's DUI sentence (Appellant had been charged with DUI, Homicide by DUI, involuntary manslaughter, *inter alia*), because the Court erred in pronouncing separate sentences for DUI and homicide by DUI as they merge for sentencing purposes. In disposition, the Court failed to remand as the Court concluded the decision did not alter the overall scheme of sentencing (cumulative 9-25 years).

Statutory Construction – **PWID, Playground** - *Cmwlth. v. Bongiorno, No. 344 WDA (2005)*. *Opinion by Hudock, J., 8/8/06* - Appellant's claim that the trial court erred by imposing the two year minimum sentence mandated by 18 Pa.C.S.A. §6317 ("drug-free zone" rule) had no merit where the Commonwealth was able to show Appellant sold crack within two hundred and fifty feet of an apartment complex with a grassy area that had a merry-go-round and "safety chips" spread on the ground. The Court concluded the area was a "playground" as such contemplated by §6317

DUI – **Reasonable Suspicion** - *Cmwlth. v. Emeigh, No. 2015 MDA (2005)*. *Opinion by Del Sole, P.J. E., 8/8/06* - The Court overturned a suppression and dismissal citing the new "reasonable suspicion" standard for motor vehicle stops. Here, Appellant made a wide right turn off of the street on which an off duty officer was in his car. The officer observed Appellant for a period of time, phoned another officer who made the arrest claiming he saw Appellant stagger to his car. The Court held the suppression court erred in applying the probable cause standard to Appellant's stop and subsequent arrest.

Sixth Amendment – **Forfeiture of Counsel** - *Cmwlth. v. Jones, No. 2321 EDA (2005)*. *Opinion by McCaffery, J., dissenting opinion by Joyce, J., 7/14/06* - Appellant's conduct was held as forfeiture of her right to counsel and the Court made no error in proceeding to trial after continuances. Appellant had repeatedly appeared in court without counsel, after having dismissed them or engaged in conduct which forced them to withdraw, and admitted that she had the means to hire counsel, and was explicitly warned the case was going to trial and she would have to represent herself if she did not retain counsel.

Megan's Law II – **Constitutional Infirmity** – **Sufficiency** – **SVP** - *Cmwlth. v. Mullins, No. 660 EDA (2005)*. *Opinion by Bender, J., 8/10/06* - The Court found the lack of judicial reviewability of an SVP finding, while of concern, was not overbroad or excessive in the case at hand. Specifically, the Court held that Appellant failed to meet the high evidentiary standard required to establish that a lack of a mechanism for subsequent judicial review and possible termination of SVP status renders the lifetime registration, notification and counseling requirements of Megan's Law II unconstitutional. In a thorough analysis of the evolution of Megan's Law I-III, the Court notes that the recent constitutional challenges to Megan's Law II, while leaving the law in tact, leave open the possibility of whether Megan's Law II (now Megan's Law III as of 1/24/05) could withstand a constitutional challenge in a case where the evidence on record rebuts the

underlying legislative findings and/or proves the possibility for successful treatments for SVPs. Here, a petitioner would have to demonstrate: no substantial risk to the community, potential for a full cure, and that the statute was in fact sufficiently onerous to be punitive.

Search & Seizure â€“ Investigative Detention - *Cmwlth. v. Clinton* , No. 926 WDA (2005). Opinion by McCaffery, dissenting opinion by Johnson, J., 8/15/2006 - Although Appellee was stopped late at night by three undercover drug task force officers (for a minor traffic violation) who surrounded his car and positioned themselves so Appellee could not exit his vehicle, and asked questions unrelated to the traffic stop, the Court found no coercive circumstances to warrant *de facto* custody and reversed suppression of evidence and statements garnered from the arrest. Rationalizing that the concern for officer safety outweighs the minor intrusion on drivers whose freedom of movement was already curtailed by a valid traffic stop (*Maryland v. Wilson* , 519 U.S. 308 (1997)), the Court held that the stop was an investigatory detention and that Appellant made his statements during this detention and not after the subsequent arrest. As such Appellant was not entitled to *Miranda* . Further, the Court found that the officer's questions were not likely to elicit and incriminating response from the Appellant and therefore did not constitute and interrogation on any level.

Search & Seizure â€“ Reasonable Suspicion â€“ Automatic Companion - *Cmwlth. v. Jackson* , No. 2922 EDA (2004). Opinion by Stevens, J., dissenting opinion by Kelly, J., 8/22/06 - Upholding the trial court's denial of a suppression motion alleging that the police lacked probable cause to stop and detain Appellant, the Court affirmed Appellant's convictions for simple assault, possession and resisting arrest. Here, Appellant had the misfortune to be with a group of people, one of whom the police had observed completing a drug transaction in the neighborhood earlier that day. The Court held that the detention of Appellant and several other men with the suspect by eight police officers where the police approached the men and immediately ordered them to face a fence and submit to a pat down was a lawful arrest. The Court concluded that because a crime had occurred earlier and because the area in question was high crime and had a reputation as, according to the officers, "a cop fighting corner" it was a reasonable safety measure for police to order Appellant and his companions to submit to the detention while arresting the their subject. In so finding the Court referenced its earlier opinion in *Cmwlth. v. Graham* 454 Pa. Super. 169 (1996) and reinforced the presumption that "the stop and frisk of an arrestee's companion can be justified depending on the circumstances presented."

Megan's Law â€“ SVP Assessment - *Cmwlth. v. Dixon* , No. 31 MDA (2006). Opinion by McCaffery, J., 8/16/06 - The trial court did not err when it classified Appellant as a Sexually Violent Predator (SVP) under 42 Pa.C.S.A. Â§9791-99.9 (Megan's Law II). Where a licensed psychologist and member of the Sexual Offender Assessment Board who was qualified by the Court as an expert in sexual offender assessments found Appellant to meet the criteria of an SVP the Court held that the his assessment, report and testimony were sufficient to satisfy the statutory requirements of an SVP assessment. In so doing the Court refuted Appellant's contention that the assessment was in error because an independent re-offense prediction was not made.

Felony Murder â€“ Predicate Offense; Jury Instruction â€“ Unreasonable Belief and Voluntary Manslaughter - *Cmwlth v. Austin* , No. 1678 EDA (2005). Opinion by Bender, J., (8/21/06). - Citing the rationale used in *Cmwlth. v. Magliocco* , 883 A.2d 479 (Pa. 2005), the Court reversed Appellant's conviction for second degree murder and remanded for a new trial on the charge of third-degree murder/ and or criminal homicide. The Court acknowledged that at times acquittal on a predicate felony will not impugn a guilty verdict on a felony murder count, however, mere reliance on the law of inconsistent

verdicts was insufficient analysis in Appellant's case. The Court noted that a conviction may stand where the Commonwealth does not charge the predicate offense when seeking a felony murder conviction but that the circumstances change when the prosecution charges both the predicate and felony murder offenses and the predicate offense is discharged. In the instant case, Appellant was acquitted of robbery as the undisputed predicate offense. The jury determined that no robbery occurred, thus the proposition that the murder was perpetrated during a robbery was negated. The Court held the conviction for felony murder could not be upheld. Further, the trial court erred in refusing to instruct the jury as to unreasonable belief voluntary manslaughter. The testimony left open the possibility that Appellant did not fully intend to shoot the victim and a verdict of guilty of voluntary manslaughter would not have been shocking.

Ander's Brief – **Frivolity of Argument** - *Cmwlt. v. Edwards, No. 1822 MDA (2005). Opinion by Bender, J., concurring opinion by Joyce, J., 8/4/06* - Counsel's *Ander's* motion to withdraw was dismissed where the Court found the issue of sentencing worthy of advocating on appeal. In so holding the Court noted that when moving counsel fulfills *Ander's* mechanical requirements, the Court had a duty to review the trial court's proceedings and render an independent judgment as to the frivolity of the appeal. In this case, although the trial Judge sentenced Appellant, a misdemeanor offender with psychological issues charged with essentially hit and run (no serious injury) within the guidelines, the sentence "raised eyebrows" by its excessive nature. The Court found the issue cognizable and meritorious.

Reckless Endangerment – **Sufficiency of Evidence** – **Photo Array** - *Cmwlt. v. Cain, No. 1626 EDA (2005). Opinion by Panella, J., 8/23/06* - Citing *Grahame-Cmwlt. v. Grahame* 482 A.2d 255 (Pa. Super. 1984)-Appellant contended evidence was insufficient to convict him of reckless endangerment and possession of an instrument of a crime because at trial, neither of the Cmwlt witness (who had previously identified Appellant through a photo array) identified Appellant as participating in the bar robbery at issue. In fact, the witnesses positively stated that, although present, Appellant was not involved in the crime. The Court rejected both Appellant's argument and the comparison with *Grahame* concluding that in *Grahame* all identification evidence was cumulatively tenuous but in the case *sub judice*, the Cmwlt witnesses positively identified Appellant in separate photo arrays, the witnesses also identified Appellant at the preliminary hearing, and the identifications were properly presented to the jury. Thus, the Court concluded, the evidence at trial supporting Appellant's identification was much stronger than that presented at *Grahame*. Further, the Court noted the general rule that any uncertainty in an eyewitness's identification of a defendant is a question of weight and not sufficiency.

DUI – **Right to Jury** – **Sufficiency** - *Cmwlt. v. Kerry, No. 2141 WDA (2005). Opinion by Orié Melvin, J., 8/23/2004*. - In appealing his conviction for DUI and related offenses, Appellant challenged the trial court's denial of his claimed right to a jury. In so doing, Appellant argued that although the maximum sentence for DUI first is no more than six months, the conviction would severely affect subsequent convictions therefore implicating constitutional severity and entitling him to trial by jury. The Court rejected the argument and held that both the United States Supreme Court and the Pennsylvania Supreme Court agree that there is no constitutional right to trial by jury for "petty offenses" and that DUI first, regardless of later recidivist deterrents, is a petty offense. Further, the Court found evidence sufficient for Appellant's bench conviction where the officer noted Appellant illegally operating an ATV on a snow covered highway (exhibiting diminution in judgment), Appellant was belligerent refused to submit to a breath test, Appellant concealed four cans of beer on his person and Appellant exhibited signs of intoxication (glassy eyes, strong odor of alcohol, etc.).

PWID – **Search & Seizure** – **Probable Cause** – **Confrontation Clause** - *Cmwlt. v. Holton, No.*

1909 MDA (2005). Opinion by Popovich, J., 8/24/06 - The Court found the suppression court properly concluded that undercover drug agents had probable cause to arrest Appellant despite the fact that they never observed any money change hands between Appellant and an unwitting buyer. The Court concluded that the totality of the circumstances (buyer's description of Appellant, buyer's conversation with Appellant and then subsequent delivery of drugs, etc.) combined with the credible testimony of the drug enforcement officer's established a *prima facie* case that criminal activity was afoot and the officers properly arrested Appellant. Further, Appellant's contention that audio taped statements of the unwitting buyer were hearsay (declarant unavailable) and erroneously admitted to trial thereby violating Pa. Rules of Evidence (801) was without merit as the statements were properly admitted under the co-conspirator exception to hearsay. (Test: 1) prove conspiracy, 2) statements made during course of conspiracy, 3) statements made in furtherance of conspiracy). Lastly, there was no violation of Appellant's sixth amendment right to confront because the statements were non-testimonial in light of the *Crawford-Crawford v. Washington*, 541 U.S. 36, 42 (2004)-examples and in light of the *Hendricks-U.S. v. Hendricks* 395 F.3d 173 (3rd Cir. 2004)-analysis of recorded statements.

Cmwth. v. Zheng, No. 2444 EDA (2005). Opinion by Klein, J., concurring opinion by McEwen, J., 8/24/06 - Appellant's conviction for endangering the welfare of a child (EWOC) was reversed where the trial court judge purported to base his conviction on the minor's late hours and the fact that Appellant himself did not feed the minor but the facts on the record did not support the conclusion. Rather, the facts argued and presented at court were related to sexual charges that the court dismissed for lack of evidence. Further, Appellant's argument that he was not given proper notice of the reasons upon which the trial judge found him guilty was not waived by a generalized 1925(b) statement because when the finding of a trial judge is vague, a general Rule 1925(b) statement is all an appellant can supply. Further, the record did not support the trial court judge's basis for conviction where Appellant tried to control his delinquent daughter.

PCRA â€“ Ineffective Assistance - *Cmwth. v. Bath, No. 2783 EDA (2005). Opinion by Johnson, J., 8/29/06* - In affirming the PCRA court's denial of Appellant's petition for relief, the Court declined to establish *per se* ineffective assistance of counsel where counsel failed to consult with a defendant concerning whether to file a petition for allowance of appeal to the Supreme Court of Pennsylvania. The Court concluded that, unlike *Liebel-Cmwth. v. Liebel*, 825 A.2d. 630 (Pa. 2003) in which it was established that failure of counsel to seek allowance of appeal to the Supreme Court constitutes ineffectiveness **where defendant requested** said allowance, Appellant's facts required a different rule. In order to establish ineffective assistance of counsel for failure to consult about allowance for appeal (or presumably that defendant had requested consultation), a defendant must first establish a duty to consult by indicating issues of potential merit for further review by the Supreme Court. Here, Appellant failed to establish any issues of potential merit.

Megan's Law II â€“ Motion for Extraordinary Relief â€“ Sufficiency of SVP - *Cmwth. v. Askew, No. 697 EDA (2005). Opinion by Kelly, J., concurring opinion by Lally-Greene, J., 8.30/06* - Appellant's oral motion for extraordinary relief (Pa.R.Crim.P. 704) made before his Megan's Law hearing yet after conviction for several sexual crimes against three year old girl was insufficient to preserve constitutional challenges to his Megan's Law sentences where Appellant failed to make a post-sentence motion and Appellant's constitutional arguments were waived. Despite this finding, the Court opined on Appellant's purported challenges and found them without merit in light of the *Mendoza-Martinez* factors (*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)), and the *Williams* holding (832 A.2d 962 (Pa. 2003)-Megan's Law requirements do not constitute punishment). Further, the Cmwth. expert properly applied the statutory factors in determining Appellant's SVP status and the evidence was sufficient.

Sentencing – “**Involuntary Manslaughter**” – **Aprendi Challenge** - *Cmwlth. v. Kearns*, No. 1012 WDA (2005). *Opinion by Bender, J.*, - Where the trial court imposed a sentence of six to twelve years in accordance with involuntary manslaughter 2nd degree felony but the that the jury was not charged that in order to find Appellant guilty of felony involuntary manslaughter they must find that the victim was under 12 and in the custody and care of Appellant nor did the verdict form reflect the finding, Appellant's due process rights were violated and judgment of sentence vacated for resentencing. Note: This case analyzes *Aprendi* and it's progeny including *U.S. v. Blakely*, 542 U.S. 296 (2004) and *Cmwlth. v. Kleinicke*, 895 A.2d 562 (Pa. Super 2006).

Pennsylvania Commonwealth Court Decisions

Challenge to Accuracy – “*Dunbar v. PA State Police*, No. 1513 C.D. (2005). *Opinion per curiam*, 7/7/06” – The Court affirmed an ALJ determination that the State Police were the proper party to defend challenges to the accuracy of criminal history records pursuant to 18 Pa.C.S. Â§ 9151 (CHRIA) and that Appellant's criminal history was accurate based upon the testimony of the State Police witness responsible for calculating sentences and who had reviewed Appellant's file. As the proper party defended the challenge, Appellant's due process rights were not violated as he had suggested. However the Court did note that the minimum and maximum time calculations were to be conducted by the DOC, indicating Appellant could challenge the accuracy of his end date through DOC channels.

Mandamus – “**Credit for Time Served**” – *Oakman v. PennDOC, et al*, No. 346 M.D. (2005). *Opinion by Pellegrini*, 7/19/06” – In a case where the DOC unilaterally decided that the trial judge had ordered too much credit for time served, the Court resoundingly rejected the assertion that the Director of Classification Movement and Registration should be responsible for making decisions as to whether a sentencing order is correct or not. The Court held that the DOC is an administrative agency, bound to follow trial court orders and the Appellant was entitled for credit for time served as ordered by the trial court.

Retroactive Application of Parole Act – “**Ex Post Facto Clause** - *Evans v. Pa. Bd. Of Prob. & Parole*, No. 34 M.D. (2006). *Opinion by Jubelirer, J.*, 8/16/06 - Noting the appropriate test for *ex post facto* clause violations as set forth in *Cimaszewski v. Pa. Bd. Of Prob. & Parole* 582 Pa. 27, 868 (2005) in which the appropriate measure of whether a retroactive application of the new parole laws violates said clause is whether the retroactive application the law creates a significant risk of prolonging incarceration, the Court sustained the Board's demurrer to Petitioner's complaint in *Mandamus*, The Court held that Petitioner had not pled sufficient facts to constitute an *ex post facto* violation. The Court reiterated the Supreme Court's finding that a petitioner must allege facts and present evidence establishing that the petitioner himself faced a significant risk of an increase in punishment.

PACDL NEWS AND ANNOUNCEMENTS

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Thursday, November 9, 2006

6:30 p.m.- 8:00 p.m. Welcoming Reception at Sheraton Society Hill

Come join your colleagues and friends for this friendly welcoming reception in historic Old City Philadelphia

Friday, November 10 2006 (6 credit hours of Rule 801 Capital Case Training)

8:00 a.m. - 8:30 a.m. Registration and Continental Breakfast

8:25 a.m. Welcome from PACDL President Joseph M. Cosgrove

8:30 a.m. to 12:45 p.m.

Advanced Jury Trial Advocacy Skills: Opening Statement; Cross-Examination; Closing Argument

Moderator: Professor Louis M. Natali, Jr.

Temple University Beasley School of Law

Introduction of Seminar and Trial Fact-Pattern

Professor Louis M. Natali, Jr.

Voir Dire Exercise

demonstrated by:

Prosecution: Gaetan J. Alfano & Gregory Miller, Miller, Alfano & Raspanti P.C

Defense: Jules Epstein, Kairys, Rudovsky, Epstein & Messing & Marc A. Bookman, Defender Association of Philadelphia

Opening Statement

demonstrated by:

Prosecution: Gaetan J. Alfano & Gregory Miller, Miller, Alfano & Raspanti P.C

Defense: John J. Duffy, Duffy, Green & Redmond, P.C.

10:15 a.m. – 10:30 a.m. Break

Cross-Examination

demonstrated by:

Prosecution: Gaetan J. Alfano & Gregory Miller , Miller, Alfano & Raspanti P.C

Defense: Eric Vos, Defender Association of Philadelphia

11:30 a.m. – 11:45 a.m. Break

Closing Argument

demonstrated by:

Prosecution: Gaetan J. Alfano & Gregory Miller, Miller, Alfano & Raspanti P.C

Defense: Ellen C. Brotman, Carroll & Brotman

12:45 p.m. - 2:15 p.m. Luncheon with Special Guest Speaker: Professor Barry C. Scheck, co-founder of *The Innocence Project*, Professor of Law and Director of Clinical Education, Benjamin N. Cardozo School of Law

2:15 p.m. - 3:15 p.m. Sentencing Advocacy Workshop: Mitigation Themes

Moderator:

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Jodeen Hobbs, Miller, Alfano & Raspanti P.C
Lisa A. Mathewson, Welsh & Recker, P.C.
Anna M. Durbin, Law Offices of Anna M. Durbin**

or

Penalty Phase Workshop: Mitigation Checklist

Moderator: Joseph M. Cosgrove, Law Offices of Joseph M. Cosgrove

Cindy Rowe, Sentencing Mitigation Specialist

Michael Wiseman, Defender Association of Philadelphia

3:15 p.m. - 3:30 p.m.

Break

3:30 p.m. - 4:45 p.m.

State and Federal Appellate Advocacy Workshop

**Peter Goldberger, Law Offices of Peter Goldberger
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5:00 p.m. – 7:00 p.m.

Cocktail Reception at Amada Restaurant

Saturday, November 11, 2006 (6 total credit hours including 1 hour of ethics)

8:30 a.m. – 9:00 a.m.

Registration and Continental Breakfast

9:00 a.m. – 10:15 a.m.

Motions Practice: State and Federal

Moderator: Jack L. Gruenstein, Vaira & Riley, P.C.

Kathleen M. Nagle, Vaira & Riley, P.C.
Tamara L. Traynor, Miller Alfano & Raspanti, P.C.
Jeffrey M. Lindy, Lindy & Associates. P.C.

10:15 - 10:30 a.m. Break

10:30 a.m. - 11:45 a.m. Developments In Representing Corporations

Moderator: Richard L. Scheff, Montgomery, McCracken, Walker & Rhoads
Robert Goldman, Fox Rothschild LLP
Meredith S. Auten, Ballard Spahr Andrews & Ingersoll, LLP
April M. Byrd, Pepper Hamilton, LLP

11:45 a.m. - 1:15 p.m. Lunch on your own and PACDL Board of Directors
Meeting

1:15 p.m. - 2:30 p.m. Grand Jury Investigations

Moderator: Mark G. Sheppard, Sprague & Sprague
Patrick J. Egan, Fox Rothschild LLP
Terri A. Pawelski, Buchanan Ingersoll PC
John N. Joseph, Post & Schell, P.C

2:30 p.m. - 2:45 p.m.

Break

2:45 p.m. – 4:00 p.m.

The New Wave of Immigration Prosecutions

**Moderator: Eric W. Sitarchuk, Ballard Spahr Andrews & Ingersoll, LLP
Steven Morley, Morley Surin & Griffin, P.C.
Thomas Suddath, Reed Smith LLP
Joseph G. Poluka, Blank Rome LLP**

or

**Share the Experience/Young Lawyers Panel
Nuts & Bolts For Federal Sentencings**

**Moderator: Jessica Natali, Ballard Spahr Andrews & Ingersoll, LLP
Catherine Henry, Defender Association of Philadelphia
Scott Coffina, Montgomery, McCracken, Walker & Rhoads, LLP**

4:00 p.m. - 4:15 p.m.

Break

**4:15 p.m. - 5:15 p.m. Ethics Credit: A Primer on the
Disciplinary Process for Criminal Defense Lawyers**

**Moderator: James C. Schwartzman, Sterens & Lee
John Rogers Carroll, Carroll & Brotman
John W. Morris, Law Offices of John W. Morris**

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Debra H. McGovern, Esquire
Executive Director
Pennsylvania Association of Criminal Defense Lawyers
115 State Street
Harrisburg, PA 17101
717-234-7403
FAX 717-234-7462
e-mail: pacdl@aol.com

Debra H. McGovern, Esquire
Executive Director
Pennsylvania Association of Criminal Defense Lawyers
115 State Street
Harrisburg, PA 17101
717-234-7403
FAX 717-234-7462
e-mail: pacdl@aol.com