



JUSTICES RULE ON POST-CONVICTION DNA TESTING

Fourth Amendment, Miranda cases also receive scrutiny

By **PROLOY K. DAS**

The Supreme Court issued more than 50 decisions in criminal law over the past 12 months. Here are some of the highlights.

Four years ago, I authored the first of my annual Supreme Court criminal law reviews for this publication by leading with 2006's decision of the year — *State v. Skakel*, 276 Conn. 633 (2006). So, for sentimental value, I will lead the 2010 edition with *Skakel v. State*, 295 Conn. 447, Kennedy cousin Michael Skakel's appeal from the trial court's denial of his petition for a new trial. General Statutes § 52-270 allows a convicted defendant to petition the trial court for a new trial based on newly discovered evidence. Skakel filed a petition claiming that Gitano Bryant (cousin of basketball star Kobe Bryant), could provide testimony implicating two other men for the 1975 murder of Martha Moxley in Greenwich. The Court, with Justice Richard Palmer dissenting, determined that Bryant's statements were not so clearly credible as to require the granting of a new trial.

Another post-conviction petition is one for DNA testing, which is authorized by General Statutes § 54-102kk. In *State v. Dupigny*, 295 Conn. 50, and *State v. Marra*, 295 Conn. 74, two decisions released on the same day, the Court addressed the standards to be applied for these petitions. The Court concluded that the petitioner must demonstrate that there is a "reasonable probability" that the testing will produce DNA results that would have altered the verdict. It de-

finied "reasonable probability," by looking to *Brady v. Maryland*, 373 U.S. 83 (1963), as a "probability sufficient to undermine confidence in the outcome."

Neither Dupigny nor Marra could satisfy this standard in attempting to get human remains and a ski cap, respectively, subjected to DNA testing.

In terms of statutory interpretation, the most interesting case was *State v. Courchesne*, 296 Conn. 622, where the Court applied the common-law "born alive rule" to conclude that an infant, who was born alive and subsequently died of injuries that had been sustained in utero, was a person for purposes of the murder statute. *Courchesne* stands out as the year's most interesting read as the majority opinion and separate concurring and dissenting opinions scholarly explore the "born alive rule." In another statutory interpretation case, the Court held in *State v. Grant*, 294 Conn. 161, that a BB gun is a firearm for purposes of the sentence enhancer. *State v. Rodriguez-Roman*, 297 Conn. 66, features a racketeering prosecution, where the Court held that a defendant's uncharted association with a co-conspirator constituted an "enterprise."

State v. Fernando A., 294 Conn. 1, addressed previously undefined domestic violence proceedings. In 2006, the Appellate Court in an unpublished decision in *State v. Duell*, A.C. 26926, granted the state's motion to dismiss an appeal from the denial of an evidentiary hearing to dissolve a family violence protective order. The state argued that

because the issuance of a protective order as a result of a pending criminal case is not a final judgment, defendants in these cases could not obtain appellate review regarding the protective

order as long as the criminal case was not resolved (even where, as in *Duell*, the victim spouse wanted the order dissolved). This led to some instances where the underlying criminal case would not be resolved by the state, in an effort to keep the protective order in place.

The legislature responded by creating a statutory right to a hearing, but failed to define the hearing. *Fernando A.* brought a public interest appeal to obtain appellate review of the denial of an evidentiary hearing. The Court held that the defendant is, in fact, entitled to hearing on the continued need for a protective order. However, he is not entitled to a hearing before the initial protective order is issued. Significantly, the Court also explained that a criminal defendant cannot force the victim to testify, though he may question the victim if the victim voluntarily testifies.

Hanging Object

There were a number of Fourth Amendment decisions this year, with the Court's 4-3 decision in *State v. Cyrus*, 297 Conn. 829



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leading the pack. *Cyrus* affirmed the trial court's dismissal of a DUI conviction, where the initial stop was made based on General Statutes § 14-199f(c), the distracted driver statute. A divided Court concluded that the mere hanging of an object from the rearview mirror did not give rise to a reasonable and articulable suspicion that the driver was, in fact, distracted by the object.

State v. Clark, 297 Conn. 1, concluded that information about a crime from a confidential informant, in the absence of any basis for the informant's knowledge, still provides officers with a reasonable suspicion to stop a vehicle. *State v. Boyd*, 295 Conn. 707 recognized that a person has a privacy right to the contents of his cell phone, including his subscriber number. *State v. Fausel*, 295 Conn. 785, explained that there need not be an actual emergency for the emergency exception to the warrant requirement to apply. So long as the police objectively believe an emergency situation exists, they may enter a residence without a warrant. The record was inadequate to review the defendant's claim in *State v. Gardner*, 297 Conn. 58, that delivery of his personal effects by Hartford Hospital personnel to police constituted a warrantless search because there was no evidence in the record as to whether the hospital personnel were acting as agents of the police at the time.

There were a few Fifth Amendment cases, including two which applied *Miranda v. Arizona*, 384 U.S. 436 (1966). In *State v. Mitchell*, 296 Conn. 449, the Court did not disturb the Appellate Court's conclusion that police officer who asked a suspect, "What is going on?" and "Why were you stopped?" was not merely trying to assess the situation but was attempting to confirm that he had the right suspects and, therefore, triggered the need for *Miranda* warnings. The Court affirmed the assault conviction on harmless error grounds.

In *State v. Canady*, 297 Conn. 322, an officer's general question, "Are you OK?," did not amount to interrogation implicating *Miranda*. In *Canady*, the Court also concluded that protections offered under General Statutes § 46b-137(a) which renders certain statements made by a child to police inadmissible in a delinquency hearing do not apply when a juvenile is tried as an adult in criminal court.

State v. Moore, 293 Conn. 781, presented an interesting situation where a prosecution witness invoked the Fifth Amendment near the end of re-direct, thereby precluding an opportunity for re-cross. The Court, over a dissent, concluded that the defendant's confrontation rights were not violated because the defendant had been afforded an opportunity to cross-examine the witness prior to redirect.

Scope Of Defenses

The Court also addressed the scope of several important defenses. In *State v. Terwilliger*, 294 Conn. 399, the Appellate Court's reversal of a manslaughter conviction was affirmed where the Court concluded that the jury should have been instructed that the state bore the burden of disproving the defendant's defense of premises theory beyond a reasonable doubt.

In *State v. Erickson*, 297 Conn. 164, the defendant's self-defense and defense of premises defenses to the charge of assault of an elderly person had no merit. The defendant had pushed a marshal, who was serving a subpoena on him, in the back after the marshal was voluntarily leaving the premises. The Court also held that denial of the defendant's request that the personnel file of the marshal be produced or reviewed in camera did not violate the right to confrontation. In *State v. Nathan J.*, 294 Conn. 243, the defense of parental justification was applied to the charge of risk of injury to a child.

This past year, the Court provided significant guidance to the criminal bar on the standards for proceedings on petitions for new trials and petitions for DNA testing, and the scope of evidentiary hearings for protective orders in domestic violence cases. These proceedings will likely continue to be refined to incorporate constitutional and statutory rights as they grow in frequency and are subject to further appellate review. ■