

CSE Case Law Update

February 2010

STATE SUPREME COURTS

Commonwealth v. Zubiel, 921 N.E.2d 78 (Mass. 2010).

- Definition of “Matter”
- Instant Messaging
- Electronic Communication

The defendant engaged in online conversations with an undercover police officer posing as a minor female during which they discussed sexual topics and during which the defendant asked the officer to send him nude pictures. The defendant was convicted of trying to disseminate matter harmful to a minor. He appealed, arguing that electronic communication in the form of text did not meet the statutory definition of “matter” and therefore his conviction should be overturned. The Supreme Court of Massachusetts agreed and entered judgment for the defendant. The court held that electronic communications consisting of text only were not visual representations, nor were they handwritten or printed material, using the ordinary definitions of those terms. It also concluded that when the statute was written the legislature did not intend to prohibit these types of communications. It concluded with a statement that if the legislature wishes to include these types of communication it should do so in future legislation.

COURTS OF APPEAL

People v. Dack, 2010 Cal. App. Unpub. LEXIS 1423 (Cal. Ct. App. Feb. 26, 2010).

- Uncharged bad acts evidence
- Prejudicial evidence

A court of appeal in California affirmed a lower court’s decision to deny the defendant’s motion for a new trial. The defendant was convicted of attempted rape of a woman who owned a sandwich shop in a shopping center that also housed a Laundromat. At trial, the judge allowed testimony about a time the man had entered the Laundromat when a female employee was alone and grabbed and held his penis. The trial court admitted the evidence as relevant to show sexual intent in the instant case. The court of appeals agreed that it was admissible to prove sexual intent and found the testimony was not excessively prejudicial. The trial court also admitted evidence that, a month after the attempted rape, police uncovered a bag of sexual toys in the defendant’s vehicle. The appellate court found that it was not reasonably probable that, had this evidence not been admitted, the defendant would have been acquitted. Therefore any error was harmless. Finally, the defendant argued that the prosecutor’s failure to inform the defendant that the

victim was a victim of another sexual incident prior to the one involved in the instant case resulted in a Brady violation and that he should be granted a new trial. The court found that there was no error because there was no prejudice. The excluded evidence was not material and the defendant had not shown a reasonable probability of a different result had the evidence been disclosed at trial.

In re Nicole D. v. Edward D., No. G042474, 2010 Cal. App. Unpub. LEXIS 1049 (Cal. Ct. App. Feb. 11, 2010).

- Child pornography
- Substantial danger to children's emotional well-being

A court of appeal in California upheld the lower court's decision to assert jurisdiction over the defendant's minor children and to remove them from his custody following the defendant's arrest for possession of child pornography. The facts show that the minor children had never discovered the child pornography on the defendant's computer, but that the oldest child had figured out the situation and had begun acting out and falling behind in school. The defendant argued that there was insufficient evidence to show that the children were suffering serious emotional damage or were at risk of such. The court held, however, that the statute does not require that the children be actually harmed, but focuses on avoiding potential future harm. It further held that there was a substantial risk that the defendant would rebuild his pornography collection and therefore returning the children would pose a substantial risk of exposing them to child pornography, which would in turn pose a substantial risk of danger to their emotional well-being. Therefore the court affirmed the decision below to remove the children from their father's custody.

People v. Salazar, No. G042244, 2010 Cal. App. Unpub. LEXIS 957 (Cal. Ct. App. Feb. 9, 2010).

- Uncharged domestic violence
- Limiting instructions

The defendant was convicted of several counts of corporal injury on a cohabitant, assault with a deadly weapon, and willfully possessing an explosive, among other crimes. Specifically, he possessed and set off homemade bombs in the presence of police officers. None of the charged acts included incidents of domestic violence. At trial, the prosecution sought to introduce evidence of recent acts of domestic violence committed against the defendant's second wife, Sherry. The court allowed it. During these violent acts against Sherry, the defendant had threatened to kill not only himself, but also Sherry and her family. The trial court allowed this evidence to show the defendant's intent during the charged assaults. The defendant had claimed that his only intent was to kill himself, but the court held his earlier violence towards Sherry and her family was relevant to showing another kind of intent. The appellate court found that the trial court did not abuse its discretion in allowing this evidence. In light of a limiting instruction to

the jury alerting them to the fact that they should only use this evidence to figure out intent, the defendant had not shown that admission of this evidence made the trial fundamentally unfair.

People v. Tillis, No. D054245, 2010 Cal. App. Unpub. LEXIS 958 (Cal. Ct. App. Feb. 9, 2010).

- Specific intent for pandering
- Specific intent for human trafficking

The defendant was convicted of human trafficking, pandering by encouraging, and sexual penetration by a foreign object. On appeal, he set forth several grounds, including instructional errors and insufficiency of the evidence. The defendant had picked up a woman who was trying to prostitute herself for the first time. He drove her around in his car and told her he would not release her until she made him \$1000. He also abused her by inserting his fingers in her vagina, slapping her, and smearing blood on her. The defendant argued on appeal that his convictions should be overturned because the trial court improperly did not instruct the jury that both pandering and human trafficking are specific intent crimes. The appellate court held that the trial court err on these grounds. The jury was instructed that the defendant could be convicted of pandering if he was encouraging the victim “to be” a prostitute, when it should have said “to become” a prostitute. The court held that “to be” encompasses more than the specific intent required for pandering because it can apply to victims the defendant believed were already prostitutes. It further held that the human trafficking jury instructions incorrectly referred to it as a general intent crime and that, since the trafficking charge was based on the pandering charge, the insufficiency with the pandering instruction affected the trafficking instructions as well. Both of these errors were grounds for reversal. Further, the court held that the trial court did not err in failing to instruct on simple battery and misdemeanor sexual battery as lesser included offenses of sexual penetration by a foreign object, because they are not necessarily included and because the facts in this case supported either sexual penetration or no crime. The court also reviewed the sufficiency of the evidence claims and concluded that there was sufficient evidence to support the convictions for pandering, human trafficking, and sexual penetration by a foreign object. Finally, it concluded that the prosecution’s failure to state on the record its reasons for its imposition of an upper term sentence was harmless and was not grounds for an ineffective assistance of counsel claim.

People v. Superior Court of Sonoma County ex rel Phillips, No. A124599, 2010 Cal. App. Unpub. LEXIS 876 (Cal. Ct. App. Feb. 5, 2010).

- Hybrid Sentencing Orders
- Selection of Principal Term

Based on related offenses, the trial court sentenced the defendant to a prison term of two years and eight months on three of the charged counts and suspended imposition of

judgment on the other three counts and instead placed the defendant on supervised probation for five years. The probation was to commence after the completion of the defendant's prison term. The court held this hybrid sentence of prison and probation was unlawful, even though the sentences were imposed for different offenses. It cited an earlier California Court of Appeals case which held that a court could not stay the execution of a probationary sentence so that a defendant could serve a state prison term, which is essentially what this hybrid sentencing scheme requires. A prisoner, once completing his prison sentence, cannot be subject to the jurisdiction of both the Department of Corrections (through parole) and a local probation department. In addition, probation by definition is the suspension of sentencing, so it does not make sense to simultaneously impose a sentence. The case was remanded for resentencing on these grounds. In addition, the state argued that the court on resentencing would have to punish the defendant for the offense that carried the longest potential prison term, as this must be the principal offense. The court held instead that the court was only required to make the principal sentence the greatest term of imprisonment imposed by the court. The trial court was not required, therefore, to punish the defendant for the crime that carried the longest potential prison term. In this case, that would have been photographing a child engaged in sexual activity, one of the offenses for which the court originally imposed probation.

Dix v. State, No. A09A2184, 2010 Ga. App. LEXIS 152 (Ga. Ct. App Feb. 23, 2010).

- Withdrawal of Guilty Plea
- Ineffective Assistance of Counsel

At trial, the defendant pleaded guilty to sexual exploitation of children. Upon finding out that he would have to move due to state sex offender registry laws, he moved to withdraw his guilty plea. This motion was denied. On appeal, he argued the he would not have entered his guilty plea had he known he would have to move. The trial court, during the motion hearing, heard testimony from trial counsel that he made a good faith effort to determine whether the defendant would have to move and concluded that he probably would not, but also told the defendant that the sheriff would make the final determination. The court heard conflicting testimony from the defendant that counsel promised him he would not have to move. Finally, it heard testimony from a probation officer that said both trial counsel and the defendant knew the sheriff would make the ultimate determination. The trial court then concluded that the defendant made his decision to plead based on the fact that a child victim would testify at trial and make it more difficult for the defense, and not because he would not have to move. The court of appeals upheld the trial court's decision because it found that it did not abuse its discretion by choosing to credit trial counsel's and the probation officer's testimonies over the defendant's.

State v. Meier, No. 35555, 2010 Ida. App. LEXIS 8 (Idaho Ct. App. Feb. 2, 2010).

- Burden of Proof

- Search and Seizure – Return of Property

During a search of the defendant's home, police seized certain items of merchandise and a briefcase containing child pornography. In exchange for the defendant's guilty plea to possession of sexually exploitative material and being a persistent violator, the state agreed not to file any charges relating to a theft investigation pursuant to which the items were seized. The defendant filed a motion to have his items returned to him and presented several pieces of evidence in support of his motion, including police inventory lists and unrelated receipts. His motion was denied. The defendant argued that, at the time his motion was made, the state had the burden to show that it had the right to retain the items. The court agreed with the defendant that the burden eventually shifts to the state. The court held that though the burden began with the defendant to show he was entitled to return of the items, the burden switched to the state to show it was entitled to keep them once the property is no longer needed for evidentiary purposes. The court held further, however, that because the defendant could still challenge his guilty plea, and because the decision to withhold theft charges was a condition of this guilty plea, the property was still needed for evidentiary purposes. Therefore, the burden had not yet shifted to the state and instead remained with the defendant. Because he had not met this burden he was not entitled to return of his property.

Ball v. State, No. 02A03-0908-CR-372, 2010 Ind. App. Unpub. LEXIS 236 (Ind. Ct. App. Feb. 25, 2010).

- Sufficiency of Evidence

The defendant was convicted of one count of felony child solicitation. The defendant argued there was insufficient evidence. In the probable cause affidavit, it said that the defendant shouted out a car window to the victim, a child, "I want to eat your p***y." Relying on this, the defendant argued that it did not constitute solicitation. The victim testified at trial, however, that the defendant said, "Let me eat your p***y." In reviewing for sufficiency of evidence the trial testimony, not the probable cause affidavit, is the primary concern. The court found that the defendant's statement, which was revealed at trial, constituted a "request," and therefore sufficient evidence of solicitation.

Watson v. State, No. 29A04-0904-CR-221, 2010 Ind. App. Unpub. LEXIS 260 (Ind. Ct. App. Feb. 26, 2010).

- Proving Age by Circumstantial Evidence
- Sanctions for Tainted Testimony
- Adult Pornography as Prior Bad Act
- Credit-Restricted Felons
- Ex-post Facto Laws

The defense argued that the state never proved his age. As an element of the crime of child molestation as a Class A felony, the state was required to prove that the defendant was twenty-nine at the time of the offense. The court held that his age can be proven by circumstantial evidence, and that the state had done so here. In addition, the court addressed the issue of sanctions. The defense had shown the videotaped testimony of the child victim to the victim's siblings, therefore tainting their potential testimony at trial. The trial court held the siblings would not be allowed to testify at trial, but said the defense could voir dire them to determine whether they had relevant, untainted evidence to offer. The appeals court found the trial court did not abuse its discretion in ordering this sanction, especially because it did not entirely exclude the siblings' testimonies. The court also held that admitting the defendant's pornography collection at trial was not fundamental error. It is unclear whether possession of adult pornography is considered a "bad act" covered by Federal Rule of Evidence 404(b) and, even if it is, the pornography was relevant to issues other than the defendant's propensity to commit the crimes, such as bolstering the victim's credibility. Finally, the appellate court held that the trial court improperly applied the statute that made the defendant a credit-restricted felon. The law was passed after the defendant committed his offenses, and therefore it was an ex post facto law as to him. The appellate court remanded for recalculation of the sentence.

State v. Gallardo, No. 101,067, 2010 Kan. App. LEXIS 21 (Kan. Ct. App. Feb. 26, 2010).

- Sex Offender Registration
- Unlawful Sexual Relations
- Statutory Scheme

The defendant was convicted of unlawful sexual relations because while he was contracted to the Department of Corrections he had sexual relations with an inmate. The statute that sets out sex offender registration requirements mandates that people convicted of committing certain offenses are required to register as sex offenders. It lists certain specific crimes the commission of which makes one a "sex offender" and also includes a catch-all category that includes any offense that "has been determined beyond a reasonable doubt to have been sexually motivated." The defendant argued that because "unlawful sexual relations" is not included in the list of crimes making one a "sex offender," he should not have been required to register. The court held, however, that his crime fell under the catch-all provision as a sexually motivated crime. Based on the facts, the court held, there was no other reason except for sexual gratification for committing the crime, and therefore it was sexually motivated beyond a reasonable doubt. The appellate court upheld the sentencing court's determination that he should register as a sex offender.

Massachusetts v. Romero, No. WOCR2007-1369, 2010 Mass. Super. LEXIS 22 (Mass. Super. Ct. Feb. 11, 2010).

- Definition of "Matter"

- Cellular Telephone Messaging
- Obscene Pictures

A Massachusetts court held that photos sent via text message through a phone fall under the definition of “matter” for the purposes of the law against dissemination of matter harmful to minors. Unlike the instant messages in Zubiel, which did not contain pictures that were harmful, photos sent via text message can form the basis for a conviction for dissemination of matter harmful to minors. Photos sent via text message fall under the broad category of “visual representation” within the definition of “matter.” They count as both “pictures” and “depictions by computer.” It does not change the result because the images were transmitted with or as text messages. The court further pointed out the similarities and blurring of the lines between today’s computers and cell phones. The court ultimately denied the defendant’s pretrial motion to dismiss the charges for possession of child pornography and dissemination of matter harmful to minors.

State v. Matusovic, No. A09-485, 2010 Minn. App. Unpub. LEXIS 134 (Minn. Ct. App. Feb. 16, 2010).

- Evidence of Prior Bad Acts (Spriegl Evidence) – 5-Step Test

The defendant was charged with second-degree criminal sexual conduct. At trial, the court admitted two pieces of evidence showing the defendant’s prior conviction for third-degree criminal sexual conduct and for possession of child pornography. The trial court gave the jury a limiting instruction indicating that this evidence was only to be used to show the defendant’s identity. The appellate court held that though this evidence was not admissible to prove identity and the trial court erred, it would have been admissible to show common scheme or plan, which the prosecutor had suggested. Therefore the court found that the evidence met the branch of the Spriegl analysis that requires the state to clearly indicate the purposes for which Spriegl evidence is offered. The problem, however, was that the Spriegl evidence was irrelevant to the case at hand because neither of the Spriegl incidents had a “marked similarity in modus operandi” to the charged offense. The court further noted that possession of child pornography is “wholly distinct from second-degree criminal sexual conduct.” Finally, the slight probative value of both of the Spriegl crimes did not outweigh the large potential for unfair prejudice. Therefore, the court concluded, the trial court had abused its discretion in admitting the evidence. It further found that this error was prejudicial and warranted a new trial because the wrongly-admitted Spriegl evidence had been so prevalent during the original trial.

State v. Fraley, 688 S.E.2d 778 (N.C. Ct. App. Feb. 16, 2010).

The defendant was convicted of soliciting a person he believed to be a child by means of a computer for the purpose of committing an unlawful sexual act. The defendant communicated with an undercover police officer multiple times via online chat and discussed meeting and sex in the same conversations. The defendant made a motion to

dismiss, which was denied. The trial court found substantial evidence that the defendant “enticed or advised” the undercover detective to meet with him, using the ordinary meanings of those words. The appellate court affirmed, noting that it looked to the entire conversations to determine whether the defendant’s words to the victim fell within the definitions. The appellate court also found no plain error in admitting at trial the detective’s opinion as to the defendant’s intent, especially because the defense invited this opinion. This invitation, along with failing to renew the defendant’s motion to dismiss at the end of trial, did not constitute ineffective assistance of counsel. There was no reasonable probability that, without these errors, the trial would have come out differently.

State v. Kell, 2010 N.J. Super. Unpub. LEXIS 265 (N.J. Super. Ct. App. Div. Feb. 8, 2010).

- Withdrawal of guilty plea
- Evidentiary hearing for post-conviction relief

The Superior Court of New Jersey upheld the lower court’s decision to deny the defendant’s petition for post-conviction relief based on allegations of ineffective assistance of trial and appellate counsel based on an attempt to withdraw his guilty plea at trial. When hearing the defendant’s petition, the trial court refused to hold an evidentiary hearing. The Superior Court held that the trial court did not err in this respect and that it had fully heard defendant’s claims in an earlier hearing on his original motion to withdraw his guilty plea.

State v. J.J., No. 505821, 2010 N.Y. App. Div. LEXIS 1039 (N.Y. App. Div. Feb. 11, 2010).

Following conflicting testimony from two different psychiatrists, the trial court found the defendant was a dangerous sex offender and ordered confinement in a secure treatment facility. The defendant appealed from the order, arguing that both the jury’s verdict and the court’s disposition were against the weight of the evidence and that trial errors deprived him of a fair trial. In order for the defendant to be confined to a mental facility, the court must have found by clear and convincing evidence that he suffered from a mental abnormality. Two psychologists testified at trial that the defendant was a pedophile, which is a mental disorder according to the DSM-IV. Another psychologist, on the other hand, testified that he did not suffer from a mental abnormality and that he could control his sexual urges. The appellate court found that when there are conflicting expert opinions, juries’ determinations of credibility deserve extreme deference and therefore it concluded that the verdict was not against the weight of the evidence. In addition, the disposition of ordering confinement was not against the weight of the evidence given the conflicting testimonies. Further, the trial court did not abuse its discretion in admitting various challenged pieces of evidence at trial because they were

not admitted only to arouse the emotions of the jury, which is the standard in a case involving New York's Mental Hygiene Laws.

Commonwealth v. Fink, No. 2041 MDA 2008, 2010 Pa. Super. LEXIS 41 (Pa. Super. Ct. Feb. 16, 2010).

- Right Against Self-Incrimination and Conditional Privilege
- Sex Offender Counseling Program Questionnaires

The trial court found that the defendant had violated his probation by refusing to answer certain questions on a questionnaire issued by a sex offender counseling program he was required to undergo as a condition of his probation. The defendant argued, however, that the Fifth Amendment privilege against self-incrimination privileged him from answering. The appellate court agreed with the defendant and remanded to the trial court with instructions to reinstate probation. The court held that the warnings to the defendant, which cautioned him not to reveal specific identifying information, were constitutionally inadequate to assure him that his answers would not result in further prosecution. In addition, the questionnaire asked about criminal activity other than that for which the defendant was currently serving his sentence, which exposed him to a risk of further prosecution. Finally, the questionnaire asked too much specific information about the crimes, which could have been used as "links in a chain of evidence by which guilt can be established"

State v. Bearden, No. M2008-01833-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 106 (Ct. Crim. App. Tenn. Feb. 11, 2010).

- Motion to Suppress for Lack of Probable Cause

Authorities uncovered images of child pornography on the defendant's computer while executing a search warrant authorizing them to look for evidence of drug trafficking. At his trial for sexual exploitation of a minor, the defendant filed a motion to suppress the computer based on the argument that the original search warrant was not supported by probable cause. The court granted the defendant's motion because the warrant lacked specificity in that it only alleged that there were marijuana plants in the defendant's home, but nothing more. The appellate court upheld the trial court's decision when the state appealed. The court held that the affidavit accompanying the warrant did not indicate probable cause that the defendant was growing marijuana for trafficking as opposed to growing small quantities for personal use. It reasoned that if the officer swearing the affidavit had seen multiple plants he should have noted how many and if he had believed that drug trafficking was taking place he should have included other facts supporting that belief.

Luera v. State, No. 12-09-00101-CR, 2010 Tex. App. LEXIS 1445 (Tex. App. Feb. 26, 2010).

- Community Service Violation – Sufficient Factual Basis

The defendant was sentenced to eight years of deferred adjudication community supervision based on an indecency with a child charge. One of the conditions of his community service was to refrain from the use of a computer that is capable of being connected to the Internet. The trial court found that he violated the conditions of his community service when he used a computer connected to the Internet. The defendant argued that his community service was incorrectly revoked because it was based on an allegation that he was viewing child pornography online and the site that he was viewing was not technically child pornography. The appellate court found that sufficient facts had supported the allegation that the defendant used a computer capable of being connected to the Internet and that he therefore committed a violation. The court held this was a violation regardless of what the defendant was viewing and regardless of the fact that a court might find the report alleging that he was viewing child pornography was technically incorrect.

Graves v. State, No. 06-09-00063-CR, 2010 Tex. App. LEXIS 1249 (Tex. App. Feb. 24, 2010).

- Motion to Suppress – Inventory Search
- Search Warrants – Sufficiency of Facts in Supporting Affidavits
- Disability – Factual Sufficiency

The defendant was convicted of several counts of aggravated sexual assault of a disabled individual and of indecency with a child. The charges arose out of a traffic stop during which the officer arrested the defendant for furnishing minors to alcohol and found evidence of the other crimes during a routine inventory search of the defendant's vehicle. From this evidence officers obtained first one search warrant and then another based on the evidence found during execution of the first warrant. The defendant filed a motion to suppress the evidence, which the trial court denied. The appellate court affirmed that decision. First, it stated that the rules of evidence do not apply to suppression hearings and therefore the court was allowed to consider documents supporting the warrant affidavits at the suppression hearing. Second, it held that the traffic stop was valid because the officer had a reasonable basis for suspecting that the defendant had committed a traffic offense – driving with an expired registration sticker. The search of the car was justified because the car was readily mobile and there was probable cause to believe the defendant had furnished alcohol to minors and was consuming it while driving. Finally, the inventory search was proper because there was no readily available alternative to having the car towed once the occupants were arrested and because the officers complied with policy for inventory searches, which included searching the trunk. The court further looked at the facts in the affidavit supporting the warrant to search the defendant's house and found that, at a minimum, they established that the defendant had

at his residence obscene devices with intent to promote them, which was sufficient to rise to the level of probable cause for a search. The defendant also argued that the evidence was not sufficient to show that one of the victims of the sexual assault was disabled. The appellate court, however, examined the relevant evidence presented at trial and determined that there was not enough evidence pointing away from the fact that she was in fact disabled to render the trial court's decision manifestly unjust. Finally, the court held that it did not deny the defendant's request for an expert, because he had requested an expert for the purpose of determining whether the disabled victim was competent to testify, and the disabled victim did not end up testifying.

Harlow v. State, No. 08-08-00128-CR, 2010 Tex. App. LEXIS 1275 (Tex. App. Feb. 24, 2010).

- Expert Testimony
- Preserving Objections

At trial, conflicting expert testimony was presented on the issue of whether the defendant was a risk to the community because he was likely to recidivate. The defendant's expert gave testimony to the effect that the testimony of the state's expert was irrelevant and unreliable. On appeal, the defendant argued that his due process right to reliability in sentencing was violated when the judge relied on this expert. At trial, however, the defendant did not object to the state's expert's testimony. The issue was whether he had to object in order to preserve the case for appeal or whether the error falls into one of the two categories of errors for which he would not be required to object: violations of waivable-only rights and denials of absolute systemic requirements. The appellate court held that even though admission of that expert's testimony, was it found to be in error, could have been a constitutional error, the defendant still waived his right to appeal because he did not make a timely and specific objection, motion, or complaint to the expert's testimony at trial and because it did not fall under those two categories of errors where no objection is required.

Bolles v. State, No. 07-08-0304-CR, 2010 Tex. App. LEXIS 1080 (Tex. App. Feb. 16, 2010).

- Extraneous Offense Evidence (Rule 404(b))
- Prejudicial Evidence (Rule 403)

The defendant was convicted to two counts of possession of child pornography. During trial, the state entered the two pictures which were the basis for the indictment, as well as other objects that were found in a trash bag belonging to the defendant. These additional items included non-pornographic photos of children, computer generated pictures of children performing various sexual acts, and handwritten sexually explicit stories involving young girls. The defendant's objection at trial, based on Rule 404(b) and Rule 403, was overruled. He appealed on the grounds that introduction of this "extraneous

offense evidence” violated his right to a fair trial. Because the objection at trial was based on evidentiary rules, the appellate court reviewed it based on the same rules. The court found that introduction of the evidence was not admitted to show action in conformity with the prior acts evidence. It was admitted, instead, in order to rebut the defense’s theory that the prosecution failed to show evidence that the pictures that formed the basis of the indictment actually portrayed children. The extraneous evidence provided circumstantial support for that part of the prosecution’s case where the prosecution had to show that the defendant possessed child pornography intelligently and knowingly, which the court found was proper. The appellate court also found that the evidence was not unduly prejudicial. The evidence that formed the basis of the indictments, two pornographic pictures, was more disturbing than the extraneous evidence pictures. There was no other evidence that the extraneous evidence was unduly prejudicial. Therefore, the appellate court upheld the convictions.

Dulaney v. State, No. 10-08-00152-CR, 2010 Tex. App. LEXIS 1005 (Tex. App. Feb. 10, 2010).

- Hearsay and Cumulative Evidence
- Predetermining Sentencing Order
- Collateral Estoppel

The defendant was convicted of eight counts of possession of child pornography. At trial, he argued that the court erred by allowing the state to introduce inadmissible hearsay evidence and by entering an order predetermining sentencing should the defendant revoke his community supervision. He also raised a double jeopardy issue, arguing that the doctrine of collateral estoppel prevented his conviction on some counts of possession and his acquittal on other counts. The court held that the introduction of the hearsay evidence was harmless error because another witness testified to the same point, and her testimony was not hearsay. It also held that the argument about the predetermined sentence was premature because the defendant could successfully complete his community service, thus rendering the issue moot. Finally, the court held that collateral estoppel only applies when there are two trials – the same issue can be litigated between the same parties multiple times during the same trial.

Priel v. State, No. 07-09-0349-CR, 2010 Tex. App. LEXIS 885 (Tex. App. Feb. 9, 2010).

- Writ of Habeas Corpus – Reduction of Bond

The defendant was charged with aggravated sexual assault of a child. Bail was set at \$75,000. The defendant filed a writ of habeas corpus alleging that his bond was set too high. He argued that because he returned periodically to attend hearings in conjunction with a prosecution for injuring a child the court should have believed he would come back for the sexual assault hearings. The court, however, noted that the punishment for aggravated sexual assault of a child is potentially much greater than that for injuring a

child, so the defendant would have greater incentive to flee. It also noted that the defendant had few familial ties to the area of the arrest. In addition, the defendant presented only “sparse and conclusory” evidence regarding funds available to him to post bond. The court mentioned that had more evidence and documentation been provided, the result might have been different. Finally, the locations to which the defendant would return were he to be let out on bond would be near children and he might pose harm to them. Therefore, the appellate court found the trial court’s denial of the defendant’s writ of habeas corpus not an abuse of discretion.

State v. Berard, No. 2008AP3187-CR, 2010 Wisc. App. LEXIS 96 (Wis. Ct. App. Feb. 3, 2010).

- Attorney Conflict of Interest

The defendant was convicted of crimes that involved child pornography on the defendant’s computer, and the defendant wished to put the blame on someone else. The attorney he retained had previously represented the other person in an unrelated matter. The defendant made a postconviction motion for a new trial, which was denied. When he moved to reconsider, however, the judge granted the motion on the grounds that there was a potential conflict of interest. The state appealed. The appellate court held that the standard for determining ineffective assistance of counsel post-conviction is more exacting than if the conflict of interest issue had been raised earlier. Postconviction, a defendant must show an actual conflict of interest. Because the trial court had granted the motion for a new trial on the basis of a “potential” conflict, the appellate court remanded for the trial court to hold a new hearing to determine whether an actual conflict existed.