January 11, 2006

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Re: ***State of Delaware v. Jennifer L. Roosa***
Case No.: 0507004923

Date Submitted: December 19, 2005
Date Decided: January 11, 2006

LETTER OPINION

Dear Counsel:

Trial in the above captioned matter took place on Monday, December 19, 2005. Following the receipt of evidence and sworn testimony the Court reserved decision. The Court also ordered post-trial briefing due on January 10, 2006. The memoranda were not filed by counsel. Pursuant to Court of Common Pleas Civil Rule 107(e) since no formal or informal extension of time was sought by either counsel for the filing of the briefs, the Court, in its discretion, considered the filings of the subject memoranda as abandoned. Nor has good cause been shown for the failure of counsel to file the memoranda as ordered by the Court on December 20, 2005. The Court conducted its own research in the proceeding. This is the Court's Final Decision and Order.[1]

[1] The Court spoke with Deputy Attorney General Rodgers in Court on July 10, 2006 and inquired why the Memoranda of Law had not been filed. Ms. Rodgers indicated the intent of the parties was to present the matter on a plea calendar. The Court instructed counsel that if that is the intent of the parties, it should be placed on a plea

THE FACTS

The defendant, Jennifer L. Roosa ("Roosa"), was charged with two Title 21 traffic counts; one count a violation of Driving a Vehicle Under the Influence of Alcohol and/or Drugs, 21 *Del. C.* §4177(a) and one count Inattentive Driving, 21 *Del. C.* .§4176(b). The Informations were filed with the Criminal Clerk of the Court by the Attorney General.

The Court finds the following relevant facts. Paul Hill ("Hill") was driving his motor vehicle on the date and place charged in the Information, July 1, 2005 southbound Route 1, Christiana, Delaware where the defendant was involved in an accident. Hill had completed the second shift at his employment and was headed to Rehoboth Beach, Delaware. He was driving a truck in New Castle County at 2:30 a.m. on July 1, 2005 while pulling a boat on a trailer. When Hill approached southbound Route 1 in Christiana he saw a pick-up truck sideways blocking both southbound lanes. Hill stopped timely his motor vehicle and accompanying boat.

When Hill stopped the defendant and another passenger struck the rear of his trailer. Hill exited his motor vehicle to observe the defendant and another passenger in their motor vehicle. Their fender was pushed in and they could not open their motor vehicle door. The Fire Police told both drivers to "get their vehicles off the road". The defendant was driving a black Hyundai and was identified in the Courtroom. Hill and the defendant exchanged insurance information. Hill presented testimony that the defendant was very apologetic.

The Fire Police then proceeded to advise them to "put your cars onto the side of the road."

On cross-examination, Hill stated the Fire Marshall's pick-up truck stationed in the middle of the road had lights on the roof and the driver of the pick-up truck, a Fire police officer,

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calendar before this Judge. As of the close of business on July 10, 2006 neither counsel contacted the Court. Neither counsel filed a Stipulation with the Court; sought an extension of time for the briefing schedule; or communicated with the Court in writing as of January 10, 2006.

was motioning the traffic to the side of the road with a light. The truck was perpendicular to traffic and was monitored by the Fire Police. Hill was driving a Jeep Grand Cherokee and he observed the lights in question and stopped. Hill spoke with the occupants of the motor vehicle who collided into the rear of his trailer as outlined above.

Paul J. Quimby ("Quimby") testified at trial. Quimby is employed by the Delaware State Fire Marshall part-time in the Christiana Fire Company ("Fire Company") in New Castle County and works for NKS Distributors full-time. He is a Major with the Fire Company and was called on July 1, 2005 to Route 1, southbound in Christiana to investigate a traffic accident. He responded to the location and time charged in the Information. Quimby arrived after 12:00 p.m. July 1, 2005. He activated the lights on his truck on the roof as well as the front of the truck; "wig-wag" lights. Back-up lights were also flashing and Quimby set up a cone pattern in the road and parked his truck in a digital pattern to steer traffic off the road. Cones were set up in order to divert the traffic to the ramp to Route 273, Quimby had a "cone-light" as well as flares at the location to steer traffic.

Within one and a half minutes he heard a bank or crack and observed that an accident had occurred. Quimby proceeded to the crash site in the left lane and observed the motor vehicles and saw the pick up truck rear ended by the defendant's motor vehicle. He called 9-1-1 and told both drivers of the motor vehicles to "move off of the road". Quimby also identified the defendant in the Courtroom.

The substance of the conversation with the defendant was that she asked him, "Am I on I-95 in Maryland?" Quimby advised her that she was on Route 1, Christiana, Delaware. He observed that the defendant had Delaware tags on her motor vehicle.

The defendant informed Quimby that she wasn't injured but she continued to ask "repetitive questions including what happened and whether someone is coming from the police." Quimby therefore called RECOM and dialed 77. The defendant continued asking "Can we leave?" and he replied, "No."

Quimby informed the Court he did not file a written report. His testimony is based upon his recall. Quimby also presented testimony that the location of the traffic accident was south of Christiana Mall, but that it is a "desolate area" and there are "no principle structures or buildings". Defendant moved her motor vehicle to the right shoulder. There were no unusual actions by the defendant, but simply repetitive questions including but not limited to "Is someone coming?" Quimby believed these actions by the defendant could reasonably be construed as being under the influence. He called the State Police. Quimby observed no odor of alcoholic beverages, although he was two – three feet away. He did not observe the defendant walk because the conversation took place with the defendant while in her motor vehicle.

Delaware State Trooper Richard E. Long ("Long") presented testimony at trial. He has been employed by the Delaware State Police since July 1, 2005.

Long was on uniform patrol from Troop 9 in July 2005. Long received special training in DUI Enforcement and was certified through the HGN and Intoxilizer 5000. He is "NITSA certified" in both areas. The certification for the HGN was by the Delaware State Police in October 2001 and the Intoxilizer October 9th and 10th, 2001. Mr. Malik stipulated to Long's qualifications and expertise and training in administering the HGN and Itoxilizer 5000.

Long was at the location of the accident on July 1, 2005 southbound Route 1 in Christiana. He was dispatched to the accident at approximately 2:50 a.m. and arrived at 3:19 a.m. due to a burglary call.

When Long arrived at the accident scene he observed the Jeep Grand Cherokee on the right shoulder southbound Route 1 and 273 and a black Hyundai Tiberon. The defendant was behind the wheel of the Tiberon and advised Long that she was the driver.

Long interviewed the defendant who was smoking and chewing gum and her speech was "slurred". He instructed the defendant to remove the gum and her "speech cleared up somewhat." Long detected a strong odor of alcohol and continued mumbled and slurred speech.

Long interviewed the defendant and was informed that she was traveling 55 miles per hour on Route 1 when she noticed stopped traffic. She could not stop and rear-ended the boat trailer.

According to Long, the road was dry and clear and it was a humid night.

Defendant made an admission, "I had three beers" earlier at a bar and stopped drinking alcoholic beverages at approximately 12:30 a.m.

Long informed the defendant that she could not drive her motor vehicle unless she cooperated by performing some field coordination tests. The defendant consented.

First, the defendant was instructed and administered the alphabet test and slowly performed the test. On the alphabet test, she performed adequately and stated "e – p" successfully.

Second, the defendant was instructed to count backwards 67 – 44 and counted, "60 – 61 – 60" and then stopped the test. It was a failure.

Third, the Horizontal Gaze Nastagnus ("HGN") test was administered. At the time Long administered the test he noticed that the defendant's eyes were bloodshot. A proper foundation was laid by the officer and the defendant told him "I understand" the test. Defendant failed the test with all six clues.

Fourth, defendant was administered the one-legged stand and given instructions and explanations on how to perform the test. During the test, the defendant swayed, raised her arms, put her left foot down; and lost her balance. Of the necessary two clues that constitute a failure, the defendant had three clues. This performance constituted a failure.

Fifth, defendant was administered the walk and turn test. The defendant missed heel-to-toe on the first nine steps on 1, 2, 4, 5, and 6 and turned around. She did not pivot as instructed. On the next nine steps she stepped off the line four times; raised her arms; and did not complete the heel-to-toe requirements of the test. She had five clues. Long testified four clues constitutes a failure and with five clues he considered this test a failure.

Sixth, the Portable Breath Test ("PBT") was administered to the defendant at 3:41 a.m. The PBT was working properly. The defendant advised Long that she was not taking medication and was not ill or injured and at 3:41 a.m. She failed the test.

The defendant was taken back to the troop; read her Miranda rights and gave "no statement". At 4:08 a.m. the observation period began and at 4:33 a.m. she was administered the Intoxilizer test.

Mr. Malik consented to the pre and post calibration logs being moved into evidence. They were so moved as State's Exhibit 1 and State's Exhibit 2.

The defendant was not wearing dentures; did not belch; vomit; or regurgitate; and blew into the Intoxilizer machine.

At this juncture Mr. Malik conducted *voir dire* of the officer. His proffer and representations to the Court were that the defendant was wearing a "tongue piercing ring" in her tongue and this allegedly threw off the BAC reading which was later read into the record. The

Court noted at this time that no Motion for Limine had been filed. Mr. Malik was allowed to proceed with his *voir dire*.

Long testified on *voir dire* that there is no Delaware State Police policy on mouth-piercings; but that he did notice one in the defendant's mouth. Long testified that he "was not sure" if it would affect the validity of the Intoxilizer 5000.

The Intoxilizer 5000 BAC reading was read into the record and indicated the defendant had a blood alcohol reading of .16.

On cross-examination with regards to the HGN, Long testified he did not make any entry into his A.R. report that the size of the pupils before the defendant's administration of the HGN test. He was instructed to review VIII §16 in the Administrator's Procedures Manual for the HGN test. This section requires that both pupils be equal in size and be examined prior to the administration of the test. Long understood this was a standardized requirement for the pre-administration of the HGN test. No other pupil tests were performed pre-HGN test and he did not track the left or right eye individually.

Mr. Malik asked Long if he performed the tracking test; the pupil test; and inquired whether defendant had contact lenses. Long responded no to all three.

With regard to the one-legged stand test and in reference to VII page 25 of the Administrative Procedures Manual, he conceded that the manual stated "even some people have difficulty performing this test when sober."

Long also conceded that if there are two inch heels on the defendant pre-test for these field test coordination tests, she should be offered to remove the "heels".

When the defendant removed the chewing gum and tobacco, Long reiterated his testimony that the defendant had "moderate" slurred and "mumbled speech", but that she had a

strong odor of alcoholic beverages two-three feet away from the driver's side window. Defendant was "cooperative" and there were no other "unusual circumstances".

The defense presented its case-in-chief. Jennifer L. Roosa ("defendant") was sworn and testified. She was involved in an accident on July 1, 2005 southbound Route 1. The defendant was traveling at a speed limit of approximately 55 miles per hour and saw the red lights and the boat trailer. She testified she could not stop abruptly and skidded and hit the back of the trailer. The defendant was dressed in a brown and green denim mini-skirt and brown sandals on the day in question. The defendant showed the sandals she was wearing on the date, July 1, 2005 which depicted three-inch high heels. The sandals were not marked as an exhibit or moved into evidence by the defense.

Defendant testified when she was administered the walk and turn test and the one-legged stand test she was wearing these three-inch heeled sandals and was not offered to have them removed.

When the defendant taken back to Troop 9 for the Intoxilizer test she blew into the intoxilizer machine. She advised the Court that she has had a tongue piercing instrument in her mouth since February 2004. It is a "twelve-gauge stainless steel rod", approximately one-inch long with two plastic balls on the end of it. It can be removed to be cleaned. The defendant had this tongue piercing instrument in her mouth when she performed the PBT, as well as the Intoxilizer 5000 test. The defendant testified the tongue piercing affects the way that she pronounces her words and specifically the "s" and "r" sounds. The defendant can take the instrument out by unscrewing it and taking it out of her mouth.

On cross-examination the defendant testified that she never advised the officer that she had this tongue piercing in her mouth and that it could cause slurring and mumbling of her "s"

and "r" sounds. Before the accident she was visiting her friends in a bar in Wilmington and drank approximately three beers. She left the bar establishment at 1:30 p.m. She lives in Magnolia and travels Route 1 approximately once a month when she goes to Wilmington. She testified that she wears these sandals "all the time" and consumed "only three beers" in approximately two and a half hours.

Mrs. Donna Roosa ("Mrs. Roosa") presented testimony. Mrs. Roosa is the defendant's mother. She is aware of the tongue piercing instrument the defendant had installed in her mouth approximately two years ago in February or March 2003. It is a silver shaft with two pink balls on the end and is approximately one inch long. She traveled to Troop 9 to retrieve her daughter after the accident and was very upset. She reiterated the testimony that she bought the sandals that were three-inches high and believes her daughter was wearing the sandals on the date she was involved in the accident.

THE LAW

Sec. 4177. Driving a vehicle while under the influence; evidence; arrests; and penalties.

(a) No person shall drive a vehicle:
  (1) When the person is under the influence of alcohol;
  (2) When the person is under the influence of any drug;
  (3) When the person is under the influence of a combination of alcohol and any drug;
  (4) When the person's alcohol concentration is .08 or more; or
  (5) When the person's alcohol concentration is, within 4 hours after the time of driving, .08 or more. Notwithstanding any other provision of the law to the contrary, a person is guilty under this subsection, without regard to the person's alcohol concentration at the time of driving, if the person's alcohol concentration is within 4 hours after the time of driving .08 or more and the alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when the person was driving.

(b) In a prosecution for a violation of subsection (a) of this section:

(1) the fact that any person charged with violating this section is, or has been, legally entitled to use alcohol or a drug shall not constitute a defense.

(2) a) No person shall be guilty under subsection (a)(5) of this section when the person has not consumed alcohol after the person has ceased driving and only such consumption after driving caused the person to have an alcohol concentration of .10 or more within 4 hours after the time of driving.

b) No person shall be guilty under subsection (a)(5) of this section when the person's alcohol concentration was .08 or more at the time of testing only as a result of the consumption of a sufficient quantity of alcohol that occurred after the person ceased driving and before any sampling which raised the person's alcohol concentration to .08 or more within 4 hours after the time of driving.

(3) The charging document may allege a violation of subsection (a) without specifying any particular subparagraph of subsection (1) and the prosecution may seek conviction under any of the subparagraphs of subsection (a).

a) For purposes of subchapter III of Chapter 27 of this title, this section and §4177B of this title, the following definitions shall apply:

(1) "Alcohol concentration of .08 or more" shall mean:

(a) An amount of alcohol in a sample of a person's blood equivalent to .08 or more grams of alcohol per hundred milliliters of blood; or

(b) An amount of alcohol in a sample of a person's breath equivalent of .08 or more grams per two hundred ten liters of breath.

(2) "Chemical test" or "test" shall include any form or method of analysis of a person's blood, breath or urine for the purposes of determining alcohol concentration or the presence of drugs which is approved for use by the Forensic Sciences Laboratory, Office of Chief Medical Examiner, the Delaware State Police Crime Laboratory, any state or federal law enforcement agency, or any hospital or medical laboratory. It shall not, however, include a preliminary screening test of breath performed in order to estimate the alcohol concentration of a person at the scene of a stop or other initial encounter between an officer and the person.

(3) "Drive" shall include driving, operating, or having actual physical control of a vehicle.
(4) "Vehicle" shall include any vehicle as defined in § 101(48) of this title, any off-highway vehicle as defined in § 101(54) of this title and any moped as defined in § 101(53) of this title.
(5) "While under the influence" shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle.
(6) "Alcohol concentration of .20 more" shall mean:
(a) An amount of alcohol in a sample of a person's blood equivalent to .20 or more grams of alcohol per hundred milliliters of blood; or
(b) An amount of alcohol in a sample of a person's breath equivalent to 20 or more grams per two hundred ten liters of breath.

. . .

(g) For purposes of a conviction premised upon subsection (a) of this section, or any proceeding pursuant to this Code in which an issue is whether a person was driving a vehicle while under the influence, evidence establishing the presence and concentration of alcohol or drugs in the person's blood, breath or urine shall be relevant and admissible. Such evidence may include the results from tests of samples of the person's blood, breath or urine taken within 4 hours after the time of driving or at some later time. In any proceeding, the resulting alcohol or drug concentration reported when a test, as defined in subsection (c)(2) of this section, is performed shall be deemed to be the actual alcohol or drug concentration in the person's blood, breath or urine without regard to any margin of error or tolerance factor inherent in such tests.
(1) Evidence of an alcohol concentration of .05 or less in a person's blood, breath or urine sample taken within 4 hours of driving and tested as defined in subsection (c)(2) of this section is prima facie evidence that the person was not under the influence of alcohol within the meaning of this statute. Evidence of an alcohol concentration of

> more than .05 but less than .10 in a person's blood, breath or urine sample taken within 4 hours of driving and tested as defined in subsection (c)(2) of this section shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol.

Sec. 4176. Careless or inattentive driving

> (b) Whoever operates a vehicle and who fails to give full time and attention to the operation of the vehicle, or whoever fails to maintain a proper lookout while operating the vehicle, shall be guilty of inattentive driving.

Case law provides that the element of driving may be proven beyond a reasonable doubt by circumstantial evidence. *Coxe v. State,* Del. Supr., 281 A.2d 606 (1971); *Lewis v. State,* Del. Supr., 626 A.2d 1350 (1993) Subsections (a) and (b) [of Sec. 4177] must be read together and defendant may "be found, beyond a reasonable doubt, to have operated a vehicle while under the influence of alcohol."

By established case law and by statute, the State is required to prove each element of the instant charges beyond a reasonable doubt. 11 *Del. C*. §301. *United States ex rel. Crosby v. Delaware,* 346 F. Supp. 213 (D. Del. 1972); *State of Delaware v. Miles A. Darst*, 2000 Del. C.P. LEXIS 35, Welch J. (April 19, 2000); *State of Delaware v. John C. Dinan*, 1998 C.P. Lexis 34, Welch, J. (December 1, 1998); *State of Delaware v. Robert R. Powers*, 1999 Del. C.P. LEXIS 32 Welch, J. (June 17, 1999); *State of Delaware v. Edmund G. Pierce*, 1999 Del. C.P. LEXIS 33, Welch, J. (June 8, 1999). A reasonable doubt is "not meant to be a vague, whimsical or merely possible doubt, but such a doubt as intelligent, reasonable, and impartial persons honestly entertain after a careful examination and conscientious consideration of the evidence. *State v. Matuschefske,* Del. Super., 215 A.2d 443 (1965).

The State also has the burden of proof beyond a reasonable doubt that jurisdiction and venue has been proven as elements of the offense. 11 *Del. C.* §232. *James v. State,* Del. Supr., 377 A.2d 15 (1977). *Thornton v. State,* Del. Supr., 405 A.2d 126 (1979).

The Court as trier of fact is the sole judge of the credibility of each fact witness.

If the Court finds the evidence presented to be in conflict, it is the Court's duty to reconcile these conflicts, if reasonably possible, so as to make one harmonious story of it all.

If the Court cannot do this, the Court must give credit to that portion of the testimony which, in the Court's judgment, is most worthy of credit and disregard any portion of the testimony which in the Court's judgment is unworthy of credit.

In doing so, the Court takes into consideration the demeanor of the witness, their apparent fairness in giving their testimony, their opportunities in hearing and knowing the facts about which they testified, and any bias or interest that they may have concerning the nature of the case.

OPINION AND ORDER

The Court has carefully scrutinized the record and enters a finding of Guilty beyond a reasonable doubt, 11 *Del. C.* §301 on both the DUI charge, 21 *Del. C.* §4177(a) and Inattentive Driving charge, 21 *Del. C.* §4176(b). First, the Court notes as a matter of law, given the defendant's BAC reading of .16 that pursuant to 21 *Del. C.* §4177(a)(4) the Court finds the defendant Guilty.

Second, given the totality of circumstances in the trial record including but not limited to all reasonable influences, the defendant clearly under 21 *Del. C.* §4177(c)(5), was "because of alcohol or drugs, or a combination of both, was less able than the person would ordinarily have been, either physically or mentally, to exercise clear judgment, sufficient physical control, or due

care in driving a motor vehicle." *See e.g. State of Delaware v. Robert Powers*, 1999 C.P. LEXIS 32, Welch, J. (June 17, 1999). The Court has also carefully scrutinized the credibility of all fact witnesses who testified, as well as the totality of circumstances in the trial record, including inferences, therefore, bases its opinion as the second basis for its adjudication on the following.

The Court does find that the Officer in question did not perform the necessary foundation and prescreening to administer the Horizontal Gaze Nostagnus Test and therefore strikes the results of that field coordination test.

Second, the Court finds that as the officer testified, the defendant was not wearing the three-inch heals when she was administered the balance of the field tests. The Court bases this on the credibility of the fact witnesses and the officer's testimony that the defendant was not wearing such shoes on the date of her accident. While the Administrative Procedures Policy provides that the defendant should be offered to remove the shoes by the investigating officer, if the heels are more than two inches in height, the Court finds that these shoes were not the ones, in fact, that were worn by the defendant on the date charged in the Information.[2]

Third, even striking the Horizontal Gaze Nostagnus test, the defendant failed the remaining field coordination tests, except for the alphabet test. The defendant failed the PBT; walk and turn test; and one-legged stand test. Her speech, even after removing the gum and cigarettes, which according to the officers were used as masks to hide odor of the alcohol on the defendant's person, was still "mumbled and slurred". Her eyes were "glassy and bloodshot". When inter viewed by the police, she thought she was in the jurisdiction of Maryland, not on Route 1 in Christiana, Delaware.

Most importantly, the defendant was involved in an accident and rear-ended a pick-up truck that was pulling a boat. The operation of that motor vehicle, even while pulling a trailer

[2] As noted, the shoes were not marked as an exhibit or received into evidence by the Court.

and boat, and still had time to stop in a clearly marked area with cones, flashing lights and a Fire Police officer showing lights before the accident to stop timely. Defendant also made and admission that she consumed alcohol or about three (3) beers, and left a bar at 2:30 a.m.

With regards to the placement of the tongue piercing, and the results of the PBT and Intoxilizer 5000, the Court has carefully reviewed the trial record. The Court cannot analogize this small piercing instrument with case law dealing with dentures which could have required the BAC reading be stricken. *See e.g., John E. Lawrence v. Delaware Division of Motor Vehicles*, 2000 Del. C.P. LEXIS 48, Welch, J. (October. 28, 2000). As the Court ruled in *Lawrence*, there is sufficient evidence in the record even absent the BAC reading of .08 to adjudicate the defendant guilty beyond a reasonable doubt for both charges. However, in this case, the Court finds no nexus to the BAC alcohol reading, which is double the limit permitted by 21 *Del. C.* §4177(a), and a small piercing instrument which was allegedly in the defendant's mouth. The Court also notes that the instrument is such a small instrument and no scientific or lay testimony was presented at trial to document that it would cause an invalid BAC reading. *See e.g., Joseph A. Swift v. Michael D. Shahan*, 2001 Del. C.P. LEXIS 5, Welch, J. (June 7, 2001). Nor was the small instrument marked as an exhibit for identification or received into evidence. No expert or lay testimony was presented in the trial record to determine what, if any, affect this instrument had in the defendants BAC reading of .16. Nor has there been any precedent that the Court is aware of that this tongue piercing is equivalent to dentures and therefore the Court should strike the BAC reading.[3]

The BAC of .16 was moved into evidence at trial with no legal or factual basis which would cause the Court to strike the same. At best, defendant's argument was that the tongue

[3] Nor was an evidentiary hearing requested by Motion in Limine to put the issue before the Court pre-trial. The Court conducted its own research, absent counsel's filings, and finds no precedent to offset a BAC reading of .16. Nor did this piercing instrument create reasonable doubt of the defendant's guilt. 11 *Del. C.* §301.

piercing instrument would affect this reading. The .16 reading is twice the legal limit of *per se* intoxication within 21 *Del. C.* §4177(a)(4) of .08. Absent some scientific basis or foundation that this tongue piercing instrument affected this reading, the Court is without legal basis to disturb the .16 reading.

The Court finds in both instances the State has met its burden beyond a reasonable doubt and so finds the defendant **GUILTY** on both charges, 21 *Del. C.* §4177(a) and 21 *Del. C.* §4176(b).

The Court Clerk shall set this matter for sentencing at the earliest convenience of the Court and parties.

IT IS SO ORDERED this 11th day of January, 2006.

John K. Welch
Judge

/jb

cc: Theresa Bleakly, Scheduling Supervisor
CCP, Criminal Division