

2016 Utah Prosecution Council Spring Conference
CRIMINAL CASE LAW UPDATE¹

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APPELLATE PROCEDURE	1
Certiorari proceedings are not an "appeal," under rule 27, Utah Rules of Criminal Procedure, in which a defendant may challenge the trial court's denial of a motion to stay his sentence pending appeal .	1
<i>State v. Robertson, 2015 UT 44 (per curiam).</i>	1
Capital case-exception to pour-over clause in Utah Code 78A-3-102(4)(a) applies only to direct appeals of capital cases.	1
<i>State v. Smith, 2015 UT 52 (per curiam).</i>	1
Asset preservation orders are not likely to evade review and thus not subject to review when moot under the mootness exception.	1
<i>State v. Steed, 2015 UT 76 (Durrant).</i>	1
Remember the clear break rule? Yeah, neither do I. Apparently the Utah Supreme Court threw it out.	2
<i>State v. Guard, 2015 UT 96 (Durrant).</i>	2
A defendant who doesn't preserve an alleged constitutional violation below doesn't get harmless-beyond-a-reasonable-doubt appellate review; rather, he has to prove the same ole' prejudice standard that applies in every other unpreserved non-constitutional claim.	2
<i>State v. Bond, 2015 UT 88 (Himonas).</i>	2
Defense counsel did not lead court into error; admission of alleged hearsay statements did not prejudice Defendant.	3
<i>State v. McNeil, 2016 UT 3 (Durham).</i>	3
Court of appeals lacks jurisdiction to review a restitution order imposed as a condition to a plea in abeyance because it is not a final judgment.	3
<i>State v. Mooers, 2015 UT App 266 (Toomey); State v. Becker, 2015 UT App 304 (Roth).</i>	3
Appeal of revocation of probation is not moot even though defendant has been released from reinstated jail sentences.	4
<i>State v. Warner, 2015 UT App 81 (Davis) (memo).</i>	4

1 Thanks to Dan Schweitzer, Supreme Court Counsel, National Association of Attorneys General, for his synopses of U.S. Supreme Court decisions.

BAIL _____ **4**

Private party that paid cash bail to guarantee rape Defendant’s appearance was not a surety under the Bail and Bail Surety statutes. _____ 4
[Royal Consulate v. Hon. Pullan, 2016 UT 5 \(Per Curiam\).](#) _____ 4

CIVIL RIGHTS _____ **4**

State courts are not free to disregard what the U.S. Supreme Court has decided with respect to when prevailing defendants can recover attorney fees under § 1983. _____ 4
[James v. City of Boise, ID, 136 S.Ct. 685 \(2016\).](#) _____ 4

Police officer entitled to qualified immunity after firing six shots at fleeing suspect’s vehicle in an attempt to end a high-speed chase. _____ 5
[Mullenix v. Luna, 136 S.Ct. 305 \(2015\).](#) _____ 5

Prison policy that prohibited a Muslim inmate from growing a ½-inch beard in accordance with his religious belief violated the Religious Land Use and Institutionalized Persons Act. _____ 5
[Holt v. Hobbs, 135 S.Ct. 853 \(2015\) \(Alito\).](#) _____ 5

Pre-trial detainee asserting excessive force claim need only show that force was objectively unreasonable, not that officers were subjectively aware that force was unreasonable. _____ 6
[Kingsley v. Hendrickson, 135 S.Ct. 1765 \(2015\) \(Breyer\).](#) _____ 6

Police officers entitled to qualified immunity after shooting mentally ill person. _____ 6
[City and County of San Francisco, Cal. v. Sheehan, 135 S.Ct. 1765 \(2015\) \(Alito\).](#) _____ 6

CRIMINAL LAW _____ **6**

In prosecution for unlawfully possessing another’s ID documents, city presented insufficient evidence that defendant knew that he did not have permission to possess another’s social security card. _____ 6
[Salt Lake City v. Carrera, 2015 UT 73 \(Parrish\).](#) _____ 6

Defendant’s failure to challenge trial court’s application of the mandate rule precluded him from revisiting earlier judge’s ruling that eyewitness testimony was admissible. _____ 7
[State v. Clopten, 2015 UT 82 \(Durham\).](#) _____ 7

Twelve shots is still twelve counts of discharging a firearm. _____ 7
[State v. Rasabout, 2015 UT 72 \(Parrish\).](#) _____ 7

Conviction for failing to stop at the command of a law enforcement officer requires more than simple flight from the officer. _____ 7
[SLC v. Gallegos, 2015 UT App 78 \(Roth\) \(memo\).](#) _____ 7

Having a .114 blood alcohol level behind the wheel when the officer commands you to stop is more than simple flight under *Gallegos*. _____ 8
[State v. Young, 2015 UT App 286 \(Pearce\) \(memo\).](#) _____ 8

Right to be present in a particular place is not a defense to stalking. _____ 8
[State v. Bingham, 2015 UT App 103 \(Voros\).](#) _____ 8

An assault need only be partially motivated by a desire to retaliate under the retaliation against a witness, victim, or informant. _____ 9
[State v. Johnson, 2015 UT App 312 \(Orme\).](#) _____ 9

A single punch can be sufficient “force or means likely to produce serious bodily injury.” _____ 9
[State v. Martinez, 2015 UT App 193 \(Pearce\).](#) _____ 9

Selling and openly using drugs in your home and keeping your stash in a readily accessible place amounts to “causing” or “permitting” your 10-year-old son to be exposed to drugs. _____ 9
[State v. Bossert, 2015 UT App 275 \(Orme\).](#) _____ 9

Defendant did not constructively possess backpack that was within his reach in car that he was driving. <u>10</u> State v. Lucero, 2015 UT App 120 (Pearce). <u>10</u>	10
Testimony from child that defendant put his finger in her “private,” specifically her “front private” used for “going to the bathroom” is sufficient for object rape conviction. _____ <u>10</u> State v. Peterson, 2015 UT App 129 (Davis) (memo). <u>10</u>	10
Using forged documents to obtain employment satisfies the “intent to defraud” element of possession of a forged writing. _____ <u>10</u> State v. Gomez, 2015 UT App 149M (Toomey). <u>10</u>	10
Reckless endangerment includes failing to perform a legal duty that puts another at risk of death. _____ <u>11</u> State v. Shepherd, 2015 UT App 208 (Orme). <u>11</u>	11
A probation violation is not a “criminal offense” for purposes of the obstruction of justice statute. _____ <u>11</u> Salt Lake City v. Valdez-Sadler, 2015 UT App 203 (Davis). <u>11</u>	11

CRIMINAL PROCEDURE _____ 12

Under federal law, when a jury instruction adds an element to the charged crime, a sufficiency challenge is assessed against the statutory elements of the crime, not the additional one; and a federal defendant who doesn’t raise a statute of limitations defense at trial is out of luck on appeal. _____ <u>12</u> Musacchio v. United States, 136 S.Ct. 709 (2016). <u>12</u>	12
A district court judge may sit as both a magistrate and a judge in the same case. _____ <u>12</u> State v. Black, 2015 UT 54 (Durham). <u>12</u>	12
Rule 65B(d)(2)(a), Utah Rules of Civil Procedure, allows Utah Supreme Court to review decision of panel of judges that reviews requests for grand juries; panel did not abuse their discretion in refusing to summon a grand jury. _____ <u>12</u> State v. Hon. Christiansen, 2015 UT 74 (Durham). <u>12</u>	12
Prosecutor’s apparent “inability or unwillingness” to differentiate between two co-defendants in joint trial suggests that separate trials are appropriate on remand. _____ <u>13</u> State v. Jok, 2015 UT App 90 (Orme). <u>13</u>	13
Trial judge’s “commentary” to presiding judge on Rule 29 motion to disqualify was inappropriate, but harmless. _____ <u>13</u> State v. Ruiz, 2016 UT App 18 (Bench). <u>13</u>	13
Revoking and restarting probation with a jail term is not “sentencing” within the meaning of Rule 22(e), Utah Rules of Criminal Procedure. _____ <u>14</u> State v. Schmidt, 2015 UT App 96 (Pearce) (memo). <u>14</u>	14
The failure to include a permanent criminal stalking injunction in defendant’s sentence resulted in an illegal sentence under rule 22(e), which could be corrected at any time. _____ <u>14</u> State v. Kropf, 2015 UT App 223 (Roth). <u>14</u>	14
A jury’s finding of guilt beyond a reasonable doubt cures any defect in the bindover process. _____ <u>14</u> State v. Hawkins, 2016 UT App 9 (Voros). <u>14</u>	14
Statement by expert pediatrician in child sexual abuse case that victim interviewed honestly was in response to defense counsel’s question and thus invited error. _____ <u>14</u> State v. Gray, 2015 UT App 106 (Orme). <u>14</u>	14
Acts of tax evasion and failing to pay employee wages were separate criminal episodes that could be charged and prosecuted separately. _____ <u>15</u> State v. Rushton, 2015 UT App 170 (Roth). <u>15</u>	15

A judge’s improper comment on the evidence and eye-rolling during defense witness testimony did not require a mistrial where the prosecutor did not use it and the judge issued a curative instruction. _____	15
<u>State v. Semisi Maama, 2015 UT App 234 (Toomey);</u>	<u>15</u>
DEATH PENALTY _____	16
Florida’s death penalty unconstitutional where the jury only recommends a sentence and the judge alone must find an aggravating factor necessary for imposing death. _____	16
<u>Hurst v. Florida, 136 S.Ct. 616 (2015) (Sotomayor).</u>	<u>16</u>
DUE PROCESS – FIFTH AND FOURTEENTH AMENDMENTS _____	16
Death row inmate was entitled to state post-conviction on <i>Brady</i> claim where the newly revealed evidence undermined confidence in the conviction. _____	16
<u>Wearry v. Cain, No. 14-10008, 2016 WL 854158.</u>	<u>16</u>
EIGHTH AMENDMENT _____	17
The Eighth Amendment does not require that capital sentencing juries be instructed that mitigating circumstances need not be proven beyond a reasonable doubt. _____	17
<u>Kansas v. Carr, 136 S.Ct. 633 (2016) (Scalia).</u>	<u>17</u>
State court violated clearly established law by refusing to allow death-penalty defendant with IQ of 75 to present claim of intellectual disability in court. _____	17
<u>Brumfield v. Cain, 135 S.Ct. 2269 (2015) (Sotomayor).</u>	<u>17</u>
Three-drug cocktail used by Oklahoma to administer the death penalty does not violate the Eighth Amendment. _____	17
<u>Glossip v. Gross, 135 S.Ct. 2726 (2015) (Alito).</u>	<u>17</u>
Twenty-five to life sentence for rape of a child does not violate the Cruel and Unusual Punishment clause of the Eighth Amendment. _____	18
<u>State v. Guadarrama, 2015 UT App 77 (Orme) (memo).</u>	<u>18</u>
EVIDENCE _____	18
Evidence that Reece possessed a stolen assault rifle was properly admitted under Rule 404(b). _____	18
<u>State v. Reece, 2015 UT 45 (Durrant).</u>	<u>18</u>
Trial properly excluded statements as hearsay. _____	18
<u>State v. Clopten, 2015 UT 82 (Durham).</u>	<u>18</u>
Court abused its discretion in rigidly applying <i>Shickles</i> factors to 404(c) evidence of prior sexual abuse. _	19
<u>State v. Cuttler, 2015 UT 95 (Himonas).</u>	<u>19</u>
Rule 404(b) evidence inadvertently elicited by defense counsel did not justify a mistrial where it was general, made in passing, and not nearly as bad as what defendant did in this case. _____	19
<u>State v. Martinez, 2015 UT App 193 (Pearce).</u>	<u>19</u>
Evidence that the sexual abuse victim came forward after hearing on the news that her abuser was shot while stalking another minor victim was admissible under rules 404(b) and 403. _____	20
<u>State v. Serbeck, 2015 UT App 273 (Orme).</u>	<u>20</u>
Prior bad acts committed at the beginning of a string of events that end in the charged crimes are admissible as part of a single criminal episode, not under rule 404(b). _____	20
<u>State v. Cheek, 2015 UT App 243 (Orme).</u>	<u>20</u>
Trial court erred in doctrine of chances case when it applied the <i>Shickles</i> factors to rule 403 balancing instead of <i>Verde</i> ’s four foundational requirements. _____	20
<u>State v. Lowther, 2015 UT App 180 (Davis).</u>	<u>20</u>

Defendant opened door for prosecutor to ask whether witness believed victim. _____	21
<u>State v. Kamrowski, 2015 UT App 75 (Christiansen).</u>	<u>21</u>
Close-up photos of homicide victim’s injuries, although unpleasant, were not gruesome. _____	21
<u>State v. Beckering, 2015 UT App 209 (Toomey).</u>	<u>21</u>
For purposes of rule 804(b)(1), a criminal defendant has an opportunity and similar motive at both preliminary hearing and trial to develop a witness’s testimony by direct, cross-, or redirect examination. _____	22
<u>West Valley City v. Kent, 2016 UT App 8 (Pearce).</u>	<u>22</u>
Jail recording in which murder defendant uses coarse language, shows little care for victim, and does not deny killing her was admissible. _____	22
<u>State v. Alzaqa, 2015 UT App 133 (Voros).</u>	<u>22</u>
Inconsistencies in detective’s testimony did not render it inherently unreliable, and his statement that speaking with other detectives “jogged” his memory did not make him incompetent to testify under Rule 602. _____	22
<u>State v. Fletcher, 2015 UT App 167 (Roth).</u>	<u>22</u>
In trial for aggravated sexual abuse of a child, Rule 412 and 403 precluded admission of previous instances of child-victim acting out sexually. _____	23
<u>State v. Ashby, 2015 UT App 169 (Toomey).</u>	<u>23</u>
Trial court properly declared witness unavailable and admitted preliminary hearing testimony. _____	23
<u>State v. Goins, 2016 UT App 57 (Orme).</u>	<u>23</u>
The self-defense statute, Utah Code section 76-2-402, does not supersede the rules of evidence and render any and all character evidence regarding the victim admissible. _____	24
<u>State v. Walker, 2015 UT App 213 (Pearce).</u>	<u>24</u>
Evidence that escort had prior run-ins with police that did not result in arrest or citation were not sufficient under rule 608 to impeach her testimony that she kept her business dealings within legal limits. _____	24
<u>State v. Aleh, 2015 UT App 195 (Voros).</u>	<u>24</u>
Pictures of murder victim from a distance with little blood not gruesome, and admissible to show that a murder was committed. _____	25
<u>State v. Chavez-Reyes, 2015 UT App 202 (Orme).</u>	<u>25</u>

EYEWITNESS IDENTIFICATION _____ 25

Rules governing the admissibility of eyewitness identification in <i>State v. Ramirez</i> do not apply to a witness who did not identify the Defendant as the perpetrator. _____	25
<u>State v. Clopten, 2015 UT 82 (Durham).</u>	<u>25</u>
Court properly allowed State to offer rebuttal expert testimony on subject of eyewitness identification. _____	25
<u>State v. Clopten, 2015 UT 82 (Durham).</u>	<u>25</u>
Courts are not required to give a <i>Long</i> instruction when the defense provides an expert on eyewitness identification. _____	26
<u>State v. Clopten, 2015 UT 82 (Durham).</u>	<u>26</u>
Defense counsel is not required to retain an eyewitness identification expert where only a few or none of the <i>Clopten</i> factors is present, and Defendant is one of only two possible, dissimilar suspects. _____	26
<u>State v. Heywood, 2015 UT App 191 (Voros).</u>	<u>26</u>
Eyewitness testimony is unreliable under <i>State v. Ramirez</i> where the witness’s initial description of a suspect differs in important respects from the defendant and the witness is unable to identify the defendant from a lineup. _____	27
<u>State v. Lujan, 2015 UT App 199 (Orme).</u>	<u>27</u>

FIFTH AMENDMENT—SELF INCRIMINATION 27

Trial court did not abuse its discretion in refusing to allow Defendant to call a witness that he knew would invoke his Fifth Amendment privilege and refuse to testify. 27
[State v. Clopten, 2015 UT 82 \(Durham\).](#) 27

A witness granted immunity has no 5th Amendment privilege; and, as it turns out, a forced state immunity grant extends to federal prosecutions and vice versa. 28
[State v. Bond, 2015 UT 88 \(Himonas\).](#) 28

A defendant interviewed in his apartment while several police officers executed a search warrant was not in custody for *Miranda* purposes, particularly where he was repeatedly told that he did not have to talk to the officers and was allowed to leave the room to say good-bye to his wife. 28
[State v. Tingey, 2016 UT App 37 \(Bench\).](#) 28

Prosecutor's use of defendant's post-*Miranda* statements that he did not know why police were questioning him was an improper comment on the right to silence under *Doyle v. Ohio*, but harmless beyond a reasonable doubt. 29
[State v. McCallie, 2016 UT App 4 \(Voros\).](#) 29

A defendant is not in custody for *Miranda* purposes where only one of the *Salt Lake City v. Carner* factors—whether the investigation focuses on the accused—is present. 29
[State v. Heywood, 2015 UT App 191 \(Voros\).](#) 29

Unsuppressed pre-*Miranda* statements are harmless where the post-*Miranda* statements are much more damaging. 29
[State v. Fretheim, 2015 UT App 197 \(Orme\).](#) 29

FIRST AMENDMENT 30

Florida rule prohibiting judges from personally soliciting campaign funds does not violate First Amendment. 30
[Williams-Yulee v. Florida Bar, 135 S.Ct. 1656 \(2015\) \(Roberts\).](#) 30

Specialty license plates are government speech and government's decision whether to approve a plate may be content- and viewpoint-based. 30
[Walker v. Texas Division, Sons of Confederate Veterans, Inc., 135 S.Ct. 2239 \(2015\) \(Breyer\).](#) 30

Sign regulations that require religious signs to be smaller and displayed for a shorter period than political or ideological signs violates First Amendment. 30
[Reed v. Town of Gilbert, AZ, 135 S.Ct. 2218 \(2015\) \(Thomas\).](#) 30

FEDERAL HABEAS REVIEW 31

Under AEDPA's deferential review, Sixth Circuit erred in granting habeas relief based on an alleged *Witherspoon* violation. 31
[White v. Wheeler, 136 S.Ct. 456 \(2015\).](#) 31

FOURTH AMENDMENT 31

Attaching a GPS tracking device to a person is a search under the Fourth Amendment. 31
[Grady v. North Carolina, 135 S.Ct. 1368 \(2015\).](#) 31

Detaining a motorist for seven minutes to wait for a dog without reasonable suspicion of criminal activity violates the Fourth Amendment. 31
[Rodriguez v. United States, 135 S.Ct. 1609 \(2015\) \(Ginsburg\).](#) 31

City ordinance requiring hotels to allow police to inspect their guest registries violates the Fourth Amendment. 32
[City of Los Angeles, CA v. Patel, 135 S.Ct. 2443 \(2015\) \(Sotomayor\).](#) 32

Police seized a car with blinking hazard lights parked on the side of the road when they pulled up behind it with their red and blues flashing; but the seizure was reasonable under the community caretaking doctrine. _____	32
<u>State v. Anderson, 2015 UT 90 (Durham).</u> _____	32
Automobile exception applies under Article I, Section 14 in the same manner as it does under the Fourth Amendment to the United States Constitution. _____	32
<u>State v. Rigby, 2016 UT App 42 (Roth).</u> _____	32
Under the inevitable discovery doctrine, the trial court improperly suppressed evidence resulting from a warrantless entry into a home where officers were already seeking a warrant that they surely would have obtained. _____	33
<u>Layton City v. Brierley, 2015 UT App 207 (Toomey).</u> _____	33
Loss prevention officer’s hearsay testimony of consent to search at suppression hearing was admissible where defendant proffered no evidence that the hearsay was unreliable. _____	33
<u>State v. Clark, 2015 UT App 289 (Pearce).</u> _____	33
Officers executing search warrant properly determined that room that was locked and that bore “No Trespassing” sign was not a separate residence. _____	34
<u>State v. Boyles, 2015 UT App 185 (Pearce).</u> _____	34
Police do not need reasonable suspicion to ask for permission to enter home, and a consent search of that home is voluntary even if the defendant—a probationer—subjectively thought that he could not refuse consent. _____	35
<u>State v. Fretheim, 2015 UT App 197 (Orme).</u> _____	35
Counsel is not ineffective for not challenging the basis for a traffic stop where the defendant leads police on a high-speed chase after the stop. _____	35
<u>State v. Lorenzo, 2015 UT App 189 (Voros).</u> _____	35
GOVERNMENT RECORDS ACCESS MANAGEMENT ACT _____	35
Article I, Section 14, of Utah Constitution does not prohibit the government from disclosing under GRAMA a private entity’s bank records that were lawfully seized.. _____	35
<u>Schroeder v. Ut. Att’y Gen. Office, 2015 UT 77 (Durrant).</u> _____	35
IMMIGRATION _____	36
Kansas controlled substance conviction for concealing unspecified pills in his sock did not trigger removal of non-citizen. _____	36
<u>Mellouli v. Lynch, 135 S.Ct. 2980 (2015) (Ginsburg).</u> _____	36
JURY INSTRUCTIONS _____	36
Error in denying lesser-included offense instructions in aggravated murder trial was harmless in light of strong evidence of guilt. _____	36
<u>State v. Reece, 2015 UT 45 (Durrant).</u> _____	36
Defendant was not entitled to a compulsion instruction based on his claim that he harmed the assault victim only to prevent his accomplices from inflicting some greater harm. _____	37
<u>State v. Dozah, 2016 UT App 13 (Christiansen).</u> _____	37
Trial court should have consulted with counsel before answering jury question. _____	37
<u>State v. Dozah, 2016 UT App 13 (Christiansen).</u> _____	37
Jury instructions in securities fraud prosecution misstated the mens rea. _____	38
<u>State v. Moore, 2015 UT App 112 (Davis).</u> _____	38

Defense-of-habitation instruction contained errors, but those errors were harmless. _____	38
<u>State v. Karr, 2015 UT App 287 (Davis).</u>	<u>38</u>
Court did not err in refusing to give mistake of fact instruction. _____	38
<u>State v. Kennedy, 2015 UT App 152 (Toomey).</u>	<u>38</u>
Jury instructions correctly informed jury that special mitigation defense required a reasonable loss of control. _____	39
<u>State v. Lambdin, 2015 UT App 176 (Roth).</u>	<u>39</u>
It is error to give instruction on reckless <i>mens rea</i> that does not include “gross deviation” language. ____	39
<u>State v. Liti, 2015 UT App 186 (Christiansen).</u>	<u>39</u>
Defendant was prejudiced by erroneous elements instruction _____	39
<u>State v. Garcia, 2016 UT App 59 (Christiansen).</u>	<u>39</u>
A defendant is not entitled to a compulsion instruction where there is no evidence that he was ever threatened into participating in a robbery. _____	40
<u>State v. Semisi Maama, 2015 UT App 234 (Voros).</u>	<u>40</u>
Class A misdemeanor assault is a necessarily lesser-included offense of third degree felony assault. ____	40
<u>State v. Sanislo, 2015 UT App 232 (Voros).</u>	<u>40</u>
JURY SELECTION _____	41
Court appropriately limited defense counsel’s voir dire of proposed jurors. _____	41
<u>State v. Reece, 2015 UT 45 (Durrant).</u>	<u>41</u>
JUVENILE LAW _____	41
Applying strict-liability rape of a child statute to 15-year-old juvenile who had mutually welcome sex with a 12-year-old did not violate due process, nor did it lead to an absurd result. _____	41
<u>In re T.S., 2015 UT App 307 (Christiansen).</u>	<u>41</u>
Juvenile Court cannot impose detention for curfew violation. _____	42
<u>In re B.L.D., 2015 UT App 82 (per curiam).</u>	<u>42</u>
MERGER _____	42
Aggravated kidnapping conviction did not merge into aggravated murder conviction under current version of the aggravated murder statute. _____	42
<u>State v. Bond, 2015 UT 88 (Himonas).</u>	<u>42</u>
POST-CONVICTION _____	42
The holdings of <i>Lafler v. Cooper</i> , 132 S.Ct. 1376 (2012), and <i>Missouri v. Frye</i> , 132 S.Ct. 1399 (2012), are new rules that do not apply retroactively in post-conviction proceedings. _____	42
<u>Winward v. State, 2015 UT 61 (Durham).</u>	<u>42</u>
A defendant may not use the Post-Conviction Remedies Act to unwind a plea in abeyance. _____	43
<u>Meza v. State, 2015 UT 70 (Parrish).</u>	<u>43</u>
Non-disclosure of impeachment evidence during plea negotiations does not make plea unknowing and involuntary. _____	43
<u>Monson v. Salt Lake City, 2015 UT App 136 (Christiansen).</u>	<u>43</u>
PRELIMINARY HEARINGS _____	44
Magistrate erred in weighing and discrediting child sex abuse victim’s testimony at preliminary hearing. ____	44
<u>State v. Schmidt, 2015 UT 65 (Durrant).</u>	<u>44</u>

Court erred in considering competing reasonable inferences at preliminary hearing. _____	44
<u>State v. Jones, 2016 UT 4 (Lee).</u>	44
A conviction by a fact-finder cures any defect in a preliminary hearing waiver. _____	45
<u>State v. Aleh, 2015 UT App 195 (Voros).</u>	45
PRISONER LITIGATION _____	45
Under federal law, a federal prisoner has to pay a filing fee for each lawsuit he files. _____	45
<u>Bruce v. Samuels, 236 S.Ct. 627 (2016) (Ginsburg).</u>	45
PROBATION _____	45
A trial court does not have to do a rule 11-esque colloquy to take your waiver of a probation revocation hearing. _____	45
<u>State v. Pacheco, 2016 UT App 19 (Roth).</u>	45
PROSECUTORIAL MISCONDUCT _____	46
Request by prosecutor to jury at the end of rebuttal argument to not let the defendant take advantage of the victim again was misconduct and was sufficiently prejudicial to warrant mistrial. _____	46
<u>State v. Akok, 2015 UT App 89 (Orme) and</u>	46
Prosecutor’s mention of uncharged prior sexual abuse was misconduct, but was harmless. _____	46
<u>State v. Gray, 2015 UT App 106 (Orme).</u>	46
Asking jury to step into shoes of child-witness to understand witness’s testimony is not prosecutorial misconduct. _____	47
<u>State v. Isom, 2015 UT App 160 (Voros).</u>	47
A prosecutor may not make arguments that are so attenuated as to be unable to support guilt. _____	47
<u>State v. Chavez-Reyes, 2015 UT App 202 (Orme).</u>	47
RESTITUTION _____	47
Trial Court’s findings on remand supported complete restitution order covering nearly all of the sexual abuse victim’s in-patient counseling costs, notwithstanding the victim’s pre-existing psychological issues. _____	47
<u>State v. Ruiz, 2016 UT App 18 (Bench).</u>	47
District court did not abuse its discretion by ordering restitution award for lost wages six years after crimes were committed. _____	48
<u>State v. Wadsworth, 2015 UT App 138 (Christiansen).</u>	48
District court abused its discretion when it based restitution on retail value of stolen items _____	48
<u>State v. Ludlow, 2015 UT App 146 (Davis).</u>	48
RETROACTIVITY _____	49
Miller v. Alabama’s rule that a juvenile committing a homicide may not be automatically sentenced to LWOP applies retroactively to case on collateral review. _____	49
<u>Montgomery v. Louisiana, 136 S.Ct. 718 (2016) (Kennedy).</u>	49
RIGHT TO COUNSEL _____	49
Asking whether Defendant had anything new to say the fourth time he asked for substitute counsel was an adequate inquiry into Defendant’s dissatisfaction with appointed counsel under Pursifell. _____	49
<u>State v. Abelon, 2016 UT App 22 (Pearce).</u>	49
Trial court properly denied defendant’s request, filed on the first day of trial, to find him indigent and to appoint his current privately retained counsel so that taxpayers could foot the bill. _____	50
<u>State v. Hawkins, 2016 UT App 9 (Voros).</u>	50

SIXTH AMENDMENT—CONFRONTATION _____ **50**

Statement of a three-year-old to his teacher about who caused bruises on his face was not testimonial. _____ 50
[Ohio v. Clark, 135 S.Ct. 2173 \(2015\) \(Alito\).](#) _____ **50**

SIXTH AMENDMENT - INEFFECTIVE ASSISTANCE OF COUNSEL _____ **51**

Counsel not ineffective in 1995 trial for not finding a report that State’s bullet expert had coauthored in 1991 that “presaged the flaws” in Comparative Bulled Lead Analysis. _____ 51
[Maryland v. Kulbicki, 136 S.Ct. 2 \(2015\).](#) _____ **51**

No clearly established law holds that defense counsel’s absence from courtroom for ten minutes during testimony of co-defendant amounts to ineffective assistance of counsel _____ 51
[Woods v. Donald, 135 S.Ct. 1372 \(2015\).](#) _____ **51**

Having sex with your client may violate the Utah Rules of Professional Conduct, but it doesn’t create a *per se* conflict of interest for 6th Amendment purposes. _____ 51
[State v. Cheek, 2015 UT App 243 \(Orme\).](#) _____ **51**

Defense counsel’s decision not to object to expert was sound trial strategy. _____ 52
[State v. Gray, 2015 UT App 106 \(Orme\).](#) _____ **52**

Trial counsel’s decision not to object to testimony that defendant was a drug addicted, was interested in threesomes and bestiality, and had a urination fetish was sound trial strategy. _____ 52
[State v. Isom, 2015 UT App 160 \(Voros\).](#) _____ **52**

SIXTH AMENDMENT – SPEEDY TRIAL _____ **52**

Because defendant expressly waived his speedy trial right three times in the first 18 months of his prosecution, the relevant time for calculating any length of delay began when he first asserted his right to a speedy trial. _____ 52
[State v. Hawkins, 2016 UT App 9 \(Voros\).](#) _____ **52**

STATUTE OF LIMITATIONS _____ **53**

Repealing a limitations period and enacting a longer one operates to extend, not expire, the initial limitations period. _____ 53
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STATUTORY CONSTRUCTION _____ **53**

The rule of last antecedent beats out the series-qualifier canon; the rule of lenity doesn’t apply because the statutory provision wasn’t hopelessly ambiguous. _____ 53
[Lockhart v. United States, 136 S.Ct. 958 \(Sotomayor\).](#) _____ **53**

SUFFICIENCY OF THE EVIDENCE _____ **54**

Five-year-old sex abuse victim’s testimony was not apparently false. _____ 54
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On denial of directed verdict motion made at the close of the prosecution’s case, an appellate court reviews the entire record, including any evidence adduced in the defense case; notwithstanding evidence that the victim was knock-down drunk during the crime, the evidence was sufficient to support an aggravated assault conviction. _____ 54
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When reviewing the denial of a directed verdict motion, the court is bound by the statutes establishing and defining the offense, not by erroneous jury-instruction definitions. _____ 55
[State v. Bossert, 2015 UT App 275 \(Orme\).](#) _____ **55**

Evidence was sufficient to show that the defendant constructively possessed a stolen driver's license where it was found in several documents bearing defendant's name in a truck most recently occupied by defendant. _____ 55
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Running stop signs and red lights, cutting off cars, and leading police on a high-speed chase suffices to prove reckless endangerment and reckless driving. And having a license "revoked for alcohol" sufficed to show a revocation stemming from a DUI. _____ 55
[State v. Lorenzo, 2015 UT App 189 \(Voros\).](#) _____ 55

UNIFORM OPERATION OF LAWS - UTAH CONSTITUTION _____ 56

It violates the uniform operation of laws provision to make it a 2nd-degree felony to cause death or serious bodily injury while driving with a measurable amount of a controlled substance, when automobile homicide or DUI with serious bodily injury is only a 3rd-degree felony. _____ 56
[State v. Ainsworth, 2016 UT App 2 \(Bench\).](#) _____ 56

APPELLATE PROCEDURE

Certiorari proceedings are not an “appeal,” under rule 27, Utah Rules of Criminal Procedure, in which a defendant may challenge the trial court’s denial of a motion to stay his sentence pending appeal .

[State v. Robertson, 2015 UT 44 \(per curiam\).](#) D. Chris Robertson was convicted in district court of multiple counts of sexual exploitation of a minor. He appealed to the court of appeals. During that appeal, he filed a motion with the district court under Rule 27, Utah Rules of Criminal Procedure, to stay his sentence pending appeal. The district court denied the motion. Robertson did not petition the court of appeals for relief. The court of appeals eventually affirmed his convictions on the merits. Robertson sought and was granted a writ of certiorari to the Utah Supreme Court. While that writ was pending, he filed a motion in the Utah Supreme Court to stay his sentence.

Held: Denied. Rule 27 states that “[a] party dissatisfied with the relief granted or denied [by the trial court] may petition the court in which the appeal is pending for relief.” Certiorari proceedings are not an “appeal” under Rule 27 in which the trial court’s denial of a stay may be challenged for the first time.

Capital case-exception to pour-over clause in Utah Code 78A-3-102(4)(a) applies only to direct appeals of capital cases.

[State v. Smith, 2015 UT 52 \(per curiam\).](#) In 2014, Tracy Eugene Smith filed a motion to reinstate his appeal from his twenty-six-year-old aggravated murder conviction. The trial court denied the motion. Smith appealed to the Utah Supreme Court, and that court transferred appeal to the Utah Court of Appeals pursuant to the pour-over provision in Utah Code 78A-3-102(4). Smith challenged the transfer, claiming that it violated subsection (4)(a), which prohibits transfers of capital cases.

Held: The transfer does not violate subsection (4)(a). Subsection (4)(a) only prohibits the transfer of capital cases that are on direct appeal from the conviction. Capital cases that come to the court by way of post-conviction proceedings, writs, or other non-direct appeals may be transferred.

Asset preservation orders are not likely to evade review and thus not subject to review when moot under the mootness exception.

[State v. Steed, 2015 UT 76 \(Durrant\).](#) In October 2008, the State sought and obtained an order freezing the assets of Joan and Frank Steed under the Utah Code § 77-38a-601. The assets were frozen pending the outcome of a tax evasion case. The Steeds unsuccessfully challenged the constitutionality of the preservation order in the district court. They were ultimately convicted of failing to file tax returns and fraud. The court ordered that a portion of the frozen assets be used to satisfy the outstanding tax obligations, penalties, interest, and fines. The remainder was returned to the Steeds. The Steeds then appealed the denial of the motion to dismiss the preservation order. In that appeal, the Steeds conceded that the appeal was moot because the assets had been returned. But they nevertheless pressed the

appeal, arguing that their claim was in the public interest, likely to recur, and likely to evade review.

Held: Appeal dismissed as moot. The court first clarified the correct standard for the third element of the exception to mootness. The Court has used the phrase “capable of evading” review and “likely to evade review” in its mootness cases. But it is insufficient that an issue be capable of evading review. The issue must be likely to evade review be excepted from the mootness doctrine. The exception does apply asset preservation orders. Many litigants will have the resources to challenge such orders. And they may be challenged by two means before the final judgment: by certifying the freeze order as final or by seeking an interlocutory appeal.

Remember the clear break rule? Yeah, neither do I. Apparently the Utah Supreme Court threw it out.

[State v. Guard, 2015 UT 96 \(Durrant\)](#). In late 2004, the State charged Guard with child kidnapping. Before trial, Guard provided notice that he intended to call David H. Dodd as an expert on eyewitness testimony. The trial court held a *Rimmasch* hearing and, following the pre-*Clopten I* discretion given to trial courts, refused to allow Dr. Dodd to testify and elected instead to issue a *Long* instruction. Specifically, the court ruled that the science underlying Dr. Dodd’s testimony was “woefully inadequate.” A jury convicted Guard in May 2006, and he appealed. His appeal was dismissed for failure to file a docketing statement. In July 2010, the trial court reinstated his right to appeal. Guard claimed in the court of appeals that he should get the benefit of *Clopten I* and have a retrial with his eyewitness expert. The court of appeals agreed and reversed. It set aside the “clear break” rule used to determine whether to apply a new rule of criminal procedure retroactively. Instead, the court of appeals held that the unusual circumstances in his case, namely the delay in his appeal, required the retroactive application of *Clopten I*. The State appealed and was granted a writ of certiorari to the Utah Supreme Court.

Held: Reversed. The clear break rule is seriously flawed. It was a failed attempt by the U.S. Supreme Court to limit the case-by-case nature of its previous balancing test, and that Court ultimately abandoned the rule because of serious concerns about its workability and its disparate treatment of similarly situated defendants. Going forward, new rules of criminal procedure announced in judicial decisions apply retroactively to all cases pending on direct review. Applying *Clopten I* to the instant case, the court did not abuse its discretion in refusing to allow Dr. Dodd to testify. Guard failed to even explain to the court what factors affecting eyewitness identification Dr. Dodd would testify about, let alone show that those factors were grounded in established science.

A defendant who doesn’t preserve an alleged constitutional violation below doesn’t get harmless-beyond-a-reasonable-doubt appellate review; rather, he has to prove the same ole’ prejudice standard that applies in every other unpreserved non-constitutional claim.

[State v. Bond, 2015 UT 88 \(Himonas\)](#). Bond raised a Confrontation Clause claim for the first time on appeal. Even though the claim was unpreserved, he argued that the State had to prove

that the alleged violation was harmless beyond a reasonable doubt under *Chapman v. California*. That case held that preserved constitutional violation claims required the State to prove that any error was harmless beyond a reasonable doubt.

Held: Unpreserved claims—even constitutional ones—are reviewed under plain error. Under that standard, it is the defendant’s burden to prove prejudice. By not preserving his claim, Bond gave up the heightened harmless standard normally required for constitutional violations. The Court’s holding here corrected the suggestion it had made in earlier cases—particularly *State v. Ross*—that the heightened standard also applied to unpreserved constitutional violations.

Defense counsel did not lead court into error; admission of alleged hearsay statements did not prejudice Defendant.

[State v. McNeil, 2016 UT 3 \(Durham\)](#). Roland McNeil was charged as a party to the assault of his co-worker. McNeil’s son, Quentin, committed the assault, and phone records demonstrated that several calls were made between McNeil and his son just before the assault. At the preliminary hearing, evidence of the phone calls was admitted through a detective who interviewed Quentin and discussed the calls with him. At trial, the State offered the preliminary hearing transcript because the detective had passed away. Counsel for McNeil objected, arguing that the statements were hearsay and deprived him of the opportunity to cross-examine the detective. The court disagreed, at which point counsel stated, “Okay, it’s not hearsay[;] it’s a neutral statement. I said it right the first time. I did. I said it right the first time.” The court then overruled counsel’s objection and let the preliminary hearing testimony in. The jury convicted, and McNeil appealed. On appeal, the State asserted the invited error doctrine, claiming that McNeil’s counsel had lead the court into error.

Held: Affirmed. Counsel did not lead the court into error. Rather, counsel made a hearsay objection and relented only when the Court insisted that the records were not hearsay. The court did not consider whether error occurred, because McNeil failed to show that the alleged error prejudiced him. The court inferred from the record that the State had the phone records, had an alternative means of authenticating the records, and that introducing the records in that fashion would not have raised any new defenses.

Concurring (Lee): The prejudice analysis in *State v. Moore*, 2012 UT 62, 289 P.3d 487, should be openly repudiated by the court.

Court of appeals lacks jurisdiction to review a restitution order imposed as a condition to a plea in abeyance because it is not a final judgment.

[State v. Mooers, 2015 UT App 266 \(Toomey\)](#); [State v. Becker, 2015 UT App 304 \(Roth\)](#). Both defendants entered pleas in abeyance in separate cases which included a condition that they pay restitution. Both defendants balked at having to pay the restitution ultimately requested and appealed.

Held: Appeals dismissed for lack of jurisdiction. A plea in abeyance is not a final judgment of conviction from which a defendant may appeal. And a restitution order entered as a condition

of a plea in abeyance agreement is not an exception to the final judgment rule. This does not mean that a defendant may never get appellate review of a non-final restitution order. He could seek discretionary review through an interlocutory appeal under Utah R. App. 5. **Cert. granted.**

Appeal of revocation of probation is not moot even though defendant has been released from reinstated jail sentences.

[State v. Warner, 2015 UT App 81 \(Davis\) \(memo\).](#) Probationer Ronald Roger Warner was incarcerated for willfully failing to comply with the terms of his probation. He appealed the revocation of his probation, but while the appeal was still pending, he was released from jail. The State filed a suggestion of mootness, arguing that any future collateral consequences of the revocation were now merely hypothetical.

Held: The appeal is not moot. Unlike civil cases, criminal cases are only moot when the party asserting mootness demonstrates that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. Here collateral consequences include the effect the violation will have on future sentencings and requests for a reduction under Utah Code § 76-3-402 as well as the effect on the defendants character and reputation.

BAIL

Private party that paid cash bail to guarantee rape Defendant's appearance was not a surety under the Bail and Bail Surety statutes.

[Royal Consulate v. Hon. Pullan, 2016 UT 5 \(Per Curiam\).](#) Monsour Al Shammari, who is a citizen of Saudi Arabia, was arrested and charged with rape. Bail was set at \$100,000, and the Royal Consulate of Saudi Arabia provided the cash funds to post bail. Al Shammari thereafter failed to appear for a hearing in the criminal. So the court forfeited his bail without giving notice of his non-appearance or the forfeiture to the Consulate. The Consulate filed a petition for an extraordinary writ in the Utah Supreme Court, claiming that it was a surety and entitled to notice before forfeiture.

Held: Denied. The notice requirements in the Bail and Bail Surety statutes apply only to "sureties." The Consulate is not a for-profit bail business and did not otherwise qualify itself as a surety. Instead, it posted a cash bond just like any other private party. It therefore is not entitled to notice and has no standing to challenge the bail forfeiture proceeding.

CIVIL RIGHTS

State courts are not free to disregard what the U.S. Supreme Court has decided with respect to when prevailing defendants can recover attorney fees under § 1983.

[James v. City of Boise, ID, 136 S.Ct. 685 \(2016\).](#) The Court unanimously and summarily reversed an Idaho Supreme Court decision that refused to follow the U.S. Supreme Court's interpretation of a federal statute. Federal law — specifically, 42 U.S.C. §1983 — grants courts discretion to

award attorney's fees in actions brought under 42 U.S.C. §1983. In *Hughes v. Rowes*, 449 U.S. 5 (1980) (*per curiam*), the Court held that §1988 permits a prevailing *defendant* to recover attorney's fees under §1988 only if "the plaintiff's action was frivolous, unreasonable, or without foundation." In the present case, a §1983 action filed in state court, the Idaho Supreme Court held that it did not have to follow *Hughes*. The court stated that, "[a]lthough the Supreme Court may have the authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute." The court went on to award attorney's fees to the prevailing defendant without applying the *Hughes* standard. Through a one-and-a-half page *per curiam* opinion, the Court reversed.

The Court reaffirmed that "[i]t is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law" (internal quotation marks omitted). Quoting Justice Story's opinion for the Court in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 348 (1816), the Court explained that this rule is necessary so that federal statutes, treaties, and the Constitution mean the same thing throughout the country. "The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law. The state court erred in concluding otherwise."

Police officer entitled to qualified immunity after firing six shots at fleeing suspect's vehicle in an attempt to end a high-speed chase.

[*Mullenix v. Luna*, 136 S.Ct. 305 \(2015\)](#). Through a *per curiam* opinion, the Court summarily reversed a Fifth Circuit decision that had denied qualified immunity to a police officer who fired six shots at a fleeing suspect's vehicle, killing the suspect, in an attempt to end an extended high-speed chase. The Court concluded that the law did not clearly establish that the officer violated the Fourth Amendment. Noting that it has "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment," the Court observed that the suspect's "flight did not pass as many cars as the drivers in" two of the Court's prior cases on this issue, but "[a]t the same time, the fleeing fugitives in [those two cases] had not verbally threatened to kill any officers in their path," as the suspect here did, "nor were they about to come upon such officers," as was the case here.

Prison policy that prohibited a Muslim inmate from growing a ½-inch beard in accordance with his religious belief violated the Religious Land Use and Institutionalized Persons Act.

[*Holt v. Hobbs*, 135 S.Ct. 853 \(2015\) \(Alito\)](#). The Court unanimously held that an Arkansas Department of Corrections policy prohibiting prisoners from growing beards violates the Religious Land Use and Institutionalized Persons Act as applied to a Muslim inmate who wishes to grow a ½-inch beard in accordance with his religious beliefs. The Court found that the state failed to meet its burden under the statute of showing that its policy is the least restrictive means of furthering its asserted interests in preventing prisoners from hiding contraband and preventing prisoners from disguising their identities.

Pre-trial detainee asserting excessive force claim need only show that force was objectively unreasonable, not that officers were subjectively aware that force was unreasonable.

[Kingsley v. Hendrickson, 135 S.Ct. 1765 \(2015\) \(Breyer\)](#). By a 5-3-1 vote, the Court held that a pretrial detainee seeking to prove an excessive force claim need not show that the jail officers “were *subjectively* aware that their use of force was unreasonable”; he need only show “that the officers’ use of that force was *objectively* unreasonable.” The Court concluded that its precedents establish that “the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment” — which he can show through “objective evidence.” The Court declined to apply the Eighth Amendment standard applicable to convicted prisoners because “pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less ‘maliciously and sadistically.’”

Police officers entitled to qualified immunity after shooting mentally ill person.

[City and County of San Francisco, Cal. v. Sheehan, 135 S.Ct. 1765 \(2015\) \(Alito\)](#). The Court held that two police officers are entitled to qualified immunity from a §1983 action filed by a mentally ill person who claimed that the officers violated the Fourth Amendment when they entered her room (for a second time) and shot her after she threatened them with a knife. The Ninth Circuit had held that the officers violated the Fourth Amendment by reopening respondent’s door rather than attempting to accommodate her disability. Reversing, the Court held that no precedent from the Ninth Circuit or it clearly established that there was not “an objective need for immediate entry” here, given the possibility that respondent—who had threatened to kill her social worker—would escape or gather more weapons. (The Court dismissed as improvidently granted the first question presented, which had asked whether Title II of the Americans with Disabilities Act applies to a police officer’s attempt to arrest a person with a mental disability.

CRIMINAL LAW

In prosecution for unlawfully possessing another’s ID documents, city presented insufficient evidence that defendant knew that he did not have permission to possess another’s social security card.

[Salt Lake City v. Carrera, 2015 UT 73 \(Parrish\)](#). Ricardo Enrique Carrera was arrested for resisting arrest. During a search incident to arrest, officers found a social security card in his wallet bearing the name Ms. Alvin. Officers asked Carrera to whom the card belonged and whether he knew Ms. Alvin. Carrera replied only that he did not know Ms. Alvin. Salt Lake City charged Carrera with resisting arrest and unlawful possession of another’s ID documents. The jury convicted him on both counts. Carrera appealed to the court of appeals, which affirmed his convictions. The Utah Supreme Court granted certiorari.

Held: Reversed. To be guilty of unlawfully possessing another’s ID documents, a defendant must know that he is not entitled to possess the documents. Knowledge that a person is not entitled to possess a Social Security card requires more than the mere knowledge that the person is holding the card without permission from its owner. It requires something more, such as knowledge that the card was stolen, an intent to use it for nefarious purposes, or

possession of the card beyond the time that a reasonable person who found a mislaid card would retain the card. Here, the city proved only that Carrera did not know the owner of the card. Such evidence is entirely consistent with innocent possession of a mislaid card and may not, without more, sustain a jury verdict.

Dissent: Justice Lee dissented, arguing that Carrera's failure during questioning to explain why he did not have the card permitted an inference that he knew that he was not entitled to possess the card.

Defendant's failure to challenge trial court's application of the mandate rule precluded him from revisiting earlier judge's ruling that eyewitness testimony was admissible.

[State v. Clopten, 2015 UT 82 \(Durham\)](#). Deon Clopten was charged in 2003 with shooting and killing Tony Fuaillemaa. In a 2006 trial presided over by Judge Fuchs, Clopten objected to the State's key eyewitness, claiming she was unreliable under *State v. Ramirez*. Judge Fuchs disagreed, and Clopten was convicted. Clopten did not appeal Judge Fuchs decision regarding the witness. But he appealed on other grounds and eventually got the Utah Supreme Court to overturn his conviction and remand the case for a new trial. In the new trial, presided over by Judge Skanchy, Clopten again challenged the admissibility of the state's key eyewitness under *State v. Ramirez*. Judge Skanchy declined to revisit Judge Fuchs's decision in the earlier trial, citing the mandate rule. Clopten was again convicted and appealed, claiming that Judge Skanchy improperly admitted the witness's testimony under *State v. Ramirez*.

Held: Affirmed. The mandate rule states that a prior decision of a district court becomes mandatory after an appeal and remand. Because Clopten did not address Judge Skanchy's application of the mandate rule on appeal, he is foreclosed from challenging the merits of Judge Fuchs's earlier ruling.

Twelve shots is still twelve counts of discharging a firearm.

[State v. Rasabout, 2015 UT 72 \(Parrish\)](#). Rasabout, riding shotgun in a Honda Civic, fired 12 shots at a house and a car parked in front. A jury convicted Rasabout of 12 counts of unlawfully discharging a firearm. The district court merged the 12 shots into one. The State appealed and the court of appeals reversed. The Utah Supreme Court granted Rasabout's cert petition.

Held: Affirmed. The court of appeals got it right. The unit of prosecution for unlawful discharge of a firearm is each discrete shot. Neither the single criminal episode statute or single larceny rule applies and there is nothing cruel or unusual about punishing a defendant for each discrete shot. For word nerds, the most interesting thing about this case is the dueling opinions between Parrish and Lee (with Durrant in the middle) about whether or not "corpus linguistics" is a viable statutory interpretive tool. If you don't know what "corpus linguistics" is, read the opinions. Or just google it.

Conviction for failing to stop at the command of a law enforcement officer requires more than simple flight from the officer.

[SLC v. Gallegos, 2015 UT App 78 \(Roth\) \(memo\)](#). Salt Lake police were dispatched to a report of men wrestling in an alley. The caller reported that two the men were wearing red. On

arriving the police saw Anthony Mark Gallegos wearing a shirt with red stripes. Officers attempted identified themselves and commanded Gallegos to stop. Gallegos ran was stopped a short distance away by another officer. Gallegos had alcohol on his breath and fresh blood and scrapes on his hands and elbows. The city charged Gallegos with failure to stop at the command of a law enforcement offer. A just convicted Gallegos, and he appealed, claiming that the evidence was insufficient.

Held: Reversed. Failure to stop at the command of a law enforcement officer requires both flight and the intent to avoid arrest. The evidence of intent to avoid arrest in this case was insufficient. Gallegos's involvement in the fight was unknown and there was insufficient evidence that he was intoxicated. There is thus no basis to infer that he ran from the police to avoid arrest.

Having a .114 blood alcohol level behind the wheel when the officer commands you to stop is more than simple flight under *Gallegos*.

State v. Young, 2015 UT App 286 (Pearce) (memo). Officers received a report that a student at SUU was disorderly, and possibly intoxicated. The responding officer found Young sitting in the driver seat of a car in a parking lot. When the officer tried to talk to Young about the report, Young put the car in reverse and drove in and out of the parking lot several times. Additional officers came and stopped Young, who smelled of alcohol. Young admitted that he had been drinking and that he taken prescription anti-anxiety medication. Young's BAC was .114. Relying on *Gallegos* (summarized above), Young challenged the sufficiency of the evidence for his failure to stop to an officer's command, arguing nothing but flight suggested that he was trying to avoid arrest.

Held: Affirmed. It's true that the State needs to prove more than flight to show that Young fled with the purpose to avoid arrest. *See SLC v. Gallegos, 2015 UT App 78*. But the State had more than flight here; it had Young's BAC of .114. It is reasonable to infer that this level of intoxication gave Young an awareness of his risk of arrest for driving under the influence of alcohol.

Right to be present in a particular place is not a defense to stalking.

State v. Bingham, 2015 UT App 103 (Voros). Stephen Dale Bingham was convicted in a bench trial of stalking his wife. The evidence demonstrated that Bingham first went to the apartment that he shared with his wife, piled all her stuff in the kitchen, and then texted her "to come get her crap out of the middle of the kitchen." A week later, Bingham went to wife's work and had to be escorted out by security. The next day, Bingham's wife went to a new apartment that she had just leased. Within ten minutes of picking up the keys from the rental office and going to the apartment, Bingham appeared on his motorcycle outside the apartment. Bingham appealed the conviction, claiming that the State had not proved that he engaged in two or more qualifying acts towards his wife.

Held: Affirmed. The incident at the apartment qualified as stalking even though Bingham lived there. The wife also occupied the apartment, and Bingham's manner of entry and the

text message would cause a reasonable person to fear for his or her safety. The second and third incident, under an objective standard, would obviously cause a reasonable person to fear for his or her safety.

An assault need only be partially motivated by a desire to retaliate under the retaliation against a witness, victim, or informant.

[State v. Johnson, 2015 UT App 312 \(Orme\)](#). Lacey Johnson and her neighbors had an on-going feud about Johnson's dog, which resulted in several fines against Johnson and her dog permanently landing in a rescue shelter. About a month later, Johnson was cited for keying the neighbor's car. A mere hour after that, Johnson called her neighbor a "cop caller" as he passed her house and threatened to tase him. The neighbor retorted with a taunt about Johnson's baby who had died. Shortly, Johnson, her mother, and her boyfriend assaulted the neighbor while Johnson yelled "cop caller." Johnson challenged the sufficiency of the evidence that the assault was motivated by retaliation. She claimed that she assaulted the neighbor in response to his taunt about her baby and not to retaliate against him for calling the police on her.

Held: Affirmed. The retaliation against a witness, victim, or informant statute does not require that retaliation be the *only* motive. Here the evidence was sufficient for the jury to conclude that Johnson was at least partially motivated to attack the neighbor because of residual anger from the recent citation for keying the car, not to mention for the earlier loss of her dog.

A single punch can be sufficient "force or means likely to produce serious bodily injury."

[State v. Martinez, 2015 UT App 193 \(Pearce\)](#). Chachi Martinez's girlfriend broke his necklace, so he broke her jaw in two places. Martinez argued that because it took only a single punch to break the victim's jaw, the evidence was insufficient to prove that he used "force or means likely to produce serious bodily injury" and therefore insufficient to convict him of aggravated assault.

Held: Affirmed. Not all punches are "created equal." Therefore, under the right circumstances, a single punch can be "force or means likely to produce serious bodily injury."

Selling and openly using drugs in your home and keeping your stash in a readily accessible place amounts to "causing" or "permitting" your 10-year-old son to be exposed to drugs.

[State v. Bossert, 2015 UT App 275 \(Orme\)](#). Bossert, who lived with his 10-year-old son, openly sold meth from his house, regularly used drugs with his friends in his house, openly talked about drug use, and even let his son smoke marijuana—although Bossert did yell at his son for trying meth. Bossert was charged with child endangerment after his son was caught smoking marijuana in the second grade bathroom at school. On appeal, Bossert argued that the evidence was insufficient to show that he intentionally or knowingly "caused" or "permitted" his son to be exposed to drugs because he was asleep when his son got into his stash.

Held: Affirmed. "Permit" requires "some measure of control or participation," i.e., "active or knowing acquiescence." Bossert had more than some measure of control; he had absolute control over his son's exposure to drugs in his home. He nevertheless created an atmosphere in his home in which drug use was open and prevalent; he frequently gave his son marijuana; and

he kept his drugs in a readily accessible place. Bossert's pattern sent a clear message to his son that he knowingly acquiesced in his son's use and exposure to drugs. That fits the meaning of "permits" in the child endangerment statute.

Defendant did not constructively possess backpack that was within his reach in car that he was driving.

[State v. Lucero, 2015 UT App 120 \(Pearce\)](#). Armondo Lucero was convicted of possessing a backpack that contained a digital scale, drugs, a handgun with the serial number filed off, and a package of thank you notes (for the courteous drug dealer). The backpack was found behind the passenger seat in a car that Lucero was driving and claimed to have recently purchased. When the officer began to search the backpack, Lucero stated that it was not his. Lucero had a passenger in the car, a female who had drugs in her purse and bra. Lucero appealed, claiming that the evidence was insufficient to demonstrate that he had both the power and intent to possess the backpack.

Held: Reversed. Non-exclusive control over the area where the contraband is found is not, by itself, enough to establish constructive possession. And the other evidence—Lucero's denial of ownership and the fact that the backpack was within his reach—are insufficient to infer constructive possession.

Testimony from child that defendant put his finger in her "private," specifically her "front private" used for "going to the bathroom" is sufficient for object rape conviction.

[State v. Peterson, 2015 UT App 129 \(Davis\) \(memo\)](#). Matthew Wallace Peterson was convicted of various child-sex related offenses, including object rape of a child. At trial, the child-victim testified that Peterson put his finger in her "private." She clarified that it was her "front private" used for "going to the bathroom." Peterson appealed, claiming that the child's description of both the body part and the penetration was insufficient prove object rape.

Held: Affirmed. Children frequently call their genitalia "private," and the use of non-anatomical terms to describe their body parts is proper so long as the meaning is clear. And here, the child's clarification made the meaning clear. Whether the child's testimony that Peterson's finger went "in" her private was sufficient to establish penetration was a credibility question and thus also sufficient.

Using forged documents to obtain employment satisfies the "intent to defraud" element of possession of a forged writing.

[State v. Gomez, 2015 UT App 149M \(Toomey\)](#). Gadiel Gomez was charged with two counts of possession of a forged writing. The evidence at trial demonstrated that Gomez purchased a fake social security card and a fake permanent resident cards. The fake cards bore real numbers that belonged real people. He then, by his own admission, used those cards to obtain employment. At the close of evidence, Gomez asked the court to instruct the jury on the lesser offense of possession of another ID documents. The court declined, stating that it saw no rational basis in the evidence to acquit Gomez of possession of a forged writing and to convict him of possession of another's ID documents. Gomez was convicted and appealed.

Held: Affirmed. Possession of a forged writing requires the state to show that Gomez possessed the fake cards with the intent to defraud another. Intent to defraud requires only that the defendant present the card as genuine in order to gain an advantage over another. Using the cards to obtain employment to which he is not entitled unambiguously satisfied that element. Thus, there was no basis to acquit of the greater offense and convict of the lesser.

Reckless endangerment includes failing to perform a legal duty that puts another at risk of death.

State v. Shepherd, 2015 UT App 208 (Orme). Skyler J Shepherd was charged with reckless endangerment, obstruction of justice, and failure to render assistance at an accident after his boat struck a woman in Pineview Reservoir. Shepherd’s friend was driving the boat. After striking the woman, the friend was too panicked to drive, so Shepard took the wheel. He drove the boat to the victim, saw that she was bleeding profusely and in dire distress, and drove away. The woman died of her injuries a short time later while clinging to the hands of a passing good Samaritan in a row boat. A jury convicted Shepherd. He appealed, claiming that the evidence was insufficient to for a jury to convict him of reckless endangerment.

Held: Affirmed Reckless endangerment includes the failure to perform an act required by law. Because the operator of a boat that causes an accident is required by law (Utah Code § 73-18-13(2)(a)) to render assistance to those affected by the accident, a boat operator may be guilty of reckless endangerment for leaving the scene of an accident without aiding a person who is seriously injured in the accident. In this case, Shepherd was not the operator when the boat struck the swimmer. But her became the operator when he took over driving for his friend. He was thus required by law to render aid and could be guilty of reckless endangerment.

A probation violation is not a “criminal offense” for purposes of the obstruction of justice statute.

Salt Lake City v. Valdez-Sadler, 2015 UT App 203 (Davis). Police went to Valdez-Sadler’s house looking for her boyfriend, a probationer. The boyfriend had a warrant out for him based on an alleged probation violation. When police asked if the boyfriend was at her house, Valdez-Sadler lied and said he was not present. They later found him and charged Valdez-Sadler with obstructing justice, which requires that someone “hinder, delay, or prevent” the investigation or apprehension of a person “regarding conduct that constitutes a criminal offense.” Valdez-Sadler argued on appeal that a probation violation was not a “criminal offense.”

Held: Reversed—a probation violation is not a “criminal offense” for purposes of the obstruction statute.

CRIMINAL PROCEDURE

Under federal law, when a jury instruction adds an element to the charged crime, a sufficiency challenge is assessed against the statutory elements of the crime, not the additional one; and a federal defendant who doesn't raise a statute of limitations defense at trial is out of luck on appeal.

Musacchio v. United States, 136 S.Ct. 709 (2016). The Court unanimously resolved, against the defendant, two issues of federal criminal law that had divided the lower courts. First, it held “that, when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency [of the evidence] challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction.” Second, the Court held that a defendant who fails to raise a statute-of-limitations defense at trial may not raise it on appeal because “an unraised limitations defense . . . cannot be plain error” reviewable under Federal Rule of Criminal Procedure 52(b).

A district court judge may sit as both a magistrate and a judge in the same case.

State v. Black, 2015 UT 54 (Durham). Terry Black was charged with aggravated murder, child kidnapping, and rape of a child. The assigned judge set a preliminary hearing six months out to give the State time to produce discovery for the defense. A few weeks before the preliminary hearing, Black's counsel filed a competency petition. The judge granted Black's request for a competency evaluation and stayed the other proceedings in the case. Black then moved to transfer the case to another judge, arguing that because the assigned judge had acted as a magistrate he could no longer function as a judge to decide the competency petition. The presiding judge denied the motion. Black sought and was granted an interlocutory appeal to the Utah Supreme Court.

Held: Affirmed. No statute, rule, or court opinion prohibits a judge functioning as both a magistrate and a judge within the same case.

Rule 65B(d)(2)(a), Utah Rules of Civil Procedure, allows Utah Supreme Court to review decision of panel of judges that reviews requests for grand juries; panel did not abuse their discretion in refusing to summon a grand jury.

State v. Hon. Christiansen, 2015 UT 74 (Durham). In October 2013, the Salt Lake County District Attorney filed a certification and statement of facts requesting a grand jury. A panel of five district court judges reviewed the certification and statement and denied the request. The certification and statement and the panel's decision are all super-G14 classified, so nothing is known about the facts of the request or the panel's basis for denying the request. With no right to appeal the denial, the DA filed an extraordinary writ in the Utah Supreme Court under Rule 65B(d)(2)(a), Utah Rules of Civil Procedure, alleging that the panel abused its discretion in denying the writ.

Held: Affirmed. The panel, through counsel, argued that the supreme court lacked jurisdiction because the panel was not “an inferior court, administrative agency, or officer

exercising a judicial function.” The supreme court disagreed. Since statehood, the decision whether to summon a grand jury has always laid exclusively with judges. That makes it a judicial function. This panel did not abuse its discretion. The DA first claimed that the panel failed to properly apply the “good cause” standard by not giving enough defense to the prosecutor’s decision to seek a grand jury. The “good cause” standard to summon a grand jury owes little deference to the prosecutor’s decision. Instead, it requires the panel to determine independently whether a grand jury is needed to maintain public confidence in the impartiality of the criminal justice process. The panel may also consider any other factor that it thinks is relevant. There is no evidence in the record that the panel in this case did not apply that standard. The DA also claimed that the panel was influenced by improper factors. But again, there is no evidence that the panel relied on improper considerations such as personal dislike for the prosecutor or astrology or tarot card readings.

Prosecutor’s apparent “inability or unwillingness” to differentiate between two co-defendants in joint trial suggests that separate trials are appropriate on remand.

[State v. Jok, 2015 UT App 90 \(Orme\)](#). John Atem Jok and David Deng Akok were charged with rape after a woman accused them of having forcible nonconsensual intercourse with her during a night of heavy drinking. Before trial, Jok moved to sever the trials. The court declined. The jury convicted, and Jok appealed. Jok’s conviction was overturned for prosecutorial misconduct (see *Jok* and *Akok* under Prosecutorial Misconduct header). But the court addressed his severance claim because it likely would reoccur on remand.

Held: Severed. The trial court did not abuse its discretion in refusing to order separate trials. But after reviewing the record, the court of appeals concluded the severance would be appropriate on remand. It noted that “the prosecutor’s apparent inability or unwillingness to differentiate between the two defendants during the first trial” justified separate trials on remand.

Trial judge’s “commentary” to presiding judge on Rule 29 motion to disqualify was inappropriate, but harmless.

[State v. Ruiz, 2016 UT App 18 \(Bench\)](#). Ruiz moved to disqualify the trial judge after the judge reimposed a restitution order—with some reductions—on remand. The judge denied the motion and, as required by rule 29, Utah Rules of Criminal Procedure, referred it to the presiding judge. In the referral order, the trial judge explained the reasons he thought the motion to disqualify should be denied. The presiding judge denied the motion. Ruiz appealed.

Held: The trial judge’s “commentary” when he referred the motion to the presiding judge was inappropriate, but harmless. By the time Ruiz filed his motion to disqualify, the trial judge had already issued the new restitution order. Ruiz did not ask for a rehearing should the judge be disqualified. Thus, even if the judge had been disqualified, it would not have altered the restitution order.

Revoking and restarting probation with a jail term is not “sentencing” within the meaning of Rule 22(e), Utah Rules of Criminal Procedure.

[State v. Schmidt, 2015 UT App 96 \(Pearce\) \(memo\).](#) In 2005, Joshua Gene Schmidt had his probation revoked. The court ordered him to serve a jail term and then closed his case. Eight years later, in 2013, Schmidt filed a motion in district court under rule 22(e), Utah Rules of Criminal Procedure, to set aside the revocation and terminate his probation as successful. The district court consider the motion on its merits and denied it. Schmidt appealed.

Held: Affirmed for lack of jurisdiction. Revoking probation is not a “sentence” within the meaning of Rule 22(e). The district court thus lacked jurisdiction to consider a motion to correct the probation revocation eight years after the fact.

The failure to include a permanent criminal stalking injunction in defendant’s sentence resulted in an illegal sentence under rule 22(e), which could be corrected at any time.

[State v. Kropf, 2015 UT App 223 \(Roth\).](#) Kropf pled guilty to stalking statute. The stalking statute provides that a permanent criminal stalking injunction “shall be issued by the court without a hearing unless the defendant requests” one at sentencing. The trial court didn’t issue the injunction because no one asked it to. The victim discovered the oversight just before Kropf was scheduled to be released from prison. The trial court granted the victim’s motion to issue the injunction. Kropf appealed, arguing that the trial court lost jurisdiction to issue the injunction once it imposed his prison sentence.

Held: Affirmed. Omitting a term required to be imposed by statute results in an illegal sentence. Because the stalking statute required the trial court to enter the injunction at sentencing, Kropf’s sentence was illegal. And because rule 22(e) allows a trial court to correct an illegal sentence at any time, the trial court had jurisdiction to include the omitted injunction.

A jury’s finding of guilt beyond a reasonable doubt cures any defect in the bindover process.

[State v. Hawkins, 2016 UT App 9 \(Voros\).](#) After a preliminary hearing, Hawkins was bound over on two counts of communications fraud. The trial court denied Hawkins’ motion to quash the bindover for insufficient probable cause. A jury acquitted Hawkins of one count and convicted him of the other. On appeal, Hawkins challenged the trial court’s denial of his motion to quash the bindover.

Held: Affirmed. Because the quantum of evidence necessary for bindover (probable cause) is lower than that required for a finding of guilt (beyond a reasonable doubt), a jury’s finding of guilt necessarily cures any deficiency in the evidence presented at preliminary hearing.

Statement by expert pediatrician in child sexual abuse case that victim interviewed honestly was in response to defense counsel’s question and thus invited error.

[State v. Gray, 2015 UT App 106 \(Orme\).](#) James Gray was charged with repeated sexually abusing a young girl over a period of six years. At trial, the State called a pediatrician who had interviewed and examined the victim to testify about her findings. On cross examination, defense counsel pointed out that the examination was unremarkable and that the she had largely taken the victim at her word. The pediatrician replied that the victim “interviewed

honestly” and that she “took her word and added to that the behavioral changes that existed.” Defense counsel did not object to the response. Bingham was convicted and appealed, claiming the court erred in allowing the expert to testify about the victim’s honesty.

Held: Affirmed. Because defense counsel did not object to the response, the claim can only be analyzed under the plain error doctrine. But defense counsel not only failed to object, he opened the door by suggesting that the pediatrician had found the victim credible, and the pediatrician merely agreed with that suggestion. The claim is thus invited error.

Acts of tax evasion and failing to pay employee wages were separate criminal episodes that could be charged and prosecuted separately.

[State v. Rushton, 2015 UT App 170 \(Roth\)](#). David M Rushton was the owner and operator of Foobtube, LLC. In 2010, he pleaded guilty to tax evasion for failing to pay Foobtube’s taxes owed in 2006, 2007, and 2008. In 2011, the Rushton was charged in a second case with a variety of fraud offenses arising from his failure to his employees an estimated \$1.7 million in wages and his failure to remit an estimated \$1.2 million in retirement funds. Rushton moved to dismiss the second case, claiming that it barred by the same criminal episode doctrine in Utah Code § 76-1-403(1). The trial court disagreed. Rushton entered a *Sery* plea and appealed.

Held: Affirmed. This case falls into the category of cases in which multiple crimes must be prosecuted in a single prosecution if there are (1) within the jurisdiction of a single court; (2) all known to the prosecutor at the time of first charging; and (3) part of the same criminal episode. The first two conditions were met here. But the third condition was not because Rushton’s crimes were directed at different victims and were not in furtherance of each other.

A judge’s improper comment on the evidence and eye-rolling during defense witness testimony did not require a mistrial where the prosecutor did not use it and the judge issued a curative instruction.

[State v. Semisi Maama, 2015 UT App 234 \(Toomey\); State v. Mesia Maama, 2015 UT App 235 \(Voros\)](#). Semisi Maama, his sister Mesia, Mesia’s friend, and Mesia’s boyfriend Anh Pham were at a restaurant. Mesia and her friend went inside while Semisi and Pham waited in the parking lot. At one point, Semisi and Pham decided to rob a man in the parking lot. Pham pointed a gun at the man and “pistol whipped” him when he did not hand over his money fast enough. Semisi urged the man to cooperate. The man then took Pham’s gun away from him, and fought off both Pham and Semisi. Mesia then came out of the restaurant and punched the man, taking Pham’s gun back.

At trial, the victim testified inconsistently about whether or not he pointed the gun at Pham or Semisi. When defense counsel tried to explore this inconsistency on cross, the judge interjected and said her notes confirmed that there was no inconsistency. The judge also repeatedly rolled her eyes during defense witness testimony. Semisi moved for a mistrial, which the trial court denied. The judge instructed the jury to rely on their memories and notes.

Semisi argued on appeal that the judge's improper interjection and demeanor denied him a fair trial.

Held: Affirmed. The trial court should not have corrected the witness, but it was harmless given the jury instruction and the prosecutor's lack of reliance on the improper comment. The judicial demeanor claim was unpreserved, so the court of appeals declined to consider it.

DEATH PENALTY

Florida's death penalty unconstitutional where the jury only recommends a sentence and the judge alone must find an aggravating factor necessary for imposing death.

[Hurst v. Florida, 136 S.Ct. 616 \(2015\) \(Sotomayor\)](#). By an 8-1 vote, the Court held that Florida's death sentencing scheme violates the Sixth Amendment in light of *Ring v. Arizona*, 536 U.S. 584 (2002). In Florida, if the jury finds by a majority vote that the statutory aggravating factors outweigh the mitigating factors, it recommends to the judge a sentence of death. The judge, giving that recommendation "great weight," then independently finds and weighs aggravating and mitigating circumstances and enters a sentence of life or death. In *Ring*, however, the Court held that juries (not judges) must find an aggravating factor necessary for imposition of the death penalty. The Court here concluded that the Florida system violates *Ring* because, even though the jury's death recommendation means a majority of the jury found the existence of an aggravating factor, "the Florida sentencing statute does not make a defendant eligible for death until . . . [t]he trial court *alone* . . . find[s] 'the facts . . . [t]hat sufficient aggravating circumstances exist.'" (Note: Utah's current system is not implicated by this decision).

DUE PROCESS – FIFTH AND FOURTEENTH AMENDMENTS

Death row inmate was entitled to state post-conviction on *Brady* claim where the newly revealed evidence undermined confidence in the conviction.

[Wearry v. Cain, No. 14-10008, 2016 WL 854158](#). By a 6-2 vote, the Court summarily reversed a Louisiana post-conviction court decision denying a death row inmate's *Brady* claim. The Court concluded that petitioner Wearry is entitled to a new trial because the prosecution failed to turn over three material types of evidence that undercut the testimony of the state's two primary witnesses, Scott and Brown: (1) "previously undisclosed police records [which] showed that two of Scott's fellow inmates had made statements that case doubt on Scott's credibility"; (2) "contrary to the prosecution's assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry"; and (3) medical records which showed that a person whom Scott said "had run into the street to flag down the victim, pulled the victim out of his car, shoved him into cargo space, and crawled into the cargo space himself" "had undergone knee surgery to repair a ruptured patellar tendon" just nine days before the murder. The Court concluded that "[b]eyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction."

EIGHTH AMENDMENT

The Eighth Amendment does not require that capital sentencing juries be instructed that mitigating circumstances need not be proven beyond a reasonable doubt.

[Kansas v. Carr, 136 S.Ct. 633 \(2016\) \(Scalia\)](#). The Court held by an 8-1 vote that the Kansas Supreme Court erred when it overturned the death sentences imposed on three defendants, two of whom were tried jointly. First, the Kansas court erred in holding that the Eighth Amendment requires courts in capital cases “to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt.” In the Court’s view, whether mitigating circumstances exist is a value judgment not susceptible to a standard of proof; it has never required affirmative instructions of this sort; and the instructions given to the juries here did not create a reasonable likelihood that it would have thought mitigating evidence had to be proven beyond a reasonable doubt. Second, the Kansas court erred in holding that the joint capital proceeding “violated the defendants’ Eighth Amendment right to an ‘individualized sentencing determination.’” The Court found that the defendants’ claim, “at bottom,” was that the joint proceeding led to “the jury consider[ing] evidence that would not have been admitted in a severed proceeding.” But, held the Court, that is more of a due process concern than an Eighth Amendment concern; and given all the evidence of the defendants’ brutal, multiple murders, the defendants failed to show that “the evidence ‘so infected the sentencing proceeding with unfairness as to render the jury’s imposition of the death penalty a denial of due process.’”

State court violated clearly established law by refusing to allow death-penalty defendant with IQ of 75 to present claim of intellectual disability in court.

[Brumfield v. Cain, 135 S.Ct. 2269 \(2015\) \(Sotomayor\)](#). By a 5-4 vote, the Court held that a state court unreasonably determined the facts within the meaning of 28 U.S.C. §2254(d)(2) when it rejected petitioner’s request for a hearing to assess whether he is intellectually disabled and therefore ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court therefore held that petitioner was “entitled to have his *Atkins* claim considered on the merits in federal court.” In particular, the Court ruled that the state court erred in holding that an IQ score of 75 showed that petitioner did not have sub-average intelligence; in finding that the trial record failed to raise questions about his “adaptive skills”; and in relying on a doctor’s description of petitioner as having “an antisocial personality.”

Three-drug cocktail used by Oklahoma to administer the death penalty does not violate the Eighth Amendment.

[Glossip v. Gross, 135 S.Ct. 2726 \(2015\) \(Alito\)](#). By a 5-4 vote, the Court held that Oklahoma’s lethal-injection protocol does not violate the Eighth Amendment’s prohibition of cruel and unusual punishment. After Oklahoma could no longer obtain sodium thiopental, it began using midazolam as the first drug in its three-drug protocol. Midazolam induces a state of unconsciousness, and is followed by a paralytic agent and then potassium chloride to induce cardiac arrest. Several death row inmates filed suit alleging that midazolam “cannot maintain a deep, comalike unconsciousness” needed to ensure the inmate does not feel pain when the second and third drugs are administered. The Court rejected their claim on the grounds that (1)

they “failed to identify a known and available alternative method of execution that entails a lesser risk of pain,” and (2) “the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma’s use of midazolam in its execution protocol entails a substantial risk of severe pain.”

Twenty-five to life sentence for rape of a child does not violate the Cruel and Unusual Punishment clause of the Eighth Amendment.

[State v. Guadarrama, 2015 UT App 77 \(Orme\) \(memo\)](#). Silvano Guadarrama pleaded guilty to rape of a child and was sentenced to twenty-five years to life in prison. He appealed, claiming that his attorney was ineffective for not challenging the constitutionality of his sentence. He asserted that the rape of child statute violated the Cruel and Unusual Punishment Clause by mandating a longer minimum sentence (twenty-five years) than murder (fifteen years).

Held: Affirmed. The Legislature has broad discretion to define crime and punishment according to its judgment of the relative heinousness of the crime. Punishing child rape more harshly than murder is not outside that discretion.

EVIDENCE

Evidence that Reece possessed a stolen assault rifle was properly admitted under Rule 404(b).

[State v. Reece, 2015 UT 45 \(Durrant\)](#). Cody Alan Reece was charged with aggravated murder and aggravated burglary for killing a woman in her living room with a single gunshot to the forehead at close range. The murder weapon was never recovered. But a 9 mm shell casing and a broken guide rod from a 90-Two Beretta were found at the scene. At trial, the state offered evidence that shortly after the murder, Reece was found in possession of an assault rifle that had been stolen along with a 90-Two Beretta from a Park City home six months earlier. The court allowed the evidence in over Reece’s objection. The jury convicted, and Reece appealed.

Held: Affirmed. Reece’s possession of the assault rifle was offered for the relevant non-character purpose of proving Reece’s identity as the murder. And in light of all the evidence in the case, the 404(b) evidence was not substantially more prejudicial than probative.

Trial properly excluded statements as hearsay.

[State v. Clopten, 2015 UT 82 \(Durham\)](#). Deon Clopten was charged with shooting and killing Tony Fuaillemaa. At trial, his defense was that another person, Freddie White, killed Fuaillemaa. Clopten attempted to introduce testimony from two inmates that White had told them that Clopten did not kill Fuaillemaa. The first prisoner claimed White told him, “Look, if you can just let your homies know it wasn’t [Clopten], I was there and I can tell you for a fact it wasn’t him.” When the prisoner asked White if he killed Fuaillemaa, White gave the prisoner a “look” and said, “It wasn’t [Clopten].” The second prisoner asked White if Clopten shot Fuaillemaa. White responded negatively. When the prisoner then asked White if he was the shooter, White said “I can’t talk about that.” The court ruled that the statements were not

admissible as statements against interest, adoptive admissions, or under the residual hearsay exception. Clopten was convicted by a jury and appealed.

Held: Affirmed. To be admissible as a statement against interest, the statement must sufficiently subject the declarant to criminal liability that no reasonable person would make the statement were it not true. White's alleged statement does not directly implicate him as the shooter. And White was concerned that other inmates might harm Clopten as revenge for killing Fuaillemaa. So he had a motive to exonerate Clopten. The statement also is not admissible under the residual exception because there are insufficient guarantees of trustworthiness in the context of the statement. The statement is not an adoptive admission by the State because the state only quoted the statements in a motion in limine to exclude them. It did not manifest a belief that they were true. Lastly, refusing to allow Clopten to admit statements that do not qualify under any hearsay exception does not violate his due process right to present all competent evidence in his defense.

Court abused its discretion in rigidly applying *Shickles* factors to 404(c) evidence of prior sexual abuse.

[State v. Cuttler, 2015 UT 95 \(Himonas\)](#). The State charged James Robert Cuttler with repeatedly raping and sodomizing his seven year-old daughter. Early in the case, the State provided notice that it intended to offer evidence under Rule 404(c) that Defendant had previously been convicted of raping and sodomizing his nine and ten year-old daughters in 1984 and 1985. The trial court agreed that the evidence met the 404(c) standard, but it nevertheless excluded the evidence under Rule 403. Applying the *Shickles* factors, it ruled that the danger of unfair prejudice substantially outweighed the probative value of the prior sexual abuse.

Held: Reversed. The district court erred in relying solely on the *Shickles* factors. The *Shickles* factors are appropriate in some cases, but do not control the Rule 403 analysis. And the "overmastering hostility" factor is never appropriate to consider. In this case, the probative value is not substantially outweighed by unfair prejudice. The similarities between the abuses are strong and weigh in favor of admitting the evidence. And the length of time between the abuses is consistent with intergenerational sex abuse.

Rule 404(b) evidence inadvertently elicited by defense counsel did not justify a mistrial where it was general, made in passing, and not nearly as bad as what defendant did in this case.

[State v. Martinez, 2015 UT App 193 \(Pearce\)](#). Chachi Martinez's girlfriend broke his necklace, so he broke her jaw in two places. Martinez moved to exclude evidence of his prior violence toward his girlfriend. The prosecutor agreed not to bring it up and he didn't. But defense counsel inadvertently twice elicited from a police officer that Martinez and the victim had a "history of violence." He moved for a mistrial, which the court denied because although it was "nice" of the prosecutor to agree not to bring it up, the court would have admitted it under rule 404(b).

Held: Affirmed. Whether or not the testimony was admissible under rule 404(b), it was harmless. It was brief and vague and the evidence of Martinez’s guilt was extensive and overwhelming.

Evidence that the sexual abuse victim came forward after hearing on the news that her abuser was shot while stalking another minor victim was admissible under rules 404(b) and 403.

[State v. Serbeck, 2015 UT App 273 \(Orme\)](#). Serbeck had sex with his 17-year-old neighbor three times. The victim’s parents learned about the relationship, but decided not to go to police until after the victim got therapy. Two-and-a-half years later, the victim went to police after hearing on the news that Serbeck had been shot by the father of a 17-year-old girl Serbeck had allegedly been stalking. The victim testified at trial that the news story prompted her to go to police because she saw “that it was still happening to others.” The victim agreed on cross-examination that Serbeck had not been charged in the other case; Serbeck testified that he had not been charged; and the parties stipulated that he had not been charged. On appeal, Serbeck argued that his counsel was ineffective for not objecting to the testimony about the alleged stalking incident.

Held: Affirmed. The testimony was admissible under rule 404(b) for the proper non-character purpose of explaining why the victim reported the abuse when she did. The evidence was highly probative to rebut Serbeck’s claim that she had a motive to fabricate the charges and it was not very prejudicial where the jury knew that in fact Serbeck had never been charged in the other case. Because the testimony was admissible, counsel was not ineffective for not objecting to it.

Prior bad acts committed at the beginning of a string of events that end in the charged crimes are admissible as part of a single criminal episode, not under rule 404(b).

[State v. Cheek, 2015 UT App 243 \(Orme\)](#). Cheek argued that her attorney was ineffective for not objecting under rule 404(b) to the admission of evidence that she had committed thefts close in time to two charged thefts.

Held: Affirmed. The other alleged thefts were committed during the same crime spree (on the same nights) that resulted in the two charged thefts. Prior bad acts committed at “the beginning of a string of events all closely related in time that ended with” the charged crimes, are admissible as “part of a single criminal episode.” Thus, counsel was not ineffective when he did not try to exclude the evidence under rule 404(b).

Trial court erred in doctrine of chances case when it applied the *Shickles* factors to rule 403 balancing instead of *Verde*’s four foundational requirements.

[State v. Lowther, 2015 UT App 180 \(Davis\)](#). Lowther was charged with raping K.S. while she was intoxicated. The trial court granted the State’s pretrial motion to admit evidence that Lowther had raped three other intoxicated women to rebut Lowther’s consent defense. Lowther entered a conditional plea, reserving the right to challenge the trial court’s 404(b) ruling.

Held: Reversed and remanded for Lowther to withdraw his plea. The trial court properly found that the three other alleged rapes were admissible under rule 404(b) under the doctrine of

chances as explained in *State v. Verde*. But the trial court erred in its rule 403 balancing when it applied the traditional *Shickles* factors instead of *Verde*'s four foundational requirements used in doctrine of chances cases. Under those requirements, the trial court should have excluded one of the three other rapes because that woman reported being significantly more intoxicated than the other women and that Lowther had used more force against her. These additional details could be "particularly inflammatory" with respect to the charged crime and could encourage a verdict on an improper basis. The court reversed the ruling on all three of the other victims, but remanded for the trial court to reconsider the other two women's testimonies under the proper legal framework and without considering the excluded one. **State's cert. petition has been granted.**

Defendant opened door for prosecutor to ask whether witness believed victim.

[State v. Kamrowski, 2015 UT App 75 \(Christiansen\)](#). Richard Kamrowski was charged with aggravated sexual abuse of a child after a five-year-old girl accused him of touching her. At trial, Kamrowski testified. His wife also testified that she considered him an honest man and that the child had never talked to her about the abuse. When the prosecutor cross-examined the wife, he elicited testimony that she had, in fact, received a letter from the victim about the abuse and that she believed the victim that the abuse happened. Kamrowski did not object. The jury convicted him, and he appealed.

Held: Affirmed. Generally, once the defendant offers a witness as to his reputation for truthfulness, he opens the door for the state to attack that witness's credibility. The state may do so by any means that would tend to dispute, explain or minimize the effect of the reputation evidence. Moreover, the wife's equivocal testimony made it unlikely that she swayed the jury either way.

Close-up photos of homicide victim's injuries, although unpleasant, were not gruesome.

[State v. Beckering, 2015 UT App 209 \(Toomey\)](#). A 22-year-old mentally disabled woman was found dead in the house Beckering shared with her husband and daughter. The victim had clearly been abused and mistreated, as evidenced by bruises, open ulcers, ligature marks, and severe dehydration. Beckering's daughter was the victim's legal guardian. Charged with aggravated abuse of a vulnerable adult as a party, Beckering claimed at trial that she had no idea about the abuse because she rarely saw the victim, who lived upstairs. She also denied having any caretaking responsibilities for the victim. On appeal, Beckering challenged the admission of six close-up photos of the victim's injuries, claiming they were irrelevant and gruesome.

Held: Affirmed. The photos—which showed injuries that would have been obvious to anyone who saw them—were relevant to rebut Beckering's claim that she had no knowledge of the victim's injuries. They were also relevant to show that the injuries were intentionally inflicted. Although unpleasant to look at, the photos were not gruesome. They were therefore presumptively admissible under rule 403. And although the photos elicited an emotional reaction—one juror refused to look at them—they were not unfairly prejudicial.

For purposes of rule 804(b)(1), a criminal defendant has an opportunity and similar motive at both preliminary hearing and trial to develop a witness's testimony by direct, cross-, or redirect examination.

[West Valley City v. Kent, 2016 UT App 8 \(Pearce\)](#). The victim testified at preliminary hearing that Kent, her boyfriend, gave her a black eye. But the victim was uninterested in testifying at trial. In fact, the trial court received two letters purporting to be from the victim, asking that the charges be dropped and stating that she had made "false accusations." The City sought to have the victim declared unavailable and her preliminary hearing testimony admitted at trial under rule 804(b)(1), Utah Rules of Evidence. The trial court found that the preliminary hearing testimony was inadmissible under rule 804 because Kent did not have an opportunity and similar motive to develop it by cross-examination. The court also found that admitting the testimony would violate the Confrontation Clause. The City appealed.

Held: Reversed. Rule 804(b)(1) is an exception for hearsay evidence if the declarant is unavailable and has previously provided testimony in certain trial and pre-trial proceedings. But the prior testimony must be "offered against a party who had ... an opportunity and similar motive to develop it by direct, cross-, or redirect examination." The Utah Supreme Court has already held that defense counsel's motive and interest are the same at both the preliminary hearing and trial. The trial court also erred in giving undue weight to the two letters in assessing whether Kent had had an opportunity and similar motive to cross-examine. Because the parties did not differentiate between the opportunity to cross-examine requirement under both the rule and the Confrontation Clause, neither did the court of appeals. Thus, admitting the testimony also would not violate the Confrontation Clause.

Jail recording in which murder defendant uses coarse language, shows little care for victim, and does not deny killing her was admissible.

[State v. Alzaga, 2015 UT App 133 \(Voros\)](#). Cristian A Alzaga was charged with murdering a woman during a drug deal on the Jordan River Parkway. At trial, the State played a recording, over Alzaga's objection, of Alzaga talking to his girlfriend about a fight he had with an inmate who accused him of killing the victim. Alzaga explains on the recording how he told the inmate that he didn't care about the victim, saying, "Fuck that bitch." Alzaga never denied killing the victim. A jury convicted him. Alzaga appealed.

Held: Affirmed. Statements by the defendant that disparage the victim and that otherwise have little probative value are usually inadmissible. But in this case, the recording was highly probative because Alzaga does not deny killing the victim, and the disparagement of the victim is minimal.

Inconsistencies in detective's testimony did not render it inherently unreliable, and his statement that speaking with other detectives "jogged" his memory did not make him incompetent to testify under Rule 602.

[State v. Fletcher, 2015 UT App 167 \(Roth\)](#). Eugene Fletcher was charged with two counts of distributing drugs after he twice sold marijuana to a CI. At trial, the detective who supervised the buys provided inconsistent testimony about how much money he gave the CI, whether he

or another agent supervised the CI, and precisely where the drug deals happened. When cross-examined about the inconsistencies, he testified that he had spoken with other detectives before the trial and that they jogged his memory. The jury convicted Fletcher as charged, and Fletcher appealed, claiming that the evidence was insufficient because the detective's testimony was inherently unreliable and that the trial court erred by not striking his testimony as being without personal knowledge under Rule 602, Utah Rules of Evidence.

Held: Affirmed. Testimony is only inherently unreliable when there exist material inconsistencies in the testimony and where there is no other circumstantial or direct evidence of the defendant's guilt. Here, the inconsistencies in the detective's testimony were not material, that is, they did not concern whether Fletcher in fact sold drugs to the CI. Rule 602 only excludes evidence that is not based on personal knowledge. A witness who's recollection is refreshed, or jogged, is still testifying from personal knowledge of the events he knows and remembers.

In trial for aggravated sexual abuse of a child, Rule 412 and 403 precluded admission of previous instances of child-victim acting out sexually.

[State v. Ashby, 2015 UT App 169 \(Toomey\)](#). Caroline Ashby was charged with sexually abusing her son. The evidence demonstrated that Ashby would bath with her son and stimulate her breasts and digitally penetrate her vagina and rectum. At trial, Ashby sought to introduce evidence that her son had previously acted out sexually with other children, including having those children touch his privates and orally stimulating their privates. She asserted that this evidence was relevant to defeat the sexual innocence theory, to impeach her son, and prove that he had the capacity to disclose sexual abuse but delay reporting her alleged abuse. The trial court denied the request under both Rule 412 and Rule 403. The jury convicted Ashby, and she appealed.

Held: Affirmed. The evidence was relevant, but only slightly. But the purposes of Rule 412, protecting victims of sexual abuse from public shame and embarrassment, demand that the evidence in this case be excluded. Similarly, under Rule 403, the slight probative value of the evidence was outweighed by the danger of unfair prejudice. There were other means of impeaching the victim and of showing that he was capable of reporting. And the evidence of prior acting out was not similar enough to Ashby's abuse to overcome the prejudice of admitting the evidence.

Trial court properly declared witness unavailable and admitted preliminary hearing testimony.

[State v. Goins, 2016 UT App 57 \(Orme\)](#). Desean Michael Goins was charged with aggravated assault and brandishing after threatening one homeless man and stabbing another. With some effort and some assistance from Salt Lake City Police Department bike patrols, the prosecution was able to locate the two homeless victims and secure their attendance at the preliminary hearing. The two men appeared in the company of a pastor whom they trusted. At the preliminary hearing, Goins's attorney had the opportunity to cross-examine both men. Sometime after the preliminary hearing, one of the homeless victims got into some trouble and

disappeared. Up until the eve of trial, the prosecution looked for the homeless man without success by checking the jail, contacting the pastor, contacting the other homeless victim, and checking homeless man's usual hangouts. At trial, the prosecution sought and was granted, over Goins's objection, permission to introduce the missing victim's preliminary hearing testimony. The jury convicted Goins, and he appealed.

Held: Affirmed. The prosecution engaged in a good faith effort to find the missing victim. It was thus appropriate for the trial court to declare the victim unavailable. And under well-established precedent, the opportunity to cross-examine and a similar motive to cross-examine is all that is needed to render the preliminary hearing testimony admissible. Both were had here.

The self-defense statute, Utah Code section 76-2-402, does not supersede the rules of evidence and render any and all character evidence regarding the victim admissible.

[State v. Walker, 2015 UT App 213 \(Pearce\)](#). Walker got into a fight with his girlfriend's cousin, during which Walker knocked the cousin unconscious. Walker was charged with aggravated assault. At trial, Walker claimed self-defense and asked the trial court to admit four of the cousin's prior convictions for assault, which he argued were relevant to show the victim's "prior violent acts or violent propensities" under the self-defense statute, Utah Code section 76-2-402. The trial court admitted one of the four instances under rule 609. On appeal, Walker argued that by making the victim's "prior violent acts or violent propensities" relevant for the finder of fact in self-defense cases, the self-defense statute rendered any and all evidence on those points admissible, regardless of the rules of evidence.

Held: Affirmed. The self-defense statute does not override the rules of evidence. Though the legislature has the power to modify rules of evidence, it must do so by (1) joint resolution and (2) a 2/3 vote. There was a 2/3 vote here, but no joint resolution. Thus, the legislature did not intend to override the rules of evidence.

Evidence that escort had prior run-ins with police that did not result in arrest or citation were not sufficient under rule 608 to impeach her testimony that she kept her business dealings within legal limits.

[State v. Aleh, 2015 UT App 195 \(Voros\)](#). Aleh met an escort in a motel. When the escort refused to have sex with Aleh, Aleh demanded his money back. The escort refused, citing her no-refunds policy. The two fought, and Aleh took her cell phone and gun. At trial, the escort testified that she kept her business within the bounds of the law—i.e., no money for sex. Defense counsel sought to impeach her with two prior incidents in which she showed up at prostitution stings, but was not arrested or cited. On appeal, Aleh argued that he should have been able to present this evidence.

Held: Affirmed. Under rule 608 of evidence, prior instances of misconduct can be inquired into on cross-examination if they impeach a witness's testimony. Here, the testimony would have confirmed, not impeached, the witness's testimony, because she was not arrested or cited—that is, her prior conduct did not violate the law.

Pictures of murder victim from a distance with little blood not gruesome, and admissible to show that a murder was committed.

[State v. Chavez-Reyes, 2015 UT App 202 \(Orme\)](#). Chavez-Reyes was the cousin to Roberto Roman, who (allegedly)² killed Deputy Josie Greenhouse-Fox. Roman was driving a Cadillac belonging to Chavez-Reyes when Fox pulled him over and was later killed. Chavez-Reyes later helped Roman to evade capture, and was later charged with obstruction of justice and other offenses. At trial, the prosecution presented photos of Fox at the murder scene to prove the underlying criminal conduct—murder—that Chavez-Reyes was obstructing the investigation of. On appeal, Chavez-Reyes argued that the photos were irrelevant, inflammatory, and gruesome, because he stipulated to the underlying murder and the picture was disturbing.

Held: The pictures were not gruesome where the photo was taken at a distance and there was very little or no blood. And the fact that the defense stipulated to the murder did not render the photo irrelevant, because the State is entitled to the moral force of its evidence (citing *State v. Gulbransen*, 2005 UT 7). The photo was thus presumptively admissible, and the trial court did not violate rule 403 by admitting it.

EYEWITNESS IDENTIFICATION

Rules governing the admissibility of eyewitness identification in *State v. Ramirez* do not apply to a witness who did not identify the Defendant as the perpetrator.

[State v. Clopten, 2015 UT 82 \(Durham\)](#). Deon Clopten was charged with shooting and killing Tony Fuaillemaa. At trial, one of the witnesses, Melissa Valdez, testified, over Clopten's objection, about the appearance and dress of the shooter. But the prosecutor never asked her to identify Clopten as the shooter. Clopten was convicted and appealed, claiming that the trial court should have excluded her testimony as unreliable under *State v. Ramirez*.

Held: Affirmed. *State v. Ramirez* only applies to an eyewitness who actually identifies a perpetrator either in-court or in an out-of-court lineup. It does not apply to a witness who provides only a description of the perpetrator.

Concurrence (Lee): Lee concurred in the court's judgment, but disagreed with view of *Ramirez*. He opined that *Ramirez* only applies when there has been a threshold showing of police misconduct

Court properly allowed State to offer rebuttal expert testimony on subject of eyewitness identification.

[State v. Clopten, 2015 UT 82 \(Durham\)](#). Deon Clopten was charged in 2003 with shooting and killing Tony Fuaillemaa. One of the principal issues in his trial was an eyewitness who identified him as the shooter. The defense, in accord with *State v. Clopten (Clopten I)*, 2009 UT 84, offered expert testimony attacking the eyewitness's reliability. The State, in turn, offered its own rebuttal expert witness to discredit the defense's expert and bolster its

² Roman was acquitted of the murder in State court, but is currently being tried federally for the murder.

eyewitness. The defense objected to the State's expert, claiming the witness was not qualified under Rule 702, Utah Rules of Evidence, and offered testimony and conclusions that contradicted the Utah Supreme Court's statements in *Clopten I*. The court disagreed and allowed the expert to testify. Defendant was convicted and appealed.

Held: Affirmed. The State's expert was an emeritus professor in the Department of Psychology at the University of British Columbia. He specialized in eyewitness memory research for forty years, during which time he published over a hundred scholarly works, including eight books and many dozens of peer-reviewed articles. In recognition of his work, he was inducted as a fellow into the Canadian Psychological Association. He based his conclusions on a study of thirty years of peer-reviewed literature and on well-accepted limitations on laboratory studies of behavior. His conclusions were thus based on reliable principles and methods. And to suggest that *Clopten I* forbids such an expert is to turn *Clopten I* on its head. *Clopten I* did not purport to establish immutable scientific principles regarding eyewitness identification. Rather, it recognized that the science of eyewitness identification is ever-evolving and that experts are a necessary part of educating the jury on the current findings.

Courts are not required to give a *Long* instruction when the defense provides an expert on eyewitness identification.

[State v. Clopten, 2015 UT 82 \(Durham\)](#). Deon Clopten was charged in 2003 with shooting and killing Tony Fuaillemaa. One of the principal issues in his trial was an eyewitness who identified him as the shooter. The defense, in accord with *State v. Clopten (Clopten I)*, 2009 UT 84, offered expert testimony attacking the eyewitness's reliability. At the close of trial, it asked the a *Long* instruction. The court refused, noting that an expert had already testified on the subject. Clopten was convicted and appealed.

Held: Affirmed. Because Mr. Clopten presented extensive expert testimony designed to educate the jury on the factors relevant to the reliability of eyewitness identifications, the trial court had no obligation to present a *Long* instruction.

Defense counsel is not required to retain an eyewitness identification expert where only a few or none of the *Clopten* factors is present, and Defendant is one of only two possible, dissimilar suspects.

[State v. Heywood, 2015 UT App 191 \(Voros\)](#). A mother and her young daughter were walking to a neighborhood park when the mother saw a man in a nearby house masturbating while looking at them. The mother tried to get the man to stop, but he persisted, stopping only when the mother pulled out her cell phone and called police. The home belonged to Heywood, and only two men lived there: Heywood and his adoptive brother. The mother identified Heywood as the creeper. Heywood argued that his trial counsel was ineffective for not hiring an eyewitness expert, getting a *Long* instruction, or otherwise challenging the mother's identification of him.

Held: Affirmed. Because Heywood was one of only two men present—the other of which did not match the witness’s description, Heywood could not prove prejudice from anything that counsel did not do to challenge the identification.

Eyewitness testimony is unreliable under *State v. Ramirez* where the witness’s initial description of a suspect differs in important respects from the defendant and the witness is unable to identify the defendant from a lineup.

State v. Lujan, 2015 UT App 199 (Orme). The victim was inside his car in his driveway when he was approached by a robber that he described as being Hispanic, wearing a black leather jacket and a beanie, and having “longish hair.” The man appeared paranoid, claimed he was being followed, and stole the victim’s car. The victim called police, who followed a fluid leak to the abandoned car, found near an elementary school.

At the school, police found Manuel Antonio Lujan crouching behind a fence, claiming that he was being followed. Lujan had “closely-shaven hair” and a goatee, but was wearing a black beanie. The victim identified Lujan at a show-up, but was unable to identify defendant from a line-up. Lujan moved to exclude the identification, claiming that it was unreliable under *State v. Ramirez*. The trial court denied the motion. Lujan was convicted and appealed.

Held: Reversed. Though this was a close case, the identification was too unreliable to go to the jury, particularly given the difference in hair length and the victim not noting the Defendant’s goatee, even though the defendant was allegedly less than a foot away when he stole the car. **The State’s cert petition was granted.**

Dissent: Judge Pearce opined that while *Ramirez* might have been wrongly decided, it was controlling and he could not “squint” at its holding in a way that made this identification unreliable.

FIFTH AMENDMENT—SELF INCRIMINATION

Trial court did not abuse its discretion in refusing to allow Defendant to call a witness that he knew would invoke his Fifth Amendment privilege and refuse to testify.

State v. Clopten, 2015 UT 82 (Durham). Deon Clopten was charged with shooting and killing Tony Fuailemaa. At trial, his defense was that another person, Freddie White, killed Fuailemaa. Clopten attempted to call Fuailemaa as a witness, knowing that Fuailemaa would simply invoke his Fifth Amendment privilege and refuse to testify. The Court denied his request.

Held: Affirmed. Trial courts have wide latitude to manage the trial process. And it was well within its discretion to preclude what would have been purely theatrical event. The court noted, however, that Clopten did not challenge the trial court’s refusal to instruct the jury that White had invoked his Fifth Amendment privilege. It thus left for another day the question of whether a defendant may draw inferences in his favor from a witness’s refusal to testify.

A witness granted immunity has no 5th Amendment privilege; and, as it turns out, a forced state immunity grant extends to federal prosecutions and vice versa.

[State v. Bond, 2015 UT 88 \(Himonas\)](#). Martin Bond and his friend Benjamin Rettig went to see Kay Mortensen (a friend of Bond's father). They forced him at gunpoint to open up a backyard bunker where he kept several guns. Back inside, they zip-tied his hands and feet, forced him to kneel over the bathtub, and slit his throat. As part of plea agreement, Rettig agreed to testify against Bond. But Rettig got cold feet at trial and took the 5th on several questions. First, he refused only to testify about what happened at Mortensen's house. Then he said he feared federal prosecution because the case involved stolen guns. The prosecutor immunized him the next day and re-called him. After he answered a few questions, the court brought the jury in; but Rettig again took the 5th on seven of the prosecutor's questions, which were essentially cumulative of other evidence at trial. Defense counsel moved for a mistrial based on Rettig's repeatedly taking the 5th in front of the jury. The trial court denied the motion.

Held: Affirmed. It's true that no party can call a witness solely to have them invoke the 5th in front of a jury. But it's okay to call a witness who has no valid 5th Amendment privilege in the first place, even if he claims it on the stand in front of the jury. Rettig had no valid privilege because the State granted him immunity. And, as it turns out, a *forced* state immunity grant extends to federal prosecutions and vice-versa. (A different rule applies to an *agreed-to* immunity grant, which is governed by contract law.)

A defendant interviewed in his apartment while several police officers executed a search warrant was not in custody for *Miranda* purposes, particularly where he was repeatedly told that he did not have to talk to the officers and was allowed to leave the room to say good-bye to his wife.

[State v. Tingey, 2016 UT App 37 \(Bench\)](#). About seven officers, armed with a search warrant, descended on Tingey's home to look for child pornography. Two plainclothes officers interviewed Tingey in a room of his choosing while the others searched in other rooms. One officer told Tingey early on that they had "the ability right now to destroy everything that's going on in your life." The other officer immediately followed up with, "I appreciate you being willing to talk to us because, you know, you don't have to." Tingey left the room for a few minutes to say goodbye to his wife and he was repeatedly told that he was not under arrest, that he could do and say what he wanted, and that he did not have to talk to police. Tingey was charged with possessing child pornography and he moved to suppress his subsequent un-*Mirandized* incriminating statements. The trial court denied the motion because it found that Tingey was not in custody during the interview.

Held: Affirmed. Although a "close question," Tingey was not in custody for *Miranda* purposes. The interview was in Tingey's home in a room he chose, there were no handcuffs or drawn guns, he was repeatedly told that he was not under arrest and did not have to talk to police, and he was allowed to leave the room to say good-bye to his wife. Although one detective uttered a "threat" about being able to destroy Tingey's life, the other immediately told him that he did not have to talk to them.

Prosecutor’s use of defendant’s post-*Miranda* statements that he did not know why police were questioning him was an improper comment on the right to silence under *Doyle v. Ohio*, but harmless beyond a reasonable doubt.

[State v. McCallie, 2016 UT App 4 \(Voros\)](#). After a night of drinking and card-playing, McCallie insulted his landlady, the victim’s aunt. The victim demanded that McCallie apologize, McCallie refused and pulled out a gun when the victim wouldn’t let it go. They struggled over the gun, resulting in a non-fatal gunshot wound to the victim’s abdomen. Police arrested McCallie and gave read him his *Miranda* rights. McCallie said he didn’t understand his rights and wasn’t going to tell them anything, but then insisted that he was asleep when they arrived and that he didn’t know why he was there or what had happened. At trial, the prosecutor cross-examined McCallie about his statements to police and then used those statements to argue that McCallie’s evolving story was proof that he had fabricated it. McCallie objected to the prosecutor’s closing as an improper comment on his right to remain silent and moved for a mistrial. The trial court denied the mistrial and McCallie appealed.

Held: Affirmed. The prosecutor’s argument was an improper comment on the right to silence under *Doyle v. Ohio*, 426 U.S. 610 (1976). But the comment was harmless beyond a reasonable doubt where the jury would not have “naturally and necessarily” construed the comment as a comment on McCallie’s silence, where there was overwhelming other evidence—mostly from a series of jailhouse phone calls—that McCallie’s story had evolved over time, and where the comment was isolated. **State has petitioned for rehearing to remove *Doyle* discussion as unnecessary to the result and because prosecutor’s comments here were not about McCallie’s *silence*, but about affirmative statements he had made.**

A defendant is not in custody for *Miranda* purposes where only one of the *Salt Lake City v. Carner* factors—whether the investigation focuses on the accused—is present.

[State v. Heywood, 2015 UT App 191 \(Voros\)](#). A mother and her young daughter were walking to a neighborhood park when the mother saw a man in a nearby house masturbating while looking at them. The mother tried to get the man to stop, but he persisted, stopping only when the mother pulled out her cell phone and called police. The home belonged to Heywood, and only two men lived there: Heywood and his adoptive brother. The mother identified Heywood as the creeper. Police went to speak with Heywood at his home, interviewed him for a half an hour, and did not use any handcuffs or displays of force. On appeal, Heywood argued that he was in custody for *Miranda* purposes and his statements should have been suppressed.

Held: Affirmed. It is not enough to show custody that the focus of the investigation is on the accused (citing *State v. Mirquet*, 914 P.2d 1144 (Utah 1996)).

Unsuppressed pre-*Miranda* statements are harmless where the post-*Miranda* statements are much more damaging.

[State v. Fretheim, 2015 UT App 197 \(Orme\)](#). Fretheim was on probation when a couple of officers showed up to his house, saying that he had been implicated in drug activity. Fretheim let the officers inside, where they saw paraphernalia in plain view. Fretheim said that there

“may be” illegal items around the apartment and consented to the officers searching. After the officers found drugs and paraphernalia, they *Mirandized* Fretheim, and he admitted that all the contraband was his. On appeal, Fretheim claimed that his counsel was ineffective for not moving to suppress his pre-*Miranda* statements.

FIRST AMENDMENT

Florida rule prohibiting judges from personally soliciting campaign funds does not violate First Amendment.

Williams-Yulee v. Florida Bar, 135 S.Ct. 1656 (2015) (Roberts). By a 5-4 vote, the Court held that a Florida rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds does not violate the First Amendment. The Court found that this is “one of the rare cases in which a speech restriction withstands strict scrutiny.” It does so, held the Court, because “[j]udges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity.” The Court rejected the plaintiff’s claim that the Florida rule is underinclusive because it allows a judge’s campaign committee to solicit funds and allows judicial candidates to write thank you notes to donors. The Court explained that the “solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary” and that the state’s “accommodations reflect Florida’s efforts to respect First Amendment interests of candidates and their contributors.”

Specialty license plates are government speech and government’s decision whether to approve a plate may be content- and viewpoint-based.

Walker v. Texas Division, Sons of Confederate Veterans, Inc., 135 S.Ct. 2239 (2015) (Breyer).

By a 5-4 vote, the Court held that Texas did not violate the First Amendment when its Department of Motor Vehicles Board denied a proposed specialty-plate design that featured the Sons of Confederate Veterans’ logo. The Court concluded that Texas specialty license plates constitute government speech and therefore may be content- and viewpoint-based. In determining that the plate design is government speech, the Court (applying the factors it set out in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)) noted that license plates have historically “communicated messages from the States”; license plate designs “are often closely identified in the public mind with the [State],” for they “are, essentially, government IDs”; and Texas has final approval authority over the designs.

Sign regulations that require religious signs to be smaller and displayed for a shorter period than political or ideological signs violates First Amendment.

Reed v. Town of Gilbert, AZ, 135 S.Ct. 2218 (2015) (Thomas). The Town of Gilbert has a Sign Code that limits the size of temporary signs displayed outdoors and how long the signs may be displayed. Under the ordinance, a sign displayed by petitioners – a church and its pastor – promoting church services must be smaller (6 square feet) and displayed for a shorter period of time (12 hours before, and one hour after, the event) than signs posted for political or ideological purposes or by homeowners’ associations. The Court unanimously held that the Sign Code is a content-based regulation of speech that violates the First Amendment. A

six-Justice majority held that the Code, because it is content-based, is subject to strict scrutiny and that it cannot survive that scrutiny because it is both underinclusive and over inclusive.

FEDERAL HABEAS REVIEW

Under AEDPA's deferential review, Sixth Circuit erred in granting habeas relief based on an alleged *Witherspoon* violation.

[White v. Wheeler, 136 S.Ct. 456 \(2015\)](#). Through a *per curiam* opinion, the Court unanimously reversed a Sixth Circuit decision that had granted relief to a habeas petition on the ground that his rights under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985), had been violated. Those decisions establish that states may remove a juror based on her opposition to the death penalty only where such opposition would substantially impair the performance of her duties. Here, the trial court sustained the prosecution's strike of a juror on the ground that she could not impose the death penalty. The Kentucky Supreme Court affirmed, but the Sixth Circuit held that the state court unreasonable applied *Witherspoon* and *Witt*. Reversing, the U.S. Supreme Court held that the Sixth Circuit failed properly to apply AEDPA deference; "[a] fairminded jurist could readily conclude that," based on the juror's statements during voir dire, the trial judge "was fair in the exercise of her 'broad discretion' in determining whether the juror was qualified to serve in a capital case."

FOURTH AMENDMENT

Attaching a GPS tracking device to a person is a search under the Fourth Amendment.

[Grady v. North Carolina, 135 S.Ct. 1368 \(2015\)](#). A state trial court ordered that petitioner, a convicted sex offender, be subjected to a satellite-based monitoring (SBM) program for the rest of his life. The North Carolina Supreme Court rejected his Fourth Amendment challenge to the program on the ground that the state's program is civil in nature. Through a *per curiam* opinion, the Court unanimously reversed based on its decision in *United States v. Jones*, 565 U.S. ____ (2012), which held that the police had engaged in a "search" with the meaning of the Fourth Amendment when they installed and monitored a GPS tracking device on a suspect's car. The Court found no basis to distinguish SBM monitoring. The Court expressly left open for remand the question whether the SBM monitoring is an *unreasonable* search that violates the Fourth Amendment.

Detaining a motorist for seven minutes to wait for a dog without reasonable suspicion of criminal activity violates the Fourth Amendment.

[Rodriguez v. United States, 135 S.Ct. 1609 \(2015\) \(Ginsburg\)](#). The Court held by a 6-3 vote that "a dog sniff conducted after completion of a traffic stop" violates the Fourth Amendment. More generally, the Court "h[e]ld that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." The Court therefore reversed an Eighth Circuit decision which had held that a seven- or eight-minute extension of a traffic stop to allow a drug-detection dog to walk around the stopped car was a "*de minimis* intrusion on [petitioner's] personal liberty."

City ordinance requiring hotels to allow police to inspect their guest registries violates the Fourth Amendment.

[City of Los Angeles, CA v. Patel, 135 S.Ct. 2443 \(2015\) \(Sotomayor\)](#). By a 5-4 vote, the Court affirmed a Ninth Circuit decision holding that a Los Angeles ordinance that requires hotels to make their guest registries subject to police inspection is facially invalid under the Fourth Amendment. The Court first held that facial challenges to laws are permitted under the Fourth Amendment. The Court then upheld this facial challenge because “in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker” — a procedure not afforded by the Los Angeles ordinance. The Court declined to apply the exception to that rule for “closely regulated industries,” holding that the exception is a narrow and inapplicable here.

Police seized a car with blinking hazard lights parked on the side of the road when they pulled up behind it with their red and blues flashing; but the seizure was reasonable under the community caretaking doctrine.

[State v. Anderson, 2015 UT 90 \(Durham\)](#). Late on a very cold December’s evening, two sheriff’s deputies came upon Anderson’s car, hazard lights activated, parked on the side of a rural highway. They decided to check on the welfare of any occupants and pulled up behind the car with their red and blue lights activated. Anderson had bloodshot eyes and was unsure of the direction he was travelling. One thing led to another and the deputies found marijuana and paraphernalia in Anderson’s car. The district court denied Anderson’s motion to suppress the evidence under the community caretaking doctrine.

Held: Affirmed. Pulling up behind Anderson’s car with red and blue lights activated was a seizure within the meaning of the Fourth Amendment. But that seizure was reasonable under the community caretaking doctrine. Under that doctrine, courts must balance “the degree to which an officer intrudes upon a citizen’s freedom of movement and privacy,” against “the degree of public interest and the exigency of the situation.” The stop here was only “minimally intrusive,” where Anderson was already parked and the deputies “show of authority” — red and blue lights” was not unduly excessive. And a reasonable officer would have cause to be concerned about someone parked on the side of a highway with flashing hazard lights, late on a very cold, dark winter’s night. The Court overruled the community caretaking test in *Provo City v. Warden*, 844 P.2d 360 (Utah App. 1992), which required that the objective circumstances demonstrate “an imminent danger to life or limb.”

Automobile exception applies under Article I, Section 14 in the same manner as it does under the Fourth Amendment to the United States Constitution.

[State v. Rigby, 2016 UT App 42 \(Roth\)](#). Zachary Rigby was stopped by a police officer for a stop sign violation. During the traffic stop, the officer smelled the odors of both burnt and fresh marijuana. He also observed that the occupants looked stoned. Based on those observations, and a positive indication from a drug dog, the officer searched the car and found marijuana and paraphernalia. Rigby moved to suppress the evidence found in his car, alleging that the search was unconstitutional. He conceded that the odor of marijuana was sufficient

to give probable cause to search the car. But he asserted that the automobile exception to the warrant requirement had a separate exigency component that the State had not satisfied. The district court denied the motion. Rigby pleaded guilty but reserved the right to appeal the denial of his motion to suppress.

Held: Affirmed. The last controlling opinion from the Utah Supreme court on this issue, *State v. Watts*, 750 P.2d 1219 (Utah 1988), held that Article I, Section 14 did impose a separate exigency requirement on the automobile exception. But that case also held that Article I, Section 14 should be interpreted lockstep with the United States Supreme Court's opinions on the Fourth Amendment unless the court found good cause to depart from those opinions. And eight years after *Watts*, in *Pennsylvania v. Labron*, 518 U.S. 938 (1996), the Supreme Court declared that the automobile exception had no separate exigency. Thus, following *Watts* mandate to keep Article I, Section 14 in lockstep with the Fourth Amendment, the automobile exception no longer has an separate exigency requirement.

Under the inevitable discovery doctrine, the trial court improperly suppressed evidence resulting from a warrantless entry into a home where officers were already seeking a warrant that they surely would have obtained.

[Layton City v. Brierley, 2015 UT App 207 \(Toomey\)](#). Police received a report that a black Mercedes SUV, driven by a "blonde female," was involved in a hit-and-run accident. The reported license plate number led them to Brierly's house. A housekeeper in the garage told police that Brierly, the homeowner's daughter had been driving the Mercedes, that she appeared to be intoxicated, and that she was downstairs in her bedroom. The officers could see that the Mercedes had front end damage. When Brierly refused to come out of the house to talk to the police, they began applying for a search warrant. One officer then stepped just inside the front door to tell the housekeeper that the house was under lockdown and no one was allowed to leave. The other officer then entered, placed his computer on a table in the entryway and began drafting search warrant documents. The officers abandoned their attempts for a search warrant after Brierly emerged and agreed to talk to officers outside. Brierly failed field sobriety tests and breath tests showed a BAC of .143. The trial court granted Brierly's motion to suppress the evidence as being the result of an illegal entry into the home, and the City appealed.

Held: Reversed. The trial court should not have suppressed under the inevitable discovery doctrine. The police had already begun efforts to get a search warrant when they made the illegal entry and only abandoned those efforts when Brierly agreed to talk to them outside. The probable –cause showing was strong and a warrant in all likelihood would have issued based on the information known to the officers before then entered the house. Armed with a warrant, the officers would have inevitably discovered the suppressed evidence.

Loss prevention officer's hearsay testimony of consent to search at suppression hearing was admissible where defendant proffered no evidence that the hearsay was unreliable.

[State v. Clark, 2015 UT App 289 \(Pearce\)](#). Police discovered a stolen driver's license intermingled with Clark's documents on the passenger side of a truck she had ridden in to a

grocery store. Clark moved to suppress the stolen license because police did not have a warrant to search the truck. At the suppression hearing, the store's loss prevention officer (LPO) testified, over Clark's hearsay objection, that she overheard the truck's owner consent to the officer's searching the truck. The trial court believed the LPO and denied the motion to suppress.

Held: Affirmed. On appeal, Clark conceded that the rules of evidence do not apply at pretrial suppression hearing and that the trial court could rely on hearsay evidence so long as it was reliable. Clark argued that the LPO's hearsay testimony about consent was unreliable because the LPO was not a neutral reporter, the LPO was biased against Clark who had tried to defraud the same store before, and the LPO's testimony was inconsistent with a police officer's prior preliminary hearing testimony. Although Clark "assembled an impressive list of concerns," she did not show that the LPO's testimony was so unreliable as to require exclusion. The LPO testified under oath and penalty of perjury. Clark had, but did not take, the opportunity to cross-examine the LPO about her perception and interpretation of the owner's statement, as well as any bias she may have harbored against Clark. And the LPO's testimony did not contradict the police officer's earlier preliminary hearing testimony merely because the police officer did not volunteer unrequested testimony about the truck owner's consent.

Officers executing search warrant properly determined that room that was locked and that bore "No Trespassing" sign was not a separate residence.

[State v. Boyles, 2015 UT App 185 \(Pearce\)](#). Officers executed a searched warrant on a home in which James Fitts and Evan D Boyles resided. Fitts was the target of the warrant. And officers did not know when they sought the warrant that Boyles had his own room that he kept locked. When officer executed the warrant, they found Boyles in the backyard and detained him. Officers knew the general layout of the home and thought they knew which room was Fitts's. When they entered the home, they found a room that was locked and that had a "No Trespassing" sign. Officers forced entry and discovered that it was Boyles room. They charged Boyles with paraphernalia that they found in the room. Boyle filed a motion to suppress, claiming that the warrant was invalid because the affidavit misrepresented the true layout of the house and claiming that officers did not execute the warrant in good faith when they forced entry into his room. The trial court disagreed. A jury convicted Boyles, and he appealed.

Held: Affirmed. There is no evidence that the officers knew that Boyle had a separate residence in the home. So the warrant was obtained in good faith. And a locked door with a "No Trespassing" sign does not clearly communicate to officers that the room is a separate residence outside the scope of the warrant. Such a room in a suspected drug house is more likely a stash room than a bedroom.

Police do not need reasonable suspicion to ask for permission to enter home, and a consent search of that home is voluntary even if the defendant—a probationer—subjectively thought that he could not refuse consent.

[State v. Fretheim, 2015 UT App 197 \(Orme\)](#). Fretheim was on probation when a couple of officers showed up to his house, saying that he had been implicated in drug activity. Fretheim let the officers inside, where they saw paraphernalia in plain view. Fretheim admitted to having drugs in the house and consented to the officers searching. On appeal, Fretheim claimed that (1) police needed, but lacked, reasonable suspicion to ask permission to enter his home; and (2) the consent search was involuntary because, as a probationer, Fretheim thought that he could not refuse consent (though he actually could have).

Held: Affirmed. Police do not need suspicion—reasonable or otherwise—to ask for permission to enter a home. Also, Fretheim’s subjective belief that he could not refuse consent did not render the consent that he gave involuntary.

Counsel is not ineffective for not challenging the basis for a traffic stop where the defendant leads police on a high-speed chase after the stop.

[State v. Lorenzo, 2015 UT App 189 \(Voros\)](#). Lorenzo was pulled over for warrants and license violations. During the stop, the officer noted the smell of alcohol. Lorenzo took off and led police on a high-speed chase through Cedar City. Lorenzo’s two young daughters were in the car at the time. He was later convicted of evading, reckless endangerment, reckless driving, and a license violation. On appeal, Lorenzo argued that his counsel was ineffective for not challenging the basis for the initial stop.

Held: Affirmed. No prejudice for failing to challenge the initial stop where Lorenzo committed a number of intervening illegalities—regardless of the basis for the stop, once Lorenzo ran away, thus committing a new offense, the legality of the initial stop did not matter.

GOVERNMENT RECORDS ACCESS MANAGEMENT ACT

Article I, Section 14, of Utah Constitution does not prohibit the government from disclosing under GRAMA a private entity’s bank records that were lawfully seized..

[Schroeder v. Ut. Att’y Gen. Office, 2015 UT 77 \(Durrant\)](#). In March 2011, the Utah Attorney General’s Office terminated an investigation into Envision Ogden without filing charges. The next day, Daniel V Schroeder filed a GRAMA request seeking all copies of the records pertaining to the Envision Ogden investigation. The Utah Attorney General’s Office released some of the records, but it refused to disclose Envision Ogden’s bank records, which it had obtained pursuant to a lawful subpoena. It also refused to disclose a Quicken summary of those records prepared by the investigator at the direction of the prosecutor or the investigator’s handwritten notes. Schroeder appealed the denial to the district court, which affirmed the denial. The court ruled that the privacy interests in bank records recognized in *State v. Thompson*, 810 P.2d 415 (Utah 1991) created a general privacy right under Article 1, Section 14, of the Utah Constitution that forbade disclosure of bank records by the government. It also

ruled that the Quicken summary and the investigators notes were attorney work product that was protected under GRAMA. Schroeder appealed.

Held: Reversed. *Thompson* did not establish a broad privacy right in bank records. It simply applied search and seizure law to a recognized privacy interest and required the government to get judicial approval before seizing bank records. Where those records are lawfully seized, nothing in *Thompson* or Article I, Section 14, prohibits their disclosure. The Quicken summary and attorney notes are protected work product. But where the investigation was closed without filing charges more than four years ago, the public's interest in disclosure far outweighs the government's interest in continuing to protect the prosecutor's work product. GRAMA thus dictates that they be disclosed.

IMMIGRATION

Kansas controlled substance conviction for concealing unspecified pills in his sock did not trigger removal of non-citizen.

Mellouli v. Lynch, 135 S.Ct. 2980 (2015) (Ginsburg). Under 8 U.S.C. §1227(a)(2)(B)(i), a non-citizen may be removed if he has been convicted of violating “any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)” By a 7-2 vote, the Court held that petitioner's conviction under Kansas law for concealing unspecified pills in his sock did not trigger removal under that provision. The Court ruled that the categorical approach applies, under which “[t]he state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law.” The Court found that petitioner's conviction does not trigger removal under that approach because, although the Kansas statute related to a controlled substance, “it was immaterial under that law whether the substance was defined in 21 U.S.C. §802. Nor did the State charge, or seek to prove, that [petitioner] possessed a substance on the §802 schedules.”

JURY INSTRUCTIONS

Error in denying lesser-included offense instructions in aggravated murder trial was harmless in light of strong evidence of guilt.

State v. Reece, 2015 UT 45 (Durrant). Cody Alan Reece was charged with aggravated murder and aggravated burglary for killing a woman in her living room with a single gunshot to the forehead at close range. At trial, he asked for lesser-included offense instructions on murder, felony murder, manslaughter, homicide by assault, and negligent homicide. The trial court denied the request, ruling that Reece's testimony at trial created “an all-or-nothing” situation that left no rational basis to acquit of aggravated murder and convict of murder. The jury convicted Reece as charged. Reece appealed.

Held: The trial court correctly excluded the murder instruction. An intentional unjustified killing while unlawfully in another's home constitutes a burglary, and the burglary then becomes the predicate crime for aggravated murder. But the trial court wrongfully excluded

the other lesser offense instructions. The testimony of Reece's cellmate that Reece told him that he accidentally shot the victim is sufficient for a jury to acquit of murder and convict of a lesser, non-intentional, homicide. But the error was harmless in light of the overwhelming evidence that Reece intentionally shot his victim. The Court rejected Reece's argument that failure to give a lesser-included jury instruction is a structural error.

Defendant was not entitled to a compulsion instruction based on his claim that he harmed the assault victim only to prevent his accomplices from inflicting some greater harm.

[State v. Dozah, 2016 UT App 13 \(Christiansen\)](#). Dozah and other drug dealer strongmen kidnapped, beat, and threatened to kill a drug user who owed their boss \$400. In the end, Dozah left the victim in a canyon in below-freezing weather, wearing only a t-shirt, pants, and shoes. Dozah wanted to run a compulsion defense based on his testimony that his one of his cohorts threatened to harm Dozah if he untied the victim and whatever threats or harm Dozah did to the victim, it was only so that his cohorts wouldn't inflict even more harm. The trial court refused to give a compulsion instruction and the jury convicted Dozah of aggravated kidnapping and aggravated assault for his participation in the crimes.

Held: The trial court properly refused to give the compulsion instruction. To be entitled to a compulsion defense instruction, the defendant must show that at least *some* evidence was put before the jury to show that he was compelled to engage in the criminal acts with which he was charged. There was none here. Threatening Dozah if he helped the victim by untying him was not the same as threatening to harm Dozah if he refused to perform criminal acts. And assaulting the victim in order to "forestall the other assailants from killing or battering" the victim further does not amount to coercion for purposes of a compulsion defense. The court of appeals, however, reversed Dozah's convictions based on other instructional error.

Trial court should have consulted with counsel before answering jury question.

[State v. Dozah, 2016 UT App 13 \(Christiansen\)](#). Dozah and an accomplice stranded the victim, clad only in a t-shirt, pants, and shoes, on a closed road in a canyon in sub-freezing temperatures. On the drive up, Dozah told the victim that he had a lead pipe with which he would bust the victim's kneecaps and then leave him for dead. Dozah and his accomplice were charged with aggravated kidnapping and aggravated assault. During deliberations, the jury sent a note to the judge asking for the definition of aggravated assault and whether leaving the victim in the canyon constituted aggravated assault. Without alerting counsel, the trial court sent a written response telling the jury (1) to look to the jury instructions for a definition of aggravated assault and (2) that the other question "must be decided without my help. It is for the jury to decide." Defense counsel did not learn of the trial court's note until after the jury had returned a guilty verdict.

Held: Reversed. While a trial court is not required to consult counsel before responding to a jury's note, it is required to alert counsel if it issues new substantive instructions. While it did not appear that the trial meant to respond substantively to the jury's question, the jury could have reasonably read the responses that way. And the jury's question suggested that it was asking whether leaving the victim in the canyon was sufficient *on its own* to constitute

aggravated assault. When it appears from a jury's question that the jury is headed toward a verdict based on an improper understanding of the law, it is incumbent on the trial court to correct the jury's misunderstanding with a new and correct instruction *after* consulting with counsel.

Jury instructions in securities fraud prosecution misstated the mens rea.

[State v. Moore, 2015 UT App 112 \(Davis\)](#). Shawn H Moore was charged with several counts of securities fraud and sale by an unlicensed agent and one count of a pattern of unlawful activity. At trial, the court instructed the jury, over Moore's objection, that a person selling a security had a duty to investigate the security must not "recklessly state facts about matters of which he is ignorant." The jury convicted Moore, and he appealed

Held: Reversed. Utah's securities fraud statutes require the State to prove that the defendant acted willfully with respect to each element of both securities fraud and a sale by an unlicensed dealer. The court's instruction to the jury to convict if it found that Moore recklessly stated untrue facts was thus contrary to the statute and erroneous. And it was not harmless because it relieved the State from proving an element of its case.

Judge Davis wrote a further opinion, in which Judges Voros and Pearce did not join, addressing other claims that Moore raised on appeal respecting an expert witness and calculating restitution. He wrote the opinion for the purpose of giving the trial court guidance on remand. Judges Voros and Pearce disagreed that it was appropriate for the court to reach issues that may arise on remand.

Defense-of-habitation instruction contained errors, but those errors were harmless.

[State v. Karr, 2015 UT App 287 \(Davis\)](#). Karr, with the help of his brother, stabbed to death an obnoxious party guest who just wouldn't leave. Karr's defense centered on his right to use force to defend his home. The jury didn't buy it and convicted him of murder and obstructing justice. On appeal, Karr argued that the defense-of-habitation instructions were wrong.

Held: Affirmed. The defense-of-habitation statute creates a presumption that a defendant's use of force is reasonable if the entry or attempted entry into the home was unlawful and was attempted with force, violence, stealth, or felonious intent. The instructions here properly told the jury that the State could rebut the presumption of reasonableness by showing that any entry or attempted entry was lawful or not made with force, violence, stealth, or felonious purpose or that Karr's beliefs and actions were unreasonable. But the instructions were technically incorrect because they erroneously focused on the purpose of the victim's entry and reasonableness of Karr's *actions* as opposed to both his *beliefs* and actions. Those technical errors, however, were harmless.

Court did not err in refusing to give mistake of fact instruction.

[State v. Kennedy, 2015 UT App 152 \(Toomey\)](#). Benita Kennedy was charged with obstruction of justice for aiding four men in fleeing from the scene of a murder. At trial, she asked for a mistake-of-fact instruction to support her defense that she did not know that a murder had

happened. The trial court declined the invitation, and the jury convicted her. Kennedy appealed.

Held: Affirmed. Courts need not give a requested instruction if the instructions as a whole fairly instruct the jury on the applicable law. In this case, the elements instruction already told the jury that it had to find that Kennedy acted with the intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding a criminal offense. That element necessarily requires finding that Kennedy knew that a crime had been committed. Her mistake-of-fact instruction was therefore redundant.

Jury instructions correctly informed jury that special mitigation defense required a reasonable loss of control.

[State v. Lambdin, 2015 UT App 176 \(Roth\)](#). Dennis Wayne Lambdin was charged with murder for killing his wife in their kitchen. He never disputed killing her. Instead, he claimed special mitigation. Specifically, that his actions were the result of extreme emotional distress brought on by years of marital strife, his wife's heavy drinking, her affair and resulting pregnancy, and her expressed intention to divorce him. Over Lambdin's objection, the court instructed the jury that it must find that both the emotional distress and the resulting loss of self-control be reasonable. The jury convicted Lambdin, and he appealed.

Held: Affirmed. While the statute only states that the emotional distress must be reasonable, years appellate precedent interpreting that statute make clear that the resulting loss of self-control must also be reasonable. Importantly, the jury need not find that the homicide itself was reasonable. It need only find that the loss of self-control was reasonable.

It is error to give instruction on reckless *mens rea* that does not include "gross deviation" language.

[State v. Liti, 2015 UT App 186 \(Christiansen\)](#). Rodney Amato Liti was charged with murder for shooting his friend during an argument. At trial, the court instructed the jury on the lesser offense of reckless manslaughter based on Liti's testimony that he accidentally discharged the gun while drawing it in response to a gun that his friend was brandishing. But the instruction omitted the second prong of the definition of reckless: that disregarding the risk constitutes a gross deviation from the standard of care that an ordinary person would exercise. The jury convicted Liti of manslaughter, and Liti appealed.

Held: Reversed. The second prong of the recklessness definition is not superfluous and failure to include it is error. In this case the error was prejudicial because a properly instructed jury might have determined that drawing a gun in response to another brandishing a gun was not a gross deviation from an ordinary standard of care.

Defendant was prejudiced by erroneous elements instruction

[State v. Garcia, 2016 UT App 59 \(Christiansen\)](#). After assaulting his cousin's girlfriend and her daughter, K.C., Yesha Anthony Garcia waited at his home for his cousin to retaliate. When his cousin slowly drove by twice with K.C. in the car, Garcia went outside and fired four shots at his cousin's car. The State charged Garcia with attempted murder. At the close of evidence,

Garcia asked for an attempted manslaughter instruction. The State agreed that the evidence warranted an attempted imperfect self-defense manslaughter instruction. Garcia’s counsel submitted such an instruction. But the instruction erroneously required the jury to find that imperfect self-defense did NOT apply. The jury convicted. Garcia appealed, claiming that his counsel was ineffective for submitting an erroneous instruction.

Held: Reversed. It was error and deficient performance for counsel to submit an elements instruction that so clearly misstated the law. And the failure to give an accurate elements instruction can never be harmless error.

A defendant is not entitled to a compulsion instruction where there is no evidence that he was ever threatened into participating in a robbery.

[State v. Semisi Maama, 2015 UT App 234 \(Voros\)](#). Semisi Maama, his sister Mesia, Mesia’s friend, and Mesia’s boyfriend Anh Pham were at a fast food place. Mesia and her friend went inside while Semisi and Pham waited in the parking lot. At one point, Semisi and Pham decided to rob a man in the parking lot. Pham pointed a gun at the man and “pistol whipped” him when he did not hand over his money fast enough. Semisi urged the man to cooperate. The man then took Pham’s gun away from him, and fought off both Pham and Semisi. Mesia then came out of the restaurant and punched the man, taking Pham’s gun back. The trial court gave a compulsion instruction for Semisi, who argued that he only urged the man to cooperate in order to prevent further violence. On appeal, Semisi argued that the jury instructions did not correctly inform the jury of the State’s burden to disprove compulsion beyond a reasonable doubt.

Held: Semisi was not entitled to a compulsion instruction in the first place, because there was no evidence (1) that he was threatened if he did not participate; or (2) that he had no other viable options to breaking the law. At any rate, the instructions correctly informed the jury of the State’s burden, even if that burden was not in the elements instruction.

Class A misdemeanor assault is a necessarily lesser-included offense of third degree felony assault.

[State v. Sanislo, 2015 UT App 232 \(Voros\)](#). Sanislo’s assault left the victim with a cut chin, broken nose, broken tooth, a black eye, and bumps all over his head. Sanislo was charged with third-degree felony assault for using “force or means likely to produce death or serious bodily injury.” At trial, the prosecutor requested a lesser-included offense instruction on class A assault for causing only “substantial bodily injury.” On appeal, Sanislo argued that class A assault was not a lesser-included of third degree aggravated assault.

Held: Affirmed. When the State requests a jury instruction on a lesser offense, the offense must be necessarily included in the charged offense—that is, that you cannot commit the greater offense without also committing the lesser offense. That is the case with class A assault and third degree aggravated assault.

JURY SELECTION

Court appropriately limited defense counsel's voir dire of proposed jurors.

[State v. Reece, 2015 UT 45 \(Durrant\)](#). Cody Alan Reece was charged with aggravated murder and aggravated burglary for killing a woman in her living room with a single gunshot to the forehead at close range. At jury selection, Reece's attorney submitted 193 proposed voir dire questions. The court asked most of them but refused to ask several questions that asked for specific details employment, social organizations, and substance abuse. A jury ultimately convicted Reece, and he appealed.

Held: Affirmed. The trial court did not abuse its discretion in limiting voir dire. The court allowed Reece to ask the vast majority of his 193 questions. And he was allowed unlimited follow-up with jurors during individual voir dire. The combination of general questioning and individual voir dire provided Reece with every opportunity to uncover bias.

JUVENILE LAW

Applying strict-liability rape of a child statute to 15-year-old juvenile who had mutually welcome sex with a 12-year-old did not violate due process, nor did it lead to an absurd result.

[In re T.S., 2015 UT App 307 \(Christiansen\)](#). After agreeing that they both liked short shorts, 15-year-old T.S. and 12-year-old A.R. had mutually welcome sex. A.R.'s father learned about the encounter after he read his daughter's diary and he reported it to police. T.S. was adjudicated in juvenile court as committing rape of a child, a strict-liability offense (at least with respect to consent), and a first degree felony if committed by an adult. T.S. got 60 hours community service, with credit for time he had already spent in a sex education class. T.S. argued in both the juvenile court and on appeal that applying a strict-liability offense to him violated due process because juveniles generally lack awareness that their actions might be criminal. T.S. alternatively argued that applying the statute to him led to absurd results.

Held: Affirmed. T.S.'s authorities, which suggest that juveniles are less culpable than adults, do not establish that due process guarantees grant juveniles an ignorance-of-the-law defense. The US Supreme Court cases that T.S. relies on considered and rejected harsh and inflexible *sentencing* of juvenile offenders, not the application of strict-liability statutes to juveniles. This case is different from *In re Z.C.*, 2007 UT 54, which applied the absurd-results doctrine to invalidate applying the rape of a child statute to a 12- and 13-year-old boy and girl who had mutually welcome sex. *Z.C.* limited its holding to "situations where no true victim or perpetrator can be identified." Here, the juvenile court expressly found that there was a clear victim and perpetrator. T.S. was more than two years older than A.R. Finally, T.S.'s concern that his adjudication might require him to register as a sex offender if he traveled to or lived in another state is not ripe.

Juvenile Court cannot impose detention for curfew violation.

In re B.L.D., 2015 UT App 82 (per curiam). The juvenile court imposed a suspended thirty-day term of detention after finding that B.L.D. violated the Davis County curfew ordinance. B.L.D. appealed. The State conceded error and summary reversal. Under Utah Code § 78A-6-117(2)(f)(ii), detention may only be imposed for an act which, if committed by an adult, would be a criminal offense. The curfew ordinance only applies to minors under the age of sixteen.

MERGER

Aggravated kidnapping conviction did not merge into aggravated murder conviction under current version of the aggravated murder statute.

State v. Bond, 2015 UT 88 (Himonas). Martin Bond and his friend Benjamin Rettig went to see Kay Mortensen (a friend of Bond's father). They forced him at gunpoint to open up a backyard bunker where he kept several guns. Back inside, they zip-tied his hands and feet, forced him to kneel over the bathtub, and slit his throat. Moments later, Mortenson's son and daughter-in-law arrived. Bond and Rettig zip-tied them, threatened them, and left with the guns. Bond was convicted of aggravated murder, aggravated robbery, aggravated burglary, and three counts of aggravated kidnapping. For the first time on appeal, Bond argued that one of his aggravated kidnapping convictions should have been merged into the aggravated murder conviction.

Held. Affirmed. Prior cases had interpreted an older version of the aggravated murder statute as requiring—under some circumstances—merger of convictions that had also served as a statutory aggravator of murder. The legislature, however, had since amended the aggravated murder statute to show its intent that the underlying statutory aggravators not merge.

POST-CONVICTION

The holdings of *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), and *Missouri v. Frye*, 132 S.Ct. 1399 (2012), are new rules that do not apply retroactively in post-conviction proceedings.

Winward v. State, 2015 UT 61 (Durham). Shannon Glen Winward is a sick pervert who was convicted twenty years ago of repeatedly sodomizing his girlfriend's sons and sexually assaulting a neighbor child. In 2009, he filed a post-conviction petition, alleging *inter alia* that his counsel had been ineffective for not conveying a plea agreement from the state. While the claims were pending in the Utah Supreme Court, the United States Supreme Court issued opinions in *Lafler* and *Frye* that held that a failure to convey a plea bargain could be prejudicial under the ineffective assistance of counsel jurisprudence found in *Strickland v. Washington* and its progeny. The Utah Supreme Court remanded the case to the district court to consider Winward's claims under *Lafler* and *Frye*. The district court once again granted summary judgment in the State's favor, ruling that *Lafler* and *Frye* were not retroactive under the Post-Conviction Remedies Act. Winward appealed.

Held: Affirmed. While lower courts were nearly unanimous in holding that a missed opportunity at a plea bargain could be prejudicial under *Strickland v. Washington*, the Supreme Court was clearly announcing a new rule when it agreed with them in *Lafler* and *Frye*. No opinion of the Supreme Court had ever explicitly found prejudice in such circumstances. And the court's precedents largely suggested a different outcome. The Utah Supreme Court noted that the pivotal holding in *Lafler*, that it is "fundamentally unfair" to give someone a harsher sentence than would have been available to him under a plea deal that he would have accepted but for his counsel's failures, was supported only by citations to *Frye* and a 2011 law review article, not to any prior opinions of the Supreme Court.

A defendant may not use the Post-Conviction Remedies Act to unwind a plea in abeyance.

[Meza v. State, 2015 UT 70 \(Parrish\)](#). Sergio Alejandro Meza pleaded no contest in justice court to one count of drug possession and one count of possession of paraphernalia. The plea was held in abeyance under certain terms and conditions, which Meza successfully completed. Then justice court then withdrew Meza's plea and dismissed the case. Meza then filed a post-conviction action in district court seeking to undo his plea, claiming that his attorney misadvised him about the adverse immigration consequences of his plea. The district court dismissed the action, ruling that the PCRA does apply to pleas held in abeyance.

Held: Affirmed. Under its plain language, the PCRA applies only to a criminal offense in which there has been a "conviction and sentence." A plea in abeyance has no sentence. And it is not conviction, except in a few defined circumstances such as the enhancement statutes in the Cohabitant Abuse Act.

Concurrence: Part II of Justice Parrish's opinion was not adopted by the full court. Only Justice Durham concurred. In Part II, Justice Parrish opined that Rule 60(b)(6), Utah Rules of Civil Procedure, provides a remedy for Meza to assert his *Padilla*.

Concurrence: Judge Roth (sitting for Justice Nehring) and Justice Lee wrote concurring opinions. They rejected Justice Parrish's Rule 60(b) analysis because Meza did not preserve or brief a claim under Rule 60(b). Justice Durrant joined Judge Roth's concurring opinion.

Non-disclosure of impeachment evidence during plea negotiations does not make plea unknowing and involuntary.

[Monson v. Salt Lake City, 2015 UT App 136 \(Christiansen\)](#). Todd E Monson pleaded guilty to impaired driving in 2010 after being arrested for DUI by Lisa Steed. At the time of his plea, he was not aware that Steed was the subject of an internal investigation by the highway patrol. That investigation ultimately uncovered discrepancies between Steed's written reports in DUI cases and both the investigator's observations and laboratory testing of samples taken from suspects. When the findings of that investigation were made public in 2012, Monson filed a post-conviction petition, seeking to withdraw his plea. He asserted that the failure of the Salt Lake City prosecutor to alert him to Steed's misconduct voided his plea. The district court disagreed and denied the petition. Monson appealed.

Held: Affirmed. There is no evidence that Steed committed any misconduct in Monson's case. So the evidence is relevant only for impeachment purposes. *Brady* requires the State to disclose impeachment evidence at trial. But no such requirement exists at the plea bargain stage. So the failure to disclose impeachment evidence does not invalidate Monson's plea.

PRELIMINARY HEARINGS

Magistrate erred in weighing and discrediting child sex abuse victim's testimony at preliminary hearing.

[State v. Schmidt, 2015 UT 65 \(Durrant\)](#). In 2010, Jacob James Schmidt was charged with various sex offenses arising from allegations that he sexually abused his girlfriend's eleven year-old daughter, C.E. on a daily basis for four years between 2002 and 2006. After a preliminary hearing at which C.E. was the State's only witness, the magistrate refused to bind the case over for trial. The magistrate found C.E.'s testimony to be inherently unreliable for three reasons: (1) C.E. gave inconsistent testimony about a letter she received from Schmidt that precipitated the abuse; (2) C.E. denied the abuse to her mother and investigators in 2006; and (3) no one had ever seen her engage in sexual activity with Schmidt despite her testimony that the abuse happened repeatedly in the common areas of the home. The State appealed.

Held: Reversed. Magistrates may not sift or weigh conflicting evidence at a preliminary hearing. Only when testimony is so contradictory, inconsistent, or unbelievable that it is unreasonable to rely on it to establish an element of the offense. The inconsistencies recited by the magistrate were all either capable of innocent explanation or supported by sufficient corroborating evidence that it was not unreasonable to believe C.E.'s testimony.

Court erred in considering competing reasonable inferences at preliminary hearing.

[State v. Jones, 2016 UT 4 \(Lee\)](#). Some totally boss prosecutor charged Adam Jones, the chief of the Kamas City Police Department, with official misconduct and witness tampering after Jones responded to a domestic violence incident at his brother's home. Although he saw clear evidence of abuse, Jones failed to follow the requirements of the Cohabitant Abuse Procedures Act. The next morning, after sheriff's deputies had responded to and arrested Jones's brother for a second domestic violence incident (and discovered Jones's neglect), Jones visited his brother at the jail tried to get him to cover up Jones's failure to adhere to the Act. At the preliminary hearing, the trial court ignored the State's reasonable inferences and refused to bind the case over. It found that Jones had responded as family, not as the police chief and therefore could not be guilty of official misconduct. And it found that Jones had no reason to believe that an official proceeding was about to be instituted against him where his conduct did not amount to a crime. He therefore could not be guilty of witness tampering. The State appealed. The court of appeals fell into the same errors and affirmed. The Utah Supreme Court then granted the State's cert petition.

Held: Reversed. The liberal bindover standard does not authorize courts to second-guess the prosecution's evidence by weighing it against the totality of the evidence in search of the most reasonable inference to be drawn therefrom. Under the probable cause standard, courts

are required to take the perspective of the reasonable arresting officer—and to do so through a lens that gives the benefit of all reasonable inferences to the prosecution. The prosecutions inferences on both counts are reasonable, and the charges should have been bound over.

A conviction by a fact-finder cures any defect in a preliminary hearing waiver.

[State v. Aleh, 2015 UT App 195 \(Voros\)](#). Aleh met an escort in a motel. When the escort refused to have sex with Aleh, Aleh demanded his money back. The escort refused, citing her no-refunds policy. The two fought, and Aleh took her cell phone and gun. He was charged with robbery, felony theft, solicitation, and other misdemeanors. Aleh waived his preliminary hearing based on the understanding that the State would dismiss all the felony counts, but the State did not do so. Aleh was later convicted on the felonies and some misdemeanors. He argued on appeal that he was deprived of his right to a preliminary hearing, and that he should get one.

Held: Affirmed. A conviction by a fact-finder beyond a reasonable doubt cures any error at the probable cause stage. Because the point of a preliminary hearing is to determine if there is enough evidence to go to trial, holding one after conviction would be an empty gesture.

PRISONER LITIGATION

Under federal law, a federal prisoner has to pay a filing fee for each lawsuit he files.

[Bruce v. Samuels, 236 S.Ct. 627 \(2016\) \(Ginsburg\)](#). Under the Prison Litigation Reform Act, a prisoner proceeding *in forma pauperis* must make an initial partial payment of the filing fee and then pay the rest of the filing fee by “mak[ing] monthly payments of 20 percent of the preceding month’s income credited to [his] account.” 28 U.S.C. §1915(b)(2). The Court unanimously held that when such a prisoner has filed more than one lawsuit or appeal, he must make the monthly installment payments for *each* case that he has filed. The Court, reasoning that §1915(b) “is written from the perspective of a single case,” rejected the prisoner’s contention that the 20% monthly installment payment is on a *per-prisoner* basis.

PROBATION

A trial court does not have to do a rule 11-esque colloquy to take your waiver of a probation revocation hearing.

[State v. Pacheco, 2016 UT App 19 \(Roth\)](#). Pacheco broke into his ex-girlfriend’s house and violently assaulted her 16-year-old daughter. A neighbor came to her aid and cooperated in Pacheco’s prosecution. After he was convicted, Pacheco saw the neighbor at a gas station and threatened him. Pacheco’s probation officer filed an order to show cause. At the hearing, Pacheco admitted to violating his probation in exchange for the State’s not filing new witness retaliation charges. Before taking his admission, the court asked Pacheco—who was represented by counsel—if he wanted to waive his hearing and admit to the violation. Pacheco said that he did and the court revoked his probation and sent him to prison.

Held: Affirmed. Pacheco argued for the first time on appeal that the trial court was required to do a more thorough, rule-11-style colloquy before allowing him to waive his hearing. The court of appeals held that there was no error, plain or otherwise. It's enough for a trial court to ensure that the probationer knows he has a right to a hearing, to counsel at the hearing, and that the probationer wants to waive the hearing.

PROSECUTORIAL MISCONDUCT

Request by prosecutor to jury at the end of rebuttal argument to not let the defendant take advantage of the victim again was misconduct and was sufficiently prejudicial to warrant mistrial.

[State v. Akok, 2015 UT App 89 \(Orme\)](#) and [State v. Jok, 2015 UT App 90 \(Orme\)](#). David Deng Akok and John Atem Jok were charged with rape after a woman accused them of having forcible nonconsensual intercourse with her during a night of heavy drinking. A subsequent Code R exam uncovered injuries consistent with forcible intercourse but not conclusive of sexual assault and semen that belong to Akok. At trial, Akok testified that he and the victim had consensual intercourse. Jok did not testify, but his attorney argued that he had not touched the victim. At the close of his rebuttal, the prosecutor said, "They took advantage of a very vulnerable victim. Don't let them take advantage of it again. Thank you." After the jury retired to deliberate, defense counsel objected to the statement and asked for a curative instruction that specifically admonished the jury not to consider the statement. The prosecutor stated that he had no objection to the instruction. The Court recalled the jurors and reminded them of their duty to consider only the evidence and that the statements of counsel in argument were not evidence. It did not admonish them to disregard the prosecutor's statement. The jury convicted, and Akok and Jok appealed.

Held: Reversed. The prosecutor's statement was inappropriate because it asked the jury to assume a partisan role of protecting the victim. The statement was prejudicial because the case was essentially a they-said/she-said case. And the court's instruction did not cure the prejudice because it did not, as the parties requested, address the inappropriate statement.

Prosecutor's mention of uncharged prior sexual abuse was misconduct, but was harmless.

[State v. Gray, 2015 UT App 106 \(Orme\)](#). James Gray was charged with repeated sexually abusing a young girl over a period of six years, from November 1991 to October 1997. In opening statement, the prosecutor mentioned that the abuse had actually started in 1989. Defense counsel did not object. The jury convicted Gray. He appealed, claiming that the prosecutor committed misconduct in mentioning the allegations of earlier abuse.

Held: Affirmed. It was misconduct for the prosecutor to bring to the jury's attention facts that it should not consider in deciding the case, namely, that the victim alleged that Gray started abusing her in 1989. But in light of all the evidence at trial, it is unlikely that the prosecutor's statement that the victim was abused for eight years instead of six years had any effect on the jury's decision.

Asking jury to step into shoes of child-witness to understand witness's testimony is not prosecutorial misconduct.

[State v. Isom, 2015 UT App 160 \(Voros\)](#). Jace Robert Isom was charged with multiple counts of child sex abuse for engaging in three-ways with his girlfriend and his girlfriend's five-year-old daughter. The daughter testified with some difficulty of the abuse. In closing argument, the prosecutor explained the daughter's obviously difficult testimony by inviting the jury to put themselves in the daughter's shoes and imagine what it would be like to testify as a small child. Defendant did not object. The court convicted him, and he appealed, asserting that the court plainly erred in not *sua sponte* intervene in the prosecutor's closing argument.

Held: Affirmed. No error occurred. The prosecutor properly invited the jury to consider the child's testimony from the point of view of a small child. He did not improperly invite the jurors to sympathize or side with the child.

A prosecutor may not make arguments that are so attenuated as to be unable to support guilt.

[State v. Chavez-Reyes, 2015 UT App 202 \(Orme\)](#). Chavez-Reyes was the cousin to Roberto Roman, who (allegedly)³ killed Deputy Josie Greenhouse-Fox. Roman was driving a Cadillac belonging to Chavez-Reyes when Fox pulled him over and was later killed. Chavez-Reyes later helped Roman to evade capture, and was later charged with obstruction of justice and other offenses. At trial, the prosecutor repeatedly argued that Chavez-Reyes's loaning his Cadillac to Roman two months before the murder showed Chavez-Reyes's intent to obstruct justice on the murder charge.

Held: The prosecutor's remarks were improper, but harmless where the defendant admitted to knowing that Roman had killed a cop when defendant helped him to evade police capture.

RESTITUTION

Trial Court's findings on remand supported complete restitution order covering nearly all of the sexual abuse victim's in-patient counseling costs, notwithstanding the victim's pre-existing psychological issues.

[State v. Ruiz, 2016 UT App 18 \(Bench\)](#). Ruiz pled guilty to attempted unlawful sexual activity with a minor. Before Ruiz's crimes, the victim was receiving outpatient mental health treatment for depression, anxiety, self-harm, substance abuse, etc. After Ruiz's abuse, she became suicidal and spent nine months in an inpatient facility. The trial court ordered Ruiz to foot the entire \$51,000 bill for the inpatient treatment. Ruiz appealed, complaining that he shouldn't have to pay for the entire inpatient bill because the victim was also being treated for pre-existing problems. The court of appeals concluded that the trial court had "failed to explain the causal nexus between" Ruiz's conduct and the entire nine months of inpatient therapy. *See State v. Ruiz*, 2013 UT App 166. The court of appeals remanded for the trial court to make more

³ Roman was acquitted of the murder in State court, but is currently being tried federally for the murder.

detailed findings. On remand, the trial court found that the entire nine months of residential treatment was necessary to address the trauma the victim suffered at Ruiz's hands, but after deciding that some therapy sessions were devoted to pre-existing issues, it reduced the original restitution order to \$42,475. The trial court's reduction was based on its understanding that the court of appeals had mandated a reduction. Ruiz appealed the restitution order again.

Held: Affirmed. The trial court's new findings were sufficient to the causal nexus between Ruiz's crimes and the need for the treatment. Judge Christiansen dissented because in her view the trial court had misread the court of appeals' original decision to require a reduction. She would have reversed and remanded for the trial court to reinstate the original \$51,000 restitution award.

District court did not abuse its discretion by ordering restitution award for lost wages six years after crimes were committed.

[State v. Wadsworth, 2015 UT App 138 \(Christiansen\)](#). In 2003, Scott C Wadsworth met his minor victim in a chat room. Over a period of three weeks, he chatted with the victim online, sent her numerous pornographic photographs and videos, and on one occasion went to her home where she performed oral sex on him. Wadsworth pleaded guilty to sexual exploitation of a minor, unlawful sexual activity with a minor, and enticing a minor over the internet. But before sentencing, he absconded. The authorities did not apprehend him until 2009. He was then sentenced and ordered to pay full restitution to the victim. At a restitution hearing several months later, the victim claimed damages for lost wages in 2009 and 2010 of \$12,934.46. The victim explained at the hearing that Wadsworth's 2009 arrest caused her psychological problems, difficulties, and depression that required her to cut her hours at work and seek counseling. The district court found that the lost wages were causally connected to Wadsworth's criminal conduct and ordered him to pay the lost wages. Wadsworth appealed that order.

Held: Affirmed. Injury to a victim arises from a defendant's criminal conduct when the conduct is the "but for" cause of the injury and when the causal nexus between the conduct and the injury is not too attenuated factually or temporally. Here, the victim testified that the lost wages were the result of psychological injury from Wadsworth's criminal conduct. And the temporal attenuation between the criminal conduct and the incurring of lost wages was due entirely to Wadsworth absconding. Restitution for lost wages was therefore appropriate. **NOTE: The Utah Supreme Court granted a writ of certiorari to review this case.**

District court abused its discretion when it based restitution on retail value of stolen items

[State v. Ludlow, 2015 UT App 146 \(Davis\)](#). Naomi Ludlow was convicted of stealing some @#\$% from somebody's car. A restitution hearing was held at which the victim testified that a variety of used electronics, clothing, and cash were taken from her car. The victim provided the retail value of the stolen items, and the State put on no further evidence of the actual market value of the items. Ludlow objected to the court basing restitution on the retail value, but provide no estimates of her own of the market value. The court awarded restitution \$3100 restitution based on the retail value minus \$350 for depreciation. Ludlow appealed.

Held: Reverse. As a general rule, pecuniary damages for property loss is the market value of the lost item, not the retail value. When the State failed to present any evidence of the market value, the trial court abused its discretion by simply guessing at a depreciation value. It should have awarded nominal damages for those items for which it could not determine the correct value from the evidence.

RETROACTIVITY

Miller v. Alabama's rule that a juvenile committing a homicide may not be automatically sentenced to LWOP applies retroactively to case on collateral review.

[Montgomery v. Louisiana, 136 S.Ct. 718 \(2016\) \(Kennedy\)](#). In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Court held that the Eighth Amendment's ban against cruel and unusual punishment requires that, before a juvenile may be sentenced to life in prison without the possibility of parole for committing a homicide offense, a judge or jury must give "consideration [to] the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." By a 6-3 vote, the Court held that the rule announced in *Miller* is a substantive rule that applies retroactively to cases on collateral review. The Court reasoned that *Miller* did more than establish new procedural requirements; it "determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender'" and thereby "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status.'" As a threshold matter, the Court held that it had jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller*. That is because, held the Court, "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."

RIGHT TO COUNSEL

Asking whether Defendant had anything new to say the fourth time he asked for substitute counsel was an adequate inquiry into Defendant's dissatisfaction with appointed counsel under Pursifell.

[State v. Abelon, 2016 UT App 22 \(Pearce\)](#). Abelon, charged with having child pornography on all his electronic devices, didn't think his appointed counsel was doing enough. He asked the trial court four times for new appointed counsel. Before denying the first three requests, the trial court listened to Abelon's complaint. It then listened to appointed counsel and appointed counsel's supervisor about all the stuff counsel was doing. The fourth time Abelon asked, the trial court asked if anything new had come up since the last three requests. Abelon said no. After hearing from appointed counsel again about how prepared he was for trial, court again denied the request for substitute counsel. Abelon was convicted and on appeal complained that the trial court should have given him new counsel.

Held: Affirmed. Under *State v. Pursifell*, 746 P.2d 270 (Utah App. 1987), when a defendant expresses dissatisfaction with his appointed counsel, the trial court "must make some reasonable, non-suggestive" inquiry to determine whether the defendant's "relationship with his appointed attorney has deteriorated to the point that the Sixth Amendment requires

appointment of substitute counsel.” The trial court here did just that the first three times. Thus, asking Abelon the fourth time whether he had anything new, was an adequate inquiry under *Pursifell*.

Trial court properly denied defendant’s request, filed on the first day of trial, to find him indigent and to appoint his current privately retained counsel so that taxpayers could foot the bill.

State v. Hawkins, 2016 UT App 9 (Voros). Hawkins, charged with two counts of communications fraud, had privately retained counsel. On the first day of trial, Hawkins moved to have the court find him indigent and to appoint his current counsel. Hawkins’ counsel represented, however, that no matter the court’s decision, he would continue to represent Hawkins at trial. The court denied the motion after trial.

Held: Affirmed. Utah’s Indigent Defense Act (IDA) provides that a court may not appoint a noncontracting defense attorney absent a “compelling reason.” Hawkins proffered two reasons: (1) an alleged conflict of interest between him and LDA (the contracting entity) because LDA was representing his co-defendants; and (2) because trial was scheduled to start that day, LDA would not have time to come up to speed. Neither reason was compelling. On the first reason, LDA’s contract with the county had a provision for non-LDA conflict contract counsel when LDA had a conflict of interest. On the second reason, the trial court properly rejected it as “a manufactured crisis.” A defendant can’t withhold his motion until the first day of trial and then claim as a compelling reason that no one else has time to come up to speed. Hawkins should have—and could have—filed his motion earlier.

SIXTH AMENDMENT—CONFRONTATION

Statement of a three-year-old to his teacher about who caused bruises on his face was not testimonial.

Ohio v. Clark, 135 S.Ct. 2173 (2015) (Alito). Without dissent, the Court held that a three-year-old child’s statement to his teacher stating who caused the bruises on his face was not testimonial, which means the introduction of that statement did not violate the Confrontation Clause. The Court declined to adopt a categorical rule that statements made to persons who are not law enforcement officers are *never* testimonial; but it agreed that “such statements are less likely to be testimonial.” The Court went on to conclude that the statement here was not testimonial because its primary purpose was not to create evidence for trial, which is “a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.” It failed the “primary purpose” test, held the Court, because the teachers were concerned about possible child abuse; the exchange “was informal and spontaneous”; “it is extremely unlikely that a 3-year-old child . . . would intend his statements to be a substitute for trial testimony”; and history does not support exclusion of the statements.

SIXTH AMENDMENT - INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel not ineffective in 1995 trial for not finding a report that State's bullet expert had coauthored in 1991 that "presaged the flaws" in Comparative Bulled Lead Analysis.

[Maryland v. Kulbicki, 136 S.Ct. 2 \(2015\)](#). Through a *per curiam* opinion, the Court unanimously reversed a Maryland Court of Appeals decision which had held that respondent Kulbicki's defense counsel was unconstitutionally ineffective at his trial. At the 1995 trial, the state called an expert on Comparative Bullet Lead Analysis (CBLA), Agent Peele, who testified that "the composition of elements in the molten lead of a bullet fragment found in Kulbicki's trunk matched the composition of lead in a bullet fragment removed from the victim's brain," which suggested they were "two pieces of the same bullet." The Maryland Court of Appeals, in 2006, faulted defense counsel for not finding a report Agent Peele had coauthored in 1991 that "presaged the flaws in CBLA evidence." Reversing, the U.S. Supreme Court noted that the validity of CBLA evidence was "widely accepted" at the time of the 1995 trial; courts regularly admitted CBLA evidence until 2003; "even the 1991 report itself did not question the validity of CBLA"; and "there is no reason to believe that a diligent search would even have discovered the supposedly critical report."

No clearly established law holds that defense counsel's absence from courtroom for ten minutes during testimony of co-defendant amounts to ineffective assistance of counsel

[Woods v. Donald, 135 S.Ct. 1372 \(2015\)](#). Through a *per curiam* opinion, the Court unanimously reversed a Sixth Circuit decision that had granted habeas relief to respondent on the ground that his attorney provided *per se* ineffective assistance of counsel under *United States v. Cronin*, 466 U.S. 648 (1984). Counsel was absent for about 10 minutes while a codefendant was testifying about a matter that was irrelevant under respondent's theory of the case. The Court stated that none of its precedents clearly established that *Cronin* applies in that context — and therefore held that habeas relief under that theory is barred by 28 U.S.C. §2254(d)(1).

Having sex with your client may violate the Utah Rules of Professional Conduct, but it doesn't create a *per se* conflict of interest for 6th Amendment purposes.

[State v. Cheek, 2015 UT App 243 \(Orme\)](#). Haley Cheek, charged with several serious felonies, claimed that she had a sexual relationship with her defense attorney which she broke off on the eve of trial. Cheek claimed that this created an actual conflict of interest under the Sixth Amendment and that prejudice was therefore presumed. Cheek's attorney denied the relationship. The trial court assumed, without deciding, that the two had a sexual relationship, but that it did not affect counsel's trial performance.

Held: Affirmed. To prove a 6th Amendment conflict of interest, a defendant must show (1) an actual conflict of interest that (2) actually affected the adequacy of counsel's representation. To prove an actual conflict, defendant must show that counsel was required to make a choice advancing his own interests to the detriment of his client's interests. While a sexual relationship with a client may be a proper subject for professional discipline, it does not *per se* establish an actual conflict of interest. Here, nothing showed that counsel was required to advance his interests to the detriment of Cheek's interests. And Cheek failed to identify how the

relationship and break-up adversely affected the quality of counsel's actual representation at trial.

Defense counsel's decision not to object to expert was sound trial strategy.

[State v. Gray, 2015 UT App 106 \(Orme\)](#). James Gray was charged with repeated sexually abusing a young girl over a period of six years, from November 1991 to October 1997. At trial, the State called a pediatrician who had interviewed and examined the victim to testify about her findings. On cross examination, defense counsel pointed out that the examination was unremarkable and that she had largely taken the victim at her word. The pediatrician replied that the victim "interviewed honestly" and that she "took her word and added to that the behavioral changes that existed." Defense counsel did not object to the response. Bingham was convicted and appealed, claiming that his counsel was ineffective for not objecting to the pediatrician's testimony.

Held: Affirmed. Counsel might reasonably have strategized to use the expert to point out the weaknesses in the State's case, namely, that the case rested largely on the testimony of the victim and was uncorroborated by any physical evidence.

Trial counsel's decision not to object to testimony that defendant was a drug addicted, was interested in threesomes and bestiality, and had a urination fetish was sound trial strategy.

[State v. Isom, 2015 UT App 160 \(Voros\)](#). Jace Robert Isom was charged with multiple counts of child sex abuse for engaging in three-ways with his girlfriend and his girlfriend's five-year-old daughter. During trial, Isom's friend testified that Isom was a drug addict and was interest in threesomes, bestiality, and urination. The friend also testified that Isom invited him to participate in a threesome with his girlfriend, showed him pictures of his girlfriend having sex with a dog, and admitted to having a threesome with his girlfriend and the girlfriend's five-year-old daughter. Trial counsel did not object to any of this testimony. Later, trial counsel called Isom and his girlfriend to refute the testimony. The jury convicted, and Isom appeal, claiming that he attorney was ineffective for not objecting to the testimony.

Held: Affirmed. Counsel employed a reasonable trial strategy of impeaching the friend by allowing the friend to testify and then arguing that the testimony was so shocking that the jury should not believe him and disregard all of his testimony, including his testimony that Isom had admitted to child abuse.

SIXTH AMENDMENT – SPEEDY TRIAL

Because defendant expressly waived his speedy trial right three times in the first 18 months of his prosecution, the relevant time for calculating any length of delay began when he first asserted his right to a speedy trial.

[State v. Hawkins, 2016 UT App 9 \(Voros\)](#). Hawkins was arrested and charged in 2009 with communications fraud. During the first 18 months of his prosecution, he expressly waived his right to a speedy trial three times, the last time in December 2010. During the next 18 months, Hawkins contributed to delays by filing several motions. Hawkins first asserted his right to a

speedy trial in May 2012, after the State moved to continue trial because a material out-of-state witness was unavailable. The trial court granted the State’s motion and trial was held seven months later.

Held: Affirmed. The initial three-year delay could not be included in the speedy trial calculation, where Hawkins expressly waived his speedy trial three times during the first 18 months and where, during the next 18 months Hawkins both acquiesced in and contributed to the delay. Thus, the relevant period for calculating any delay began when Hawkins first asserted his right to a speedy trial, after the State sought a continuance based on the unavailability of a material witness. The seven-month delay from Hawkins’ assertion and trial was not presumptively prejudicial and therefore did not require further inquiry into the other *Barker v. Wingo* factors.

STATUTE OF LIMITATIONS

Repealing a limitations period and enacting a longer one operates to extend, not expire, the initial limitations period.

[Lucero v. State, 2016 UT App 50 \(Bench\) \(mem\)](#). In 2011, Lucero pled guilty child sex abuse charges for conduct committed between 1999 and 2000 and in 2003. When Lucero committed his conduct, the statute of limitations was “within four years after the report of the offense to a law enforcement agency.” Lucero’s abuse was first reported to law enforcement in 2010. But in 2008, two years earlier, the legislature repealed the applicable statute of limitations and enacted a new one which allowed the State to commence a prosecution for Lucero’s crimes “at any time.” Lucero filed a post-conviction petition alleging that his attorney was ineffective for not raising a statute of limitations defense to his prosecution. According to Lucero once the initial statute of limitations was repealed, any right to prosecute under it was “extinguished,” which made it so that the new statute did not extend the limitations period. The district court rejected the argument and Lucero appealed the denial of his post-conviction petition.

Held: Affirmed. Statutory amendments enlarging a statute of limitations period will extend the limitations period only if the amendment goes into effect before the previously applicable statute of limitations has run. The court of appeals rejected Lucero’s “questionable assertion” that the repeal and reenactment of the initial statute expired, rather than extended, the limitations period. And here the amendments became effective before the limitations period had expired—let alone been triggered—because the crimes were not reported to law enforcement before the repeal of the earlier statute. Counsel therefore was not ineffective.

STATUTORY CONSTRUCTION

The rule of last antecedent beats out the series-qualifier canon; the rule of lenity doesn’t apply because the statutory provision wasn’t hopelessly ambiguous.

[Lockhart v. United States, 136 S.Ct. 958 \(Sotomayor\)](#). Under 18 U.S.C. §2252(b)(2), a district court must impose a 10-year mandatory-minimum sentence if a defendant convicted of possessing child pornography “has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct *involving a minor or ward*”

(emphasis added). By a 6-2 vote, the Court held that the phrase “involving a minor or ward” modifies only “abusive sexual conduct” — meaning that the provision’s mandatory-minimum sentence is triggered by a prior conviction under New York law for sexual abuse involving an *adult* victim. The Court reasoned that the “rule of the last antecedent” — under which “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows” — applies and is “fortifie[d]” by the statutory context. The Court declined to apply the rule of lenity because the provision was not hopelessly ambiguous.

SUFFICIENCY OF THE EVIDENCE

Five-year-old sex abuse victim’s testimony was not apparently false.

[State v. Kamrowski, 2015 UT App 75 \(Christiansen\)](#). Richard Kamrowski was charged with aggravated sexual abuse of a child after a five-year-old girl accused him of touching her. At trial, the victim said several things that were inconsistent with her testimony at a preliminary hearing, including whether she ever fell asleep with the television on, whether Kamrowski woke her to turn off the television or turned it off himself, whether he entered the bedroom with a flashlight or not, whether her eyes were open or closed during the abuse, and how many times Kamrowski abused her. The jury convicted Kamrowski, and he appealed.

Held: Affirmed. Courts may disregard testimony only when it is inherently improbable and thus apparently false. While the victim’s testimony in this case had some inconsistencies, they related only to peripheral issues and not to the abuse itself.

On denial of directed verdict motion made at the close of the prosecution’s case, an appellate court reviews the entire record, including any evidence adduced in the defense case; notwithstanding evidence that the victim was knock-down drunk during the crime, the evidence was sufficient to support an aggravated assault conviction.

[State v. McCallie, 2016 UT App 4 \(Voros\)](#). After a night of drinking and card-playing, McCallie insulted his landlady, the victim’s aunt. The victim demanded that McCallie apologize and McCallie refused. According to the victim, McCallie then pulled a gun out, cocked the hammer, and pointed the gun in the victim’s face and said, “How about I just f—in’ kill you?” The victim and McCallie struggled over the gun, resulting in a non-fatal gunshot wound to the victim’s abdomen. A jury convicted McCallie of aggravated assault, but acquitted him discharge of a firearm. On appeal, McCallie argued that the evidence was insufficient to support the assault conviction.

Held: Affirmed. As a threshold matter, an appellate court reviews the entire record on appeal from the denial of a directed verdict motion made at the end of the State’s case in chief. The fact that the victim had a BAC of .31 the night of the assault went to the victim’s credibility, which the jury gets to weigh. And the victim’s testimony here—that McCallie pointed a gun in his face and threatened to kill him—if believed was sufficient to find McCallie guilty of aggravated assault.

When reviewing the denial of a directed verdict motion, the court is bound by the statutes establishing and defining the offense, not by erroneous jury-instruction definitions.

[State v. Bossert, 2015 UT App 275 \(Orme\)](#). Bossert was charged with child endangerment for exposing his 10-year-old son to drugs. The child endangerment statute requires the State to prove that the defendant intentionally or knowingly “caused” or “permitted” a child to be exposed to drugs. The district court denied Bossert’s directed verdict motion on those elements. The subsequent jury instructions gave a very crabbed definition of “caused” or “permitted.” Using the jury instruction definitions, Bossert argued on appeal that the trial court should have directed verdict.

Held: In reviewing whether there is sufficient evidence to send a case to the jury, the appellate court looks to the statutes setting forth and defining the elements. It is not bound by subsequently given erroneous jury instructions.

Evidence was sufficient to show that the defendant constructively possessed a stolen driver’s license where it was found in several documents bearing defendant’s name in a truck most recently occupied by defendant.

[State v. Clark, 2015 UT App 289 \(Pearce\)](#). The victim’s stolen driver’s license was found on the passenger side of a truck most recently occupied by Clark. The license was “stacked together” with a court document bearing Clark’s name and accompanied by a paystub in the victim’s name. Clark had used a false identification in the past. A jury found Clark guilty of theft by receiving stolen property. Clark appealed, challenging the sufficiency of the evidence to tie her to stolen license.

Held: Affirmed. The license was intermingled with documents bearing Clark’s name, the paystub suggested that the license had been used to obtain and cash a paycheck in the victim’s name, there was no evidence that anyone besides Clark or her male associate had ever occupied the truck or possess the stolen license, the jury could reasonably infer that Clark—a woman—was more likely than her male associate to have used a woman’s stolen driver’s license, and Clark had used a false identification in the past. Taken together, the evidence was sufficient to show that Clark constructively possessed the stolen license.

Running stop signs and red lights, cutting off cars, and leading police on a high-speed chase suffices to prove reckless endangerment and reckless driving. And having a license “revoked for alcohol” sufficed to show a revocation stemming from a DUI.

[State v. Lorenzo, 2015 UT App 189 \(Voros\)](#). Lorenzo was pulled over for warrants and license violations. During the stop, the officer noted the smell of alcohol. Lorenzo took off and led police on a high-speed chase through Cedar City. Lorenzo’s two young daughters were in the car at the time. He was later convicted of evading, reckless endangerment, reckless driving, and a license violation. On appeal, he argued that notwithstanding his many traffic violations, he did not endanger his daughters. He also argued that the

Held: Affirmed, for obvious reasons, on the reckless counts. On the license count, the officer testified that Lorenzo’s driver license was revoked for alcohol, which in the officer’s experience

meant a prior DUI conviction. In the absence of evidence to the contrary, it was reasonable for the court to infer that the alcohol-related revocation was based on a prior DUI conviction.

UNIFORM OPERATION OF LAWS - UTAH CONSTITUTION

It violates the uniform operation of laws provision to make it a 2nd-degree felony to cause death or serious bodily injury while driving with a measurable amount of a controlled substance, when automobile homicide or DUI with serious bodily injury is only a 3rd-degree felony.

[State v. Ainsworth, 2016 UT App 2 \(Bench\)](#). Ainsworth, with meth in his blood, drove head-on into a car, killing an 18-month-old baby and seriously injuring her parents. Ainsworth was charged with three counts of driving with a measurable amount of a controlled substance and negligently causing death or serious bodily injury, all second-degree felonies. Ainsworth unsuccessfully argued in the trial court that it violated the uniform operation of laws provision to convict him of second-degree felonies because people charged with automobile homicide or DUI with causing serious bodily injury only get third-degree felonies for basically doing the same thing.

Held: Reversed and remanded for the trial court to enter convictions for third degree felonies. There's no rational basis for punishing individuals who have "any measurable amount" of controlled substance in their bodies more harshly than individuals who have an incapacitating amount of the substance in their bodies. **State has filed cert petition.**