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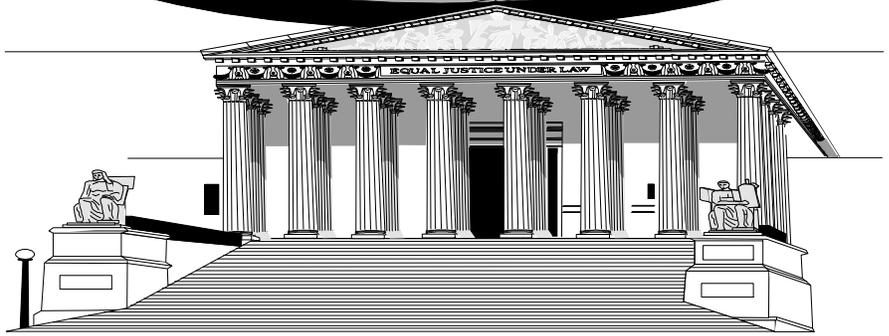
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UTAH SUPREME COURT

Under Utah Code section 76-10-1206, ordinary negligence is an appropriate standard to establish culpability for the crime of dealing in material harmful to minors.

Defendant Haltom, the co-owner of Dr. John's Lingerie and Novelty Store, was caught selling a pornographic tape to a seventeen-year-old girl. Haltom was convicted of dealing in material harmful to a minor, a third degree felony. Under Utah Code section 76-10-1206, a person is guilty of this crime if he "fail[s] to exercise reasonable care in ascertaining the proper age of a minor." The Utah Court of Appeals affirmed Haltom's conviction, interpreting "reasonable care" to be synonymous with ordinary negligence. The Utah Supreme Court granted certiorari to consider whether the court of appeals was correct when it evaluated Mr. Haltom's conduct against the standard of ordinary negligence. The

Court concluded that it was. Although Haltom argued that the State cannot brand a person a felon for an act of ordinary negligence, the Court found that there were several reasons why the State could, in fact, do just that. First, the Court found that the Utah Legislature was within its power to specify the "reasonable care" standard, since the legislature has the discretion to specify a mental state different from the most commonly used ones like knowing, reckless, or criminal negligence, under Utah Code section 76-2-101. The Court also clarified that the ordinary negligence standard is not limited to civil cases, but that it applies to criminal cases as well. Finally, the Court specified that the "United States Supreme Court has imposed no constitutional impediment to making merely negligent conduct criminal." Thus, the decision of the Court of Appeals is affirmed. *State v. Haltom*, No. 20050815 (February 23, 2007).

see **BRIEFS** on page 2



BRIEFS continued from page 1

A Permanency Order issued from a juvenile court is final for purposes of appellate review if it ends the juvenile proceedings, and leaves no questions open for further judicial action.

J.D.K. (“Father”) and H.M. (“Mother”) have eleven children together. Due to multiple instances of neglect and abuse, the State filed a petition involving the first ten children of Father and Mother. In the course of these proceedings, all ten children were removed, while the infant, L.K., remained with Mother. Initially, the juvenile court set the permanency goal for all of the children in DCFS custody as reunification with Mother, and ordered reunification services. In an April Permanency Hearing, Judge Valdez ordered a ninety-day extension of reunification services for



Mother, and ordered that supervised visitation between the Mother and children begin immediately. Because criminal charges had been filed against Judge Valdez’s son in connection with an altercation that occurred outside the courthouse between the son and protestors during the April Permanency Hearing, Judge Lindsley was assigned to the case in Judge Valdez’s place. Judge Lindsley held a July Permanency Hearing, during which she entered a written “Permanency Order” for all but two of the children to be returned to their

mother. The Utah Office of Guardian ad Litem (“GAL”) appealed the July Permanency Order to the Utah Court of Appeals, who certified the case to the Utah Supreme Court.

The Court was faced with three main issues: (1) whether the permanency order was final for purposes of appellate review; (2) whether the juvenile court applied the correct legal standard in deciding whether to return the children to Mother’s custody; and (3) whether the juvenile court committed

reversible error in applying rule 20A(h)(1) of the Utah Rules of Juvenile Procedure to exclude as untimely testimony from the GAL’s expert witness, Dr. Goldsmith. The Court ultimately affirmed the decisions of the juvenile court, holding first that the permanency order returning the children to Mother’s custody was final for purposes of appellate review, since the order returning children to the custody of their mother was one that ended the juvenile proceedings, “leaving no question open for further judicial action.” Second, the Court held that the juvenile court appropriately applied the safety standard provided in Utah Code section 78-3a-312(2)(a) during the July Permanency Hearing, since Judge Lindsley reviewed transcripts of the April Permanency Hearing, and heard lengthy testimony from both the office of GAL and the children regarding their safety. Finally, the Court held that while the juvenile court misapplied rule 20A(h)(1) of the Utah Rules of Juvenile Procedure in excluding the expert testimony offered by GAL, the error was harmless, and so should not warrant a reversal of juvenile court. *State ex rel. S.M.*, No. 20051030 (February 23, 2007).

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CASE SUMMARY TOPICS

UTAH SUPREME COURT

State v. Haltom--Culpability; Ordinary Negligence

State ex. Rel. S.M.--Juvenile Permanency Orders

UTAH COURT OF APPEALS

West Valley City v. Fieeiki--Robertson Test

State v. Levin--Custody during Interrogation

State v. Anderson--Concurrent/Consecutive Sentences

S.K. and J.K. v. State--Notice to Pay Child Support

TENTH CIRCUIT

United States v. Brakeman--Search Warrants

Prairie Band Potawatomi Nation v. Wagon--Injunctions

United States v. Leon--Waiver of Right to Appeal

Cortez v. McCauley--Qualified Immunity

United States v. Willis--Intent to Defraud

United States v. Torres-Laranega--Jury Instructions

Anderson v. Sirmons--Ineffective Assistance of Counsel

ANNOUNCING UPC'S UTAH PROSECUTORS' BRIEF BANK

Utah Prosecution Council is pleased to announce that, at long last, a Utah prosecutors' brief bank has been established. A little over a year ago the New York Prosecutors Training Institute (NYPTI) made its brief bank software available to the National District Attorneys Association (NDAA) with the goal of establishing what, it hopes, will become a national prosecutors' brief bank. UPC then approached Fred Voros, Chief of the Appeals Division of the Utah Attorney General's Office. Fred very generously allowed UPC access to his division's extensive bank of briefs, which goes back a number of years and covers virtually every criminal law related issue. For the past several months, Peter Leavitt, one of UPC's law clerks, has had the unenviable task of going through Appeals' briefs and preparing them for inclusion in the brief bank. At this point, Appeals Division briefs from the past four years loaded into the bank, with work continuing. Now, thanks to the work and generosity of all of the above, and the commitment by the Prosecution Council of funding for the project, a Utah section of the NDAA/NYPTI brief bank is available to all Utah prosecutors. Here are the details.

Purpose and Use of the Brief Bank

The purpose of the brief bank is to provide an easy to use data base for the benefit of prosecutors state-wide. The brief bank is organized by categories and subcategories. Each category represents a broad area of law or a general stage in the criminal process. The subcategories within each category more specifically pinpoint particular issues. For example, the category of *Evidentiary Issues* contains subcategories such as *Hearsay*, *Character Evidence*, and *Expert Testimony*. The text you retrieve contains the argument section from the appellate brief for that specific issue of the case. The argument section has not been edited or altered and appears in text format as it was filed with the court.

In order to facilitate your further research, many of the cases provide the case citation (in public domain format) as well as the web address to locate the brief on the state court website (note the web address is not a link because the brief is run from a secured site). The citation is provided to allow you to find the courts opinion in that particular case. For the briefs that do not list a case citation or web address, the text of each brief contains the first and last name of the defendant in that case. This is to aid in finding what is probably an unpublished court opinion, through your own additional research.

The brief bank is not intended to substitute for original research in current sources of authority. Each brief provides a clear and concise argument with relevant legal support. However, because current case law is constantly evolving, you should always conduct further research to insure you are citing good law.

Accessing the Brief Bank

Accessing the brief bank is a two step process. First, you must receive a security certificate from NYPTI. To obtain a security certificate, fill out the form below entitled "Request for NDAA Brief Bank User Account" and return it to:

Mark Nash
Utah Prosecution Council
P O Box 140841
Salt Lake City UT 84114-0841
Or Fax to: (801) 366-0204.

See **BRIEF BANK** on page 4

BRIEF BANK *continued from page 3*

The purpose of having the forms sent to Prosecution Council is for us to confirm to NYPTI that the applicant is, indeed, a prosecutor in Utah. NDAA and NYPTI are very adamant that the brief bank be limited to currently active prosecutors. After UPC has reviewed and approved the application, you will be contacted by a technician from NYPTI who will provide your username and password, and will walk you through the certification process. Once your security certification is complete, and you have your username and password, you are ready to access the brief bank.

IMPORTANT!! It is vital that you complete the certification process on the computer you intent to use for your research. ONLY the computer you use for certification can thereafter be used to access the brief bank. Additionally, you may only access the brief bank using <https://kemmlerandco.com>. Note the “s” in the <https://> portion of the address. This creates the secure connection and is necessary to access the NDAA website.

It is important to note that all portions of the NDAA/NYPTI brief bank will be open to any prosecutor who has access rights. Therefore, while the Utah section of the brief bank, containing briefs from our Appeals Division, may prove most helpful on most issues, users will find briefs from a number of states on a variety of issues in the brief bank.

Finally, please note that the original NDAA/NYPTI brief bank was created exclusively for briefs of capital homicide cases. As such you will notice that the title of the bank you will use is *Homicide Prosecutions*. Despite this label, the Utah section of the brief bank contains issues from all areas of criminal law, and is not limited to homicide prosecutions. As NDAA/NYPTI make multiple bank titles available we will add those titles to the brief bank. For the time being, please search the *Homicide Prosecutions* bank for all criminal law related issues.

UPC, in cooperation with the above named entities, is excited to be able to provide this service to Utah Prosecutors. We believe that the brief bank will be a valuable asset that will expedite the research process in each case that you prosecute. The brief bank will continue to grow as we are able to review and index more and more cases. In the near future the Council will be determining a procedure for adding briefs from offices other than the AG’s Appeals Division. For now, the brief bank is ready to use as soon as you have completed the security certification.

Sincerely,

Peter D. Leavitt
Utah Prosecution Council

Request for NDAA Brief Bank User Account

First Name: _____ **Last Name:** _____

County: _____ **Phone:** _____

State: _____

Mailing Address: _____

E-Mail: _____

Please check and sign below.

_____ I hereby certify that I am a (circle one) **trial** or **appellate** prosecutor or
work in the office of a trial or appellate prosecutor.

Signed

Date

UPON COMPLETION SEND TO MARK NASH · UTAH PROSECUTION COUNCIL,
P.O. BOX 140841, SALT LAKE CITY, UT 84114-0841 · OR VIA FAX: (801) 366-0204



BRIEFS continued from page 2

UTAH COURT OF APPEALS

The *Robertson* two-tier analysis is the appropriate test to apply in determining whether an accused's statements were made in the course of plea discussions for the purposes of exclusion under Utah Rule of Evidence 410.

Defendant Fieeiki, a Utah Highway Patrol officer, was involved in a domestic dispute with his wife. His wife called the police, and Levin was arrested. Fearing the effects of this domestic violence charge on his job, Levin retained defense counsel. While he was not yet in custody and had not yet been charged with any crimes related to the domestic violence incident, Levin willingly attended a meeting with defense counsel, a city prosecutor, and an investigator employed by the city at the City Attorney's office. The purpose of the meeting is disputed; however, during this meeting, Fieeiki made several incriminating statements. At no point during the meeting were plea negotiations discussed or entered into. The city eventually charged Fieeiki with domestic assault. Fieeiki moved to suppress the incriminating statements made during the voluntary meeting, alleging that these statements were inadmissible because they were made in the course of plea discussions. The trial court denied Fieeiki's motion, and he was convicted by a jury of simple assault, a class B misdemeanor. On appeal, the Utah Court of Appeals affirmed



the district court's denial of Fieeiki's motion to suppress. According to the Court, for statements to be inadmissible under Utah Rule of Evidence 410, the statements must be made "in the course of plea discussions." To determine if the statements were made in the course of plea discussions, the Court employed the federal *Robertson* test, which has two parts: (1) whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and (2) whether the accused's expectation was reasonable given the totality of the objective circumstances. In this case, the Court found that the transcript of the meeting did not indicate in any way that Fieeiki expected to negotiate a plea at the

time of the discussion. Instead, the prosecutor had not yet filed any charges against Fieeiki for which he could even enter into a plea agreement; second, defense counsel indicated that Fieeiki did not need to be read his *Miranda* rights before the meeting, since he was not in custody; and finally, Fieeiki's statements were recorded, indicating that they might later be used as evidence by the prosecution. Since the Court found that the first prong of the *Robertson* test was unsatisfied, it did not address the second prong; but affirmed Fieeiki's conviction. *West Valley City v. Fieeiki*, No. 20050459-CA (February 23, 2007).

In determining whether an accused is in custody, the factors of the interrogation site, the presence of indicia of arrest, and the length of the interrogation may outweigh the single factor that the investigation focused on the accused.

Defendant Levin was in the driver's seat of a convertible with two other

men, parked on the road in a rural area near Utah Lake, when an sheriff's deputy noticed the vehicle had expired tags. Seeing several open containers of alcohol in plain view, the deputy searched the vehicle for more open containers, finding drug paraphernalia and marijuana. He called in two certified drug recognition experts, one of whom informed him that he believed Levin was under the influence of drugs. At this point the deputy pulled Levin aside and said "There's no doubt in my mind that you've been smoking marijuana," to which Levin responded that he'd "taken a couple of hits," using a pipe the officers had not located. The three men were then issued a citation and allowed to depart. As the convertible drove away, however, one of the officers noticed a pipe that had been located directly underneath the vehicle. The officers stopped the car, and asked the men if that was the pipe they had used to smoke. One of the men confirmed that it was, and drug charges were brought against Levin. At trial, Levin moved to suppress evidence of the incriminating statements he had made to the deputy, arguing that despite being subjected to custodial interrogation, he had not been given the required *Miranda* warning. The trial court denied the motion, and Levin was convicted for possession or use of marijuana with a prior conviction, and possession of drug paraphernalia. The Utah Court of Appeals affirmed the decision of the trial court, but Levin appealed this decision to the Supreme Court, which held that the Court of Appeals applied the improper standard of review as to the trial court's determination of custodial interrogation. As a result, the Court of Appeals examined for a second time Levin's claim that he was subjected to custodial interrogation at the time he made incriminating statements. Applying the Supreme

On the Lighter Side



HIGHWAY PATROL HUMOR

In most of the United States, there is a policy of checking on any stalled vehicle on the highway when the temperatures drop down to single digits or below.

About 3 AM, one very cold morning, Trooper Allan Nixon (Oklahoma Highway Patrol) responded to a call that there was a car off the shoulder of the road outside Shattuck, OK. He located the car,



stuck in deep snow, and with the engine still running. Pulling in behind the car with his emergency lights on, the Trooper walked to the driver's door to find an older man passed out behind the wheel with a nearly empty vodka bottle on the seat beside him.

The driver came awake when the Trooper tapped on the window. Seeing the rotating lights in his rearview mirror, and the State Trooper standing next to his car, the man panicked. He jerked the gearshift into "drive" and hit the gas. The car's speedometer was showing 20-30-40 and then 50 mph, but it was still stuck in the snow, wheels spinning.

Trooper Nixon, having a sense of humor, began running in place next to the speeding, but still stationary

car. The driver was totally freaked, thinking the Trooper was actually keeping up with him.

This goes on for about 30 seconds, then the Trooper yelled at the man to "Pull over!"

The man obeyed, turned his wheel and stopped the engine.

Needless to say, the man from Dumas, Texas was arrested and is probably still shaking his head over the State Trooper in Oklahoma who could run 50 miles per hour.

Who says Troopers don't have a sense of humor?

Excerpts from Jerry Bruckheimer's *et cetera* column in the *Texas Bar Journal*, Jan 2007, Vol. 70, No. 1; and Feb 2007, Vol. 70, No. 2

AND HIS NICKNAME IS LUCKY

Judge **Burt Carnes** of Georgetown (368th District Court) provided this contribution and the title. It's an excerpt from a recent bench trial in his court that was prosecuted by **Lindsey Roberts** and defended by **Steve Copenhaver**...

Q: You had talked about your disabilities some. You know, I don't want to get into a large medical history. But what type of disabilities do you currently have?

A: Well, I started off with problems with my left leg, constant pain and numbness. And finally they detected a large bone tumor. And when they removed the bone tumor, I lost my tibia as well with it.

And then I pretty much felt like I was recovering from that. But I was at a red light, and a drunk driver in a Ford F-150 pickup truck hit me head-on at 150 miles per hour...and the impact ruptured my disc, and I became paralyzed for nine



months from the waist down. And I'm partially paralyzed still. But I didn't ever file for disability then because I'm trained in martial arts, 44 years, and I have my pride. So I just continued trying to recover.

And I was snow skiing in Santa Fe, and my ski didn't come off, and I lost all four ligaments, my cruciates, my posterior, my anterior; my cartilage, and I lost my quadriceps as well.

And then at that point I was pretty well fully disabled. But unfortunately, after that I was shot in the head three times, and my right arm was shot. And the artery was severed, and two nerves are permanently damaged and my bone was shattered into fragments...

DOING VOIR DIRE

Judge **Vickers L. Cunningham** of Dallas (283rd District Court) writes that he was "in the middle of capital murder jury selection on the fifth of the 'Texas 7' death penalty cases. During individual voir dire, a prospective juror was being questioned by the prosecutor about the answers the venireman provided in his written questionnaire":

Q: Just flipping through your questionnaire, I have got to ask you about this. We asked the question, "What is the first thing that comes to your mind when you think of

'prosecutor,'" and you said "liars."

A: I didn't know how to spell "manipulators."

Q: When we got down to the "defense lawyers," the next question, you said they were better liars.

A: Yes.

Judge Cunningham adds: "After the lawyers were able to understand his views a little better, the parties agreed to excuse him from jury duty on this case."

Prosecutor Profile

Troy S. Rawlings Davis County Attorney

Troy Rawlings can say he always knew he wanted to be a lawyer. His childhood career goal, he says, was to be a criminal defense attorney. Although Troy did not remain in criminal defense for his entire career, he is able to use his experiences in both criminal defense and in prosecution to his advantage in his new position as Davis County Attorney.

Born in Preston, Idaho, Troy spent his childhood in Kansas and moved to Bountiful, Utah for High School. He attended college at the University of Utah, working at U.P.S. “in the wee hours of the morning loading package cars” to pay for his education. Troy then spent three years in Alabama for law school, an experience he says he loved. After law school, Troy was a private practice solo practitioner. He then spent five years as a public defender in Davis County, and an additional seven years as a prosecutor.

When asked about why he “switched sides,” so to speak, Troy has an interesting perspective. He says, “I had no real ability to do anything but try to persuade as a defense attorney. As a prosecutor, however, you are in a position to really do justice and make decisions that impact lives in the direction you feel appropriate.”

In his role as a prosecutor, Troy is aware of the challenges, and also the rewards. With four children of his own, Troy is sensitive to the “emotional and family dynamics” often present in the cases he prosecutes. He remembers the disappointment of losing a jury trial on a child sex-offense case. He has also seen, first hand, “families ripped apart due to crime.” And yet, as a prosecutor, Troy feels that he can make a difference. The most important qualities of a good prosecutor, according to Troy, are “A sincere desire to do justice and get the right person with the proper charge and consequence based on all circumstances;” “being fair minded and not afraid to make a tough decision you feel appropriate, even if it will upset someone;” “upholding the Constitution and treating it, and the people you deal with, with dignity;” and, finally, “doing what is right, not just what may be legal.”

Through it all, Troy finds the most rewarding experiences to be the times “when a victim gets to feel justice was done to the degree appropriate, yet they find themselves able to find peace and forgiveness.” And as a prosecutor, Troy can be satisfied, knowing he has helped to bring about that peace.



Birthplace: Preston, Idaho

Undergrad: University of Utah

Year: 1991

Law School: Samford University in Birmingham, Alabama

Year: 1994

Childhood Career Goal: Criminal Defense Attorney

Last Book Read: *Hardy Boys Series*, with his sons--currently on book 21!

Favorite Movie: Braveheart

Favorite Singer: Billy Joel

Favorite Sports Team: Alabama for College Football, and BYU Locally

Favorite Quote: “Reach for the stars because even if you do not get one, you will not end up with a handful of mud, either.”



BRIEFS continued from page 6

Court's standard, the Court again held that Levin had not been in custody or subject to interrogation at the time the statements were made. The Utah Supreme Court has established four factors for "determining whether an accused who has not been formally arrested is in custody. They are: (1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation." In this case, the Court found that three of the four elements indicated that Levin was not in custody, since (a) no objective indicia of arrest, such as guns, locked doors, or handcuffs, were present; (b) the site of the interrogation was a public, open road; and (c) the length of the detention (over an hour) was a reasonable amount of time for officers to pursue their investigation. Although the Court found that the interrogation did focus somewhat on Levin, it also found that the other three other factors came together to "outweigh the single factor that the investigation had focused on the defendant," under the rule laid out in *Brandley*. Accordingly, the decision of the district court was, once more, affirmed. *State v. Levin*, No. 20030336-CA (March 1, 2007).

Under Utah Code section 76-3-401 (1)(b), it is appropriate for a court to decide whether the sentence for any felony offense(s) should be served concurrently or consecutively to another sentence being served at the time of the sentencing when a defendant is "already serving" that other sentence.

Defendant Anderson pleaded guilty to theft, and Judge Noel sentenced

him to a prison term not to exceed five terms. The judge then suspended the sentence and placed Anderson on probation for eighteen months, during which time Anderson pleaded guilty to two counts of aggravated robbery. As to the aggravated robbery charges, Judge Atherton sentenced Anderson to two concurrent indeterminate terms of at least six years imprisonment. Adult Probation and Parole filed an affidavit alleging that Anderson violated the conditions of his probation when he was charged with aggravated robbery. This affidavit was filed with Judge Reese, who had replaced Judge Noel as the judge overseeing Anderson's probation for the initial theft charge. Judge Reese revoked Anderson's probation and imposed the original sentence of zero to five years, ordering the theft sentence to run consecutively to the aggravated robbery sentences. Anderson appealed Judge Reese's order, arguing that the judge lacked authority under Utah Code section 76-3-401 to order the theft sentence to run consecutively with the aggravated robbery sentences. The Utah Court of Appeals reviewed the statutory interpretation for correctness, and found that Judge Reese had the authority to reinstate the original sentence for the theft, and to order it to run consecutively with the aggravated robbery sentences. According to the Court, while Utah Code section 76-3-401(1) (b) does not authorize a court to order a sentence concurrent or consecutive to another sentence that has not yet been both imposed and executed, the statute does allow a court to order a sentence concurrent or consecutive to another sen-

tence that has already been both imposed and executed. In this case, Anderson was serving his aggravated robbery sentences at the time Judge Reese sought to execute the suspended theft sentence. Thus, Judge Reese, and not Judge Atherton, was required to determine whether that theft sentence would, in fact, run concurrently or consecutively to the aggravated robbery sentences. The decision of Judge Reese was affirmed. *State v. Anderson*, No. 20041095-CA (March 1, 2007).

Under Utah Code section 78-3a-906, notice of obligation to pay child support is satisfied when a juvenile court's decision to require payment is made on record at a court hearing.

Minor L.N. was the legal ward of S.K. and J.K., her paternal Grandparents. In 2005, the Grandparents placed L.N. in the care of family friend N.Y., due to L.N.'s "behavioral problems." The Grandparents intended for N.Y. to adopt L.N., but N.Y. also experienced problems raising L.N., and in 2006 she slapped L.N. in the face, splitting L.N.'s lip. L.N. was removed from N.Y.'s home and placed in protective custody of the Division of Child and Family Services (DCFS). At a shelter hearing regarding L.N., the juvenile court placed L.N. in the custody of DCFS for appropriate placement, and also ordered L.N.'s Grandparents to pay child support. The Grandparents appealed the juvenile court's child support order, asserting that the juvenile court did not provide them with oral and written notice of its child support order at the shelter hearing as required by Utah Code section 78-3a-906. The Utah Court of Appeals rejected this argument,





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holding that since the juvenile court made its child support decision on the record at the shelter hearing and since the Grandparents were served with the written notice required by the statute shortly after the shelter hearing, this oral and written “substantially fulfilled” the statute’s requirements. The decision of the juvenile court was affirmed. *S.K. and J.K. v. State (In re L.N.)*, No. 20060302-CA (March 1, 2007).

TENTH CIRCUIT

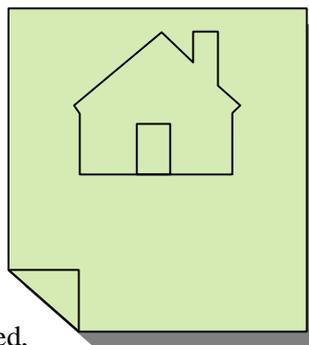
There is no Fourth Amendment violation when an affidavit to a search warrant contains a sufficiently accurate description of the property to be searched, and when a search of a person is confined to that which is reasonable to discover weapons.

A County Sheriff’s Deputy was responding to a call regarding a loud party when he observed a man running from the residence of the defendant, Brakeman. The man claimed Brakeman was shooting at him. The Deputy, familiar with Brakeman and his home, completed an affidavit for a search warrant, which contained the mailing address, and not the physical address, of Brakeman’s residence. The warrant was granted, and in the course of the search officers found a rifle, handgun, ammunition, and marijuana. Later, another officer pulled Brakeman over for a traffic violation. When Brakeman told officers he had a pocketknife on

his person, the officer conducted a pat-down search, and felt an object shaped like a knife. Although Brakeman told the officer the object was his glasses’ case, the officer opened the case to find baggies containing methamphetamine. A subsequent search of Brakeman and his vehicle turned up both a knife and a handgun. Brakeman was convicted of being a felon in possession of firearms and ammunition, one count of possession with intent to distribute less than five grams of methamphetamine, and one count of carrying a firearm during



and in relation to a drug-trafficking crime. On appeal, Brakeman claimed that the district court erred in not granting his motion to suppress the evidence used against him, since (1) the warrant used to search his residence was defective because its description of the place to be searched was not sufficiently particular, and (2) the officer’s pat-down search of his person impermissibly extended to the contents of a glasses case after it



was removed from his pocket. The Tenth Circuit affirmed Brakeman’s convictions. First, the Court held that the warrant was particular enough to satisfy the Fourth Amendment, since the description of the property “was sufficiently accurate that any ambiguity could be cured by [the Deputy’s] personal knowledge.” Second, the Court held that the search of the glasses’ case was reasonable, since police had reasonable suspicion

that it may have contained the knife Brakeman said he had, and since the search was “confined in scope to an intrusion reasonably designed to discover” weapons. *United States v. Brakeman*, No. 06-2139 (February 5, 2007).

A state court may grant a permanent injunction in favor of a Native American Tribe when the interests of the Tribe outweigh the interests of the defendants, and when the injunction does not mandate state participation in enforcement of federal statutes.

The plaintiff, Prairie Band Potawatomi Nation v. Wagon (the “Tribe”), filed an action in state court against several Kansas state officials seeking to have its motor vehicle registrations and titles recognized by the State. The state court granted an injunction in favor of the Tribe, and later permanently enjoined the defendants from further application and enforcement of Kansas’ motor vehicle and titling laws against plaintiff and any persons who operate or own a vehicle properly registered and titled pursuant to tribal law. The defendants appealed the state court’s decisions, alleging that the trial court (1) abused its discretion in issuing the permanent injunction; (2) erred in its ruling that defendants were not entitled to sovereign immunity; and (3) erred in ruling that the relief requested by the Tribe (a permanent injunction) did not violate the Tenth Amendment. The Court of Appeals for the Tenth Circuit affirmed the decisions of the state courts. First, the Court held that the *Hicks* case does not change the application of the *Bracker* balancing test in this case, and that district court appropriately found that the Tribe’s interest in self-governance by enacting and enforcing its own vehicle registration and titling laws outweighs

MORE ON *RODRIGUEZ*

BY JEFF GRAY, ASSISTANT ATTORNEY GENERAL

In *Rodriguez*, defendant made a left-hand turn into oncoming traffic and was broadsided by a school bus, critically injuring her and fatally injuring her friend, who was sitting in the front seat. By the time police arrived, both women were in the process of being transported to local hospitals—defendant to LDS Hospital and her friend to University of Utah Medical Center (UMC). Paramedics at the scene told officers that defendant's friend was not expected to survive. They also advised officers that both women smelled of alcohol. Police searched the vehicle and found a partially consumed bottle of Vodka in the friend's purse.

An officer was dispatched to the hospital to obtain a blood sample from defendant, but he mistakenly went to UMC first. When the officer finally arrived at LDS Hospital, he observed that defendant exhibited various signs of intoxication—her speech was slurred, her eyes were bloodshot, she smelled of alcohol, and she was uncooperative and belligerent. A technician arrived some 20 minutes later and drew a blood sample from an existing IV line. A blood analysis revealed a blood alcohol content nearly five times the legal limit (.39).

After defendant recovered from her injuries, she was charged with automobile homicide. She moved to suppress the blood alcohol evidence, arguing that officers should have obtained a warrant. When her motion was denied, defendant entered a conditional guilty plea and appealed. The court of appeals reversed, holding that exigent circumstances were not present to justify the warrantless blood draw.

On certiorari, the Utah Supreme Court reversed, upholding the trial court's order denying defendant's motion to suppress. In doing so, however, the Court rejected the State's argument that *Schmerber v. California*, 384 U.S. 757 (Utah 1966), created a *per se* exception to the warrant requirement based on the evanescent nature of blood-alcohol evidence alone. The Court held instead that the determination of exigent circumstances "depends on 'all of the circumstances surrounding the search and the nature of the search or seizure itself.'" *Rodriguez*, 2007 UT 15, ¶¶ 11, 51, 60 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). The Court held that in addition to the evanescent nature of blood alcohol evidence, courts should also consider the availability of a warrant, the continuing and ongoing nature of the investigation, the feasibility of other alternatives, the conduct of the officers, the seriousness of the offense, and the strength of the probable cause evidence. *Id.* at ¶¶ 11, 53-54, 60 (citing *City of Orem v. Henrie*, 868 P.2d 1384, 1392 (Utah App. 1994)). The Court concluded that in this case, "the seriousness of the accident coupled with the compelling evidence of Ms. Rodriguez's alcohol impairment" was sufficient to justify application of the exigent circumstances exception.

The Court emphasized, however, that it was "disturb[ed]" by what it characterized as the officers' "constitutional blind spot" in failing to consider the need and viability of obtaining a warrant. Noting changes in both the law and technology, the Court strongly cautioned law enforcement officials to take advantage of telephonic and other electronically communicated warrants ("e-warrants"), and voiced its expectation of a marked increase in the use of such warrants in the future.

2007 LEOJ (Law Enforcement Official & Judge) Course June 13, 14, and 15

The 2007 Law Enforcement Official and Judge (LEOJ) course will be held on June 13, 14, and 15 at Camp Williams in Bluffdale. This is the only course approved for issuance of a certificate of qualification under Utah Code Ann. section 53-5-711(2)(b). It is generally offered only one time each year. The course begins each day at 8 a.m. and concludes at 5 p.m. Participants must attend the full course in order to successfully complete the



requirements of section 53-5-711(2)(b). No prior experience with firearms is required. Participants must supply their own ammunition, handgun, and safety equipment. There is no charge to qualified participants.

Limited space is available. To register, or for more information, please send an email to KenWallentine@Utah.gov



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state interests in regulating vehicle registration. Second, the Court held that under *Ex Parte Young*, the defendants were not entitled to sovereign immunity, since they “have assisted or currently assist in giving effect to the law.” Finally, the Court held that the permanent injunction did not violate the Tenth Amendment, since the injunction does not mandate state participation in the enforcement of a federal statutory scheme. *Prairie Band Potawatomi Nation v. Wagon*, No. 03-3322 (March 25, 2005).

A waiver of a right to appeal will be enforced when the defendant knowingly and voluntarily enters the plea, and when enforcement of the waiver does not result in injustice.

Defendant Leon pleaded guilty to aiding and abetting the interstate

communication of a threat in violation of 18 U.S.C. § 875(c) and 18 U.S.C. § 2. His plea also included a waiver of his right to appeal his conviction and sentence. The district court denied Leon’s later motion to withdraw his guilty plea. Leon appealed, and the government filed a motion to enforce the plea agreement. The Tenth Circuit dismissed Leon’s appeal and granted the government’s request. According to the Court, a criminal defendant’s waiver of his right to appeal must be enforced when three elements are met: first, the disputed appeal must fall within the scope of the waiver of appellate rights; second, the defendant’s waiver of his appellate rights must be knowing and voluntary made; and third, enforcement of the waiver must not result in a miscarriage of justice. In this case, all the elements were satisfied. In particular, Leon’s assertion that his waiver was not knowingly and intelligently made is without merit. Although Leon asserted that he only signed the waiver because he believed he had HIV/AIDS at the time, an evidentiary hearing on the matter

concluded that there was no evidence to support this assertion. Furthermore, a psychiatric report of Leon concluded that his claim to have no memory of the plea hearing was simply not credible, and that he was, in fact, competent at the time he entered the plea.

United States v. Leon, No. 06-3195 (February 8, 2007).



If a jury could reasonably find that the detention of a plaintiff is reasonable, a plaintiff could still possibly recover on an independent excessive force claim, from which officers would not be entitled to qualified immunity.

A County Sheriff’s Department received a call from a nurse at a hospital. Apparently, the mother of a two-year-old girl brought to the hospital said the child complained that her



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babysitter's boyfriend had "hurt her pee pee." In response to this allegation, officers were dispatched to the residence of the alleged babysitter in the middle of the night. Upon arrival at the home, officers seized Rick Cortez, handcuffed him, read him his Miranda rights, and placed him in the back of the patrol car for questioning. They also seized Tina Cortez by the arm and placed her in a separate patrol car, where she was also subjected to questioning. When the hospital did not find any evidence of molestation of the child, the Rick Cortez and Tina Cortez were released.

Subsequently, the two filed a civil rights suit against the officers. The district court denied the defendants' motion for summary judgment based on qualified immunity, and the defendants appealed. The Tenth Circuit reversed the district court's denial of the motion for partial summary judgment as to the excessive force claim of Tina Cortez, and affirmed the district court's decision in all other respects. Although the defendants' were entitled to qualified immunity on almost all accounts, the Court determined that if a trial were to establish that the investigative detention of Tina Cortez was reasonable, Tina Cortez possibly could recover on an independent excessive force claim. *Cortez v. McCauley*, No. 04-2062 (February 10, 2006).



A defendant is guilty of aiding and abetting the accessing without authorization of a protected computer under 18 U.S.C. § 1030(a)(2)(C) even when there is no proof of intent to defraud nor proof that the defendant knew the value of the information obtained.

An employee of a debt collection agency, defendant Willis used a website called Accurint.com, owned by LexisNexis, to gain access to individuals' names, addresses, social security numbers, dates of birth, telephone numbers, and other property data. Part of Willis's responsibilities were to provide new employees with usernames and passwords for the database, and to deactivate the usernames and passwords of employees who no longer worked for the company. Employees were not authorized to obtain information from Accurint.com for personal use. While investigating two individuals for identity theft, officers discovered

that under the username Amanda Diaz, Accurint was being used to make false identity documents, open instant store credit at various retailers, and use the store credit to purchase goods that were later sold for cash. During his first interview with Secret Service agents, Willis said that Amanda Diaz was a former employer whose account had been closed, and that he did not know how or by whom her account was being used.

During the second interview, however, Willis confessed to having given a username and password to his drug dealer in exchange for methamphetamine.

He also admitted to having provided one of the suspects of identity theft with the username and password of

Amanda Diaz. Willis was convicted of aiding and abetting the accessing without authorization of a protected computer, in violation of 18 U.S.C. §§ 2(a) and 1030(a)(2)(C), (c)(2)(B) (iii). On appeal, Willis argued that he lacked the requisite mens rea to commit the crime, since one who aids and abets must have the intent to defraud and, in so doing, must know that the information obtained will have a value above \$5,000. The Tenth Circuit rejected Willis's argument, holding that the plain language of § 1030(a)(2)(C) requires only proof that the defendant intentionally accessed information from a protected computer. Since there was adequate proof that Willis intentionally accessed the information, his conviction is affirmed. *United States v. Willis*, No. 06-6009 (February 16, 2007).

Jury instruction requiring a common sense inference does not improperly lower the government's burden of proof on the elements of a continuing criminal enterprise.

Defendant Torres-Laranega was the leader of a drug-trafficking ring that transported multi-tons of marijuana from the southwestern U.S. to Chicago in tractor trailers. When an employee of Torres-Laranega turned federal informant, four of these trailers were seized within a four month period. Torres-Laranega was actively planning yet another drug shipment when he was arrested. He was convicted for engaging in a continuing

criminal enterprise, or CCE, under the "drug kingpin" statute. Torres-Laranega appealed his CCE conviction on two grounds: first, that the district court's jury instructions improperly

lowered the government's burden of proof on the "substantial income"





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element of the CCE charge; and second, that there was insufficient evidence to suggest that Torres-Laranega personally obtained substantial income or resources from the enterprise. The Court of Appeals for the Tenth Circuit affirmed the Torres-Laranega's CCE conviction. First, the Court held that instructions allowing the jury to find substantial income or resources from Torres-Laranega's position in the criminal organization in conjunction with the volume of drugs handled by the organization did not improperly conflate two separate and distinct elements of the government's proof. Rather, jury instructions may "require a permissible and common sense inference", instead of direct proof, to satisfy an element of a crime. Furthermore, the Court held that evidence presented to the jury regarding Torres-Laranega's acquisition and delivery of large quantities of drugs was sufficient evidence to warrant a jury's inference that Torres-Laranega personally obtained sub-

stantial income from the enterprise. *United States v. Torres-Laranega*, No. 05-2302 (February 21, 2007).

Counsel's failure to investigate mitigating circumstances in a murder case may constitute ineffective assistance of counsel when there is a probability that a jury may have concluded that the balance of aggravating and mitigating circumstances did not warrant the death penalty.

Together with other men, defendant Anderson was involved in forcing another man to shoot, and in the shooting of, four other men. The house with the victims was set on fire, and only one of the four shot men survived.

Anderson was convicted of three counts of first degree murder, and sentenced to death on each of the convictions. Anderson filed a habeas corpus petition in federal district court, asserting that his convictions



and sentences were unconstitutional on ten different grounds. The district court denied Anderson's petition, and he appealed. In review, the Tenth Circuit determined that Anderson received ineffective assistance of counsel during the penalty phase of his trial, and thus that the other issues raised by Anderson on appeal need not be addressed. Evidence showed that Anderson grew up in a dysfunctional home, and that he suffered from brain damage and drug addictions. However, trial counsel never investigated Anderson's family background, mental health, or neurological health. The Court held that in this lack of investigation, counsel failed to present an adequate case in mitigation during the penalty phase of the trial. Furthermore, this ineffective assistance was prejudicial, because a reasonable jury may have found that the balance of aggravating and mitigating circumstances did not warrant the death penalty. The order of the district court denying Anderson's habeas petition was reversed, and the matter remanded to the district court to grant the writ. *Anderson v. Sirmons*, No. 04-6397 (February 21, 2007).

UTAH PROSECUTION COUNCIL

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2006 –2007 TRAINING SCHEDULE

UTAH PROSECUTION COUNCIL AND OTHER UTAH CLE CONFERENCES

April 5-6	<u>SPRING CONFERENCE</u> <i>Case law update, legislative update, ethics and more.</i>	Red Lion Hotel Salt Lake City, UT
April & May	<u>REGIONAL LEGISLATIVE UPDATES</u>	24 locations
April 26	<u>20TH ANNUAL CRIME VICTIMS' CONFERENCE</u> <i>Presented by the Utah Council on Victims of Crime. Call (800) 621-7444</i>	South Towne Center Sandy, UT
May 3-4	<u>UTAH PROSECUTORIAL ASSISTANTS ASSN ANNUAL CONFERENCE</u> <i>Networking and training for those who really make the office operate</i>	Eccles Conf. Center Ogden, UT
May 9-11	<u>UTAH MUNICIPAL ATTORNEYS ASSN SPRING CONFERENCE</u> <i>For more information, e-mail pturner@southsaltlakecity.com</i>	Zion Park Inn Springdale, UT
May 16-18	<u>ADVANCED TRIAL SKILLS TRAINING</u> <i>Session two of the grant funded advanced trial skills training</i>	Courtyard by Marriott Layton, UT
June 21-22	<u>16TH ANNUAL DOMESTIC VIOLENCE CONFERENCE</u> <i>DV prosecution is homicide prevention - become part of the team</i>	Marriott Hotel Provo, UT
August 9-10	<u>UTAH MUNICIPAL PROSECUTORS ASSN. ANNUAL CONFERENCE</u> <i>For municipal prosecutors and others whose case load is largely misdemeanors</i>	Zion Park Inn Springdale, UT
August 20-24	<u>BASIC PROSECUTOR COURSE</u> <i>One of the most comprehensive new prosecutor courses in the country</i>	University Inn Logan, UT
September 26-28	<u>FALL PROSECUTOR TRAINING CONFERENCE</u> <i>All Utah prosecutors' chance to gather, learn and network</i>	The Yarrow Park City, UT
October 17-19	<u>GOVERNMENT CIVIL PRACTICE CONFERENCE</u> <i>For attorneys from counties and cities whose practice is on the civil side</i>	Zion Park Inn Springdale, UT
November 7-9	<u>ADVANCED TRIAL SKILLS TRAINING</u> <i>Advanced Trial Skills Training for Career Prosecutors</i>	Courtyard by Marriott St. George, UT
November 14	<u>COUNTY ATTORNEYS EXECUTIVE SEMINAR</u> <i>The annual opportunity for all county/district attorneys to meet together</i>	Dixie Center St. George, UT

NATIONAL ADVOCACY CENTER (NAC)

A description of and application form for NAC courses can be accessed by clicking on the course title,
or by contacting Utah Prosecution Council at (801) 366-0202; e-mail: mnash@utah.gov.

Courses at the NAC are free. Travel, lodging and meal expenses are paid or reimbursed by NAC, and no tuition is charged.

June 25-29	<u>APPELLATE ADVOCACY</u> <i>Learn the art of successful appellate oral argument and brief writing</i> The registration deadline is March 30, 2007	NAC Columbia, SC
August 6-10	<u>BOOTCAMP: AN INTRODUCTION TO PROSECUTION</u> <i>A course for newly hired prosecutors</i> Registration deadline is May 4th	NAC Columbia, SC
July 23-26	<u>CROSS-EXAMINATION</u> <i>A complete review of cross-examination theory and practice</i> The reg deadline is April 20th	NAC Columbia, SC
August 27-30	<u>COURTROOM TECHNOLOGY</u> <i>Upper level PowerPoint; Sanction II; Audio/Video Editing</i> The registration deadline is May 25th	NAC Columbia, SC
August 13-17	<u>PROSECUTOR AND THE JURY</u> <i>Focusing on selection, opening statement & summation</i> The registration deadline is May 11th	NAC Columbia, SC
Multiple dates (see table)	<u>TRIAL ADVOCACY I</u> <i>A practical, "hands-on" training course for trial prosecutors</i>	NAC Columbia, SC
<u>Course Dates:</u>	<u>Course numbers:</u>	<u>Registration deadlines:</u>
July 9-13	10-07-TA1	April 6, 2007
July 16-20	11-07-TA1	April 13, 2007
July 30 - August 3	12-07-TA1	April 27, 2007
September 10-14	13-07-TA1	June 8, 2007
September 24-28	14-07-TA1	June 22, 2007
August 20-24	<u>TRIAL ADVOCACY II</u> <i>Practical instruction for experienced trial prosecutors</i> The registration deadline is May 18th	NAC Columbia, SC
August 27-31	<u>UNSAFE HAVENS II</u> <i>Prosecuting on-line crimes against children - Reg. deadline is June 1st</i>	NAC Columbia, SC

**NATIONAL COLLEGE OF DISTRICT ATTORNEYS (NCDA)*
AMERICAN PROSECUTORS RESEARCH INSTITUTE (APRI)**
AND OTHER NATIONAL CLE CONFERENCES**

April 15-19	<u>MEETING CHALLENGES IN PROSECUTION & VICTIM ADVOCACY</u> - NCDA*	Savannah, GA
April 29 - May 3	<u>OFFICE ADMINISTRATION COURSE</u> - NCDA*	San Francisco, CA
MAY 6-10	<u>EXPERTS</u> - NCDA* (NEW COURSE)	San Antonio, TX
May 7-11	<u>EQUAL JUSTICE FOR CHILDREN</u> - APRI** <i>Investigation and prosecution of child abuse. This is an excellent course, and not far away.</i>	Sparks, NV
May 13-17	<u>PROSECUTING DRUG CASES</u> - NCDA*	San Diego, CA
May 16-18	<u>JUMPSTART: FOR NEWLY ASSIGNED JUVENILE PROSECUTORS</u> - APRI**	Charleston, SC
May 21-25	<u>UNSAFE HAVENS I: Prosecuting Online Crimes Against Children</u> - APRI**	Austin, TX
June 3-14	<u>CAREER PROSECUTOR COURSE</u> - NCDA* <i>The premier national course for career prosecutors & those who aspire to be such.</i>	Charleston, SC
June 20-22	<u>JUMPSTART: FOR NEWLY ASSIGNED JUVENILE PROSECUTORS</u> - APRI**	Milwaukee, WI
July 25-28	<u>ASSN OF GOVERNMENT LAWYERS IN CAPITAL LITIGATION CONF.</u> <i>For additional information & conference registration forms, please call Jan Dyer at (623) 979-4846</i>	Lake Buena Vista, FL
June 24-28	<u>CRIMINAL INVESTIGATIONS COURSE</u> - NCDA*	Orlando, FL
August 20-24	<u>INVESTIGATION & PROSECUTION OF CHILD FATALITIES & PHYSICAL ABUSE</u> An APRI** course	Indianapolis, IN
August 27-30	<u>BEYOND FINDING WORDS</u> - APRI**	Atlantic City, NJ
September 16-20	<u>WHITE COLLAR CRIME</u> - NCDA*	San Francisco, CA
September 23-27	<u>PROSECUTING HOMICIDE CASES</u> - NCDA*	Providence, RI
Sept. 30 - Oct. 4	<u>PROSECUTING DRUG CASES</u> - NCDA*	Las Vegas, NV
October 20-24	<u>THE EXECUTIVE PROGRAM</u> - NCDA*	Marco Island, FL
October 27-31	<u>17TH NATIONAL CONFERENCE ON DOMESTIC VIOLENCE</u> - NCDA*	Orlando, FL
Oct. 28 - Nov. 1	<u>CONTEMPORARY TRIAL ISSUES</u> - NCDA*	New Orleans, LA
November 4-8	<u>EVIDENCE FOR PROSECUTORS</u> - NCDA*	Tucson, AZ

* For course description and on-line registration for NCDA courses, click on the course title or call Prosecution Council at (801) 366-0202, e-mail: mnash@utah.gov.

** For course descriptions and registration brochures for APRI courses, click on the course title or call Prosecution Council at (801) 366-0202, e-mail: mnash@utah.gov