

The

PROSECUTOR



United States Supreme Court

ABA Standards not the sole standard in deciding an ineffective assistance of counsel claim.

In February 1985, Robert Van Hook went to a bar in an effort to find someone to rob. He met David Self and after drinking for several hours they went to Self's apartment. Van Hook then brutally murdered Self and fled with his valuables. Van Hook

was indicted for aggravated murder, with one capital specification, and aggravated robbery. He waived his right to a jury trial and was found guilty on all counts by a three-judge panel. After considering the mitigating and aggravating factors, the court imposed the death penalty.

Van Hook unsuccessfully appealed the sentence and was denied certiorari. He was also denied on his state post-conviction relief claims. The Sixth Circuit granted habeas relief to Van Hook in response to a claim of ineffective assistance of counsel. It based its finding on ABA guidelines adopted in 2003, which it applied as the standard for the 1985 case. The state petitioned for a writ of certiorari, which was granted.

The United States Supreme Court held that the decision not to pursue or present additional mitigating evidence was reasonable. It reasoned that the defendant's attorney did not fail to act in the face of glaring and powerful

evidence. Rather, it was a "decision not to seek more" evidence than had already been received and such a decision was "well within the range of professionally reasonable judgments." It further stated that the ABA standards should only be considered as one of many guides in making a determination of the prevailing professional norm and that the sole standard continues to be whether counsel made "objectively reasonable choices." Reversed and remanded. *Bobby v. Van Hook*, 130 S. Ct. 13 (2009).

Utah Supreme Court

Sexually Explicit Business and Escort Service Tax held constitutional

The Sexually Explicit Business and Escort Service Tax was created in 2004.

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It “imposes a 10 percent gross receipts tax on businesses whose employees or independent contractors (1) perform services while nude or partially nude for 30 days or more per year, or (2) provide companionship to another individual in exchange for compensation.” The revenue from the tax funds sex offender treatment programs and investigations of internet crimes against children. A group of escort agencies and dance clubs claim the tax violates their First Amendment rights. The district court granted summary judgment, finding that the tax was constitutional and did not violate the plaintiff’s rights. An appeal to the Utah Supreme Court was filed.

The Utah Supreme Court applied the analysis set out in *United States v.*

O’Brien, 391 U.S. 367 (1968), and concluded that it passed the test because it “is beyond question that the legislature has the authority to enact a tax to raise revenue,” the “tax furthers a substantial government interest,” and the government interest of providing treatment to sex offenders is unrelated to the suppression of protected expression. It also held that it was “not unconstitutionally overbroad because it does not prohibit a substantial amount of protected speech.” However, the court did determine that the statutory provision applying the Tax to escort services was unconstitutionally vague. *Bushco v. Utah State Tax Comm’n*, 2009 UT 73.

Utah Court of Appeals

An express finding that a building permit had issued was not required

In 1960 Watson’s built a home to accommodate two families, which at the time fell within the zoning requirements of the neighborhood. In 1970, the City changed the zoning to single-family residential. In 1978, Lucherinis purchased the home and continued to rent out the basement apartment. In 2006 when Lucherini made contact with the City regarding a sump pump problem, the

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City discovered the rental apartment and sent a Compliance Request Letter either requiring the compliance with the single-family restriction or that Lucherini would file an application to establish the residence as a legally existing nonconformity or that it was continuously occupied as a two-family dwelling. Lucherini filed the application, but it was denied by the City. He appealed the decision to the Logan City Board of Adjustment which, following a hearing and considering all the evidence and testimony, reversed the decision of the director and granted the Lucherinis' application. Plaintiffs, who were neighbors, were dissatisfied with the decision and filed a complaint in the district court.

"The district court granted summary judgment in favor of Plaintiffs, concluding that the Board's finding was insufficient as a matter of law to establish the prior legality of a nonconforming use." It based its decision upon its "interpretation of the Utah Code regarding building permits, see Utah Code Ann. § 10-9a-802(2)(b) (2007), as requiring the Board to "expressly find that a multi-family building permit had been issued." As such, the district court ruled that the granting of Lucherinis' application was illegal. Logan City appealed.

The Utah Court of Appeals held that the district court erred in its interpretation of the statute and accordingly, its conclusion that the Board's findings were in violation of the law was also in error. It reasoned that the Board had discretion and in light of the lack of records preserved by the City, it was not unlawful to consider other evidence upon which it based its finding. Reversed and



remanded. *Thompson v. Logan City*, 2009 UT App 335.

Clarified interpretation of the "Postconviction Determination of Factual Innocence" statute

In 2004, Harry Miller was convicted of aggravated robbery and sentenced to prison for a term of five to life. The conviction was based on a crime that took place in December 2000. At trial, Miller presented an alibi defense that he was in Louisiana at the time the crime occurred, but other than his own testimony, he had no evidence or witnesses to support that defense. Miller appealed claiming ineffective assistance of counsel because his attorney failed to obtain other alibi witnesses to testify on his behalf. The matter was remanded back to district court to make findings as to whether his counsel was deficient, and if so, whether that deficiency resulted in prejudice. It determined that there was no deficiency and even if there was, Miller was not prejudiced. The case was returned to the appellate court and oral arguments were scheduled. Shortly before argument, the parties stipulated to a summary reversal of his

conviction because they agreed an error had occurred during the trial and that justice dictated that Miller receive a new trial. In preparation for retrial, the prosecutor reviewed the case and filed a motion to dismiss the charges against Miller. Miller was released from prison nearly four and one-half years after his initial arrest.

Miller filed a civil petition against the State of Utah to determine his factual innocence. The trial court found that Miller failed to satisfy the statutory requirements contained in the "Postconviction Determination of Factual Innocence" statute. See Utah Code Ann. §78B-9-402(2)(a). The court concluded that Miller failed to show he was entitled to a hearing on factual innocence and granted the State's motion to dismiss. Miller appealed.

The appellate court reviewed the statute and held that the "plain language of section 78B-9-402 entitles a petitioner, such as Miller, who has secured reversal or vacatur of his conviction and who is facing no further prosecution for that offense to file a petition under subsection (2)(b). It further held that the statutory requirements and constraints of subsection (2)(a) did not apply to subsection (2)(b). Accordingly, Miller only has to raise a "justiciable bona fide issue of factual innocence" in order to be entitled to a factual innocence hearing. The court acknowledged Miller's physical and temporal limitations at the time the crime occurred. Specifically, Miller had suffered a stroke, which limited his mobility to the degree that he required assistance to get around. In addition, the window of time for Miller to fly from Louisiana to Utah and commit an act of violence against a stranger was

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PROSECUTOR PROFILE



James M. Swink

Cache County Attorney

James wanted to be a kid forever and never grow up. Such wisdom at such a young age earmarked him for accomplishing many great things. He also wanted to be a fireman but later in his youth decided that he wanted to go to law school and had the wonderful support and encouragement of his wife to do just that. He attended Utah State University where he graduated in 1993 with a degree in Economics. It was at this fine school that he met a beautiful dairyman's daughter named Keri Merrill. A mutual friend asked James to go with Keri to a preference dance but he declined because he had to work. After having a friend point out who he'd passed up the date with, he was disappointed that he hadn't accepted. Luckily, Keri asked him out a second time which he readily accepted. And as he says, "The rest is history, almost ancient history." He later attended J. Reuben Clark School of Law and graduated in 1997. James grew up in Sandy, Utah. He has the fondest respect and admiration for his parents as well and says they are awesome. His father worked hard as a district manager for a parts company and later owned his own business. His mother, an R.N. stayed at home giving the best care possible to her eight children. She was the best cook in the world and fixed the family a hot breakfast every day before they left the house. She also routinely baked treats such as cookies, fresh breads, whoopee pies, fudge, divinity, cinnamon suckers and a plethora of other goodies for after school snacks. Having a nurse for a mother had its upside as well because they rarely had to go to the doctor. His mother would treat them the best she could and when needed would simply call the doctor and tell him their symptoms and he would call in the proper prescription.

James loves to travel and if money were no issue would visit every country in Europe. He plans to visit Germany in 2012 and shares that one thing on his 'bucket list' is to visit every state's capitol building. His favorite sports team is the Dallas Cowboys, his favorite food is authentic Italian, his favorite treat is a Lindt Dark Chocolate Lindor Ball, and with the exception of hip hop, heavy metal or rap, he enjoys most music with Beethoven's 9th Symphony being his favorite. His favorite movie is 'The Incredibles' and his favorite TV show is 'Mystery!' He is very active and loves to cycle, run and play the piano. He has completed the LOTOJA bike race three times and loved it. In the 206 miles traveled in a single day, up and down hills, through crosswinds and through canyons, he says he has been put face-to-face with some of the greatest physical pain he's ever gone through but wouldn't trade the experiences for the world.

In his professional career, James feels that his time with the Weber County Attorney's Office had a huge impact on the way he prosecuted cases. Gary Heward's incredible influence and tutelage influenced his career more than any other person. About five years ago he had an offer to go into private practice with the lure of substantially more money, however he realized shortly after accepting the offer that prosecuting was his love and he could never be happy doing anything else. He withdrew his acceptance and the County Attorney was gracious enough to let him stay. He's worked for Cache County for eleven years and has had some interesting experiences all the way around. His most rewarding memory was seeing a sixteen-year-old go to prison and after being released six years later, he'd earned a college degree and developed an attitude to be a productive and contributing member of the community. His favorite memory occurred during a trial in Weber County when he had his victim and star witness ejected from the gallery of the courtroom because of his disruptive gestures and language. And his funniest experience came from his early prosecuting days when he was trying a child sex abuse case in juvenile court and during a recess the defendant's father hurdled the bar and came after him. Upon seeing the defendant's father coming after him the victim's father jumped over the bar and jumped in front of the defendant's father. When the bailiff was eventually distracted enough from balancing his checkbook to notice, he made his way over to quell the commotion!

James advice to others would be to always work hard and remember that we work for the people of the government that employs us. Enjoy the high points and ride out the low points until you're back on top! That wisdom hailes from the same depth as his childhood desire to never grow up!

PREFERRED NAME - James

BIRTHPLACE - SLC, Utah

FAMILY - Father of 5 children,
The 3rd of eight children

PETS - A Shih Tzu named
Chewbacca (Chewy)

FIRST JOB

At age 13 he was a sweeper at
Peruvian Park Elementary

FAVORITE BOOK

Les Miserables by Victor Hugo

LAST BOOK READ

The Lost Symbol by Dan Brown

FAVORITE QUOTE/WORDS OF WISDOM

"Work will win when wishy,
washy, wishing won't."

"Do it! Do it now! Do it with a
purpose, do it with a plan, make no
small plans for they have no magic
with the soul of man."



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confined to a twenty-four hour period. As such, it held that the facts did raise a bona fide issue and that his petition satisfied the requirements of the Factual Innocence Statute. The trial court's decision is reversed and remanded so "Miller may receive the factual innocence hearing to which he is statutorily entitled." *Miller v. State*, 2009 UT App 341.

Sheriff's sale set aside based on inadequacy of sales price and circumstances of unfairness

In 2002, Justin C. Bond was hired by David Pyper to represent him in a probate matter. The representation resulted in attorney fees exceeding \$9000, which Pyper did not pay. Bond sued for payment and the district court entered judgment in his favor. Bond levied against a house belonging to Pyper and a sheriff's sale was held in November 2006. Bond was the only bidder and purchased the property for a \$329 bid that was credited towards the amount of the judgment. Bond was aware of an estimated \$75,000 in equity that Pyper had in the property. In an effort to redeem the property, Pyper made repeated phone calls to Bond but with no response. By May 2007, the 180-day time period for redemption of property under rule 69C of the Utah Rules of Civil Procedure expired, and the sheriff's deed was issued, which transferred the property to Bond. Pyper continued to call on a daily basis through May 30, 2007. At that time Pyper hired a new attorney who made contact to request a payoff amount and was promised a response, however, no response was ever received. Two more weeks of unreturned phone calls were made and

a letter was sent regarding the matter. A letter was then received stating that the period for redemption had expired. In June 2007, Pyper filed a Petition to Set Aside Sheriff's Sale and to Redeem Property. He also paid to the district court the redemption amount of \$349.27 in an effort to comply with rule 69C. Finally in June 2008, an evidentiary hearing was held and the district court set aside the sheriff's sale of the property on the grounds of the grossly inadequate sales price and the unfair actions during the redemption period. Bond appealed.

The appellate court held that the district court did not err in setting aside the sheriff's sale of property even though the redemption period had expired. It agreed with the finding of the district court of the "great inadequacy of the sales price and slight circumstances of unfairness." The court held that, together, these findings were sufficient to give the district court the authority to set aside the sale. Affirmed. *Pyper v. Bond*, 2009 UT App 331.

Bus driver deemed a position of special trust

John Michael Tanner worked as a school bus driver for eight years. During that time he developed a sexual relationship with a seventeen-year-old special education student. Tanner went to trial on the charges of two counts of forcible sexual abuse and one count of sexual battery. In order to convict on the forcible sexual abuse charges, the State had to prove that Tanner's

position of a school bus driver constituted a position of special trust. Following the close of the State's case during trial, Tanner challenged whether a school bus driver was a position of special trust and moved the court to dismiss the forcible sexual abuse charges or reduce them to two counts of sexual battery. The court denied the motion and submitted the issue to the jury. Tanner was convicted of two counts of sexual battery and one count of forcible sexual abuse. Tanner appealed.

On appeal the court concluded that the statute was "not ambiguous because it clearly defined a "position of special trust" as a "position occupied by a person in a position of authority, who by reason of that position is able to exercise undue influence over the victim." It further stated that the statutory list of positions was not exclusive and that there was sufficient evidence to "show that Tanner occupied a position of authority over the victim and used his position to exercise undue influence over her." Accordingly, the court held that the jury's finding was reasonable. Affirmed. *State v. Tanner*, 2009 UT App 326.



Tenth Circuit Court of Appeals

Waiver of Attorney-Client Privilege by Ineffective Assistance of Counsel Claim

Jeremy Vaughan Pinson entered into a plea agreement on criminal charges and as part of the agreement he waived his right to appeal. However, the

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IN DEFENSE OF THE DEATH PENALTY

Part II of II By Paul Cassell

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(continued from November's edition...)

Administrative Objections

Because their general objections to death penalty have found so little support, abolitionists have largely abandoned these claims. Even if the death penalty is justified in principle, they maintain, in practice it is unfairly administered. The collection of essays in *Debating the Death Penalty* are typical of the modern debate. Three of the four abolitionist chapters (by Ryan, Bright, and Stevenson) rest almost exclusively on administrative challenges to the penalty.

The abolitionists most frequently raise three particular administrative challenges to the death penalty: first, that it is infected with racism; second, that innocent persons have been executed; and finally, that capital defendants do not receive effective assistance of legal counsel. This section explains why each of these objections cannot justify nationwide abolition of the penalty. But before turning to the details of these objections, an opening observation is in order.

No responsible supporter of the death penalty holds any brief for inadequate defense attorneys, racist prosecutors, or inattentive judges. If problems arise in a particular case, they should be corrected. And indeed, in many of the cases cited by the abolitionists, the problems in particular cases were in fact corrected. The issue, however, is whether such problems are sufficiently widespread to justify completely depriving the federal government and 38 states of the option of imposing a capital sentence on a justly convicted offender. These are global questions that cannot be resolved by reciting isolated instances of abuse in a single jurisdiction (e.g., Alabama, where Bryan Stephenson conducts most of his work or Illinois where Governor Ryan conducted a review.) Rather, these questions are appropriately resolved by examining the data about the system as a whole. With the big picture in view, it is clear that the administrative objections provide no grounds for abolishing capital punishment.

Racism

Capital punishment in America is racist, its opponents claim. The arguments about racism come in two forms: a “mass market” version and a “specialist” form.⁴¹ Both versions are seriously flawed.

In the “mass market” version, we are told that the death penalty discriminates against African-American defendants. For instance, the Reverend Jesse Jackson, in his book *Legal Lynching*, argues that

[n]umerous researchers have shown conclusively that African American defendants are far more likely to receive the death penalty than are white defendants charged with the same crime.⁴²

The support for this claim is said to be the undisputed fact that, when compared to their percentage in the overall population, African-Americans are over-represented on death row. For example, while 12 percent of the population is African-American, about 43 percent of death row inmates are African-American, and 38 percent of prisoners executed since 1977 are African-American.⁴³

Such simple statistics of over-representation fail to prove racial bias. The relevant population for comparison is not the general population, but rather the population of murderers. If the death penalty is administered without regard to race, the percentage of African-American death row inmates found at the end of the process should not exceed the percentage of African-American defendants charged with murder at the beginning. The available statistics indicate that is precisely what happens. The Department of Justice found that while African-Americans constituted 48 percent of adults charged with homicide, they were only 42 percent of those admitted to prison under sentence of death.⁴⁴ In other words, once arrested for murder, blacks are actually less likely to receive a capital sentence than are whites.

Critics of this data might argue that police may be more likely to charge African-Americans than whites with murder at the outset of the process. The

data does not support this. One way of investigating this claim is to analyze crime victim reports of the race of those who have committed crimes against them. While it is obviously impossible to talk to murder victims, it is possible to talk to victims of armed robberies, who are reasonable surrogates. When victims' reports of armed robbery cases are compared with the criminal justice processing of those cases, there is no evidence of racial discrimination in charging decisions.⁴⁵

The over-representation of African-Americans on death row to which Jackson refers is, indisputably, of great public concern. Policy makers must certainly examine the causes of that over-representation—for example, differences in economic or educational opportunities—and address them. But given such societal factors, racial bias cannot be inferred from such simplistic calculations.

To confirm or dispel concern about black defendants being singled out for the death penalty, one must conduct more sophisticated social science research. Various researchers (often of an abolitionist bent) have set out to prove such racial discrimination. They have been disappointed. The studies of the post-*Furman* death penalty in America have generally found that African-American defendants are not more likely to receive the death penalty. Summarizing all the data in 1990, the General Accounting Office concluded that evidence that blacks were discriminated against was “equivocal.”⁴⁶ Similarly, in a comprehensive study Professor Baldus and his colleagues reported that “regardless of the methodology used,” studies show “no systematic race-of-defendant” effect.⁴⁷

This ought to be treated as good news of progress in the American criminal justice system. One could draw the following conclusion—that, while African-American defendants in capital cases were previously treated unfairly (especially in the South), modern statistics reveal considerable progress. This conclusion, of course, is anathema to the agenda of abolitionists. Thus, when pressed by someone who is

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familiar with the social science data finding no discrimination against African-American offenders, more sophisticated abolitionists often abandon the mass market version of their racism argument and shift to the specialist version. Abolitionist Bryan Stevenson argues that data demonstrates the existence of “racial bias in Georgia’s use of the death penalty,” by which he means statistics suggesting that blacks who kill whites are more likely to receive a death penalty than are other victim/offender combinations.⁴⁸

These specialist statistics are no less misleading than the mass market statistics. But before turning to them, it is important to note the implications of this retreat to a race-of-the-victim claim. It seems implausible, to say the least, that a racist criminal justice system would look past minority defendants and discriminate solely on the more attenuated basis of the race of their victims. If racists are running the system, why would they not just discriminate directly against minority defendants?

In any event, the race-of-the-victim claim cannot withstand close scrutiny. Of necessity, a race-of-the-victim claim involves comparison: i.e., comparing the facts of comparable cases in different victim and offender combinations to see whether unexplainable disparities emerge. Thus, the anecdotes tell us little—the question belongs in the realm of statistical analysis.

Statisticians Stanley Rothman and Stephen Powers have offered the best review of the relevant data.⁴⁹ As they explain, the vast majority of homicides (no less than other offenses) are intra-racial: about 95 percent do not cross racial lines. The small minority of inter-racial homicides have vastly different characteristics. Black-on-black homicides and white-on-white homicides are most likely to occur during altercations between persons who know one another, circumstances often viewed as inappropriate for the death penalty. On the other hand, black-on-white homicides are much more often committed during the course of a serious felony, a classic case

for the death penalty. For example, in Georgia, only 7 percent of the black-defendant-kills-black-victim cases involve armed robbery; compared to 67 percent of the black-defendant-kills-white-victim cases. Similarly, black-defendant-kills-white-victim cases more often involve the murder of a law enforcement officer, kidnapping and rape, mutilation, execution-style killing, and torture—all quintessential aggravating factors—than do other combinations. Finally, white-defendant-kills-black-victim cases are so rare that it is difficult to draw meaningful statistical conclusions.

Given these obvious differences between, on the one hand, intra-racial homicides and, on the other, black-on-white homicides, the simple comparisons of the percent of death sentences within each classification reported in this volume by both Stephenson and Bright is unilluminating. To put the point in more precise statistical terms, an alleged race-of-the-victim effect will be an obvious “spurious” correlation. To cite but one example, a significant number of death penalty cases involve murder of law enforcement officers, about 85 percent of whom are white. Unless there are statistical controls for this fact, it is virtually certain that a simple eyeballing of statistics will show a race-of-the-victim effect that is instead immediately explainable by this fact (among many others).

The issue of spurious correlations and the alleged race-of-the-victim effect was put on trial in 1984 in the Federal District Court for the Northern District of Georgia before District Court Judge J. Owen Forrester. Judge Forrester took testimony from Baldus and other statisticians who purported to have identified a genuine race-of-the-victim effect in Georgia. In an opinion that spans 65 pages in the Federal Reporter, Forrester squarely rejected the claim. Forrester first observed that Baldus found no race-of-the-defendant effect—that is, black defendants were not directly discriminated against. With respect to the race-of-the-victim, only his “summary” models (i.e., models including just a few control variables) purported to demonstrate

the effect. The effect, in fact, disappeared entirely as additional control variables were added. When Baldus ran his regression equations with all of the 430 control variables for which he had collected data, no statistically significant evidence of discrimination remained. Forrester accordingly held:

The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables ... produce no statistically significant evidence that races play a part in either [the prosecution’s or the jury’s capital decisions].⁵⁰

Forrester’s carefully reasoned and detailed opinion should have put an end to race of the victim claims. It is, after all, the only review of the claim by a neutral decision maker. Moreover, Forrester’s findings about the Baldus study—that a purported race of the victim effect in “summary” models gradually disappears as more control variables are added into the equations—apply equally to the other race-of-the-victim studies. Without exception, the studies purporting to demonstrate a race-of-the-victim effect control for only a few relevant variables (nowhere approaching the 430 variables ultimately analyzed by Forrester), producing a spurious correlation rather than any casual connection. But abolitionists never discuss his findings. Instead, they refer to the later United States Supreme Court decision reviewing Forrester’s opinion. The Supreme Court, perhaps unwilling to dive into the statistical subtleties of multiple regression analysis, decided to proceed on the “assumption” that the Baldus race-of-the-victim figures were *factually* accurate. The Court found that the figures were nonetheless *legally* insufficient to establish cognizable claim of discrimination.⁵¹ Because it proceeded on this assumption, the Supreme Court could affirm Judge Forrester without needing to reach the statistical question of whether a race-of-the-victim effect actually existed. But Forrester’s opinion might well serve an emblematic example of abolitionist

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claims—when put to the test before a fair-minded observer, they cannot withstand scrutiny.

Perhaps the most successful rhetorical attack on the death penalty has been the claim that innocent persons have been convicted of, and even executed for, capital offenses. The claim about innocents being executed is a relatively new one for abolitionists. Nowhere is this rhetorical shift better exemplified than in the writings by Bedau. In 1971, Bedau took the position that it is,

false sentimentality to argue that the death penalty ought to be abolished because of the abstract possibility that an innocent person might be executed, when the record fails to disclose that such cases occur.⁵²

Now, however, Bedau apparently takes the view that such cases happen frequently enough that capital punishment must be abolished in this country. More generally, the claim that innocents have actually been executed has been repeated by abolitionists so often that it has been something of an urban legend. But (like other abolitionist arguments) the claim does hold up under scrutiny.

The claim that innocent defendants have been executed was most notably advanced in a 1987 article by Bedau and his co-author, Michael Radelet.⁵³ In their widely cited article, they claimed that 23 innocent persons had been executed in this country in this century.

Of course, the immediate question that springs to mind is how precisely did Bedau and Radelet determine the “innocence” of these executed persons. Stephen Markman (then an Assistant Attorney General in the Justice Department and currently a Justice on the Michigan Supreme Court) and I began looking carefully at the 23 cases and published our response in the 1988 *Stanford Law Review*.⁵⁴ We found that most of the cases came from the early part of this century, long before the adoption of the extensive contemporary system of safeguards in the death penalty’s administration. Moreover, Bedau and

Radelet could cite but a single allegedly erroneous execution during the past 30 years—that of James Adams, convicted in 1974. A dispassionate review of the facts of that case demonstrates, however, that Adams was unquestionably guilty. To find Adams “innocent,” Bedau and Radelet ignored such compelling evidence of guilt as money stained in blood matching that of the victim found in Adams’ possession and the victim’s eyeglasses found in the locked trunk of his car. A full recitation of the evidence against Adams is set out in a footnote,⁵⁵ but the compelling evidence of guilt raises the question of how Bedau and Radelet wound up making so many mistakes in their analysis of the case? Perhaps the reason is the source that they used. The *only* source cited in their article is Adams’ Petition for Executive Clemency, a document written by his defense lawyers. An objective review of the claims by the Florida Clemency Board found the petition to be without merit, a finding Bedau and Radelet do not discuss. In short, James Adams was a murderer and was justly convicted.⁵⁶

Bedau and Radelet’s other alleged instances of “innocent” persons executed in earlier parts of this century are equally questionable. In our 1988 article, we reviewed all 11 cases of alleged executions of innocent people in which appellate opinions set forth facts proved at trial in detail sufficient to permit a neutral observer to assess the validity of Bedau and Radelet’s claims, including all of the cases since 1940. While a full review of all of those cases would unduly extend this article, a few highlights will suffice to make the point.⁵⁷

To prove the “innocence” of one defendant, Everett Appelgate who was executed for murdering his wife with rat poison in 1932, Bedau and Radelet cited two sources; those sources in fact actually believed that Appelgate was guilty.⁵⁸ In another case, that of defendant Sie Dawson, the authors stated, falsely, that there were no eyewitnesses to the crime. In fact, there was an eyewitness: the victim’s four-year-old son, Donnie, who had been beaten and left to die at the scene of the

crime. When found a day later, Donnie told his father, the police chief, and a family friend that Sie Dawson had committed the murder with a hammer.⁵⁹ As another example, Bedau and Radelet cite a book to prove generally the innocence of Charles Louis Tucker, executed in Massachusetts in 1906 for stabbing a young girl to death during a robbery. The book actually says that the governor’s rejection of Tucker’s clemency petition was “conscientious and admirable.”⁶⁰

Finally, my favorite example of Bedau and Radelet’s research comes from my home state of Utah and involves one of their sources cited “generally” to prove that Joseph Hillstrom was innocent. That source was a book published by Wallace Stegner entitled *Joe Hill: A Biographical Novel*. The foreword explained that the book “is fiction, with fiction’s prerogatives and none of history’s limiting obligations. . . . Joe Hill as he appears here—let me repeat it—is an act of the imagination.” While citing a work of fiction is bad enough, even more startling is the fact that the novel strongly suggests that its protagonist, Joe Hill, is in fact a guilty murderer! This is not surprising, since Wallace Stegner published two magazine articles in which he gave his view that the real-life Joseph Hillstrom was a killer.⁶¹

The questionable examples in the Bedau-Radelet article make an important point about the debate over mistaken executions. It is easy for opponents of the death penalty to allege, despite a unanimous jury verdict, appellate court review, and denial of executive clemency, that an “innocent” person has been executed. Such an assertion costs nothing and will help abolitionists advance their cause. As this review demonstrates, such claims should be reviewed with a healthy dose of skepticism.

While abolitionists have been unable to find a credible case of an innocent person who has actually been executed in recent years, they have provided several credible “close call” cases—that is, examples of innocent persons who were sentenced to death who were exonerated shortly before the execution. Such miscarriages of justice are, to be sure, very troubling. These cases

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deserve careful study to determine what went wrong and what kinds of reforms can correct the problem. But when offered as justification for abolishing the death penalty, these close call cases are unpersuasive.

To justify abolishing the death penalty on grounds of risk to the innocent, abolitionists would have to establish that innocent persons are jeopardized more by the retention of the death penalty than from its absence. In fact, the balance of risk tips decisively in favor of retaining the death penalty. On the one hand, abolitionists have been unable to demonstrate that even a single innocent person has been executed in error. On the other hand, there are numerous documented cases of innocent persons who have died because of our society's failure to carry out death sentences. Earlier in this text, for example, I discussed the deaths of Colleen Reed and many other women because of society's failure to execute a single dangerous murderer—Kenneth Allen McDuff. The victims of McDuff were no “close calls” but rather fatalities directly resulting from abolition of the death penalty in 1972. Today, thousands of killers no less dangerous than McDuff are currently incarcerated on the nation's death rows. If they are not executed, they will remain serious threats to kill again—either inside prison walls or outside following an escape or a parole. Clearly, on any realistic assessment, the innocent are far more at risk from allowing these dangerous convicts to live than from executing them after a full and careful review of their legal claims.

Effective Representation of Counsel

A last attack on the death penalty concerns the quality of counsel appointed to represent indigent defendants charged with capital offenses. Abolitionists argue that inexperienced and even incompetent counsel is routinely appointed in capital cases. Abolitionist Stephen Bright argues that the death penalty is imposed “not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers.”⁶² Citing

various anecdotal examples of ineffective assistance of counsel, Bright concludes that the death penalty ought to be abolished.

The conclusion does not follow from the factual premises. Ineffective assistance of counsel in a particular case calls for reversal of the conviction—something already required by Supreme Court precedents.⁶³ But to make a persuasive argument for completely abolishing capital punishment, the abolitionists would need to demonstrate that defendants in capital cases are represented by inadequate counsel (1) frequently, (2) throughout the United States, and (3) under current appointment procedures. The abolitionists cannot begin to make such a showing on any of these three points.

For starters, the abolitionists do not show the ineffectiveness is widespread. Instead, their inevitable tactic is to recite various anecdotal examples of defense ineffectiveness. The reader should assess those few examples against the backdrop of about 3,500 persons currently on death row⁶⁴—all of whom have had, or will soon have, their cases reviewed by appellate courts to insure that their trial counsel was effective. The abolitionists never explain why a handful of anecdotes justify setting aside literally thousands of capital sentences.

The abolitionists also fail to justify abolition through the United States. It is hard to understand, for example, why my home state of Utah should have its capital sentencing statute invalidated because of concerns over the quality of appointed counsel in, say, Alabama. Utah has a carefully developed procedure for appointing counsel in capital cases. The court must appoint at least two attorneys for the accused. At least one of the attorneys must meet stringent requirements for experience in criminal cases generally and capital cases in particular. The court is further required to make specific findings about the capabilities of the lawyers to handle a capital defense.⁶⁵ These new procedures have worked well to insure high quality representation for capital defendants in Utah. Indeed, the only vocal

complaints have come from county treasurers who complain about the sizeable cost of hiring defense lawyers from the small pool that meets the stringent certification requirements. In Utah, payments to defense attorneys in capital cases often exceed \$100,000.⁶⁶ Josh Marquis has made a similar point about his state of Oregon.⁶⁷

Indeed, in another striking example of a mismatch between their evidence and their claims, the abolitionists seek to strike not merely 38 state statutes authorizing capital punishment, but also numerous federal statutes. Current federal law authorizes death penalties for such extremely serious offenses as terrorist bombings, espionage involving the nation's nuclear weapon systems, treason, and assassination of the President or members of Congress. In a death penalty case, federal law requires appointment of extremely well-qualified counsel and provides them with seemingly unlimited resources. The federal government spent in excess of \$13.8 million to pay for attorneys and cover other costs of McVeigh's defense until his execution.⁶⁸ Yet even with what may have been the most expensive defense in the history of the world, McVeigh was sentenced to death and ultimately executed—disproving Bright's claim here that the ultimate penalty falls only on those who have “the misfortune to be assigned the worst lawyers.” To be sure, McVeigh's case was the most costly in federal history, but defendants faced with death in the federal system receive generous financial support, with payments well in excess of \$100,000 commonplace. The abolitionists offer no explanation as to why these federal provisions fail to assure effective representation.

The evidence of inadequacy of counsel suffers another serious flaw—it is grossly outdated. It is striking how many of the examples are more than 10 and even 20 years old. Perhaps such timeworn anecdotes would be instructive if attorney appointment procedures had remained the same. They have not. In recent years, nearly all of the states authorizing capital punishment have created specific competency standards for

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appointed counsel.⁶⁹ Most of those standards exceed the exacting qualifications that Congress required for appointment of counsel in federal cases.⁷⁰

Recent reforms in the leading death penalty state of Texas will serve to illustrate the point. In 1995, Texas created local selection committees to handle appointment of counsel in capital cases and set a variety of competence standards for capital defense attorneys.⁷¹ As part of the continuing effort to monitor defense counsel in capital cases, in 2001, Texas established a Task Force on Indigent Defense to develop further standards and policies for the appointment of defense counsel.⁷²

Illinois provides another illustration. Governor Ryan's remarks in commuting previously imposed death sentences obscured (perhaps by design) the extent to which significant recent reforms have been made. For example, in 2001, the Illinois Supreme Court established a Capital Litigation Trial Bar that set demanding standards for attorneys representing capital defendants. It required that indigent defendants be appointed two attorneys, and that prosecutors give notification of their intent to seek the death penalty no later than 120 days after arraignment in order to give the defense more time to prepare. After putting these new rules into effect, the high court emphasized that it would continue to monitor closely all death penalty cases, and add additional reforms as appropriate.

These recent reforms make one last point about questions of adequacy of counsel: any deficiencies are not inherent in the death penalty. The abolitionists have chosen not even to discuss of the recent changes in Texas, Illinois, and elsewhere. Instead, they engage in little more than rhetorical posturing. That is disappointing because it would be informative to hear suggestions from experienced capital defense attorneys like Bryan Stephen and Stephen Bright as to how the latest wave of improvements could be further improved. But the abolitionists apparently have little interest in incremental progress in the capital punishment system. Indeed, Hugo

Bedau forthrightly reports in his essay that it is "troubling" to abolitionists that reforms "might succeed," thereby giving "an even more convincing seal of approval to whatever death sentences and executions were imposed under their aegis."⁷³ Abolitionists are certainly entitled to single-mindedly pursue their attack on the death penalty. But without squarely addressing the recent reforms made (for example) in providing counsel to capital defendants, their arguments for abolition will remain unconvincing.

Within this text, I have tried to briefly, but comprehensively, present the arguments for the death penalty, and respond to the claims lodged against it. In closing, it may be appropriate to step back from the specifics of the fray and look at the debate as a whole.

Those of us who support the death penalty do not pretend to have clairvoyant vision. Instead, we recognize that decisions about the death penalty, no less than many other social policies, must be made on the basis of imperfect information. At the same time, however, we recognize the extreme importance of the social choices that are being made. We understand that human lives are held in the balance whenever death penalty decisions are made—whether the decision is to impose the penalty on a defendant who might later prove to be innocent, or withhold it from a defendant who might later kill again or serve as a deterrent example. It is because of the value that we place on innocent human life that we find the choice an agonizing one. In *Debating the Death Penalty*, for example, both Judge Alex Kozinski and District Attorney Joshua Marquis have talked openly about the conflicts that they experience in handling death penalty cases.

In contrast, those opposed to capital punishment have a surety that we find surprising. Abolitionists are certain that the death penalty does not deter—indeed, that it has not ever deterred anyone, anywhere, at any time. They are certain that it has never incapacitated anyone and prevented a subsequent killing. Finally, they are

certain that it is not just punishment, despite the contrary views of the majority of the fellow citizens in this country (and in many others).

In probing this confidence, I have asked abolitionists, assuming for a moment that the death penalty deters, whether they would nonetheless continue to oppose it. They refused to answer what they viewed as a speculative question. Bedau, however, has given a straightforward response on other occasions. As Louis Pojman points out in his article in *Debating the Death Penalty*, Bedau has frankly stated that he would oppose capital punishment even if it decreased the homicide rate by 100 percent.⁷⁴ Most abolitionists probably hold the same view, but are unwilling to admit it quite so forthrightly. This difference is, perhaps, the starkest contrast between the abolitionists and the penalty's supporters. Those of us who support the death penalty find the anguish and destruction resulting from any murder too much to tolerate. We could never dream of society standing by while the homicide rate unnecessarily rose even 1 percent, let alone 100 percent. We know that behind the homicide "rate" are flesh and blood individuals, like Colleen Reed described earlier in this text.

We are confident of only one thing: that society must do everything reasonably within its power to prevent such tragedies. To be sure, the benefits of the death penalty are not always certain. But we are unwilling to risk innocent lives on the speculative chance that the death penalty will turn out not to deter and not to incapacitate. The last time abolitionists succeeded in invalidating capital punishment in this country, they released brutal murderers to kill again—ultimately causing the deaths of Colleen Reed and many others. That was too high a price then. It is too a high price now.

ENDNOTES

41. See McAdams, *Racial Disparity and the Death Penalty* (1998) 61 Law and Contemporary Problems 153.
42. Jackson, *Legal Lynching: Racism, Injustice, and the Death Penalty* (Marlowe 1996) p. 100.
43. U.S. Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1999* (2000), tables 6.84 & 6.95, available at <<http://>

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- albany.edu/sourcebook/archive.html> (last visited May 9, 2008).
44. U.S. Dept. of Justice, Bureau of Justice Statistics, Bulletin: Capital Punishment 2005, available at <<http://www.ojp.usdoj.gov/bjs/abstract/cp05.htm>> (last visited May 10, 2008).
45. Langan, *Racism on Trial: New Evidence to explain the Racial Composition of Prisons in the United States* (1985) 76 J. of Criminal Law & Criminology 666.
46. U.S. General Accounting Office, Report: Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (Feb. 1990).
47. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (Northeastern University Press 1990) p. 254.
48. Bedau & Cassell, *supra*, note 3 at 76.
49. Rothman & Powers, *Execution by Quota?*, *The Public Interest* (Summer 1994). To simplify the exposition, I will track Rothman and Powers in referring to African-Americans as “blacks” in the discussion of race of the victim issues.
50. *McCleskey v. Zant* (N.D. Ga. 1984) 580 F. Supp. 338, 368.
51. *McCleskey v. Zant* (1991) 499 U.S. 467.
52. Bedau, *The Death Penalty in America: Review and Forecast* (June 1971) 35 Federal Probation 32, p. 36.
53. Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1987) 40 Stan. L.Rev. 21.
54. Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study* (1988) 41 Stan. L.Rev. 121.
55. James Adams was convicted of killing then robbing a Florida rancher in 1974. Adams was executed in 1984. Bedau & Radelet claim that Adams was innocent, but do not mention the following salient facts:
- Adams was arrested shortly after the murder with money stained with blood matching the victim’s;
 - Adams claimed that the money was stained because of a cut on his finger, but his blood did not match the blood on the money;
 - Clothes belonging to Adams were found in the locked trunk of his car stained with blood matching the victim’s;
 - Eyeglasses belonging to the victim were also found in the locked trunk of Adams’ car;
 - Adams told the police when arrested that the clothing and eyeglasses found in his trunk were his, but at trial, he changed his story and denied owning any of the items;
 - A witness, John Tompkins, saw Adams driving his car to and from the victim’s house at the time of the murder;
 - Another witness saw Adams’ car parked at the victim’s house at the time of the murder;
 - A few hours after the murder, Adams took his brown car to an auto shop and asked that it be painted a different color; and
 - Adams’ principal alibi witness contradicted him on the critical issue of his whereabouts at the time of the crime.
- While ignoring all of this evidence, Bedau & Radelet offer the following to “prove” Adams’ innocence:
- A witness who identified Adams’ car leaving the scene of the crime was allegedly mad at Adams—but Bedau and Radelet do not mention that three other witnesses also saw Adams at or near the scene of the crime;
 - A voice that sounded like a woman’s was heard at the time of the murder—but the trial transcript reveals that this was the strangled voice of the victim pleading for mercy; and
 - A hair sample was found that did not match Adams’ hair—but Bedau & Radelet state inaccurately that it was found “clutched in the victim’s hand,” when in fact it was a remnant of a sweeping of the ambulance and could have come from any of a number of sources.
56. A full review of the Adams case, including citations to the original trial transcript and other court documents is found in Markman & Cassell, *supra*, note 54 at 128–133, 148–150.
57. *Id.* at 133–145.
58. Compare Bedau & Radelet, *supra*, note 53 at 92 with Kilgallen, *Murder One* (Random House 1967) 190–191, 230 (Appelgate “very nearly got away” with the murder) and Lawes, *Meet the Murderer!* (Harper 1940) 334–335 (“Frankly, I do not doubt the culpability” of Appelgate).
59. Compare Bedau & Radelet, *supra*, note 53 at 109 with *Dawson v. State* (Fla. 1962) 139 So. 2d 408, 412; *St. Petersburg Times* (Sept. 24, 1977) p. 12A, col. 1 and Markman & Cassell, *supra*, note 50 at 136. Interestingly, Bedau himself indicated in 1982 that the Dawson case “remain [ed] in the limbo of uncertainty” because “[t]he original news story [regarding Dawson’s supposed innocence] merely reported allegations and was inconclusive; no subsequent inquiry known to me has established whether Dawson was really innocent.” Bedau, *Miscarriages of Justice and the Death Penalty*, in *The Death Penalty in America* (Oxford University Press 1982) 236–237 (citing to the same sources later cited in the *Stanford Law Review* as somehow “proving” Dawson’s innocence).
60. Compare Bedau & Radelet, *supra*, note 53 at 164 with Edmund Pearson, *Masterpieces of Murder* (Little, Brown 1963) 171; Markman & Cassell, *supra*, note 54 at 143.
61. Compare Bedau & Radelet, *supra*, note 53 at 126 with Wallace Stegner, *Joe Hill: A Biographical Novel* (Doubleday 1969) 13–14; Stegner, *Joe Hill: The Wobblies Troubadour*, *New Republic* (Jan. 5, 1948), p. 20; Stegner, *Correspondence: Joe Hill* (Feb. 9, 1948) *New Republic* 38–39. See also Markman & Cassell, *supra*, fn. 54 at 138–139.
62. Bedau & Cassell, *supra*, note 3 at 152.
63. *Strickland v. Washington* (1984) 466 U.S. 668.
64. U.S. Dept. of Commerce, *Statistical Abstract of the United States* 205 (2002).
65. Utah Rules of Criminal Procedure, Rule 8(b).
66. *Inmate Legal Fees Could Deplete Sanpete Coffers*, *Salt Lake Tribune* (Aug. 16, 1994), p. A1.
67. Bedau & Cassell, *supra*, note 3 at 117.
68. *Defending McVeigh*, *The Journal Record* (Oklahoma City) (July 2, 2001).
69. Herman, *Indigent Defense & Capital Representation* (National Center for State Courts, No. IS01-0407, July 17, 2001), available at <www.ncsconline.org/WC/Publications/KIS_IndDefMemoPub.pdf> (last visited May 10, 2008).
70. See Hatch Report, *supra*, note 26.
71. *Tex. Crim. Proc. Rule* 26.052.
72. *Tex. Gov. Code Ann.* 71.060.
73. Bedau & Cassell, *supra*, note 3 at 15.
74. *Id.* at 71 (citing correspondence from Bedau, among other sources).
- Paul G. Cassell, professor of law, received a B.A. (1981) and a J.D. (1984) from Stanford University, where he graduated Order of the Coif and was President of the Stanford Law Review. He clerked for then-Judge Antonin Scalia when Justice Scalia was on the D.C. Circuit U.S. Court of Appeals, and for the Chief Justice of the United States, Warren Burger, before becoming an Associate Deputy Attorney General with the U.S. Justice Department. Cassell was an Assistant U.S. Attorney for the Eastern District of Virginia from 1988 to 1991. He joined the faculty at the University of Utah, College of Law in 1992, where he taught full time until he was sworn in as a U.S. District Court Judge for the District of Utah on July 2, 2002. In November 2007, he resigned his judicial position to return full time to the College of Law, to teach, write, and litigate on issues relating to crime victims rights and criminal justice reform.*
- This text was substantially completed before Professor Cassell assumed the bench in 2002. It originally appeared as a chapter in the book, Debating the Death Penalty, edited by Bedau & Cassell, pp. 183–217. © 2004 by Oxford University Press. It appears here with permission by Oxford University Press and it has been updated by the author.*



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agreement preserved his right to appeal a sentence if issued above the advisory guideline range applicable to the case. Following sentencing and on the basis that the sentence exceeded the guideline range, Jeremy appealed. The court held that the sentence was reasonable in all respects. He then filed a motion in the federal district court to vacate his sentence and raised nine challenges. The motion and request for a Certificate of Appealability (COA) were denied. He appeals and raises four issues: (1) that he was incompetent at the time of his guilty plea; (2) that the court order restricting his correspondence violated his constitutional rights; (3) that the court erred in denying him leave to amend his motion to vacate; and (4) that his Sixth Amendment right to counsel and attorney-client privilege was violated by the court when it order his original trial counsel to file an affidavit in support of the government.

The appellate court held that Pinson had been thoroughly tested during the original proceedings and that the court had no reason to believe that he was not competent to enter the plea and waive his right to appeal. His challenge to the restriction on correspondence was waived pursuant to the plea agreement and the court declined to address that issue further. The court further held that the district court did not abuse its discretion in denying Pinson leave to amend his motion, because the proposed amendment would only have resulted in additional support for claims already found to be legally flawed. And finally, the court held that a claim of ineffective assistance of counsel impliedly waives attorney-client privilege, but only to the degree

“needed to ensure the fairness of the proceedings before it” in proving or disproving the claim. Request for a COA is denied and the appeal dismissed. *United States v. Pinson*, 584 F.3d 972 (10th Cir. 2009).

Obstruction of Justice requires knowledge that actions will likely affect a proceeding

During the course of an investigation into the source of a methamphetamine business, Travis Allen Phillips was used as an informant to purchase increasingly large amounts of the drug. However, shortly after the first buy investigators learned that he had revealed the identity of the undercover investigator to the seller, Ms. Lopez. Investigators quickly executed a search warrant on Ms. Lopez but did not find any evidence of methamphetamine trafficking or the identity of her supplier. Phillips was convicted of obstructing an official proceeding in violation of 18 U.S.C. §1512(c)(2) and appealed. He argued that evidence at trial was insufficient to prove requisite intent and sustain his conviction.

The court relied on the application of *United States v. Aguilar*, 515 U.S. 593, 599 (1995), to a similar statute which held that if a defendant lacks knowledge that his actions will likely affect a judicial proceeding, he lacks the intent to obstruct. As such, “although a proceeding need not be pending under the statute, it must be at least foreseeable to the defendant.” Accordingly the court held that the

same nexus requirement applied in this case. The court went on to review the claim of insufficient evidence and held that Mr. Phillips had no other apparent interest in divulging the investigator’s identity other than to thwart the investigation. A reasonable jury could conclude, beyond a reasonable doubt, that Phillip’s disclosure obstructed the proceeding. Affirmed. *United States v. Phillips*, 583 F.3d 1261 (10th Cir. 2009).

No expectation of privacy for storage unit rented with stolen identity

Eric Johnson enlisted his girlfriend, Brittany Christensen, to rent a storage unit on his behalf. Christensen did so using stolen identification of another person and paid for the first month in advance.

During a traffic stop, police discovered the stolen identification and rental agreement in the victim’s name as well as drug paraphernalia. After contacting the identity theft victim, police responded to the storage facility and conducted a search of the unit wherein they found two firearms. Johnson was charged with one count of being a felon in possession of a firearm and one count of possessing the firearm while being an illegal user of or addicted to a controlled substance. Johnson moved to suppress the evidence discovered during the search of the storage unit and a hearing was held. The motion was denied. Johnson entered a conditional plea and now appeals.

The appellate court relied on the classic two-part Fourth Amendment test in *United States v. Allen*, 235 F.3d 482,



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489 (10th Cir. 2000), which queries: (1) "whether the defendant manifested a subjective expectation of privacy in the area searched" and (2) "whether society is prepared to recognize that expectation as objectively reasonable." The court concluded that even if Johnson could establish a subjective expectation of privacy in the storage unit, he could "not show that his expectation of privacy was one that society would recognize as objectively reasonable." In addition, the court stated that because the rental agreement was fraudulently obtained, Christensen's contractual right to the storage unit was at risk of rescission at any time. And, furthermore, because a real person's name was used on the agreement there was a continual risk that the victim would learn of the rented unit and show up demanding access to it. Accordingly, the court held that Johnson did not have any Fourth Amendment rights or expectation of privacy in the unit and "could not expect that the police were required to obtain a warrant or establish an exception to that requirement in order to search the unit." *United States v. Johnson*, 584 F.3d 995 (10th Cir. 2009).

Other States

Court suppresses response to a question about drug use during the booking process

Denney was arrested for shoplifting. She was arrested and she invoked her right to remain silent when questioned by the arresting officer. As a routine part of the booking process, the correctional officer asked questions

about drug use. Denney admitted to taking morphine earlier in the day. The arresting officer overheard Denney's admission and charged her with drug possession. Denney claimed that the admission of her booking responses violated her Miranda rights. The court sided with Denney, noting that "a legitimate question, asked with good intentions, will still violate a defendant's Miranda rights if it is reasonably likely to produce an incriminating response." The court held that "regardless of their routine nature, the questions in this case were reasonably likely to produce an incriminating response." However, the booking officer had no reason to believe that Denney had used drugs and was asking the question as part of a routine designed to promote the arrestee's health and safety while jailed. Thus, it is hard to see how the response to any question about drug or alcohol use could ever be admissible in court under this ruling.

This ruling is generally more restrictive than most other courts. However, the Ninth Circuit has also narrowly interpreted the routine booking question exception to the Miranda rule. The Supreme Court has held that booking questions "normally attendant to arrest and custody" are not subject to a Miranda analysis and are the arrestee's responses are generally admissible. *Rhode Island v. Innis*, 446 U.S. 291 (1980). Most courts hold that answers about drug and alcohol use and consumption, when asked for health and welfare reasons and not to elicit incriminating information, are admissible. See *Merritt v. State*, 653 S.E.2d 368 (Ga. App.2007) (responses to questions about alcohol consumption were admissible at trial). For now, Washington officers will be operating under a more restrictive rule. *State v. Denney*, 218 P.3d 633 (Wash. App. 2009).

Melendez-Diaz in Other States

DRE certification training sufficient foundation for an officer's testimony

Jacob J. Daly was pulled over by Officer Monico for operating his car without a headlight. When the officer approached the vehicle he could smell marijuana and observed that Daly's eyes were watery and bloodshot. Daly admitted to smoking marijuana earlier in the day and consented to a search of his vehicle. During the search drug paraphernalia and traces of marijuana were discovered. Officer



Hilger responded and conducted field sobriety tests. Daly was arrested, and subsequently breath and urine testing was conducted pursuant to standardized "drug

recognition expert" (DRE) protocol. Evidence of marijuana use was found in his urine. Daly was charged with one count of driving under the influence (DUI), one count of possession of 1 ounce or less of marijuana, and one count of possession of drug paraphernalia. Daly filed a pretrial *Daubert/Schafersman* motion regarding the admissibility of the State's opinion that he was under the influence of drugs. The court denied the motion following a lengthy hearing. Daly was convicted on all charges and appealed to the district court, which

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affirmed the trial court's judgment. He challenged the admissibility of Officer Hilger's DRE testimony and other issues regarding the witnesses who testified at the *Daubert/Schafersman* hearing, including that they were not qualified to offer testimony on DRE protocol, objecting to exhibits used by them to support their testimony, objecting to the court's refusal to receive cross-examination testimony and Daly's proffer of evidence relating to their testimony. He also argued that the court committed cumulative error by overruling the various motions of Daly regarding the striking of a juror, admission of evidence and motions for mistrial.

In a lengthy decision the Supreme Court of Nebraska reviewed each assignment of error and held that the trial court did not abuse its discretion in allowing Officer Hilger's opinion testimony or prejudicially err in any other regard. With respect to Officer Hilger's testimony, the court reasoned that sufficient foundation for an officer's testimony included "training to detect the physical and mental effects of alcohol, experience in doing so, and the officer's account of the procedures undertaken to evaluate." Therefore, an officer who completed the training and experience necessary for certification as a drug recognition expert (DRE) was sufficiently qualified to testify. Accordingly, the court concluded that the district court did not err in affirming Daly's conviction and sentence. Affirmed. *State v. Daly*, 278 Neb. 903 (Neb. 2009).

Certification of accuracy of a breath-test machine is not testimonial evidence

Lucas Chapman Bergin was convicted of driving under the influence of intoxicants (DUII) and appealed. The Court of Appeals affirmed the decision without an opinion and Bergin now petitions for reconsideration. In his petition, Bergin argues that the trial court erred when it admitted a breathalyzer certificate because prosecution had not shown the technician to be unavailable nor that Bergin had had a prior opportunity to cross-examine him.



The intermediate appellate court held that the certifications in this case, attesting to the accuracy of the breath-test machine, were not the classic form of testimonial evidence aimed at by the confrontation clause. As such, a showing of unavailability and proof of prior opportunity to cross-examine were not an issue. The court also concluded that the certifications were more akin to public or business records and "not considered testimonial in

nature at common law." In addition, the court found no evidence that the technicians were operating as agents in the police investigation of the defendant. Moreover, the technicians who performed the tests did so without knowing when or even if the certificates would be used at all. Reconsideration allowed; former disposition adhered to. *State v. Bergin*, 217 P.3d 1087 (Or. App. 2009).



Machine generated data not testimonial evidence

Clark Darden, was charged with unsafe operation of a vehicle and operating a motor vehicle while the alcohol concentration in his blood was above .08 grams. At trial, the court admitted the testimony of the prosecution's forensic expert who testified regarding the forensic analysis of Darden's blood, even though the expert was a supervisor and not the technician who actually conducted the testing.

The court relied on the Fourth Circuit decision of *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007) to hold that the forensic expert's testimony was admissible. It reasoned under *Washington*, that "a technician who conducts lab tests could intentionally or unintentionally affect the data generated, but the same could be said, however, for anyone handling the sample in the chain of custody." Additionally, "the technicians did not generate their own conclusions but simply ran the tests which generated the data." The expert's testimony was based on his own review of the printed data generated by the testing machine and did not rely on statements of other technicians. Challenges to the admissibility and reliability of machine generated data should be addressed through authentication, not by hearsay or Confrontation Clause analysis. In this case, since the statements to which the expert testified did not come from out-of-court technicians, there was no violation of the Confrontation Clause. *U.S. v. Darden*, --- F.Supp.2d ---, 2009 WL 3049886 (D.Md.).

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Blood alcohol report is testimonial evidence. (Review granted and pending)

Virginia Lopez was involved in an auto accident that resulted in the death of the driver of the other vehicle. Blood was taken from Lopez and the results showed that she was intoxicated at the time of the accident. Prosecution presented documentation for the individual blood samples but failed to present the chain of custody documentation or have the person who prepared the blood alcohol report testify. The court admitted the samples on the basis that the documentation, together with the testimony of its custodian was sufficient to establish the chain of custody. Lopez was convicted of vehicular manslaughter while intoxicated. She appealed, but the Court of Appeals affirmed. The Supreme Court granted a petition for review and transferred back to the Court of Appeal for reconsideration.

The Court of Appeals held that under *Crawford* and *Melendez*, the blood alcohol report should not have been admitted into evidence. It reasoned that the report was indistinguishable from the facts in *Melendez* and was therefore testimonial hearsay. There was no evidence that the lab technician was unavailable or that there had been prior opportunity to cross-examine him. Therefore, the evidence was admitted in violation of the confrontation clause and because it cannot be shown that the error was harmless beyond a reasonable doubt, the judgment was reversed. *People v. Lopez*, 98 Cal. Rptr.3d 825 (Cal.App. 4 Dist. 2009). **Cautionary Note: A petition for review is granted by the Supreme Court of California. The parties will brief and argue whether the defendant was denied his right of confrontation under the Sixth Amendment and whether the error was prejudicial. --- Cal.Rptr.3d ----, 2009 WL 4795606 (Cal.).**



End of BRIEFS



On the Lighter Side

Why does Santa always go down the chimney?

Because it soots him!

Where does Santa stay when he's on holidays?

At a Ho-ho-tel!

What does Mrs. Claus sing to Santy on his birthday?

"Freeze a jolly good fellow!"

What does Santa put on his toast?

"Jingle Jam"

What do you get if you cross Father Christmas with a duck?

A Christmas Quacker!

An honest politician, a kind lawyer and Santa Claus were walking down the street and saw a \$20 bill. Which one picked it up??

Santa! The other two don't exist!

What do you do if Santa Claus gets stuck in your chimney?

Pour Santa flush on him!

What does Santa say to the toys on Christmas Eve?

Okay everyone, sack time!

What do the elves call it when Père Noël claps his hands at the end of a play?

Santapplause!

Why does Santa like to work in his garden?

Because he likes to hoe, hoe, hoe!

What do you call a kitty on the beach on Christmas morning?

Sandy Claws!

Who delivers presents to dentist offices?

Santa Jaws!

What do you get if Santa comes down the chimney while the fire is still burning?

Crisp Kringle!

Why does St. Nicholas have a white beard?

So he can hide at the North Pole!

What do you call Santa when he has no money?

Saint "Nickel"-less!

What do you call someone who doesn't believe in Father Christmas?

A rebel without a Claus!

DO YOU HAVE A JOKE, HUMOROUS QUIP OR COURT EXPERIENCE? We'd like to hear it! Please forward any jokes, stories or experiences to mwhittington@utah.gov.

Submission does not ensure publication as we reserve the right to select the most appropriate material available and request your compliance with copyright restrictions. Thanks!

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Utah Prosecution Council & Other Utah CLE Conferences

April 22-23	SPRING CONFERENCE <i>Case law update, legislative update and more</i>	South Towne Center Sandy, UT
April & May	STATEWIDE REGIONAL LEGISLATIVE UPDATES	23 locations statewide

National Advocacy Center (NAC)

Effective February 1, 2010, The National District Attorneys Association will provide the following for NAC courses: course training materials; lodging [which includes breakfast, lunch and two refreshment breaks; and airfare up to \$550. Evening dinner and any other incidentals are NOT covered.

[For specifics on NAC expenses click here.](#) Click [here](#) to access the NAC on-line application form. A description of and application form for NAC courses can be accessed by clicking on the course title.

March 15-19	TRIAL ADVOCACY I <i>A practical, hands-on training course for trial prosecutors</i> <i>The application deadline is January 8, 2010.</i>	NAC Columbia, SC
March 22-26	TRIAL ADVOCACY II <i>Practical instruction for experienced trial prosecutors</i> <i>The application deadline is January 15, 2010.</i>	NAC Columbia, SC
March 29 - April 1	CROSS EXAMINATION <i>A complete review of cross examination theory and practice</i> <i>The application deadline is January 22, 2010.</i>	NAC Columbia, SC

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

February 1-5	INVESTIGATION AND PROSECUTION OF CHILD FATALITIES AND PHYSICAL ABUSE - APRI* <i>Will include specialized tracks for prosecutors, investigators, medical and mental health providers, advocates, social work professionals.</i>	Eldorado Hotel Santa Fe, NM
February 21-25	PROSECUTING DRUG CASES - NCDA*	Memphis, TN
March 7-11	PROSECUTING HOMICIDE CASES - NCDA*	Orlando, FL
April 25-29	EVIDENCE FOR PROSECUTORS - NCDA*	San Francisco, CA

* For a course description and on-line registration for this course, click on the course title (if the course title is not hyperlinked, the sponsor has yet to put a course description on line) or call Prosecution Council at (801) 366-0202 or e-mail: mnash@utah.gov. To access the interactive NCDA on-line registration form, click on [2009 Courses](#).