

The

PROSECUTOR



United States Supreme Court

Right to speedy trial not upheld when defendant repeatedly changed attorneys

Brillon was charged and convicted on felony domestic assault and habitual offender offenses. Following at least six attorneys being assigned to his case and after three years had passed from the time of his arrest, Brillon was tried by jury and found guilty. Upon conviction, Brillon filed a motion to dismiss for want of a speedy trial. The trial court denied the motion; however, the Vermont Supreme

Court reversed based on Brillon's Sixth Amendment right to a speedy trial. Certiorari was granted.

The U.S. Supreme Court held that the state supreme court "erred in ranking assigned counsel essentially as state actors in the criminal justice system." No justification was found for handling Brillon's speedy-trial claims any differently based on counsel being publicly assigned, rather than if counsel had been privately retained. It held that regardless of how counsel was obtained, they "act on behalf of their clients, and delays sought... were ordinarily attributable to the defendants they represented." The Court relied on Barker's "functional analysis" and held that the record did not show that Brillon was denied his right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514 (1972). Reversed and remanded for further proceedings. *Vermont v. Brillon*, 129 S. Ct. 1283 (2009).

State law governs harmless-error review of peremptory challenge

Michael Rivera was charged with first-degree murder for the shooting death of sixteen-year-old Marcus Lee, after mistaking Lee for a member of a rival gang. During jury selection, Deloris

Gomez acknowledged that she worked at a hospital, had contact with patients while checking them in for treatment, and that the hospital treated many gunshot victims. She further claimed, however, that her experience would not affect her ability to be impartial. Rivera's counsel sought to use a peremptory challenge to excuse Gomez from being seated on the jury. Two of Rivera's prior challenges had already been used to eliminate women and the judge expressed his concern that the defense was discriminating against Gomez. Dissatisfied with the defense counsel's proffered reasons, the judge denied the challenge. On appeal, Rivera challenged the rejection of his peremptory challenge. The Supreme Court of Illinois found that the challenge should have been allowed, but that the error was harmless. Certiorari granted.

Rivera argued that the improper seating of a juror should not be subject to harmless-error analysis because it is impossible to determine how a properly seated jury may have decided the case. As such, he argued that automatic reversal was the rule as a matter of federal law. The Supreme Court held, however, that if a case was decided by a competent and

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unbiased jury of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error was a matter for the state to address under its own laws. In this case the Court held that Rivera received "a fair trial before an impartial and properly instructed jury" which is "precisely what due process required." Judgment Affirmed. *Rivera v. Illinois*, 129 S. Ct. 1446 (2009).

Plain-Error Rule Governs Unpreserved Claim

James Puckett was charged with armed bank robbery and using a firearm during a crime of violence. He entered into a plea agreement wherein he agreed to plead guilty to both counts, waive his right to trial, and cooperate with the government by being truthful about involvement in criminal activities. In exchange for his pleas, prosecution agreed to recommend a three-level reduction in his offense level and to

recommend that his sentence be placed at the lowest end of the guideline level. Prosecution subsequently filed a motion, in line with the agreement, and Puckett appeared in court and entered his plea. Puckett did not appear for sentencing until three years later because of health problems. In the interim, however, he was involved in committing another crime to which he eventually confessed to his probation officer. The probation officer filed an addendum recommending that Puckett should not receive a reduction since he had failed to terminate his criminal activity.

At sentencing Puckett objected to the addendum but at no time did he ever state that the prosecution was violating its obligations under the plea agreement by no longer advocating for the reduction. On appeal in the Fifth Circuit, Puckett made that argument for the first time. However, the court held that although error had occurred, he failed to make the objection in the District Court, and thus he

forfeited his claim. Certiorari was granted to determine whether Rule 52(b)'s plain-error test applies to a forfeited claim when government fails "to meet its obligations under a plea agreement."

The Court concluded that Rule 52(b) did apply and affirmed. It explained that an objection must be made in a federal judicial proceeding to preserve the issue. "If an error is not properly preserved, appellate-court authority to remedy the error is strictly circumscribed." *Puckett v. United States*, 129 S. Ct. 1423 (2009).



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Case Summaries





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McNabb-Mallory rule modified

John Corley was suspected of robbing a bank, but was also wanted in connection with a separate crime. When agents moved in to arrest him, he pushed an agent down and ran. Agent's chased him and arrested him for assaulting an officer. Agents interrogated and held him for 29.5 hours after arrest before presenting him to a magistrate. During the interrogation, Corley decided to confess to his involvement in the robbery and signed a confession. Corley tried to suppress his oral and written confessions under Rule 5 (a) and McNabb-Mallory, but the District Court denied the motion. He was convicted of conspiracy and armed robbery. On appeal to the Third Circuit, the conviction was affirmed on the grounds that 18 U.S.C. § 3501 "abrogated the McNabb-Mallory rule and replaced it with a pure voluntariness test. The majority found that if a confession was found admissible after considering the points in § 3501(b) it would be admissible regardless of whether delay in presentment was unnecessary or unreasonable." Certiorari was granted.

The Supreme Court held that § 3501 did not supplant the McNabb-Mallory rule, it only modified it. It further held that if the confession was made before "presentment but beyond six hours, the court must decide whether delaying that long was unreasonable or unnecessary under the McNabb-Mallory cases, and if it was, the confession is to be suppressed." Judgment vacated and remanded. *Corley v. United States*, 129 S. Ct. 1558 (2009).

Federal Counsel may be authorized in state clemency proceedings.

Edward Harbison was sentenced to death by a state court in Tennessee. Following the denial of his federal habeas corpus petition, he requested an attorney for state clemency proceedings based on new evidence developed during preparation for the habeas corpus action. "Relying on Circuit precedent construing 18 U.S.C. § 3599, which provides for the appointment of federal counsel, the District

Court denied the motion, and the Court of Appeals affirmed." Certiorari granted.

The Supreme Court addressed two issues in its holding. First, the Court held that a certificate of appealability is not required to appeal an order denying a request for federally appointed counsel. Second, the Court held that § 3599 does authorize the appointment of federal counsel to represent clients in state clemency proceedings. It reasoned that it was "entirely plausible" that Congress intended the authorization of "federally funded counsel to represent their state clients in clemency proceedings" because it would ensure meaningful access by all prisoners to the "fail-safe of our justice system." Judgment reversed. *Harbison v. Bell*, 129 S. Ct. 1481 (2009).



Utah Supreme Court

Definition of "inherently improbable testimony" expanded

Ryan Robbins was convicted, by a jury, of aggravated sexual abuse of a child involving his step-daughter as the victim. The only evidence of the criminal activity consisted of the victim's testimony. There were several inconsistencies in her testimony on matters not directly related to the abuse itself. Upon conviction, Robbins filed a motion to arrest judgment. The court denied the motion and the appellate court affirmed the denial. Certiorari was granted.

The Utah Supreme Court expanded the definition of inherently improbable testimony to include "circumstances where a witness's testimony is incredibly dubious and, as such, apparently false." The court further held that in light of the judge's expressed concerns, the credibility of the step-daughter's testimony, and the inconsistencies in the testimony, the court could reevaluate the credibility of the child's testimony and disregard it as inherently improbable in its determination of whether there was sufficient evidence to support the verdict. The court held, however, that "the trial court could reevaluate the jury's credibility determinations only in those instances where (1) there are material inconsistencies in the testimony and (2) there is no other circumstantial or direct evidence of the defendant's guilt." Reversed and remanded with instructions for the trial court to enter an acquittal. *State v. Robbins*, 2009 UT 23. *Note: The appellate division has filed a Petition for Rehearing in this matter.

Privilege tax not unconstitutional

ABCO Enterprises entered an agreement with Ogden City for the use of two parcels of land. Although the land was exempt from property tax because Ogden City was the owner, the Weber County Board of Equalization imposed a privilege tax against ABCO pursuant to Utah Code § 59-4-101. The statute provides that since ABCO used the properties for profitable business purposes, they must pay a privilege tax in the same amount as what the property taxes would have been if it were not an exempt property. The county and the State Tax Commission ruled that the privilege tax was properly assessed. ABCO appeals on the issues of whether the statute is unconstitutional because it "classifies potentially differently situated persons in a similar manner." Certiorari granted.

The Utah Supreme Court held that this case does not present any of the three

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PROSECUTOR PROFILE

Brittany Huff

Assistant City Prosecutor,
Murray City Attorney's Office



Brittany Huff has been with Murray City Attorney's Office for the past year and a half. She spends a great amount of time in court and loves every minute of it. Her zest for learning and acquiring the necessary courtroom skills helps make her an effective prosecutor. Prior to working at Murray City, she worked for the Layton City Attorney's Office where she assisted with both civil and criminal caseloads. Her fun and dynamic personality makes her an asset to any office.

Brittany has been married for fourteen years to Neil, the love of her life. They have an adorable little boy Ian that Brittany proclaims to be "the cutest little boy alive" and from his picture, who could argue that!

An adventurous spirit to the core, Brittany is never afraid to tackle something new. She has lived in Southern France for a few months and learned to speak the language. Although it is now a little buried from lack of use, don't be afraid to greet her with "Bonjour" the next time you see her. She also loves the outdoors and is actively involved in playing tennis, skiing, swimming, and biking.

Brittany attended the University of Utah for her undergraduate degree in English, Education and English as a Second Language. It took her almost nine years to decide what she wanted to be when she grew up. But her efforts paid off, she had no student loans to repay, and has never looked back. After graduation, she attended the University of Idaho law school. She and Neil lived down a dirt road, out in the woods on 40 acres and loved every minute of it. Neil continually begs her to move back and she relishes the memories of life with some of the neatest people on earth.

So what does Brittany love the most about being a prosecutor? The attorneys she gets to work with. They are great people who have been willing to share their professional experiences and friendships and that willingness has added so much to the job experience. The most frustrating parts of the job are the unfair fights and, of course, losing a jury trial when you know the defendant is guilty.

Brittany says, "Being a prosecutor has given me perspective on life and made me a more grateful person. I wouldn't do a thing differently if I had to do it over again."

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PREFERRED NAME

Brittany

BIRTHPLACE

Salt Lake City, Utah

FAMILY

Middle child of five children;
Mother to Ian (1 1/2 years old)

FIRST JOB

Working at Baskin Robbins at
age 14

FAVORITE BOOK

East of Eden by John Steinbeck

LAST BOOK SHE READ

The Good Earth by Pearl S. Buck

WORDS OF WISDOM

"Some succeed because they are
destined to, but most succeed
because they are determined to."
-Author unknown.



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situations where preservation is required and as such, their constitutional claim is not waived. It further held that the privilege tax does not violate the Utah Constitution under the uniform operation of laws provision or the Equal Protection Clause. It reasoned under a three-part inquiry that the classification created is reasonable, the legislative purpose of the tax is legitimate and a rational relationship existed between the classification created and the legislative purpose. Affirmed. *ABCO Enters. v. Utah Tax Comm'n*, 2009 UT 24.

No statutory duty to maintain road

Appellants are involved in farming operations east of the town of Fairfield. The primary access to their land is a road that is only partially maintained by the town. The road has deteriorated because of the lack of maintenance. Despite the offers of financial assistance by those living outside of town, Fairfield has declined to provide any additional maintenance. The only alternate route to the land is a rough, narrow road that has sharp edges and causes tire damage. The Fourth District Court, Provo, Utah, denied a request for an extraordinary writ sought by appellants to compel Fairfield to maintain the road. Certiorari granted.

The Utah Supreme Court held that the farmers had suffered an injury and had standing. However, it also held that there was no statutory duty imposed on the town to maintain the road. Accordingly, the town had the sole discretion to make decisions pertaining to the care and maintenance of the road. Decision affirmed. *Hogs R Us v. Fairfield*, 2009 UT 21.



Utah Court of Appeals

Attorney's waiver of appearance not a violation of due process rights

Perry, who was incarcerated, was not transported to a probation revocation hearing. At the time of the hearing, his attorney waived Perry's appearance and proceeded in his absence. Pursuant to an earlier admission by Perry, the district court found that he had violated his probation. Accordingly, the court revoked his probation and imposed the original sentence to run concurrent with his present commitment. Subsequently, Perry objected to not being transported to the hearing and sought review of the Third District Court's order. He argued that the court erred in proceeding with the hearing in his absence, which violated his due process rights. He also argued that he received ineffective assistance of counsel because his attorney allowed the hearing to proceed without objection.

The Utah Court of Appeals declined to review Perry's claim of violation of due process rights because his attorney was present and agreed to the hearing proceeding in Perry's absence. On the claim of ineffective assistance of counsel, the court concluded it failed as a matter of law because Perry failed to show "actual prejudice or of circumstances justifying a presumption of such." Affirmed. *State v. Perry*, 2009 UT App 51.

"Shoulder movement" was not a reasonable articulable suspicion

During a traffic stop, a police officer subjectively believed that Parke was concealing either a weapon or narcotics after observing a "shoulder movement." He ordered Parke to put his hands outside the window so he could approach safely. Parke questioned the order, but did

comply. A back-up officer arrived and Parke was asked to step out of the vehicle so a weapons search could be done for their safety. During the search of Parke's person, a pocketknife with an attached capsule was found. Upon extending the search to the "grab area" of where Parke had been sitting, a baggie containing methamphetamine was also located. During the search incident to arrest, a baggie of crystallized substance was found inside the capsule. Parke was charged with unlawful possession of a controlled substance, a third degree felony. He filed a motion to suppress the evidence, which was denied. Following that denial, Parke pleaded guilty to the charge but reserved the right to appeal. On appeal Parke argued that police did not have reasonable suspicion to search him, which violated his Fourth Amendment rights. The court of appeals agreed.

The officer's hunch that Parke was concealing a weapon or narcotics was based on a shoulder movement and does not support a reasonable articulable suspicion that he was armed and dangerous. Parke may have just been reaching for his wallet, rather than a weapon, and when he extended his hands out the window the officer knew Parke was not holding a weapon, mitigating any danger that may have been present. The court reversed the denial of motion to suppress evidence and remanded. *State v. Parke*, 2009 UT App 50.

Criminal nonsupport sentence upheld

Richardson entered a guilty plea to one count of criminal nonsupport. Pursuant to a plea agreement, Richardson agreed to pay back support in predetermined amounts and increments and then to pay his "ongoing child support." In exchange, the State agreed that if he paid and was current at the time of sentencing, additional jail time would not be requested. Richardson was current on payments at the time of the sentencing hearing, however, the hearing was continued so the court could receive and review the Presentence Investigation Report. At the rescheduled hearing, Richardson had again fallen behind on payments and requested a continuance so he could get current before

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Why Do Women Stay in Relationships Involving Domestic Violence?

By DeLynn Fudge, Federal Grants Division Director,
Oklahoma District Attorney's Council

Imagine this scenario: A man asks a woman out for a date. He goes to the door to pick her up. She opens the door and he punches her in the face and says, "Now that we have that out of the way, let's go to dinner." According to Doug Miles, Chief Deputy District Attorney, Special Division in the Colorado Springs District Attorneys Office and a recent trainer for the District Attorneys Council, in his 22 years of prosecuting domestic violence cases, he has never seen that scenario.

Relationships that involve domestic violence don't start out that way. All relationships, even ones involving domestic violence, begin with the same excitement and the element of hope that non-abusive ones do. At some point, the seemingly normal relationship goes awry and violence enters the picture. As with any pattern in a relationship, the abuse begins and often escalates over time as do the methods used to exert power and control over the victim.

But why does a woman who is being beaten stay? Why doesn't she just leave? Without the answers to these questions, it seems that it is difficult for some to be understanding and/or responsive to domestic violence victims. The development of domestic violence is a process and it is a process for victims to free themselves.

We often don't question why it is difficult for people to overcome poverty, to get beyond a severe drug addiction, or to cope with significant mental health issues such as schizophrenia or major depression. We intuitively or through education and training understand the complexities and incredible difficulties of moving beyond or even managing these life problems. So why is it so different for domestic violence? Why is it that there isn't a similar understanding for domestic violence victims as there is for others who are coping with such significant life difficulties. It is the concept that many attribute to domestic violence victims that she is a "willing victim". If she wanted to leave, she is an adult and she could.

According to Miles, the answer to why she stays and doesn't just leave is fairly simple and yet incredibly complex. It is an odd combination of love, hope, and fear. Often, it isn't that a woman hates the man who abuses her; she hates the abuse. She doesn't want to end the relationship. She would just prefer the abuse stop so she can have the relationship she thought she'd have when they first met. She stays because, however briefly, she sees glimpses of the person she loves and fell in love with.

She is also fearful. Being beaten on a daily, weekly, or monthly basis over a long period of time has an impact. At a training, someone once asked the following question, "Why didn't the field slaves run away from the plantation in the middle of the night while the master slept?" The immediate response from the audience was, "Because the slaves knew they would be hunted down, caught, and beaten like never before and there was a good chance of getting killed." The psychological terrorism that domestic violence victims live with is no different.

While it can be a very subtle or even an unconscious process, victims of domestic violence are often held responsible by others for the problem **and** the solution - which isn't generally a standard to which others with life problems are held. It is understood that a person in poverty needs a multitude of services, a drug addict needs treatment; those with mental health issues need medication and sometimes therapy. So it is with domestic violence victims. Yet, some expect domestic violence victims to extricate themselves without the necessary support and services.

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Why Do Women Stay in Relationships Involving Domestic Violence?

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In an effort to understand the countless reasons why she doesn't just leave, the following list has been developed from a number of resources including domestic violence victims and the advocates that work with them. For any particular victim, there may be one singular reason but more likely a multitude of reasons why she doesn't leave an abusive partner. It is easy to project upon a victim that it is a simple act to leave but in many cases, it just isn't. Research has found that the most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him.

As you read these reasons, consider the following: *What if it isn't just one reason, but it is 10, or 20, or even 40 of these reasons? Can we better understand the complexity and difficulty of why she doesn't leave and begin to focus on providing the myriad of services to support her to leave?*

1. Her partner says, "I will kill you" and she believes him.
2. Her partner says, "I will kill the children" and she believes him.
3. Her partner says, "I will kill myself" and she believes him.
4. Her partner says, "I will kill your family" and she believes him.
5. He has threatened to call child welfare on her and she's fearful her children will be taken away.
6. She's fearful of the criminal justice system in her life.
7. She's afraid she'll have to testify about the most difficult and painful events in her life.
8. She's fearful of him if she participates in filing charges.
9. She doesn't want him to go to jail.
10. He's the sole breadwinner and she can't afford for him to go to jail.
11. Her partner says, "I will get custody of the children."
12. Her partner did get custody of the children when she left before.
13. She's fearful she'll be accused of deserting her children if she leaves.
14. She thinks it is better for her to be beaten than her children to be beaten.
15. She thinks she can protect her children better if she is in the home rather than if her children have visitation with him alone.
16. She has stepchildren and she loves them and doesn't want to abandon them.
17. She feels she is protecting her stepchildren from being abused.
18. He has isolated her from family and friends and his family is the only family that she has.
19. He always keeps one or more of the children with him so she can't leave.
20. She loves her partner.
21. She continues to hope the abuse will stop.
22. She doesn't want to think of herself as a domestic violence victim.
23. She doesn't want to be perceived by others as a domestic violence victim.
24. Her partner says, "I'm sorry" and she believes him.
25. Her partner says, "I'll never do it again" and she believes him.
26. She thinks that if he just went to counseling he would change or be cured.
27. She thinks her partner "loves" her.
28. She doesn't think she deserves any better.
29. She doesn't know how or where to seek help.
30. Her religious beliefs discourage her or religion encourages her to save the marriage at all costs.
31. Mental health professionals discourage her.
32. Her family discourages her.
33. His family discourages her.
34. The children discourage her.
35. It is against her culture to disclose family issues or involve the government in family matters.
36. It is against her culture to get divorced.
37. It is against her personal beliefs to get divorced.
38. She doesn't have the money to get a divorce.
39. They own a business together.
40. They own property together.
41. Her partner has told her it is her fault and if she would just change he wouldn't beat her.
42. He has told her she's crazy, sick, hysterical and she won't be believed.
43. She feels it is her fault and endlessly tries to change her behavior.
44. She's a drug addict.
45. She's an alcoholic.
46. She was a victim of physical abuse as a child and believes that violence is a normal part of a relationship.
47. She was a victim of sexual abuse as a child and believes that violence is a normal part of a relationship.

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Why Do Women Stay in Relationships Involving Domestic Violence?

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48. Her mother was a victim of domestic violence and that is what she knows.
49. Her partner is a drug addict.
50. Her partner is an alcoholic.
51. She's deaf.
52. She's blind.
53. She's mentally challenged.
54. She's in a wheel chair.
55. She's has other physical challenges.
56. She has mental health issues.
57. She can't read.
58. Her health is bad and she's fearful she can't care for her children alone.
59. She doesn't speak English.
60. She doesn't have papers to be in this country.
61. A shelter isn't available or the shelter is full.
62. The shelter is in another county.
63. There are no domestic violence support services in her area.
64. She doesn't have transportation to get to a job.
65. She lives in a rural area and doesn't have transportation to a shelter or access to a phone.
66. She doesn't have a job or has few skills to get a job where she can support herself and her children.
67. He has continually damaged her employment record by harassing her at work, excessive lateness, and absenteeism and she can't get a job.
68. She can't afford childcare with the job she can get.
69. She doesn't have a place to go.
70. She doesn't have access to cash, bank accounts, or credit cards.
71. She doesn't have the first and last months rent or deposits for utilities.
72. She won't have health insurance.
73. She won't have car insurance.
74. She doesn't have credit because he has ruined it.
75. She's afraid she'll become homeless.
76. She won't be able to get any of her belongings once she leaves.
77. She's afraid she will lose her home.
78. She's isolated because he's methodically driven away family and friends.
79. She's depressed.
80. She's embarrassed.
81. She's overwhelmed.
82. She doesn't think she can make it.
83. She's afraid of being alone.
84. She's a public figure.
85. She's fearful of losing her job if it were found out that she was a domestic violence victim.
86. Her partner is a public figure.
87. Her partner is a law enforcement officer or some other criminal justice professional.
88. His friends are in law enforcement or other criminal justice professionals.
89. She doesn't think that anyone will believe her husband abuses her.
90. She's sought out help before but it got worse.
91. Law enforcement wasn't responsive.
92. The prosecutor wasn't responsive.
93. The judge didn't take her seriously.
94. She got a restraining order before in an effort to try to leave but he beat her anyway so what is the point?
95. She doesn't want to leave her pets.
96. Her partner tortured her pets before when she threatened to leave.
97. Her partner threatens to kill her pets if she leaves.
98. Her partner has killed her pets.
99. The children don't want to leave their pets.
100. The children don't want to leave their father.
101. The children don't want to leave their school.
102. The children don't want to leave their house and things.
103. The children don't want to leave their friends.
104. She feels she should sacrifice herself so her children can have a father, a good school, a home, or financial security.
105. She thinks her children will be worse off if she leaves.
106. She's afraid of the unknown.
107. She feels that there is no help.
108. She is the victim and feels she shouldn't have to leave her home.
109. She's tried to leave before.
110. He has threatened her with a weapon.
111. He harassed, threatened, stalked, and retaliated against her when she left in the past.
112. Her partner found her before and she knows that if she does leave the danger of more severe violence or death increases.

In the future, rather than asking, "Why do women stay in relationships involving domestic violence? Reframe the question and ask, "What services need to be provided to support her when she is ready to leave?"



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sentencing. His request was denied and he was sentenced to spend 180 days in jail. He appealed the sentence.

Richardson argued that his due process rights were violated when the court found him in breach of the plea agreement based “solely upon the State’s unilateral representation.” He further argued that the court should address the issue under Utah R. Crim. P. 22(e) or the plain error doctrine. The court determined that both Richardson and his attorney admitted to being behind in child support, which supported the State’s claim that he was in breach of the plea agreement. In addition, an evidentiary hearing was never requested. As such, the court held that Richardson’s sentence was not illegal and “declined to correct it pursuant to Rule 22(e) or the plain error doctrine.” The trial court’s judgment was affirmed. *State v. Richardson*, 2009 UT App 40.

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Final order is necessary to appeal as of right

Martin was charged with two counts of criminal mischief. He entered a no contest plea to one count, which was held in abeyance for one year. He further agreed to replace the fence and tree he had torn down as a condition to the plea in abeyance. Prior to the appeal being filed, the trial court set aside the sentence as illegal because the court had not complied with the Restitution Act. Another sentencing hearing was scheduled, however, Martin filed the appeal so the re-sentencing did not occur.

On appeal, the court held that because the re-sentencing never occurred, there was no final order from which Martin could appeal as of right. Accordingly, the court dismissed the appeal for lack of jurisdiction. *State v. Martin*, 2009 UT App 43.

Private party information may not implicate constitutional protections

Upon being arrested, Rowley asked his parents to take care of the things in the bed of his truck. His father entered the cab of the truck to move it into the garage and while doing so discovered a syringe and porcelain cup, both of which contained an unknown substance. The father showed the items to his wife who then searched the bags from the back of the truck and located digital scales. The father called a friend in law enforcement who instructed him to return the items to the truck. The officer then responded to the home and at the father’s invitation, retrieved the evidence. The substance was tested and determined to be methamphetamine, so Rowley was charged with possessing methamphetamine in a drug free zone. After losing his motion to suppress the evidence, he entered a conditional guilty plea and reserved his right to appeal.

On appeal Rowley argued that because the officer’s search of the truck and subsequent seizure of incriminating evidence occurred after his father had searched the truck, it violated his rights under the Fourth Amendment and Utah Constitution Article I, Section 14. The court relied on *United States v. Jacobsen* and held that the evidence was found during a private search, which “extinguished his expectation of privacy in the evidence.” 466 U.S. 109, 113 (1984). It further held that a private party could provide information to law enforcement and not implicate constitutional protections. As long as the “scope of the private search is not exceeded,” an area or container already privately searched and resealed can be re-searched. Therefore, the fact that the parents had returned the evidence back to the truck is legally insignificant and does not restore the expectation of privacy. And, because the officer’s search did not exceed the father’s search, Rowley’s rights were not violated. Trial court’s judgment affirmed. *State v. Rowley*, 2009 UT App 33.

Grounds for parental termination upheld

The appellant father (“KH”) seeks review of an order terminating his parental rights in his child. Utah law permits the termination of parental rights if neglect, parental unfitness or incompetence, failed parental adjustment, or a failed trial home placement, inter alia, are found. Utah Code § 78A-6-507(1)(b), (c), (e), (h). In this case, KH was found to be an “unfit and incompetent parent” due to his substance abuse problems. In addition, the juvenile court concluded there was a failure of parental adjustment and that the trial home placement had also failed.



The issue raised on appeal is whether the court improperly relied on ‘sub-cut-off trace amounts’ from KH’s drug tests to terminate his parental rights. The court affirmed the juvenile court’s

order and held that even if there was error in considering the urinalyses the order was sustainable because “several separate grounds under Utah Code §78A-6-105 (Supp. 2008) supported termination.” KH’s repeated criminal activity, incarcerations, and absences from the child supported a finding that he was an unfit or incompetent parent. Additionally, the failed home trial placement, considered independently, was adequate grounds to terminate his parental rights. *K.H. v. State (In re D.H.)*, 2009 UT App 32.

Highly provocative, contemporaneous trigger required for EED defense

White went to her ex-husband, Mr. White’s, workplace and got into an argument about various divorce issues. She mouthed words about killing him and made gestures of shooting him as a song played on the radio and the singer sang the words, “I want to blow you away.” She made other comments about wanting to kill him and left with the parting words, “You are a parasite on this earth and I’m going to wipe you off

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this earth.” Four hours later, White returned to Mr. White’s workplace and waited in the parking lot. As he exited the building he was talking on a cell phone, which White claimed, triggered a “burst of anger, agitation, loss, grief, and disappointment” that had accumulated during the marriage, separation and divorce. She drove her vehicle towards him and accelerated quickly. Mr. White jumped out of the way and ran back into the building where White pursued him, through glass doors and struck him twice with her vehicle before finally stopping. White was charged with attempted murder and criminal mischief. She filed a motion to include a jury instruction regarding the affirmative defense of extreme emotional distress. The trial court denied her motion, and she appealed.

The appellate court held that the trial court had not erred in denying the motion. It affirmed the trial court’s application of an objective standard in viewing the evidence. It also affirmed the conclusion that “a highly provocative, contemporaneous trigger was required” for White’s loss of self-control to “qualify as extreme emotional distress.” The appellate court agreed with the trial court that evidence of such a trigger had not been provided and accordingly, she was not entitled to a jury instruction on that affirmative defense. *State v. White*, 2009 UT App 81.



Tenth Circuit Court of Appeals

Fourth Amendment ordinarily won’t apply to bounty hunters.

Bounty hunters apprehended Poe after he jumped bail in a criminal case. At the time of apprehension, drugs, drug paraphernalia and a loaded firearm were located by the bounty hunters and reported to police. Poe was charged and subsequently filed a motion to suppress the evidence. He claimed the evidence was the result of a warrantless search, which violated his fourth amendment rights because the bounty hunters were acting on behalf of the state and impinged on his expectation of privacy at his girlfriend’s home. The motion was denied. As a result, Poe was convicted and sentenced to 165 months imprisonment and ten years supervised probation. Poe appealed the denial of his motion.

The court relied on the two part test adopted in *United States v. Souza* to determine whether the bounty hunters’ relationship with police qualified them as state actors. 223 F.3d 1197 (10th Cir. 2000). The court first determines “whether the government knew of and acquiesced in the individual’s intrusive conduct,” and then, “whether the party performing the search intended to assist law enforcement efforts or to further his own ends.” In this case, although the court agreed that Poe had an expectation of privacy while staying at his girlfriend’s home, it held that the bounty hunters were acting for their own interests and thus, were not state actors for Fourth Amendment purposes. Judgment affirmed. *United States v. Poe*, 556 F.3d 1113 (10th Cir. 2009).

Employers can prohibit employees from keeping guns in cars on company property.

In response to a number of companies prohibiting employees from bringing firearms onto company property, the Oklahoma legislature amended its laws to

limit such policies. The new laws held “employers criminally liable for prohibiting employees from storing firearms in locked vehicles on company property.” Several businesses filed suit challenging the laws, claiming they were unconstitutionally vague, a violation of their due process rights and preempted by the Occupational Safety and Health Act (OSH Act) of 1970. The district court held that the laws were not unconstitutionally vague and did not violate the employers’ due process rights. It further held that the OSH Act preempted the new laws and granted an injunction to enjoin enforcement.

On appeal, the Tenth Circuit upheld the district court’s ruling that the laws were not vague and did not violate due process rights. However, it found that the court erred in finding that OSHA preempted the new laws. It stated that the facts did not overcome the presumption that the police powers of states were not

to be superseded by federal law unless it was the “clear and manifest” intent of Congress. Accordingly, the court held that “Congress did not clearly intend the OSH Act to preempt the Amendments.” Affirmed in part, reversed in part. *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 (10th Circuit, 2009).

In forma pauperis on appeal

Boling-Bey sought to proceed in forma pauperis (IFP) on appeal. As such, he was required to provide a certified copy of his inmate trust fund account statement. He refused to do so, arguing that he could proceed IFP on appeal because he had been previously permitted to proceed IFP at the trial stage and because the court had not found his appeal to be in bad faith or otherwise disallowed.

The court held that regardless of



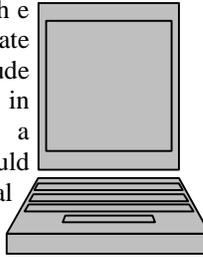
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whether the trial court granted IFP status at the trial stage, under the Prison Litigation Reform Act, a prisoner must file a separate motion in the district court if seeking to proceed IFP on appeal. *Boling-Bey v. United States Parole Comm'n*, 559 F.3d 1149 (10th Cir. 2009).

stay in the conference room. Given the totality of the circumstances, the appellate court could not conclude that he was interviewed in circumstances that a reasonable person would associate with a formal arrest. *United States v. Bassignani*, --- F.3d ---, 2009 WL 764562 (9th Cir. 2009).



prosecutor and then issued a “wanted bulletin” indicating that the prosecutor would be preparing an arrest warrant. A month later, an anonymous tipster called police and reported seeing Groves. The dispatcher broadcast the information, including erroneously broadcasting that a warrant had been issued for Groves. A responding officer saw Groves driving and stopped him. The officer saw a gun under Groves’ seat and arrested him for being a felon in possession of a gun. Groves challenged the arrest on the basis of the mistaken information regarding the warrant for his arrest.

The court of appeals agreed that Groves’ detention and the discovery of his gun were unlawful because there was no actual arrest warrant. However, relying on the recent U.S. Supreme Court case of *Herring v. United States*, the court held that suppression of the gun was not the appropriate remedy for the dispatcher’s mistake. “There is nothing in the record to suggest that the South Bend Police Department recklessly disregarded constitutional requirements or that any police personnel knowingly falsified a warrant record.” Thus, Groves’ conviction was upheld. *United States v. Groves*, 559 F.3d 637 (7th Cir. 2009).



Once a stand-off lawfully begins, officers need not stop to obtain a warrant

A security guard responded to Fisher’s apartment on a noise complaint. Fisher, highly intoxicated, became agitated and pointed a rifle in the guard’s direction. The guard left and called police. When officers arrived, Fisher was loading cartridges into a heavy caliber rifle and told them that he would kill them if they approached his home. Officers used negotiators, gas and noise/flash distraction devices to encourage surrender. About 12 hours into the stand-off, Fisher agreed to come out and surrender. He began to walk toward officers, then suddenly turned and ran back toward his home. An officer shot him in the leg with a less-lethal projectile and Fisher

Other Circuits

Suspect not “in custody” during workplace interview

Investigator’s identified Bassignani’s workplace email address as a conduit for downloading child pornography. During their investigation, they asked Bassignani to accompany them to a conference room. He was informed that he was not under arrest and that he would walk out of the room at the end of the interview. However, the investigator did not specifically tell Bassignani that he was “free to leave.” During the questioning in the conference room, Bassignani told the investigators where his car keys could be found. Other investigators searched Bassignani’s home computer, office computer and car. They found child pornography and wiping software. Bassignani admitted to downloading child pornography. At the conclusion of the interview, Bassignani left the room and he was not arrested. He was later indicted on one count of distributing images of child pornography and one count of possessing images of child pornography under 18 U.S.C.S. § 2252.

Bassignani asked the court to suppress his statements, claiming that he was “in custody” for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966) and that the lack of *Miranda* rendered the evidence from the interview inadmissible. Though the trial court found that Bassignani was in custody, the appellate court reversed. The appellate court determined that Bassignani was interviewed in a place familiar to him, he was not confronted with evidence of his guilt, other persons came and went during the interview, and there was no evidence that officers pressured him to confess or

Causing another to touch himself during child pornography production qualifies for sentencing enhancement

Robert Shafer and his partner and co-defendant, Kurt Amundson, operated a state-licensed foster care home for boys. Shafer and Amundson held nude hot tub encounters with the boys. Shafer also took photos of the nude boys. Shafer had a sexual relationship lasting five or six years with one of the boys, beginning when the boy was eight years old. During one of the sexual encounters, Shafer persuaded the 11 year-old boy to masturbate himself during videotaping. Shafer was charged under 18 U.S.C. § 2246(3), which defines “sexual contact” as “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” Intentional touching is a sentencing enhancement. Shafer was sentenced to 30 years.

On appeal Shaffer argued that “sexual contact” did not include masturbation. The court of appeals reviewed the statute and for the first time by any court, it held that “intentional touching” could include enticing another person to touch his or her own genitalia, anus, groin, breast, inner thigh, or buttocks with an intent to abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person. *United States v. Shafer*, 557 F.3d 440 (6th Cir. 2009).

Mistaken warrant broadcast leads to gun arrest, and no suppression

Groves was suspected of shooting several rounds into a home. The investigating officer consulted with a

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On the Lighter Side

During a visit to the mental asylum, I asked the director "How do you determine whether or not a patient should be institutionalized?"

"Well," said the director, "we fill up a bathtub, then we offer a teaspoon, a teacup and a bucket to the patient, and ask him or her to empty the bathtub."

"Oh, I understand," I said.

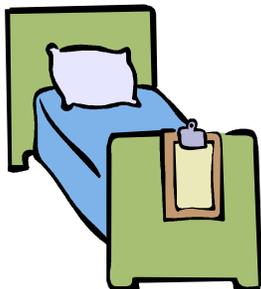
"A normal person would use the bucket

because it's bigger than the spoon or the teacup."

"No." said the director, "A

normal person

would pull the plug. Do you want a bed near the window?"



An old Italian lived alone in New Jersey. He wanted to plant his annual tomato garden but he was

getting old. His only son, Vincent, who used to help him, was in prison. He wrote a letter to his son, explaining his predicament:



Dear Vincent,
I am feeling pretty sad because it looks like I won't be able to plant my tomato garden this year. I'm just too old to dig up the garden plot. I know if you were here you could dig it up for me.

Love, Papa

A few days later he received a letter from his son:

Dear Pop,
Don't dig up that garden. That's where the bodies are buried.

Love, Vinnie

At four the next morning, FBI agents and local police arrived and dug up the entire area without finding any bodies. That afternoon, the old man received another letter from his son:

Dear Pop,
Go ahead and plant the tomatoes now. That's the best I could do under these circumstances.
Love, Vinnie

Thanks to The Oregon District Attorney's Association.

What's wrong with lawyer jokes?

Lawyer's don't think they're funny, and nobody else thinks they're jokes!



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was arrested. At no time during the stand-off did the officers go to the local courthouse to swear out an arrest warrant.

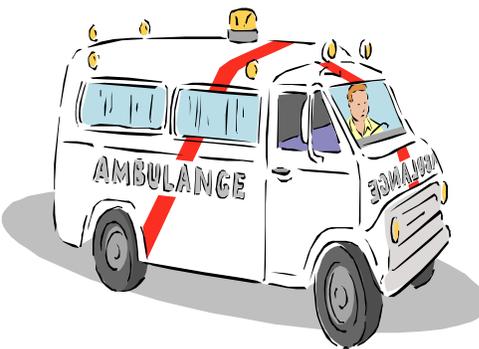
On appeal, Fisher argued that officers are required to assess the exigent circumstances doctrine “each passing minute” during a stand-off. The Ninth Circuit Court of Appeals initially held in Fisher’s favor, ruling that the initial exigency had dissipated and that police should have obtained a warrant prior to taking action to secure Fisher. However, by an en banc hearing, the Ninth Circuit reversed and held that once police lawfully begin a standoff, initiated by a suspect’s actions, the officers do not need to stop and obtain a warrant, even if the standoff continues and there are lulls in the action that might permit some of the officers to leave their posts and obtain a warrant. The Ninth Circuit reasoned that to rule otherwise would be to place a “dangerous burden” on police. *Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009) (en banc).

Search of paramedic's computer was not "government search"

Inman, a paramedic, was at work in the field responding to an ambulance call. Other paramedics were at the station and opened Inman’s laptop to check for Inman’s girlfriend’s name on his instant messenger list. He saw icons that suggested child pornography, opened the files and viewed three explicit videos of children engaged in sex. The next day, the coworker told an investigator about the videos. During the investigation, police found child pornography on Inman’s computer and a DVD with child pornography at his home. Inman filed a motion to suppress the evidence, which was denied. Inman asked the court to suppress the warrant and the subsequent searches. He alleged that his coworkers, all employed by the government and one of who was a supervisor, were government agents that searched his computer illegally. The trial court denied his motion and he was convicted of possession of child pornography. Inman appealed.

On appeal, the court held that a private citizen conducted the search and therefore Inman’s Fourth Amendment rights were not violated. The court considered “whether the

government had knowledge of and acquiesced in the intrusive conduct; whether the citizen intended to assist law enforcement agents or instead acted to further his own purposes; and whether the citizen acted at the government’s request.” In this case, the snooping paramedics were curious about Inman’s girlfriend. They had no intent to find any evidence or any information that might be helpful to a government investigation. In fact, once they found the child pornography, they were initially hesitant in reporting it to police. Thus, the initial discovery of the child pornography did not violate the Fourth Amendment and the evidence was admissible against Inman. District court



judgment affirmed. *United States v. Inman*, --- F.3d---, 2009 WL 538717 (8th Cir. 2009).

Miranda waiver evaluated by voluntariness and knowledge as perceived by interrogating officers at the time of interrogation

Garner found a woman’s purse near a pay phone at a hospital emergency room. He took the purse and hailed a cab to take him to the woman’s home. There he told the cab driver his girlfriend was evicting him and had the driver wait while Garner loaded appliances and other goods from the home into the cab. Garner saw six children sleeping in the home. After Garner loaded the cab, he set several fires in the home and all but one of the children died in the fire. Following *Miranda*, Garner admitted to the theft and to setting the fires, but explained that he thought the children would escape alive. Garner was convicted in the state court of murder and sentenced to death. He

filed a petition for a writ of habeas corpus. The District court denied his petition and he appealed.

The Court of Appeals determined that the appropriate test was whether Garner showed discernable signs to police that he was incapable of understanding the warnings that the officers provided. The court derived this test from its interpretation of *Colorado v. Connelly*, 479 U.S. 157 (1986). In a case decided shortly after *Colorado v. Connelly*, the Court explained that the analysis of a *Miranda* warning has two components: voluntariness and comprehension. If the totality of the circumstances shows that the waiver was the product of a free and deliberate choice, and not intimidation and coercion, and the waiver was made with full awareness of the right being surrendered and the consequences of that surrender, then the court should find a valid waiver. *Moran v. Burbine*, 475 U.S. 412 (1986).

In this case, the totality of the circumstances did not suggest to police that Garner was unable to understand the *Miranda* warning and give a knowing waiver. Therefore, his confession was admissible. “Even if Garner’s mental capacity, background, age, and experience did somehow prevent him from actually understanding the *Miranda* warnings” and the evidence indicates that they did not “the officers questioning Garner had no way to discern the misunderstanding in Garner’s mind.” The judgment denying the habeas corpus petition was affirmed. *Garner v. Mitchell*, 557 F.3d 257 (6th Cir. 2009).



Calendar

Utah Prosecution Council (UPC) And Other Utah CLE Conferences

June 18-19	UTAH PROSECUTORIAL ASSISTANTS ASSN ANNUAL CONFERENCE <i>Professional training for the non-attorney staff in prosecution offices</i>	The RiverWoods Logan, UT
June 22-26	UTAH VICTIM ASSISTANCE ACADEMY (CLE's pending) <i>Exceptional training designed for anyone who works with crime victims</i>	Weber State Univ. Ogden, UT
August 6-7	UTAH MUNICIPAL PROSECUTORS ASSN ANNUAL CONFERENCE <i>Instruction aimed specifically at municipal prosecutors</i>	Ruby's Inn Bryce, UT
August 17-22	BASIC PROSECUTOR COURSE <i>Substantive and trial skills training for newly minted prosecutors</i>	University Inn Logan, UT
September 16-18	FALL PROSECUTOR TRAINING CONFERENCE <i>Our annual prosecutor gathering. Don't miss it.</i>	The RiverWoods Logan, UT
October 14-16	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>Training for those who keep the Commission and Council happy</i>	Moab Valley Inn Moab, UT
November 3-5	JOINING FORCES: PREVENTION, INVESTIGATION, PROSECUTION AND TREATMENT OF CHILD ABUSE <i>Sponsored by Prevent Child Abuse Utah (UPC is a co-sponsor)</i>	Davis Co Conf Ctr Layton, UT
November 11-13	COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR <i>Executive discussion and training for the bosses and their chief deputies</i>	Dixie Center St. George, UT
November 18-20	ADVANCED TRIAL SKILLS TRAINING – CHILD SEX ABUSE CASES <i>The third annual advanced trial skills training for experienced prosecutors</i>	Courtyard by Marriott St. George, UT

National College of District Attorneys (NCDA) and American Prosecutors Research Institute (APRI)

July 29 - August 1	30TH ANNUAL AGACL CONFERENCE <i>Sponsored by the Association of Government Attorneys in Capital Litigation For more information go to www.agacl.com, or call (623) 979-4846</i>	Miami, FL
TBA	GOVERNMENT CIVIL PRACTICE - NCDA*	TBA
September 13-17	PROSECUTING DRUG CASES - NCDA*	San Diego, CA
October 24-28	THE EXECUTIVE PROGRAM - NCDA* <i>Designed specifically for elected prosecutors and chief deputies</i>	Myrtle Beach, CA

Calendar cont'd

National College of District Attorneys (NCDA) and American Prosecutors Research Institute (APRI)

Oct. 31 - Nov. 4	NATIONAL CONFERENCE ON DOMESTIC VIOLENCE - NCDA*	San Antonio, TX
TBA	WHITE COLLAR CRIME - NCDA*	TBA
November 8-12	PROSECUTING HOMICIDE CASES - NCDA*	San Francisco, CA
December 6-10	FORENSIC EVIDENCE - NCDA*	San Diego, CA
December 6-10	PROSECUTING SEXUAL ASSAULTS - NCDA*	Washington, DC

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.

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.

Restoration of federal funding for the NAC is still being sought. In the meantime, NDAA continues to offer courses at the NAC, albeit without reimbursement of expenses. Students at the NAC will be responsible for their travel, lodging and partial meal expenses.

[For specifics on NAC expenses click here.](#)

All courses are subject to cancellation and dates are subject to change. Applicants will be notified of any changes as early as possible. [Click here to access the NAC on-line application form.](#)

August 24-28	BOOTCAMP: AN INTRODUCTION TO PROSECUTION <i>A course for newly hired prosecutors</i> <i>Application deadline: June 26th</i>	NAC Columbia, SC
August 3-7 Sept 28 - Oct 2	TRIAL ADVOCACY I <i>A practical, hands-on training course for trial prosecutors</i> <i>Application deadlines: June 5th for August course; July 31st for September course</i>	NAC Columbia, SC
July 27-31	PROSECUTOR AND THE JURY <i>Focusing on selection, opening and summation</i> <i>Application deadline is May 29, 2009</i>	NAC Columbia, SC
Sept 15-18	COURTROOM TECHNOLOGY <i>The electronic litigator from case analysis/prep to courtroom presentations</i> <i>Application deadline is July 17, 2009</i>	NAC Columbia, SC