

The

PROSECUTOR



RECENT CASES

United States Supreme Court

Dog's Search of Home's Front Step An Unreasonable Search

Police received a tip that defendant's home was being used to grow marijuana. Detectives allowed a drug dog to search the front of the home. The drug dog alerted to the presence of narcotics at the front door to the home. The detectives then obtained a search warrant based on the dog's alert. Later, when agents executed the warrant they found marijuana plants

and the defendant in the home. Defendant moved to suppress any evidence found in the search, claiming the dog's search was an unreasonable search which violated his Fourth Amendment Rights.

The U.S. Supreme Court held the search was unconstitutional because the officers did not have an implied license to enter the porch to conduct a search. The court differentiated this case from those involving cars or luggage because it involved a home. The U.S. Supreme Court affirmed the Supreme Court of Florida's decision and held the evidence should have been suppressed. *Florida v. Jardines, U.S., No. 11-564, 3/26/13*

Wiretapping Opponents Lack Standing

Wiretapping is allowed under §1881(a) is subject to statutory conditions, judicial authorization, congressional supervision and compliance with the Fourth Amendment. This type of surveillance is directed at communications with persons who are outside the U.S. who are not "United States persons," which means citizens, permanent residents, and some associations or corporations. The respondents claimed they engaged in communications with people outside the

U.S. and who are likely targets of §1881(a) surveillance. Respondents claim they engage in sensitive telephone and email communications with clients, sources, and others in regions where "the Government's counterterrorism...efforts" are of special focus. Respondents claimed they have standing because there is an objectively reasonable likelihood their communications will be intercepted under §1881(a) at some point in the future. They also claimed they were suffering present injuries because of the measures they were taking to protect their communications.

The U.S. Supreme Court held respondents did not have standing under Article III and they were not suffering present injuries. The court held respondent's theory of future injury "is too speculative to satisfy the well-established requirement that threatened injury must be certainly impending."

The Supreme Court also held the injury would need to be directly traceable to §1881(a). Here, the Supreme Court held "respondents cannot manufacture injury by choosing to make expenditures based on hypothetical harm," which is what the

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court considered the harm of protecting their communications from the possibility of future harm. The Second Circuit's judgment was reversed and remanded for further proceedings. *Clapper v. Amnesty International USA*, U.S., No. 11-1025, 2/26/13

Utah Supreme Court

Proposed Order Required For Appellate Court To Have Jurisdiction

The Central Utah Water Conservatory District (the District) filed to condemn six waterfront properties owned by Mr. King. The District valued the lots at \$28,400 and offered Mr. King \$48,600 for them. At trial the jury returned a verdict valuing the properties at \$56,100 and rewarded Mr. King statutory interest. After the verdict, Mr. King moved for a new trial. The district court then prepared, signed, and filed an order entitled, "Ruling and Order....," which denied Mr. King's motion for a new trial. Mr. King then filed an appeal less than thirty days after entry of the district court's "Ruling and Order."

The court of appeals issued a per curiam opinion dismissing Mr. King's appeal without prejudice. The dismissal was based on the absence of a final, appealable order. Without a final order the court of appeals lacked jurisdiction over the case. The Utah Supreme Court granted certiorari to decide if the court of appeals erred by dismissing the appeal based on the grounds that the district court's order was not final.

The Utah Supreme Court held Mr. King's appeal was properly denied because the district court's order was not final, according to Rule 7(f)(2) of the Utah Rules of Civil Procedure. The supreme court held that Rule 7(f)(2) requires the prevailing party to serve a proposed order, in conformity with the court's decision, before the

appellate court may have jurisdiction. The exception is if the district court specifically states that no additional order is required or the court has already approved a proposed order submitted with a party's initial memorandum.

In an attempt to clarify previous decisions, the supreme court also held these guidelines apply to all final judgments when a party is seeking to deny or preserve appellate jurisdiction. The Utah Supreme Court held Mr. King's appeal was not ripe because the final order had not been signed by the district court when he had filed his appeal. *Central Utah v. King*, 2013 UT 13

When UGIA Applies, No Other Statute of Limitations Are Applicable

Micheal Howe, an employee of Peak Alarm, called Salt Lake City Police to request officers respond to West High School. A month later Salt Lake City police officers arrested Mr. Howe for making a false alarm under a Salt Lake City ordinance. After Mr. Howe was granted a directed verdict at trial, he filed a notice of claim with Salt Lake City (the City) in 2004. The City challenged these claims arguing Mr. Howe failed to comply with the procedural requirements of the Utah Government Immunity Act (UGIA).

The City then moved for summary judgment claiming Mr. Howe's claims were barred by the statute of limitations governing private parties. The district court denied the City's motion for summary judgment. The Utah Supreme Court reviewed the case to determine the applicable statute of limitations. The City argued the UGIA does not replace the statute of limitations governing private parties and Mr. Howe was required to comply with both, the UGIA and statute of limitations for private parties.

The Utah Supreme Court held the UGIA is a "single

comprehensive chapter governing all claims against governmental entities or against their employees or agents arising out of the performance of the employee's duties." The supreme court also held, the statute of limitations for private parties does not apply when the UGIA is governing a claim. The Utah Supreme Court affirmed the district court's denial of summary judgment and remanded the case for further proceedings. *Peak Alarm v. Salt Lake City Corp.*, 2013 UT 8

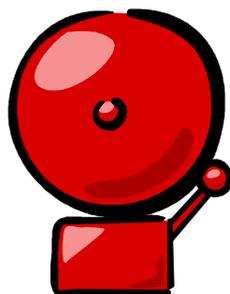
Motions to Suppress 105 Pounds of Marijuana Denied

Utah Highway Patrol (UHP) stopped defendant during a drug interdiction exercise on a I-80. The officer noticed defendant had crossed the fog line three times within a half mile and pulled him over. When defendant stopped, the officer approached the car and noticed the rear compartment was filled with something covered by a blanket. The officer then smelt the strong odor of marijuana through the car window. Upon searching the car, the officer found 105 pounds of marijuana.



Defendant filed two motions to suppress the evidence of the marijuana. The motion claimed the UHP unconstitutionally denied defendant his equal protection right to travel because the UHP selectively enforced the traffic laws against those driving cars with out-of-state license plates.

The Utah Supreme Court held the motion was properly denied by the district court because "making high volume traffic stops focusing on out-of-state licensed cars had a conceivable relation to UHP's legitimate goal of intercepting drug traffic" and defendant's equal protection right to travel was not impinged because there was no withholding of access to "fundamental economic rights or essential services in



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Utah.” *State v. Chettero*, 2013 UT 9

Exception to Harsher Sentence Rule Applies to Justice Courts

Defendant was charged with voyeurism, a class B misdemeanor, in the justice court system. He accepted a plea agreement, pled guilty to disorderly conduct, a class C misdemeanor. He was sentenced to ninety days in jail and ordered to pay a fine. Defendant appealed his conviction and was given a trial de novo in the district court. The district court convicted him of the class B misdemeanor and imposed a greater sentence and fine.

Defendant then appealed the district court’s decision claiming the district court violated Utah code by imposing a more severe punishment than the original punishment imposed by the justice court.

The Utah Supreme Court had previously held the statute prohibiting more severe punishment by an appellate court did not apply when a defendant enters into a plea agreement with the prosecution. Here, the supreme court held this exception, allowing a judge to impose a greater sentence in cases where plea agreements have been reached, applies to justice courts also. The supreme court affirmed the appellate court’s decision and denied defendant’s request for extraordinary relief. *Vorher v. Henroid*, 2013 UT 10

Government Is Immune From Suit Arising Out of Third-Party Deceit

Mr. Higgins was a parolee from the Utah State Prison when he defrauded the appellants out of more than 27 million dollars. Mr. Higgins ran the Madison Group, which was a ponzi scheme. As part



of his parole conditions, Higgins was not supposed to leave the state, be self-employed or handle other people’s money.

He did all of these activities while running the Madison Group.

Appellants filed a complaint against the State of Utah claiming negligent supervision, gross negligence, failure to warn and negligent misrepresentation. The State responded with a motion to dismiss claiming immunity under subsection (b) of the Utah Government Immunity Act (UGIA) and the district court granted the motion. Appellants argued the district court erred by rejecting their claim that subsection (b) of the UGIA does not apply to their case.

The Utah Supreme Court held the State cannot be held liable for the intentional actions of a third-party and that subsection (b) provides an exception to the waiver of government immunity for any injury arising from deceit. The supreme court held that deceit, as listed in the statute, is the intentional tort of deceit and the state is immune from injury arising out of the deceit of Mr. Higgins. The Utah Supreme Court affirmed the district court’s dismissal of the complaint. *Van De Grift v. State*, 2013 UT 11

Utah Court of Appeals

Reasonable Suspicion Created When Parked in Road with Engine Running

Defendant’s car was parked in the middle of a dirt road leading to a camp ground with the lights on and the engine running. Upon approaching defendant’s car, the arresting officer turned on the overhead lights on his car and did not see any response from someone in the vehicle. The officer then approached the vehicle and found defendant slumped over the steering wheel and a gun on the dashboard. The officer had to yell and knock on the window to wake defendant. When defendant awoke, he showed signs of being intoxicated and the officer asked him if he

had been drinking. Defendant responded, “not too much.” The officer then had defendant get out of the car and perform a field sobriety test, which defendant failed.



Defendant moved to suppress any evidence the officer found after the officer determined defendant was in his car. The motion to suppress was denied by the district court and defendant was convicted of use of a controlled substance and possession of a firearm by a restricted person.

Defendant appealed his convictions claiming the officer did not have reasonable suspicion to perform the field sobriety test. Specifically, defendant claimed that when the officer learned defendant was in the car, there was no reasonable suspicion to extend the stop. The appellate court found the facts showed the officer did have reasonable suspicion to support a sobriety test because defendant appeared intoxicated. The appellate court affirmed the denial of the motion to suppress and the convictions. *State v. Ruvalcaba*, 2013 UT App 35

District Court Must Bindover Defendant Following Preliminary Hearing

Probation and Parole agents found meth in defendant’s bedroom. Defendant and his wife admitted to having smoked meth and tested positive for the substance. The couple was arrested and DCFS took custody of the couple’s two children.

Defendant and his wife had the same attorney representing them. Their counsel reached a joint plea agreement with the State to reduce the charges against the wife because she wanted stay out of jail and try to regain custody of the children. At a preliminary hearing the district court proceeded with discussing defendant’s guilty plea and never discussed his right to a preliminary hearing or asked if he had waived this right. Defendant eventually

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PROSECUTOR PROFILE



Quick Facts

Born: Provo, UT

Law School: Willamette University, College of Law

Favorite TV series: The Good Wife

Favorite Book: Empire Falls by Richard Russo

Favorite Sports Team: BYU (football and Basketball) and the Chicago Cubs

Favorite Music: Jazz

Kent Sundberg Division Chief Utah County Attorney's Office

Kent is the Civil Division Chief at the Utah County Attorney's Office. He has worked at the Utah County Attorney's Office for over thirty-one years. Growing up he wanted to be the starting shortstop for the Chicago Cubs. His first job was working as staff of the Sullivan's Steakhouse at the top of Bridal Veil Falls in Provo Canyon. While working there, they were required to take the trash from the top of the falls down to the garbage dumpster at the base of the falls twice a day. However, the garbage can didn't fit in the gondola, so he and his friends would ride on top and hold it!

Kent grew up in Orem and served an LDS Mission in Sweden. He attended BYU as an undergraduate, where he graduated in history. He attended Willamette University, College of Law and graduated in 1975. He decided to go to law school because it seemed like the next best thing to do when it became obvious that he was not going to become a major league shortstop.

During his early career with the County he represented the State at civil commitment hearings at the State Hospital. He did that for the first 14 years of working for the Utah County Attorney's Office and the office still represents the State at those commitment hearings.

He has enjoyed his job in the Civil Division and particularly as the Civil Division Chief, because it has allowed him to represent and advise the County and its officials in a number of different areas of the law. He has advised the Planning Commission, the Board of Adjustment, the Board of Equalization, the Municipal Building Authority of Utah County, the Health Department, the Clerk/Auditor, the Recorder, and the Commission concerning land use issues, bankruptcy law, health and sanitation issues, taxation, bonding, claims against the County, and other issues.

From 1992 through December, 2012, he served as the Litigation Management Committee Chair for the Utah Counties Insurance Pool (UCIP), and as a member of the Board of Trustees of UCIP. He was appointed to the Board of Trustees of the Utah Local Governments Trust in March of this year. He also serves as the Chair of the Board of the Provo City/Utah County Ice Sheet Authority, the entity that constructed the ice arena in Provo as a venue site for the 2002 Winter Olympics, and that now manages and operates the facility. He initially advised that body as its legal counsel, but then was appointed to the Board in 1998, and has served on the Board since.

He met his wife on a blind date and they have been taking a golfing trip to Palm Springs for the last twenty-five years. His ideal vacation destinations are Palm Springs, Kauai, and their Park City condo. His favorite restaurant is Talisker on Main in Park City. He keeps busy with work, his wife and five daughters, and 12 grandchildren. He is also the stake president of a Young Single Adult stake at BYU.



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entered a plea of guilty. On appeal defendant claimed the district court erred by accepting his plea and sentencing him without a bindover. Defendant argued the district court did not have subject matter jurisdiction. The appellate court held, “A district court cannot exercise its jurisdiction to accept a guilty plea until the defendant has been bound over following either a preliminary hearing or ... waiver of a preliminary hearing.” The appellate court held the district court did not have jurisdiction and reversed and remanded the case for further proceedings. *State v. Smith*, 2013 UT App 52

Single Criminal Episode Statute Does Not Apply to Citations

Defendant was arrested for a hit and run accident in 2006. He was charged with a misdemeanor DUI and was cited for following too closely. Defendant paid the fine for the citation before any prosecution for the DUI started. Murray City (City) then filed charges against defendant for the DUI. However, the City became aware defendant had already paid the fine for the citation and the remaining charges had been dismissed. The City believed the charges arose from a single criminal episode and thus, all other charges would be barred by double jeopardy. In February 2007, the justice court dismissed the charges.



In April 2007, Salt Lake County charged defendant with a felony DUI offense arising from the same incident because he had at least two prior DUI convictions on his record.

On appeal, defendant argued that prosecution of the felony DUI offense was barred under the Single Criminal Episode Statute, res judica and double jeopardy.

The appellate court held the conviction for following too closely did not constitute a prosecution under the Single Criminal Episode Statute because the issuance of a citation is not considered prosecution. The court further held “no information had yet been filed charging [defendant] with that offense or any of the other offenses for which he was cited.”

The appellate court also held the misdemeanor DUI “was not resolved in a way that implicates the Single Criminal Episode Statute” because it was voluntarily dismissed. The appellate court held the voluntary dismissal also allows the prosecution for the felony DUI by the county because jeopardy could not have attached to the DUI offense because the felony DUI was dismissed during pretrial proceedings and defendant had not stood trial for the offense. *State v. Sommerville*, 2013 UT App 40

Extreme Emotional Distress Defense Not Allowed If Self Inflicted

Defendant was convicted for attempted murder after stabbing his victim multiple times. After defendant decided the victim had passed an STD to his girlfriend and on to himself he went to the victims house and confronted him. This confrontation led to a fistfight and the eventual stabbing. At trial the judge gave the jury instructions about what mens rea was for attempted murder and an instruction that outlines the elements of attempted murder.

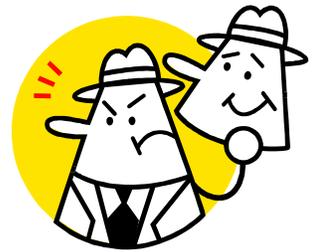
On appeal defendant argued he was not able to fully support his extreme emotional distress defense because he was not allowed to present an expert witness. He also argues the jury instructions were wrong because they did not “instruct the jury that the mental state required in order to find him guilty of attempted murder as an accomplice was actual intent to cause death.”

The appellate court held that for extreme emotional distress to be an available defense for defendant, defendant must not

have created the extreme emotional disturbance or stress. The court held defendant did cause the triggering stressors and so the defense was not available to him in the first place. The appellate court also held that reading “instructions twelve and fifteen together, the mens rea required for accomplice liability was adequately explained by the jury instructions provided.” *State v. Augustine*, 2013 UT App 61

Evidence Sufficient for Conviction

Defendant approached an undercover detective and asked the detective “what he was looking for.” The officer understood this as a question about what kind of drugs he wanted. The officer responded, “forty white.” Defendant immediately turned to a man nearby and shouted “quarenta,” meaning “forty.” The man then came over, the officer showed some cash, and the man gave him two twists of cocaine. Defendant was convicted of arranging to distribute a controlled substance.



Defendant appealed her conviction arguing there was insufficient evidence to convict her and she was merely a translator for a conversation. The appellate court held the evidence, viewed in the light most favorable to the jury’s verdict, was sufficient to infer that defendant intended to arrange a drug deal. The appellate court cited the following facts: defendant initiated the contact, solicited the transaction and directed the holder of the drugs to complete the deal. Defendant’s conviction was affirmed. *State v. Garcia*, 2013 UT App 54

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Defendant Knowingly and Voluntarily Plead No Contest

Defendant plead no contest to one count of attempted aggravated assault and two counts of burglary. Defendant then moved to withdraw his plea and the district court denied his motion. He appealed the district court's order denying his motion to



withdraw his pleas of no contests. Defendant argued his pleas of no contest were not knowing and voluntary because at the time of the pleas he had a new attorney and new evidence had just come out.

Defendant acknowledged that the district court complied with Rule 11 of the Utah Rules of Criminal Procedure and the appellate court held defendant indicated he understood all of the rights he was waiving by entering his plea. The appellate court held that because defendant stated he understood the rights he was waiving he failed to demonstrate his pleas were not knowingly made. Defendant's appeals were denied and his conviction affirmed. *State v. Knowlden*, 2013 UT App 63

Evidence Sufficient for Prove Defendant Was Served

Defendant was convicted of violating a protective order, a class A misdemeanor. Defendant appealed the conviction arguing the district court erred in denying his motion for a directed verdict. Defendant argued directed verdict should have been granted because the State failed to present sufficient evidence showing: defendant was the person named in the order, the place of business listed on the order was within the jurisdiction of the district court, or that defendant was served with the protective order.

The appellate court held there was sufficient evidence to show he was the person named in the order because the jury could make the inference from witnesses discussing him throughout the trial. The appellate court held there was sufficient evidence to determine the work address listed in the protective order was located in Heber City, Utah and was within the jurisdiction, even though Utah was not listed after Heber City. Lastly, the court held the testimony of the serving officer, even though confusing, was sufficient evidence for a conviction. The conviction was affirmed. *State v. Epps*, 2013 UT App 29

Analyst Met Required Basic Foundational Showing

Defendant broke into a home and pulled the occupants of a home from their bed, threw them to the floor and tied them up with electrical cords. Once the victims were tied up, defendant and accomplices rummaged through the house, stealing electronics, tools, and jewelry. A neighbor noticed the intruders and called the police.

As the police arrived the men fled. Eventually defendant and another man were found hiding behind a shed several blocks away. Ample physical evidence connecting defendant and his companion to the crime was found. DNA evidence was processed and used at trial. After two days of testimony about the DNA evidence, defendant moved to exclude all of the State's analyst's testimony under Rule 702 of the Utah Rules of Evidence. The trial court denied the motion to exclude the testimony and defendant was convicted of five counts of aggravated kidnapping, one



count of aggravated burglary, and one count of aggravated robbery.

On appeal, defendant claimed the trial court abused its discretion by failing to strike the analyst's testimony. The appellate court held the testimony of the analyst met the "basic foundational showing required by *Gunn Hill Dairy*" because the analyst testified that she followed the procedures and guidelines established at the Utah State Crime Lab in preparing the reports and calculations. The appellate court held the trial court did not abuse its discretion by refusing to strike the testimony and affirmed the conviction. *State v. Lievanos*, 2013 UT App 49



Defendant Must be Notified of the Proper Amount of Time to File Appeal

Collins was convicted of and sentenced for murder and two counts of aggravated robbery. The trial court did not advise him of his right to appeal during sentencing. However, Collins's defense counsel advised him multiple times of his right to appeal and even informed him of the "appealable issues." Collin's attorney did not tell him the appeal must be filed within thirty days after sentencing.

At sentencing, Collins told his attorney he did not want to appeal and his attorney told him, "If you change your mind you must let me know within two weeks." Collins did not appeal within the thirty day requirement.

Two years later, Collins sent a letter to the court wanting a status report on the appeal. Defense counsel responded, "There is no appeal. You didn't request one." Collins then moved to reinstate his time to appeal. The trial court denied his motion and Collins appealed claiming he was unconstitutionally deprived of his right to appeal.

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On the Lighter Side

Justice Is Served

Punxsutawney Phil has finally been held responsible for his irreprehensible disregard for people's hopes and dreams of Spring. This year, as many times before, Phil signaled an early start to Spring by not seeing his shadow, but has not delivered on that promise. And Butler County, Ohio officials hope to put a stop to this type of action by "suing" the groundhog.

The officials drafted a fake indictment charging Phil with "misrepresentation of early spring" claiming he did so "purposely, and with prior calculation and design, causing the people to believe that Spring would come early."



This indictment may have come about because Ohio residents have continued to see snow fall many days after Spring. Ohio officials, so upset by the snow fall, even sought the death penalty against Punxsutawney Phil, citing "aggravating circumstances." The situation was de-escalated when Phil's handler took the blame for the bad prediction this year. *

Banana and Lobster Steal Critter

At the University North Carolina someone, dressed as a banana, and his accomplice, dressed as a lobster, are in hot water after breaking into the student union. The duo broke into the closed student union around 3 A.M. and stole a sculpture. The sculpture was a piece by Bynum artist Clyde Jones who came to campus and carved the creature and allowed students to paint the creature. The sculpture is estimated to be worth \$1,000. The Daily Tar Heel reported that the silly duo needs to be aware that their actions can be considered a felony and that there are serious consequences for their funny actions. **



*<http://www.foxnews.com/us/2013/03/25/punxsutawney-phil-handler-takes-blame-for-faulty-forecast/>

**<http://www.dailytarheel.com/article/2013/04/banana-lobster-may-have-stolen-critter>



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After reviewing Utah Supreme Court decisions, the appellate court held, “[A] defendant who has not been properly informed by either court or counsel of his appeal rights, including the time within the notice of appeal must be filed, is entitled to reinstatement of the appeal time under *Manning*.”

Furthermore, the appellate court held, “[The] defendant is not required to show, in addition [to showing he was uninformed by the court and counsel], had he been informed of his rights, he would have appealed.” The appellate court reversed and remanded for the reinstatement of the thirty-day period for Collins to file an appeal. *State v. Collins*, 2013 UT App 42

Intimidation Not a Factor in Counsel’s Performance



Defendant was on trial for attempted murder and a few misdemeanors. During the trial defendant’s counsel notified the judge that they felt intimidated by

defendant and wished to withdraw. The court inquired into the situation, asked the counsel if they could continue to appropriately represent defendant. Counsel replied that they could and that they would act in his best interests. Defendant moved to appoint new counsel, claiming he couldn’t trust his attorney’s if they felt intimidated by him. His motions to appoint new counsel were denied.

On appeal defendant argued his convictions should have been vacated and a new trial ordered because his counsel labored under a conflict of interest that adversely affected counsel’s performance in representing him. The appellate court held defense counsel “continued to zealously represent defendant, despite defendant’s complaints and apparent efforts at intimidation.” The appellate court also held defendant failed to show instances of how counsel failed to represent his better interest at trial. The appellate court affirmed defendant’s

conviction. *State v. Martinez*, 2013 UT App 39

Attorney Fee Denied to Owner of Corporation

Salt Lake County attempted to condemn real estate owned by Butler, Crockett & Walsh Development Corporation (BCW). BCW prevailed at trial concerning the condemnation and sought attorney fees and costs under the Eminent Domain Act and bad faith fee statute. The trial court denied these claims and defendant appealed.

On appeal BCW argued the trial court erred in not awarding BCW attorney fees and costs under Utah’s Bad Faith Fee statute. The appellate court held the trial court rejected BCW’s fee request on two independent, alternative grounds and on appeal BCW only addressed one of the grounds. Therefore, the appellate court would not determine if Salt Lake County actually acted in bad faith. Instead, the appellate court accepted the argument that Mr. Walsh was a pro se litigant because he owned 98% of BCW stock and was the attorney for BCW through the litigation. BCW did not challenge the independent nature of this argument and so the appellate court did not reverse the trial court’s refusal to award attorney fees. *Salt Lake County v. Butler, Crockett & Walsh*, 2013 UT App 30

Tenth Circuit Court of Appeals

“Forthwith” Does Not Create Special Instructions For Execution of Warrant

A confidential informant told law enforcement agents of a meth dealer who had a large amount of the drug in his mobile home. The warrant was executed nine days after the warrant was issued. When they searched defendant’s home they found sixteen bags of meth, marijuana, cash, and paraphernalia.

Defendant moved to suppress the evidence claiming the search warrant was stale when executed because it was executed nine days after it was issued, which was too long according to the instructions of the warrant. Defendant argued the instructions told law enforcement to execute the warrant “forthwith.” The district court denied the motion to suppress and defendant appealed.



On appeal, defendant again argued the warrant was not executed “forthwith” and was therefore stale. Defendant argues the term “forthwith” was a command to police to perform the search with special haste.

The Court of Appeals for the Tenth Circuit treated the term as an anachronism, left in many model warrants as boiler plate language. The appellate court held even if the officers failed to execute the warrant “forthwith,” the only time constraint on the execution of the warrant is the 10-day limit in Rule 41 of the Federal Rules of Criminal Procedure. *United States v. Garcia*, 10th Cir., No. 11-2233, 2/13/13

Right to Choice of Counsel Not Violated By Seizure

Defendant and co-conspirators successfully carried out a “pump-and-dump” scheme, where they artificially inflated the price of stocks and then sold them at a profit. Defendant made millions lying to investors and producing fraudulent documents to allow for the public sale of the stocks. The government seized defendant’s assets prior to trial. Defendant argued the government substantially deprived him of his Sixth Amendment right to counsel because he could not afford to pay the counsel of his choice. Defendant claimed the government’s actions were deliberately calculated to deny him access to his funds

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for the use of his defense team.

The court of appeals held that, even assuming the government improperly seized his property, defendant's Sixth Amendment right to counsel was not violated. The appellate court agreed with the district court's finding that defendant had spent over \$900,000 in attorneys' fees since he was indicted and still had other assets available. The appellate court held because defendant did not show how he would have used the assets to present a better defense than the one he did present, his right to counsel of choice was not denied by the government's action. *United States v. Gordon*, 10th Cir., No. 10-5146, 3/15/13



Hearsay Allowed At Sentencing

Appellant, Joey Ruby, was on supervised release

and one of the conditions of his supervised release was that he not commit any crimes. In 2010, Ruby was arrested for a traffic incident that led to charges of third-degree assault, DUI, domestic violence, reckless driving and driving under restraint. The undisputed facts of the incident are that Ruby was in a car wreck and he and another passenger shouted and had some physical contact, with Ruby throwing the girl to the ground twice.

At trial Ruby was convicted and sentenced to time served. After the trial, Ruby's federal probation officer filed a Petition for Arrest based on Ruby's conviction. The Petition included a statement of facts, which was copied from the Probable Cause Statement completed by the police department. This statement of facts was attested to by the victim and the other passengers. It claimed Ruby started yelling at the victim while driving. He then punched the victim while driving and lost control of the car, which crashed into a tree. Ruby then dragged the victim out of the car and punched her before he threw

her to the ground. At a revocation hearing, Ruby objected to this version of events, but the district court denied his objection and credited the version contained in the report.

Ruby was sentenced to time in prison and supervised release. Ruby appealed his sentence arguing the court erred by not requiring the witness to appear and relying on hearsay for sentencing. The appellate court held that because it was a sentencing hearing the court can have access to any relevant information, "as long as it adheres to a preponderance of the evidence standard." The appellate court further held there is a relaxed standard for evidence at sentencing and because the hearsay was corroborated by other evidence it met this standard. The appellate court upheld the sentence. *United States v. Ruby*, 10th Cir., No. 11-1441, 1/29/13

No New Evidence May be Considered on Second Writ for Habeas Corpus Petition

Defendant was convicted of first degree murder and first degree sexual penetration and sentenced to life imprisonment plus eighteen years. The conviction arose from the death of Nancy Mitchell, who was found dead in an area called Six Mile Dam. Her body was found with a skull fracture and many other injuries. There were many conflicting explanations offered to police and at trial by witnesses and friends of Mitchell. Defendant denied killing Mitchell and appealed his conviction.

His first habeas petition claimed juror misconduct and denial-of-continuance. Both were denied and defendant filed another habeas petition. His second petition claimed a *Brady* violation because a pre-trial statement was made by a man that could have been implicated in the crime. While this claim was pending, defendant received results of DNA testing that could not find any male DNA or sperm cells in the evidence taken from Mitchell's body and clothing. The district court held evidentiary hearings on the second petition and granted a conditional

writ of habeas corpus.

The Court of Appeals for the Tenth Circuit was faced with deciding if defendant satisfies the gate keeping requirements of 28 U.S.C. § 2244(b)(2) in order to grant another writ of habeas corpus.

There is a circuit split on the requirements for granting a second writ of habeas corpus. The Fourth Circuit held in *US v. Macdonald* the court must make its determination [about the sufficiency of evidence] based on the "evidence as a whole," even if it would not normally be admitted. The Tenth Circuit did not agree and held "The inquiry is only concerned with the evidence presented at trial," properly adjusted for evidence erroneously excluded at trial.

Here, the court did not find defendant could show by clear and convincing evidence a jury would not have convicted him if the new evidence was admitted. The appellate court vacated the district court's conditional grant of habeas corpus and dismissed the claim for lack of jurisdiction. *Case v. Hatch*, 10th Cir., No. 11-2094, 2/26/13

Carrying A Concealed Firearm Is Not Protected by Second Amendment



Defendant applied for a concealed handgun license (CHL) from the sheriff of Denver, Colorado. However, defendant was denied because under state law only state residents may be issued a CHL. Defendant filed suit against the sheriff and other officials claiming the policy violates the Second Amendment and other constitutional provisions.

The Court of Appeals for the Tenth Circuit held concealed carry restrictions do not

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interfere with Second Amendment rights and the carrying of concealed firearms is not protected by the Second Amendment. The court affirmed the summary judgment granted by the district court. *Peterson v. Martinez*, 10th Cir., No. 11-1149, 2/22/13

Exclusion of Co-defendant Doesn't Offend Right to Public Trial

Defendant was indicted for issuing herself checks drawn on federal funds while an employee of the Department of Social Services, which provided welfare assistance to Arapahoe



Tribal members. Defendant and her co-defendant were on trial for embezzlement of monies from an organization receiving federal funds and conspiracy to embezzle from an organization receiving federal funds.

During trial, co-defendant's counsel informed the judge of a conflict with one of the government's witnesses. The judge *sua sponte* declared mistrial as to the co-defendant and informed the co-defendant she was not allowed to remain and watch any of the proceedings. Defendant objected

claiming her Sixth Amendment right to public trial. The district court rejected defendant's claim, citing fears of witness intimidation because of the co-defendant's position in the tribe. Defendant was acquitted of the conspiracy charge, but convicted of embezzlement.

Defendant appealed claiming her Sixth Amendment right to public trial. The Court of Appeals for the Tenth Circuit held the exclusion of the co-defendant did not undermine the interest protected by the Sixth Amendment because defendant was not at risk of being treated unfairly or unjustly condemned. The appellate court held the need to protect against witness intimidation was a substantial interest and affirmed the district court's ruling. *United States v. Addison*, 10th Cir., No. 11-8105, 2/26/13

Suppression of Evidence Based on Pinging Denied

FBI agents were investigating the importation of narcotics when they determined defendant was involved. The agents obtained a wiretap order for two of defendant's cell phones and the order allowed for "pinging" the phone to determine the GPS location of the phone. Agents used these orders to determine the activities of defendant and arrested him for the distribution of illegal drugs. When agents arrested him they found the phone

which had been tapped on his person.

At trial, defendant claimed any evidence discovered after the agents used GPS "pinging" to determine his location should have been suppressed because it violated his right to protection from unreasonable search and seizure.

The U.S. Court of Appeals for the Tenth Circuit held the evidence was admissible because it was authorized by the wiretap order and under the good-faith exception. The court, affirming the district court's decision, held the good-faith exception applied because agents could not have been on notice that their actions were illegal because "the law on electronic surveillance is very much unsettled." *United States v. Barajas*, 10th Cir., No. 12-3003, 3/4/13

Other Circuits/ States

Creating Fraudulent Documents Enough to Uphold Conspiracy Conviction

Defendant started receiving disability payments from Unum in 2006. He was told many times by *Continued on page 12*

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Unum employees that if his income changed he was required to provide documentation and be re-assessed for his disability payments.

In March 2007, defendant had started working as a driver for Home Health Care Solutions (HHCS). Later, defendant requested the checks from Unum be directly deposited into his bank account

and this was done electronically. Then, in December 2007, defendant had HHCS start making out all of his pay checks in his wife's name. HHCS also created tax documents and

an independent contractor agreement for defendant's wife. Defendant's wife never worked for HHCS, but HHCS created these documents shifting defendant's income to his wife.

Defendant was charged and convicted of conspiracy to commit wire-fraud. HHCS was acquitted of the same charges with the government conceding HHCS knew nothing about defendant defrauding Unum. On appeal the defendant argued that because HHCS did not know of the fraud there cannot be a conspiracy to commit wire-fraud. The government argued that all HHCS needed to know was that defendant was committing fraud, not the particulars of who was being defrauded.

The Court of Appeals for the First Circuit held that HHCS did not need to know the fraud victim's identity because it is not an essential element of the wire-fraud statute. Instead, the appellate court held that because HHCS did know there was fraud being committed, evidenced by the fact that they were creating documents for someone who did not work there, it was enough to find a conspiracy to commit fraud. *United States v. Tum*, 1st Cir., No. 11-1624, 2/1/13

Officer's Actions Showed Lack of Exigency, Warrantless Search Unreasonable

Mr. and Mrs. Yengel were involved in a domestic dispute and police officers were called to the scene. Officer Stanton learned of the possible existence of a grenade and several firearms inside the home. The officer also learned that Mrs. Yengel's young son was asleep in the home. The officer asked Mrs. Yengel to show him where Mr. Yengel kept the grenade. Mrs. Yengel then took the officer into the upstairs bedroom, collected a number of firearms and asked the officer to remove them from the home. Again, the officer asked Mrs. Yengel to show him where the grenade was kept. Mrs. Yengel then took him to another room and showed him a closet with a keypad lock on the door and told the officer he could kick it in to get into it. The officer used a screwdriver to pry his way into the closet, where he found a container he thought might contain the explosive. Then, the officer evacuated the home and surrounding residences, called the fire marshal and the Explosive Ordnance Disposal team (EOD). The EOD arrived, searched the closet and found a backpack with a partially completed homemade bomb.

Defendant was charged and convicted of possession of an unregistered firearm, which the homemade weapon was considered for legal purposes. Defendant moved to suppress the evidence found in the closet because it was a warrantless search. The district court granted the motion.

The government appealed arguing the search was justified by exigent circumstances. The Court of Appeals for the Fourth Circuit rejected this argument holding the officer's actions showed the threat was stable, immobile, and inaccessible. Furthermore the lack

of a phone call to the EOD or an evacuation of the child before opening the closet showed the officer did not think an exigency existed. The appellate court affirmed the district court's suppression of the evidence. *United States v. Yengel*, 4th Cir., No. 12-4317, 2/15/13

Court Upheld Requirement That Juveniles Report Based on SORNA

Appellant resided in Japan with his family, members of the U.S. Navy. In February 2008, Appellant's mother reported to U.S. Naval Criminal Investigation Service that appellant had been having inappropriate sexual contact with his half-sisters, who were ages ten and six. Appellant was charged and convicted of one-count aggravated sexual abuse in the District of South Carolina. Appellant was sentenced to incarceration and placed under juvenile delinquent supervision with special conditions. One of the conditions was that appellant must comply with the mandatory reporting requirements of Sex Offender Registration and Notification Act (SORNA). Appellant appealed, objecting to the sex offender registration condition. Appellant claimed the condition contravenes the confidentiality provisions of the Federal Juvenile Delinquency Act (FJDA) and offends the Eighth Amendment's prohibition on cruel and unusual punishment.

The appellate court held, "where two statutes conflict a specific statute closely applicable to the substance of the controversy at hands controls over a more generalized provision," and SORNA is the more specific statute. The appellate court held that SORNA controlled because it



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directs juveniles, fourteen and older, to register when convicted of certain aggravated sex crimes. The appellate court also held SORNA does not offend the Eight Amendment because Congress enacted it as a civil remedy rather than a criminal punishment. *United States v. Under Seal*, 4th Cir., No. 12-4055, 2/26/13

Federal Relief Limited to Record At State Level

Defendant was convicted of aggravated murder, aggravated robbery, and kidnapping. Defendant abducted the victim at gunpoint and forced him into the trunk of the victim's car. Defendant then picked up a friend before driving to a factory area, where he ordered the victim out of the car, stole his wallet and shot him in the head. Defendant admitted to some of the crimes, but claimed the gun went off accidentally and he didn't mean to kill the victim.



Nissan, but the car was painted blue. The officer decided to stop the defendant to check for "registration compliance" and noticed defendant was nervous. The officer had a drug dog search the car, which returned a positive alert for drugs. Defendant allowed officers to search the car and the officers found two packages of heroin. Defendant moved to suppress the evidence claiming the officer did not have reasonable suspicion to effectuate the traffic stop.

The Court of Appeals for the Seventh Circuit agreed with the defendant and held the color discrepancy did not create reasonable suspicion of any crime being committed. The appellate court relied on the officer's statement that he stopped the defendant to check for "registration compliance," holding he did not have a reasonable suspicion about a crime. The appellate court affirmed the district court's decision. *United States v. Uribe*, 7th Cir., No. 11-3590, 2/13/13

Linguist As Lay Witness May Identify Voice

DEA agents began monitoring the telephone conversations of Alfredo Galindo Villalobos (Galindo) suspecting him of drug trafficking. The agents intercepted calls about a large shipment to be delivered and followed Galindo's SUV to a bus station. At the bus station, Galindo and defendant picked up three men carrying large duffel bags. The SUV was stopped and cocaine was found. After seizing the cocaine, the agents pretended to be seizing the cocaine for their personal use and released the dealers. A few weeks later the agents executed search warrants and seized more drugs and cars.

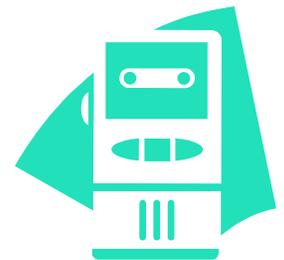
Over the objection of defendant, the DEA had a linguist identify the defendant as the man speaking in recordings of phone calls concerning drug deals. The linguist had listened to recorded calls made from prison, when it was known defendant was speaking, and compared these recordings to the tapes the DEA made when

wiretapping Galindo's phone. The linguist testified as a lay witness and gave his opinion that the voices were both the defendant's. Defendant was convicted and appealed requesting acquittal or a new trial claiming the district court erred in admitting the linguist's testimony.

The appellate court held a lay witness may testify to the opinion that the voice on the recording is the voice of the defendant as long as they have personal familiarity with the voice. The appellate court held the Federal Rules of Evidence control the issue and the district court's ruling is reviewed for abuse of discretion. The appellate court held the district court's ruling did not abuse their discretion in determining that the witness was allowed to testify. *United States v. Mendiola*, 7th Cir., No. 10-1595, 2/11/13

Officer Had Reasonable Suspicion of Man With Open Container

Seven or eight men were drinking on a public sidewalk in a neighborhood where recent gang activity had occurred. Police were called and responded with three squad cars and six officers. The officers saw many of the men with open alcohol containers and asked them to step towards a car parked in the street. All of the men except defendant complied. According to the officer, defendant looked nervous and started backing away from the officers. Eventually defendant noticed officers were surrounding him and walked to the car. The officer patted him down and found a pistol in his waistband.



The officer testified at trial that he intended to write citations for violating the open

Defendant appealed directly to the state court and was denied relief. Defendant then appealed to the federal court and at the same time sought a writ of habeas corpus. On appeal the district court conditionally granted defendant's petition for a writ of habeas corpus.

The Court of Appeals for the Sixth Circuit needed to decide if the federal appellate court could consider any additional evidence introduced in federal court when the parties jointly move to expand the record. Relying on *Pinholster*, the appellate court held, "federal relief is limited to the record that was before the state court that adjudicated the claim on the merits." *Moore v. Mitchell*, 6th Cir., No. 08-3167, 2/26/13

Wrong Paint Color Does Not Create Reasonable Suspicion

Defendant was traveling on I-70 when a police officer checked his registration. The registration of the car was for a white

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container ordinance, but because of the area wanted to pat down everyone for weapons. Defendant moved to suppress the evidence, but the motion was denied by the district court because the court found there was reasonable suspicion that defendant might be carrying a weapon. Defendant was convicted of possession of a firearm by a felon and appealed arguing there was no reasonable suspicion authorizing the search.



The U.S. Court of Appeals for the Seventh Circuit affirmed defendant's conviction. The appellate court held that when the circumstances are viewed as a whole, the officer had reasonable suspicion. The appellate court held defendant's actions (movement away from officers and nervous demeanor), combined with the other factors (bad neighborhood, men were drinking, large group of men) was enough to satisfy *Terry* and justify the search. *United States v. Patton*, 7th Cir., No. 11-2659, 1/29/13

Passive Drug Dog Searches In School Held Constitutional

Defendant's classroom was subject to a police search for drugs using drug dogs. Students and teachers were instructed to leave the room and leave all possessions in the room. Defendant left his backpack, zipped up, on his desk. The police and drug dogs entered the room and performed the search. After the dogs did not signal the presence of drugs, the police left and defendant entered the room to find his backpack unzipped. Defendant filed action against the school district seeking a declaration that his constitutional rights had been violated by the search and seizure of his property, a permanent injunction, and other relief.

Defendant argued his right to protection from unreasonable search and seizure under the Fourth Amendment was violated by the search. The U.S. Court of Appeals for the Eighth Circuit held searches that are minimally intrusive and "provide an effective means for adducing the requisite degree of individualized suspicion to conduct further, more intrusive searches do not violate the Fourth Amendment." The appellate court affirmed the district court's decision. *Burlison v. Springfield Public Schools*, 8th Cir., No. 12-1382, 3/4/13

Suspicionless Search Permissible When Probation Agreement Allows

Defendant was investigated for his involvement in a homicide. Investigators determined defendant was on probation and that his probation agreement allowed for the warrantless search of his "person, property, premises and vehicle, any time of the day or night, with or without probable cause, by any peace, parole or probation officer." Defendant's residence was searched without a warrant and a shotgun was found. Defendant filed a motion to suppress the shotgun, arguing the search was illegal. The motion was denied and the defendant was convicted.

The U.S. Court of Appeals for the Ninth Circuit held, "the slight intrusion on defendant's expectation of privacy" does not outweigh the government's interests. The appellate court held the search was reasonable. The court clarified that suspicionless searches are only allowed under the Fourth Amendment when they are conducted pursuant to suspicionless search clauses of a probationer's agreement. *United States v. King*, 9th Cir., No. 11-10182, 3/8/13

Brady Violations Call for Conditional Writ of Habeas Corpus

Defendant was convicted for participating in the kidnapping and murder of her four-year old son. Defendant was convicted on the testimony of the detective that

interviewed her. The detective testified defendant waived her *Miranda* rights and confessed to paying for the murder of her son. Defendant testified she never admitted to participating in the murder and did not waive her rights. Defense counsel requested the detective's personal file, but the prosecution claimed there was no impeachment material in his file and the detective was allowed to testify without facing impeachment.

However, the U.S. Court of appeals held the prosecution violated *Brady* and *Giglio* by not providing the file because it contained proof that the detective had lied in court about violating people's *Miranda* rights and had been suspended for lying about misconduct. The appellate court held defendant was entitled to habeas relief, reversed and remanded the case for additional discovery and gave extensive instructions on how the case was to proceed. *Milke v. Ryan*, 9th Cir., No. 07-99001, 3/14/13

Documentation of Breathalyzer Calibration Non-testimonial



Police received an anonymous tip that defendant had left a restaurant intoxicated and was driving a gray car with a sticker on the window. An officer noticed the car and followed it for a few minutes. After the vehicle weaved a few times, the officer pulled the car over and spoke to defendant. Defendant appeared intoxicated and smelt of alcohol. The officer had defendant perform several field sobriety tests, which he failed. Defendant then agreed to take a breathalyzer test. According to the breathalyzer machine, defendant's blood alcohol content was at .15%, almost twice the legal limit.

At trial, the prosecution offered documents into evidence, which showed the

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breathalyzer machine had been routinely calibrated by the state Division of Criminal Justice Services. On appeal, defendant argued the records violated his rights to confrontation clause since he was not given the opportunity to cross-examine the witness who performed the calibration of the machine.

The New York Court of Appeals held the documents pertaining to the calibration and testing of the breathalyzer machine were non-testimonial under *Crawford* and its progeny. The appellate court held the trial court's decision to not suppress the documents was correct and the conviction was affirmed. *People v. Pealer*, N.Y., No. 9, 2/19/13

Officers Not Entitled to Qualified Immunity For Retaliation

Defendant was driving to work, listening to music, when a police car started following him. When stopped at a intersection, defendant got out of his car and asked the officer why he was being followed. The officer told him to get back in his car and drive. Defendant did as told and was then pulled over. When he came to a stop he got out of his car and started yelling at the officer. The officer, armed with a taser, told defendant to stay in his car. During the stop, the officer stated many times defendant might be arrested for violating the city's noise ordinance if he didn't "stop running his mouth." The officer ultimately arrested defendant because he "acted a fool...talked [himself] into jail."

Defendant filed for civil damages against the city and the officers for retaliating against him for exercising his First Amendment rights. The district court granted summary judgment in favour of the city and officers and found the officers

had probable cause to arrest defendant. The Court of Appeals for the Ninth Circuit held the officers actions were in retaliation for defendant's

exercise of his free speech. The appellate court also held that because the officer knew of defendant's right to speech the officer was not entitled to qualified immunity. The district court's holding was reversed and remanded. *Ford v. Yakima, Wash., 9th Cir., No. 11-35319, 2/8/13*

Prohibition of Felon Possessing Firearms Constitutional

Police responded to a 911 call concerning domestic violence. As officers approached the scene, they received an alert that the suspect involved in the violence usually carried a pistol in his waistband and had fled the scene in his car. The police followed the car and watched defendant lean over to passenger side of the vehicle multiple times. The officers pulled the car over and found a .22 pistol in a backpack on the passenger side of the car.

At trial defendant testified he was a felon for a fifth-degree controlled substance offense. He was convicted of possession of a firearm by an ineligible person. Defendant appealed claiming the law was unconstitutional as applied to him.

The Minnesota Supreme Court held the statute prohibiting felons from possessing a firearm was constitutional. The supreme court also held defendant did not show to the court the law was unconstitutional as applied to him. The court gave many reasons why defendant's conviction and bar of possession should be upheld even though his previous conviction was for possession of drugs. *State v. Craig, Minn., No. A10-1938, 2/27/13*

Double Jeopardy Does Not Protect Stalker from Prosecution for Second Stalking

Defendant's girlfriend, A.C., tried to break ties with him in May 2010 and shortly thereafter obtained a protective order against him. After the protective order was issued, defendant had contact with A.C. by leaving flowers and a note on her car,

calling her and seeing her in person. A.C. then obtained another protective order. Defendant, again, contacted her on the phone. Defendant was charged with and convicted of stalking, first offense, and criminal mischief. Shortly after this conviction, defendant again made contact with A.C. and was arrested and charged with stalking, second offense.

At trial, defendant argued the state's action was barred by double jeopardy. Defendant claimed the state should not be allowed to use prior incidents, for which he had already been convicted of, to prove the current charge of the same criminal action.

The Iowa Supreme Court held, "The legislator did not intend to allow a stalker to continue a pattern of stalking behaviour and be protected under the shield of double jeopardy." Then supreme court also held defendant had fair notice his conduct could be criminally prosecuted and therefore the state was allowed to convict defendant for stalking, second offense, using some of the same evidence that led to his previous conviction. *State v. Lindell, Iowa, No. 11-0770, 3/8/13*

Felony-murder Rule Clarified

Defendant was hired to build a home for a friend and during the construction he burglarized a home of all the appliances to use in the house he was building. He loaded the appliances into the bed of his truck and started driving them towards his home. About an hour into the trip a stove fell out of the bed of the truck because it had not been tied down and the tailgate was down. Later, the victim was driving on



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the interstate and swerved to avoid hitting the stove when he struck a truck in a different lane and was killed.

Defendant moved to have a jury instruction about the escape rule as applied in California. The escape rule reads, “The crime of burglary continues until the perpetrator has actually reached a temporary place of safety. The perpetrator has reached a temporary place of safety if he has successfully escaped from the scene, is no longer being chased, and has unchallenged possession of the property.” Defendant was denied this jury instruction and was convicted of first degree murder under the felony-murder theory.

The California Supreme Court held the trial court erred by not giving the jury instruction. The supreme court held, “The felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death.” The supreme court reversed the conviction and remanded the case for further proceedings. *People v. Wilkins, Cal., No. S190713, 3/7/13*

Video Technology Violates Confrontation Clause

A New Mexico court of appeals held a district court erred by allowing a state crime lab employee to testify about blood analysis results by video conference. The defendant, who was charged with a DWI, objected to the testimony claiming the confrontation clause guarantees a face-to-face meeting.

The appellate court held, “if there’s a departure from [the face to face] standard, it must be to further an important public policy and must be supported by findings by the trial court.”

The prosecution argued the video conference technology saves the state money and because of the financial crisis it serves an important public policy. The appellate court held the state’s financial

crisis was not considered an important “public policy.” The opinion stated that neither the witness’s convenience, nor the convenience of his employers are situations that demonstrate necessity. The court remanded the case for new trial. *State v. Smith, N.M. Ct. App. No. 31,265, 3/19/13*

Plea Offer Must Have Been Accepted by Both Co-Defendants

Co-defendants forced their way into the apartment of the victim and demanded money. The victim refused and the defendants then stabbed him with a kitchen knife in the abdomen. The co-defendants then stole cash and other valuables and left. The co-defendants were charged with first-degree burglary, assault with intent to kill while armed, aggravated assault while armed and other crimes. The government offered a plea deal to both co-defendants as a “wired” deal, meaning as part of each offer, each co-defendant must accept the offer also. However, at a pre-trial hearing the prosecutor notified the judge that the offer had expired.

Defendant, Benitez, was convicted of assault with intent to kill while armed, aggravated assault while armed and some lesser offenses. Afterwards, Benitez moved to have his conviction vacated claiming ineffective assistance of counsel. Benitez claimed his attorney did not notify him of the plea offer and he would have accepted it, had he known about it.

The appellate court held Benitez was not notified and would have accepted the offer if he had been. The appellate court also held this did not affect Benitez’s opportunity accept the offer because Benitez did not offer any evidence that his co-defendant would have accepted the offer, which was required for the plea to be accepted by the government. The case was remanded for further evidentiary proceedings considering the government’s offer and the co-defendant’s likelihood to accept it.

Benitez v. United States, D.C., No. 11-CO-1537, 2/21/13

Defendant’s Confession Held Involuntary Because of Agent’s Tactics

Defendant voluntarily went to discuss an accusation of rape with Kansas Bureau of Investigations Agents and to take a polygraph test. Defendant was told his *Miranda* rights and provided with a document informing him the polygraph test was voluntary and he could terminate the test at any time. During the test, defendant provided answers and co-operated. After the test, defendant was informed he failed the question about whether he had ever touched the girl’s vagina. The agent then started to be more direct and accusatory. Defendant told the agent he was ready to go home and that he was “done.” The agent continued to press him and he eventually gave a confession, an incriminating drawing, and made other incriminating statements.

Defendant claimed the evidence should have been suppressed under the Fifth Amendment because the confessions and other evidence were given involuntarily. Defendant claimed the evidence was given involuntarily because the officer’s assurances defendant was free to terminate the interrogation and leave at any time were not honored. The appellate court held defendant’s confessions and other incriminating actions were not voluntary when considering the totality of circumstances. *State v. Swindler, Kan., No. 104,580, 2/15/13*



Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 23-24	UPC SPRING CONFERENCE <i>Case law and legislative update, Use of Force training and civility</i>	Sheraton Hotel Salt Lake City, UT
April 25-26	26th Annual Crime Victims Conference <i>Sponsored by the Utah Office for Victims of Crime</i> Registration Flyer	Zermat Resort Midway, UT
May 14-16	ANNUAL CHILD ABUSE AND DOMESTIC VIOLENCE CONFERENCE <i>Sponsored jointly by the Children's Justice Centers and UPC</i>	Zermat Resort Midway, UT
June 19-21	UTAH PROSECUTORIAL ASSISTANTS ASSOCIATION CONFERENCE <i>Training for the non-attorney staff in prosecution offices</i>	Ruby's Inn Bryce City, UT
August 1-2	UTAH MUNICIPAL PROSECUTORS ASSN ANNUAL CONFERENCE <i>For city prosecutors and all others whose case load is largely misdemeanor</i>	Capitol Reef Resort Torrey, UT
August 19-23	BASIC PROSECUTOR COURSE <i>Trial ad and substantive legal instruction for new prosecutors</i>	University Inn Logan, UT
September 11-13	FALL PROSECUTORS' TRAINING CONFERENCE <i>The annual CLE event for all Utah prosecutors</i>	Riverwoods Logan, UT
October 16-18	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>CLE for civil side attorneys from counties and cities</i>	Zion Park Inn Springdale, UT
November 20-22	ADVANCED TRIAL SKILLS COURSE <i>For felony prosecutors with 4+ years of prosecution experience</i>	Hampton Inn West Jordan, UT

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

22 dates and locations around the country	INVESTIGATION AND PROSECUTION OF MORTGAGE FRAUD AND VACANT PROPERTY CRIME <i>This 2 day course will be held in 22 different locations throughout the country during 2013</i> Flyer Registration Lodging Scholarship Application	
May 20-24	GOVERNMENT CIVIL PRACTICE CONFERENCE Summary <i>Specifically designed for attorneys involved in the civil arena of public service.</i>	Salt Lake City, UT
June 3-7	SAFETY NET Agenda Registration Summary <i>Multidisciplinary Investigation and Prosecution of Technology-facilitated Child Sexual Exploitation</i>	Sterling, VA

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June 10-12	THE PROSECUTOR AND THE MEDIA Agenda Registration Summary	Salem, MA
June 17-26	CAREER PROSECUTOR COURSE Summary <i>Designed for those who have committed to prosecution as a career. Trial advocacy, leadership skills, and substantive legal training</i>	San Diego, CA
July 22-26	UNSAFE HAVENS II Agenda Registration Summary <i>Advanced Trial Advocacy for Prosecution of Technology Facilitated Crimes Against Children</i>	San Antonio, TX
July 24-27	ASSOC. OF GOVERNMENT ATTORNEYS IN CAPITAL LITIGATION <i>For more information about and registration forms for the 2013 AGACL conference, visit www.agacl.com or call Susan Wilhelm at (512) 240-5489.</i>	Washington, DC
July 29– Aug. 2	PROSECUTING HOMICIDE CASES Summary <i>Covering all aspects of a homicide case; including investigation, case management, pre-trial and trial.</i>	Seattle, WA
August 19-23	PROSECUTING SEXUAL ASSAULT CASES Summary <i>Learn to address the unique issues in sexual assault cases: evidence, trial advocacy, victim issues, ethics, etc.</i>	Denver, CO
September 9-13	PROSECUTING DRUG CASES Summary <i>NDAA's popular course for narcotics prosecutors and investigators.</i>	Las Vegas, NV

*For a course description, click on the “[Summary](#)” link after the course title. If an agenda has been posted there will also be an “[Agenda](#)” link. Registration for all NDAA courses is now on-line. To register for a course, click on the “[Register](#)” link. If there are no “[Summary](#)” or “[Register](#)” links, that information has not yet been posted on the NDAA website.