

The PROSECUTOR



Director's Thoughts...

I suspect that were a popular vote to be taken, February would be voted as the least favorite month of the year. The big holidays are over and the bills have arrived. There is a bit more daylight but snow and ice still prevail. Temperatures have yet to come anywhere near the pleasant range. When it's not snowing, many of us have those lovely, chewable air inversions. And, on top of all that, February means the legislature is in session.

Speaking of which, here is a sampling of bills being worked on or watched by SWAP-LAC, the Civil Legislative Affairs Committee, the Association of Counties and/or the Law Enforcement Legislative Committee. (The title of each bill is hyperlinked. If you want to read the bill, just click on the title.)

HOUSE BILLS

[HB 20 - Wrongful Documents](#)

Rep. Webb

County Recorders are often presented with documents for recording that are of questionable propriety. This bill makes significant amendments to Chapter 9 of Title 38, Wrongful Documents. If passed it would provide an amended procedure to be followed by county recorders when they receive a questionable document. The bill also gives the recorder immunity from suit if he or she acts in good faith in refusing to record a questionable document. The bill provides civil penalties for recording or attempting to record a fallacious document, but no criminal penalties.

[HB 31 - ENTICING A MINOR](#)

Rep. Webb

The bill makes amendments to 76-4-401 which were requested by prosecutors who regularly handle Enticing a Minor cases. It clarifies that the elements of the offense of Enticing a Minor do not include intent to complete a sexual

offense with a minor. It also modifies the definition of "text messaging." The penalties for enticing a minor are based on the level of sexual conduct in which the actor solicits, seduces, lures, or entices, or attempts to solicit, seduce, lure, or entice a minor to engage.

[HB 33 - Expungement Process Amendments](#)

Rep. Hutchings

Work on this idea, if not this specific bill, began during last year's session. The idea is to make it possible for people who have drug possession offenses on their record but who have now cleaned up their life and no longer have anything to do with drugs, to clean up their record. Such persons often have difficulty getting jobs despite many years of drug free life.

The bill creates a process to expunge drug-related offenses by adding

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LEGAL BRIEFS



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another felony and misdemeanor offense to the list of those for which expunction is possible. It requires the petitioner to be free of illegal substance abuse and to be successfully managing any substance addiction. The bill also clarifies the difference between a pardon and an expungement.

HB 50 - Dating Violence Protection Act

Rep. Seelig

The basic aim of this bill is to provide protective order type protection to people who are or have been in a dating relationship. Similar bills have been introduced every year for several years running, but have never passed. This year, with some changes to the language and the minority leader as the sponsor, it may have more legs than in the past.

The bill provides for the issuance, modification, and enforcement of protective orders between parties who are, or who have been, in a dating relationship when:

- the parties are emancipated or 18 years of age or older;
- the parties are, or have been, in a dating relationship with each other; and
- a party commits abuse or dating violence against the other party.

Procedures to obtain a dating protective order and sanctions which may be imposed by a court are similar to those for other protective orders. A violation of a dating violence protective order would be a class B misdemeanor.

HB 76 - Concealed Weapon Carry

Amendments

Rep. Mathis

It's likely you have already heard about this bill. If passed, it will make it legal for any person 21 years of age or older who may lawfully possess a dangerous weapon to carry a concealed, loaded firearm without the necessity of obtaining any kind of concealed weapon permit. The current concealed weapon permit will not be repealed. Holders of concealed carry permits would be able to carry in locations not allowed without the

permit. In most situations, however, John Q. Citizen, over 21 years of age and not firearm restricted, would be allowed to carry concealed, loaded heat without having to obtain a permit or even having to receive any training to enable them to identify the end from which the bullet comes.

The Law Enforcement Legislative Committee has voted to oppose this bill.

HB - 83 Speed Limit Amendments

Rep. Dunnigan

This bill would expand the portions of the state's rural interstates upon which UDOT may increase the speed limit from 75 to 80 mph.

HB 93 - Traffic Violations Amendments

Rep. Peterson

The aim of this bill is to prevent a person who has caused a crash resulting in serious bodily injury or death from quickly going to court and pleading guilty to a traffic citation issued by the officer at the scene; thereby precluding prosecution for more serious charges because of double jeopardy.

The bill defines serious bodily injury and provides that a peace officer may not issue a citation for certain moving traffic violations if the traffic violation resulted in a crash and any person involved in the crash sustained serious bodily injury or death as a proximate result of the crash. A peace officer who does not issue a citation shall forward his or her report to the appropriate prosecuting attorney for screening.

HB 108 - Metal Theft Amendments

Rep. Draxler

This bill is part of a continuing effort to deal with the ever more blatant theft of metal. The bill:

- increases the penalty for violations by sellers regarding regulated metal;
- provides increased penalties for repeat violations by dealers and sellers of the Regulation of Metal Dealers Act;
- clarifies that local governmental entities may deny or revoke licenses or other regulatory permits upon violation of the

Regulation of Metal Dealers Act;

- clarifies that persons who violate the act may also be charged with other offenses related to the illegal possession or sale of stolen regulated metal;
- requires that dealers obtain a photograph and signature from repeat sellers at each transaction;
- provides that all metal dealer transactions are subject to the Regulation of Metal Dealers Act by removing the exemption for small amounts of metal; and
- relocates and renumbers the Regulation of Metal Dealers Act and related provisions in other statutes.

HB 114 - Second Amendment Preservation Act

Rep. Greene

This bill wins the prize for the most blatantly unconstitutional piece of legislation proposed this year. Among other things, the bill would:

- prohibit any state or local official from enforcing any federal firearms statute or rule;
- make it a 3rd degree felony for any federal official to try to enforce any federal firearms law in Utah regarding any firearm that has remained exclusively within the state; and
- require the Attorney General to provide for the defense of an officer, employee, or citizen of this state who is prosecuted by the **United States government for violation of a federal law relating to firearms.**

Legislative Research and General Counsel has attached a 3½ page constitutional note to the bill.

HB 283 & SB 114 - Safety Belt Enforcement Amendments

Rep. Perry & Sen. Robles

HB 283 would allow enforcement of seat belt violations as a primary offense on highways where the speed limit is 45 mph or greater.

SB 114 would do the same thing but would apply to highways where the speed limit is 55 mph or greater.

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SENATE BILLS

[SB 10 - Retirement Eligibility Amendments](#)

Sen. Weiler

Elected officials take note!

Among other things, this bill:

- Provides that a member of the retirement system who is retiring and who is also an elected official does not have to leave the elected office to be eligible to retire, unless he or she is also retiring as an elected official; and
- Provides that a member of the retirement system who is retiring and who is also a member of a part-time appointed board does not have to leave the board to be eligible to retire.

[SB 52 - Game Fowl Fighting Amendments](#)

Sen. Davis

If passed, this bill will make it a third degree felony for a person to:

- possess, keep, or train game fowl with the intent to engage them in a fighting exhibition with other game fowl;
- cause game fowl to fight with or injure other game fowl for the purposes of amusement or gain;
- permit game fowl fighting on property controlled by the person; or
- control, aid, or abet game fowl fighting.

It would be a class B misdemeanor to knowingly and intentionally be present as a spectator at a place where preparations for game fowl fighting are being made or where a game fowl fighting exhibition occurs.

[SB 107 - Public Shooting Ranges](#)

Sen. Christensen

The sponsor of this bill reasons that because shooting ranges belonging to governmental entities (read, law enforcement ranges) have been paid for with public funds, the public should be able to use them, with only minimal exceptions.

The bill:

- grants the public access to use a public

shooting range during normal business hours;

- permits a fee to be charged for the public to use a public shooting range; and
- describes when a public shooting range can be temporarily restricted from public use during regular business hours. (Generally, during police practice or qualification use or during necessary maintenance.)

The Law Enforcement Legislative Committee has voted to oppose the bill.

[SB 131 - Assault Amendments](#)

Sen. Osmond

If this bill passes, assault on a peace officer or military service member in uniform (76-5-102.4) will become a third degree felony if the offender causes substantial bodily injury. The offense will become a second degree felony if the offender uses a dangerous weapon or force likely to cause serious injury or death.

[S.B. 137 - Motor Vehicle Registration Enforcement Amendments](#)

Sen. Thatcher

Based upon what I heard at Law Enforcement Legislative Committee, this is another in a long tradition of bills aimed at putting Salt Lake City in its place. You've always gotta keep an eye on those big city liberals.

The bill prohibits a local highway authority from enacting an ordinance, regulation, rule, fee, or criminal or civil fine pertaining to a registration violation or a registration decal that conflicts with or is more stringent than the registration requirements under Title 41, Motor Vehicles.

Apparently, SLC was issuing citations for vehicles upon which the state's infamous fading registration decal had become unreadable.

[SB 149 - Governmental Immunity Amendments](#)

Sen. Adams

This bill provides that immunity

from suit against a governmental entity is not waived in the case of:

- injury to a suspect who was fleeing after a law enforcement officer activated the emergency lights on the officer's vehicle to effect a stop; or
- injury to a person other than a suspect which resulted from a suspect fleeing after a law enforcement officer activated the emergency lights on his or her vehicle when the officer operated his or her vehicle reasonably during the pursuit.

[SB 152 - Alcohol and Drug Related Offense Amendments](#)

Sen. Adams

The bill provides:

"[77-2a-3](8) Beginning on July 1, 2013, no plea may be held in abeyance in any case involving a violation described in Subsection 41-6a-501(2)(a)." If the bill passes, PIAs will be prohibited not only for DUIs but also for pretty much any driving offense that involves alcohol or drugs.

[SB 159 - Theft Amendments](#)

Sen. Thatcher

This is the result of an entire year of negotiations between SWAP, the Sentencing Commission, the sponsor, merchants and others. If passed, this bill will change the theft enhancement provisions contained in 76-6-412.

The bill provides that:

- the penalty for a third theft conviction in 10 years becomes a third degree felony if one of the prior convictions was a class A misdemeanor and/or if the value of the property in the current case is more than \$500 but less than \$1,500;
- the penalty for a theft conviction is a third degree felony if the defendant has been previously convicted of felony theft; and
- changes the penalty from a felony to a class A misdemeanor for a person convicted of theft for a third time in 10 years if none of the above apply.

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PROSECUTOR PROFILE



Quick Facts

Favorite Music: “The people at iTunes love me. I am constantly downloading music of all types. I had to buy a 64GB iPhone to fit my music on it. I currently have over 5,000 songs on it and that isn’t even close to all the music I have.”

Favorite Book: Murder mysteries with a repeating protagonist. The Harry Bosch series by Michael Connelly, the Jack Reacher series by Lee Child, and the Lucas Davenport/Prey series by John Sandford, and many more.

Favorite Sports Team: BYU. Growing up, he used to go with his father to the basketball games at the old field house. He says, “That place got so loud. I remember watching Kresimir Cosic and Bernie Fryer play. Those are good memories”

Favorite Restaurant: The Cheesecake Factory, Thai Drift, Market Street Grill, just to name a few.

Tucker Hansen Municipal Prosecutor

James “Tucker” Hansen is a partner at Hansen Wright Eddy & Haws, P.C. and the prosecutor for a number of cities: Alpine, American Fork, Cedar Hills, Cottonwood Heights, Highland, and Holladay. In addition to being a prosecutor, he has a civil practice. He has been prosecuting since 1991. In addition to the cities listed above, he has also been the prosecutor for Lehi, Lindon, Pleasant Grove, and Riverton.

Tucker grew up in Orem and remembers when Orem was mostly cherry tree orchards. His father started a river running business called Tour West and during the summers he worked, first as a boatman, and later as a guide, taking commercial trips down the Grand Canyon on the Colorado River.

In his younger days he wanted to be a Rock Star. He didn’t become one, obviously, but he plays keyboards in a rock band called Fire At Will. This summer they are scheduled to play for Pleasant Grove’s Strawberry Days celebration, the Huntington City Heritage Days Celebration, and Spanish Fork Fiesta Days.

In addition to music, he took up running several years ago. He jokes he isn’t fast, which means he is very slow. He ran his first marathon in 2011. It was the “Huff to Bluff”. It turns out it is about 26 miles from Blanding to Bluff along Highway 191. Last year he ran 3 races: The Saint George Marathon, The Antelope Island 50k, and The Squaw Peak 50 miler. His favorite 2 questions he has to answer about running are “how long was the marathon that you ran?” and, in regards to the 50 miler, “are you going to run that all at once?”

He graduated from BYU with a philosophy degree and attended law school at the Sandra Day O’Connor College of Law at Arizona State University. After graduating in 1988, he practiced law in Arizona for three years before moving back to Utah.

Tucker says he didn’t decide to work as a prosecutor, but rather started working as an associate at a firm that had municipal prosecution contracts. Over time, he did more and more municipal prosecution. He has always enjoyed being a prosecutor and one of the wonderful things about being a prosecutor is that he doesn’t have to take any criminal defense cases in his civil practice.

He feels, “A good prosecutor needs to be fair – to the victim, to the public, to the system, and to the defendant. There are times when you don’t cut a deal. It may be because of the nature of the crime or the history of the defendant. There are other times when you need to give a defendant a reduced plea or a plea-in-abeyance. A good prosecutor recognizes which course is the right one, given all the different factors.”

Tucker is married to Charole and they have 5 children. Their oldest child is a girl, then they had triplets – 2 girls and a boy – and then one more boy for good measure. They are all married except the youngest, who is now at BYU. They also have 3 grandchildren, with one more on the way.

Also, he and his wife, along with friends, formed a charitable organization called Builders Without Borders of Utah. Every year, he and his wife lead a group of 60 to 70 volunteers to the LDS Tijuana Central Stake, in Tijuana, Mexico, where they do humanitarian service. They build homes, fix roofs, teach classes, distribute food, and gorge themselves on “tacos con carne asada.”



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SB 160 - Patronizing a Prostitute

Amendments

Sen. Stevenson

This bill provides that a second or subsequent offense of patronizing a prostitute, whether as a violation of state law or a local ordinance, is a class A misdemeanor.

The above is by no means an exhaustive list of all bills of interest to prosecutors or civil side public attorneys. Furthermore, because it is early in the session as I write this, I have made no effort to let you know how any of the above bills are progressing, or not. If you have interest in any specific bill, I commend to you the Legislative Website, www.le.utah.gov. There you can find the current status of a bill, including amendments and fiscal note. If you want to receive up to the minute news on one or more bills, use the bill tracking service. Put your cursor over "Bills" then select "Tracking Service" in the pop up box. Once you have put in your bill number you will receive an e-mail any time anyone on the hill so much as thinks about the bill in question. (Maybe not quite, but it's a really great service.)

You are, of course, welcome to contact me by e-mail, mnash@utah.gov, or by telephone, (801) 366-0201. I'll do my best to answer your legislative questions or refer you to someone who can.

Make sure you mark your calendar to attend the Spring Conference. It will be held on Tuesday and Wednesday, April 23-24, at the Sheraton Hotel, 150 West 500 South in Salt Lake City. As always, the agenda will include a case law update and a legislative wrap-up. Watch for the brochure in the mail.

RECENT CASES

Utah Supreme Court

Post-Conviction Court Erred in Granting Summary Judgment on Ineffective Counsel Claim

Defendant appeared at Ms. Christensen's door, was let in and started questioning Ms. Christensen about when the last time defendant and she had sex. Ms. Christensen's boyfriend Mr. May was present during the conversation. When Ms. Christensen did not respond to his questioning, defendant pulled out a gun and threatened her. He told Mr. May that he couldn't let her hurt Mr. May like she had hurt defendant. Defendant pushed Ms. Christensen toward a bedroom and shot her three times, killing her. Mr. May attempted to flee and defendant chased him and fired six shots at him, one of which hit him. Defendant was convicted of both aggravated murder and attempted aggravated murder.

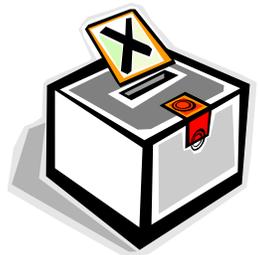
In a post-conviction relief petition defendant argued: 1) he went to the victim's home fearing for her safety because of past instances when she called him seeking protection from an abusive ex-boyfriend; 2) his counsel at trial court was ineffective because counsel did not raise an extreme emotional distress defense; 3) his appellate counsel was ineffective because counsel did not argue on direct appeal that trial counsel was ineffective for not raising the extreme emotional distress defense. He also requested an evidentiary hearing and pro bono counsel for the post-conviction

proceedings. All requests and arguments were dismissed as frivolous except defendant's claims for ineffective trial and appellate counsel. The state moved for summary judgment on the remaining two claims for ineffective counsel and the post-conviction court granted the motion.

The Utah Supreme Court held appellate counsel was ineffective because there were disputed issues of material fact about whether appellate counsel investigated what happened with the trial court counsel. This precludes summary judgment. The supreme court also held that because the trial court needs to decide the issue of material fact, the supreme court cannot decide whether appellate counsel was ineffective for raising the claim of ineffective counsel at trial court and therefore, cannot determine if the trial counsel claim is procedurally barred. The Utah Supreme Court held the post-conviction court erred in granting summary judgment for the State on both of these issues and remanded the case. *Ross v. State*, 2012 UT 93.

Validation of Proposition No. 5 was Approved by the Utah Supreme Court

Voters approved Salt Lake City's Proposition No. 5, allowing the city to issue bonds to fund a "Regional Sports, Recreation and Education Complex." The city then attempted to gain validation from the courts through the Bond Validation Act. Validation would have allowed the city to proceed with a judicial declaration that the proposed bonds are legal and an injunction against any future legal challenges to the bonds. Appellants appeared in opposition to the city and challenged the bond on many statutory and constitutional grounds. The district court denied each of the appellant's claims.



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Appellants claim they were denied due process through the validation proceedings conducted by the district court and appellants claimed those proceedings were not proper according to the Validation Act because the proceedings should be broad in scope, the notice they received was



inadequate, the hearing did not provide them with a meaningful opportunity to be heard and the project materially differs from the proposal. They also argue validation was not proper because the city's authorization of the bonds violated the Local Government Bonding Act.

The Utah Supreme Court held appellants were given due process because the trial court ordered the publication of notice concerning the city's validation petition. The publication properly served the appellants with process and subjected them to the personal jurisdiction of the district court. The appellants also had adequate time to prepare for the validation hearing. The district court also protected appellants' due process rights by allowing them a "meaningful opportunity to be heard" by allowing them to testify, examine witnesses, and present closing arguments.

The Utah supreme Court held the Validation Act was followed by the trial court because the Validation Act "Provides a narrow, expedited procedure limited to consideration of the validity of the bonds as financial instruments" and does not permit consideration of details related to the physical completion of the overall project. Lastly, validation was proper because the city complied with the Local Government Bonding Act when authorizing the bonds. The supreme court held the district court complied with due process and properly applied the Validation and Bonding Acts and affirmed its grant of the City's validation petition. *Salt Lake City v. Taxpayers*, 2012 UT 84.

Utah Court of Appeals

Trial Court Did Not Abuse Discretion in Sentencing

Defendant pled guilty to forcible sexual abuse and appealed his sentence, arguing the district court abused its discretion in sentencing him to one to fifteen years in the Utah State Prison. Abuse of discretion occurs when a judge "fails to consider all legally relevant factors or if the sentence imposed is clearly excessive."

Defendant argues the district court abused its discretion when it did not follow the advice of the pre-sentence investigation report and a report prepared by Utah Sentencing Alternatives. The appellate court held the district court did not abuse its discretion because it took other factors into consideration such as, the nature of the relationship between defendant and victim, the effects on the victim, and violence used in the crime.

Defendant also argued the district court abused its discretion by improperly relying on unsupported speculation in its sentencing decision when the judge stated "something underlying here that just maybe perhaps hasn't come forward." The appellate court held the district court did not abuse its discretion by wondering about the motive behind the sexual assault because it relied on the evidence and arguments presented to reach the sentence imposed. *State v. Ashmore*, 2012 App 354

Argument Does Not Overcome Prima Facie Evidence of Speeding

Defendant appealed his conviction for speeding. Defendant does not dispute he was going faster than the posted speed limit, which is prima facie evidence that his speed was not reasonable or prudent

and was unlawful. Defendant claims his speed was "Reasonable and prudent given the existing road conditions." The appellate court held there was evidence supporting the district court's conclusion and defendant did not overcome the prima facie evidence that his speeding was unlawful. *American Fork City v. Bishop*, 2012 UT App 362



Consecutive Terms Upheld for Teacher Who Raped Former Student

Defendant was an eighth grade math teacher when she became tutoring a former student. The relationship soon became sexual, with the defendant sending naked photographs and then engaging in "phone sex." The defendant then performed oral sex on the student. Eventually, defendant had sexual intercourse with the student seven or eight times over the course of a few months. Another teacher, who had also had a sexual relationship with the student, went to the police and told of her and defendant's sexual relationships with the student. The student was fourteen when the sexual encounters began and Utah statute states a fourteen-year-old has limited ability to consent to sexual activity. The State argued the minor was unable to consent because defendant was in "a position of trust."

Defendant was convicted of five counts of rape and three counts of forcible sodomy. Defendant argued during sentencing that the punishment be minimal because defendant was not a teacher of the victim at the time of the crimes and she was not a threat to society. The district court sentenced her to two consecutive terms of one to fifteen years, citing concerns that the offenses took place over a long period of time and defendant did not stop when warned by another teacher.

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On the Lighter Side

Good, Better, Best

GOOD: A Bend, Oregon policeman had a perfect spot to watch for speeders, but wasn't getting many. Then he discovered the problem – a 12-year-old boy was standing up the road with a hand painted sign, which read 'RADAR TRAP AHEAD.' The officer also found the boy had an accomplice who was down the road with a sign reading 'TIPS' and a bucket full of money. (And we used to just sell lemonade!)

BETTER: A motorist was mailed a picture of his car speeding through an automated radar post in Pendleton, Oregon. A \$40 speeding ticket was included. Being cute, he sent the police department a picture of \$40. The police responded with another mailed photo of handcuffs.

BEST: A young woman was pulled over for speeding. An Oregon State Trooper walked to her car window, flipping open his ticket book. She said, "I'll bet you are going to sell me a ticket to the State Trooper's Ball." He replied, "Oregon State Troopers don't have balls." There was a moment of silence. He then closed his book, tipped his hat, got back in his patrol car and left.

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The court of appeals affirmed the district court's sentence stating, "It simply cannot be said no reasonable person would take the view adopted by the district court." The district court did not improperly consider defendant's role as a teacher because the district court stated the most compelling reason for a harsher sentence was the "Repeated conduct of an adult toward a child, and that adult had every opportunity to change the course of the encounter." *State v. Bowers*, 2012 UT App 353

Building Permit Does Not Create Contractual Relationship

The Clouds constructed a warehouse for storage in Washington, Utah after having the proper conditional use and building permits issued for the building. Washington City (the city) building officials completed all of the required inspections and never mentioned the need for an automatic sprinkler system to make the building comply with the fire code.

After the building was completed, the city fire chief found the building did not comply with the fire code because of the lack of sprinkler system. The city refused to issue a certificate of occupancy to the Clouds based on the fire chief's inspection.

The Clouds sued the city alleging breach of contract, a private attorney general claim and breach of the implied covenant of good faith and fair dealing. They sought an ex parte temporary restraining order enjoining the city from taking any action to enforce the fire code against them. The district court denied the city's request for summary judgment based on Rule 56(f), which allows a party opposing the motion to argue there is a reason they can not obtain the evidence needed to prepare affidavits in opposition to the motion.

The city appealed the denial of summary judgment claiming four issues: 1) the Utah Governmental Immunity Act (UGIA) requires a pre-suit written notice for the claim to move forward

and the Clouds did not satisfy this; 2) the UGIA protects the city from this litigation; 3) a building permit does not create a contractual relationship; 4) Rule 56(f) should not have been used to deny them summary judgment.

The appellate court held:

- the Clouds failed to fulfill the statutory requirement to file a notice of claim before the action started barring the non-contract claims under the UGIA. the issuance of a building permit does not create a contractual obligation for the city.
- the Clouds' claim for private attorney general claim, which would force the city to pay the attorney fees, was denied because the city prevailed on the underlying claim.
- the district court applied Rule 56(f) incorrectly because the litigation had been going on for seven years and the Cloud's motion did not identify any facts they hoped to uncover through additional discovery. *Cloud v. Washington City*, 2012 UT App 348

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Petitioner Did Not Argue That He Met the Current Requirements for Post-conviction Relief

Petitioner pled guilty to murder classified as a domestic violence offense, and a DUI with two or more prior convictions within ten years. He was sentenced to a mandatory term of five years to life for the murder conviction and zero to five years for the DUI. Four years after his conviction he filed a petition for post-conviction relief, arguing ineffective assistance of counsel. Petitioner's claim was denied because it was barred by the one-year statute of limitations for post-conviction relief and his tardiness was not excused by the equitable tolling exception under Utah Code.

On appeal petitioner argued the district court should have excused his tardiness under the "interest of justice" exception. Petitioner argued this exception requires "reversal of [a]ny conviction obtained via [the] deprivation of [a] fundamental right regardless of the mere passage of time." However, the Post Conviction Relief Act (PCRA) has replaced any language of "interest of justice" with the tolling language. The tolling language stops the limitation period only for the period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity." The petitioner did not argue these requirements and the appellate court affirmed the post-conviction dismissal of his petition for relief. *Cunningham v. State*, 2012 UT App 358

Conviction For Possession of Meth Vacated and New Trial Ordered for Receiving Stolen Goods For Crawford Error

Officers executed a search warrant on defendant's apartment and found methamphetamine in a metal lockbox. The lockbox was in a bedroom next to multiple computers and defendant's girlfriend's belongings. When officers brought a laptop

out to the Defendant, he claimed he was a computer repairman and the computers were not stolen. He was charged for



stolen property.

Defendant appealed, arguing the evidence was not sufficient to support his conviction of possession of meth. He also contended the trial court erred by allowing hearsay evidence to be admitted. Lastly, he claimed his constitutional right to confrontation was violated by establishing the laptop had been stolen through an incident report.

To show constructive possession of the meth the State must "Prove that there was a sufficient nexus between the accused and the drug to permit an inference that the accused had both the power and the intent to exercise dominion and control over the drug." The appellate court held that because the state could not determine the location of the lockbox during the search, "Inferences constitute virtually the entire case against defendant" and the factual evidence of his possession of the drugs is inconclusive. Defendant's conviction of possession of methamphetamine was vacated.

On appeal the State conceded the *Crawford* error and the court reversed the conviction for receiving stolen goods and remanded for a new trial. *State v. Gonzalez-Camargo*, 2012 UT App 366

Counsel Was Ineffective For Not Calling an Arson Expert and Failing to Raise Non-arson Defense

Landry was convicted of aggravated arson for setting fire to an apartment. During trial officers testified the fire was a result of arson. Defense counsel did not call an

arson expert to refute the state's position. Instead, defense counsel elicited testimony damaging to the prosecution's case from witnesses and had Landry testify on his own behalf that he had left the apartment to rent a hotel and planned to return later to pick up his belongings.

After Landry was convicted he appealed and the appellate court affirmed his conviction. He then filed for post-conviction relief, asserting his right to due process was violated, the evidence used to convict him was insufficient and his trial counsel and appellate counsel provided ineffective assistance.

The appellate court affirmed the dismissal of all of Landry's claims except his claim for ineffective assistance of counsel. To prevail on the claim of ineffective assistance of counsel Landry needed to allege facts which showed "his counsel's performance fell below an objective standard of reasonable professional judgment, thereby prejudicing him." Landry claimed his trial counsel completely failed to mount a non-arson defense in the face of weak evidence that the fire was actually the result of an intentional act and that discredited investigation techniques were used. Landry provided evidence, through a fire science expert, that scientific evidence could have refuted the prosecution's theory at trial. The appellate court held that the performance of Landry's trial counsel fell below the objective standard and was a deficient performance for failing to consult an arson expert or put on a competent non-arson defense.

The appellate court held that even though Landry did not give specific facts supporting the claim that his appellate counsel was ineffective, it



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is a logical conclusion that if his trial counsel was ineffective and the appellate counsel did not raise a claim of ineffective assistance of counsel, the appellate counsel is automatically ineffective. The appellate court remanded Landry's case for further proceedings on whether his appellate counsel was ineffective and was forced to dismiss all other claims because they were inadequately briefed and were procedurally barred. *Landry v. State*, 2012 UT App 350

Only an Adequate Record Is Required

Okuly was convicted of criminal mischief after destroying the victims cell phone. At trial there was an issue with the recording machine and the record was incomplete. Okuly appealed his conviction of criminal mischief claiming the record was "not adequate for appellate review." Under rule 11(h) of the Utah Rules of Appellate Procedure, Okuly attempted to address deficiencies in the record by moving for remand. The district court prepared an order, under rule 11(h), to supplement the transcript. The order stated that either party could object or if neither did so, it would be part of the record on appeal. Okuly did not object, failing to preserve any challenge to the accuracy of the reconstructed record. The appellate court held the law does not require a complete record, but instead only that the record must be adequate to review specific claims of error already raised. *State v. Okuly*, 2012 UT App 347



Court Has Jurisdiction Over Sexual Exploitation of a Minor Even if Defendant Is Out of State

Mills was on leave from the military when he started a relationship with the sixteen-year-old victim, C.D. They had sex several

times before he returned to his post. While he was out of state he convinced C.D. to send him nude photos of herself and when he returned to Utah they had sex multiple times. While he was in Utah C.D. expressed that she did not want to have sex with him any more. After that conversation, C.D. allowed him to spend the night at her house as long he promised they would not have sex. That night he forced himself on her as she repeatedly told him she didn't want to have sex. The next day C.D. deleted photos of herself off his laptop. Almost a year later C.D. reported the rape to authorities. Mills was convicted of unlawful conduct with a sixteen or seventeen year old, one count of enticing a minor, five counts of sexual exploitation of a minor and one count of rape. Footnote #2 clarifies that sexual exploitation of a minor is Utah's version of the "crime committed by, inter alia, possessing or producing child pornography."

At trial Mills' counsel objected to the state calling expert witnesses about which he was not given the required advanced notice. His counsel then tried to bring expert witnesses of which he did not give advanced notice to the prosecution. The state objected to Mills' expert witness. Mills counsel did not move for a continuance in order to provide the required advanced notice. The judge asked Mills' counsel if the trial could proceed even though he had not given proper notice to the prosecution and his expert witness would not be allowed. He agreed to proceed and waived his right to appeal. None of the expert witnesses were allowed to testify. Mills was convicted on all counts, even though the nude pictures were not recovered and were not presented at trial.

On appeal Mills argued he wasn't allowed to provide exculpatory evidence because he wasn't allowed to present expert witnesses, the court did not have jurisdiction over the him concerning the crime of sexual exploitation of a minor and

the prosecution did not provide sufficient evidence to convict him.

The appellate court held Mills waived the issue of expert witnesses when he failed to move for a continuance and when he verbally waived his right on the first day of trial. On the issue of jurisdiction, the appellate court held there was enough evidence for the court to have personal jurisdiction over defendant because there was testimony the photos were made in Utah at the request of defendant and the photos were on defendant's computer in Utah when they were deleted.

Lastly, the court held that a jury's verdict against sufficiency of evidence will not be overturned "if upon reviewing the evidence and all inferences that can be reasonably drawn from it, [we conclude] that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." The court held that the testimony of C.D. was enough evidence for a reasonable jury to find that Mills had committed the crime of sexual exploitation of a minor beyond a reasonable doubt and affirmed Mills' convictions for that crime. *State v. Mills*, 2012 UT App 367

Utah Identity Fraud Law Does Not Criminalize Fabricating Social Security Number

Defendant made up a random combination of nine numbers and began representing it as his social security number. He used this made up number for employment purposes for numerous years. Defendant was arrested and charged with identity fraud when a woman in Arizona lost her job and was denied unemployment benefits because her social security was on record as employed at a candy store in Ogden, Utah, where defendant was using it.



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Under Utah law a person commits identity fraud only when that person “(i) obtains personal identifying information of another person whether that person is alive or deceased; and (ii) knowingly or intentionally uses, or attempts to use, that information with fraudulent intent, including to obtain, or attempt to obtain, credit, goods, services, employment, any other thing of value, or medical information.” On appeal defendant argued “obtain” does not include fabrication of information. The State argued “obtain” should not be defined so narrowly. The State argued that by not allowing “obtain” to mean to fabricate, the legislator’s intent to prosecute even those who are ignorant of the fact that the information belongs to another is meaningless. The State contended “obtain” should mean “get” which includes fabricating and every other method someone can use to “get” another’s personal information.

The appellate court held the word “obtain” means a “planned action or effort related to an external source.” The appellate court also held that while what defendant did was wrong and a crime



under federal law, he did not commit identity fraud under Utah law because he did not “obtain” the information from anyone. The appellate court reversed his conviction and vacated his sentence. *State v. Rincon*, 2012 UT App 372

Interfering With an Arresting Officer Upheld After Acquitted of Underlying Arrest

Robinson was convicted of interfering with an arresting officer after he refused to be detained for questioning at the Fourth District Courthouse in American Fork, Utah. At trial for the disorderly conduct charges, defendant was instructed to not leave the courtroom. The officers stated, “Come on back in here.” When Robinson told the officers that he didn’t want to come back the officer responded, “It’s not an option.” In the same proceeding Robinson was acquitted of disorderly conduct.

On appeal Robinson contended under Utah law anyone charged with interfering with an arresting officer must be detained for a valid conviction. Robinson argued because he was acquitted of disorderly conduct there was no valid conviction and so the underlying detention was unlawful and “sufficient to reverse” his conviction. Robinson did not preserve this claim for appeal because at trial he did not assert he could only be guilty of interfering with an

arresting officer if he was guilty of disorderly conduct. Even though this claim was not preserved for appeal, the appellate court clarified stating, “A person may be found guilty of resisting arrest even when the underlying arrest is later found to be unlawful.” *American Fork City v. Robinson*, 2012 UT App 357

Conviction of Multiple Sexual Assaults Resulting from Same Criminal Episode Affirmed

On June 1, 2008 defendant demanded oral sex from his live-in girlfriend, S.G. She refused, but defendant told her “You’re my woman. You’re supposed to do these things” and then forced her to perform oral sex. She did not fight because she was scared of defendant’s behaviour. Defendant then ordered S.G. to have intercourse with him, which she refused and repeatedly told him to stop. Defendant forced her to have intercourse with him by squeezing her throat. Eventually S.G. left the home to buy cigarettes. Defendant joined her and while walking to the store he hit her, knocked her to the ground and verbally berated her. When leaving the store defendant started to hit S.G. again and the store attendant called 911. Defendant was convicted of assault and two counts of aggravated sexual assault.

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Defendant appealed his conviction of two counts of aggravated sexual assault asserting ineffective assistance of counsel. Defendant contended his counsel failed to “adequately investigate the state’s experts did testify the injuries could be the result of consensual sex, just as defendant’s expert advised they would concede.

Defendant also contended S.G.’s testimony was not credible based on false or inconsistent statements which S.G. made to the police. In footnote four, the appellate court stated, “None of these inconsistencies or falsehoods...bore directly on the issue of consent” and so they were not admitted. The court also noted that defendant’s testimony on the issue of consent “was less than

compelling” because he testified “She...my woman when we together...she don’t have to do anything she don’t want to, but they are things that people claim to whatever, when they consider someone something , you know what I mean.”



The appellate court also felt defendant hurt his own credibility when he testified that his beating of S.G. was “Probably not acceptable,” but was “nothing to how she was getting beat up by her boyfriend” and “She’ll live. She’s a strong woman. She’ll get over it, but all this right here [the prosecution and trial] isn’t necessary.” The appellate court held that defendant “failed to demonstrate a reasonable probability of a more favourable result” even if his counsel had interviewed the State’s experts or had defendant’s own expert testify at trial. *State v. Selzer*, 2013 UT App 3

Motion to Suppress Must Be Filed in a Timely Manner Before the Start of the Actual Trial

Defendant was convicted for possession of a controlled substance. At a pre-trial conference defendant’s counsel moved for

a continuance of the trial and informed the court that she would be filing a motion to suppress. The state objected to the motion to suppress because it was untimely based on Rule 12(c)(1)(B) of the Utah Rules of Criminal Procedure. The trial court agreed and denied the motion. The trial was continued twice and at a later proceeding the trial court again denied a motion to suppress, stating it was untimely and should have been filed before the first scheduled trial date. The appellate court held the rule refers to “trial” as the actual trial, not the first date the trial was scheduled for. *State v. Smith*, 2012 UT App 370

Statutory Prison Sentence Affirmed even though Defendant had Mental Illness

Defendant pled guilty to aggravated assault and was sentenced to the statutory prison term of zero to five years. He appealed, asserting the district court abused its discretion by imposing this sentence on him instead of granting probation. Defendant claims the district court did not consider all the relevant factors or give sufficient weight to his mental illness.

The appellate court reviews a trial court’s sentencing decision for abuse of discretion which occurs when the “judge fails to consider all legally relevant factors or imposes a clearly excessive sentence.” The appellate court held the district court considered all relevant mitigating and aggravating factors and the sentence imposed was not clearly excessive. The appellate court also held that the district court gave sufficient weight to his mental illness by taking into consideration that his mental illness was not treated until incarceration. Therefore, the appellate court held the district court did not abuse its discretion and affirmed the sentence. *State v. Ward*, 2012 UT App 346

Tenth Circuit Court of Appeals

Defendant Unequivocally Invoked His Right to Counsel Through Letter

While in jail on unrelated charges it was communicated to an FBI agent that defendant wanted to speak to the agent about some robberies that had taken place. The agent responded that he would visit defendant at the jail the next morning. The next morning the agent received a phone call from defendant’s attorney stating that defendant did not wish



to speak to the agent without his attorney present. The agent continued to the jail where defendant presented a letter to the FBI agent which stated that defendant did not wish to speak without his attorney present. The agent then asked defendant if he wished to be interviewed without his attorney present. Defendant stated he wanted to answer questions without the attorney present. Before the interview started the agent presented defendant with a *Miranda* rights form which defendant read aloud, said he knew his rights and signed.

The United States Court of Appeals for the Tenth Circuit held that by handing the agent the letter defendant unequivocally invoked his right to counsel and that any questioning that took place afterwards was improper. The Court based their decision on *Edwards v. Arizona* rule which states that once a suspect has invoked his right to counsel he cannot be subject to further interrogation without counsel unless he initiates the contact. The court held all questioning of the suspect should have stopped when the letter was delivered. *United States v. Santistevan*, 10th Cir., No. 11-1534, 12/17/12

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Other Circuits/ States

Federal Identity Theft Statutes Ambiguous about Corporations

Defendants carried out a scheme to steal money from the Woodsmith's, a small furniture manufacturer. The scheme included setting up a bank account in the name of the Woodsmith's, creating a stamp to sign checks, and depositing checks for the Woodsmith's into the account. In total the defendant's stole about \$655,000. The defendants were convicted of identity theft and aggravated identity theft among other charges. The government argued corporations are included within the class of protected victims because the statute was meant to protect people and corporations from the harm of identity theft. The Court of Appeals for the Fourth Circuit held congress used the terms "person" and "individual" when referring to victims of identity theft and the terms are ambiguous without Congressional intent to interpret them. Because of the ambiguity the appellate court must rely on the rule of lenity, which states, "When a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that congress should have spoken in language that is clear and definite." The

appellate court held this requires them to vacate the defendant's convictions. *United States v. Hilton*, 4th Cir., No. 11-4273, 12/13/12



Spousal Privilege Did Not Extend to Defendant's Work Computer

Defendant used his position as member of Virginia House of Delegates and Chairman

of the Appropriations Committee to fund a new Center for Teacher Quality and Educational Leadership at Old Dominion University. Defendant agreed to fund the center in return for a position at the center. E-mails to and from defendant's wife concerning the amount needed per month in salary and the couple's financial difficulties were sent to or from defendant's work computer and email account. On appeal defendant argued the e-mails to and from his wife should be protected from admission by spousal privilege. Defendant knew the employer had the right to use all information sent, accessed or stored in the company's computer system and defendant took no steps to protect these e-mails from being shared, accessed or used against him. The court held the e-mails were not protected because defendant did not have an expectation of privacy and took no steps to protect his privacy from the employer using the e-mails when, why and however they chose. *United States v. Hamilton*, 4th Cir., No. 11-4847, 12/13/12

Illegal Aliens Do Not Have Second Amendment Rights

Defendant, Nicolas Carpio-Leon, a citizen of Mexico, was convicted of unlawfully possessing firearms while in the U.S. During trial he moved to dismiss the case claiming the law violated his Second Amendment right to possess a firearm. His motion to dismiss was denied and he appealed claiming the law violated his Second Amendment rights.

The 4th Circuit Court of Appeals upheld the law prohibiting illegal aliens from possessing firearms stating, "the scope of the Second Amendment does not extend to provide protection to illegal aliens, because illegal aliens are not law-abiding members of the political community and aliens who have entered the United States unlawfully have no more rights under the Second Amendment than do aliens outside of the United States seeking admittance." *United States v. Carpio-Leon*, 4th Cir., No. 11-5063, 12/14/12

Three Hour Detention Without Probable Cause was Unlawful

Prentiss Watson was convicted of the federal crimes of possession of a firearm and ammunition by a felon. Police were investigating drug deals near the building in which Watson lived and worked. They arrested a man who lived on the same floor as Watson and decided to obtain a warrant to search the building. Following procedure, the officers secured the building and detained Watson, who was working in a convenience store on the first level of the building. He had been detained for about three hours when police obtained a search warrant and found a pistol and ammunition in his room on the second floor. When asked about the pistol he replied, "That old thing, it doesn't even work."



Watson filed a motion to suppress his statement and exclude any evidence of the revolver, claiming he was the subject of an unlawful detention and illegal arrest. The trial court denied his motion to suppress.

On appeal Watson challenged the trial court's denial of his motion to suppress reasserting the same claims. The appellate court's decision turned on whether the detention was reasonable. The appellate court held the government failed to meet its burden of demonstrating a legitimate public interest in detaining Watson for three hours and the detention was an unlawful arrest. Therefore, the evidence should have been suppressed, the conviction was vacated and the case remanded to the trial court.

United States v. Watson, 4th Cir., No. 11-4371, 1/2/13

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Phone Calls to Identify Suspect Were Not a Search of Cell Phone

An informant arranged to buy crack cocaine from defendant. Police waited for defendant to arrive and stopped his vehicle before the sale was completed. To verify that defendant was the man the informant named, officer's called the phone number that the informant had used to set up the sale. Defendant's phone rang within seconds of the phone number being dialed each time. The officers then searched the vehicle and found a sawed-off shotgun and ammunition.



On appeal defendant argued any evidence discovered after his cell phone was illegally seized and should have been suppressed. Defendant argued the police did not have probable cause to seize and search his phone and it was an illegal search to call the phone and look at the phone to ensure defendant's identity. The appellate court agreed with the district court and held defendant's phone was not searched because the police did not attempt to retrieve any information from the phone. Police possessed it briefly to determine if it would ring and confirm defendant's identity. Furthermore, the seizure was momentary and "minimally intrusive" with "strong countervailing governmental interests." The court of appeals held the seizure was justified and did not violate the Fourth Amendment. *United States v. Lawing*, 4th Cir., No. 11-4896, 12/31/12

"Sexual Activity" Defined, Defendant Guilty Regardless of No Physical Contact

Defendant pretended to be a young girl and initiated internet and phone conversations with minor girls. Defendant asked them to touch themselves and get naked for him. Defendant pled guilty to enticing or attempting to entice a minor to engage in illegal sexual activity, a federal crime. The

statute requires: 1) use of a facility of interstate commerce; 2) to knowingly persuade, induce, entice, or coerce; 3) a person which is younger than eighteen; 4) to engage in an illegal sexual activity.

On appeal defendant argues that the definition of "sexual activity" requires interpersonal physical contact. Because he did not have any physical contact with his victims he cannot be guilty of violating the statute. The U.S. Court of Appeals for the Fourth Circuit defined "sexual activity" as the "active pursuit of libidinal gratification" and held there is no requirement for physical contact. The appellate court held that defendant's claim failed and affirmed the guilty plea.

This definition and holding differ from the U.S. Court of Appeals for the Seventh Circuit in which the court held that "sexual activity" is synonymous with "sexual act" as defined in 18 U.S.C. § 2246(2). The Fourth Circuit court argues this cannot be because § 2246(2) requires physical contact involving genitalia and is a very specific act criminalizing very specific conduct. *United States v. Fugit*, 4th Cir., No. 11-6741, 12/31/12

Counsel Must Be Appointed to Attend Competency Hearing

Defendant was on trial for taking part in a conspiracy to counterfeit checks and a conspiracy to defraud private citizens by buying and selling cars. Defendant would make a counterfeit check, pay for the car with the check and then quickly resell the car. Before the trial started defendant acted paranoid and three court appointed attorneys withdrew. After the next counsel



was appointed defendant moved to waive counsel and represent himself. The judge denied both motions citing government interests. The government filed a motion to determine competency, which was denied.

Closer to the trial, defendant again moved to represent himself and this time it was granted, allowing his counsel to stay on as standby counsel. The government again moved for a competency evaluation and this time it was granted. Counsel was not re-appointed to attend the competency hearing with defendant.

On appeal, Defendant argued he should not have been allowed to represent himself at his competency hearing, citing a federal statute which states "The person whose mental condition is subject to the hearing shall be represented by counsel." (Emphasis added). The U.S. Court of Appeals for the Sixth Circuit held a defendant's Sixth Amendment right to counsel is violated whenever the trial court has reasonable cause to believe that a defendant is incompetent to stand trial and does not appoint counsel to represent him. *United States v. Ross*, 6th Cir., No. 09-1852, 12/31/12

Providing a Firearm to a Prohibited Person Based on Recipient's Possession

Thomas Kelly was convicted on tax and financial charges and failed to appear for sentencing. After he failed to appear and had become a fugitive, defendant, William Stegmeier, permitted Kelly to stay in his recreation vehicle and told him a pistol was in the closet of the vehicle. Defendant then provided Kelly a job at his construction company and paid him in cash. Defendant was convicted of harboring a fugitive and providing a firearm to a prohibited person. Defendant argues there was insufficient evidence to convict him of these crimes.

The 8th Circuit Court of Appeals held that a recipient's possession is sufficient proof for a conviction of providing a firearm to a

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convict him of these crimes.

The 8th Circuit Court of Appeals held that a recipient's possession is sufficient proof for a conviction of providing a firearm to a prohibited person. Here, defendant gave control over the RV where the firearm was stored, informed him of the presence of the firearm and later stated Kelly must have moved the firearm. The Court of Appeals for the Eighth Circuit held these facts were sufficient to prove Kelly possessed the firearm and are enough to show defendant provided the gun to him. *United States v. Stegmeier*, 8th Cir., No. 11-3776, 12/13/12

Focus of RICO is on the Pattern of Racketeering Activity

Four Chinese nationals were convicted of crimes after they stole funds from the Bank of China and tried to retain the funds by illegal transfers and immigration fraud. The four men transferred millions of dollars to Hong Kong and used it to make fraudulent loans, buy real estate, and finance gambling trips. Also, each of the men entered into fake marriages with women who held valid U.S. immigration status. When they were caught in China they fled to the U.S to escape prosecution. The trial court applied the Racketeer Influenced and Corrupt Organizations Act ("RICO") and charged defendants with money laundering conspiracy, conspiracy to transport stolen money and using fraudulent passports, along with other federal crimes.

Defendants appealed their convictions, claiming the conspiracy was extraterritorial and outside the jurisdiction of RICO. Caselaw states that where the statute does not speak of extraterritorial applications there is a presumption against it. The appellate court held the presumption in this case is that RICO does not apply extraterritorially. The circuits are split between the focus of RICO being on



domestic enterprises or on the pattern of racketeering activity. The appellate court held RICO's focus is on the pattern of racketeering activity and "defendant's pattern of racketeering may have been conceived and planned overseas, but it was executed and perpetuated in the United States." The appellate court affirmed the conviction using RICO. *United States v. Xu*, 9th Cir., No. 09-10189, 1/3/13

Restoration of Right to Vote Does Not Restore Right to Possess a Firearm

Defendant was convicted of a felony assault and lost his right to vote, serve on juries, hold office and possess a firearm. Defendant had his right to vote restored through the Alabama State Board of Pardons and Paroles in 2006. In 2009 defendant was arrested in possession of a firearm and he pled guilty to this crime in 2011.

On appeal defendant argued the reinstatement of his right to vote negated his status as a felon and that he had the right to possess a firearm. The United States Court of Appeals for the Eleventh Circuit held that under federal law the restoration of the right to vote does not erase the felon status nor does it grant the right to possess a firearm. *United States v. Thompson*, 11th Cir., No. 11-15122, 12/11/12

Searches May Be Limited, but not Plain View Doctrine

Police investigating identity theft suspected defendant of the crime and submitted a warrant application to a magistrate. The application for the warrant requested the ability to search defendant's residence, to seize all electronic devices and to search the devices offsite.



The judicial officer reviewing the request granted the warrant, but, in a separate order, put very specific restrictions on the search of the devices. These restrictions included that the officers were not able to seize evidence of other crimes even if they were in plain view, the type of digital evidence that could be seized, who could perform the search and what type of searches and the tools that could be used to complete the search. The State filed a motion for extraordinary relief to remove the extra conditions placed on the search.

The Vermont Supreme Court held the judicial officer did have the power to impose instructions concerning the search because of the demands of probable cause and particularity requirement for warrants. However, the Supreme Court held that the judicial officer did not have the authority to stop officers from seizing items in plain view. *In re Appeal of Application for Search Warrant*, Vt., No. 2010-479, 12/14/12

Talk of Leniency and Treatment Made Confession Inadmissible

Defendant was left alone with his girlfriend's 17 month old son. When the girlfriend arrived home her son was screaming and had bloody stool. After the hospital looked at the boy, defendant was brought in for questioning because the boy had injuries consistent with sexual abuse. During questioning the detective did not read defendant his *Miranda* rights. Detective also discussed what happens to pedophiles and told defendant pedophiles receive treatment for their addictions. Defendant confessed to the crime after the detective suggested that he could receive treatment if he cooperated.

The Supreme Court of Iowa held the detective's line of questioning was misleading because he did not tell defendant his rights or that the county attorney would determine criminal charges, which carry prison sentences. The

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which carry prison sentences. The Supreme Court of Iowa held that by omitting these facts the detective misled defendant to believe that he would receive treatment and not a prison sentence. The lower court decision was reversed and the case was remanded to trial court for a new trial. *State v. Howard, Iowa, No. 10-1742, 12/21/12*

Prosecutor's Questioning of Defendant's Remorse was not Misconduct

Defendant was convicted of first degree murder during an attempted robbery when he shot Mr. Shield in front of his family. During the penalty phase defendant took the stand and testified he was "very sorry" for having killed Mr. Shield. He further explained he was sorry because he could imagine someone shooting his own mother and the testimony of the victim's daughter deeply affected him. During cross-examination the prosecutor asked defendant why he was "laughing and carrying on" when outside the jury's presence. Defense Counsel objected and the court sustained the objection striking the question and instructing the jury to disregard the question and any answer. Defendant moved for a new trial claiming these comments were prejudicial misconduct. This motion was denied by the trial court.



On appeal defendant raised the same claims stating the prosecutor's remarks violated his constitutional rights to due process, a fair trial, nonarbitrary determinations of guilt and penalty under the federal and state Constitution. The appellate court held the prosecutor's comments were not misconduct and did not "infect" the trial with unfairness to the level of denying due process. *People v. Watkins, Cal., No. S026634, 12/17/12*

Defendant Must Be Aware of Police Presence For Seizure to Take Place.

Defendant was arrested and charged with a DUI and claimed his Fourth Amendment rights were violated by the arresting officers actions. After being found drunk in his car with the motor running, the arresting officer pulled his car up behind the defendant's car, effectively pinning defendant's car in. The officer then saw defendant asleep in the driver's seat with open beer cans in the vehicle. The officer awoke defendant and determined he was intoxicated.



The trial court held defendant was seized under the Fourth Amendment because if he wanted to leave he would not have been able to. However, the Colorado Supreme Court held a person must be aware of police presence before a seizure can take place. Here, defendant was not aware he was blocked in and the Supreme Court held he was not seized and remanded the case to the trial court. *Tate v. People, Colo., No. 11SC382, 12/20/12*

No expectation of privacy in an interrogation room

Chaudry Rashid immigrated to the United States from Pakistan. He forced his daughter to marry her cousin to permit the cousin to lawfully enter the United States. When the daughter tried to end the marriage, Rashid killed her for her disobedience. He was arrested and interrogated. At the conclusion of the interrogation, Rashid asked to speak to his family. The officers left the interrogation room, but left the recording equipment active and left Rashid handcuffed. Rashid told several family members that he had killed his daughter and that she deserved to die

of a *Miranda* violation. However, the court admitted the multiple confessions that Rashid made to his family after the interrogation. .

On appeal Rashid claimed that he had an expectation of privacy in the interrogation room. The court compared the interrogation room situation to cases in which courts have held that handcuffed suspects sitting in police cars have no expectation of privacy. Those courts have allowed admission of statements recorded by in-car audio/video recording. The appellate court held Rashid could not reasonably expect privacy while under arrest for murder, handcuffed and locked in an interrogation room. *Rashid v. State, 2013 WL 227642 (Ga. 2013)*

The trial court suppressed the evidence gained during the interrogation on the basis

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	26 th 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 20-21	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
February 18-22	FORENSIC EVIDENCE <i>Designed with the prosecution team in mind; prosecutors, law enforcement, and forensic professionals</i>	Flyer San Diego, CA
March 4-8	THE EXECUTIVE PROGRAM <i>The Executive Program is the course designed for prosecution leadership</i>	Flyer Charleston, SC

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March 4-8	THE EXECUTIVE PROGRAM	Flyer	Charleston, SC		
	<i>The Executive Program is the course designed for prosecution leadership.</i>				
March 25-29	CHILDPROOF	Agenda	Application	Registration	Washington, DC
	<i>Advanced Trial Advocacy for Child Abuse Prosecutors</i>				

*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.