

The

# PROSECUTOR



## RECENT CASES

### United States Supreme Court

#### Actual Innocence May Allow Petitioner To Overcome Procedural Bar

In 1993 Perkins attended a party in Flint, Michigan with two friends, Henderson and Jones. That night, Henderson was found murdered by stab wounds to his head. Perkins was charged with the murder of Henderson. At trial, Jones testified

Perkins killed Henderson while Jones watched. Perkins was convicted of first degree murder and the conviction became final on May 5, 1997.

Perkins filed a federal habeas corpus petition on June 13, 2008, more than 11 years after his conviction. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a state prisoner ordinarily has one year to file a federal petition for habeas corpus, from the date when their conviction became final. However, if the petition alleges newly discovered evidence the filing deadline is one year from the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Perkins submitted three affidavits suggesting Jones killed Henderson. The District Court found that even

if the affidavits were considered new evidence, the statute of limitations had run because the last affidavit was collected five years before respondent filed.

Respondent appealed and the Supreme Court granted certiorari to resolve a Circuit conflict on whether AEDPA's statute of limitations can be overcome by a showing of actual innocence.

The Supreme Court held actual innocence, if proved, serves as a gateway through which a petitioner may pass if the impediment is a procedural bar, as it was in *Schlup v. Delo* and *House v. Bell* or expiration of the AEDPA statute of limitations, as in this case. The miscarriage of justice exception applies to a severely confined category: cases in which new evidence shows "it is more likely than not that no reasonable juror

*Continued on page 5*

### In This Issue:

2 [In Memory of Bill Daines](#)

4 [Case Summary Index](#)

7 [Prosecutor Profile: Paige Williamson](#)

10 [Lighter Side](#)

16 [HB 384 Article](#)

22 [John R Justice Program](#)

23 [Training Calendar](#)

## IN MEMORY OF BILL DAINES

William Fred Daines died suddenly, Friday, July 5, 2013, of a brain aneurysm, shocking all who knew him. He went to work Wednesday with a headache, checked into a hospital the next day, July 4, according to family, and the aneurysm spread fatally. He passed Friday at 12:09 p.m. at McKay-Dee Hospital, surrounded by family, friends and co-workers.

Bill graduated from the University of Utah School of Law in 1969. He joined the Weber County Attorney's Office in 1975 and spent the next 38 years pacing the wells of the 2<sup>nd</sup> District Courtrooms as a prosecutor. He loved his job and never lost his excitement for going to work. At age 69 some questioned why he hadn't retired. Kris Knowlton, who worked in Weber County with Bill for 16 years, said, "He would never have retired, because he loved what he did. He loved where he worked."



Bill loved to train other attorneys. He presented numerous times at Prosecution Council training events, helped plan many conferences and served as a member of the UPC Training Committee. His favorite audience was the new prosecutors at the Basic Prosecutor Course. This photo was taken several years ago while he was teaching *Demonstrative Evidence* at a Basic Course. Above all, he wanted to imbue the new prosecutors with his commitment to preparation, excellence and to the importance of justice.



For Bill, Justice was not just something prosecutors did, it was the goal and *raison d'être* of the entire criminal justice system. Bill was happy when all participants in the system did their jobs well. Upon graduation from law school, Bill's son Peter joined the Salt Lake Legal Defenders Office. Given any excuse, or none at all, he bragged about what Peter had done or was doing. He wouldn't have been any prouder were Peter a prosecutor who had just won a difficult case.

Away from the office and courtroom, Bill loved the outdoors and outdoor sports. Several times each year he made a pilgrimage to Island Park, ID. In this photo, sent by Bill's son, Peter, Bill is standing next to one of his favorite fishing holes. Bill also enjoyed duck hunting in the marshes around the Great Salt Lake. Bill was a gun enthusiast, but especially for nice shotguns. Paul Boyden tells how, after SWAP meetings in Salt Lake, the two of them would sneak off to a nearby gun store to look at shotguns. Bill was as interested in the fancy scroll work on a stock and the finish on a barrel as in the action. As Paul put it, "Bill was a member of the 'guns as furniture' club."



Several of Bill's friends sent thoughts and recollections of Bill.

Rob Parrish:

Bill has been one of the stalwarts of Utah prosecution for many decades and has been a source of training, inspiration, and wisdom for many of us during all that time. Very few among our number have the common sense, trial acumen, and experience that Bill had. Even fewer are just a nice person, as Bill has always been.

Robert Stott:

Bill relished being a prosecutor. Like a good condiment, Bill made prosecuting exciting, invigorating, and enviable. I appeared in many seminars with Bill, but he always upstaged me. We greatly miss Bill, but the inspiration and influence of this suburb prosecutor and human being remains with us.

Pat Nolan provided a classic Bill Daines quote:

My favorite quote from Bill, on being asked to comment on going 'paperless': "Before you go shred your file, make sure you make a copy of every piece of paper in it, because you're going to need it somewhere down the road . . ."

Chris Shaw:

He is one of the reasons I changed paths during the most productive time of my career. I wanted to do what he did for over 40 years. Bill was a big part of my decision to leave private practice and I'm happy I was able to spend the last six years working side by side with him. Bill brought justice to so many people. He loved his job and he did it very well.

John Holliday:

I was a law clerk in the Weber County Attorney's Office and had the ominous task of trying to teach Bill how to use Google and Westlaw. I don't think he ever got very good at it. But, while Bill may have seemed technologically challenged to us new, young attorney's, the example of values and ethics he set was timeless and invaluable. He was a hellava man to look up to as a law student.

Tyke Tsakalos:

The most important wisdom Bill conveyed to me was that a prosecutors (and probably any other lawyers) reputation would be established in very short order. A good reputation would take more work up front but would carry you through your career, even though you still had to work at it. Attorneys and judges would know and react to it and would treat you with respect. A bad reputation (lazy and unwilling to try cases) could almost never be overcome. Judges and attorneys would disrespect you and even really good cases would not settle advantageously. He was right!

A few days after Bill's death, the Standard Examiner carried an excellent article about him, including memories from many who had the privilege to work closely with him. The link to that article is [http://m.standard.net/standardex/db\\_/contentdetail.htm?contentguid=rv2jFNzH](http://m.standard.net/standardex/db_/contentdetail.htm?contentguid=rv2jFNzH). Make sure you read it. You'll smile, laugh and maybe shed a few tears.

We love you, Bill.

# Case Summary Index

## [United States Supreme Court](#) (p. 1-6 )

*McQuiggin v. Perkins*—**Actual Innocence May Allow Petitioner To Overcome Procedural Bar**

*Trevino v. Thaler*—**Exception For Federal Review Granted When Procedure Bars Petitioner From Bringing Claim**

*Nevada v. Jackson* —**No Federal Law Guaranteeing Extrinsic Evidence For Impeachment**

*Peugh v. United States*—**Ex Post Facto Requires Government to Use Sentencing Guidelines Effective When Crimes Committed**

## [Utah Supreme Court](#) (p. 6-8)

*Brown v. State*—**Factual Innocence Determinations To Be Based On Newly Discovered and Previously Available Evidence**

*State v. Maughan*—**Lenient Standard For Bind Over For Obstruction of Justice**

## [Utah Appellate Court](#) (p. 8-14)

*State v. Wright* —**Officer’s Statistical Testimony was Inadmissible**

*Friedman v. Salt Lake County*—**Court Affirmed Dismissal of Involuntary Servitude and Other Claims**

*State v. Gedi*—**Opening the Door Not Ineffective Assistance of Counsel**

*State v. Gunter*—**Inadequate Inquiry Of Voluntary Absence Harmless**

*State v. McNeil*—**Statement Not Hearsay Because of Stipulation**

*State v. Martinez*—**Self-Defense Instruction Deficient, But Harmless**

*Orem City v. Santos*—**Detainment of Shoplifter Does Not Make Employees Government Agents**

*State v. Stone*—**Appellate Court Lacked Jurisdiction Once Guilty Plea Was Entered**

## [Tenth Circuit Court of Appeals](#) (p. 14)

*United States v. Christie*—**Broad Search Of Computer and Lengthy Delay Before Warrant Acceptable**

## [Other Circuits / States](#) (p.14-21 )

*United States v. Wurie*—**Search-Incident-To-Arrest Exception Does Not Authorize The Warrantless Search Of Data**

*United States v. Castellanos*—**Without Proof Of Ownership Or Control, No Expectation Of Privacy In Car**

*United States v. Brooks*—**GPS Tracking Records Non-Testimonial**

*United States v. Rojas-Pedroza*—**A-File Records Non-Testimonial**

*Ferguson v. Secretary, Florida Department of Corrections*—**Florida Standard For Executing Mentally Ill Not Inconsistent With Federal Law**

*Davis v. U.S. Sentencing Commission*—**Federal Prisoner’s May Bring *Bivens* Claims To Seek Reduction In Sentence**

*State v. Butler (Tyler B.)*—**Age and Presence of Parent Should be Examined For Minors**

*Chambers v. State*—**Life Sentence for Seventeen Year Old Not Cruel Or Unusual Punishment**

*People v. Henderson*—**Fleeing Prevents A Claim For Fruit Of Poisonous Tree**

*State v. Morales*—**Unlawful Detention Does Taint Evidence**



[Continued from page 1](#)

would have convicted [the petitioner].” The Supreme Court held the miscarriage of justice exception, as applied to other statutes, applies to the AEDPA and the gateway should open only when a petitioner presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error. Here, the Supreme Court held that respondent’s new evidence was “hardly adequate to show that, had it been presented at trial, no reasonable juror would have convicted [respondent].”

[McQuiggin v. Perkins, U.S., No. 12-126, 5/28/13](#)

### **Exception For Federal Review Granted When Procedure Bars Petitioner From Bringing Claim**

Petitioner was convicted of capital murder in Texas after the death of Linda Salinas. A sentence of death was imposed and new counsel was appointed to handle the direct appeal. Petitioner’s appellate counsel did not claim the trial counsel was ineffective during the penalty phase of the proceedings. In fact no claim for ineffective counsel was brought until he filed a petition in federal court seeking a writ of habeas corpus.

While Texas law grants permission, in theory, to bring an ineffective assistance of trial counsel claim on direct appeal, in practice it denies a meaningful opportunity to do so. Texas procedures make it nearly

impossible for a claim to be presented on direct appeal because the trial record is likely to be insufficient to support the claim. Also, a motion for a new trial to develop the record is usually inadequate because of Texas rules regarding the time limits for filing, and the disposal of such motions and the availability of trial transcripts.

The Supreme Court held that because the Texas procedural rules bar petitioners from the opportunity to develop a meaningful ineffective assistance of counsel claim, the exception from *Martinez* applies. The exception in *Martinez* was developed because certain states required these claims to be raised in an initial collateral review proceeding. The exception allows a petitioner to “obtain federal review of a default claim by showing cause for the default and prejudice from a violation of the federal law.”

[Trevino v. Thaler, U.S., No. 11-10189, 5/28/13](#)

### **No Federal Law Guaranteeing Extrinsic Evidence For Impeachment**

Defendant was convicted of rape and other serious crimes after his relationship ended with his girlfriend. She moved out, but defendant found where she lived, broke in and attacked her. Defendant threatened her life, assaulted and raped her.

At trial, the defense’s theory was that the victim had fabricated the sexual assault and reported it to

control defendant. To support this theory they sought to admit past occasions where the victim had called the police and falsely claimed defendant had raped or sexually assaulted her. The trial court denied this request. Defendant was sentenced to life in prison.

On appeal, defendant claimed the trial court’s denial violated the Confrontation Clause. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) authorizes federal habeas court to grant relief to a prisoner whose state court conviction “involved an unreasonable application of... clearly established Federal law, as determined by the Supreme Court.” The U.S. Supreme Court held no case has held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes. Therefore, the Supreme Court reversed the Ninth Circuit judgment.

[Nevada v. Jackson, No. 12-694, 6/3/13](#)

### **Ex Post Facto Requires Government to Use Sentencing Guidelines Effective When Crimes Committed**

Defendant and his cousin participated in two fraudulent schemes to raise money for their failing businesses. They fraudulently obtained loans for future grain deliveries they



[Continued on page 6](#)



[Continued from page 5](#)

did not have. The loaning bank lost over \$2 million. Defendant also engaged in a “check kiting” scheme, overdrawing the account by \$471,000. They were eventually charged with nine counts of bank fraud. Defendant plead not guilty and went to trial. He was convicted of five counts of bank fraud and acquitted on the rest of the charges. At sentencing, defendant argued that the *Ex Post Facto* Clause required that he be sentenced under the 1998 version of the Federal Sentencing Guidelines because they were in effect at the time of his offenses. The trial court applied the current sentencing guidelines, even though there was a significant difference in the possible sentences defendant could receive.

On appeal, defendant reasserted his claim that he should have been sentenced using the guidelines in place at the time of his crimes. The government argued there was no constitutional violation because Sentencing Guidelines are not “law,” but are just guidelines for courts. The U.S. Supreme Court held that even though the guidelines are not law per se, they still fall into *Calder’s* third category of *ex post facto* violations. The Court held, “The *Ex Post Facto* Clause forbids the government to enhance the measure of punishment by altering the substantive formula used to calculate the applicable sentencing range.” The Supreme Court reversed the Seventh Circuit and remanded the case. [Peugh v.](#)

[United States, No. 12-62, 06/10/13](#)

## Utah Supreme Court

### **Factual Innocence Determinations To Be Based On Newly Discovered and Previously Available Evidence**

Brown was convicted of murder in 1995. She filed a petition for a determination of factual innocence in 2009. The factual innocence judge found that she had proven her factual innocence by clear and convincing evidence because one witness (who was on the defense witness list at trial but was not called) credibly testified that the victim was alive after the time of death that the State had relied on at trial, and Brown had credibly accounted for her whereabouts for the remaining time that the murder could have been committed.

The State appealed, arguing that (1) the judge erroneously relied on previously available evidence, and (2) the evidence did not clearly and convincingly establish that Brown did not commit the murder. Significant evidence from the trial suggested that the witness may have

been mistaken about when he saw the victim. And Brown's account of her whereabouts depended entirely on her own testimony and

testimony from her boyfriend and her son, who perjured himself at trial. Moreover, Brown now admitted that she had lied to the police when she claimed that she had not forged the victim's checks—the motive the State had argued at trial.

Justice Durrant, writing for the four-justice majority, affirmed. The court held that the original version of the factual innocence statute, UTAH CODE ANN. § 78B-9-401 to -405 (2008), allowed the judge to consider both previously available and newly discovered evidence. The statute was amended in 2012, however, to require that a factual innocence determination be “based upon the newly discovered evidence described in the petition.” UTAH CODE ANN. § 78B-9-404(8)(b) (2012).

The court further held that the State waived its challenge to the finding of factual innocence because the State conceded that it was not challenging the judge's factual findings. The State argued that the judge's findings about time of death and Brown's alibi were not pure factual findings, because those findings depended not only on witness testimony and evidence that the judge heard firsthand, but also on evidence from the criminal trial that the judge did not hear, which was entitled to deference. The State further argued that, even if the witness had credibly testified about when he believed he saw the victim, in light of the significant

[Continued on page 8](#)



# PROSECUTOR PROFILE

## Paige Williamson Senior City Prosecutor Salt Lake City Prosecutor's Office



### Quick Facts

**Born:** Salt Lake City

**Law School:** University of Utah

**Favorite TV series:** Big Bang Theory

**Favorite Food:** Fine cheeses

**Favorite Restaurant:** Market Street Oyster Bar

**Favorite Sports Team:** The Avalanche

**Favorite Quote:** "Not all who wander are lost"

**Favorite Books:** Helter Skelter by Vincent Bugliosi

Paige Williamson is a Senior City Prosecutor with the Salt Lake City Prosecutor's Office. She was born and grew up in Salt Lake City. As a child she wanted to be a marine biologist, but thought her asthma would prevent her from being able to scuba dive. She recently found out that was not the case as she became certified to scuba dive four years ago.

Growing up she had great examples in her parents. Both found passion in their jobs and encouraged her to do the same. Also, both were dedicated to public service as her mom was a nurse at the Salt Lake County Health Department and Director of Epidemiology. Her father worked for the Department of Workforce Services for over thirty years and did not want to retire because he was too passionate about the work he was doing.

These examples helped Paige as she graduated from the University of Utah in Communications and went on to law school at the U. Law school was a natural choice for her because she loves to argue and always has. Also, she believes we find truth by arguing all sides. She enjoyed law school immensely and while she doesn't EVER want to do it again, she wouldn't change a thing. She says her law school class was amazing, fun, and surprisingly cooperative.

She attempted to find work as a prosecutor right out of law school, but the jobs were not there so she did criminal defense and family law for a few years and worked as an adjudicator for the Department of Workforce Services. She applied for a position with Salt Lake City Prosecutor's office twice and the second time she interviewed she was mugged at knifepoint the same day...and got the job.

One of the most challenging experiences of the job for Paige is having a victim upset with her for proceeding on a case against their abuser. However, it was also rewarding that the victim thanked her after trial. Paige also found shaking the hand of a drug court defendant who, finally, after 3 years in a six month program, graduated as very rewarding.

Once, Paige had a trial where the defense attorney's only argument in closing was repeating over and over that his client didn't do it. Her rebuttal was to get up and say "I'm a leprechaun, I'm a leprechaun, I'm a leprechaun, just saying it over and over doesn't make it so." However, she is relatively short, so it probably wasn't the best example.

While her parents were great examples, her son has influenced her life more than anyone. He has changed the way she sees the world and now she views cases in a whole new light.



[Continued from page 6](#)

contradictory evidence, and questions surrounding the credibility of Brown's alibi, the evidence did not rise to the level of clear and convincing.

The court rejected the State's arguments. It did so even though it "readily" recognized "the existence of evidence" that "calls into question the post-conviction court's factual findings" and agreed with the State's argument that factual innocence was not the only reasonable interpretation of all the evidence. The Court ultimately held that, in light of the State's concession, it had no choice but to affirm.

Justice Lee dissented. He concluded that the State had not waived its challenge to the factual innocence finding and that the evidence demonstrated that the finding was clearly erroneous. He opined that Brown had not established clear and convincing proof of factual innocence because her alibi-that she was at the scene of the crime when the murder could have been committed-was "the weakest" he had heard of. In his view, the State "easily carried its burden on appeal." [Brown v. State, 2013 UT 42](#)

**Summary Written by  
Christopher Ballard, Assistant  
Utah Attorney General in the  
Criminal Appeals Division**

## **Lenient Standard For Bind Over For Obstruction of Justice**

Brad Perry was murdered in 1984, but his case was unsolved. In 2005, investigators were convinced Glenn Griffin was involved in the murder and began interviewing Griffin's friends. Maughan was interviewed and ultimately confessed he had helped Griffin murder Perry. The State wanted Maughan to testify at Griffin's trial so they offered him use immunity under UCA 77-22b-1 so that he would not invoke his Fifth Amendment rights. Maughan refused to testify citing worries about the protections the immunity offered him and his constitutional rights. The district judge compelled Maughan to testify under threat of obstruction of justice. Maughan still refused and was eventually charged with three counts of obstruction of justice.

The magistrate judge refused to bind him over for trial and dismissed the obstruction charges and on appeal, the court of appeals affirmed the magistrate judge's decision. The State petitioned for certiorari and the Utah Supreme Court reversed. The supreme court held that obstruction of justice is a crime of specific intent, which requires proof of "intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal

offense." The supreme court held the State presented enough evidence of the specific intent to bind Maughan over for trial. The supreme court held, "the prosecution is only required to produce believable evidence of all the elements of the crime charged" or "evidence to support reasonable believe." The supreme court held, "this is a lenient standard" and "an inference is reasonable unless it falls to a level of inconsistency... that no reasonable jury could accept it." [State v. Maughan, 2013 UT App 37](#)

## **Utah Court of Appeals**

### **Officer's Statistical Testimony Was Inadmissible**

Wright was charged with two counts of aggravated sexual abuse of a child when his daughter (daughter) accused him of putting his hands down her pants, touching her buttocks, vaginal and breast areas. Daughter reported this started when she was six or seven and continued until Wright moved to Las Vegas when Daughter was nine years old.

At trial, Detective Faulkner testified about how often cases of sexual abuse involved delayed disclosure. He initially responded that it was not uncommon, but then when



[Continued on page 9](#)



[Continued from page 8](#)

asked a follow up question he responded that about a third of the hundreds of cases he has been involved with involve delayed disclosure. Also, the prosecutor responded to the defense counsel's theory of the case by stating in closing arguments, "there is absolutely no reason not to believe Daughter, who, as I told you before gave you every single piece of evidence that you need for the elements of this crime. Daughter doesn't want to hurt her father. She loved him even after he did horrible things to her. She just wants him to stop hurting her. You have the power to make that stop."

Wright argued on appeal that the testimony of Officer Faulkner should not have been allowed because it was expert testimony and he was not testifying as an expert. Wright argued Faulkner's statement was knowledge that is not within the knowledge of the average bystander and governed by the rules of evidence dealing with expert testimony. Wright argued this statistical evidence encouraged the jury to focus on seemingly scientific evidence. The Court of Appeals agreed and held the testimony was inadmissible, but was a harmless error.

Wright also argued that the



prosecutor committed prosecutorial misconduct during his closing statements. Wright argued the statements made in closing were improper because they "diverted the jury from its duty to decide the case on the evidence" and the last statement "was designed to appeal to the jurors sentiments by charging the jury to convict [Wright] in order to ensure [Daughter's] safety." The court of appeals held the first four lines were permissible under the fair reply doctrine because the defense opened the door to such remarks by attributing a specific motive to Daughter that provoked what amounted to a fair reply from the prosecutor.

The last statement, "You have the power to make that [the abuse] stop," was beyond the scope of fair reply because it did not rebut any statements made by the defense and appeals to the jurors emotions, diverting their attention away from their duty to impartially apply the law. However, the court of appeals held that while the statement was improper, it did not require reversal. The standard for whether objectionable comments merit reversal is found in *State v. Ross* and states, "did the remarks call to the attention of the jurors matter which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks." [State v. Wright 2013 UT](#)

[App 142](#)

## **Court Affirmed Dismissal of Involuntary Servitude and Other Claims**

Friedman was a federal prisoner being held at the Salt Lake County Adult Detention Center. While there, Friedman was instructed to by an officer to clean the writing from his cell wall. Friedman is Jewish and refused to clean his cell because he was observing his Sabbath as it was Saturday. Because of his refusal to clean on Saturday Friedman's recreation hour was terminated. Friedman alleged the Salt Lake County violated his rights under the Utah Constitution. Friedman sought relief from the prison officials and the district court.

On appeal, he claimed the County violated his right to due process and involuntary servitude. The Court of Appeals held Friedman failed to state a claim upon which relief could be granted for violation of due process because the administrative review process was followed; he received a hearing, and made a prisoner grievance appeal. The court of appeals also held Friedman's claim of involuntary servitude failed because he was a detainee of the Detention Center and required to follow their rules, which included cleaning their cells on a daily basis, and he had a choice to accept the consequences of disobeying the order. Lastly, the court of appeals held Friedman did

[Continued on page 11](#)



# On the Lighter Side

**An Eyepopping Day of Trial** I've seen a lot of verdicts described as "eyepopping," but that description became a literal one for the jurors in an assault trial going on in a Philadelphia-area Court of Common Pleas in early February. The defendant, Matthew Brunelli, was on trial for his role in an August 2011 fight outside of the New Princeton Tavern; during the fight, Brunelli allegedly struck John Huttick, causing the loss of Huttick's eye.

While Huttick was testifying on the witness stand, his \$3,000 prosthetic left eye popped out. He caught it, crying out as he did so, as several jurors gasped and started to rise.

Judge Robert Coleman, who called the moment an "unfortunate, unfortunate incident" declared a mistrial and dismissed the shaken jurors.

**Shouldn't She Just Wait for the Lindsay Lohan Designer Ankle Monitor?** Twenty-two-year-old Rebecca Gallanagh of Staffordshire, England, may have gotten in trouble with the law, but that wasn't going to keep her from getting her bling on.

The young woman was convicted of being disorderly in public for her role in a fight outside a nightclub last November, and as part of her punishment, the court ordered her to wear an electronic monitoring bracelet and observe a strict curfew.

But, Gallanagh thought, the court never suspended her fashion sense, so she "bedazzled" the ankle monitor by decorating it with fake diamonds.

She says she got the idea from a reality show, "Big Fat Gypsy Weddings," and that she did it "to make me feel better about wearing it. . . . It just matched my style."

But Gallanagh's act of decorating defiance didn't sit well with either the monitor's manufacturer or the presiding judge, who slapped her with a \$220 fine for her action (which the manufacturer said could hamper the electronic ankle bracelet's effectiveness).

**The Force is Strong With This One** Better cast David Canterbury in the next "Star Wars" film. The 33-year-old Oregon man was arrested in 2011 after an incident in a Portland Toys R Us store, in which he allegedly assaulted three customers with toy "Star Wars" light sabers.

When police arrived, they saw Canterbury swinging two of the light sabers. First, one officer tried to subdue the man with a Taser, but Canterbury must have learned from a Jedi master, because he used the light sabers to sweep aside the device's wires.

Another officer similarly tried to use his Taser, only to face the same result. Finally, officers rushed Canterbury and wrestled him to the ground.

Evidently, the Jedi mind trick didn't work either: Canterbury was taken into custody on charges of assault and resisting arrest.

<http://setexasrecord.com/arguments/282847-legally-speaking-the-lighter-side-of-the-law>



[Continued from page 9](#)

not establish that there were existing equitable remedies that could have redressed his injuries. The court of appeals affirmed the trial court's dismissal of each of his claims. [Friedman v. Salt Lake County 2013 UT App 137](#)

### **Opening the Door Not Ineffective Assistance of Counsel**

Defendant was convicted of violation of domestic violence protective order and threat of domestic violence. At trial, defendant's counsel elicited testimony about the events that lead to the protective order being issued. On cross examination, the government elicited testimony from defendant that he plead guilty to the charges that brought about that protective order. On redirect, defendant's counsel asked defendant if he plead guilty to those charges because he was guilty, defendant answered affirmatively, and then counsel asked why he didn't plead guilty to the current charges, to which defendant answered he wasn't guilty. Defendant was found guilty of both charges by a jury.

On appeal, Defendant claimed ineffective counsel because his attorney opened the door to otherwise inadmissible testimony about the January 2010 incident that led to the issuance of the domestic violence protective order and his related domestic violence and criminal mischief convictions.



Defendant claimed there was no justified strategy to admit the evidence about the prior convictions.

The court of appeals held defendant's counsel was employing a trial strategy by trying to portray "[defendant]'s implausible version of the events as more credible than the State's, and the only tool he apparently had to work with was [defendant]'s own credibility." The court held defendant's counsel's performance was not deficient and defendant was not prejudiced by the performance and affirmed the convictions. [State v. Gedi 2013 UT App 133](#)

### **Inadequate Inquiry of Voluntary Absence Harmless**

A child victim reported he had been inappropriately touched by Gunter and that Gunter had exposed himself to the child multiple times. Investigators arranged a call between the child and Gunter, where the child confronted him about the incidents. During the call Gunter admitted the guilt, without describing specific incidents. Gunter was charged with three counts of aggravated sexual abuse of a child and four counts of lewdness.

At trial, Gunter himself did not appear at trial and the court found he had voluntarily absented himself. Gunter was convicted of

one count of aggravated sexual abuse of a minor and four counts of lewdness. He was arrested in Mexico and extradited to Utah.

Posttrial counsel for Gunter moved for a new trial claiming the trial court conducted an inadequate inquiry into the voluntariness of Gunter's absence from trial. The trial court denied both motions and sentenced Gunter to fifteen years to life and one year for each count of lewdness.

On appeal, Gunter reasserted the same claims. The appellate court held the trial court did err by inadequately inquiring into the voluntariness of Gunter's absence, but that this was a harmless error because the trial court made a posttrial finding that Gunter's absence was voluntary. The appellate court affirmed the convictions. [State v. Gunter, 2013 UT App 140](#)

### **Statement Not Hearsay Because of Stipulation**

Roland McNeil worked with Allen, the victim, and they were friends until an argument abruptly ended the friendship. Shortly after the friendship ended McNeil's son, Quentin, approached Allen in front of his apartment and asked to borrow a phone. Quentin then pushed Allen into the apartment, attacked him with a knife, punched him, broke his nose and



[Continued on page 12](#)



[Continued from page 11](#)

knocked out eight of his teeth and robbed him.

During the investigation, Quentin told police that McNeil had sent him to beat up Allen. In preliminary hearings, McNeil and the prosecution stipulated that the detective's testimony about phone call records between McNestieil and Quentin did not include hearsay. Then at McNeil's preliminary hearing, Quentin denied his earlier story.

At trial, an officer's testimony from the preliminary hearing was admitted over defendant's objection. McNeil was convicted of aggravated assault.

On appeal, McNeil argued the statement was improperly admitted and that his conviction should have been reversed. The court of appeals held the admission of the statement by the officer from the preliminary hearing was not error because McNeil stipulated to the admission. The court of appeals affirmed the conviction. [State v. McNeil, 2013 UT App 134](#)

### **Self-Defense Instruction Deficient, But Harmless**

Defendant stabbed Torres during a drug deal that took place in a public park. Defendant asserted that Torres threatened him with a gun and that defendant stabbed him in self-defense. At trial, the court gave

jury instructions that included a summary of the law of self-defense.

The jury convicted defendant of aggravated assault and arranging to distribute a controlled substance in a drug-free zone.



On appeal, Defendant argued the trial court failed to adequately instruct the jury on his claim of self-defense because the instructions did not properly explain the

State's and Defendant's relative burdens of proof. Defendant asserted this error required the reversal of his convictions even though his objection was not preserved. Defendant also sought reversal claiming ineffective counsel because his counsel did not object to the jury instructions.

The court of appeals held, "A party seeking reversal under the plain error standard must prove that "[1] [a]n error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful.'" See *State v. Powell*, 2007 UT 154 P.3d 788. The court of appeals held this case turned on the third prong and that the standard for this and ineffective counsel are the same: there would have been a different outcome to the case. The court of appeals held the outcome of the case would not have been different with correct jury instructions, therefore there was no error and his counsel was

not ineffective. [State v. Martinez, 2013 UT App 154](#)

### **Detainment of Shoplifter Does Not Make Employees Government Agents**

Defendant was shopping at Costco with a group of people when some employees noticed her take merchandise from her shopping car and place it behind a diaper bag that was located in a storage compartment underneath a baby stroller. After the employee's noticed this they escorted defendant to the store's office and asked whether she had merchandise in her possession for which she had not paid and if so, what she intended to do with it. The employees also searched her purse and stroller before calling the Orem City Police Department (OCPD).



Defendant was charged with retail theft and filed a motion to suppress the statements made to Costco employees.

The motion was denied and the jury found defendant guilty. On appeal, defendant argued that the Costco employees acted as agents of the government in conducting the search and interrogation when she

[Continued on page 13](#)



[Continued from page 12](#)

was detained. Defendant argues the employees violated her Fourth and Fifth Amendment rights.

The court of appeals held the Walther test is used to decide if a private party has acted as an agent of the government. The Walther test states, “[t]he government must be involved either directly as a participant or indirectly as an encourager of the private citizen’s actions before we deem the citizen to be an instrument of the state.” This is a two part test: “whether the government knew of or acquiesced [in] the search,” and then, second, whether “the person’s intent and purpose in conducting the search and decide whether the person was acting in the person’s own interest or to further law enforcement.”

Here, the court of appeals held defendant did not show anywhere in the record that OCPD had knowledge or acquiesced to the Costco employee’s investigatory conduct. Also, the court of appeals

held that because the trial court found the Costco employees were acting with the primary purpose of protecting Costco assets. The court of appeals held defendant did not show the Costco employees were acting as government agents under the Walther test. The court affirmed the denial of defendant’s motion to suppress. [Orem City v. Santos, 2013 UT App 155](#)

### **Appellate Court Lacked Jurisdiction Once Guilty Plea Was Entered**

Stone was charged with aggravated kidnapping, aggravated robbery and three other offenses. The State and Stone reached a plea deal where the State would dismiss all of the other charges if Stone would enter a guilty plea on the charge of aggravated kidnapping and a reduced charge of robbery. Once he pled guilty, he did not withdraw his plea and was sentenced to fifteen to life and one to fifteen for the respective convictions. Stone filed a direct appeal from the district court’s final order and judgment.

On appeal, Stone argued he was denied effective assistance of counsel and that the district court committed plain error by accepting his guilty pleas. The State argued the appellate court did not have jurisdiction. The appellate court agreed with the State and held it lacked jurisdiction to review the validity of the pleas. The court held it lacked jurisdiction because he failed to make a motion to withdraw his guilty pleas, which is required by statute. The court also held UCA 77-13-6, which governed here, was constitutional. The court advised that if Stone wished to challenge his pleas, he must do so under the PCRA and rule 65 C of the Utah Rules of Civil Procedure. The appeal was dismissed. [State v. Stone, 2013 UT App 148](#)

[Continued on page 14](#)

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[Continued from page 13](#)

## Tenth Circuit Court of Appeals

### Searches of Computer Deemed Constitutional After Lengthy Delay

Appellant was convicted of second-degree murder, two assimilated state law homicide charges, and an assimilated child abuse charge in federal court. Appellant's three year old daughter died from dehydration when appellant's husband left for an out-of-state deployment because appellant did nothing to care for the child. Instead of caring for the girl, appellant spent from noon to three A.M. playing video games. In chat rooms she complained of having to care for the child and showed excitement about her husband leaving and that she was free to party.

The police found most of this out by using forensic analysis of the computer appellant spent so much time on. On appeal, appellant claimed the evidence gathered from the search of her computer was a violation of her Fourth Amendment rights and should have been suppressed.

Appellant claimed the two searches of the computer were unconstitutional because the warrants issued allowing the



searches were untimely. The first warrant was issued five months after the computer was seized, which appellant claimed was an unreasonable amount of time for seizure before a search. However, the court held appellant's rights were not violated because she did not object to the lawful seizure authorized by her husband and co-owner of the computer. The court held the length of time did not matter because it was a lawful seizure with authorization that was not objected to and there government had compelling reasons for the delay.

The second warrant was issued in May 2009 to conduct a more thorough search of the same computer. Appellant argued this warrant violated her Fourth Amendment rights because it violated the particularity requirement, allowing agents to search her computer without probable cause to look for specific evidence. However, the court agreed with the government and held they could not question the government's search procedures without more evidence provided by appellant about how the search violated her rights, was too broad, or what better protocols the government may have used.

[\*United States v. Christie, 10th Cir., No. 11-2106, 6/11/13\*](#)

## Other Circuits/ States

### Search-Incident-To-Arrest Exception Does Not Authorize The Warrantless Search of Data

A police officer saw defendant stop in a parking lot, pick up a man and complete a drug sale in the car. The officers stopped the man buying the drugs and found crack cocaine on his person. The buyer identified the defendant and told them he sold crack cocaine. The officers then pulled defendant's car over. He was arrested for distributing crack cocaine and searched incident to arrest. While at the police station and before he was booked, defendant's cell phone started ringing. The officers could read the words "my house" on the outside of the phone. The officers searched the phone for the call logs and noticed the same caller had called quite a few times. The officers also saw a picture of a woman and child.

The officers retrieved the address associated with the phone number and went directly to defendant's house to preserve evidence. The officers entered the home and froze it while they waited for a search warrant. Once the warrant was obtained, they found drugs and firearms. Defendant was charged with possessing with the intent to

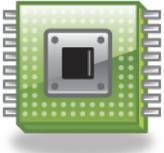
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[Continued from page 14](#)

distribute and distributing cocaine.

Defendant moved to suppress the evidence found arguing the search of his cell phone violated his Fourth Amendment rights. The trial court denied his motion to suppress and defendant was convicted.



On appeal, defendant argued the evidence should have been

suppressed on the same grounds. The U.S. Court of Appeals for the First Circuit held a search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person, because the court was not convinced that such a search is ever necessary to protect arresting officers or preserve destructible evidence. The court held, "many Americans store their most personal "papers" and "effects,"... in electronic format on a cell phone, carried on the person. Allowing the police to search that data without a warrant any time they conduct a lawful arrest would... create a serious and recurring threat to the privacy of countless individuals." [United States v. Wurie, 1st Cir., No. 11-1792, 5/17/13](#)

### **Without Proof of Ownership Or Control, No Expectation of Privacy In Car**

A car on an auto transport truck stood out to Officer Roberts because it still had a dealer licence plate on. Roberts tried to track down the owner of the car, but was

unable. Roberts then asked the driver of the transport truck if he could search the car. The transport driver gave Roberts permission and the car was searched. Roberts noticed the smell of bondo, used in auto body alteration, noticed fresh tool marks on the bolts holding in the seats, and noticed a hollow spot in the floor. Officer Roberts used a camera to look into the gas tank and found bags of drugs floating there.

Eventually defendant called looking for the vehicle, claiming he was buying the car. When questioned about the car he insisted he was only buying it, not selling it. Police later found the cell phone number listed as the contact for the seller of the car and two duffel bags full of drugs in the defendant's possession. Defendant was charged with intent to distribute more than 5 kilograms of cocaine.

Defendant moved to suppress the duffel bags and car arguing his Fourth Amendment rights were violated because the officer did not have a warrant to search the vehicle. The trial court denied the motion finding defendant did not have an expectation of privacy because defendant failed to show he owned the car, which had fake addresses and names for it.

Defendant appealed and court of appeals held defendant did not have

an expectation of privacy because he failed to show that at the time of the search he had a possessory interest in the car. The court held defendant failed to provide any evidence that he was in fact the owner of the car and therefore, based on the record, he cannot have any expectation of privacy to protect him from a search. [United States v. Castellanos, 4th Cir., No. 12-4108, 5/29/13](#)

### **GPS Tracking Records Non-Testimonial**

Defendant was convicted of several felonies in connection with a bank robbery. When the bank was robbed the bank teller placed a stack of bills, with a GPS transmitter hidden inside, in the bag provided by the robber. During the investigation, law enforcement used the GPS coordinates to apprehend defendant. The officers recovered the disguise and other physical evidence from the robbery from the defendant. At trial, the prosecution introduced GPS tracking reports into evidence.

On appeal, defendant argued the admission of the GPS tracking reports violated his rights under the Sixth Amendment's Confrontation Clause. The U.S. Court of Appeals for the Eighth Circuit held "the threshold issue is whether the record being proffered is



[Continued on page 18](#)

# Changes to Asset Forfeiture and the Disposition of Property Seized as Evidence

by Lana Taylor, Assistant Utah Attorney General

In the 2013 session of the Utah Legislature, House Bill 384 passed which moves all of the provisions regarding forfeiture into one place, Title 24. The bill goes into effect on July 1<sup>st</sup> of this year and will allow all property that is the proceeds of any criminal activity or has been used to facilitate the commission of a state or federal crime to be forfeited.<sup>1</sup> The bill contains the same procedures and protections previously contained in the forfeiture statute, however the procedures for initiating and litigating a forfeiture action have been clarified in the bill which should help law enforcement and prosecutors forfeit property in the future.

The bill still includes a requirement that law enforcement provide notice of the seizure within 30 days from the date that the property is seized.<sup>2</sup> Notice must be provided to the person from whom property was seized, as well as the owner of the property or an interest holder in property as those terms are defined in the bill.<sup>3</sup>

The bill makes some helpful changes to the procedures for litigating criminal and civil forfeiture actions. Prosecutors will have up to 90 days from when the property is seized to file a civil forfeiture action.<sup>4</sup> Thereafter, prosecutors have an additional 30 days to serve a copy of the civil forfeiture complaint on the claimants.<sup>5</sup> Service may be made by personal service, certified mail, or publication on Utah's Public Legal Notice Website, if allowed by the court.<sup>6</sup>

The bill still contains limitations on the transfer and sharing of property to federal agencies; however, the language of the bill does not require that the law enforcement agency or prosecutor obtain a turnover order before giving seized property to a federal agency.<sup>7</sup> Money and property that is forfeited by the state must still go to the Criminal Forfeiture Restricted Account administered by the Commission on Criminal and Juvenile Justice for distribution through what has now been officially named the State Asset Forfeiture Grant Program.<sup>8</sup>

The bill also moves the procedures for handling property seized as evidence, previously found in Title 77, Chapter 24, into Title 24. It also clarifies the procedures to be used when the property seized as evidence no longer needs to be held in a criminal proceeding. A prosecutor may seek a court order to use the defendant's property to pay outstanding fines, fees and restitution.<sup>9</sup> An owner may also petition the court for the return of property that is held as evidence.<sup>10</sup>

When a prosecutor determines that a weapon no longer needs to be held as evidence, the prosecutor may petition the court for an order transferring ownership of any weapons to the seizing agency for its use and disposal as the seizing agency determines, if the owner:

- is the person who committed the crime for which the weapon was seized; or
- may not lawfully possess the weapon.<sup>11</sup>

<sup>1</sup> Utah Code Ann. § 24-4-102.

<sup>2</sup> § 24-4-103(1)(a).

<sup>3</sup> §§ 24-4-103(1)(a) and 24-1-102(4).

<sup>4</sup> § 24-4-104(1)(a).

<sup>5</sup> § 24-4-104(2)(a).

<sup>6</sup> § 24-4-104(2)(b).

<sup>7</sup> § 24-4-114.

<sup>8</sup> § 24-4-115 and 24-4-117.

<sup>9</sup> § 24-3-103(1)(a).

<sup>10</sup> § 24-3-104.

<sup>11</sup> § 24-3-103(1)(b).

If the prosecutor notifies the law enforcement agency that property no longer needs to be held as evidence, the property may be disposed of, if the property is contraband, or returned to the owner.<sup>12</sup> However, the bill specifies that the person seeking to claim the property must establish that the person is the rightful owner and may lawfully possess the property.<sup>13</sup> This may be done by providing:

- identifying proof or documentation of ownership of the property; or
- a notarized statement, if proof or documentation is not available.<sup>14</sup>

If the law enforcement agency is unable to locate the rightful owner of the property or if the rightful owner is not entitled to lawfully possess the property, the agency may:

- apply the property to a public interest use;
- sell the property at public auction and apply the proceeds of the sale to a public interest use; or
- destroy the property if it is unfit for a public interest use or for sale.

However, before the property or the proceeds from the sale of the property may be applied to a public interest use, as that term is defined in the statute, the law enforcement agency must still obtain from the legislative body of the law enforcement agency:

- permission to apply the property or proceeds to public interest use; and
- the designation and approval of the public interest use of the property or the proceeds.

The language of the bill may be found on-line at the Utah Legislature's website at:

<http://le.utah.gov/~2013/bills/hbillenr/HB0384.pdf>

or

<http://le.utah.gov/UtahCode/chapter.jsp?code=24>.

For questions about the bill, contact Lana Taylor at 801-281-1241 or [lataylor@utah.gov](mailto:lataylor@utah.gov).

<sup>12</sup> § 24-3-103(1)(c).

<sup>13</sup> § 24-3-103(3)(a).

<sup>14</sup> § 24-3-103(3)(b).

<sup>15</sup> § 24-3-103(5).

<sup>16</sup> § 24-3-103(6).



[Continued from page 15](#)

testimonial.” The Circuit Court held “the crucial inquiry is whether the record was created for the purpose of establishing or proving some fact at trial” and that statements obtained in the course of law enforcement may be non-testimonial. Here, the Circuit Court led the GPS tracking reports were used to track defendant in the criminal investigation and were therefore nontestimonial. [United States v. Brooks, 8th Cir., No. 12-3152, 5/28/13](#)

### **A-File Records Non-Testimonial**

Defendant entered the United States illegally in 1982 at the age of fourteen. While residing in the U.S., he was convicted of multiple crimes and deported multiple times. After he was removed in April 2010, defendant was again found in the U.S. illegally and in August of that same year the government indicted him for being an illegal alien in the U.S. who had previously been removed from the country. Defendant file a pretrial motion to bar the admission of documents from the individual case file maintained by the Department of Homeland Security (referred to as an “alien file” or “A-file”) for the purpose of proving alienage. The court denied the pretrial motion and defendant was convicted.

On appeal, defendant challenged the district court’s denial of his motion in limine to bar the admission of the documents in his A-file. He claimed the statements



were testimonial and the admission of them violated the Confrontation Clause of the Sixth Amendment.

The U.S. Court of Appeals for the Ninth Circuit held previous decisions in *Bullcoming* and *Bryant* did not overrule the precedent that the objective approach used to determine the status of A-file documents as testimonial or not. Here, the court held the statements made used from defendant’s A-file were non-testimonial because they were not made in anticipation of future criminal litigation, but rather to “record the decision regarding the alien’s deportation.”

[United States v. Rojas-Pedroza, 9th Cir., No. 11-50379, 5/28/13](#)

### **Florida Standard For Executing Mentally Ill Not Inconsistent With Federal Law**

Ferguson posed as a Florida Power and Light employee who needed to check some electrical issues at the house of Miss Margaret Wooden. She let him in and he drew a gun on her, bound and blindfolded her. He and his two cohorts then searched the house for drugs and money. Soon, more people came to the home and each of them was bound, blindfolded and searched at gunpoint. Ferguson then shot each of them execution style, kneeling

with a shot to the back of the head. Two miraculously survived and told police about the executions.

Ferguson then killed a young man and raped and killed a young woman who had pulled over on the side of a road. He shot both in the head and stole what little jewelry and cash they had on them. Ferguson confessed to the killings and was convicted of eight counts of murder. He was sentenced to death and appealed claiming mental incompetence.

Ferguson had a storied mental history and had been evaluated many times. Before the murders, he was diagnosed with paranoid schizophrenia, committed to a state psychiatric facility and eventually deemed mentally competent and discharged. After the murders, the State of Florida had a panel of experts evaluate Ferguson and found that while he had grandiose ideas of himself and what he would be in the afterlife, stating he was the “Prince of God” and would be on the “right hand of God.” However, the panel also found that he understood he was being executed, it would result in his physical death, and that he was being punished for the murders he committed.



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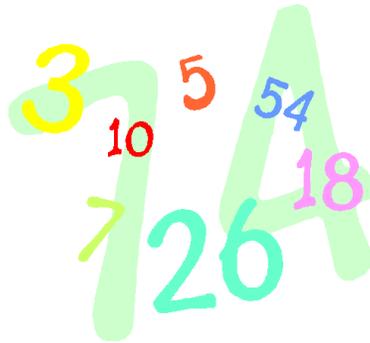


[Continued from page 18](#)

The Court of Appeals for the Eleventh Circuit held the Florida Supreme Court applied a competency standard that was not inconsistent with clearly established federal law, as set forth in *Ford* and *Panetti*. The appellate court held that the requisite “awareness” or “comprehension” required by *Ford* was a “rational understanding of the connection between a prisoner’s crimes and his execution.” The court held the *Panetti* court rejected an “overly narrow interpretation of *Ford* that deems a prisoner’s mental illness and delusional beliefs irrelevant to whether he can understand the fact of his pending execution and the reason for it.” [Ferguson v. Secretary, Florida Department of Corrections, 11th Cir., No. 12-15422, 5/21/13](#)

### **Federal Prisoner’s May Bring Bivens Claims To Seek Reduction In Sentence**

Davis was sentenced to life in prison for conspiracy to possess with intent to distribute and the distribution of powder and crack cocaine. After he was sentenced, Congress tried to give some relief to the disparity in sentencing guidelines for those possessing crack instead of powder cocaine. They reduced the sentence for those possessing smaller amounts of crack cocaine. However, these reductions did not apply to Davis because he was convicted involving 15 kg or more.



In 2011, Davis brought a *pro se* lawsuit seeking relief under the Declaratory

Judgment Act, 28 U.S.C. § 2201(a) and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The U.S. Court of Appeals for the District of Columbia Circuit held that to determine if a federal prisoner must bring his equal protection challenge by means of a habeas petition the court had to first answer two questions: Does the scope of the habeas-channeling rule differ for federal and state prisoners? And is the rule for federal prisoners so broad that it includes equal protection challenges to Guidelines amendments?

The court answered those questions by holding a federal prisoner need bring his claim in habeas only if success on the merits will “necessarily imply the invalidity of confinement or shorten its duration.” Thus, the court rejected the distinction between state and federal prisoners for the purposes of habeas channeling. The court also held that the district court had jurisdiction to take up the merits of Davis’s *Bivens* claim because even though the

claim was flawed, it still did not fail the “especially high bar for dismissing a claim for lack of subject matter jurisdiction.” [Davis v. U.S. Sentencing Commission, D.C. Cir., No. 11-5264, 5/28/13](#)

### **Age and Presence of Parent Should be Examined For Minors**

A school monitor noticed Tyler, a sixteen-year-old high school student, smelt like marijuana and had drug paraphernalia in his car. School officials detained Tyler and an officer was called. The officer read Tyler his rights and Tyler admitted he smoked marijuana before driving to school. When Tyler was arrested for DUI he became agitated and the officer put him in handcuffs. The officer then read Tyler an “implied consent

admonition” twice, once verbatim and once in plain English. Tyler then agreed to have his blood drawn and tested. Tyler was charged with DUI and

moved to suppress the evidence.

Tyler argued he did not consent to the blood draw, that he was lacked legal capacity to consent. The juvenile court granted the motion holding that under the circumstances Tyler’s consent was



[Continued on page 20](#)



[Continued from page 19](#)

involuntary. Then the court of appeals reversed the juvenile court holding the blood was not testimonial and so the Fifth Amendment did not apply.

The supreme court held the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw. The court also held that the boy's age and the presence of parents were part of the totality of circumstances that should have been taken into account when determining whether the consent was involuntary or not. Here, the supreme court held that under the Fourth Amendment requirements, the totality of circumstances showed Tyler's consent was involuntary. The court did not address the other arguments Tyler put forward. [State v. Butler \(Tyler B.\), Ariz., No. CV-12-0402-PR, 5/30/13](#)

### **Life Sentence for Seventeen Year Old Not Cruel Or Unusual Punishment**

Appellant saw a Lincoln Town Car parked with its keys still in it and stole it. After it was reported stolen, law enforcement stopped the car and appellant drove the car into the officer's car before driving away. A chase ensued and appellant drove over 30 miles at speeds between 90 and 110 miles per hour. As appellant tried to exit the highway, he sped up and hit an unmarked squad car on the passenger side. The officer who had parked the car was thrown about 70 feet from the

point of impact and died.



Appellant was charged with first degree murder of a peace officer and other felony offenses. Appellant was 17 years old at the time of the

incident, but was tried as an adult because he was charged with first-degree murder and was over the age of 16. Appellant was convicted of first degree murder and sentenced to life imprisonment without possibility of release under Minnesota law.

In his postconviction appeal, appellant claimed his sentence violated the prohibition against cruel or unusual punishment under the U.S. and Minnesota Constitutions. The appellate court held the Legislature intended to apply a life sentence without the possibility of release to a seventeen year old convicted of first-degree murder of a peace officer and therefore because the sentence is not "well nigh universally rejected" it cannot be cruel or unusual punishment. The court also held the rule in *Miller*, which disallows mandatory sentencing guidelines that apply life without parole to seventeen year olds, does not retroactively apply to appellant's sentence. The

court held the *Miller* rule to be procedural and not a watershed rule, thus barring its application to appellant's sentence. [Chambers v. State, Minn., No. A11-1954, 5/31/13](#)

### **Fleeing Prevents A Claim For Fruit of Poisonous Tree**

Based on an anonymous tip, officers stopped the car defendant was riding in. The officers did not observe the driver commit any traffic violations. The driver immediately got out of the car and started walking towards the officers. The officers ordered him back to his vehicle, handcuffed him and then ordered everyone out of the car. Defendant was in the back seat of the car and when he got out of the car he started to run. Defendant quickly dropped a pistol as he tried to flee. Defendant was arrested and convicted of aggravated unlawful use of a weapon.

At trial, the judge observed that a



motion to suppress the gun would not have had any chance of success because the gun was abandoned and defendant did not submit to unauthorized police authority when defendant ran, dropped the gun and left the gun behind. On

[Continued on page 21](#)

# LEGAL BRIEFS



[Continued from page 20](#)

appeal, defendant argued ineffective assistance of counsel because his council did not file a motion to suppress. To have had a successful ineffective assistance of counsel claim defendant must have shown the motion to suppress would have been successful.

Here, the supreme court held the motion to suppress could not have been successful because the gun was not “the fruit of the poisonous tree.” The supreme court held that defendant’s flight ended the seizure and anything happening thereafter was, by its very nature no longer tied to the initial stop. The supreme court held, “Permitting defendant to flee from police...yet claim the protections of the Fourth Amendment would foster a lack of cooperation with law enforcement officers, putting the police and public at risk.” The supreme court affirmed the conviction. [People v. Henderson, 2013 IL 114040](#)



## Unlawful Detention Does Taint Evidence

An officer stopped at an apartment complex parking lot to investigate an unoccupied and legally parked car with its headlights on. The officer noticed the 30-day license tag had expired as the headlights

turned off automatically. Defendant yelled from his balcony to the officer to ask what was going on and then came down to speak to the officer. The officer asked who owned the car and defendant informed him a friend in the complex did.

After the car owner came over to speak to the officers, defendant stayed in the area and listened to the conversation. At some point, the officer asked defendant for his I.D., even though he did not suspect defendant of committing any offenses. The officer was advised that there was a possible warrant for defendant and so the officer told defendant to stay in the area.

When the warrant was confirmed defendant was arrested, asked if he had anything on him and he responded he had a bag of marijuana in his pocket.

At trial and on appeal, the issue was whether the marijuana could be suppressed because of the unlawful detention or if the warrant purged the taint of the unlawful detention. The Kansas Supreme Court held the encounter with the defendant became an unlawful detention when the officer retained the I.D. and detained defendant while running the background check.

The supreme court also held the discovery of the warrant did not purge the taint of the unlawful detention or else police “could



randomly stop and detain citizens, request identification, and run warrants checks despite the lack of

any reasonable suspicion to support the detention, knowing that if the detention leads to discovery of an outstanding arrest warrant, any evidence discovered in the subsequent search will be admissible.” The supreme court held “the preceding unlawful detention does not taint the lawful arrest on the outstanding warrant, nor does it prevent the officer from conducting a safety search pursuant to that arrest; but it does taint any evidence discovered during the unlawful detention or during a search incident to the lawful arrest.”

[State v. Morales, Kan., No. 102,342, 5/17/13](#)

**JOHN R JUSTICE**  
**STUDENT LOAN REPAYMENT**  
**ASSISTANCE PROGRAM**  
**FOR PROSECUTORS AND PUBLIC DEFENDERS**

**2013 APPLICATIONS NOW BEING ACCEPTED**  
**Deadline is 5:00 p.m. on Monday, August 26, 2013**

**Are you a full time prosecutor or public defender?**  
**Are you still paying on your student loans?**  
**IF SO, READ ON!**

Utah Prosecution Council (UPC) is now accepting applications from public defenders and prosecutors for student loan repayment assistance through the John R Justice Student Loan Repayment Assistance Program (JRJ).

***The application deadline is 5:00 p.m. on Monday, August 26, 2013.***

Applications must be received by UPC at its office by that time in order to be considered.

All prosecutors and public defenders, especially those still paying on student loans, should know about the JRJ Program. Briefly put, it provides financial assistance to full time prosecutors and public defenders to assist them in repaying the student loans they incurred while getting their education. To access full information about the JRJ program, including an application form for JRJ financial assistance, go to the Utah JRJ website: . At that site you will find:

- The 5 page Utah JRJ Information Packet which contains all the information about JRJ the UPC staff could think to include, plus a link to frequently asked questions, and answers thereto, on the Bureau of Justice Assistance (BJA) website.
- The Utah JRJ benefit application form. It is in fillable PDF format so applicants can fill it out on-line then print it off for signing and mailing.
- The JRJ Service Agreement which must be signed and submitted by all applicants.  
(Applicants who have submitted a service agreement as part of a past year's JRJ application and received JRJ financial assistance do not need to sign a new service agreement.)
- UPC's 2012-13 application to BJA for JRJ funding for Utah. Reading it gives you an idea of the program requirements and restrictions.
- Links to other sites containing JRJ and other student loan repayment assistance information.

After reading the information on the , you are welcome to contact me regarding questions you may still have regarding the 2013 JRJ application process. Just click on the "Contact Us" link on the left side of the and send your question.

Mark Nash, Director, Utah Prosecution Council

# Calendar

## UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

August 19-23	<a href="#">BASIC PROSECUTOR COURSE</a> <i>Trial ad and substantive legal instruction for new prosecutors</i>	University Inn Logan, UT
September 11-13	<a href="#">FALL PROSECUTORS' TRAINING CONFERENCE</a> <i>The annual CLE event for all Utah prosecutors</i>	Riverwoods Logan, UT
October 16-18	<a href="#">GOVERNMENT CIVIL PRACTICE CONFERENCE</a> <i>CLE for civil side attorneys from counties and cities</i>	Zion Park Inn Springdale, UT
November 20-22	<a href="#">ADVANCED TRIAL SKILLS COURSE</a> <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	<a href="#">INVESTIGATION AND PROSECUTION OF MORTGAGE FRAUD AND VACANT PROPERTY CRIME</a> <i>This 2 day course will be held in 22 different locations throughout the country during 2013</i> <a href="#">Flyer</a> <a href="#">Registration</a> <a href="#">Lodging Scholarship Application</a>	
August 12-16	<a href="#">TRIAL ADVOCACY I</a> <i>HANDS ON trial skills training for newer prosecutors</i> <a href="#">Agenda</a> <a href="#">Registration</a> <a href="#">Summary</a>	Danvers, MA
August 19-23	<a href="#">PROSECUTING SEXUAL ASSAULT CASES</a> <i>Learn to address the unique issues in sexual assault cases: evidence, trial advocacy, victim issues, ethics, etc.</i> <a href="#">Agenda</a> <a href="#">Registration</a> <a href="#">Hotel Registration</a> <a href="#">Summary</a>	Denver, CO
September 9-13	<a href="#">PROSECUTING DRUG CASES</a> <a href="#">Summary</a> <i>NDAA's popular course for narcotics prosecutors and investigators.</i>	Las Vegas, NV
September 23-27	<a href="#">STRATEGIES FOR JUSTICE</a> <a href="#">Registration</a> <a href="#">Summary</a> <i>Advanced Investigation and Prosecution of Child Abuse and Exploitation</i>	Atlanta, GA

\*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.