

The

PROSECUTOR



RECENT CASES

United States Supreme Court

DNA Analysis Reasonable As Part Of Booking For Serious Crimes

Defendant was arrested in Maryland and charged with first- and second-degree assault for menacing a group of people with a shotgun. As part of a routine booking procedure for serious offenses, a DNA sample was taken. Defendant's DNA was matched to DNA from a rape that occurred seven years earlier. Defendant was tried and convicted for the rape. On appeal, defendant argued the Maryland law

authorizing law enforcement to take DNA samples when booking a suspect into jail on serious charges and using the DNA was prohibited by the Fourth Amendment.

The U.S. Supreme Court held, "the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides." The Supreme Court held the law was constitutional as it allowed a DNA sample to be collected from someone whose valid arrest was supported by probable cause.

The court held the use of this DNA for identification is a valid government interest and a "reasonable search that can be considered part of a routine booking procedure." When officers make an arrest for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

The Supreme Court reversed the judgment of the Court of Appeals of Maryland.

This holding affirms Utah's practice of collecting and analyzing DNA of serious criminal offenders. Utah statutes authorizing this practice can be found at

UCA § 53-10-403 through §53-10-407. In the most recent legislative session the legislator amended § 53-10-403 to expand the list of crimes for which DNA samples may be taken at booking. Some of the new crimes includes sale of body parts, failure to stop at an accident resulting in death, driving with any amount of controlled substance in the body causing serious injury or death, enticing a minor over the internet, etc. [Maryland v. King, U.S., No. 12-207, 6/3/13](#)

Automatic Vacatur Of Guilty Plea Incompatible With Rule 11(h)

Defendant was under indictment on multiple tax fraud charges when he requested new counsel from the court. Defendant complained that his counsel had not put forth any defensive strategy, but instead advised him to plead guilty. The judge had defendant and counsel meet with him *in camera* to discuss new counsel. At the meeting the judge informed defendant he would not get any new counsel and that sometimes pleading guilty was the best and only strategy. The judge advised defendant to receive the max reduction at sentencing defendant would need to plead guilty and "come to the cross."

[Continued on page 3](#)

In This Issue:

2 [Case Summary Index](#)

8 [On the Lighter Side](#)

6 [Prosecutor Profile: Ann Marie Allen](#)

18 [Training Calendar](#)

Case Summary Index

[United States Supreme Court](#) (p. 1, 3)

Maryland v. King —DNA Analysis Reasonable As Part Of Booking For Serious Crimes

Boyer v. Louisiana —Defense Delays and Continuances Prompt Court To Drop Case

Metrish v. Lancaster —Retroactive Denial of Diminished-Capacity Defense Not A Violation of Due Process

[Utah Supreme Court](#) (p. 3-6)

State v. Watkins —State Must Prove Both Elements of Aggravated Sexual Abuse Of A Child

Schroeder Investments, L.C. v. Edwards —Condemnation Statute and Caselaw Do Not Authorize Compensation for Compatible Use

Metropolitan Water v. Sorf —Default Judgment Set Aside, Even Though Proper Service

State v. Mateos-Martinez —Prosecutors Can Make Charging Decisions and Victim Impact Statements Allowed

[Utah Appellate Court](#) (p. 6-9)

State v. Nacey —Testimony of Witness Not Inherently Unreliable, Sufficient Evidence For Conviction

Williams v. Williams —Cumulative Actions Justify Stalking Injunction

State v. Graham —Defendant Not Boundover For Lack of Evidence, and Boundover Based on Testimony

State v. Reynolds —Lesser Offense Not Included For Crossing Property Line

State v. Ali —Detective's Eyewitness Account Not Inherently Improbable

Johnson v. Weber County —Green Valley Qualifies As School for Zoning Purposes

Hatch v. Kane County Board of Adjustment —Subdivision Subject to Ordinance In Force At Last Configuration

[Tenth Circuit Court of Appeals](#) (p. 9-10)

United States v. Toombs —Testimony From Previous Trial Subject to Evaluation Under Federal Rules of Evidence

United States v. MacKay —Chart Showing Defendant As Top Prescriber Was Admissible

Browning v. Trammell —Federal Habeas Court May Only Consider Brady Evidence Included In State Court Trial

[Other Circuits / States](#) (p. 11-17)

United States v. Diaz-Arias —Labels Not Considered Improper Vouching

United States v. Towns —Purchase Logs of Pharmacies Considered Business Records

United States v. Grigsby —Overriding Justification Required When Forcing Psychotropic Medicine

United States v. Barnes —Delayed *Miranda* Warnings Improper

United States v. Ramirez —Instruction Barring Speculation Not Prejudicial

Goldstein v. Long Beach —District Attorneys Liable When Acting On Behalf of County

United States v. Sivilla —When Government Destroyed Evidence, Remedial Instruction Warranted

United States v. Legg —Condition of Only One Personal Internet Device Upheld

People v. Handy —Adverse Inference Charge Required When State Destroys Requested Evidence

People v. Nuckles —Accessory To Underlying Felony Includes Assisting Hiding Parolee

Smallwood v. State —Warrant Required Before Searching Arrestee's Cellphone For Evidence

State v. Campbell —Covering Peephole Created Exigency

Miller v. Thaler —Defendant Must Show Counsel's Performance Deficient and Prejudicial

Gallaway v. State —Youtube Video Admitted to Rebut Testimony About State of Mind

State v. Copeland —Less Weight Given To Third Party Refusal To Search of Car

State v. Coristine —Defendant's Sixth Amendment Right Violated by Jury Instruction About Affirmative Defense

Commonwealth v. Britt —Joint Venture Allows Conviction Based On Own Possession of Weapon

State v. McLeod —Expert Witness's Independent Judgment of Hearsay Statement Admissible Under Crawford

People v. Zavala —Human Query Does Not Render Evidence Recorded By Computer Inadmissible

LEGAL BRIEFS



[Continued from page 1](#)

A couple of months later, defendant plead guilty in exchange for dropping some charges and a reduced sentence. Afterwards, he filed a brief arguing the plea should be set aside due to the Judge's comments. Defendant claimed the comments violated Rule 11(c)(1) and the government conceded the argument. The Circuit precedent required automatic vacatur of the guilty plea and no need to decide if the error was prejudicial.



The U.S. Supreme Court granted certiorari to resolve a Circuit conflict about the consequences of a Rule 11(c)(1) violation. The U.S. Supreme Court held automatic vacatur of a guilty plea is incompatible with Rule 11(h). The court held the Rule 11(h) is designed to stop automatic vacatur and calls for "across-the-board application of the harmless-error prescription." The Supreme Court remanded the case for determinations about whether the Judges actions were prejudicial. [US v. Davila, No. 12-167, 06/13/13](#)

Defense Delays and Continuances Prompt Court To Drop Case

In 2002, petitioner and his brother were picked up while hitchhiking. Petitioner robbed and murdered the driver and enlisted his bother to cover up the crime. Petitioner was charged with murder and the State sought the death penalty. The court appointed Thomas Lorenzi to serve as petitioner's defense counsel, but there was confusion about who was to pay Mr. Lorenzi. Over three years, the defense requested the preliminary hearing to decide who would pay Mr. Lorenzi to be continued on eight separate occasions.

In March 2006, the trial court held the hearing to determine who would pay Mr. Lorenzi and it was determined that his fees could not be paid until the start of the next fiscal year. Ten months later, the State said it would no longer seek the death penalty,

which reduced the complexity and cost of the case. This allowed the case to move forward and the trial started in September 2009. The jury found petitioner guilty of second-degree murder and armed robbery. Petitioner claims his right to a speedy trial was violated by the five year delay for his trial. The U.S. Supreme Court granted certiorari to decide "[w]hether a state's failure to fund counsel for an indigent defendant for five years, particularly where failure was the direct result of the prosecution's choice to seek the death penalty, should be weighed against the state for speedy trial purposes." The Supreme Court held that because the majority of the delay was a direct result of defense requests for continuances, defense motions and events beyond anyone's control, the writ of certiorari was improvidently granted. The Supreme Court dropped the case and did not give an opinion on question before them. [Boyer v. Louisiana, U.S., No. 11-9953, 4/29/13](#)

Retroactive Denial of Diminished-Capacity Defense Not A Violation of Due Process

Defendant, a former police officer with a history of mental-health problems, shot and killed his girlfriend in a parking lot in 1993. At trial, defendant admitted he had killed his girlfriend, but asserted insanity and diminished-capacity defenses. At the time of the trial Michigan Court of Appeals precedent allowed a defendant who pleaded diminished capacity, although currently legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a

particular crime. If a defendant successfully showed mental illness prevented him from forming the specific state mind



required as an essential element of the crime, he could only be convicted of a lesser offense not requiring the specific state of mind.

Even though defendant asserted an insanity and diminished-capacity defense the jury convicted him of first degree murder. Afterwards, defendant was granted habeas relief because of prosecutorial misconduct and in 2005 he was retried. When he was being retried the Michigan Supreme Court had disapproved the decisions recognizing the diminished-capacity defense. And even though the crime had taken place years before the new Supreme Court ruling, the trial court did not allow defendant to assert the defense. Defendant was again convicted of first degree murder.

The U.S. Court of Appeals for the Sixth Circuit reversed the conviction holding the decision to apply the new caselaw was unreasonable. The U.S. Supreme Court granted certiorari to defendant's habeas petition claiming his due process rights were violated.

The Supreme Court held that under the AEDPA, to obtain federal habeas relief a defendant must establish that in rejecting his due process claim, a court unreasonably applied federal law clearly established by the Supreme Court. The Supreme Court held the district court's ruling against defendant did not violate due process because the court's ruling was a case of first impression and the federal case law was not so clearly established to make the decision unreasonable. The Supreme Court reversed the judgment of the Sixth Circuit and affirmed the conviction. [Metrish v. Lancaster, U.S., No. 12-547, 5/20/13](#)

Utah Supreme Court

State Must Prove Both Elements of Aggravated Sexual Abuse Of A Child
Watkins moved in with his niece, Tristan, her husband, Joe, and their three kids. Joe also had a daughter from a prior

[Continued on page 4](#)



[Continued from page 3](#)

relationship, H.C., which regularly visited and stayed overnight a couple of times while Watkins was staying there. While Watkins stayed at the home the parents told the children to call him “Uncle Tony,” but H.C. simply called him Tony because she “didn’t understand how he fit into the family.” Watkins watched the children sometimes, but did not have a formal role in the daily operation of the family.

One night while H.C. was staying the night, Watkins went into her room and laid down next to her. He then started kissing her head and pinching her butt. H.C. told him to leave and when he did not she got mad and told him to leave again. He left the room, only to return later to give H.C. a \$100 bill and tell her to not tell anybody. H.C. told her dad about the money the next morning, but did not tell him about the rest of the incident until a few weeks later.

Watkins was charged with aggravated sexual assault of a child. The State argued Watkins’s status as an “adult cohabitant of a parent” constituted an aggravating factor because he occupied a position of special trust under §76-5-404.1(4)(h). Watkins’s argued, at trial and on appeal, the prosecution failed to show that he occupied a position of special trust. The trial court denied Watkins’s motion to dismiss concluding, “the position of trust was simply indicated by a mature adult and a 10-year old child who had lived in the same home.” The appellate court agreed, holding, “a position of special trust may be established in two ways: either by occupying a position specifically listed by statute or by fitting the definition of a position of special trust, which the statute clearly defines as a position of authority... as a person who by reason of that position is able to exercise undue influence over the victim.”

The Utah Supreme Court disagreed and held, “Proof that a defendant occupies one of the enumerated positions under Utah Code section 76-5-404.1(4)(h) suffices to establish only that the defendant occupied a position of authority. But for the State to

establish aggravated sexual abuse of a child under (4)(h), it must prove both the defendant occupied a position of authority over the victim and the position gave the defendant the ability to exercise under influence over the victim.” The supreme court reasoned the legislative history intended prosecutors to be required to prove both elements and reversed the appellate court’s holding. [State v. Watkins, 2013 UT 28](#)

Compensation for Compatible Use Not Authorized

Schroeder sought to gain an easement from UDOT to build a road to property Schroeder owned. Schroeder intended to build a self-storage facility on the property, but needed an easement wide enough to build a road for access to the facility. UDOT owned the land adjacent to Schroeder’s land and was maintaining a retention pond necessary for its I-15 CORE highway expansion project.

After Schroeder failed to negotiate a deal for the easement, he filed a condemnation action against UDOT’s property. UDOT immediately moved for summary judgment asserting the “more necessary public use doctrine.” Schroeder claimed the “compatible use” exception applied and allowed the court to move forward with the condemnation action, even though Schroeder conceded UDOT’s use was more necessary. Schroeder argued the land had a compatible use because Schroeder would donate some of the adjacent land to UDOT and pay for UDOT to move the retention pond allowing both the pond and the road to exist. The trial court rejected this argument and Schroeder appealed the grant of summary judgment in favor of UDOT.

The Utah Supreme Court held Schroeder’s argument that the road was compatible with the pond failed because it was unsupported by Utah caselaw and “runs afoul of the governing statute.” The supreme court held the cases which Schroeder cited were distinguishable because the property in both cases was not

being used to its full capacity and the UDOT’s land was completely used by the retention pond. Schroeder asserted that the caselaw authorizes condemnation whenever the condemner is willing and able to compensate the property owner for modifications necessary to make the uses compatible. The supreme court rejected this view and held the statute does not authorize this. The supreme court held UDOT was entitled to judgment as a matter of law and affirmed district court’s decision. [Schroeder Investments, L.C. v. Edwards, 2013 UT 25](#)

Default Judgment Set Aside, Even Though Proper Service

Sorf owned residential property in Sandy, UT. The Metropolitan Water District (the District) held multiple easements which ran across Sorf’s property and provided the District with certain rights over his property. In 2009, Sorf made multiple



improvements to his backyard including removing trees, rocks and brush. He also graded the dirt, added a gazebo, wall, sidewalk, fence, shed, concrete pad, and a hot tub. Sorf claims he and the District spoke many times regarding these improvements and that he complied with all the District’s requirements. The District argues these improvements constituted a risk to the aqueduct and obstruct the district’s access the easement.

In 2010, the District filed a complaint against Sorf seeking declaratory judgment and injunctive relief requiring the improvements to be removed. The District attempted to serve the summons and complaint to Sorf at his residence. Sorf’s live in girlfriend answered the door, refused to accept the papers, and when the process server left them inside the front door she threw them outside. Sorf then received a letter stating the district’s desire to settle and Sorf contacted them about settlement.

[Continued on page 6](#)

PROSECUTOR PROFILE



Ann Marie Allen Deputy County Attorney

Quick Facts

Born: Richfield, Utah

Law School: BYU

Favorite TV series: M.A.S.H.

Favorite Food: Cioppino

Favorite Restaurant: The Stinking Rose in San Francisco

Favorite Sports Team: Cedar High Soccer Team, With Matt Allen as Center Forward.

Favorite Quote: “A Soft Answer Turneth Away Wrath”

Pet: Grandpa’s Horses

Favorite Books: Les Miserables by Victor Hugo and The Glass Castle by Jeannette Walls

Ann Marie Allen is a Deputy County Attorney for Iron County. Growing up in Richfield, Utah she always wanted to be a lawyer. She said her parents didn’t have “boy’s chores” and “girls’ chores”, rather her and her sisters were able to clean stalls and stack bales of hay as well as the boys. This allowed her to believe she could be a lawyer, even though she did not know any female lawyers growing up.

Her father was a lawyer and took her to Court with him often. She remembers a judge in the Federal Court asking the bailiff to place a chair next to him on the bench and inviting her to sit next him during a hearing. Ann Marie saw how her dad was able to contribute to the community in important ways because of his profession and wanted to be able to do that also.

She graduated from BYU with a B.A. in English and met her husband at the BYU library. They were married after his first year of law school and just before she started. She attended the J. Reuben Clark School of Law and graduated in 1997. They now have three children together.

In college, Ann Marie spent six months in Europe on a study abroad. She says, “It was one of the best things I have done in my life.” It was based in Vienna and she was able to take trains all over Europe and stay in Russia, Israel and England. She says, “The Berlin Wall had just come down and Eastern Europe was paradise for adventurous, but budget-minded students.” Now, she would like to take a vacation to an upscale pacific island resort where the huts have floors made of glass so that you can see the sea life.

After school, Ann Marie started by teaching professionalism and ethics at the J. Reuben Clark School of Law and then taught evidence at Utah Valley University. Her first job that took her into the courtroom was as the Beaver County public defender. In that position she handled nearly every type of case possible in District, Juvenile, and Justice Court.

As a public defender Ann Marie thought prosecuting looked easy and that prosecutors held most of the “cards”. And now she thinks defending looks easy, but thinks prosecutors hold some of the “cards” and have the ability to a lot of good for individuals and the system.

As a prosecutor, Ann Marie has found cases with uncooperative victims of significant crimes particularly difficult. She remembers being surprised during her first domestic violence case when the victim, who had her teeth knocked out, did not want to go forward with the prosecution of her husband. Since then, she has learned more effective ways of communicating with these victims and can usually achieve some sort of successful prosecution in these types of cases.

One of the most rewarding things about prosecution to Ann Marie is getting a conviction in a case where the defendant is guilty, but no one thinks the case can be successfully prosecuted. She also finds when someone graduates from drug court very rewarding when she really believes they have left drugs behind for good or when a successful young adult whom she knew as a very troubled teenager comes back to Juvenile Court to have their record expunged.



[Continued from page 4](#)

Before any more negotiations happened, the District moved for default judgment and it was granted because Sorf never responded. Sorf moved to set aside the default judgment under rule 60(b) The district court denied his motion finding he had been properly served and Sorf appealed.

Rule 60(b) only allows the default judgment to be set aside because defendant established he failed to file an answer due to



mistake, inadvertence, surprise, or excusable neglect. Sorf claimed he thought the District had not filed a complaint and would not unless they couldn't reach a negotiated solution. He claimed he did not know about the complaint until he retained counsel. The Utah Supreme Court held this established his reason for not filing an answer and entitled him to have the default judgment set aside under rule 60(b). The supreme court held the fact that the service was proper did not matter because Sorf was still entitled to have the judgment set aside under 60(b) because he established his reason for not filing was mistake, inadvertence, surprise, or excusable neglect. [Metropolitan Water v. Sorf, 2013 UT 27](#)

Prosecutors Can Make Charging Decisions and Victim Impact Statements Allowed

Defendant attempted to rob a beauty salon by walking in and displaying a gun. He ordered the owner to go to the back room and retrieve any money and bring it out. She went to the back room, but returned with a gun. Defendant shot her in the chest and left. Defendant was apprehended in Mexico and extradited to Utah. Defendant was charged with aggravated murder, two counts of aggravated robbery and two counts of aggravated assault and was convicted of all charges. At the sentencing hearing, the court heard victim impact testimony and Defendant was sentenced to

life in prison without the possibility of parole.

Defendant appealed his conviction arguing the prosecution's decision to charge him with aggravated murder violated his constitutional rights. He also argued the victim impact statements were admitted at sentencing violated his constitutional rights.

Defendant failed to persuade the Utah Supreme Court that any of his constitutional rights had been violated. The court held the decision to charge aggravated murder under the defendant's circumstances was a classic exercise of prosecutorial discretion.

With respect to the victim impact statements, the supreme court held "there is no Eighth Amendment bar to certain types of victim impact testimony in noncapital, adult sentencing proceedings before a judge." The supreme court affirmed the conviction and sentence. [State v. Mateos-Martinez, 2013 UT 23](#)

Utah Court of Appeals

Testimony of Witness Not Inherently Unreliable, Sufficient Evidence For Conviction

Defendant was convicted of attempted rape and on appeal argued there was insufficient evidence to support the conviction. The appellate court held to prevail on appeal of the attempted rape conviction, defendant must show the district court committed plain error because he did not preserve his right to appeal. The court held, defendant must



"show the evidence was insufficient to support a conviction of the crime charged and the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury."

Here, defendant argued the victim's testimony was so unreliable that the district court plainly erred in submitting the case to the jury. Defendant characterized the witness as schizophrenic liar and presented testimony of several witnesses who questioned the witness's reputation of truthfulness. The appellate court held defendant failed to demonstrate that the district court committed plain error in submitting the case to the jury because his challenges were based on generalized concerns about the witness's credibility. Furthermore, the appellate court held the witness's testimony could not be inherently false without more evidence because her testimony was supported by evidence. [State v. Nacey, 2013 UT App 125](#)

Cumulative Actions Justify Stalking Injunction

Defendant appealed a civil stalking injunction issued against him in favor of his ex-wife, Jeri. After their separation, Jeri told defendant to only contact her through her attorney, changed residences and redacted all of her contact information from their divorce documents. However, defendant contacted her many times, sent pictures of her new home to her, had the phone company un-block his number so he could call her, and sent many offensive emails. He also directly went against an order issued by the California court responsible for the couple's pending divorce.

On appeal, defendant argued the appellate court could only consider the contacts he had with Jeri that were mentioned in the district court's written findings and that these few contacts did not support the conclusion that the volume of contacts supported the stalking injunction.

[Continued on page 7](#)



[Continued from page 6](#)

The appellate court clarified they could affirm the district court's injunction on any grounds apparent to them from the record and that the stalking statute only requires two or more contacts. The appellate court held the cumulative effects of defendant's actions justified the injunction and affirmed the trial court's decision.

[Williams v. Williams, 2013 UT App 111](#)

Defendant Not Bound Over For Lack of Evidence, and Bound Over Based on Testimony

An investor (Investor) invested hundreds of thousands of dollars to create a company (Green Harvest) that would remove the scrap wood left at the site of a former steel mill. The salvaged wood was supposed to be worth five to eight million dollars. Investor provided the money and defendant was running the day to day operations. Defendant would sometimes submit invoices for reimbursement. Defendant submitted three separate invoices for reimbursement totaling fifty-eight thousand dollars for asbestos removal, even though defendant was not licensed to remove asbestos. The State charged defendant with three counts of communications fraud based on the invoices for asbestos removal.

At the preliminary hearing, the State sought to have defendant bound over on the three charges of communications fraud. To support their argument the State presented the invoices, the fact that the defendant was not licensed to remove asbestos, and that all the asbestos removal at the site was performed by other contractors. The magistrate found the State did not meet its burden of "presenting enough facts to establish the second element of communications fraud" so the



court could not find probable cause that the fraud took place. Defendant claimed he paid someone else to do the removal and submitted the invoices for reimbursement to Green Harvest.

The State appealed from a magistrate's order declining to bind over defendant on three counts of communications fraud. The appellate court held the evidence presented, even when viewed in the light most favorable to the prosecution, did not support the finding of probable cause because there was no evidence defendant did not pay others to do the work, the invoices were fraudulent, or that the asbestos wasn't removed.

The State also brought charges for second degree felony theft against defendant and the magistrate declined to bind over defendant on this charge. This charge emanated from the use of a Green Harvest debit card. The State presented evidence that defendant used the card while on a family vacation, charging over \$7,000 for car rentals and other expenses. The State presented testimony from the office manager stating defendant knew he was not to use the card for personal use and Investor's son's testimony that defendant agreed to pay back the money when he returned from vacation.

The magistrate found that there was not enough evidence to show probable cause for the first element of the crime, unauthorized control of the property.

However, the appellate court held that the magistrate inappropriately disregarded the testimony of the office manager. The appellate court held the magistrate was only allowed to disregard the office manager's testimony if it was "wholly lacking and incapable of creating a reasonable inference regarding a portion of the prosecution's case" or is at "a level of inconsistency or incredibility that no reasonable jury could accept it." Here, the appellate court held the testimony of the office manager could not be disregarded and when viewed in the light most

favorable to the prosecution provides the probable cause necessary to bind over defendant on the felony theft charge.

[State v. Graham, 2013 UT App 109,](#)

[State v. Graham, 2013 UT App 110](#)

Lesser Offense Not Included

Defendant took Kmart merchandise and ran out of an emergency exit of the store as an employee followed him. Defendant ran for about ten seconds and had left the store's property when he turned and pulled out a pistol, threatening the employee's life. At trial, defendant requested the court instruct the jury on the lesser included offenses of retail theft and aggravated assault. The trial court declined to include the lesser included offenses and defendant was convicted of aggravated robbery.

On appeal, defendant argued the trial court abused its discretion in declining to instruct the jury on the lesser included offenses. The appellate court held that "to be entitled to a jury instruction for a lesser included offense, a defendant must show: (1) that the charged offense and the lesser included offense have overlapping statutory elements; and (2) that the evidence provides a rational basis for a verdict acquitting him of the offense charged and convicting him of the included offense." The appellate court held the issue was "whether the evidence provided a rational basis for acquitting defendant of aggravated robbery, but convicting him of the lesser included offenses of retail theft and aggravated assault."

Defendant claimed the jury could have



found that the gun was not used in the immediate flight from a theft because he did not use

the gun in the store or on store property, but only after he fled to an adjacent street. The appellate court held the trial court

[Continued on page 9](#)

On the Lighter Side

Legal case names are not made up, but they are funny.

Batman v. Commissioner, 189 F.2d 107 (5th Cir. 1951), cert. denied 342 U.S. 877 (1951).

4 Exotic Dancers v. Spearmint Rhino and the Wild Goose, et al., No. CV 08-4038 ABC, 2009 WL 250054 (C.D. Cal. Jan. 29, 2009) (denying plaintiffs' motion for leave to proceed pseudonymously).

Death v. Graves, CGC-06-451316 (San Francisco Super. Ct. filed Apr. 17, 2006) (complaint alleging that the defendants' vehicle crashed into plaintiff Alan Death's motorcycle; Death lived).

United States v. 2,507 Live Canary Winged Parakeets, 689 F. Supp. 1106 (S.D. Fla. 1988).

Schmuck v. United States, 489 U.S. 705 (1989).

I Am The Beast Six Six Six of the Lord of Hosts in Edmond Frank MacGillivray Jr. Now. I Am The Beast Six Six Six of the Lord of Hosts IEFMJN. I Am The Beast Six Six Six of the Lord of Hosts. I Am The Beast Six Six Six of the Lord of Hosts OTLOHIEFMJN. I Am The Beast SSSOTLOHIEFMJN. I Am The Beast Six Six Six. Beast Six Six Six Lord v. Michigan State Police, et al., File No. 5:89:92, 1990 U.S. Dist. LEXIS 8792 (W.D. Mich. July 12, 1990).



And if you thought the last one was long, the next is a doozy. I'm sure none of you will read the who thing, so just notice some of the funny nicknames: The Nutcracker, The Snake, Nunzi Pro, the Horse, Joey the Clown, Peanuts, Jackie the Lackie, Figgy, Peanuts, etc.

United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO; Commission of La Cosa Nostra; Anthony Salerno, also known as Fat Tony; Matthew Ianniello, also known as Matty the Horse; Anthony Provenzano, also known as Tony Pro; Nunzio Provenzano, also known as Nunzi Pro; Anthony Corallo, also known as Tony Ducks; Salvatore Santoro; Christopher Furnari, Sr., also known as Christie Tick; Frank Manzo; Carmine Persico, also known as The Snake, also known as Junior; Gennaro Langella, also known as Gerry Lang; Philip Rastelli, also known as Rusty; Nicholas Marangello, also known as Nicky Glasses; Joseph Massino, also known as Joey Messino; Anthony Ficarotta, also known as Figgy; Eugene Boffa, Sr.; Francis Sheeran; Milton Rockman, also known as Maishe; John Tronolone, also known as Peanuts; Joseph John Aiuppa, also known as Joey Aiuppa, also known as Joe Doves, also known as Joey O'Brien; John Phillip Cerone, also known as Jackie Cerone, also known as Jackie the Lackie; Joseph Lombardo, also known as Joey the Clown; Angelo LaPietra, also known as The Nutcracker; Frank Balistreri, also known as Carl Angelo Deluna, also known as Toughy; Carl Civella, also known as Corky; Anthony Thomas Civella, also known as Tony Ripe; General Executive Board, International Brotherhood of Teamsters; Jackie Presser, General President [and other officers including sixteen Vice Presidents]; In re Application LXXXVI of the Independent Administrator, Leroy Ellis, Appellee v. Roadway Express, Inc., 3 F.3d 634 (2d Cir. 1993).

All names found on Loweringthebar.net



[Continued from page 7](#)

acted within its discretion by finding there was no rational basis in the evidence for the jury to have found that Reynolds did not use the gun in the immediate flight from the commission of the theft and that the facts were not “ambiguous or susceptible to alternative interpretations that would allow a jury to acquit defendant of aggravated robbery” and convict him of the lesser offenses. [State v. Reynolds, 2013 UT App 112](#)

Detective’s Eyewitness Account Not Inherently Improbable

Ali appealed his convictions of distributing or arranging to distribute a controlled



substance and providing false information to a peace officer. Ali argued the undercover detective’s

eyewitness testimony identifying Ali as the person who sold crack cocaine was so unreliable it was insufficient evidence for conviction. The court of appeals held a jury verdict may only be overturned for insufficiency of the evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt.

The appellate court held the detective testimony was not inherently improbable. The detective met with Ali face to face during the drug transaction, described Ali’s distinctive clothing he was wearing when arrested, and knew that Ali was sharing a hotel room with the other person involved in the drug transaction. The court also held the jury was well informed of the problems of eyewitness identifications by experts and the court and chose to believe the detectives account and testimony concerning Ali. The conviction was affirmed. [State v. Ali, 2013 UT App 113](#)

Green Valley Qualifies As School for Zoning Purposes

The Green Valley Academy Private Education Institution (Green Valley) was approved to build within the Agricultural Valley 3 (AV-3) by the Ogden Valley Planning Commission. The building was to be primarily used as a school and would offer onsite housing, counseling and therapy secessions as ancillary to the educational program. Residents of the area opposed the school being built in the AV-3, claiming the school was really a residential treatment facility and not allowed in the zoning area. The residents appealed to the Weber County Board of Adjustments (BOA), but the BOA disagreed with the residents and upheld the zoning approval. The residents then filed a petition for review and Declaratory and Injunctive Relief with the district court. The district court granted Green Valley’s motion for summary judgment finding the building was a school.

On appeal, the residents argue the BOA’s decision was arbitrary, capricious, illegal and not supported by substantial evidence and so the summary judgment was inappropriate. The residents claim the BOA’s decision was illegal because it was made in violation of the Weber County ordinance. The appellate court held Green Valley met the definition of school provided by the ordinance. The appellate court held the fact that the school also offers other amenities and programs does not disqualify it as being a school. The appellate court affirmed the grant of summary judgment to Green Valley.

[Johnson v. Weber County 2013 UT App 121](#)

Subdivision Subject To Ordinance In Force At Last Configuration

Petitioner appealed the district court’s grant of summary judgment to Kane County and



the Kane County Board of Adjustment (the Board). The district court did not disturb the Board’s decision to deny petitioner’s application for a building permit on the basis that the property on which petitioner intended to build had been improperly subdivided.

Petitioner argued his property was properly subdivided under the 1972 subdivision ordinance that was in effect when he subdivided his property. The Board found that the property was not properly subdivided according to the ordinance because there were plots that were less than ten acres, and that the property was never actually subdivided because there were no plans submitted, approved or filed with the county.

The appellate court held the property was subject to whichever ordinance was in force the last time the lots were configured to be approved by the county. Accordingly, the appellate court held the property is subject to the current ordinance because the plots were not created in 1972. Petitioner did not dispute that he had not complied with the current statute and so the court upheld the Board’s decision to deny the building permit. [Hatch v. Kane County Board of Adjustment 2013 UT App 119](#)

Tenth Circuit Court of Appeals

Testimony From Previous Trial Subject To Evaluation Under FRE

Defendant was indicted on eight drug and firearm offenses in 2006. In 2008, defendant was convicted of seven offenses. Defendant appealed the convictions arguing there had been a violation of the Speedy Trial Act and the court of appeals reversed. Then, a new grand jury returned

[Continued on page 10](#)



[Continued from page 9](#)

a new indictment against defendant and the case proceeded to trial in 2010. At trial, the government was permitted to read into evidence the entire transcript of defendant's testimony from his 2008 trial.

On appeal, defendant argued the district court committed reversible error by admitting the entirety of his testimony. The U.S. Court of Appeals for the Tenth Circuit held that while the admission of the testimony does not violate the Fifth Amendment, it is still subject to the Federal Rules of Evidence. The court of appeals held that before admitting defendant's testimony from a previous trial, the trial court must address and rule on any objections under the FRE. The court of appeals held it was error to admit the testimony without evaluating it under the FRE, but held the error was harmless because there was plenty of evidence to show defendant's guilt. [United States v. Toombs, 10th Cir., No. 11-3271, 4/26/13](#)

Chart Showing Defendant As Top Prescriber Was Admissible

Defendant practiced medicine in Brigham City, UT. From 2001 to 2007 his main practice was pain management. He was indicted on 129 counts of violations of the Controlled Substances Act. In opening statements defendant's counsel said he switched his practice to pain management out of a desire to not see patients travel a long distance to seek treatment. He referred to himself as practicing in a small town and did not want people from "his community" suffering from chronic pain to have to travel to Logan, Ogden, or Salt Lake City. The government responded by introducing a chart that revealed defendant was the number one prescriber in the state from 2005 through 2008.

Defendant appealed the admission of this evidence arguing the evidence was not relevant and was inadmissible under FRE 403. The U.S. Court of Appeals for the Tenth Circuit held the evidence was relevant because the charts painted a picture of Defendant's practice as a pain

management physician and rebutted the idea that he was only practicing in a small community. The court of appeals also held that the opening of the door by defendant in his opening statement did not allow in the evidence by itself, but did make the evidence more probative.

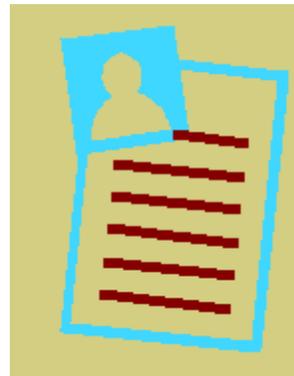


This allowed the probative value of the evidence to not be substantially outweighed by the prejudice it would cause to defendant. The court upheld the district court's ruling and held the judge did not err by

allowing the charts into evidence. [United States v. MacKay, 10th Cir., No. 12-4001, 4/30/13](#)

Federal Habeas Court May Only Consider Brady Evidence Included In State Court Trial

Defendant was accused of the murder of Harry and Teresa Hye by the Hye's adopted daughter, Cenessa Tackett. Tackett claimed defendant and a friend came to her home around three A.M., was let in and then pulled out a pistol. Tackett claimed that defendant and his accomplice tied them up, put them in a closet, set the house on fire and then shot all three. Tackett was barely grazed by the gun shot and was able to escape and call 911. Tackett claimed defendant wanted to kill her because she had told him she was pregnant with his child and he did not want to pay child support.



During pretrial proceedings Tackett's attorney accidentally sent the prosecution two psychiatric reports which described Tackett as displaying "blurring of reality and fantasy" and that she was manipulative, grandiose, egocentric, projected blame onto others and that "An assaultive, combative, or even homicidal

potential must be carefully considered."

When prosecution received these reports, it notified the defense of their existence, but did not reveal their contents. Defense moved to compel the production of the reports, but the trial court found the reports did not contain any exculpatory or impeaching information and denied the motion to compel. At trial, the defense tried to show that Tackett herself had more of a motive and intent to kill her parents than the defendant did and that he was being framed by Tackett.

The U.S. Court of Appeals for the Tenth Circuit was faced with the question of what universe of evidence they could consider. The court of appeals relied on the Supreme Court's recent decision, *Pinholster*, which held that "review under § 2254(d)(1) is

limited to the record that was before the state court that adjudicated the claim on the merits." The court of appeals held in the context of *Brady* the *Pinholster* ruling confines the analysis of favorability and materiality to the record before the state trial court because if the analysis looks to what might have changed had the *Brady* evidence been disclosed before trial, then it would make no sense to account for evidence that was not available before trial. The court of appeals

held the court could not consider the evidence defendant developed in post-conviction proceedings concerning Tackett's mental records, which defendant believed favored his theory of the case.

[Browning v. Trammell, 10th Cir., No. 11-5102, 5/6/13](#)

[Continued on page 11](#)



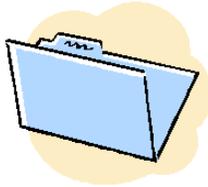
[Continued from page 10](#)

Other Circuits/ States

Labels Not Considered Improper Vouching

Defendant was found guilty of conspiring to distribute cocaine. The investigation into defendant's activities included court approved wire-tapping of the defendant's conversations with other conspirators.

During trial, the jury was allowed to receive transcripts of the recordings labeled with defendant's first name.



The transcripts were labeled in order to identify defendant as one of the speakers. The judge included instructions to the jury cautioning them that the government still had to prove that the speaker was, in fact, the defendant.

On appeal, defendant argued the district court abused its discretion when it allowed the government to provide the jury with transcripts of the intercepted phone conversations which identified the defendant as one of the speakers by labeling it with his first name.

The U.S. Court of Appeals for the First Circuit held there was sufficient evidence to establish that the person speaking in the recordings was the defendant, the judge sufficiently instructed the jury that is was up to them to decide whether the speaker in question was defendant, and the labeling of the transcripts "merely memorialized a part of the testimony" and therefore was not improper vouching. The Court of Appeals affirmed the admittance of the evidence, but suggested in the future it would be better practice for the government to establish the basis for the labeling of the transcripts before the documents are presented to the jury, in addition to the court instructing the jury as was done in this case. [United States v. Diaz-Arias, 1st Cir., No. 11-2271, 4/29/13](#)

Purchase Logs Of Pharmacies Considered Business Records

Defendant was convicted for conspiracy to manufacture methamphetamine and conspiracy to possess and distribute pseudoephedrine. Law enforcement discovered a conspiracy where individuals would visit multiple pharmacies to obtain large quantities of pseudoephedrine and use it to manufacture methamphetamine. Law enforcement compiled a list of alleged conspirators and obtained lists of purchases of pseudoephedrine from each pharmacy. The lists were admitted at trial over defendant's objection.

On appeal, defendant claimed the pseudoephedrine purchase logs were inadmissible under the hearsay rule and the Sixth Amendment's Confrontation Clause. Defendant claimed the records were not business records because they were kept with law enforcement in mind and that their introduction by a law enforcement officer, who had no actual knowledge of the records violated the confrontation clause. The U.S. Court of Appeals for the Fifth Circuit held the logs were business records because they were kept in the ordinary course of business and affirmed the conviction. [United States v. Towns, 5th Cir., No. 11-50948, 4/30/13](#)

Overriding Justification Required When Forcing Psychotropic Medicine

Between January and March 2010 three banks were robbed in the Columbus, Ohio area. The FBI alleged defendant, who lived in a homeless shelter, was responsible for the robberies. The FBI linked defendant to the robberies through eyewitness accounts and physical evidence. Defendant was charged with three counts of unarmed bank robbery in violation of 18 U.S.C.

Defendant's counsel filed an unopposed motion requesting mental evaluations to determine if defendant was competent to stand trial and whether he was sane at the time of the offenses. The motion was granted and

[Continued on page 12](#)

Mark Nash, Director, mnash@utah.gov

Ed Berkovich, Staff Attorney - TSRP, eberkovich@utah.gov

Donna Kelly, Staff Attorney - SA/DVRP, dkelly@utah.gov

Marilyn Jasperson, Training Coordinator, mjasperson@utah.gov

Ron Weight, IT Director, rweight@utah.gov

Jacob Fordham, Law Clerk, jfordham@utah.gov

Visit the UPC online at
www.upc.utah.gov





[Continued from page 11](#)

psychological evaluations were conducted. Defendant was committed into custody to determine if he could be restored to mental competency to stand trial. While being held in the medical facility, it was determined defendant was schizophrenic and that he should take drugs in an attempt to make him competent.

The evaluators determined defendant did not present a danger to himself

or others and therefore did not meet the criteria for involuntary medication under *Washington v. Harper* and so evaluators



requested a judicial order under *Sell* to allow them to give him involuntary drug injections. Defendant opposed the motion arguing he would be required to stay on the drugs, not just until he was considered competent, but until his trial was over, and that extensive use of the drugs carries with it serious negative side effects. The district court granted the government's motion and ordered involuntary medication.

If defendant was not forcibly medicated and able to stand trial he would be forced to civil commitment on a conditional release. However, some doctors did not think he was fit for release into society and so he would be held indefinitely.

On appeal, the U.S. Court of Appeals for the Sixth Circuit held, "Each involuntary medication case presents a court with the challenging task of balancing the defendant's fundamental constitutional right to liberty against the government's important interest in prosecution." The court held, "inquiry entails recognition of the difficulties inherent in dealing with mentally disable defendants" because if either side wins "that success is at best a mixed blessing." For these reasons the court held, "forcing psychotropic medication on a pretrial detainee is

impermissible absent a finding of overriding justification and a determination of medical appropriateness." Using this standard, the court reversed the district court's order permitting involuntary medication and remanded the case. [United States v. Grigsby, 6th Cir., No. 11-3736, 4/11/13](#)

Delayed Miranda Warnings Improper

The FBI recruited Craig to be an informant and arranged to get drugs from defendant and sell them to a third party. The FBI had Craig make the arrangements and recorded the telephone call. However, agents missed arresting defendant and received the drugs from Craig later. Afterwards, agents had defendant's parole officer schedule a meeting with him. Agents attended the meeting and questioned defendant about his sale of drugs to Craig without advising him of his *Miranda* rights. Defendant denied the sale, until agents played the recording of the phone call and then defendant admitted he had sold the drugs. The agents then advised him of his *Miranda* rights and had him sign a waiver. After he had signed the waiver he gave a full confession.

Before trial, defendant moved to suppress his statements claiming the agents violated his 4th Amendment rights and the trial court denied his motion finding he was not in custody before being advised of his *Miranda* rights. The U.S. Court of Appeals for the Ninth Circuit reversed the trial court's finding. The court of appeals held defendant was in custody because he was required to appear by his parole terms, was confined in a police-dominated environment and would not feel free to leave.

The court also held the agents deliberately delayed providing *Miranda* warnings to allow the defendant to make incriminating statements, then have the defendant waive his *Miranda* rights and then have the defendant make the incriminating statements again. The court held that under *Williams* the "mid-stream warnings"

the agents used were not effective and that defendant's post-warning confession should have been suppressed. The appellate court reversed the trial court's decision.

[United States v. Barnes, 9th Cir., No. 11-30107, 4/18/13](#)

Instruction Barring Speculation Not Prejudicial

Defendant was part of a government sting which had an undercover agent purchase escalating amounts of meth from defendant using a go-between, Bejaran. Defendant and Bejaran were arrested after the fourth transaction. At trial, defendant asked the judge to deliver a missing witness instruction informing the jury that it could conclude the government did not call Bejaran as a witness because his testimony would have hurt the government's case. The district court refused to give the instruction and after closing arguments instructed the jury, sua sponte, they "should not speculate as to any reason why Bejaran was not called."



On appeal, the U.S. Court of Appeals for the Ninth Circuit held the judge's sua sponte instruction

did not rise to the level of constitutional error. In the absence of constitutional error, the court could reverse the conviction only if they could say with fair assurance the judgment was substantially swayed by the error. Here, the court of appeals held the State presented enough evidence for the jury to find defendant guilty of dealing drugs and the instruction did not have a prejudicial effect. [United States v. Ramirez, 9th Cir., No. 11-50346, 4/29/13](#)

District Attorneys Liable When Acting On Behalf Of County

Goldstein, appellant, was wrongfully

[Continued on page 13](#)



[Continued from page 12](#)

convicted of murder and spent 24 years in prison.

His conviction was largely based on the perjured testimony of an unreliable jailhouse informant. The informant had previously



received reduced sentences by testifying in other cases and lied on the stand in appellant's case to earn benefits. In 1998, Goldstein filed a habeas petition which showed that the informant lied and had received prior rewards for testifying. Defendant was released from prison and filed an action for relief under 42 U.S.C. § 1983. He claimed that the Los Angeles County District Attorney's Office failed to create any system for prosecutors to access information pertaining to the benefits provided to jailhouse informants and failed to train prosecutors to disseminate this information. The district court found the Los Angeles County District Attorney and Chief Deputy District Attorney were immune because they were acting on behalf of the State and not the local county.

The U.S. Court of Appeals for the Ninth Circuit held the defendants were acting on behalf of the county, not the state, when making policy decisions. The court of appeals held the policies challenged by Goldstein, specifically policies about jailhouse informants, are distinct from the acts the District Attorney undertakes on behalf of the state and a cause of action may lie against the County under § 1983.

[Goldstein v. Long Beach, 9th Cir., No. 10-56787, 5/8/13](#)

When Government Destroyed Evidence, Remedial Instruction Warranted

Defendant owned a business selling perfume in the street markets of Tijuana, Mexico. He crossed between Mexico and California a few times a week. On June 2, 2010 defendant loaned his Jeep to his sister

-in-law's long-term boyfriend, Josue. Josue had the Jeep for several hours. On the next border crossing, inspectors noticed the engine manifold appeared to be cut. After a few hours, the inspectors retrieved a large amount of cocaine and heroin hidden inside the manifold. The inspectors took photographs of the engine, car, and drugs, but the photos were of very poor quality.

Defendant requested the preservation of the evidence seized from the Jeep and received both assurances and a court order that the evidence would be preserved. However, the Jeep was sold for parts and no evidence was left, other than the poor quality photos, for defendant and defendant's experts to examine.

At trial, defendant requested that the court instruct the jury, "the defense were not allowed or given an opportunity to inspect the vehicle even though the court had ordered that the government preserve [it]." The trial court denied the motion finding that there was no bad faith and the photos were preserved.



On appeal, defendant argued his due process rights were violated by the government's destruction of evidence and the trial judge erred in denying his motion to dismiss. Alternatively, defendant argued the trial judge erred in requiring a showing of bad faith in order to give a remedial jury instruction.

The U.S. Court of Appeals for the Ninth Circuit held, the trial judge used the wrong standard, bad faith, and instead should have used the following: "[o]ur principal concern is to provide the accused an opportunity to produce and examine all relevant evidence, to insure a fair trial." The appellate court continued, courts must balance "the quality of the Government's conduct" against "the degree of prejudice to the accused," where the government bears the burden of justifying its conduct

and the accused of demonstrating prejudice.

Here, the court of appeals held the destruction of the evidence was significantly prejudicial and a remedial jury instruction was warranted. The court of appeals affirmed and reversed in part and remanded the case to the district court for a new trial with instruction to grant the defendant a remedial jury instruction.

[United States v. Sivilla, 9th Cir., 11-50484, 5/7/13](#)

Condition Of Only One Personal Internet Device Upheld

Defendant contacted an undercover police officer through the internet and discussed having sex with a thirteen year-old boy. Defendant made arrangements to meet at an apartment in D.C. and planned to have sex with the boy and do drugs. Defendant went to the meeting, was arrested and pled guilty to persuading a person to travel in interstate commerce to engage in criminal sexual activity. The district court imposed 30 months of imprisonment and 180 months of supervised release.

As a condition of his release, the court limited defendant to owning only one personal internet-capable device. The court explained that "the purpose of the limitation was to make the probation office's monitoring of [his] internet use feasible."

On appeal, defendant argued the limitation to one personal computer was too restrictive and violates the requirement that conditions of supervised release must involve no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence, protection of the public from further crimes of the defendant, and effective correctional treatment. The U.S. Court of Appeals for the District of



[Continued on page 14](#)



[Continued from page 13](#)

Columbia Circuit held the condition was related to the offense, served to protect the public, and may be modified in the future if it becomes too burdensome. The court affirmed the condition. [United States v. Legg, D.C. Cir., No. 11-3077, 4/19/13](#)

Adverse Inference Charge Required When State Destroys Requested Evidence

Defendant was charged with assaults of three different deputy sheriffs, based on events that happened while he was an inmate. It was claimed defendant assaulted a deputy while in his cell and then when being taken out his cell he assaulted another deputy. The third count comes from a separate incident. In a pre-trial motion, defendant requested any electronic surveillance of the incident. However, the prosecutor was not able to produce them because the jail records over tapes every thirty days and the tape of the incidents was not saved. At trial, the court gave an adverse inference charge with respect to video of one of the incidents, but not the incident that involved two counts. Defendant was convicted of one count of assault from the incident that did not receive an adverse inference charge. The appellate court affirmed the conviction rejecting the implication that an adverse inference charge should have been given.

The New York Court of Appeals held when a defendant, in a criminal case, acting with due diligence, demands evidence that is reasonably likely to be of material importance, and that evidence has been destroyed by the State, the defendant is entitled to an adverse inference charge. The New York Court of Appeals held this should encourage the State to preserve evidence or not destroy evidence of an incident that is likely to be material in a criminal case. The court of appeals reversed the decision and ordered a new trial. [People v. Handy, N.Y., No. 35, 3/28/13](#)



Accessory To Underlying Felony Includes Assisting Hiding Parolee

Adam gray was released from prison in July 2008. One year after Gray was paroled, his parole officer determined he had absconded from parole and a warrant was issued for his arrest. Defendant considered Gray like a son and offered him a place to stay. However, as part of Gray's parole he was not supposed to leave Kern County and defendant lived in adjacent Kings County.



Gray and his girlfriend came to live with defendant and her live-in-boyfriend, Amaral. Shortly after Gray started living with defendant, they noticed he was featured as a wanted fugitive in the "Crime Stoppers" section of the local newspaper. Amaral told defendant he worried that harboring Gray would result in defendant's parole being revoked. The next month Amaral called the Crime Stoppers hotline and reported Gray was at his house. Gray was arrested and sentenced to prison. Defendant was also arrested and was convicted of being an accessory to Gray's underlying felony.

On appeal, defendant claimed the act of assisting a parolee abscond from supervision did not satisfy the statutory definition of an accessory. The Supreme Court of California held, "that a person who intentionally aids a parolee in absconding from parole supervision qualifies as an accessory." The supreme court held the statute defines accessory as anyone who helps a principal avoid arrest, trial, conviction, or punishment and that breaking parole was considered punishment. [People v. Nuckles, Cal., No. S200612, 4/22/13](#)

Warrant Required Before Searching Arrestee's Cellphone For Evidence

Defendant was accused of robbing a convenience store in Jacksonville, Florida in 2008. A warrant for his arrest was issued and defendant was arrested by Officer Brown. During the arrest, Officer Brown seized defendant's cell phone incident to arrest and searched the content of the phone. The officer did not mention the phone or the data he viewed in his arrest report.

Just before trial, Officer Brown revealed to the prosecutor he had seized and searched defendant's cell phone. Officer Brown informed the prosecutor that he had viewed incriminating photos on the phone. The prosecutor obtained a search warrant to view the images and introduced them as evidence at trial over the objection of defendant.

On appeal, the district court certified the question as: Does *Robinson* allow a police officer to search through photographs contained within a cell phone which is on an arrestee's person at the time of a valid arrest, notwithstanding that there is no reasonable belief that the cell phone contains evidence of any crime?

The Supreme Court of Florida held, "[the] cell phones of today are materially distinguishable from the static, limited-capacity cigarette packet in *Robinson*, not only in the ability to hold, import and export private information, but by the very personal and vast nature of the information that may be stored on them." The supreme court held, "the decision of the United States Supreme Court in *Robinson*, which governed the search of a static, non-interactive container, cannot be deemed analogous to the search of modern electronic device cellphone." The court answered the certified question in the negative and held that while the separation and possession of the cell phone were proper, a warrant was needed before the

[Continued on page 15](#)



[Continued from page 14](#)

cell phone could be searched for data. [Smallwood v. State, Fla., No. SC11-1130, 5/2/13](#)

Covering Peephole Created Exigency

Officer Nible was called to an apartment complex because of a noise complaint. As the officer approached the apartment, he smelt burnt marijuana and heard voices inside. In order to have the occupants open the door, the officer covered the peephole and turned his body to hide when knocking on the door. When the door opened, the officer thought he saw a pistol in defendant's hand, so the officer pushed his way into the apartment. After handcuffing defendant, Officer Nible noticed a large marijuana bong and marijuana on the kitchen counter. After a search of the apartment, they found a handgun in the couch. Defendant filed a motion to suppress, which was denied. Defendant was convicted of multiple crimes.

On appeal, defendant argued the officer did not have exigent circumstances and even if he did have exigent circumstances, the officer created the exigency by covering the door's peephole and hiding himself.

The Supreme Court of Kansas held the officer's conduct preceding the exigency was unreasonable and violated the Fourth Amendment. Therefore, Officer Nible could not rely on the exigent circumstances



exception to justify his warrantless entry. The supreme court reversed the district court's denial of defendant's motion to suppress and remanded the case. [State v. Campbell, Kan., No. 101,860, 5/3/13](#)

Defendant Must Show Counsel's Performance Deficient and Prejudicial

Defendant was indicted for intoxicated manslaughter with a vehicle and felony theft. The State offered defendant a plea

bargain with a recommended sentence of sixteen years of imprisonment. Defendant's trial counsel stated that he informed defendant about the deal and defendant rejected the offer asking counsel to take a counteroffer of twelve years to the State. Counsel stated that he did take the counteroffer back to the State, but did not inform defendant that the State rejected it. Then, just before trial defendant decided to take the offer, but the State said the offer had been withdrawn. During trial, defendant and the State reached an agreement on a sentence of thirty-five years for intoxicated manslaughter and dismissed the indictment for felony theft.

On appeal, Defendant claimed trial counsel provided ineffective assistance regarding a lapsed plea offer from the State. Defendant claimed his trial counsel never relayed his twelve year counter offer to the State and that he would have accepted the State's initial sixteen year plea offer if he had known that it was final.

The U.S. Court of Appeals for the Fifth Circuit held that to prevail on a claim of ineffective assistance of counsel the defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. The court held these two standards are highly deferential and when they both apply "review is doubly so." The court held defendant did not meet this standard and did not by clear and convincing evidence rebut the presumption of correctness owed to the State habeas court's factual determination. [Miller v. Thaler, 5th Cir., No. 11-40696, 5/2/13](#)

Youtube Video Admitted To Rebut Testimony About State of Mind

Defendant was charged with murder by abuse or neglect in the first degree after his three month old daughter died from serious injuries. Defendant claimed he accidentally dropped the girl while doing stretches and that he had accidentally caused many of the other injuries because he was clumsy.

At trial, defendant testified about how he was very depressed and suicidal because he missed his daughter. He said he was suicidal every day. The state sought to introduce evidence that he posted a video during this time that showed him being "flippant" and laughing and have a good time. Defendant objected stating the video was not relevant. The trial court found the evidence was relevant under Rule 401 and the probative value was not substantially outweighed by the prejudice under Rule 403. The court admitted it into evidence

On appeal, the Supreme Court of Delaware held defendant put his "post-incident" demeanor at issue by testifying he thought about killing himself every day and that the video was probative evidence that his demeanor was inconsistent with his testimony. The supreme court also held the probative value of the video was not substantially outweighed by the prejudice of it. The supreme court held the trial judge's rulings were not clearly erroneous and therefore affirmed the trial court's



judgments. [Galloway v. State, Del., No. 161-2012, 5/2/13](#)

Less Weight Given To Third Party Refusal To Search of Car

A deputy was observing a house for illegal narcotics activity when he saw appellee pull up to the house, get out of the car, leave the deputy's sight and then quickly return to the car. The deputy pulled the car over for a traffic violation and asked the driver for consent to search the car. The driver agreed to the search, but appellee refused and informed the officer she was the owner of the car and that she was married to the driver. Even though appellee refused the search, the officer searched the

[Continued on page 16](#)



[Continued from page 15](#)

car and found two pills of Tramadol. Appellee was arrested and charged with possession of a dangerous drug.

Appellee filed a motion to suppress arguing that *Randolph* applies to the search of vehicles as well as residences, but the motion was denied. The Supreme Court of Texas held the principle's that underlie *Randolph*, weigh against treating a car the same as home. The supreme court held passengers of a car are subservient to a driver's control and therefore, a hierarchy between driver and passenger allows the driver to give sole consent to have the car searched.

However, the court cautioned this is not always true, like when the passenger is the sole owner and allowing the driver to drive the



car or when the driver is a chauffeur. Concluding, the supreme court held *Randolph* does not apply to vehicular searches and that those searches are controlled by pre-existing law. The supreme court reversed the court of appeals judgment. [State v. Copeland, Tex. Crim. App., No. PD-1340-12, 5/8/13](#)

Defendant's Sixth Amendment Right Violated by Jury Instruction About Affirmative Defense

Defendant and L.F. were at a party together and both drank heavily before L.F. went to her room and went to sleep. Defendant then entered her room and had sexual intercourse with L.F. as she lay on her stomach, going in and out of consciousness. Defendant presented two witnesses that testified that L.F. drank, but did not appear intoxicated. Defendant testified that L.F. initiated the sexual intercourse and was an active and willing participant. Defendant was charged with second degree rape, which requires the State prove beyond a reasonable doubt the defendant engaged in sexual intercourse

with someone who was incapable of consent by reason of being physically helpless or mentally incapacitated.

At trial, defendant's main argument was the State failed to prove beyond a reasonable doubt that the victim was incapacitated. Before closing arguments, the trial judge read a jury instruction, over the objection of defendant, about affirmative defense. Defendant appealed claiming the jury instruction violated his Sixth Amendment right to control one's own defense. The Washington Supreme Court held, "Because [defendant] validly waived his right to mount a reasonable belief affirmative defense, the trial court violated his Sixth Amendment rights." [State v. Coristine, Wash., No. 86145-5, 5/9/13](#)

Joint Venture Allows Conviction Based On Own Possession of Weapon

Defendant and Calhoun had previously had a dating relationship and were fighting over the insurance settlement proceeds the defendant received after an automobile accident. Defendant and her new boyfriend, Bolling, were driving home at 2 A.M. when they saw Calhoun park his car in front of her apartment building. Defendant got out of her car and walked toward Calhoun and Bolling followed her to the car. As Bolling approached the car he shot and killed Calhoun with one shot. Then, defendant and Bolling shot and killed a passenger, and then shot another passenger several times. Defendant and Bolling then got in their car and drove away. Defendant was prosecuted for the murder of Calhoun, even though she did not shoot him, on a theory of joint venture liability.

On appeal, defendant argued the judge erred by failing to instruct the jury the Commonwealth had to prove defendant knew Bolling was armed in order to convict her of the murder of Calhoun with deliberate premeditation. The judge instructed the jury that to prove armed assault with intent to murder the

commonwealth must prove defendant committed the alleged assault by means of a dangerous weapon.

The Massachusetts Supreme Judicial Court held the theory of joint venture, "as it relates to deliberately premeditated murder does not require the Commonwealth to prove that the defendant knew the actual killer had a weapon. Rather, it requires the Commonwealth to prove that the defendant knew that one or more of the participants in the joint venture had a weapon."



This holding overturned prior cases

and established that the Commonwealth only needs to prove a defendant knew that a weapon was present with one of the participants, even if it was the defendant who possessed the weapon. The court also clarified, "The Commonwealth should only bear the burden of proving that a joint venturer had knowledge that a member of the joint venture had a weapon where the conviction on a joint venture theory is for a crime that has use or possession of a weapon as an element." [Commonwealth v. Britt, Mass., No. SJC-10877, 5/10/13](#)

Expert Witness's Independent Judgment of Hearsay Statement Admissible Under Crawford

In 1989, defendant was involved in an apartment fire that caused the death of four occupants in the building. Soon after the fire, officials became suspicious of defendant because she made statements about seeking the insurance money and made conflicting statements about how the fire started. The case became cold and was re-opened in 2010. New investigators reexamined the original evidence and science used to show defendant's story did not match what actually happened. The new investigators reviewed the previous

[Continued on page 17](#)



[Continued from page 16](#)

investigators opinions and methods and agreed that defendant's story did not match what actually happened.

At trial, defendant moved to suppress the opinions of the new investigators arguing their opinions were based on the old investigator's hearsay statements and violated confrontation clause rights. The trial court suppressed the new investigators opinions and statements reasoning they were not independent of the old expert's opinions. The State appealed arguing the statements were not asserted for the truth of the matter and that defendant would have a chance to cross examine the witness, even if that would require them to bring in evidence

The Supreme Court of New Hampshire held the trial court erred in ruling that to allow the State's experts to testify regarding their opinions would violate the defendant's rights under the Confrontation Clause to the Federal Constitution. The supreme court held, "It distinguished between expert testimony that

represents witnesses' own "independent judgment" based on their "own training and experience" and expert testimony that serves merely as a conduit for presenting the substance of hearsay statements of a nontestifying witness."

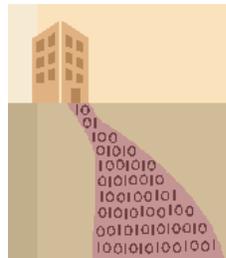
Where an expert testifies with regard to his or her independent judgment, even if that judgment is based upon inadmissible testimonial hearsay the supreme court held it does not violate the confrontation clause. The supreme court reversed the lower court ruling on this issue. [State v. McLeod, N.H., No. 2011-809, 5/14/13](#)



Human Query Does Not Render Evidence Recorded By Computer Inadmissible

Defendant was convicted of five counts of robbery and one count of burglary. At trial the court admitted cell phone records over the hearsay objections of defendant. The trial court ruled the records were admissible under the business record exception.

On appeal, defendant argued a human query was required to retrieve the information from the computers record archive and this process is unreliable and does not justify



the exception. The California Court of Appeals held, "a printed compilation of call data produced by human query for use at trial falls under the business records exception where the underlying data is automatically recorded and stored by a reliable computer program in the regular course of business." Furthermore, the appellate court held documents produced by human query are not inadmissible where the "underlying data itself was not produced by human input, but rather, was recorded by the computer system itself each time a user made a call." [People v. Zavala, Cal. Ct. App., No. D062125, 5/13/13](#)

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

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	
July 10-12	SPECIAL OFFENSES Agenda Registration Summary <i>Domestic Violence, Stalking, Sexual Assault for the Prosecution Team</i>	Topeka, KS
July 22-26	UNSAFE HAVENS II Agenda Registration Summary <i>Advanced Trial Advocacy for Prosecution of Technology Facilitated Crimes Against Children</i>	San Antonio, TX
July 24-27	ASSOC. OF GOVERNMENT ATTORNEYS IN CAPITAL LITIGATION <i>For more information about and registration forms for the 2013 AGACL conference, visit www.agacl.com or call Susan Wilhelm at (512) 240-5486.</i> Agenda Conference FAQ Registration Hotel Registration	Liaison Capitol Hill Washington, DC
July 29– Aug. 2	PROSECUTING HOMICIDE CASES Summary <i>Covering all aspects of a homicide case; including investigation, case management, pre-trial and trial.</i>	Seattle, WA
August 12-16	TRIAL ADVOCACY I <i>HANDS ON trial skills training for newer prosecutors</i> Agenda Registration Summary	Danvers, MA
August 19-23	PROSECUTING SEXUAL ASSAULT CASES <i>Learn to address the unique issues in sexual assault cases: evidence, trial advocacy, victim issues, ethics, etc.</i> Agenda Registration Hotel Registration Summary	Denver, CO

Continued from page 17

September 9-13	PROSECUTING DRUG CASES <i>NDAA's popular course for narcotics prosecutors and investigators.</i>	Summary	Las Vegas, NV
September 23-27	STRATEGIES FOR JUSTICE <i>Advanced Investigation and Prosecution of Child Abuse and Exploitation</i>	Registration Summary	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.