

The

PROSECUTOR



Utah Supreme Court

Officer Owed Fleeing Suspect Duty of Care

Mrs. Torrie called the Sheriff's Office to report that her son, Wayne, had taken the family Suburban against her wishes. Mrs. Torrie asked that officer's locate Wayne and bring him into custody. While Wayne was still missing, he sent texts to his mother saying he was suicidal. Mrs. Torrie informed dispatch that her son was threatening to commit suicide by crashing

language imposes a duty on Deputy Harper in this case..." The court of appeals held that because the legislator failed to carve-out an exception to the duty of that applies during the pursuit of an actual or suspected criminal."

The Supreme Court was clear when it held the court did not adopt a test to determine whether an officer owed a duty to a fleeing suspect. The court also clarified. "the imposition of a duty is a separate and distinct analysis from breach and proximate cause." The court of appeals reversed the district court's grant of summary judgment and remanded the case for further proceedings. [Torrie v. Weber County, 2013 UT 48](#)

State Owed Duty of Care To Campers Attacked By Black Bear

A black bear attacked a man while he was sleeping in his tent on June 16, 2007. That man and friends were successful in scaring the bear away and notified the Division of Wildlife Resources (DWR). DWR classified the bear as a threat to public safety and determined that the bear needed to be destroyed. Two agents attempted to track the bear on the same day, but were unsuccessful. The agents did not leave a warning at the campsite or post a warning

the vehicle if police attempted to apprehend him, but she did not ask them to stop their searches. Wayne was spotted by a Weber County Sheriff and followed to a stop sign. While stopped, the Deputy then turned on his lights in an attempt to pull him over. Wayne did not pull over, but sped off. The Deputy followed in pursuit, going up to seventy five mph. After less than a minute of pursuit, Wayne's vehicle abruptly left the road and rolled several times, throwing Wayne out of the car and killing him.

Wayne's parents sued alleging negligence and the district court granted summary judgment finding that the county and deputy "owed no duty to Plaintiff's decedent." On appeal, the question presented to the court was whether law enforcement owes a duty of care to fleeing suspects.

The Torries argued Wayne was owed a duty "by statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm." They argued the Deputy had a statutory duty to use reasonable care in deciding whether to pursue Wayne and in actually pursuing him. The Utah Supreme Court agreed by holding, "The statutory

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on the road, or close the road leading to the campsite. The agents figured it was already late on a Sunday evening and that no one would be camping there that night. The Mulveys set up camp that evening at the same campsite, cooked dinner, put their coolers and garbage in their car and went to bed in a single tent. However, Sam, the victim, brought a granola bar and can of soda into the tent that night. The same bear that had attacked people early that day entered the campsite, pulled Sam from the tent and killed him.

Initially, the State argued the permit exception to the Utah Governmental Immunity Act protected the State from liability.



However, the court of appeals held the permit exception was

inapplicable to the facts of this case. On remand, the State claimed two alternative arguments. The State argued that it owed no duty to the Mulveys and that if it did owe a duty, the natural condition exception precluded liability. On remand, the state brought two alternative theories for dismissal. The plaintiffs argued the State was precluded from raising them on remand because they were not brought originally. The Utah appellate court held the State was not precluded from raising these arguments because the court did not rule on the merits of these arguments.

The Utah Supreme Court then held the State's protective actions, directed at the campsite, gave rise to a duty of care to the Mulvey's as the next occupants of the campsite. The court held the actions taken created a special relation between the Mulvey's and the State because the State took action to protect those who would occupy that specific campsite before the

bear was destroyed.

Lastly, the supreme court held the bear was not a natural condition on the land and as a result the State was not immune from liability under the immunity act. The appellate court held that a natural condition is a feature that has a "much closer tie to the land itself, such as a river, lake or tree." The appellate court held the district court erred in granting summary judgment to the State and reversed and remanded the case. [Francis v. State, 2013 UT 43](#)

Utah Court of Appeals

Stipulation Prevents Challenge of Restitution Order

Defendant was driving in the wrong direction and hit a car driven by a couple. The defendant was very intoxicated at the time of the accident and was not injured. When officers arrived on scene there was a heavy snowfall and poor road conditions, so the officer asked defendant to accompany them to the police station so that field sobriety tests (FST's) could be conducted in a lighted, heated and secured parking garage. Defendant failed the FST's, admitted to having many shots of vodka before driving, and had a blood alcohol content of .228.

Before trial, defendant moved to suppress the evidence gathered at the station, but the motion was denied.

Defendant was sentenced to probation for thirty-six months, a jail term of 180 days, and a fine of \$2,883. At a hearing concerning restitution, defendant stipulated to complete restitution in the amount of \$5,442.24 for Wife and \$92,036.03 for



Husband. The court then amended the order of restitution and required defendant to pay court-ordered restitution of \$28,800. On appeal, defendant challenged the trial court's determination of both complete restitution and court-ordered restitution. The Utah Court of Appeals held defendant's stipulation estopped her from challenging the complete restitution determination on appeal because she stipulated to it and did not challenge the trial courts. Defendant claimed the court-ordered restitution should have been set aside because it was ineffective assistance of counsel to advise her to enter into the stipulation. The court of appeals held they will not second guess the trial counsel's strategy to place the defendant in a contrite position to avoid the actual restitution which would have been extremely large because of the financial impact of the accident. [State v. Beckstrom, 2013 UT App 186](#)

Refusal To Admit Past Sexual Encounters Harmless

E.M., E.M.'s Boyfriend and defendant all went to a party. E.M. smoked marijuana and got drunk. She then went and laid down in Boyfriend's and Friend's room. Eventually, Boyfriend joined her and the two had sex. After he left, the details become a little mottled with each party asserting different scenarios. According to E.M., she awoke to defendant on top of her, kissing her, and touching her genitals. She then passed out again only to wake up to defendant performing oral sex. She repeatedly told him, "no," but he continued. She then asked him to promise to not have sex with her. She then passed out again and later awoke to find defendant on top of her having sex with her.

Then next morning she told Boyfriend and Friend what happened and then reported the incident. The trial court refused to permit defense counsel to cross-examine E.M about her previous sexual encounters based on Utah Rules of Evidence Rule 412.

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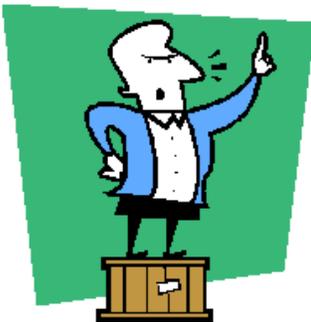
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Defendant appealed claiming the trial court erred by prohibiting his counsel from eliciting testimony regarding E.M.'s encounters with Boyfriend and Guest, arguing that curtailing cross-examination of E.M. was a violation of his Sixth Amendment Confrontation Clause rights. The appellate court held that while the incident with Friend was not presumptively inadmissible under Rule 412, its exclusion was harmless beyond a reasonable doubt.

[State v. Denos, 2013 UT App 192](#)

Victim Lacked Standing To Disqualify Attorney General's Office

Packer developed and patented a new lecture capture technology and submitted a bid for the system to be used at Weber State University. Packer suspected that Weber State's bid process was designed so that only one supplier could submit a successful bid. Packer submitted a GRAMA request for documents and information about the bidding process. While he received some of the documents, Packer believed the file he received was incomplete and so he submitted another GRAMA request.



Eventually, Packer contacted the Utah Attorney General's Office about the issue and

a criminal investigation was opened. The Attorney General started investigating and Packer filed motions seeking to sanction and disqualify counsel for both the Attorney General and Weber State because of an alleged conflict of interest, to have a special prosecutor appointed and to require the Attorney General to comply with the Subpoena Act by filing descriptions of documents and transcripts of testimony obtained pursuant to its subpoenas. The Attorney General and Weber State moved to strike or dismiss Packer's motions

claiming Packer lacked standing to bring the motions. The district court agreed that Packer did fail the traditional and alternative tests.

The Utah Court of Appeals held Packer failed the traditional test for standing because "the relief requested was not substantially likely to redress the injury claimed." Also, the court held Packer lacked standing to disqualify counsel and appoint a special prosecutor because "the general rule is that a person lacks standing to disqualify counsel unless the person has an attorney-client privilege with the attorney to be disqualified" and Packer did not have that privilege with either counsel.

The Utah Court of Appeals held parties may gain alternative or public-interest standing if they can show "that they are an appropriate party raising issues of significant public importance." Here, the court held Packer failed the alternative test for standing because he did not show he had "a personal interest regarding either the conflict of interest alleged in his motions or in his 'generalized' concerns about the fairness of the investigation." [Packer v. Utah Attorney General's Office, 2013 UT App 194](#)

Other Circuits/ States

More Evidence Needed to Prove Termination Inconsistent

Phillips was on duty as a patrol officer when dispatch requested assistance with a possible fugitive. Phillips responded by driving his police car at speeds over 100 mph through six intersections, he drove without lights or sirens at speeds over 100 mph and passed other cars. After the incident, South Jordan City started an internal complaint against Phillips

regarding his driving. After the investigation, Phillips was terminated.



On appeal, Phillips argued the South Jordan City Appeal Board (the Board) erred by upholding his termination for many reasons. Phillips contended that he did not violate his Emergency Vehicle Operation training, or the department policies. The court of appeals agreed with the district court and held there was no abuse of discretion in determining Phillips had violated the policies and training.

The court of appeals also held Phillips did not provide enough evidence to show the City's termination of his employment was inconsistent or not proportional. The court of appeals declined to disturb the decision of the Board. [Phillips v. South Jordan City, 2013 UT App 183](#)

Journalist Have No Privilege to Hide Their Confidential Sources In Criminal Trial

Sterling was prosecuted for illegally providing classified information to the New York Times reporter, James Risen. Sterling had been dismissed from the CIA and sought to publish his memoirs containing top-secret information about a classified program involving Iran's nuclear program. Risen was subpoenaed for information about the program. Risen moved to quash the subpoena, claiming his source was protected by the First Amendment or a federal common-law reporter's privilege.

The district court held that Risen did have a reporter's privilege entitling him to protect his sources and not disclose the type of classified national security information. The U.S. Court of Appeals for the Fourth Circuit reversed the district court's holding. The Court of Appeals held "There is no First Amendment testimonial privilege, absolute or qualified, that

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PROSECUTOR PROFILE



Quick Facts

Law School: BYU

Favorite Music: Anything by Jack White

Last Book Read: The Myth of Sisyphus by Albert Camus

Favorite Movie: Casablanca

Favorite Quote:
“Extraordinary claims require extraordinary evidence.” — Carl Sagan

Advice: “Before you do anything read the rule.”

Andrew Peterson Assistant Attorney General Criminal Appeals

Andrew Peterson, Drew, was known as Droodle when he was a kid. His first job was selling sarsaparilla, wearing striped vest and straw hat at the concession stand for a western melodrama playhouse. He grew up in Kansas, like Superman. He graduated from BYU in 1999 with an undergraduate of Political Science. He then attended law school at the same school, graduating in 2002. He went to law school so that he could kick butt like Jack McCoy. When he decided to go to law school his dad said, “What on earth are you going to do with *that* degree?”

After graduating he was a Guardian ad Litem. He loved this because he was able to have total confidence that no matter what, his client was the good guy. He is currently an Assistant Attorney General in the Criminal Appeals Division. He has been there two and half years.

Drew’s most rewarding experience was when a defendant became suicidal after he charged him with theft. He barricaded himself in his apartment with a gun, and the crisis intervention team asked Drew to talk to him. While he was in the defendant’s living room, wearing a bullet proof vest and looking at his gun on the coffee table, Drew offered him a plea bargain that got him some mental health treatment. The defendant accepted, and greatly benefitted from treatment.

Drew’s most challenging experience was his first week as a prosecutor. He was handed a jury trial on a charge of telephone harassment, that had been prepared by someone else. He had never even seen a jury trial before, but he did his best and got a conviction—he’s still not sure how.

Drew says, “Doing criminal appeals, I get the benefit of the hard and skillful work of trial prosecutors who got the conviction in the first place. I enjoy seeing the talent and dedication of so many people across the state, and I enjoy making arguments that support the justice and fairness of those previous efforts. There really isn’t anything about the job I dislike.”

Drew is an avid runner who just ran his 6th marathon. He says he is chasing his white whale of finishing a marathon under three hours. His favorite sports team is the Runagades, a local marathoning club. Drew has three children ages 13, 10, and 7. He also has two standard poodles



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protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source.”



The Courts of Appeals also reiterated the LaRouche test which states that before requiring disclosure of a reporter’s source in a civil proceeding, the court must consider “(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information.”

Sterling argued that Rule 501 of the FRE created a privilege for journalist to protect their sources during a criminal proceeding. The Court of Appeals held that Rule 501 did not create a privilege for journalist and that only the Supreme Court is allowed to determine what privileges are afforded to journalist. The Court of Appeals then applied the LaRouche test and held that the conduct at issue still was not protected.

[United States v. Sterling, 4th Cir., No. 11-5028, 7/19/13](#)

Actual Innocence Exception Requires Showing Of Seriousness

Caso was the chief of staff for United States Representative Curt Weldon when a nonprofit consulting firm asked Representative Weldon to take legislative action on two proposals implicating relations between the U.S. and Russia. The same firm retained Caso’s wife to edit written drafts of the proposals. The firm paid his wife \$19,000 for *de minimis* services. At the end of the year Caso did not report the payments to his wife on his annual disclosure statement.

The government charged Caso with conspiracy to commit honest-services wire fraud, 18 U.S.C. § 1346. Caso entered a plea agreement in which he admitted to intentionally not disclosing the payments because it created a personal conflict of interest. Caso was sentenced to and successfully completed three years’ probation and 170 days home confinement. The U.S. Supreme Court then decided *Skilling v. United States*, 130 S. Ct. 2896 (2010). *Skilling* narrowed prosecution of § 1346 to only include “bribes and kickbacks -- nothing more.” Caso filed to vacate and set aside his conviction and sentence on the ground that the conduct to which he admitted in the statement of the offense was not a crime. The district court held that because Caso did not make the claim on appeal, he was not entitled to collateral relief.

Supreme Court held that a prisoner’s procedural default of a claim should not block the prisoner’s ability to present the claim when he can demonstrate his actual innocence. In *Bousley v. United States*, 523 U.S. 614 (1998), Supreme Court held that a petitioner endeavoring to satisfy the actual-innocence exception must make a showing regarding the seriousness of other offenses that prosecutors gave up pursuing as part of the plea agreement.

Here, the U.S. Court of Appeals for the D.C. Circuit applied *Bousley* and, using the federal sentencing guidelines, held that Caso had made a showing that the seriousness of the other offenses satisfied the actual-innocence exception. The court held, “the appropriate measure of “seriousness” for purposes of this rule must be determined by reference to the United States Sentencing Guidelines.” [United States v. Caso, D.C. Cir., No. 12-3015, 7/19/13](#)

Invitation to Look At Items For Sale Reduced Curtilage

Eric Haase noticed a motorcycle which had been stolen from him a few months earlier in defendant’s front yard with a for sale sign on it. Mr. Haase called the police,

which came over to investigate. The officers entered through a chain link fence that warned of dogs, but did not have a “No Trespassing” sign. The officer’s knocked on the door of the home, but no one answered. The officers then walked over to the motorcycle and confirmed the V.I.N. matched the one reported to police by Mr. Haase when his motorcycle was stolen. The officers then noticed quite a few cars on the lot between the defendant’s home and the next door neighbor. The officer’s checked and one of the vehicles had been stolen.

The officers then secured the home and yard while they applied



for a warrant. When the warrant was issued, the officers searched the home and found a shotgun. Before trial, defendant moved to suppress the shotgun claiming the warrantless entry into the front yard violated his Fourth Amendment rights because the area was the curtilage. The district court rejected both of these arguments and the U.S. Court of Appeals for the Eighth Circuit agreed.

The Eight Circuit court held the front yard was not considered curtilage after weighing the factors. The court held that the fact that the yard was fenced and close to the home was outweighed by the defendant placing a “For Sale” sign on the motorcycle to draw attention to the public that he was selling things in his front yard. The court also said because the fence was short and could easily be look over to see the entire front yard and home and that everyone would have to enter through the unlocked fence to knock on the door of the home the front yard was not considered.

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[United States v. Bausby, 8th Cir., No. 12-3212, 7/11/13](#)

Medical Examiners Can Testify About Their Own Conclusions Based On Reports Of Others

Defendant and victim were in a relationship for seventeen years, lived together, and were raising five children. Defendant became convinced that victim was having an affair and started becoming angry with her often. Defendant and victim fought a few times in the days preceding her murder.

On the night of the murder, the victim was at a friend's house drinking when defendant showed up drunk. Defendant accused victim of cheating on him and told her that she had to leave with him. She left with him to try to avoid a fight. When they arrived home, the victim laid down to go to sleep in the living room. Defendant yelled at her to come to their bedroom and the victim refused. Defendant became angry, grabbed a kitchen knife and knelt down and stabbed the victim in the chest. When she struggled to get away he punched and hit her. The victim's daughter called 911 and her son's tried to pull defendant off the victim.

At trial, the medical examiner that performed the autopsy had left the medical examiner's office and moved to Vermont. The state filed a motion in limine to have a substitute medical examiner testify at trial and defense counsel did not object. The medical examiner testified about conclusions that could be made based on the facts found in the report.

On appeal, defendant argued the state did not establish that the medical examiner that performed the autopsy was unavailable and that the testimony of the substitute medical examiner violated his Confrontation Clause rights. The Massachusetts Supreme Court held the testimony of the substitute medical examiner did not create



a substantial likelihood of a miscarriage of justice. Much of the medical examiner's testimony was cumulative of other properly admitted evidence.

[Commonwealth v. Reavis, Mass., No. SJC-10395, 7/16/13](#)

Absence of Interpreter Violation of Confrontation Clause

Charles, a Haitian national who only speaks Creole, flew into Miami International Airport and presented travel documents to a Customs and Border Protection (CBP) officer. There was a



discrepancy between the name and date-of-birth associated with one of the forms. To conduct an interrogation of Charles the CBP officer used an over-the-phone interpreter

service. The interpreter on the phone translated from English to Creole and from Creole to English. During the investigation Charles made incriminating statements to the officer, which was translated by the interpreter.

At trial, the government did not call the interpreter to testify, but rather had the CBP officer testify what was told to him by the interpreter. The CBP officer testified he was told by the interpreter that Charles received the document in question from a man that offered to help her. She said she did not pay the man and did not notice the document was wrong until she sat down on the plane to fly.

On appeal, Charles argued the government violated her Sixth Amendment Confrontation Clause rights because the interpreter did not testify and was not available for cross-examination. There was no dispute that the statements the interpreter made to the CBP officer were testimonial.

The U.S. Court of Appeals for the Eleventh Circuit held, "The Supreme Court has held the Confrontation Clause "commands, not

that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Here, the Circuit Court held the interpreter was an agent of Charles, but that Charles did have a right to confront the interpreter in trial. The Circuit Court held defendant was not the declarant of the statements made to the testifying officer and therefore the Confrontation Clause was violated. The court further held, "the Confrontation Clause requires an interpreter of the concepts and nuances of language to be available for cross-examination at trial." However, this error was not a plain error because there was no settled law on this issue and so the court affirmed the conviction. [United States v. Charles, 11th Cir., No. 12-14080, 7/25/13](#)

Sufficient Nexus Between Digital Camera And Child Pornography

Special Agent Kinch, of the New Mexico Attorney General's Office, investigated the distribution of child pornography over the ultra-peer sharing internet site Gnutella. During the investigation she found one IP address associated with a New Mexico internet service provider that contained fifty-eight files that were available for sharing. Agent Kinch believed that the files were of sexually exploitive material. She confirmed one of the files contained child pornography and sent a *subpoena duces tecum* to the internet provider to obtain the information of the subscriber.



Agent Kinch then applied for a search warrant to search the address of the subscriber for the computer that was being used to reproduce child pornography. The affidavit also requested authorization to seize and view any photos, including computer formatted photos, and computer hardware equipment, including digital

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On the Lighter Side

The Living Dead

Juan Arias, from New York, has filed his third lawsuit to establish he is not dead. Arias was declared dead by a hospital in the Bronx that he was never treated at. The hospital listed his Social Security number, full name, and date of birth on the death certificate of another Juan Arias.

Arias wasn't sure what happened when his Medicaid benefits were cut off, he credit cards were canceled and bank accounts closed. However, Arias did not mind that his taxes were sent back. The government said all he needs to do is show proof of his identity to have his benefits, and more importantly his life, restored.

<http://nypost.com/2013/09/07/man-declared-dead-is-very-much-alive/>

The Blind Shooting the Blind.

Iowa legislatures have passed a law allowing people who are legally blind to carry guns in public. The new permits are allowed by state law which prevents sheriffs from denying someone the right to carry a weapon based on physical ability.

There are some misgivings about the permits with some Iowans worried about safety. The Delaware Sheriff was quoted saying, "I'm not an expert in vision, at what point do vision problems have a detrimental effect to fire a firearm? If you see nothing but a blurry mass in front of you, then I would say you probably shouldn't be shooting something." However, there are training programs and Iowans who are blind have been allowed to hunt for a long time.

<http://www.desmoinesregister.com/article/20130908/NEWS/309080061/?odyssey=nav%7Chead&gcheck=1>

Whoops, Is That Pot?

The first man to be issued a civil ticket for growing marijuana in Vermont was 73 years-old. William Reynolds claimed he was just "playing around" with the seeds he found. He was ordered to pay a \$200 fine for having a pot-tered two and a half foot tall marijuana plant at his apartment. Reynolds says he doesn't smoke marijuana and won't contest the ticket. Vermont is the latest of states to decriminalize possession of small amounts of marijuana.

<http://www.burlingtonfreepress.com/viewart/20130830/NEWS07/308300013/Man-73-gets-first-Vermont-pot-ticket>



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cameras.

The search returned two digital cameras. The search of one of the digital cameras revealed images of defendant engaging in sexual acts with a four-year-old. The defendant filed a motion to suppress the images found on the camera claiming it was an illegal search of the camera. The district court found that the warrant did not contain specific enough information regarding the camera to allow the seizure and suppressed all evidence derived from the seizure of the camera.

The court of appeals agreed with the trial court and the prosecution appealed to the Supreme Court of New Mexico. The Supreme Court held, “Based on Agent Kinch’s investigation, training, and experience investigating online child predators, there was a sufficient nexus between the suspected crime of possessing and attempting to distribute child pornography over an online network and the digital camera where such images might be stored.” The supreme court reversed the decision. [State v. Gurule, N.M., No. 33,023, 6/13/13](#)

No Reasonable Expectation of Privacy for Cell Site Data

In connection with a criminal investigation, the U.S. government sought the cell site data for defendant’s cell phone for both, when the phone was making a call and when the phone was idle. This data would tell the government which tower and sector to the cell phone had sent a signal. The magistrate judge granted the request of the subscriber information, but denied the request for the historical cell site data. The Stored Communications Act (SCA) governs the disclosure of stored electronic communications by service providers. The law only requires the government show specific and



articulable facts there is reasonable grounds for the information to be relevant to the criminal investigation. The judge of the district court found the standard of the SCA was unconstitutionally low.

The government appealed claiming the SCA’s lowered standard, which does not require probable cause to obtain the cell site data, was constitutional. The government argued that the cell site information does not require the same standard as GPS information because it is less precise. The government also argued that because the information was collected and stored by a third party the government can obtain the records with a lower standard then if the government was collecting the information for criminal investigation.

The U.S. Court of Appeals for the Fifth Circuit held that a showing of less than probable cause does not violate the Constitution. The Circuit court held that it is not reasonable for people to expect service providers to keep information about the location of cell phones private. [In re Application of United States for Historical Cell Site Data, 5th Cir., No. 11-20884, 7/30/13](#)

Officer Did Not Violate The Fourth Amendment By Crossing Defendant’s Property Line

Officer Murray received a tip from an anonymous source that someone was growing marijuana. The officer went to investigate and noticed the backyard was enclosed by a tall fence made from wooden slats. He was unable to view any incriminating evidence from public places, so he contacted a neighbor who allowed him to look through the fence from his property line. What Officer Murray did not know was that the fence was set back about eighteen inches from the property line so when Officer Murray was right next to the fence he was trespassing on the defendant’s property.

While looking through the fence, Officer Murray could see Marijuana plants planted



and sprouting in the defendant’s backyard. Murray applied for and received a search warrant. Upon searching the residence, 227 marijuana plants, scales, packaging material, \$1,400.00, and dried marijuana. Defendant was arrested and charged with conspiring to manufacture marijuana.

Defendant moved to suppress the evidence seized during the search claiming the Officer violated the Fourth Amendment because he was trespassing. The district court denied the motion finding the property was an open field, which does not require a search warrant to search.

Defendant appealed arguing the property was curtilage or that the officer violated the Fourth Amendment by trespassing under *Jones*. The U.S. Court of Appeals for the Eighth Circuit held the property was not curtilage because defendant the land was not behind the fence, was unused, and was not protected from passersby. The circuit court also held that because the land was an open field the officer was not trespassing by peering through the fence. [United States v. Mathias, 8th Cir., No. 12-3092, 7/31/13](#)

Unreported Misidentification By Drug Dog Brady Violation

Defendant was arrested for the murder of John Guerrero. Guerrero was killed while stopped at stoplight by someone who got out of a white Volkswagen Beetle and shot the victim in the head with a pistol. Some eyewitnesses described the shooter to a sketch artist, and a parole officer thought the sketch looked like defendant. A picture of defendant was put in a group of pictures and shown to the eyewitnesses who chose defendant as the shooter. Then officers did a scent test on the car and the dog signaled

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that defendant's scent was present on the passenger side of the Volkswagen.

At trial, the prosecutors did not have any physical evidence other than the scent test. The prosecutor really focused on the scent test and eyewitness statements. The prosecutor never revealed that the dog, Reilly, had made two mistaken identifications on two prior occasions. In a case only a few months earlier, the prosecution had stipulated to the fact that Reilly had mistaken identifications and Reilly's scent test was not allowed into evidence in that case.



On appeal, defendant argued the evidence about Reilly's misidentifications

was exculpatory or impeaching evidence that should have been disclosed under *Brady*. The U.C. Court of Appeals for the Ninth Circuit held the prosecution's failure to disclose that Reilly had a history of mistaken identifications violated *Brady v. Maryland* and the California courts' decision to the contrary was an unreasonable application of *Brady*. The court reversed the district court's judgment on the *Brady* claim and granted defendant's writ of habeas corpus. [Aguilar v. Woodford, 9th Cir., No. 09-55575, 7/29/13](#)

Duty Under *Brady* The Same As Ethical Rules

Assistant District Attorney Sharon Riek was assigned to prosecute Tyrone Smith, who had been arrested for possession of marijuana. Smith was driving a car and Isaiah Simpson was a passenger when they were stopped and marijuana was found in the car. Smith was charged as a repeat offender and his extended supervision privileges were to be taken away.

However, Simpson, the passenger, told investigators the marijuana was his and not Smith's. Simpson also told the defense attorney, Lukoff, and District Attorney Michael Nieskes. Nieskes says he wrote the confession down on a piece of paper and passed the note along to Riek.

In preparation for trial, Lukoff met with Simpson and learned that Simpson had confessed to possessing the marijuana to D.A. Nieskes. Lukoff sent a request to Riek for any information received from Simpson. Riek sent Lukoff a copy of the Note four days before trial, with an attachment explaining that she had ordered investigators to verify his confession and they were not able to.

On the day of the trial, Simpson arrived to testify and Riek instructed investigators to interview him. Simpson again admitted that the marijuana was his. Riek then moved to dismiss the case against Smith.

A disciplinary complaint was filed against Riek alleging that by failing to promptly provide the defense with exculpatory information concerning a third party's admission Riek violated SCR 20:3.8(f)(1). The referee found that a prosecutor's ethical duty under SCR 20:3.8(f)(1) was consistent with the constitutional requirement of *Brady v. Mayland*, 377 U.S. 83 (1963). The referee stated that SCR 20:3.8(f)(1) "must include *Brady's* materiality standard. To hold otherwise would be to require disclosure of favorable evidence without regard to that evidence's significance and no matter how many times the defense has already heard/received the same." [In re Riek, Wis., No. 2011AP1049-D, 7/23/13](#)



Judge has Broad Discretion Concerning Use of Demonstrative Evidence In Jury Deliberations

Pangborn was employed at the Beatrice

State Developmental Center. In October 2011, he was charged with six counts of abuse of a vulnerable adult and five counts of strangulation. A jury trial was held and eight witnesses testified and numerous exhibits were admitted into evidence.



Exhibit 36 was a "road map" of the State's case. Exhibit 36 was a chart showing each count, the victim, witness, location and injury of all the charges against Pangborn. The exhibit was admitted for demonstrative purposes only, but was later submitted to the jury to use during deliberation.

On appeal, Pangborn claimed the district court abused its discretion by allowing the jury to use the exhibit during deliberations. The Nebraska Supreme Court held judges have broad discretion about whether demonstrative evidence may be used by the jury during deliberations. The Supreme Court also held, "it is an abuse of discretion for a trial judge to send a demonstrative exhibit to the jury for use in deliberations without first weighing potential prejudice against usefulness and employing limiting instructions and other safeguards to prevent prejudice." The court reversed the judgment and remanded the case for a new trial. [State v. Pangborn, Neb., No. S-12-941, 7/26/13](#)

Prosecutor Misconduct Punished With Standards Went Misconduct Occurred

The actions of this case stem from a drive by shooting in 1993. Derrick Smith and Shauna Farrow were walking home from a party when a car pulled up, opened its doors, and shot both of them. Farrow was killed and Smith was injured. Smith was the only witness and gave multiple conflicting statements about what happened.

Robert Miller was the prosecutor of the

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two accused of shooting Smith and Farrow. He obtained a sentence of death in both trials. Both convictions were later reversed on appeal citing the prosecutor's "egregious conduct."

The Oklahoma Supreme Court held a 180-day suspension was appropriate for the "reprehensible" misconduct. The Supreme Court looked at the misconduct, lack of prior disciplinary history, the length of time which had passed since the violations occurred and the discipline administered in similar cases. The court also took into account when the violations occurred and the types of standards that were in place at that time. Noting that the standards at the time of the misconduct were much more lenient than today's punishment would be, the court was "not inclined to apply the harsher standard of today to conduct that occurred at a time when it was punished lightly, if at all." [State ex rel. Oklahoma Bar Ass'n v. Miller, Okla., No. SCBD-5732, 6/25/13](#)

Trial Court Decides If Unadjudicated Acts Were Criminal

Defendant was charged with committing four lewd acts upon his niece, B, who was 19-years old at trial. B testified that the molestation began in 1998 when she was eight and would stay overnight with defendant during school breaks. When she would stay there she would share a bed

with defendant and his wife. Defendant would rub B's vagina, buttocks and breasts. This happened multiple times and as the years went on Defendant would touch B in the same way even though she slept in a different bed. Eventually, the abuse stopped and B reported it to her mother.

Before trial, the prosecution presented evidence under section 1108 that defendant, at the age of fourteen, had sexually abused his five-year-old sister. No juvenile court allegations were filed in the case and there was no conviction. Defendant argued on appeal that because he was fourteen at the time of the alleged abuse, the California penal code creates a rebuttable presumption that he was incapable of committing a crime. In order for his actions to be a crime at the age of fourteen the state needed to prove he appreciated the wrongfulness of his conduct.

The appellate court held the jury decides if the proffered conduct amounted to a crime. However, the Supreme Court of California held the trial court must decide whether a defendant had the capacity to understand the wrongfulness of his conduct as a threshold question to admission of the unadjudicated sexual offense. The court of appeals was reversed and the case remanded. [People v. Cottone, Cal., No. S194107, 7/22/13](#)

Conviction For Conspiracy To Commit Active Gang Participation Upheld

Defendant was convicted of conspiracy to commit active gang participation after he and his gang members engaged in a turf war with their rival gang, killing three different people in early 2007.

Defendant appealed claiming conspiracy to actively participate in a criminal street gang did not qualify as a crime. The court of appeals agreed with the defendant and held conspiracy to actively participate in a criminal street gang did not qualify as a crime, but the court still upheld the conspiracy convictions on the theory that defendant did commit conspiracy to commit murder.



The Supreme Court of California held that even though there is no statute explaining conspiracy to commit

active gang participation there is also not a statute for conspiracy to commit murder. The supreme court held there was not legislative intent to prevent applying conspiracy to the crime of gang activity. Furthermore, the court held "Wharton's Rule" does not apply because defendant knew each of his co-defendants was a gang member and agreed to commit the crimes with them.

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“Wharton’s Rule” only applies when it is necessary for two or more people to commit the actual crime, such as dueling. Gang activity does not require more than one person to commit the crime because it only requires one person to commit a crime in the furtherance of a gang. The court held that it only requires, “(1) participation in a gang that is more than nominal or passive, (2) knowledge of the gang’s pattern of criminal gang activity, and (3) the willful promotion, furtherance, or assistance in felonious conduct by gang members,” such as murder in this case. The Court of Appeals judgment was reversed and the case was remanded. [People v. Johnson, Cal., No. S202790, 7/18/13](#)

Child Was Unavailable, Not Incompetent At Trial

RS was sexually assaulted by defendant while attending daycare at his home. Defendant was charged with multiple counts of first and second-degree criminal sexual conduct. RS, who was three years old at the time, was the victim and complainant against defendant. At trial, the State called RS to take the stand and testify. When questioned RS became physically agitated and was not able to answer questions. When RS was not able to answer the court’s questions about telling the truth or what a promise is, the court held that RS was not competent to testify under MRE 601. The state then moved to have RS declared unavailable under 804(b) (1) and have RS’s testimony from the preliminary hearings admitted. The trial court denied the motion to declare RS unavailable.



The prosecution appealed to the Michigan Supreme Court. The Supreme Court held the mental infirmity defined in 804(b)(1) need not be long lasting or permanent, but existing at the time the witness takes the stand. Here, the supreme court held that just because RS was mentally able to testify two other times does not “affect the determination whether she was mentally capable or infirm for purposes of MRE 804 (a)(4) at the time her testimony was sought at trial.” The court held RS was unavailable and remanded the case. [People v. Duncan, Mich., No. 146295, 7/30/13](#)

Defense Council Opened The Door To Contested Evidence

Defendant was pulled over on the suspicion of driving under the influence because he was driving twenty miles per hour less than the posted speed limit and crossed the line many times. The officer pulled defendant over and investigated whether defendant was intoxicated or not. After he was arrested, defendant was asked sixteen standard post-arrest questions and defendant refused to answer how much alcohol he had drank, where he had drank it, and when and what he had last eaten.



Defendant filed a pretrial motion to exclude the questions, and the fact that he refused to answer the questions. Defendant argued admitting defendant’s refusal would violate defendant’s constitutional right against self-incrimination.

At trial, defense counsel presented as proof that defendant was not intoxicated the defendant’s candor with the officer about his drinking and driving. Defense council suggested a guilty person would not tell the officer he had been drinking beer. The prosecution then brought up the fact that

defendant would not answer the officer’s post-arrest questions. The defense counsel objected and the judge allowed the prosecution to discuss it further stating the defense “opened the door.”

On appeal, the Supreme Court held “defense counsel opened the door to the admission of the contested evidence” and “defendant cannot benefit of inquiry into one subject and expect the state’s questioning within the same scope to be held impermissible.” The judgment was affirmed. [State v. Brown, Conn., No. SC-18870, 8/6/13](#)

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

October 16-18	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>CLE for civil side attorneys from counties and cities</i>	Zion Park Inn Springdale, UT
November 14-15	COUNTY & DISTRICT ATTORNEYS EXECUTIVE SEMINAR <i>Annual gathering of County and District Attorneys - in conjunction with UAC</i>	Dixie Center St. George, UT
November 20-22	ADVANCED TRIAL SKILLS COURSE <i>For felony prosecutors with 4+ years of prosecution experience</i>	Hampton Inn West Jordan, UT
April 10-11	SPRING CONFERENCE <i>Legislative and case law updates, ethics and/or civility and more</i>	Sheraton Hotel Salt Lake City, 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	
October 7-9	MANAGING THE GOVERNMENT ATTORNEY'S OFFICE Summary Agenda Registration	East Lansing, MI
November 4-8	childPROOF Summary Registration <i>Advanced Trial Advocacy on Abusive Head Trauma cases for Child Abuse Prosecutors</i>	Santa Fe, NM
November 11-15	THE EXECUTIVE PROGRAM Registration Brochure <i>The course designed for prosecution leadership</i>	Savannah, GA
December 9-13	FORENSIC EVIDENCE Summary Registration Agenda <i>Comprehensive training on the challenges inherent in violent crime cases involving scientific evidence</i>	Los Angeles, CA

* 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 links, that information has yet to be posted by NDAA.

2013 Basic Prosecutor Course

A few photos from the old tradition, the BBQ, and may a new tradition, Wednesday night kickball.

