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CRIMINAL CASE LAW UPDATE[1]

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1 Thanks to Dan Schweitzer, Supreme Court Counsel, National Association of Attorneys General, for his synopses of U.S. Supreme Court decisions.

APPELLATE PROCEDURE

The court won't kick out your appeal if you don't marshal the evidence, but you probably won't meet your burden of persuasion if you don't.
***State v. Nielsen*, 2014 UT 10 (Lee).** Nielsen was convicted of 15-year-old Trisha Autry's aggravated murder and sentenced to life without parole. On appeal, he challenged the sufficiency of the evidence that he kidnapped Trisha. Nielsen did not marshal the evidence as required by court rule and the State asked the Court to affirm for that reason alone.

Held: The Court affirmed on the merits, but substantially changed its marshaling jurisprudence. More recent Utah opinions have refused to reach sufficiency-of-the-evidence challenges where the appellant has not marshaled the evidence. The Court clarifies that a failure to marshal is not a basis for imposing a procedural default on the appellant. Rather, a failure to marshal is more accurately a failure to meet one's burden of persuasion. Going forward, Utah's appellate courts will not be refusing to reach an issue merely because the appellant does not marshal the evidence; but it will probably find that the appellant (including Nielsen) didn't meet his burden of persuasion if he doesn't.

A defendant seeking to reinstate his appeal right under *Manning* must show, not only that no one told him of the right, but also that if they had, he would have timely appealed.
***State v. Collins*, 2014 UT 61 (Durrant).** A jury convicted Collins of murder and aggravated robbery. When he was sentenced in January 2007, the trial court did not tell him, as required by Utah R. Crim. P. 22(c), that had the right to appeal and that an appeal notice had to be filed within 30 days. Two years later, Collins sought to reinstate the time for appeal under Utah R. App. P. 4(f) and *Manning v. State*, 2005 UT 61. Collins claimed he told his attorney to file an appeal, but his attorney didn't do so. Collins's attorney testified that in fact he twice urged Collins to appeal, but that Collins said he didn't want to. The attorney told Collins to let him know if he changed his mind within two weeks, but didn't mention that any appeal had to be filed within 30 days. The trial court believed the attorney and denied reinstatement. The court of appeals reversed, holding that the trial court's and counsel's failure to inform Collins of the 30-day time for appeal denied him his appeal right. The court of appeals rejected the State's argument that Collins should have to show that he would have filed a timely appeal if he had been properly informed of his rights. The supreme court granted the State's cert petition.

Held: Reversed. *Manning* and rule 4(f) require a defendant to show that he was *deprived* of his right to appeal. Implicit in that term is a requirement that a defendant show that something outside his control prevented him from timely appealing. Thus, in addition to showing that neither the court nor counsel properly advised him of his right to appeal, Collins must also show that "but for" this failure he would have filed a timely appeal.

A defendant convicted in justice court who has been denied his right to an appeal de novo in district court, has an unlimited time to seek reinstatement of his appeal right under *Manning* and Utah R. App. P. 4(f).

***Ralphs v. McClellan*, 2014 UT 36 (Lee).** Ralphs, a serial exhibitionist, was facing his fourth lewdness charge, enhanced to a felony by two prior misdemeanor convictions in justice court. While this charge was pending, Ralphs filed a *Manning* motion in justice court to reinstate the time for appealing his otherwise time-barred appeal from his second misdemeanor lewdness conviction. The justice court denied the motion, and Ralphs sought de novo review of that denial in district court. The district court denied the motion, finding that Ralphs had forfeited his right for *Manning* relief by waiting too long to assert it.

Held: Reversed. As a threshold matter, the relief of restarting the time of a denied appeal under *Manning* and Utah R. P. 4(f) applies to justice court convictions. Once a justice court denies that relief, the district court has appellate jurisdiction to review that ruling de novo. And because neither *Manning* nor rule 4(f) impose a deadline, the district court erred here by ruling that Ralphs had waiting too long to assert his appeal right. The Court suggests that its advisory committee on the rules of appellate procedure might want to suggest a time limit for *Manning/*Rule 4(f) motions.

State had appeal of right from dismissal of prosecution, even though the dismissal was on the State's motion after the magistrate bound over on a lesser uncharged offense.

***State v. Arghittu*, 2015 UT App 22 (Pearce).** The State charged Arghittu with distributing a controlled substance analog, money laundering, and pattern of unlawful activity. After a preliminary hearing, the magistrate refused to bindover on the charged offenses, but found probable cause to bind Arghittu over on an uncharged lesser offense. The magistrate ordered the State to amend its information accordingly. The State instead moved the magistrate to dismiss the entire prosecution. The State appealed from the order granting the dismissal. On appeal, Arghittu argued that the State could not appeal from its own dismissal, but rather had to seek a petition for interlocutory appeal from the magistrate's partial bindover.

Held: Utah R. Crim. P. 7 provides that if a magistrate doesn't find probable cause on the charged crimes, he must dismiss the information and discharge the defendant. By statute, the State may, as a matter of right, appeal from such a dismissal. The dismissal order here acknowledged the absence of probable cause for the charged crimes and the State's refusal to amend the information. The State therefore could directly appeal.

Defendant's motion to dismiss aggravated kidnapping charge at close of State's evidence on merger theory was premature and did not preserve claim of error for appeal.

***State v Ellis*, 2014 UT App 185 (Greenwood).** Roger Ellis was charged with aggravated kidnapping and elder abuse. His mother testified that at trial that for a full day Ellis followed her around the house, yelled at her, hitting her, blocking her from leaving the house, and, later in the evening, threatening to kill her with a butcher knife. Mother eventually was able to call 911 and summon paramedics under the guise of having chest pains. Once the paramedics transported her out of the house, she told them that she was been detained and abused by her

son. At the close of the State's case, Ellis moved to dismiss the aggravated kidnapping charge, claiming that the State had failed to present sufficient evidence of the charge. The trial court denied the motion, and the jury convicted Ellis. He appealed, claiming that trial court erred by not merging the aggravated kidnapping charge into the elder abuse charge when he moved to dismiss at the close of the State's case.

Held: Affirmed. While a defendant may raise the issue of merger at any time, a trial court should only rule on it once the jury has returned a verdict of guilty on both counts. A defendant who fails to seek a ruling on merger after the jury returns guilty verdicts does not preserve the claim for appeal.

CRIMINAL LAW

Statute enumerating circumstances of nonconsent for sexual offenses is not exhaustive list; the statute merely prescribes the circumstances in which the jury may not find consent as a matter of public policy.

State v. Barela, 2015 UT 22 (Lee). Massage therapist Barela had sex with his lesbian client . Barela said that the client initiated the sex. The client said that Barela totally took her by surprise when he pulled her to the end of the table, dropped his pants, put his penis in her vagina, and ejaculated. The client testified that she did not say or do anything to suggest that she wanted to have sex with Barela; but she also did not physically resist or tell Barela "no," because she "froze." Barela argued on appeal that Utah Code Ann. § 76-5-406, which enumerates circumstances under which the victim has not consented, was exhaustive. Barela contended that because the circumstances here did not fall under any of the statutory examples, the State had not proved nonconsent.

Held: Section 406 does not define nonconsent. It merely limits the various theories of consent that might otherwise be available. Section 406 does not establish the "sum and substance of all circumstances amounting to nonconsent." Rather, it simply prescribes "the circumstances in which the legislature forecloses a jury finding of consent as a matter of public policy." (Note: The Court reversed and remanded for a new trial based on an erroneous elements instruction; it reached this issue because it was likely to recur on remand.)

When a married couple fails to file a return, it is the State's burden to show their individual tax liabilities. The requirement to file a tax return derives from Title 59, not the rules of the State Tax Commission.

***State v. Steed*, 2014 UT 16 (Durrant).** Joan and Frank Steed were charged with several tax related crimes, including failure to file a tax return. While they conceded that they never filed returns, they argued that they did not have to file returns because they did not have a tax liability. The State, in turn, argued that they did have a tax liability and that they were also required to file a return because they had gross income above the filing threshold. The trial court denied the Steed's motions to dismiss and allowed the case to go to the jury under two theories of criminal intent: that the Steeds had failed to file a return with the intent to avoid a tax or that the Steeds had failed to file a return with the intent to avoid a requirement of the

Tax Commission. The jury convicted the Steeds of failing to file returns, and the Steeds appealed.

Held: Reversed. The State presented evidence that the Steeds had a tax liability, but it failed to present any evidence of their individual liabilities. A spouse is not criminally liable for his partner's tax deficiencies. So the State failed to present sufficient evidence that the Steeds failed to file to avoid a tax liability. The State also failed to present any evidence that the Steeds intended to avoid a requirement of the Tax Commission. It did present evidence that they had sufficient gross income to trigger the filing requirement. But the gross income filing requirement is found in Title 59, not the Tax Commission rules, and the State did not ask the court to instruct the jury on the filing requirements of Title 59. The evidence was thus insufficient, and the Court reversed the verdict and directed the trial court to enter a judgment of acquittal.

CRIMINAL PROCEDURE

Single criminal episode statute does not bar subsequent DUI prosecution after defendant has paid fine in justice court for open container citation arising out of same incident.
***State v. Ririe*, 2015 UT 37 (Lee).** Ririe was caught driving with an open container and a blood alcohol level of .216. The officer cited her for the open container in justice court. After Ririe didn't pay the citation, prosecutors filed an information in district court charging her with DUI, an alcohol-restricted driver offense, and open container. Ririe then paid the open container fine in justice court and moved to dismiss the district court prosecution under double jeopardy and the single criminal episode statute (Utah Code Ann. § 76-1-403). The State conceded that double jeopardy barred prosecution of the open container count. The trial court ruled that the single criminal episode statute did not bar prosecution for the other two counts.

Held. Affirmed. When a defendant is prosecuted for one or more offenses arising out of a single criminal episode, section 76-1-403(1) precludes a subsequent prosecution for the same or different offense arising out of the same criminal episode if (1) the subsequent prosecution is for an offense that was or should have been tried under section 76-1-402(2) in the first prosecution, and (2) the first prosecution resulted in a conviction. Section 402(2) requires that the first prosecution involve a prosecuting attorney and that it be commenced by information or indictment. While the citation here was technically a prosecution resulting in a conviction, that prosecution neither involved a prosecuting attorney nor an information or indictment. The single criminal episode statute therefore did not preclude Ririe's subsequent DUI prosecution.

Defendant has "high bar" to obtain subpoena for a victim's medical records.
State v. Barela, 2015 UT 22 (Lee). Barela, sought a post-verdict subpoena for the rape victim's medical records under Utah R. Crim. P. 14(b). The trial court denied the subpoena because it was untimely and because Barela had not shown that the records were reasonably certain to provide exculpatory evidence. Barela challenged the denial of the subpoena on appeal.

Held: The trial court was well within its discretion to deny the subpoena request as untimely. Rule 14(b) requires a request to be filed no later than 30 days before trial or "by such other time as permitted by the court." The fact that "a court *may* permit a request later than 30 days before trial does not mean that it *should* do so, much less that it would be reversed on appeal for not doing so." Because the supreme court had reversed for a new trial based on an erroneous elements instruction, it also clarified the standard for obtaining a victim's medical records on remand: (1) the defendant had to show to a "reasonable certainty" that "the records actually contain exculpatory evidence favorable to the defense," and (2) his request had to "identify the records sought with particularity and be reasonably limited as to subject matter."

Violation of terms of plea in abeyance need be proved only by preponderance of the evidence.

***Layton City v. Stevenson*, 2014 UT 37 (Durrant).** Defendant was arrested in Layton for patronizing a prostitute. He entered a no contest plea, which Layton City agreed to hold in abeyance for 18 months. A condition of the agreement was that defendant commit no "violations of law" other than minor traffic offenses. Six months later, defendant was charged with sexual solicitation in Sunset City. Defendant entered into a diversion agreement in that case. Layton City subsequently requested an order to show cause in district court, alleging that defendant had violated the terms and conditions of his plea in abeyance agreement based on the sexual solicitation charge in Sunset. The district court determined that a violation of law under the terms of the plea in abeyance agreement required a conviction and not merely an allegation of misconduct. It thus denied the city's request to enter a conviction on the no contest plea and it dismissed the case. The city appealed and the court of appeals reversed, holding that proof of a violation, not proof of a conviction, was the proper standard. The Utah Supreme Court granted certiorari.

Held: Affirmed. The plain meaning of the word "violations" does not require proof of a conviction to sustain a violation of the plea in abeyance agreement. Additionally, there is no presumption of innocence in a hearing to determine a violation of a plea in abeyance and the prosecution need only prove the violation by a preponderance of the evidence.

Violation of a plea in abeyance agreement need not be willful.

***State v Pantelakis*, 2014 UT App 113 (Bench).** Annbrosia V. Pantelakis was a deadbeat mom who was charged with criminal nonsupport. She entered into a plea in abeyance that required her to make monthly child support payments, make monthly payments to her arrearage, seek a job, and contact her plea in abeyance monitor. During the next eight months, Pantelakos made only two payments, failed to contact her monitor, and only filed one job application. The State filed an order to show cause. Pantelakis responded that the violations were not willful. The trial disagreed and entered her conviction. Pantelakis appealed.

Held: Affirmed. Violations of a plea in abeyance are governed by statute, not by constitutional rule. And the statute requires only that the state prove that the defendant failed to substantially comply with the agreement. Willfulness need not be shown.

A trial court may not acquit following a jury guilty verdict; nor may a trial court arrest judgment based on evidence not heard by the jury.

State v. Black, 2015 UT App 30 (Pearce). A jury found Mr. and Mrs. Black guilty of theft and other charges based on allegations that they misused a would-be Homebuyer's funds. The Homebuyer testified at trial that in one transaction, while the homebuyer was sick and on medications, Mrs. Black and a Title Agent used undue influence to get her to sign away her property interest. Mrs. Black denied the allegation at trial, but the Title Agent did not testify for health reasons. The trial court denied the Blacks motion for directed verdict and the jury convicted. After trial, the Blacks moved to arrest judgment, alleging that the prosecution withheld or concealed exculpatory evidence—the Title Agent's testimony—by convincing her that she could be prosecuted for talking to the Blacks or their attorneys. After a hearing, the trial court found that the Title Agent's post-verdict testimony seriously undermined the Homebuyer's trial testimony. The trial court arrested judgment, dismissed all the charges, and acquitted the Blacks. The State appealed.

Held: Reversed and remanded. A trial court may not acquit after a jury returns a guilty verdict. Utah R. Crim. P. 23 allows a trial court to arrest judgment "if the facts proved or admitted do not constitute a public offense ...." But a trial court may not arrest judgment on post-trial testimony never heard by the jury because the facts that testimony contained were "never proved nor admitted." The district court also erred under Utah R. Crim. P. 17(p) in dismissing the charges because the evidence was legally sufficient to establish the charged offenses. First, the trial court had already ruled the evidence sufficient when it denied directed verdict. If the Title Agent's testimony had been presented to the jury, it would have at most created an evidentiary conflict. An evidentiary conflict does not render the totality of the evidence insufficient. The appropriate remedy here was not to dismiss the charges, but to put the new evidence before the jury and let it resolve any conflicts.

Evidence that DUI Defendant was in actual physical control of car was not inherently improbable.

State v. Olola, 2014 UT App 263 (Davis) (memo). Julius Olola was convicted of DUI. He appealed the conviction, claiming that the court erred in denying his motion for a directed verdict. Olola asserted that the evidence that he was in actual physical control of the car was inherently improbable because the sole witness to his drunken escapades had provided material inconsistent statements.

Held: Affirmed. To succeed on a directed verdict motion based on inherently improbable evidence, the defendant must show both that some testimony or evidence materially inconsistent and that no other evidence supports that element of the offense. Here, while the witness did provide materially inconsistent statements, his testimony was supported by

damage to the Defendant's car and to other cars in the parking lot where the Defendant was driving drunk.

Guilty verdict on only two of three counts of unlawful sexual activity with a minor that occurred over the same weekend with the same victim was not inconsistent verdict that justified motion for a new trial.

State v. LoPrinzi, 2014 UT App 256 (Roth). Forty-three year-old Sarah Ann LoPrinzi was charged with three counts of unlawful sexual activity with a minor after a weekend of illicit sodomy and sexual intercourse with a fifteen year-old boy. After hearing the evidence, the jury convicted LoPrinzi of only two of the three counts. LoPrinzi sought a new trial, reasoning that if the jury believed the fifteen-year-old, it should have convicted her of all three counts, not just two. The court denied the motion, and LoPrinzi appealed.

Held: Affirmed. A court will not reverse verdicts as inconsistent unless reasonable minds could not have arrived at the verdict based on the law and evidence. If there is sufficient evidence as to each count, the court will not reverse the verdict absent some additional error. Here, no additional error occurred. Thus, the mere appearance of inconsistency in the verdict does not warrant a new trial.

Inconsistent verdicts won't get the defendant any relief, so long as sufficient evidence supports each of the guilty verdicts.

***State v. Salt*, 2015 UT App 72 (Roth).** Salt's ex-girlfriend tried to leave after she got tired of explaining why she broke up with him. Salt wouldn't let her leave. He called her names, twisted her head, hit her on the head with a piece of pottery, kicked her phone away when she tried to call 911, and hit her on the head with a metal pipe. When she finally got up, he momentarily blocked the doorway before she was able to push past him. The girlfriend ended up with 65 staples in her scalp, lingering back pain, and a lump on the side of her head. The jury acquitted Salt of aggravated kidnapping, but convicted him of third-degree felony aggravated assault involving domestic violence. Salt argued he should get a new trial because the acquittal on kidnapping was inconsistent with the conviction of aggravated assault.

Held: Affirmed. It's not enough to claim inconsistent verdicts; there has to be an additional error beyond a showing of inconsistency. So long as sufficient evidence supports each of the guilty verdicts, the convictions will stand. Here, evidence that Salt hit the victim with a metal pipe and a piece of pottery, causing her significant head injuries and lingering residual back pain was sufficient to support his aggravated assault conviction.

Respondent cannot collaterally attack civil protective order in criminal proceeding.

State v Hegbloom, 2014 UT App 213 (Voros). Karl Matin Hegbloom was the subject of a protective order obtained by his baby momma. During the hearing on the order, Hegbloom sought to present evidence in his favor. The commissioner denied his request to present evidence and instead proceeded by proffer. He instructed Hegbloom to file a written objection if Hegbloom disagreed with the decision not to take evidence. Hegbloom never filed a written objection. A few months later, Hegbloom was charged with violating the protective order. In

the criminal proceeding, Hegbloom contended that the order was invalid because he was denied due process at the hearing on the order. The trial court disagreed, and Hegbloom entered a conditional guilty plea, reserving his right to appeal the trial court's ruling on his collateral attack on the order.

Held: Affirmed. An order may be collaterally attacked if it is void. A judgment is void if it was entered without jurisdiction or without due process. But Hegbloom was given a hearing and an opportunity to contest the commissioner's findings. He simply chose not to avail himself of the process he was given.

Flight from officers was not part of same criminal episode as earlier domestic violence.
***State v Parkinson*, 2014 UT App 140 (Greenwood).** Police responded to a complaint of domestic violence at the home of Benjamin Parkinson. When they arrived, Parkinson had already left. While speaking with the victim, the officer saw Parkinson drive by. The officer commanded Parkinson to stop and gave chase, catching Parkinson after a car and foot chase. West Valley City charged Parkinson with four class B misdemeanor domestic violence offenses in its justice court. Parkinson pleaded guilty to one of those charges in exchange for dismissal of the others. West Valley City then charged Parkinson with DUI, fleeing, resisting arrest, and driving on a suspended license. Parkinson moved to dismiss the charges, claiming that they were part of the same criminal episode as the assault and that the double jeopardy clause now barred their prosecution. The trial court agreed, and the State appealed.

Held: Reversed. Parkinson's fleeing and DUI were not incident to his domestic violence crimes.

Defendant may not withdraw his sixteen-year-old guilty plea.
***State v Mardoniz-Rosado*, 2014 UT App 128 (Pearce).** In 1996, Juan Mardoniz-Rosado pleaded guilty to one count of theft as a class A misdemeanor. He paid a fine and successfully completed six months of court probation. Sixteen years later, Mardoniz-Rosado sought to withdraw his guilty plea by filing a motion in the criminal case. He claimed that he was never informed of his right to file a motion to withdraw his plea or his right to appeal. The trial court denied his motion to withdraw his plea but granted the motion to reinstate his appeal. In the court of appeals, Mardoniz-Rosado argued for the first time that the court erred by not exercising its inherent authority to withdraw his plea *sua sponte*. He further argued that the Court had authority to withdraw under three common law remedies: the ancient writ of coram nobis, the unusual circumstances exception, and the egregious injustice exception.

Held: Affirm. The Court lost jurisdiction to *sua sponte* withdraw the plea when it entered the final judgment in 1996. And Mardiniz-Rosado cannot pursue any extraordinary common law remedies until he first seeks relief under the Post-Conviction Remedies Act.

Court did not abuse discretion in refusing to sever robbery counts.
***State v Benson*, 2014 UT App 92 (Voros).** Malik Eagle Benson was charged with several counts of robbery for a 24-hour spree in which he robbed a man of his car at a taqueria, robbed the patrons and waitress at the taqueria, robbed two people outside a restaurant, , robbed a

gas station, and a robbed a burger king. Before trial, Benson moved to sever the taqueria counts from the rest of the counts, claiming that they were not sufficiently connected in their commission. And, although he conceded that the counts would all be admissible under Rule 404(b) in trials on the other, he claimed that he was prejudiced by trying all the counts together. The trial court denied the motion. A jury convicted Benson of several but not all of the counts. Benson appealed.

Held: Affirmed. Benson committed the robberies in a single spree within a 24-hour period. He used the same weapon and the same vehicle. The courts were thus connected together in their commission. And given that he conceded that the counts would be admissible in separate trials, he suffered no prejudice from joinder of the counts.

Defendant made a knowing, intelligent, and voluntary waiver of his right to a jury trial despite lack of colloquy with court.

***State v Finlayson*, 2014 UT App 282 (Greenwood).** Jeffrey Finlayson was charged with aggravated kidnapping and aggravated assault for a domestic violence incident involving his wife. After losing a round of motions in limine, Finlayson conferred with his attorney. They returned to court and the attorney told the court that Finlayson was worried about a jury hearing some of the evidence that the State would admit. He indicated that Finlayson wanted to waive his right to a jury trial. The court asked Finlayson whether that was correct. Finlayson replied that it was. The Court then gave the State twenty-four hours to decide whether it consented. The Court ultimately held a bench trial and convicted Finlayson as charged. Finlayson appealed, asserting that the Court plainly erred in holding a bench trial without assuring that Finlayson made a knowing and intelligent waiver of hi right to a jury trial.

Held: Affirmed. While a colloquy is always helpful in waiving important constitutional rights, it is not a prerequisite to finding a valid waiver of a right to a jury trial where other factors indicate a knowing, intelligent, and voluntary waiver. Here, counsel's representations in court and Finlayson's affirmation of those representations is sufficient to establish a knowing, intelligent, and voluntary waiver.

DEATH PENALTY

State law may not take an IQ score as final and conclusive evidence in assessing whether a defendant has an intellectual disability barring him from execution under *Atkins*.

Hall v. Florida, 134 S.Ct. 1986 (2014). Under *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth Amendment bars execution of persons with intellectual disability. By a 5-4 vote, the Court held that Florida law – which "defines intellectual disability to require an IQ test score of 70 or less" – is unconstitutional because it "creates an unacceptable risk that persons with intellectual disability will be executed." The Court faulted the Florida law for "tak[ing] an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence"; and for failing to recognize that an IQ score, "on its own terms, [is] imprecise." Finding that there is a strong consensus among the states *not* to use that strict cutoff and that the cutoff "goes against the unanimous . . . consensus" of medical

experts, the Court held "that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."

DISCOVERY

State violated Rule 16 by failing to disclose information known to police but not to prosecutor; but error did not merit reversal where defense never asked for continuance. ***State v Alvarado*, 2014 UT App 87 (Greenwood).** Adrian J Alvarado was charged with several drug related charges after he was stopped for a traffic violation and officers found drugs on his passenger. Specifically, they found marijuana, heroin, mushrooms, balloons, and a digital scale in a duffel bag that the passenger was hiding under her jacket. Alvarado had $1850 in cash on his person, leading officers to suspect that the duffel bag belonged to him. Alvarado asserted that the drugs and paraphernalia in the duffel bag did not belong to him, but he did admit that he planned on using the $1850 to purchase drugs. In the middle of the trial, the State learned from the officers that they had, in fact, conducted a controlled buy from Alvarado shortly before the traffic stop using a confidential informant. The State sought to admit this evidence. Alvarado objected, claiming that admission of the evidence would violate Rule 16, as Alvarado had made a discovery request for all exculpatory and inculpatory evidence. Alvarado also moved to dismiss the case. The trial court denied overruled the objection and denied the motion to dismiss. The jury convicted Alvarado, and he appealed.

Held: Affirmed. Because the information was known to the officers, it was deemed to be in the State's possession and subject to the mandates of Rule 16. But Rule 16 also provides for a continuance as a remedy. And Utah's courts have repeatedly held that a party must first avail himself of the remedies in Rule 16 before moving to dismiss the case or exclude the evidence. Because Alvarado never sought a continuance, he cannot appeal the trial court denial of his motion to exclude the evidence or dismiss the case.

DOUBLE JEOPARDY

Double jeopardy barred retrial when, after jury was sworn, unprepared prosecutor refused to present evidence, and trial court granted defense motion for directed verdict. *Martinez v. Illinois*, 134 S.Ct. 2070 (2014). Through a unanimous *per curiam* opinion, the Court summarily reversed an Illinois Supreme Court decision that rejected petitioner's double jeopardy claim. Because the state's counsel was not prepared, the state declined to present any evidence after the court swore in the jury; the trial court rejected the state's motion for a continuance and instead granted petitioner's motion for a directed verdict. The Illinois Supreme Court held that jeopardy had not attached because petitioner "was never at risk of conviction." Reversing, the U.S. Supreme Court held that (1) "jeopardy attaches when the jury is empaneled and sworn"; and (2) jeopardy terminated when the judge ruled that the evidence against him was insufficient.

DUE PROCESS – FIFTH AND FOURTEENTH AMENDMENTS

Defendant not denied due process right to notice merely because the prosecution tried him on the theory that defendant delivered the fatal blow, but then asking for an aiding-and-abetting instruction.
***Lopez v. Smith*, 135 S.Ct. 1 (2014).** Through a *per curiam* opinion, the Court unanimously reversed a Ninth Circuit decision that had granted habeas relief to respondent on the ground that his Sixth Amendment and due process right to notice had been violated. The Ninth Circuit faulted the prosecution for trying the case on the theory that respondent himself delivered the fatal blow to the victim, but then requesting an aiding-and-abetting instruction. In reversing, the Court noted that (as even the Ninth Circuit acknowledged) the information charging respondent with first-degree murder put him on notice that he could be convicted as either a principal or an aider-and-abettor. And none of the Court's decisions "clearly establish that a defendant, once adequately apprised of such a possibility, can nevertheless be deprived of adequate notice by a prosecutorial decision to focus on another theory of liability at trial." Habeas relief was therefore barred by 28 U.S.C. §2254(d)(1).

The definition of "cohabitant" in the Cohabitant Abuse Act is not overly broad or vague.
***State v. Salt*, 2015 UT App 72 (Roth).** Salt beat up his former live-in girlfriend and was convicted of third-degree felony aggravated assault involving domestic violence. The Cohabitant Abuse Act defines "cohabitant" as "a person who ... resides or has resided in the same residence as the other party." Salt challenged the constitutionality of this definition as being overly broad and vague.

Held: Affirmed. The definition of "cohabitant" does not infringe on a person's First Amendment right to freedom of association because it does not penalize a person for choosing to reside with another person. It only prohibits violence or threats of violence against cohabitants. Such acts are not the sort of expression the First Amendment protects. The definition of "cohabitant" is also not vague as applied to Salt. He and the victim lived together in Salt's house for nearly two years and the victim had moved out only two months earlier. The statutory definition of cohabitant would have put Salt on notice that the victim was a cohabitant and that his assault on her violated the Cohabitant Abuse Act.

DUE PROCESS – STATE CONSTITUTION

Admitting eyewitness identification that was not as troubling as that admitted in *Ramirez* did not violate Utah's due process clause.
***State v. Glasscock*, 2014 UT App 221 (Roth).** A man wearing an eye patch robbed a student of his backpack at gunpoint and sped off in a gray Dodge Stratus with his two friends. Police stopped a gray Stratus containing Glasscock (who had an eye patch) and two other men. The student (looking through binoculars at the three men) identified Glasscock as the man who robbed him. A search of the car yielded a loaded pistol under the driver's seat and a short rifle. Glasscock ultimately confessed that he had committed the crime and that one of his cohorts had thrown the backpack out of the car before police arrived. Glasscock unsuccessfully

sought to exclude the student's identification of him as unconstitutionally unreliable under the due process clause of Utah's constitution.

Held: Affirmed. The victim's identification of Glasscock was not nearly so troubling than that in *State v. Ramirez*, 817 P.2d 774 (Utah 1991), which was constitutionally admissible. The robber in *Ramirez* was masked; Glasscock was not. And *u*nlike the highly suggestive showup in *Ramirez*— where the witness viewed the defendant all alone, handcuffed to a fence, and spotlighted— the victim here could see all three of the men that police apprehended. The identification therefore was not constitutionally unreliable.

EVIDENCE

Rule 106: "Rule of Completeness" does not require admitting entire police interrogation video when the omitted portions are not necessary to qualify, explain, or place into context the portion already introduced.

***State v. Jones,* 2015 UT 19 (Nehring).** Police interviewed Jones twice about a young woman found murdered in her car. Jones did not testify at his murder trial. A detective described the first interview and testified extensively about the second. The detective had the interview transcripts with him on the stand and, at one point, read from them. The transcripts were not entered into evidence. When the defense tried to introduce a videotape of the entire second interview, the trial court excluded it as inadmissible hearsay under URE 801. Defendant argued that the entire second interview should have been admitted under the "rule of completeness" as codified in URE 106.

Held: Affirmed. Rule 106 provides that when "a writing or recorded statement or part thereof is introduced by a party," the adverse party "may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The Court dodged whether the rule against hearsay overrides rule 106, finding instead that Jones had not shown that any omitted portion was "necessary to qualify, explain, or place into context the portion already introduced." The detective's testimony sufficiently contextualized Jones's statements during the second interview: the detective accurately related the substance of the interview and defense counsel elicited further details during cross-examination.

Rule 402/403: Child abuse defendant's testimony suggesting that a DCFS investigation had exonerated her opened the door to rebuttal testimony that DCFS had in fact substantiated an allegation of abuse against defendant.

***State v. Ruiz*, 2014 UT App 143 (Roth).** Ruiz was convicted of reckless child abuse homicide after an infant in her care died from apparent violent shaking. Ruiz testified that although DCFS had initially removed her own children from her home, their investigation was more thorough than that of the police and that DCFS had not "charged" her with anything. The State called a DCFS worker in rebuttal to testify that in fact DCFS had substantiated an allegation of child abuse against Ruiz. On appeal, Ruiz argued that even though she had opened the door, the

DCFS worker's testimony should have been excluded as irrelevant and unfairly prejudicial under rules 402 and rule 403.

Held. Affirmed. By taking the witness stand, a defendant can "open the door" to evidence that might otherwise be considered "irrelevant" or "unfairly prejudicial." Once she does so, she cannot complain when the opposing party seeks to rebut it. Here, Ruiz's testimony falsely suggested that DCFS had exonerated her of any wrongdoing. The prosecution was within its rights to rebut that false impression.

Rule 403: Gang-related evidence was highly probative in gang-related murder to prove intent, motive, and lack of self-defense.

***State v. Gonzalez*, 2015 UT 10 (Parrish).** While "Dog-Town guy" Gonzalez stood outside a department store door waiting for his girlfriend, a rival gang member came in with his girlfriend, sister, and 4-year-old nephew. The two exchanged "words." After calling some of his homeboys, Gonzalez followed his rival into a restroom where he stabbed the rival to death in front of the four-year-old nephew. Gonzalez admitted to the killing, but claimed he acted in self-defense. At trial, although Gonzalez stipulated that both he and the victim were gang members, the trial court allowed the State to present both lay and expert gang-related testimony.

Held: Affirmed. Gang-related evidence can be problematic under both rule 403 and 404 because of the potential prejudice of "guilt by association." But gang evidence is not necessarily *unfairly* prejudicial and it should be admitted where it has high probative value. Here, it was highly probative to prove intent, motive, and lack of self-defense. Gonzalez's stipulation to gang membership neither rendered the gang-related evidence irrelevant nor unfairly prejudicial.

Rule 403: Color photos of assault victim's blood-spattered bedroom and close-ups of her various injuries were admissible to show the extent of the victim's injuries, an element of the crime.

State v. Kataria, 2014 UT App 236 (Voros) (cert. denied). Kartaria beat his live-in girlfriend, inflicting injuries to her face, a crush injury to a hand, extensive bruising, a dislocated toe, multiple fractures in her foot, a broken nose, and bleeding in her brain. During "this dispute," Kataria also wrest the victim's cell phone from her, twice ordered her into the bathroom to shower blood off her body, and stopped her from leaving the room to get towel. Kataria was charged with aggravated assault and aggravated kidnapping. An element of both crimes as charged was that Kataria had inflicted serious or substantial bodily injury on the victim. On appeal, Kataria challenged the admission of several photos showing the victim's blood-spattered room and close-ups of her injuries.

Held: Affirmed. The photos were relevant to proving an essential element of the charged crimes. That fact that Kataria did not dispute the extent of the victim's injuries did not render the evidence less relevant. Nor was it a basis for depriving the prosecution of the opportunity to the legitimate moral force of its evidence. Color photographs of the body of a victim—even

photographs that are gruesome—are not inadmissible if they are probative of essential facts, even if they may be cumulative of other evidence.

Rule 403: Video footage of assault victim convulsing on floor covered in blood was not substantially more prejudicial than probative.

***State v. Rupert*, 2014 UT App 279 (Davis).** Robert Rupert was housed in the Box Elder County Jail with four other inmates, including James Pettus. Video footage of the cell recorded Rupert jumping Pettus from behind while he was in confrontation with another inmate. Rupert punched Pettus repeatedly, breaking his nose, blacking two of his eyes, and injuring one of his ears. The video showed Pettus after the attack covered in blood and convulsing on the floor. Rupert was charged with assault by a prisoner and sought to exclude the post-attack footage of the victim as unduly prejudicial under Rule 403. The trial court denied the request and the jury convicted Rupert. Rupert appealed.

Held: Affirmed. The court reviewed its cases excluding gruesome evidence for being substantially more prejudicial than probative. In light of those cases, the evidence of the victim covered in blood convulsing on the floor, while was of minimal probative value, was not so prejudicial as to be excluded under Rule 403.

Rule 403: Officer's testimony that in his experience about 90% of the crimes he saw were drug driven was not impermissible "anecdotal statistical evidence."

***State v. Jones*, 2015 UT 19 (Nehring).** At Jones's murder/aggravated robbery trial, a police officer testified that in his experience, about 90% of the crimes he dealt with were drug driven, often for less than $50's worth of drugs. Jones challenged the testimony on appeal as impermissible "anecdotal statistical evidence."

Held: Affirmed. The Court has previously condemned anecdotal statistical evidence when it concerns matters "no susceptible to quantitative analysis," such as opinions on the veracity of the witness. But the detective here testified regarding the percentage of crimes linked to drug use—a quantifiable metric. And the State was clear that it was not seeking official police statistics, only the officer's professional opinion based on personal observations. Plus, no unfair prejudice to Jones where the jury had already heard about the victim's drug use and Jones's admission that he had used drugs with the victim the night of her death.

Rule 404(b): Evidence that child had been previously injured in remarkably similar fashion as the fatal injury was admissible to prove identity.

***State v. Lucero*, 2014 UT 15 (Durrant).** Lucero's two-year-old son died after someone bent him backwards, snapping his spine and pulling apart his aorta. The autopsy showed a prior spinal injury near the fatal one had been inflicted one to two weeks earlier with the same backward-bending force. Lucero told eight people, including police, that she was alone with the boy when the fatal injury was inflicted. She had also told others that the boy had difficulty walking a week or two earlier when he was alone with her and her mother. Lucero changed her story after police told her that her son had died from inflicted trauma. Now she claimed that her boyfriend was alone with the boy at the time of both the fatal and prior injuries. Lucero

appealed the admission of the prior injury under rule 404(b) because (1) the State had not first presented clear and convincing evidence that she caused the prior injury; (2) the evidence was not relevant to a proper noncharacter purpose; (3) the evidence did not pass rule 403's balancing test; and (4) the trial court did not scrupulously examine the evidence before admitting it.

Held: Affirmed. The evidence was relevant to the proper noncharacter purpose of identity, a hotly-contested issue at trial. In essence, the State argued that the similarity of the injuries proved modus operandi, which bears on the ultimate issue of identity. But here the relevance was conditional unless and until the prosecution tied Lucero to the prior injury. When 404(b) evidence is conditionally relevant, rule 104 requires the prosecution to make a threshold showing, by a preponderance of the evidence, that the defendant committed the other bad acts. The Court rejected the clear and convincing standard urged by the defense. The Court also distinguished between conditionally relevant evidence under 404(b) to prove identity and battered child syndrome evidence to prove nonaccidental trauma. The Court also held that rule 403 did not require exclusion because the evidence was highly probative to a contested issue and any potential for unfair prejudice did not substantially outweigh that probative value. The Court clarified that in a rule 403 weighing, a trial court need not weigh all the so-called *Shickles* factors, only those that are relevant. The trial court should also consider any other relevant factors. Finally, the trial court scrupulously examined the evidence before admitting it by engaging in rule 404(b)'s three- or four-step analysis on the record.

Rule 404(b): Conviction reversed because trial court did not "scrupulously examine" evidence that defendant sold drugs to sex abuse victim's mother and encouraged mother to prostitute herself to pay for the drugs.

***State v. Thornton*, 2014 UT App 265 (Pearce) (State's cert. petition pending).** Thornton repeatedly had sex with the 12-year-old daughter of a woman with whom he shared an apartment. After two mistrials (including a hung jury), the trial court allowed the prosecution to introduce evidence under rule 404(b) that Thornton supplied drugs to the mother and encouraged her to prostitute herself to pay for the drugs. The stated purposes for introducing the evidence was to explain why the victim delayed reporting the abuse to her mother and how Thornton was able to exercise such power and authority over both the mother and the victim.

Held: Reversed. The court of appeals declined to decide whether the evidence was admissible under rule 404(b), instead reversing because the trial court had not scrupulously examined the evidence before admitting it. The court of appeals acknowledged that "in many respects," the trial court's ruling reflected the required "care and precision" in deciding admissibility, the trial court erred in not performing a separate analysis for the drug and prostitution evidence. The court reasoned that if the trial court had separately analyzed the evidence, it might have admitted the drug evidence while excluding the prostitution evidence.

Rule 404(c)/403: Uncharged acts of sexual abuse against the same child victim as part of an ongoing course of conduct are not unfairly prejudicial, particularly when offered as propensity evidence under rule 404(c).

***State v. Lintzen*, 2015 UT App 68 (Roth).** Lintzen sexually abused his stepdaughter over a six-year-old period, starting when she was about five. He was charged with a single count of aggravated sexual abuse of a child based on his most recent fondling of the child over and under her clothing. The trial court granted the State's pretrial motion to admit testimony of Lintzen's prior uncharged acts of sexual abuse against his stepdaughter, including acts of sodomy and vaginal and anal penetration.

Held: Affirmed. Rule 404(c) permits evidence that a defendant committed other acts of "child molestation to prove a propensity to commit the crime charged." Like rule 404(b), rule 404(c) evidence is subject to rule 403 balancing: its probative value cannot be substantially outweighed by its potential for unfair prejudice. But the potential for unfair prejudice is low when, as here, the uncharged acts of abuse are committed by the same defendant against the same victim, during the same uninterrupted course of conduct. A jury will either believe or disbelieve the victim based on her own credibility, not on whether she asserts that the act occurred several more times. The potential for unfair prejudice is even lower under rule 404(c), which unlike rule 404(b), allows the evidence in to show propensity.

Rule 412: Vague allegations that rape victim had previously consented to "rough sex" with defendant and "pretty much everything else one could think of" not specific enough for admission.

***State v. Bravo*, 2015 UT App 17 (Pearce) (Defendant's cert. pet. pending).** Bravo and the victim divorced in 2008, but continued their sexual relationship until 2010, when they fought, called police, and the victim told Bravo to never come back. A few weeks later, Bravo forced his way into the victim's apartment, where he pinned her to the ground with a dog leash against her neck, raped her vaginally, and then raped her anally. The trial court let Bravo testify that the two had continued their sexual relationship after the divorce, but would not let him testify that the couple had previously engaged in consensual (1) unspecified "numerous other sex acts well outside this community's standards for sexual behavior," including "pretty much everything else one could think of," that made "the events on the night in question" look "tame" in comparison; (2) "rough sex," including bondage, sadomasochism, and autoerotic asphyxiation; and (3) anal sex.

Held: Affirmed. Under *State v. Richardson*, 2013 UT 50, the trial court erred in finding that the proffered testimony was not relevant to show consent under rule 412(b)(2). But relevant evidence under rule 412(b)(2) must still pass the rule 403 balancing test. Rule 412 evidence is presumptively inadmissible for purposes of rule 403. And rule 412 requires that a defendant not only to proffer "specific instances" of the victim's sexual behavior with him, but also to "specifically describe the evidence" to be admitted. Bravo's 50-Shades-of-Grey defense of "pretty much everything you" can think of, "rough sex," bondage, sadomasochism, and autoerotic asphyxiation can mean a lot of different things to different people. Bravo's vague

proffer was thus not specific enough to allow the trial court to assess its probative value and then weigh it against the potential for unfair prejudice to the victim.

Rule 412: Trial court properly excluded evidence that 12-year-old victim was sexually active with a boy her age at the same time defendant was having sex with her.
***State v. Thornton*, 2014 UT App 265 (Pearce) (Defendant's cross-cert. pet. pending).** Thornton repeatedly had sex with the 12-year-old daughter of a woman with whom he shared an apartment. Thornton supplied the girl's mother with drugs and encouraged the mother to prostitute herself to pay for the drugs. The girl eventually disclosed the abuse by telling her mother that she believed that she Thornton had gotten her pregnant. The trial court wouldn't let Thornton put in evidence that the victim was having a sexual relationship with a 12-year-old boy at the time of the abuse.

Held: Affirming trial court's rule 412 ruling, but reversing on rule 404(b) ruling (see above). The victim's sexual relationship was not admissible under rule 412(b)(1) because her erroneous belief that she was pregnant was not "semen, injury, or other physical evidence." The evidence was also not necessary to rebut an inference that the victim must be telling the truth because she lacked the sexual sophistication to fabricate her accusations. Under the facts of this case, it was unlikely that the jury viewed the victim as a sexual innocent, particularly where her mother openly entertained her prostitution clients in the home.

Rule 606(b): A party can't use one juror's affidavit of what another juror said in deliberations in order to demonstrate the other juror's dishonesty in voir dire.
***Warger v. Shauers*, 135 S.Ct. 521 (2014).** Federal Rule of Evidence 606(b) provides that "[d]uring an inquiry into the validity of a verdict," evidence "about any statement made or incident that occurred during the jury's deliberations" is inadmissible. The Court unanimously held that "Rule 606(b) precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty during *voir dire*."

Trial court improperly excluded as hearsay evidence that murder investigation failed to follow-up on leads implicating another person.
***State v. McCullar*, 2014 UT App 215 (Voros) (cert. denied).** On December 22, 2009, Filberto Robles Bedolla was found dead in his apartment. The police investigation implicated Robert L. McCullar, who ultimately was charged with Bedolla's murder. At trial, McCullar tried to impeach the murder investigation by presenting evidence that police had evidence that another person, Dawna Finch, had committed the murder. Unfortunately for McCullar, the trial court excluded most of the evidence inculpating Finch. McCullar proffered testimony from four witnesses: two of Bedolla's friends, a convenience store clerk, and Bedolla's landlord. The convenience store clerk would have testified that several days before the murder Bedolla came into the store and stated that Finch had demanded money and threaten to rob him if he did not pay. The landlord would have testified that Bedolla seemed out of sorts in the days before the murder and told him of a plan to move to California. The trial court excluded the testimony of both witnesses as inadmissible hearsay. Bedolla's friends would have provided

evidence of Finch's violent character by testifying of an incident in which she pinned another friend to a bed and held a pair of scissors to his throat in a dispute over drug money. The trial court excluded their testimony as substantially more prejudicial than probative under rule 403. The jury found McCullar guilty of murder. McCullar appealed.

Held: Reversed. McCullar did not offer the statements of the clerk and landlord to prove that what Bedolla said was true. Rather, he offered them to impeach law enforcement's investigation of Bedolla's murder. The statements were thus not hearsay. The statements of Bedolla's friends was not substantially more prejudicial than probative and its exclusion violated McCullar's constitutional right to an opportunity to present a meaningful defense.

Rule 702/403: Although Y-STR DNA is most helpful in excluding possible suspects, it is sufficiently reliable to be admitted as identification evidence.

***State v. Jones*, 2015 UT 19 (Nehring).** Tara Brennan was found murdered by strangulation in her Honda. She had belt around her neck, stab wounds to her face, defensive wounds on her hands, and a slash to her neck. Jones admitted to police that he had smoked cocaine with the victim in her car the night she was murdered, but claimed she was alive when he left her. Two years later, Y-STR DNA testing on the belt and the victim's fingernails produced a profile that "matched" Jones in that it was a "rare profile" that excluded 99.6 percent of the male population, but not Jones. Unlike traditional PCR STR testing, Y-STR DNA tests only for male DNA and is thus statistically less powerful. A Y-STR DNA "match" means only that an individual cannot be excluded as the source of the sample. Jones complained that Y-STR DNA cannot reliably be used to identify a suspect.

Held: Affirmed. Under rule 702, courts are merely a "gatekeeper" that ensures a "minimal threshold" of reliability before permitting expert testimony. This Court has already affirmed the reliability of the underlying methodology of both PCR STR and Y-STR DNA analysis. Here the statistical conclusions from the Y-STR DNA (which was all that Jones challenged) went to the weight of the testimony and not to its underlying scientific reliability. The trial court thus was right to let it in. Rule 403 likewise did not exclude the evidence. Where, as here, expert testimony accurately presents the evidence and properly describes the evidence's scientific limitations, it is not unfairly prejudicial or likely to confuse the jury.

State laid sufficient foundation to admit fingerprint evidence.

***State v Woodard*, 2014 UT App 162 (Orme).** Eric Woodard was charged with drug trafficking after officers executing a search warrant on his home found a large bag of ecstasy. A crime scene tech was able to lift a single print from the bag. The print matched Woodard. At trial, the State presented evidence from the crime scene tech and the crime lab analyst who matched the prints. The crime lab analyst brought an exhibit that depicted the print from the bag and the matching print from Woodard's ten card print taken at the jail. Defense counsel objected to the admissibility of the exhibit, claiming that the State had not shown that the two prints depicted in the exhibit were, in fact, the print from the bag and Woodard's print. The trial court overruled the objection. It noted that the crime scene tech had testified that she photographed the print and put it in a database shared with the crime lab. The crime lab

analyst had testified that retrieved the print from that database. The court also noted that the ten-print card bore the Woodard's name, birthdate, social security number, the date of his arrest, and the jail he was booked into. The jury convicted Woodard, and he appealed.

Held: Affirmed. Any questions in the authenticity of the prints in the exhibit go to the weight of the evidence, not its admissibility.

Fingerprint evidence is still admissible.
***State v Woodard*, 2014 UT App 162 (Orme).** Eric Woodard was charged with drug trafficking after officers executing a search warrant on his home found a large bag of ecstasy. A crime scene tech was able to lift a single print from the bag. The print matched Woodard. At trial, the crime lab analyst who matched the prints testified about the science behind fingerprint matching. He explained that there is no national standard, but that there is an overarching practice called the ACE-V methodology that is advocated. The process includes having a second analyst verify the work of the first. The State did not present testimony from the second analyst. But the testifying analyst asserted that that a second analyst did look at the prints and that no prints leave the crime lab without being reviewed by a second analyst. At the close of the state's case, Woodard moved to strike the fingerprint evidence because fingerprint evidence is unreliable and because the analyst had not followed the ACE-V protocol. The court denied the motion, and the jury convicted Woodard. He appealed.

Held: Affirmed. Any question about the accuracy of the analyst's testimony go to the weight of the evidence, not its admissibility.

FIFTH AMENDMENT—SELF INCRIMINATION

Although 5th Amendment requires a "no adverse inference" instruction from a defendant's failure to testify at the guilt phase, it's an open question whether a defendant is entitled to the same instruction for his silence at sentencing.
***White v. Woodall*, 134 S.Ct. 1697 (2014).** By a 6-3 vote, the Court held that the Sixth Circuit erred when it granted habeas relief based on respondent's claim that he was wrongly denied a "no adverse inference" instruction at the capital sentencing proceeding that followed his plea of guilty to murder and the statutory aggravating circumstances. In *Carter v. Kentucky*, 450 U.S. 288 (1981), the Court held that the Fifth Amendment requires a trial judge to instruct the jury at the guilt phase that it should not draw any adverse inferences against a defendant due to his failure to testify. And in *Mitchell v. United States*, 526 U.S. 314 (1999), the Court – relying on *Estelle v. Smith*, 451 U.S. 454 (1981) – disapproved a trial judge's drawing an adverse inference from the defendant's silence at sentencing "with regard to factual determinations respecting the circumstances and details of the crime." The Sixth Circuit had concluded that those decisions, in combination, established respondent's entitlement to a no-adverse-inference instruction. Disagreeing, the Court explained that "*Mitchell* itself leaves open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence." Whether a no-adverse-inference instruction is required in these circumstances – an issue the Court did not resolve – is not "beyond any possibility for

fairminded disagreement," as required for relief under 28 U.S.C. §2254(d)(1). The Court rejected the notion that §2254(d)(1) authorizes habeas relief where a state court unreasonably refused to extend a governing legal rule: "[§]2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat that failure to do so as error."

Suspect interviewed in police car during execution of search warrant on home was not in custody for purposes of *Miranda*.

***State v. Fuller*, 2014 UT 29 (Durrant).** Law Enforcement discovered child pornography on a computer using Limewire. They used an administrative subpoena to trace the IP address of the computer to an account registered to Robert Fuller. Further investigation revealed that Fuller lived in a home with other males and that he was facing child sex abuse charges. Two months after first discovering child pornography, officers obtained a search warrant for the home that authorized them to search all computers and other electronic devices in the home for child pornography. When officers executed the warrant, they found Fuller's brother, Bradley fuller, in the home. Bradley Fuller tried to manipulate his computer before the officers seized it. An officer took Bradley outside the home and interviewed him in an unmarked police car. The officer told Bradley that he was free to leave at any time during the interview. Bradley admitted to the officer that he had some "inappropriate material" on his computer. A search of his computer revealed images and video of child pornography. Bradley moved to suppress his confession, claiming that it was obtained in violation of *Miranda*. The trial court denied the motion.

Held: Affirmed. Bradley Fuller was not in custody when he was interviewed. Although the interview was conducted in a police car, Bradley was specifically told that he was free to leave at any time. He was not handcuffed and was not arrested at the end of the interview. He also was not the initial focus of the investigation. He only became the focus after he openly admitted that he had inappropriate materials on his computer.

Arrestee's ambiguous invocation of right to counsel was cured by officer's further questioning about desire for counsel.

***State v. Stewart*, 2014 UT App 289 (Orme) (memo).** Shannon Stewart was stopped for a broken taillight. The officer noticed signs of impairment, conducted a DUI investigation, and ultimately found drugs and arrested Stewart for DUI and drug possession. The officer Mirandized her and then asked whether she understood her rights and whether she would speak with him. Stewart replied that she understood her rights and that she would answer some questions but that she would probably want an attorney for others. The officer told Stewart that if she wanted an attorney that he would not be able to talk to her. He then verified that she understood her rights and that she could have an attorney. Stewart replied that she understood her rights and wanted to cooperate. The officer then resumed his questioning. Stewart then admitted to relapsing and possessing the drugs. Stewart was convicted by a jury of drug possession. She appealed, claiming that her attorney was ineffective for not moving under *Miranda* to suppress her admissions.

Held: Affirmed. Counsel was not ineffective if a motion to suppress would have been futile. Here, Stewart made an ambiguous invocation of her right to counsel. In such a case, the questioning must stop, and further questioning is limited only to clarifying the ambiguous invocation. And the officer did just that and obtained a valid waiver of Stewart's *Miranda* rights.

Test for whether someone is in custody for *Miranda* purposes is not whether he is "free to leave," but whether his "freedom of action is curtailed to a degree associated with formal arrest."

***Layton City v. Carr*, 2014 UT App 227 (Christiansen).** Carr was convicted at a bench trial of domestic violence assault. Police interviewed Carr on his front porch when they responded to a 911 call reporting domestic violence. They did not give Carr his *Miranda* warnings. Carr asserted that his trial counsel was ineffective for not moving to suppress his statements to police.

Held: Affirmed. Carr has not shown that he was in custody and that the police were therefore required to give him *Miranda* warnings. Whether someone is "free to leave" does not determine whether he is in custody for *Miranda* purposes. Rather, the question is whether the suspect's "freedom of action is curtailed to a degree associated with formal arrest." Relevant factors include the site of the interrogation, whether the investigation focused on the accused, whether objective indicia of arrest are present, and the length and form of the interrogation. Carr was interviewed on the front porch of the house where he lived, the interviewed focused on what happened that night instead of on whether Carr committed a crime, there were no indicia of formal arrest (such as guns or handcuffs), and the interview was brief and casual.

Being "toasted" from "eating Lortabs," using heroin, and drinking three-quarters of a gallon of vodka not enough to show confession was coerced.

***State v. Glasscock*, 2014 UT App 221 (Roth).** A man wearing an eye patch robbed a student of his backpack at gunpoint and sped off in a gray Dodge Stratus with his two friends. Police stopped a gray Stratus containing Glasscock (who had an eye patch) and two other men. The student (looking through binoculars at the three men) identified Glasscock as the man who robbed him. During a 30-minute interrogation, Glasscock finally admitted to committing the crime. Before trial, Glasscock unsuccessfully challenged his confession, arguing that during the interrogation he was "significantly impaired" from alcohol, heroin, pain pills, and several mental health disorders. Glasscock claimed that the officers knew he was impaired and had coerced his confession by employing a false friend technique.

Held: Affirmed. A confession is not compelled merely because a defendant was under the influence of drugs or alcohol at the time police questioned him. It is not enough to show that police know of a suspect's mental illness or deficiencies at the time he confesses; rather, defendant must show that the police effectively exploited his weaknesses to obtain the confession. After reviewing the video recording of the interrogation, the Court found the trial court's findings that the confession was not coerced to be unassailable. The interrogation was only 30 minutes and the detectives did not misrepresent the strength of the evidence against

Glasscock, make any threats, or falsely promise significantly more lenient treatment if he confessed. Also, Glasscock's answers to the questions were detailed and lucid. Nothing in the interrogation, other than his own statements, suggested that he was significantly impaired or suffering from a mental illness.

State proved knowing and voluntary waiver of privilege against self-incrimination despite lost written waiver.

***State v Rogers*, 2014 UT App 89 (Orme).** Ernest Rogers was suspected of sexual abuse of a child. He accepted an invitation to be interviewed at the police station. The video recorded interview showed that the detective read Rogers his rights and had Rogers sign a written waiver. Rogers then provided a full confession. The interview lasted only ten minutes. Once he was charged, Rogers moved to suppress his confession, claiming that it was taken in violation of his privilege against self-incrimination. Although the police had subsequently lost the written waiver, the trial court denied the motion. Rogers entered a condition guilty plea and appealed.

Held: Affirmed. Rogers was informed of his rights. He acknowledged understanding them by signing the form. And the police did nothing coercive.

FOURTH AMENDMENT

Search-incident-to-arrest exception to warrant requirement does not apply to digital content on cell phones.

***Riley v. California*, 134 S.Ct. 2473 (2014).** The Court unanimously held that the police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. The Court held that the search-incident-to-arrest exception to the warrant requirement does not apply "with respect to digital content on cell phones" because the governmental interests that support the doctrine – harm to officers and destruction of evidence – are rarely implicated "when the search is of digital data," while the privacy interests at stake are high given the immense amount of personal information contained on cell phones. The Court rejected various "fallback arguments" proposed by California and the United States as "flawed" and instead noted that the exigent circumstances exception could justify the warrantless search of a particular cell phone.

Anonymous tip about reckless driving, without additional police observation, gave police reasonable suspicion that driver was drunk.

***Prado Navarette v. California*, 134 S.Ct. 1683 (2014).** By a 5-4 vote, the Court held that the police, consistent with the Fourth Amendment, may stop a vehicle based on an anonymous tip about reckless driving even where the police did not personally observe reckless driving. The Court found that "under the totality of circumstances, the officer had reasonable suspicion that the driver was intoxicated." In reaching that conclusion, the Court pointed to various "indicia of reliability" in the anonymous call here: it described wrongdoing by a specific vehicle based on first-hand observation; it was made shortly after the incident; and the caller used the 911

emergency system, which can be recorded. And, the Court added, the alleged behavior objectively suggested drunk driving, a serious offense.

Reasonable suspicion can be based on a reasonable mistake of law.
***Heien v. North Carolina*, 135 S.Ct. 530 (2014).** By an 8-1 vote, the Court held that a police officer's reasonable "mistake of law can give rise to the reasonable suspicion necessary to" justify a traffic stop. In this case, an officer stopped petitioner's car for having one brake light that did not work and then found drugs in the car — but the North Carolina courts then interpreted state law as requiring only one working brake light (meaning petitioner had not broken the law). The Court explained that reasonableness is the touchstone of the Fourth Amendment and that, just as searches and seizures may be based on reasonable mistakes of fact, so too can they be based on reasonable mistakes of law.

Officers reasonably used deadly force under the 4th Amendment—and therefore were entitled to qualified immunity—when they shot a driver in a fleeing car to put an end to a dangerous car chase.
***Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014).** The Court unanimously held that the Sixth Circuit erred when it denied qualified immunity to "police officers who shot the driver of a fleeing vehicle to put an end to a dangerous car chase." Relying on *Scott v. Harris*, 550 U.S. 372 (2007), the Court held that the officers acted reasonably in using deadly force, and therefore did not violate the Fourth Amendment. The Court further held that even if the officers' conduct had violated the Fourth Amendment, they would be entitled to qualified immunity because no case around the time of the incident "clearly established the unconstitutionality of using lethal force to end a high-speed car chase."

Third Circuit wrong to deny police officer qualified immunity merely because he initiated a "knock and talk" at the back door instead of the front.
***Carroll v. Carman*, 135 S.Ct. 348 (2014).** Through a unanimous *per curiam* opinion, the Court summarily reversed the Third Circuit and held that a police officer was entitled to qualified immunity from a §1983 lawsuit alleging he violated the Fourth Amendment. The Third Circuit had held that the officer violated the Fourth Amendment by conducting a "knock and talk" interview at the back door of a residence. In the Third Circuit's view, knock and talk encounters "must begin at the front door." Reversing, the Supreme Court held that no precedent clearly established that rule, thus entitling the officer to qualified immunity. The Court found that the one precedent relied on by the Third Circuit, if "it says anything about this case, . . . arguably supports [the officer's] view."

Drugs found during search incident to arrest pursuant to a valid warrant must be suppressed because officer unlawfully detained defendant before discovering the warrant.
***State v. Strieff*, 2015 UT 2 (Lee) (State SCOTUS cert. pet. pending).** In a unanimous decision, the Utah Supreme Court held that an outstanding arrest warrant is not a intervening circumstance that attenuates an unlawful stop from the evidence discovered during the arrest on the warrant. Edward Strieff was stopped as he was leaving a suspected drug house. During the stop, the officer discovered that Strieff had an outstanding traffic warrant. He arrested

Strieff and during a search incident to arrest discovered drugs on Strieff's person. The State conceded that the officer lacked reasonable suspicion to stop Strieff. But it argued that suppression was not an appropriate remedy because Strieff's warrant attenuated the search from the bad stop. Both the district court and court of appeals agreed. Strieff sought and was granted a writ of certiorari.

Held: Reversed. While there is an abundance of federal and state case law declaring that an outstanding arrest warrant is an intervening circumstance that can attenuate an arrest and search from a bad stop, there are also opinions to the contrary, and the United States Supreme Court has never addressed the issue. The court thus chose to fashion its own analysis. It held that the attenuation doctrine only applies to voluntary acts of the defendant such as a confession or consent. Strieff's warrant is thus not an attenuating circumstance. And while his arrest and search incident to arrest remain valid, the drugs must be suppressed as the fruits of an unlawful detention.

Warrant to search computers for child pornography was not stale and was described places to be searched with sufficient particularity.

***State v. Fuller*, 2014 UT 29 (Durrant).** Law Enforcement discovered child pornography on a computer using Limewire. They used an administrative subpoena to trace the IP address of the computer to an account registered to Robert Fuller. Further investigation revealed that Fuller lived in a home with other males and that he was facing child sex abuse charges. Two months after first discovering child pornography, officers obtained a search warrant for the home that authorized them to search all computers and other electronic devices in the home for child pornography. When officers executed the warrant, they found Fuller's brother, Bradley fuller, in the home. Bradley Fuller tried to manipulate his computer before the officers seized it. He then admitted that he had some "inappropriate material" on his computer. A search of his computer revealed images and video of child pornography. Bradley Fuller challenged the warrant, claiming that it was stale, that it lacked probable cause because it omitted certain details, and that it did not describe with sufficient particularity the things to be searched. The trial court denied the motion.

Held: Affirmed. Fuller waived his challenge to probable cause by not requesting a *Franks* hearing. The warrant was not stale because child pornography tends to be acquired and hoarded rather than acquired and used up or discarded. And the warrant was sufficiently particular. Although it allowed police to search all computers in the home, it limited the method of their search to means that would only uncover child pornography and that would not reveal other innocent materials.

Utah's eWarrant system complies with the Fourth Amendment's requirement that warrants issue only upon probable cause supported by oath or affirmation.

***State v. Guttierrez-Perez*, 2014 UT 11 (Durrant).** After a night of clubbing and drinking, Gabriel Gutierrez-Perez ran a red light, killing a paramedic, Jonathan Bowers and injuring several other people. Officers investigating collision sought and obtained an eWarrant for Gutierrez-Perez's blood. A blood draw revealed that he was at a .11 BAC. Gutierrez-Perez

challenged the warrant, claiming that the eWarrant system did not comply with the Fourth Amendment's requirement that warrants issue only upon probable cause supported by oath or affirmation. The trial court denied his motion to suppress. Gutierrez-Perez then pleaded guilty but reserved the right to appeal the trial court's ruling on his motion.

Held: Affirmed. The Court reviewed the history of oaths and affirmations under the common law. It determined based on that history that affidavit in Utah's eWarrant system constitutes an affirmation as understood by the founders. It is a knowing and intentional statement to a neutral magistrate; it affirm that the information in the statement is true; and it does so under circumstances that impress upon the affiant the solemnity of the words and the promise to be truthful in legal terms.

Law enforcement's use of toolkit to identify files freely sharing child pornography on P2P networks does not constitute a search; neither is obtaining an IP address from an ISP.
***State v. Roberts*, 2015 UT 24 (Parrish).** Using the "Wyoming Toolkit," Utah's Internet Crimes Against Children task force (ICAC), discovered that an Emery County IP address was sharing child pornography via a peer-to-peer (P2P) file sharing network. ICAC used an administrative subpoena on the internet service provider (ISP) to learn that Roberts owned the IP address. ICAC used this information to get a search warrant to search Roberts's home and computers. The trial court denied Roberts's motion to suppress the child pornography found on his computer.

Held: Affirmed. Joining all the federal courts to have addressed the issue, the Court held that using the toolkit was not a search within the meaning of the 4th Amendment because there is no reasonable expectation of privacy of a file shared over a P2P network. Likewise, obtaining an IP address from an ISP is not a search because there is no reasonable expectation of privacy in internet subscription information. In addition, the administrative subpoena to the ISP complied with the law in effect at the time. Although the legislature has since tightened the requirements for obtaining administrative subpoenas in this context, those amendments were not in effect at the time and did not apply retroactively.

Driver who was jittery and dancing around in car and who had constricted pupils and slurred speech was lawfully detained on suspicion of DUI.
***State v. Stewart*, 2014 UT App 289 (Orme) (memo).** Shannon Stewart was stopped for a broken taillight. The officer, a trained DRE, noticed that she was jittery and "dancing around the car." He also noticed that she had constricted pupils and slurred speech. He had her exit the car and perform field sobriety tests, which she failed. The officer's DUI investigation ultimately lead to the discovery of and charges for drugs and paraphernalia. A jury convicted Stewart and she appealed, claiming that her attorney was ineffective for not moving to suppress the evidence. Stewart asserted that the officer delayed the resolution of the traffic stop without adequate reasonable suspicion of criminal activity beyond a broken taillight.

Held: Affirmed. Counsel was not ineffective if a motion to suppress would have been futile. Here, Stewart's jittery behavior, constricted pupils, and slurred speech gave the officer sufficient suspicion to detain Stewart for a DUI investigation.

Citizen's tip that a small red-headed boy was driving a motorhome provided reasonable suspicion to stop defendant, even though the boy was no longer behind the wheel and the officer observed no traffic violations.

***State v. Rose*, 2015 UT App 49 (Pearce) (memo).** Citizen was driving on a rural highway behind an older white motorhome, weaving in and out of its lane and slowing and speeding up. As Citizen passed the motorhome, he saw a "little red-headed boy" behind the wheel. Citizen called and reported what he saw to a sheriff's deputy that he knew. Within minutes, the deputy was at an intersection of the highway and saw Citizen drive by, followed by a white motorhome. No other vehicles were on the road. The deputy pulled the motorhome over, although he did not personally see any traffic violations. Rose, an adult man sporting a bandana and goatee, sat behind the wheel. He smelled of alcohol; was flushed; had glassy, bloodshot eyes; and shook uncontrollably. Rose was traveling with his wife and children, one of whom was a red-haired boy. Rose failed field sobriety and a portable breath test. Rose admitted to drinking a bunch of beer and letting his son sit on his lap and steer the motorhome. Rose unsuccessfully challenged the stop and was convicted of DUI.

Held: Affirmed. The officer had reasonable suspicion to stop the motorhome, even though the officer did not personally observe any traffic violations. Citizen informant tips are presumed reliable and the one here was sufficiently detailed, even though it lacked the make, model, license plate or any other unique physical characteristics of the motorhome. The deputy could be confident that he had the right motorhome because he arrived at the highway mere minutes after getting the call, he saw Citizen's vehicle drive by, which was immediately followed by the described motorhome. And no other vehicles were on the road.

Tip by identified citizen informant provided reasonable suspicion to stop defendant.

***State v. Welker*, 2014 UT App 284 (Davis) (memo).** Brent Welker was stopped by a police officer who saw his truck leaving the scene of a suspicious incident. The officer had received a tip from a identified woman at an apartment complex that a suspicious person in a truck similar to Welker's had entered a carport and was possibly trying to burglarize the woman's apartment or steal a trailer. The woman reported that the person had a flashlight and was looking in the windows of the apartment. The officer responded to the scene immediately and caught Welker driving away from the apartment complex. While speaking with Welker, the officer noticed signs of impairment. He ultimately arrested Welker for DUI. Welker unsuccessfully challenged the stop and was convicted by a jury. He appealed.

Held: Affirmed. The instant case is similar to *State v. Markland*, 2005 UT 26. The officer stopped Welker while investigating a suspicious circumstance late at night. Welker was the only vehicle in the area and matched the description given by the caller.

GUILTY PLEAS

Rule 11 governs the taking of guilty pleas, but statute governs their withdrawal; statute permits withdrawal only if a defendant shows that the plea was unconstitutional, i.e., unknowing or involuntary.

***State v. Velarde*, 2015 UT App 71 (Voros).** Velarde pled guilty to arranging to distribute meth. When the trial court asked him what he did, Velarde said he had meth on his person and "was going to distribute it." Velarde later unsuccessfully tried to withdraw his plea, arguing that the trial court had not strictly complied with Utah R. Crim. P. 11 and that his plea wasn't knowing or voluntary because the trial court didn't "clarify and articulate that the factual basis mirrored the appropriate elements of the offense and that he understood he was admitting to those facts."

Held: Affirmed. Rule 11 governs the taking of guilty pleas, but any attempt to withdraw a guilty plea is governed by statute. Utah Code Ann. § 77-13-6 says a defendant may withdraw a plea only if it is not knowing or voluntary. A rule 11 violation by itself is not enough to show that a plea wasn't knowing or voluntary. We look at the record as whole to decide whether there is a factual basis to support the plea. Velarde heard the charge and its elements at arraignment and his preliminary hearing. And during the plea colloquy he said he had meth and was going to distribute. All this shows he understood the nature of the offense to which he pled guilty and the factual basis for his plea.

IMMIGRATION

Defendant was not prejudiced by her counsel's failure to fully comprehend immigration consequences of her plea.

***State v Aguirre-Juarez*, 2014 UT App 212 (Voros) (memo).** Marciela Aguirre-Juarez was charged with identity fraud after she used a fake green card with another person's alien registration number and another person's social security number to obtain employment. On the advice of counsel, she pleaded guilty to attempted identity fraud as a class A misdemeanor with a suspended jail sentence of 364 days. Her counsel recognized that the plea would likely still get her deported. But he felt that it was her best option at that point. After Aguirre-Juarez was sentenced, she discovered that the plea would interfere with her ability to later be readmitted into the United States. She appealed the sentence, claiming that her attorney should have sought a sentence of less than six months and that such a sentence would not have interfered with her readmission into the country.

Held: Affirmed. Aguirre-Juarez was not prejudiced by her counsel's performance. While a crime of moral turpitude does not bar readmission if the sentence is less than six months, Aguirre-Juarez is still inadmissible under INA 1182(a)(6)(C). That section bar admission to anyone who obtained a benefit under the immigration act through fraud. And obtaining employment is a benefit under the Act. Her guilty plea thus makes her inadmissible regardless of the length of the sentence.

JURY INSTRUCTIONS

Instructions on elements of rape must be clear that the statutory mental state applies to both the act of intercourse and to the defendant's knowledge or recklessness as to the victim's nonconsent.

***State v. Barela*, 2015 UT 22 (Lee).** Massage therapist Barela had sex with his lesbian client. Barela said she invited it by humping the table and grabbing his crotch. And when they started having sex, he claimed that she was totally into it, giving him oral sex while playing with her breasts. The client said that Barela took it by surprise: he started massaging her inner thigh and, then, "within seconds" —before she could say anything—Barela pulled her to the end of the table, dropped his pants, put his penis in her vagina, and ejaculated. The client testified that she did not say or do anything to suggest that she wanted to have sex with Barela; she also did not physically resist or tell Barela "no" because she "froze." With trial counsel's consent, the trial court instructed the jury that it could convict Barela only after finding that: 1. The defendant; 2. Intentionally or knowingly; 3. Had sexual intercourse with the client; 4. That said act of intercourse was without the consent of the client. On appeal, Barela argued that her trial counsel was ineffective for agreeing to the instruction. Barela argued that the instruction was erroneous because it did not make clear that the mental state applied not only to the act of intercourse, but also to Barela's mental state as to the client's non-consent.

Held: Reversed and remanded for a new trial. The instruction was erroneous because it "implied" that the mental state requirement applied only to the act of sexual intercourse and not to the client's nonconsent. Counsel performed objectively unreasonably by not objecting to the erroneous instruction. Barela was prejudiced by the erroneous instruction because a correctly instructed jury could have reasonably found that Barela had neither knowledge nor recklessness as to the client's nonconsent. **Dissent:** Justice Durham dissented because although she agreed that counsel was deficient in not objecting to the erroneous instruction, there was no way a properly instructed jury would have believed Barela's implausible story.

Jury instruction that created rebuttable presumption that note was a security accurately stated law and thus did not impermissibly shift burden of proof to defense.

***State v. Kelson*, 2014 UT 50 (Lee).** Grace C Kelson was charged with several securities fraud related crimes for soliciting promissory notes as part of an investment scheme. The trial court instructed the jury that a note is presumed to be a security unless it met one of several criteria that rendered it a non-security. The jury convicted Kelson, and she appealed. The court of appeals reversed, holding that the instruction impermissibly shifted the burden of proof to the defense. The State sought and was granted a writ of certiorari.

Held: Reversed. Due process principles forbid the State from using presumptions to shift the burden of proof created by criminal laws. But the legislature is under no such prohibition. It may create presumptions in criminal laws without running afoul of due process concerns. In this case, the presumption is found in the law, and the jury instruction accurately stated the law.

Trial court erred by not instructing jury on applicable mental state for failure to respond to an officer's signal to stop.

***State v. Bird*, 2015 UT 7 (Parrish).** Dustin Lynn Bird ("Birdman") was charged with failing to respond to an officer's signal to stop. At trial, the proposed elements instruction described the statutory elements, but did not describe a mental state. Birdman's attorney objected to the instruction and suggested a mental state of willful or reckless. The trial court gave the instruction as proposed, the jury convicted Birdman, and he appealed. The court of appeals reversed, holding that the statutory phrase "receive a visual or audible signal to stop" suggested that there needed to be some level of "mental appreciation" for the signal to stop; likewise, the statutory phrase "attempt to elude or flee" suggested that the jury needed to find that Birdman purposefully fled. Because these implicit mental states were not explained to the jury, the court of appeals remanded for a new trial. The supreme court granted the State's cert petition.

Held: Affirmed. A lay juror can be expected to understand that "receive" contemplates a level of knowledge. But we cannot assume that a juror would recognize the significance of this knowledge requirement as an essential mental state element. The trial court thus erred in not instructing that the charge included a knowing mental state and defining what would satisfy that element. Likewise, although a lay juror might understand that "attempt to flee" means to "try to flee," she cannot be expected to understand that this means intentionally leaving "in an effort to escape or avoid a peace officer." The trial court thus also erred by not telling the jury that an "attempt to fell or elude" requires an intentional mental state. **Dissent:** Lee dissented because in his view the terms "receive" and "attempt" adequately conveyed to the jury that the requisite mental states and that any error was harmless in any event.

Third degree felony aggravated assault does not require that a person act with the intent to cause a specific level of harm.

***State v. Salt*, 2015 UT App 72 (Roth).** Salt's ex-girlfriend tried to leave after she got tired of explaining why she broke up with him. Salt called her names, twisted her head, hit her on the head with a piece of pottery, kicked her phone away when she tried to call 911, and hit her on the head with a metal pipe. The girlfriend ended up with 65 staples in her scalp to close lacerations totaling 11 inches in length. She suffered back pain for years and still had a lump on the side of her head. A jury convicted Salt of third-degree felony aggravated assault involving domestic violence. Salt complained that the elements instruction did not require the jury to find that he specifically intended the result of his conduct, i.e., to cause serious bodily injury.

Held: Affirmed. The instruction was correct because third-degree felony aggravated assault does not require that the defendant act with the intent to cause a specific level of harm. It requires only that the defendant used a dangerous weapon or "other means likely to produce death or serious bodily injury."

Defendant charged with depraved indifference murder and reckless child abuse homicide was not entitled to lesser offense instruction on negligent homicide where no evidence supported a conviction on the lesser charge.

***State v. Ruiz*, 2014 UT App 143 (Roth).** Ruiz was charged with depraved indifference murder and reckless child abuse homicide after an infant in her care died from apparent violent shaking. Ruiz told police that she had slightly and gently shaken the baby to try to awaken him. At trial, Ruiz presented expert testimony that the baby died from a bleeding disorder, not from shaking. Ruiz sought a lesser included instruction on negligent homicide on the theory either (1) that she negligently failed to call for help soon, enough even though the baby was in obvious distress from a preexisting bleeding disorder; or (2) that when she gently shook the baby, it exacerbated a prior intracranial bleed. The trial court refused to give the instruction.

Held. Affirmed. A defendant is entitled to a lesser offense instruction only when the elements of the greater and the lesser offenses overlap and when there is some evidence on which the jury can rationally acquit of the greater and convict of the lesser. Here, the elements of the greater and lesser offenses overlapped and there was some evidence on which the jury could rationally acquit of the greater. But there was no evidence on which the jury could rationally convict of negligent homicide. No evidence showed that Ruiz's delay in calling for emergency help caused the baby's death. Likewise, no evidence showed that the slight shaking Ruiz described to police would amount to a gross deviation from the applicable standard of care.

Attempted aggravated murder defendant was not prejudiced by counsel failure to object to alleged errors in jury instructions.

***State v. Ochoa*, 2014 UT App 296 (Davis) (memo).** Inmate Juan Ochoa was tried for attempted aggravated murder and possession of a dangerous weapon in a correctional facility after he attacked and repeatedly stabbed his cellmate with a shank. After a jury convicted him on both counts, he appealed, claiming that the jury instructions were deficient in several respects and that his attorney was ineffective for not objecting to them. Specifically, he claimed that the instructions impermissibly directed the jury to find that he was an inmate in a correctional facility, that the instructions for possessing a dangerous weapon in a correctional facility omitted the mens rea element, and that the mens rea for attempted aggravated murder was not adequately defined.

Held: Affirmed. Ochoa was not prejudiced by any of these alleged errors. Errors in the jury instructions are not structural and are subject to prejudice analysis when asserted under the rubric of ineffective assistance of counsel. Here, there was never any dispute that Ochoa was an inmate and that he resided in a correctional facility at the time of the offense. And there was no rational way the jury could convict him of trying stab his cellmate to death with a shank and not also find that he intentionally, knowingly, or recklessly possessed the shank. Lastly, the mens rea description for an attempt crime used an outdated version of the statute, it adequately conveyed the notion that Ochoa must have intentionally attempted to murder his cellmate

Trial court properly rejected Defendant's requested self-defense instruction.
***State v. Rupert*, 2014 UT App 279 (Davis).** Robert Rupert was housed in the Box Elder County Jail with four other inmates, including James Pettus. Video footage of the cell recorded Rupert jumping Pettus from behind while he was in confrontation with another inmate. Rupert punched Pettus repeatedly, breaking his nose, blacking two of his eyes, and injuring one of his ears. The video showed Pettus after the attack covered in blood and convulsing on the floor. Rupert was charged with assault by a prisoner. He sought a self-defense instruction, claiming that Pettus had threatened him the night before and the morning of the fight. The trial court denied his request, and the jury convicted him as charged. Rupert appealed.

Held: Affirmed. A party is entitled to a self-defense instruction only when there is a reasonable basis in the evidence to justify the instruction. Past threats do not justify the preemptive use of self-defense.

Woman who had consensual oral and sexual intercourse with fifteen-year-old boy not entitled to sexual battery instruction.
***State v. LoPrinzi*, 2014 UT App 256 (Roth).** Forty-three year-old Sarah Ann LoPrinzi was charged with three counts of unlawful sexual activity with a minor after a weekend of illicit sodomy and sexual intercourse with a fifteen year-old boy. LoPrinzi asserted her innocence, claiming that the sexual activity never occurred. She sought, however, an instruction on sexual battery. The trial court denied the instruction, finding no rational basis in the facts for the instruction. The jury convicted LoPrinzi of two of the three counts. LoPrinzi appealed.

Held: Affirmed. A defendant is only entitled to a lesser-included offense instruction only when there is a rational basis in the evidence to acquit of the greater offense and convict on the lesser. Sexual battery implicitly requires a finding that the conduct was non-consensual. Here, consent was never at issue. The fifteen-year-old consented to the activity, and LoPrinzi claimed that it never happened. The court further opined that because unlawful sexual activity occurs with the consent of the minor, sexual battery can only be a lesser included offense of unlawful sexual activity with a minor only if the evidence raises a question of consent.

Trial court properly gave flight instruction where Defendant moved to Wyoming while under suspicion of engaging in unlawful sexual activity with a minor.
***State v. LoPrinzi*, 2014 UT App 256 (Roth).** Forty-three year-old Sarah Ann LoPrinzi was charged with three counts of unlawful sexual activity with a minor after a weekend of illicit sodomy and sexual intercourse with a fifteen year-old boy. A few days after the weekend of love, police contacted LoPrinzi and arranged a time for he to come in an speak with them. LoPrinzi never showed up. A few weeks later police learned that LoPrinzi had relocated to Wyoming. At trial, the state sought and was granted a flight instruction. The jury convicted LoPrinzi of two of the three counts. LoPrinzi appealed.

Held: Affirmed. A flight instruction is proper anytime that facts support a reasonable inference that the Defendant fled out of a consciousness of guilt. Here, within two weeks of

learning that she was under investigation, LoPrinzi suddenly relocated to Wyoming with her teenage son and pets. Any inference that she fled out of guilt is fair and the instruction was thus appropriate. **Concurrence:** Judge Voros concurred in the judgment, but opined that flight instructions should never be given. Rather, the issue is one that should be argued by the parties at closing without interference from the court.

Counsel was ineffective for failing to request that court include legal definition of indecent liberties in jury instruction in sexual abuse of a child trial.

***State v. Lewis*, 2014 UT App 241 (Orme).** David Lewis was charged with sexual abuse f a child and attempted sexual abuse of a child. The charges were filed after two sisters who were eleven and thirteen respectively reported that Lewis tried to remove the pants of the first and touched the breasts and genitals over the clothing of the second. At trial, the elements instruction on sexual abuse of a child submitted by the state mirrored the statutory elements and included the indecent liberties elements. But neither party offered an instruction defining indecent liberties. Lewis testified on his own behalf and claimed that he only touched the belly of the thirteen-year-old. The jury convicted Lewis of sexual abuse of a child and acquitted him of attempted sexual abuse of a child. Lewis appealed, claiming that his counsel was ineffective for not submitting an instruction on indecent liberties.

Held: Reversed. Lewis's counsel performed deficiently by not offering an instruction that explained to the jury the narrow legal definition of indecent liberties. And Lewis was prejudiced by counsel's failure because without that instruction, a jury might have convicted him of indecent liberties for touching the uncovered belly of the thirteen-year-old girl.

***State v. Watkins's* holding on the definition of cohabitant does not apply in domestic violence case.**

***State v Ellis*, 2014 UT App 185 (Greenwood).** Roger Ellis was charged with aggravated kidnapping and elder abuse as crimes of domestic violence. At trial, the jury instructions used the definition of cohabitant found in the Cohabitant Abuse Act. Ellis was convicted. He appealed, claiming that his attorney was ineffective for not objecting to the definition of cohabitant because that definition had been rejected by the Utah Supreme Court in *State v. Watkins*, 2013 UT 28, 309 P.3d 209.

Held: Affirmed. The *Watkins* court considered the term cohabitant only in the context of the role of a cohabitant being in a special position of trust in a sexual abuse of child case. It rejected the definition in the Cohabitant Abuse Act because it was inconsistent with prior case law in the subject. But Ellis was charged with a crime of domestic violence and the definition was used, as was intended in the Cohabitant Abuse Act, to enhance a domestic violence charge.

Homicide by assault instruction that misstated mens rea requirement was "astonishingly erroneous" and warranted reversal despite being offered by defense and despite jury convicting of greater offense of murder.

***State v Johnson*, 2014 UT App 161 (Davis) (cert. granted).** Michael Wadell Johnson was convicted of murder in a case in which intent and causation were hotly contested. He

appealed, claiming that the court never gave the jury a verdict form for his lesser included offense instruction on homicide by assault. Before argument, the court of appeals asked the parties to brief whether the homicide by assault instruction was correct and whether it was so "astonishingly erroneous" that the issue could be decided by the court of appeals despite not being preserved below or raised by either party on appeal.

Held: Reversed. The homicide by assault instruction misstated the mens rea requirement so as to essentially mirror the elements of murder. This deprived Johnson of the full benefit of the reasonable doubt instruction and warrants reversal, despite Johnson's failure to preserve the issue below or raise it on appeal.

Dissent (Bench): Johnson submitted the erroneous instruction and failed to challenge it on appeal until the court pointed out the error. There is nothing manifestly unjust about refusing to consider the error. Moreover, there is no prejudice. The jury had the option of convicting of a lesser offense, it chose not to despite the elements being essentially the same as murder. It is unlikely that a correct instruction with elements less than murder would have caused the jury to acquit Johnson of murder.

JURY SELECTION

Court did not abuse its discretion in refusing to ask members of the jury venire in murder case whether they would be embarrassed to return a not-guilty verdict in a murder case.
***State v Alvarez*, 2014 UT App 179 (Orme) (memo).** Francisco Alvarez was charged with murdering somebody at a little league baseball game. During jury selection, his attorney repeatedly asked the court to inquire of the venire members whether "any of them would feel any embarrassment for returning a not-guilty verdict knowing a defendant is charged with murder." The trial court denied the request. The jury convicted Alvarez, and he appealed.

Held: Affirmed. A trial court abuses its discretion in denying a request to ask a question of the jury venire only if the denial deprives the counsel of an adequate opportunity to gain the information needed to evaluate the jurors, including the informed exercise of peremptory challenges. Here, the trial court asked plenty of other questions that provided counsel the information needed to evaluate the jurors. Thus, the trial court did not abuse its discretion.

Refusing to asked to ask potential jurors during voir dire about religious affiliation was not an abuse of discretion, even though the defendant was a clergyman, his victim was a member of his congregation, and all the witnesses were members of the same church.
***State v. Flores*, 2014 UT App 214 (Voros).** Flores, the leader of a small LDS Church congregation, was accused of twice feeling up the breasts of a 16-year-old member of his flock in an LDS meetinghouse. During voir dire, the trial court refused Flores's request to ask potential jurors about their religious affiliation. But the trial court did ask whether potential jurors whether they could fairly and impartially judge the testimony of a clergy member or religious leader, just as they would any other witness's testimony.

Held: Affirmed. Trial courts do not have to ask every question that a party wants them to during voir dire; nor do they have to ask questions in a particular manner. Flores's proposed question was not calculated to uncover potential bias pertinent to the facts of this case. While the proposed question may have eventually led to suggestions of latent religious bias, it would have required several additional questions or inferences before it did. The trial court's general question sufficiently targeted potential jurors' attitudes toward clergy, which was the real issue.

Under *Batson*, a prosecutor's reason for exercising a peremptory challenge does not have to "make sense"; it just has to be legitimate.

***State v. Flores*, 2014 UT App 214 (Voros).** Flores, the leader of a small LDS Church congregation, was accused of twice feeling up the breasts of a 16-year-old member of his flock in an LDS meetinghouse. Flores raised a *Batson* challenge against the prosecutor's use of peremptory strikes against four veniremen. After hearing the prosecutor's explanations, the trial court denied the *Batson* challenges.

Held: Affirmed. The trial court accepted the prosecutor's proffered gender-neutral reasons for the strikes. Those reasons did not have to "make sense"; peremptory challenges by their nature can be "silly or superstitious." The reasons just have to be gender/race neutral. And once a trial court has "stamped its approval" on a prosecutor's peremptory challenge, "mounting a successful *Batson* challenge on appeal verges on the impossible." This is because a trial court's *Batson* determination rests on factual findings that turn largely on an evaluation of credibility, which is given great deference on appeal.

MERGER

Aggravated kidnapping conviction merged into aggravated murder conviction where the kidnapping conviction was the only aggravator.

***State v. Nielsen*, 2014 UT 10 (Lee).** Nielsen was convicted of 15-year-old Trisha Autry's aggravated kidnapping and aggravated murder and sentenced to life without parole. The kidnapping conviction served as the sole statutory aggravator for the murder conviction.

Held: Under Utah case law, it was plain error for the trial court not to merge the aggravated kidnapping conviction into the aggravated murder conviction. **Note:** Statutory amendments, which did not apply to Nielsen, now prevent merger of convictions of statutory aggravators with an aggravated murder conviction.

Aggravated kidnapping does not merge into aggravated assault where the period of detention (forcing the victim to take two showers) was longer than the minimum inherent in an assault.

***State v. Kataria*, 2014 UT App 236 (Voros) (cert. denied).** Kartaria beat his live-in girlfriend, resulting in injuries to her face, a crush injury to a hand, extensive bruising, a dislocated toe, multiple fractures in her foot, a broken nose, and bleeding in her brain. During "this dispute," Kataria also wrest the victim's cell phone from her, twice ordered her into the bathroom to shower blood off her body, and stopped her from leaving the room to get towel. The jury

convicted Kataria of both aggravated assault and aggravated kidnapping. The trial court merged the kidnapping conviction into the assault conviction. Kataria appealed his remaining conviction, and the State cross-appealed from the trial court's merger ruling.

Held: Aggravated assault conviction unanimously affirmed in lead opinion by Judge Davis, and the trial court's merger ruling reversed in separate opinion by Judge Voros, joined by Judge Pearce. Under *State v. Couch* and *State v. Finlayson*, a kidnapping may merge into its host crime, such as rape or robbery, if the detention was no longer than that necessary involved in the commission of the crime. Under the so-called three-factor *Buggs* test, the detention must not be slight, inconsequential, merely incidental to, or inherent in the nature of the other crime. The two forced showers here constituted a period of detention longer than that inherent in the commission of aggravated assault.

Dragging assault victim 58 feet down a hall and back into a locked apartment where she could be assaulted again was a detention significantly independent of the assault; the merger decision belongs to the court, not the jury, and only after the jury has returned two guilty verdicts.

***State v. Sanchez*, 2015 UT App 27 (Roth).** Sanchez beat his live-in girlfriend. When she escaped to a neighbor's apartment, Sanchez dragged her the 58 feet back to their apartment, locked the door, and commenced beating her anew, all while the neighbor beat on the door and shouted at r Sanchez to let the victim go. By the time Sanchez finished, the victim was covered in blood, with a bite mark on her cheek, and her ear nearly ripped off. A jury convicted Sanchez of both aggravated kidnapping and assault with substantial bodily injury. On appeal, Sanchez argued the trial court should have merged the kidnapping conviction into the assault conviction or instruct the jury on the *Finlayson* factors that determine whether a kidnapping should merge into another crime.

Held: Affirmed. Under *Finlayson*'s 3-part test, the detention here (1) was not slight, inconsequential, or merely incidental to the assault; (2) was not inherent in the assault; and (3) had significance independent of the assault in that it made the assault substantially easier to commit. The trial court, therefore, did not err in refusing to merge the two crimes. The trial court also properly refused to instruct the jury on the *Finlayson* factors. First, the merger question is for the court, not the jury. Second, merger is not ripe for review until the prosecution has presented its case and the jury has convicted on multiple charges. Until then, the trial court cannot assess whether, under the particular facts of the case, the two crimes should merge.

Aggravated kidnapping was incidental to and does not merge into aggravated assault.

***State v Finlayson*, 2014 UT App 282 (Greenwood).** Jeffrey Finlayson detained his wife in their home for over an hour during which time he pinned her to the bed, hit her repeatedly, wrestled with her, threatened to kill her, strangled her, blocked the doorway, took her mobile phone, prevented her from opening the front door, shoved her down a flight of ten to twelve stairs, strangled her again, and sat on her for twenty minutes. He was charged found guilty of aggravated kidnapping and aggravated assault. He moved, unsuccessfully, to merge the

counts, claiming that the detention was incidental to and inherent in the aggravated assault. The trial court denied the motion, and Finlayson appealed.

Held: Affirmed. The detention was much longer than and wholly independent from the aggravated assault. The counts do not, therefore, merge.

POST-CONVICTION

A writ of coram nobis doesn't lie if you can seek a remedy under the Post-Conviction Remedies Act.

***Oseguera v. State*, 2014 UT 31 (Nehring).** Oseguera pled guilty in 2002 to theft. He got probation and an agreement by the State not to oppose a 402(b) reduction. Eight years later, after immigration officials began deportation proceedings, Oseguera filed a petition asking to vacate his plea under the PCRA or, alternatively, through a writ of coram nobis. Oseguera claimed his counsel was ineffective during the plea process because Oseguera was not informed of the potential immigration consequences related to his plea. The district court found that Oseguera's petition was time-barred under the PCRA and that he hadn't proved ineffective assistance in any event. Oseguera appealed, arguing that his counsel was ineffective and that if his claim was time-barred under the PCRA, the district court should have granted him relief under a writ of coram nobis.

Held: Affirmed. The Court refused to address the merits of Oseguera's ineffectiveness claim because it was unpreserved. It then held that the district court properly declined to issue a writ of coram nobis. A writ of coram nobis is an "extraordinary remedy" and lies only when there is no other plain, speedy, adequate remedy. The PCRA, which provides an avenue for collaterally attacking a conviction, gave Oseguera an adequate remedy at law. Oseguera, therefore, was not entitled to a writ of coram nobis.

PRELIMINARY HEARINGS

A district court's subject matter jurisdiction over a prosecution does not hinge on whether it held a preliminary hearing, took an express waiver of the right to a preliminary hearing, or issued a bindover order.

***State v. Smith*, 2014 UT 33 (Durrant).** Smith pled guilty to drug charges. Before taking Smith's plea, the district court did not hold a preliminary hearing, obtain Smith's waiver of a preliminary hearing, or issue a bindover order. After being sentenced, Smith appealed, arguing that the district court lacked jurisdiction to take his plea without issuing a formal bindover order either after holding a preliminary hearing or taking an express waiver. Smith argued that his guilty plea was therefore void. The court of appeals agreed and set aside Smith's plea. The supreme court granted the State's cert petition.

Held: Reversed. A district court's criminal subject matter jurisdiction is invoked once an information has been filed. A district court's jurisdiction over a criminal prosecution does not hinge on whether it held a preliminary hearing, obtained an express waiver of the right to a

preliminary hearing, or issued a bindover order. The relevant jurisdictional statutes grant district courts broad subject matter jurisdiction over criminal matters and nothing in either the Utah Constitution or Utah Code makes the exercise of that jurisdiction dependent on the right to a preliminary hearing or bindover order. Language in *State v. Humphrey* suggesting otherwise was rendered obsolete when the Legislature merged the functions of district courts and the former circuit courts.

A conviction beyond a reasonable doubt cures any alleged defect in the bindover decision.
***State v. Nielsen*, 2014 UT 10 (Lee).** Nielsen was convicted of 15-year-old Trisha Autry's aggravated kidnapping and aggravated murder and sentenced to life without parole. On appeal, he argued that the evidence was insufficient to support bindover on the kidnapping aggravator and therefore insufficient to bindover on aggravated murder.

Held: Affirmed. The Court had already determined that the evidence was sufficient to support Nielsen's conviction for aggravated kidnapping. If there was enough evidence to support a conviction beyond a reasonable doubt there was necessarily enough evidence to support the lower bindover standard of probable cause. Any alleged defect in a bindover decision is thus cured by a subsequent guilty verdict on the same charge.

Utah's constitution precludes evaluating a statute's constitutionality at the preliminary hearing stage; that is a question for the district court after bindover.
***State v. Arghittu*, 2015 UT App 22 (Pearce).** The magistrate refused to bind Arghittu over on distribution of a controlled substance analog that was not listed in the statute because it believed that Arghittu did not have sufficient notice that the analog was prohibited and that the statute was an impermissible delegation of legislative authority to the State Crime Lab. The State appealed.

Held: Reversed. Utah's constitution limits the function of a preliminary hearing to determining whether probable cause exists. The State adduced sufficient evidence to reasonably believe that the substance Arghittu distributed was a controlled substance analog. Once the State adduced that evidence, the magistrate should have bound Arghittu over. The magistrate exceeded the scope of Arghittu's preliminary hearing when it refused to bindover based on a conclusion that the applicable statute was unconstitutional. The constitutionality of the statute was an issue for the district court after Arghittu had been bound over.

Trial court properly refused to bind over police chief on misconduct and witness tampering charges.
***State v Jones*, 2014 UT App 142 (Greenwood) (cert. granted).** Kamas Police Chief Adam Jones was charged with official neglect and misconduct under Utah Code § 10-3-826, official misconduct under Utah Code § 76-8-201, and witness tampering. The charges arose after Jones responded to his brother's home in uniform and on duty, discovered evidence that his brother was drunk and had assault his wife, and left without complying with any part of the Cohabitant Abuse Act. Sheriff's deputies answered a 911 call from the home later in the evening and arrested Jones's brother after they discovered that he had against assaulted his

wife and his child. The next morning, Jones visited his brother at the jail and suggested to him that brother was drunk and had passed out in his bed. After hearing evidence, the trial court refused to bind over Jones on any of the charges. The State appealed.

Held: Affirmed. Jones was not acting as a police chief when he responded to his brother's home. He was only acting as a line police officer. He thus cannot be guilty of official neglect and misconduct under Utah Code § 10-3-826, because he was not acting as a municipal officer. Nor was Jones guilty of official misconduct because he was responding to the home as a family member, not as a police officer. Despite being in uniform and on duty, the court of appeals determined that Jones's assertion to an investigator that he was responding to a personal call made any inference that he was acting as a police officer unreasonable Lastly, the court determined that Travis had no reason to believe that his actions would be investigated because he responded to the home as a family member, not a police officer.

PROBATION

Appeal from probation revocation remanded for trial court to explain why it found two of three violations and to reconsider whether it really wanted to revoke probation.
***State v. Legg*, 2014 UT App 80 (Orme).** Legg's probation officer arrested him a mere week after he finished the jail term that was a component of his probation. The trial court revoked probation after finding three violations (including possessing a tiny amount of cocaine), but only after expressing concerns about revoking so early and opining that the probation officer had "an awful quick trigger" on Legg. Legg appealed, challenging the sufficiency of the evidence to support that he "willfully" violated all three conditions.

Held: The trial court did not sufficiently explain on the record what evidence it relied on in finding two of the three violations. While the evidence and the trial court's reasoning was clearly sufficient on one of the violations (which alone was enough to revoke), the trial court's expressed qualm about revoking makes it unclear that it would have revoked on this violation alone. Remanded for the trial court to put its reasoning for finding the first two violations on the record and to reconsider whether it still wanted to revoke probation in light of those reasons.

Agreement to cooperate with police in exchange for lenity at sentencing is akin to a plea agreement, not a condition of probation, and is thus governed by contract law.
***State v Terrazas*, 2014 UT App 229 (Roth).** Robert Terrazas, a suspected founding member of the Ogden Trece gang, was charged with several felon drug and weapons offenses. He entered into a cooperation agreement with the State in which he pleaded guilty to ten felony offenses and agreed to help the Ogden Metro Gang Unit build prosecutable cases against three top Ogden Trece gang members. In exchange for building cases against his former gangmates, the State agreed to allow Terrazas to serve a term of probation in another state. The agreement was memorialized in a written document with an addendum that contained the names of the gang members Terrazas was supposed to target. In accordance with the agreement, the court imposed the statutory prison terms but stayed execution of the sentence

for three months while Terrazas worked. After several months, Terrazas had failed to perform. So the court held a hearing and received evidence from Terrazas and the State. It then determined that Terrazas had breached the cooperation agreement. It executed the sentence and sent Terrazas to prison. Terrazas appealed.

Held: Affirmed. The cooperation agreement in this case is much more like a plea agreement than a condition of probation. It is thus not subject to the requirements to find a probation violation, including the requirements in Utah Code § 77-18-1 and the requirement of a finding of willfulness. Rather, court need only find a breach of the agreement under principles of contract law. Under those principles, Terrazas's failure to perform amounts to a breach regardless of his good faith efforts.

PROSECUTORIAL ETHICS

District Attorney's office sufficiently screened former defense attorneys from murder case to overcome presumption of conflict.
***State v Cater*, 2014 UT App 201 (Christiansen).** Spencer Isaiah Cater was charged with aggravated kidnapping and aggravated robbery. He was initially represented by Kent Morgan and Jeff Hall. While the charges were pending, Morgan and Hall left private practice to work at the Salt Lake County District Attorney's Office. Cater moved to disqualify the entire DA's office claiming that the office had no written screening policy, that the Morgan and Hall were not, in fact, screened from the case, and that under *State v. McClellen*, 2009 UT 50, the DA's office could not overcome the presumption that the entire office was now privy to Morgan and Hall's confidential client information. The trial court held a hearing and determined that while no written screening policy existed that Morgan, Hall, and the attorneys prosecuting Cater all understood that they could not discuss the case and did not, in fact, discuss the case. A jury then convicted Cater, and he appealed.

Held: Affirmed. A written screening policy is not required in every case to overcome the presumed of shared communications. Rather, each case must be evaluated on a case by case basis. And in most cases, a verbal directives coupled with steps to secure files will suffice.

Prosecutor could not be disqualified under Utah R. Prof'l Conduct 3.7 because he was not likely to a necessary witness to plea negotiations with the defendant's accomplice.
***State v. Melancon*, 2014 UT App 260 (Pearce).** Melancon talked his brother into burning down Melancon's house for the insurance money. Before the fire, Melancon moved out all the stuff he wanted, told his brother how to do it, and took his family to Las Vegas for the weekend. The brother nearly died during the fire and ratted his brother out in exchange for a favorable plea deal and his testimony. Melancon wanted to call the prosecutor as a witness to his brother's plea negotiations and moved to disqualify the prosecutor under Utah R. Prof'l Conduct 3.7(a)(1), which provides that a lawyer "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless ... the testimony relates to an uncontested issue." The trial court refused to disqualify the prosecutor.

Held: Affirmed. The attorney-work-product doctrine prohibited Melancon from calling the prosecutor as a witness, to the extent that he sought to present evidence of the prosecutor's internal thought processes resulting in the plea offer to the brother. And Melancon could not show that the prosecutor was a necessary witness where the plea negotiations were recorded and a police investigator was present during the negotiations and available to testify about them.

PROSECUTORIAL MISCONDUCT

Argument that officer had no reason to plant evidence on defendant and that he could lose his job for doing so was not impermissible "vouching"; argument that prosecutor and most people don't carry lots of cash on them was permissible inference from the evidence.
***State v. Ashcraft*, 2015 UT 5 (Lee).** Over two nights, officer sees truck belonging to known drug trafficker repeatedly driving through motel parking lot known for drug activity. Ashcraft (not the owner of the truck) is driving with a female passenger. Ashcraft tells the officer that he borrowed the truck from the known drug trafficker. Ashcraft has on him $793 in cash and a pocketknife with a brownish/black tar substance that looks like (and field tests as) heroin. Ashcraft claims ignorance about a green bag hidden in the bed of the truck, but before the officer can open it, accuses the officer of planting it. The bag has 30-40 baggies of heroin, a bunch of pills, two digital scales, glass pipes with residue on them, and a pink stun gun.

Held: The prosecutor did not impermissibly vouch for the officer when he argued in closing that the officer had "no ax to grind" and "nothing to gain by" planting evidence and that an officer doing "something like that" puts his " career on the line." The argument was not a statement that the prosecutor personally knew the officer was truthful and did not imply that the prosecutor knew more about the officer than the jurors did. Rather, the argument, like the defense's argument that the officer planted the evidence, was "in accordance with common-sense incentives and reasonable inferences generally known to the jury." The prosecutor also did not ask the jury to consider evidence not before it when he stated that he personally only carried about $10 in his wallet at a time and that it was not normal for most people to have as much cash as defendant did. While the prosecutor may have "gone too far" by pressing this inference in light of his own personal experience, he rendered that mistake harmless by immediately telling the jury to rely on their own experience and not his own.

Repeatedly calling defense arguments "red herrings" not prosecutorial misconduct.
***State v. Jones*, 2015 UT 19 (Nehring).** Jones raised several claims of prosecutorial misconduct during closing, including repeatedly calling defense arguments "red herrings."

Held: Affirmed. Nothing wrong with contesting an opposing party's theories as irrelevant or improbable by calling them "red herrings," so long as the comments don't amount to a personal attack on defense counsel or an insinuation that the defense intends to mislead the jury. The comments here were confined to the defense theories.

Prosecutor's statement that the jury should convict DUI Defendant to "nip" his conduct "before somebody gets killed" was improper but harmless.
***State v. Olola*, 2014 UT App 263 (Davis) (memo).** Julius Olola was convicted of DUI. During closing arguments, the prosecutor asked the jury to convict Olola in order to "nip" his conduct "before somebody gets killed." Olola did not object to the statement when it was made. But he appealed the conviction and claimed that the statement improperly suggested that the jury base its decision on the impact it would have on society rather than on the facts.

Held: Affirmed. The statement was improper. But in the context of the jury instructions, the facts, and the entirety of the prosecutor's closing argument, the statement was harmless.

Prosecutor's comment that "the State has no interest in convicting the innocent" okay because in context he was only explaining why the State has such a heavy burden of proof.
***State v. Christensen*, 2014 UT App 166 (Roth).** Christensen was convicted of felony theft and criminal mischief. In rebuttal closing, the prosecutor stated that he welcomed the heavy burden of proof beyond a reasonable doubt because "the State has no interest in convicting anyone that's innocent."

Held: The prosecutor's statement was okay because in context the prosecutor was not suggesting that the State only prosecutes people who are guilty or that his office would have never brought charges if defendant had in fact committed the charged crimes. Rather, he was only reminding the jury of the uncontroversial point that the criminal justice system requires proof beyond a reasonable doubt to avoid convicting the innocent.

Prosecutor's closing argument that a State's witness has "no reason to lie" was not impermissibly bolstering the witness's testimony; it was merely a reasonable inference from the evidence, even if not the only one.
***State v. Christensen*, 2014 UT App 166 (Roth).** Christensen was convicted of felony theft and criminal mischief. In closing, the prosecutor argued that although a witness had initially lied to police, she had "no reason to lie" on the stand at trial.

Held: This was not impermissible bolstering. The prosecutor did not state his personal beliefs or improperly call the jury's attention to facts not in evidence. The prosecutor only drew the reasonable inferences from the evidence. Although Christensen's counsel drew the opposite inference during his closing, this did not make the prosecutor's argument unreasonable or improper.

RESTITUTION

Federal Crime Victims Rights Act does not hold a possessor of child pornography jointly and severally liable with the thousands of other individuals who possessed and viewed the same images; rather, any restitution order under the Act should reflect the defendant's relative role underlying the victim's general losses.
***Paroline v. United States*, 134 S.CT. 1710 (2014).** The Court addressed how much restitution a possessor of child pornography must pay to the victim under the Crime Victims Rights Act, 18

U.S.C. §2259, where the defendant was one of thousands of individuals who possessed and viewed the images. A 5-Justice majority held that in such a case, a federal district court "should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses. The amount would not be severe in a case like this," but it "would not be a token or nominal amount." The Court explained that a district "court must assess as best it can from available evidence the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses," and listed various "factors" ("rough guideposts") "that bear" on the issue.

Under federal Mandatory Victims Restitution Act (MVRA), restitution order for mortgage fraud must be reduced by amount victim bank got in reselling the foreclosed property, not by the value of the property when victim bank received it.

***Robers v. United States*, 134 S.Ct. 1854 (2014).** The Court determined the amount of restitution petitioner must pay his victims under the federal Mandatory Victims Restitution Act of 1996 (MVRA) for serving as a straw buyer in a mortgage fraud scheme. The victims (two banks) were able to recoup some of their losses (the money lent) by reselling the property after the foreclosure actions gave them title. The Court held that "a sentencing court must reduce the restitution amount by the amount of money the victim received in selling the collateral [the foreclosed property], not the value of the collateral when the victim received it." That is so, held the Court, because where return of that property is "impracticable," the MVRA requires offenders to pay the victim "an amount equal to . . . the value of the property" less "the value (as of the date the property is returned) of any part of the property that is returned."
The Court concluded that the statutory phrase "any part of the property" refers here to the money lent, which was not "returned" to the banks until they received the money from the sales.

RETROACTIVITY

Indigent Defense Act (IDA) amendments coupling state-funded defense resources with representation by state-funded counsel apply to all requests filed after the effective date of the amendments.

***State v. Earl*, 2015 UT 12 (Lee).** Effective 5/8/2012, the legislature amended the IDA to couple the availability of defense resources with the retention of state-funded counsel. The amendments overruled the Court's construction of the IDA in *State v. Parduhn*, 2011 UT 55. Earl, who was indigent, had retained private counsel, who—after the effective date of the amendments—moved for state-funded defense resources. The trial court denied the motion, finding that the amendments applied to Earl.

Held: Affirmed. The version of the IDA in effect when defendant files a formal request for state-funded resources applies. Because Earl waited to file her motion until after the amendments went into effect, the amendments applied. The Court rejected Earl's constitutional challenges to conditioning state-funded defense resources on representation by appointed counsel. Earl lacked standing to challenge any violation of the procurement code in the bidding process for the public defender contract.

RIGHT TO COUNSEL

Defendant's repeated extreme dilatory, disruptive, and threatening conduct forfeited his right to counsel for remainder of his direct appeal.
***State v. Allgier*, 2015 UT 6 (per curiam).** Allgier was charged with aggravated murder for killing a prison guard during an escape. He avoided the death penalty by pleading guilty and agreeing to life without parole. Allgier appealed, but never moved to withdraw his guilty plea. Over the next several months, Allgier filed repeated pro se motions for appointment of new appellate counsel. His appointed attorneys sought to withdraw after Allgier filed bar complaints and threatened them. The Court allowed Allgier one substitution of counsel, but warned that it would carefully scrutinize further motions. Allgier continued to file motions filled with derogatory and demeaning language to remove his appointed attorneys. After Allgier's counsel filed the opening brief and the State filed its response, Allgier's counsel again moved to withdraw, this time reporting that Allgier had refused to communicate or meet with counsel and had again "leveled threats" against them, including that "he knows how to find people outside of prison." In apparent proof of that ability, Allgier mailed documents to one of his appointed attorney's home address, which had never been given to Allgier. The State agreed that counsel should be allowed to withdraw, but argued that Allgier had forfeited his right to counsel for the remainder of the appellate process.

Held: Allgier's persistent dilatory conduct in filing multiple pro se motions and his series of threats to multiple appellate attorneys call for the drastic measure of forfeiting his right to counsel for the remainder of his appeal. Whether an appellant's conduct is sufficiently egregious to warrant forfeiture will depend on the individual circumstances of each case. Here, Allgier will not suffer unduly harsh consequences from his forfeiture: his appeal is from a guilty plea that he never moved to withdraw, his counsel have already filed an opening brief, and the State has filed its response. A reply brief is not a critical part of an appeal, Allgier has no right to oral argument, and the Court can scrutinize the record and the arguments to ensure a fair decision. Allgier was given time to filed a pro se reply brief if he wished and the Court determined to decide the appeal without oral argument.

Ambiguous justice court plea document in uncounseled DUI plea did not show by a preponderance that defendant's waiver of counsel was knowing and intelligent.
***State v. Jimenez-Wiss*, 2015 UT App 36 (Pearce).** Jimenez-Wiss was charged with felony DUI, enhanced by two prior misdemeanor DUI guilty pleas in justice court. The first plea was counseled; the second was not and her plea resulted in a suspended jail sentence. Jimenez-Wiss unsuccessfully challenged the use of her uncounseled plea to enhance her current DUI charge to a felony, arguing that there was not enough evidence to show that she knowingly and intelligently waived her right to counsel.

Held: Reversed. A prior conviction may not be used to enhance a criminal charge if that conviction was obtained in violation of the defendant's right to counsel. The only evidence presented that Jimenez-Wiss intentionally and knowingly waived counsel was a written form plea document. But that document was ambiguous as to whether Jimenez-Wiss intentionally

waived counsel. She did not check the box stating that she did not wish to be represented by counsel and she did not fill out or sign the section titled "Waiver of Counsel for Today's Hearing." Although she initialed a later paragraph explaining her right to counsel, she left blank a place to state that she was waiving her right to counsel and that she was doing so knowingly and intelligently. Although it was reasonable to infer from all this that Jimenez-Wiss intentionally and knowingly waived her right to counsel, it was equally reasonable to infer that she did not. Because any doubts on this score must be resolved against waiver, the State failed to meet its burden that her waiver was valid.

SENTENCING

District court failed to properly determine whether a sentence less than LWOP was in the interests of justice.

***Lebeau v. State*, 2014 UT 39 (Parrish).** Andrew LeBeau was convicted by a jury of aggravated kidnapping with serious bodily injury. LeBeau was charged after he kidnapped his girlfriend, got into a high speed chase with the police, and crashed his car, causing his girlfriend to be thrown from the car. The girlfriend suffered a broken eye socket, fractured femur, fractured pelvis, broken arm, and shattered ankle. At sentencing the court began with a presumptive sentence of LWOP and then determined whether the aggravating and mitigating circumstances dictated a lesser term. It noted several aggravating factors, but largely reject the mitigating factors that LeBeau argued, including his lengthy employment history, his minimal criminal history, and his strong family support. The court determined that an LWOP sentence was appropriate. LeBeau appealed. The court of appeals affirmed the trial court, holding that it had appropriately exercised its discretion in considering the aggravating and mitigating factors. LeBeau sought a writ of certiorari, claiming that Utah Code § 76-5-302(4) required the trial court to undertake a separate "interests of justice" analysis before imposing an LWOP sentence. The Utah Supreme Court granted the writ.

Held: Reversed. Before imposing an LWOP sentence under Utah Code § 76-5-302(3)(b), the trial court must determine whether an lesser sentence is in the "interests of justice" under Utah Code § 76-5-302(4). To make the determination, the trial court must consider the proportionality of the sentence and the defendant's rehabilitative potential. While the aggravating and mitigating circumstances described in the sentencing guidelines are part of that analysis, other factors described in the opinion must also be considered. In LeBeau's cases, the trial court did not properly consider all these factors before sentencing LeBeau.

Dissent (Lee): Justice Lee disagreed with the "detailed sentencing standards prescribed by the majority." He recited he history of discretionary and indeterminate sentencing. Justice Lee then opined that the "interests of justice" language in Utah Code § 76-5-302(4) was nothing more than a reinforcement of the discretion that Utah has long given its courts in matters of sentencing.

LWOP for juvenile who raped and murdered his youth counselor was constitutional.
***State v. Houston*, 2015 UT 40 (Nehring).** Seventeen-and-a-half-year-old Houston was housed in a group for trouble teens because he previously committed several sexual assaults, including two at knife point. At the group home, he raped a female counsel at knife point and then, because she wouldn't stop screaming, slit her throat, tried to rip out her trachea, tried to snap her neck, and stabbed her to death. Houston pled guilty to aggravated murder and a jury gave him LWOP.

Held: Affirmed. Giving LWOP to a juvenile did not violate state cruel and unusual punishment clause; state unnecessary rigor clause; state uniform operation or laws or federal equal protection; or state and federal due process. **Dissent (Durham)**: The dissent concludes sentencing any juvenile to LWOP violates the state cruel and unusual punishment clause because juveniles are categorically less culpable.

***Shondel* doctrine did not apply to third-degree felony aggravated assault and class A misdemeanor assault because the statutory elements of the two crimes are not wholly duplicative.**
***State v. Salt*, 2015 UT App 72 (Roth).** Salt was convicted of third-degree felony aggravated assault after he repeatedly hit his ex-girlfriend in the head with a piece of pottery and a metal pipe. A jury convicted Salt of third-degree felony aggravated assault involving domestic violence. Salt argued that the trial court's refusal to sentence him to class A misdemeanor assault violated the *Shondel* doctrine because there was no "meaningful distinction" between the two crimes where the actual result (substantial bodily injury) could be the same.

Held: Affirmed. Under the *Shondel* doctrine, when "two statutes define exactly the same penal offense, a defendant can be sentenced only under the statute requiring the lesser penalty." Two statutes define exactly the same offense only when they have identical statutory elements. The elements of class A misdemeanor simple assault are not the same as third-degree felony aggravated assault because the two statutes describe conduct significantly different in both conduct and *potential* for harm.

***Shondel* doctrine does not apply to accomplice-liability aggravated arson and criminal solicitation because the statutory elements of the two crimes do not completely overlap.**
***State v. Melancon*, 2014 UT App 260 (Pearce).** Melancon talked his brother into burning down Melancon's house for the insurance money. Before the fire, Melancon moved out all the stuff he wanted, told his brother how to do it, and took his family to Las Vegas for the weekend. The brother nearly died during the fire and ratted his brother out in exchange for a favorable plea deal and his testimony. A jury convicted Melancon of both aggravated arson as an accomplice and criminal solicitation. The trial court merged the criminal solicitation into the aggravated arson conviction, but refused to give Melancon the benefit of solicitation's lesser penalty under *Shondel*.

Held: Affirmed. The *Shondel* doctrine applies only when two statutes define *exactly* the same penal offense; in that case, a defendant is entitled to the lesser penalty of the two crimes. Two

crimes are exactly the same only when their statutory elements completely overlap. Accomplice liability, unlike criminal solicitation, is not an independent crime; a person cannot be charged with accomplice liability standing alone. Rather, the State must prove that the underlying crime was actually attempted or completed before it can get a conviction of a defendant as an accomplice to that crime. Criminal solicitation, on the other hand, requires only that the defendant solicited conduct that would be a crime if performed; it does not require the solicited person actually attempt or complete the underlying crime. Because the elements of the two crimes do not overlap, the *Shondel* doctrine does not apply.

Rule of lenity is a canon of statutory construction that applies only when there is an ambiguity in the governing statute.

***State v. Salt*, 2015 UT App 72 (Roth).** Salt was convicted of third-degree felony aggravated assault after he repeatedly hit his ex-girlfriend in the head with a piece of pottery and a metal pipe. Salt argued that the rule of lenity required the trial court to reduce his sentence to a class A misdemeanor under section 76-3-402(1).

Held: Affirmed. The rule of lenity is "an ancient rule of statutory construction that penal statues should be strictly construed against the government" and in favor of the defendant. It appears that Utah's legislature has rejected the rule of lenity as a permissible canon of statutory instruction, but even if it has not, the rule wouldn't apply to Salt. The rule applies only when there is an ambiguity in the statute. Salt hasn't shown how the statutory definitions of the varying degrees of bodily injury in the assault statutes are so indistinguishable as to be ambiguous.

Trial court was within its discretion to deny 402 reduction at sentencing and to refuse to give defendant fewer than 365 days in jail to help him avoid deportation.

***State v. Sanchez*, 2015 UT App 58 (Toomey).** A jury convicted Sanchez, a non-citizen, of a lesser offense of unlawful possession of another's identification documents, a class A misdemeanor. Sanchez wanted the trial court to sentence him under 76-3-402(1) as a class B misdemeanor. Alternatively, Sanchez asked the trial court to give him fewer than 365 days in jail so that he could avoid deportation. The trial court refused both requests.

Held: Affirmed. A trial court has discretion to deny a section 402(1) reduction request. Here, the trial court found that sentencing Sanchez to a class A misdemeanor would not be unduly harsh, particularly where he already caught a break when the jury convicted him of a lesser offense. And the trial court did not abuse its discretion by refusing to deviate from its normal practice of imposing the maximum standard sentence of 365 days just so that Sanchez could avoid deportation. In fact, it appears that giving Sanchez fewer jail days would have had no affect on his potential for deportation.

Defendant has no right to allocate when a court reduces an incorrect sentence under Rule 22(e).

***State v Samul*, 2015 UT App 23 (Bench).** Theodore James Samul pleaded guilty to one count of attempted aggravated sexual assault and one count of attempted aggravated kidnapping.

The trial court imposed a three years to life sentence for each count. The trial court also imposed consecutive sentences because Samul's crimes were disturbing and the court wanted to incarcerate him for as long as possible. Nine years later, Samul moved to correct his sentence, pointing out that attempted aggravated kidnapping was a second degree felony punishable by only one to fifteen years in prison. The State agreed, and the court amended the sentence nunc pro tunc without further hearing. Samul objected to the amendment, arguing that he should have been allowed to allocate for concurrent sentences. The trial court overruled the objection. Samul appealed.

Held: Affirmed. When a Rule 22(e) correction to a sentencing raises a reasonable probability that the trial court might have imposed a different sentence had it imposed the correct sentence to begin with, the Defendant is entitled to allocate at the correction and argue for a new sentence. But here, the trial court indicated at sentencing that it intended to incarcerate Samul for as long as possible. And the corrected sentence reduced the length of Samul's sentence. So there is no reasonable probability that the trial court would have imposed concurrent terms had it ordered the correct sentence in the first place.

SIXTH AMENDMENT - INEFFECTIVE ASSISTANCE OF COUNSEL

Utah's sex offender registry requirement is collateral consequence, and an attorney's failure to advise his client that a conviction will require him to register as a sex offender does not violate the Sixth Amendment right to counsel.

***State v. Trotter*, 2014 UT 14 (Durham).** In 2009, Kenneth Trotter pleaded guilty to a misdemeanor count of unlawful sexual activity with a minor. He later moved to withdraw his plea, alleging that neither his attorney nor the district court had informed him that his conviction would require him to register as a sex offender. Trotter asserted that the sex offender registry requirement was a direct consequence of his plea and that the court and counsel were obligated to inform him of that requirement before he pleaded guilty. The trial court disagreed and denied the motion to withdraw. Trotter then renewed his motion and claimed that the sex offender registry requirement was akin to the deportation consequence in *Padilla* and that the court should extend the reasoning in *Padilla* to the sex offender registry requirement. The trial court again disagreed with Trotter, and Trotter appealed.

Held: Affirmed. The sex offender registry requirement is a collateral consequence. Collateral consequences are categorically excluded from the scope of the Sixth Amendment's protections. And the sex offender requirement is not a severe consequence like deportation, thus *Padilla's* reasoning does not extend to it. (US Supreme Court denied cert.)

Counsel was not ineffective for failing to successfully defend his peremptory strikes against a Batson challenge.

***State v. Sessions*, 2014 UT 44 (Lee).** Ronnie Cyril Session was tried on charges of aggravated sexual assault after brutally raping and strangling his wife. During jury selection, his counsel struck five women from the jury venire. The prosecutor raised a Batson challenge. Counsel failed to provide a non-discriminatory reason for striking two of the women, despite there

being clear non-discriminatory reasons to strike them, and he admitted that he was unaware of any legal prohibition to striking potential jurors on the basis of gender. The court found a Batson violation and chose to reinstate the two jurors. Counsel did not ask to have his peremptory challenges reinstated. The jury convicted Sessions, and he appealed. The court of appeals affirmed. Session sought and was granted a writ of certiorari, claiming that his counsel was ineffective in striking all women and mishandling the Batson challenge and that the trial court plainly erred in reinstating the jurors and not reinstating his peremptory challenges.

Held: Affirmed. Counsel's lack of knowledge is not enough by itself to constitute deficient performance so long as his actual representation is objectively reasonable. Here, objectively reasonable counsel would have had a non-discriminatory basis to strike the jurors. And when counsel lost the Batson challenge, he could have concluded that reinstating the jurors was as good as any other remedy and that the existing panel was as good or better than the other possible panels. The court found it troubling that counsel could not articulate a non-discriminatory basis to strike two of the jurors. But Sessions failed to show that he was prejudiced by that deficiency, and the court rejected his invitation to presume prejudice. Lastly, the court rejected his plain error argument. The court chose a legally appropriate remedy for the Batson violation and had no constitutional obligation to restore Session's peremptory challenges.

Counsel in murder/child abuse case was not ineffective for stipulating to certain facts, for allowing defendant's unredacted police interrogation video to be played to the jury, or for not presenting a battered woman syndrome defense.

***State v. Lucero*, 2014 UT 15 (Durrant).** Lucero's two-year-old son died after someone bent him backwards, snapping his spine and pulling apart his aorta. The boy suffered seizures immediately before his death. Lucero initially told several people that she was alone with the child when the fatal injury and a prior similar injury were inflicted. But she changed her story and blamed her boyfriend when she learned that the boy had died of nonaccidental trauma. At trial, Lucero explained her shifting story by claiming that she was only trying to shield her undocumented boyfriend from deportation, but that once she realized her son had been abused, she was no longer willing to protect him.

Held. Affirmed. Counsel had conceivable legitimate strategic reasons for stipulating that one of Lucero's other children had been hospitalized for seizures: it supported her claim that she initially lied to police only to protect her boyfriend from deportation; it cut against insinuations in the police interrogation that she had harmed the other child; it suggested that Lucero was a caring and attentive mother because she took her child to the hospital. Defense counsel also had a conceivable legitimate strategic reason for allowing the jury to hear the unredacted video of the police interrogation: it showed that despite aggressive, hostile questioning Lucero never cracked and confessed; and her emotional reactions to the forceful questioning, including a prayer, could have won the jury's sympathy. While counsel might have reasonably decided to advance a battered woman syndrome theory in addition to the defense presented at trial, it was also reasonable not to do so. *Strickland* does not require counsel to argue every reasonable theory; it requires only that the theory ultimately employed be reasonable.

Counsel is not required to object to prosecutor's closing argument unless the comments were really, really, really, really bad.

***State v. Houston*, 2015 UT 40 (Nehring).** Seventeen-and-a-half-year-old Houston was housed in a group for trouble teens because he previously committed several sexual assaults, including two at knife point. At the group home, he raped a female counsel at knife point and then, because she wouldn't stop screaming, slit her throat, tried to rip out her trachea, tried to snap her neck, and stabbed her to death. Houston pled guilty to aggravated murder and a jury gave him LWOP. On appeal, Houston challenged his counsel's effectiveness because he didn't object to the prosecutor's allegedly improper comments in closing.

Held: Affirmed. In an IAC challenge, the relevant question is not whether the prosecutor's comments were proper, but "whether they were so improper that counsel's only defensible choice was to interrupt those comments with an objection." And with respect to Houston's corresponding plain error claim, trial courts have not duty to "constantly survey or second-guess the nonobjecting party's best interests or trial strategy."

Counsel was not ineffective for choosing not to object to the admission of diaper-fetish material in a child sex abuse prosecution.

***State v Hanigan*, 2014 UT App 165 (Orme) (memo).** Asgia Ji Hanigan was convicted of three felony child sex abuse related crimes. He appealed, claiming that his attorney was ineffective for failing to object to the admission of certain exhibits, including magazines showing adults dressed in diapers engaging in masochistic sex, letter written to Hanigan discussing sex and diaper fetishes, photos of Hanigan in a diaper sucking on a baby bottle, and photos of adults and minors dressed in diaper-fetish attire.

Held: Affirmed. An objection to much of the material would have been futile because the material was relevant to refute Hanigan's claim that he used a catheter and suffered from a sexually disabling injury. Also, the case was tried to the bench, not a jury, and a judge is less likely to be swayed to convicted on an improper basis than a jury.

STATUTE OF LIMITATIONS

Neither securities fraud, theft, nor communications fraud are continuing offenses.

***State v. Taylor*, 2015 UT 42; *State v. Kay*, 2015 UT 43 (Parrish).** Taylor was charged with several counts of securities fraud and theft based on his alleged operation of a Ponzi scheme. Kay, a home builder, was charged with several counts of communications fraud after he allegedly used $135,000 intended to pay down a construction loan for other business expenses. The issue in both cases was whether the charged crimes were continuing offenses that extended the statute of limitations.

Held: None of the charged crimes in either case were continuing offenses. Legislative intent, as shown by the plain language of the statute, governs whether an offense is continuing. The securities fraud statute ties any actionable fraud "in connection with the offer, sale, or purchase of any security." Thus, the fraud is complete once the offer, sale, or purchase is

complete. Any communications to cover the fraud made after that point do not continue the offense of securities fraud, but are more appropriately charged as communications fraud. Theft likewise is not a continuing offense, but is complete as soon the thief obtains or exercises control over the property with the required intent. Any later acts of disposing, concealing, selling, or withholding the property are more appropriately charged as receiving stolen property. Communications fraud is also not continuing, but is complete as soon as the fraudulent communication is made for the purpose of executing or concealing a scheme or artifice.

SUFFICIENCY OF THE EVIDENCE

Repeatedly driving a borrowed truck through known drug area, while carrying lots of cash and a pocketknife with heroin on it, shows a sufficient nexus to heroin hidden in the bed of the truck, especially where the driver accuses the officer of planting it.
***State v. Ashcraft*, 2015 UT 5 (Lee).** Over two nights, officer sees truck belonging to known drug trafficker repeatedly driving through motel parking lot known for drug activity. But Ashcraft (not the owner of the truck) is driving with a female passenger. Ashcraft claims that he had borrowed the truck from the known drug trafficker. Ashcraft is carrying $793 in cash and a pocketknife with a brownish/black tar substance that looks like (and field tests as) heroin. The officer finds a green bag hidden in the bed of the truck. Ashcraft denies any knowledge of the bag, but before the officer can open it, accuses the officer of planting it. The bag has 30-40 baggies of heroin, a bunch of pills, two digital scales, glass pipes with residue on them, and a pink stun gun. On appeal, Ashcraft challenged the sufficiency of the evidence that he constructively possessed the green bag.

Held: The following facts taken together established a sufficient nexus between Ashcraft and the bag to prove constructive possession: (1) Ashcraft's occupancy of the truck; (2) his repeatedly driving through an area known for drug activity during late night and early morning hours; (2) while carrying lots of cash; (3) while carrying a pocketknife with a substance on it identified as heroin by the arresting officer; (4) the bag was close enough for him to have reached through the open window and touched it; and (5) his accusing the arresting officer of planting the bag in the truck immediately upon being asked about it and before it was open. Each of these facts taken on their own could have an innocent explanation, but cumulatively they are enough to sustain a reasonable jury verdict. **Dissent (Parrish joined by Nehring):** The dissent employs a divide-and-conquer approach to argue that each individual fact has an innocent explanation and was therefore not enough to prove constructive possession.

Evidence that a 15-year-old girl was afraid of defendant and took efforts to avoid him was sufficient to show that she would not have willingly gone with him.
***State v. Nielsen*, 2014 UT 10 (Lee).** Nielsen was convicted of 15-year-old Trisha Autry's aggravated kidnapping and aggravated murder and sentenced to life without parole. On appeal, Nielsen claimed there was no evidence that he kidnapped her because there was no direct evidence on the victim's unwillingness to go with him, and the best circumstantial evidence showed only that the victim might have been "leery or scared" of him.

Held: Affirmed. Direct evidence is not required to convict. The State presented strong circumstantial evidence that the victim would not have willingly gone with Nielsen, including: he repeatedly followed the victim home from school; the victim consistently responded to this attention with fear, which she expressed to friends, church leader, mother, and sister; the victim repeatedly asked to be picked up from school rather than walk home because she was afraid of Nielsen; on the morning of her disappearance, the victim was wearing clothing she would not have worn if she had planned to meet someone on her walk; and the victim's remains showed signs of blunt force trauma inflicted before her death.

Evidence that kidnap victim was free to move about the house and was left alone at one point went to weight, not sufficiency, of the evidence.

***State v Ellis*, 2014 UT App 185 (Greenwood).** Roger Ellis was charged with aggravated kidnapping and elder abuse. His mother testified that at trial that for a full day Ellis followed her around the house, yelled at her, hitting her, blocking her from leaving the house, and, later in the evening, threatening to kill her with a butcher knife. Mother eventually was able to call 911 and summon paramedics under the guise of having chest pains. Once the paramedics transported her out of the house, she told them that she had been detained and abused by her son. A jury convicted Ellis, and he appealed, claiming that the evidence was insufficient because it was indisputable that his mother was free to move about her house and was left alone at least once while Ellis smoked a cigarette.

Held: Affirmed. The State presented sufficient evidence to support each element of the aggravated kidnapping statute. Ellis's claim goes only to the weight of the evidence, not its sufficiency.

A fraudulent insurance claim doesn't have to be so good that the insurance company is likely to pay it.

***State v. Ferguson*, 2015 UT App 45 (Christiansen).** Ferguson submitted an insurance claim representing that expensive equipment had been damaged in a small flood in his business basement. In fact, the equipment he claimed to have been damaged was nowhere near the basement at the time of the flood. The insurance company asked Ferguson for supporting documentation and denied the claim when Ferguson didn't cooperate with the request. A jury convicted Ferguson of insurance fraud. Ferguson challenged the sufficiency of the evidence to support his conviction.

Held: Affirmed. A person commits insurance fraud when he "presents, or causes to be presented, any oral or written statement or representation" as "part of or in support of" an insurance claim. The statute does not require, as Ferguson argued, that the defendant pursue a company's claim procedure to the point where the insurance company "would reasonably be expected to pay a claim." Ferguson's reliance on an old Utah Supreme Court case was misplaced, where that case interpreted an earlier version of the statute.

Running away after a police officer commands you to stop is not enough to prove the specific mental state of "for the purpose of avoiding arrest."
***Salt Lake City v. Gallegos,* 2015 UT App 78 (Roth)**. Police responded to a call that several men (two of them clad in red) were fighting in an adjacent alleyway in a high-crime area. Police saw Gallegos, wearing a shirt with red stripes, with another man in the alley. As soon as the men made eye contact with police they took off running. The officers yelled, "Stop, police," but the men kept running. Police finally tracked down Gallegos, who claimed that he didn't realize they were cops. Gallegos smelled of alcohol and had fresh blood and scrapes on his hands and elbows. Gallegos was cited for and convicted of failure to stop at the command of a police officer.

Held: Reversed for insufficient evidence. The State had to prove not only that Gallegos failed to stop, but that he fled for the specific purpose of avoiding arrest. Gallegos's flight alone was not enough to prove that Gallegos fled because he was worried about being arrested.

UNIFORM OPERATION OF LAWS - UTAH CONSTITUTION

Defendant lacked standing to claim that the sexual exploitation of a child statute violated the uniform operation of laws by allowing prosecutors to view child pornography while theoretically exposing defense attorneys to prosecution for the same thing.
***State v. Roberts*, 2015 UT 24 (Parrish).** Roberts, convicted of possessing child pornography, claimed that the sexual exploitation of a child statute violated Utah's uniform operation of laws clause in two ways: (1) it impermissibly distinguishes between those who may legally view child pornography (i.e., law enforcement officers and employees of designated entities) and those who may not; (2) it unconstitutionally distinguishes between prosecuting attorneys, who may legally view child pornography in the performance of their duties, and defense attorneys who theoretically can be prosecuted for doing the same thing.

Held: Affirmed. On the first claim, the classification was permissible because the two classes were not similarly situated. The statute exempts only those law enforcement officers who are "acting within the scope of a criminal investigation," and employees of specific entities who are "acting within the scope of their employment" and in "good faith performance" of reporting or preventing child pornography. Officers and employees acting outside the scope of their duties are treated like anyone else who views child pornography. On the second claim, Roberts lacked standing to bring it because he could show no injury where his attorney had not been prosecuted or threatened with prosecution.

VENUE

To show harm from an alleged change-of-venue error, a defendant must show that an actual biased juror sat.
***State v. Nielsen*, 2014 UT 10 (Lee).** Cody Nielsen was convicted of the aggravated murder of Trisha Autry and sentenced to life without parole. Long before trial, Nielsen moved to change

venue from Cache to Davis County based on pretrial publicity. The trial court granted the motion, but for reasons not in the record, never transferred the file to Davis County. Nielsen later moved to change venue to Box Elder County. The trial court granted the motion, but again, the case was not immediately transferred. Ultimately, because of logistical and security concerns, the trial court, over Nielsen's objection, decided to choose a Box Elder jury and transport them to a Cache County courthouse for trial. On appeal, Nielsen argued it was reversible error not to immediately transfer the case when the court granted the two change of venue motions. Alternatively, he argued that the trial court abused its discretion in holding the trial in Cache County.

Held: Affirmed. A defendant challenging a change of venue ruling must show prejudice. When the alleged harm is a tainted jury in trial that has already happened, it is not enough to speculate about the effects of pretrial publicity. Rather, a defendant must show that an actual biased juror sat. Nielsen didn't do so here. Nielsen also didn't show that the trial court abused its discretion in holding trial in Cache County where he merely speculated that the jury might have felt "undue pressure" to make a decision they might otherwise not have made in Box Elder County.

VICTIM RIGHTS

Victims have limited-party status to file a restitution request in a criminal case; victim's mother was not entitled to lost wages and travel expenses related to attending court hearings.

***State v. Brown*, 2014 UT 48 (Lee).** Michael Adam Brown pleaded guilty to one count of unlawful sexual activity with a sixteen or seventeen year old. During the criminal proceedings, the victim's mother attended many of the hearings, sometimes without the victim. In so doing, she missed work and sometimes drove a few hundred miles. After Brown was sentenced, the victim's mother filed a restitution request for $1,228.00 for lost wages and travel expenses. Brown objected, arguing that the victim did not have standing to request restitution apart from the prosecution. The prosecutor then filed an identical restitution request on behalf of the victim. The trial court rejected both requests, ruling that the victim did not have standing to seek restitution on her own and that lost wages and travel expenses incurred attending court hearings were not recoverable as restitution.

Held: Reversed in part and affirmed in part. Victims have limited-party status to seek restitution independent of the prosecution. This is clear from the provisions of the Rights of Crime Victims Act that authorize a victim to seek restitution and to seek redress and appeal violations of the Act. The Act specifically states that victims may appeal any adverse rulings on a motion brought by a victim. The Act thus contemplates that a victim would file motions, including a motion for restitution. But in this case, expenses and lost wages incurred attending court hearings are not compensable. Restitution is limited to what the victim could recover in a civil action against the defendant for his or her injuries. And as a general rule, litigation expenses are not recoverable as part a tort claim.