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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

Peeping Tom who appealed the sweet plea deal he got in justice court was stuck with the extra 90 days he got after a trial de novo in district court.

***Vorher v. Henriod*, 2013 UT 10 (Parrish).** Vorher was caught peeping into the bedroom of a teenage girl while she dressed for school. He was charged with class B misdemeanor voyeurism in justice court. He pled guilty to class C misdemeanor disorderly conduct. The justice court imposed a fine and 90 days. Vorher appealed his conviction to the district court, where he was convicted of the original class B misdemeanor charge. The district court gave him 180 days in jail and a higher fine. Vorher objected, arguing that under Section 76-3-405, he could not be sentenced to more than the 90 days the justice court had given him. Vorher filed a petition for extraordinary relief in the court of appeals, which affirmed. The Utah Supreme Court granted cert and affirmed the court of appeals.

Held: Section 76-3-405(1) provides that upon a defendant's reconviction after a successful appeal, the sentencing court "shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied." But section 76-3-405(2)(b) contains a broad exception when the original sentence is the result of a guilty plea: when a defendant enters into a plea agreement with the prosecution and later successfully moves to invalidate his conviction, the defendant and the prosecution stand in the same position as though the plea bargain, conviction, and sentence never occurred. Both subsections apply to justice courts. Vorher's justice court conviction resulted from a plea agreement in which Vorher pled guilty to a reduced charge. Section 76-3-405's prohibition on increased sentences, therefore, did not apply.

Counsel's stipulation that the plea complied with rule 11 was invited error.

***State v. Moa*, 2012 UT 28 (Durrant).** Charles Moa pled no contest to a third degree felony arising from his participation in a shooting. He later sought to withdraw his plea, claiming that he had not understood the potential sentence, that his counsel had been ineffective for not objecting to a last minute change in the plea offer, and that the State had breached the plea agreement. The court appointed him new counsel. Moa's new attorney stipulated that the court had fully complied with rule 11, and the trial court denied the motion to withdraw. On appeal, Moa argued for the first time that his plea was not knowing and voluntary. The court of appeals affirmed, holding that Moa had not preserved his claim that the plea was not knowing and voluntary and that he had not shown plain error. The Supreme Court granted Moa's petition for certiorari.

Held: The Supreme Court refused to review the claim because Moa invited the error. Invited error occurs when counsel makes an affirmative representation that leads the trial court into the alleged error. In this case, Moa's attorney stipulated that the court had complied with rule 11, thereby preventing the court from even considering whether the plea was knowing and voluntary.

Defendant not denied right to appeal by trial court's failure to inform him of the 30-day deadline for appealing where defense counsel informed defendant of that right.

***State v. Kabor*, 2013 UT App 12 (Roth).** Kabor was convicted of murder, obstruction of justice, and discharging a firearm from his vehicle. He was sentenced to prison in January 2009. The trial court did not tell him at sentencing, as required by Utah R. Crim. P. 22(c), of his right to appeal and the 30-day deadline for filing an appeal. Seventy-seven days later, Kabor moved to reinstate the time for filing a notice of appeal under Utah R. App. P. 4(f) and *Manning v. State*, 2005 UT 61. Kabor testified at the hearing on his motion that immediately after trial he asked his trial counsel to file an appeal. He claimed that he did not learn of the 30-day deadline for filing an appeal until it was too late. Kabor's attorney, however, testified that he told Kabor at least twice before sentencing that Kabor had the right to appeal, although he did not think that Kabor had grounds for an appeal. But the attorney Kabor that if he wanted to appeal he needed to let counsel know by sentencing so that they could ask for appointed counsel or, if Kabor preferred, his attorney could recommend private appellate counsel. The attorney said that he told Kabor that an appeal would have to be filed within 30 days of sentencing. The attorney testified that Kabor told him before sentencing that he did not want to appeal and that he said nothing at sentencing to make counsel think he had changed his mind. The trial court believed the attorney and denied the motion to restart the time for appeal.

Held: Affirmed. A defendant is entitled to reinstatement of his direct appeal right only if he shows that he was "unconstitutionally deprived, through no fault of his own, of his right to appeal." Although the trial court did not inform Kabor of his right to appeal, his attorney did. Because Kabor had actual knowledge of his right to appeal and the time period for doing so and because he told counsel that he did not want to appeal, Kabor has not shown that he was deprived of his right to appeal.

Defendant granted reinstatement of time for appeal even though told his attorney he did not want to appeal where neither the trial court nor his attorney told him the deadline for filing an appeal.

***State v. Collins*, 2013 UT App 42 (Voros).** A jury convicted Collins of murder and two counts of aggravated robbery. He was sentenced in January 2007. The trial court did not inform Collins at sentencing, as required by Utah R. Crim. P. 22(c), that he had the right to appeal and that the appeal notice had to be filed within 30 days. Two years later, Collins moved to reinstate the time for filing an appeal under Utah R. App. P. 4(f) and *Manning v. State*, 2005 UT 61. Collins claimed that he timely directed his attorney to file an appeal, but his attorney did not do so. But Collins' attorney testified that he twice informed Collins of his right to appeal, once right after the jury returned the guilty verdict and again at sentencing. In fact, counsel said he encouraged Collins to testify, but that Collins told him both time that he did not want to appeal. At sentencing, the attorney told Collins that if he changed his mind, he need to let counsel know within two weeks so that he could file a notice of appeal. Counsel never heard

from Collins after that. The trial court believed the attorney and denied the motion to reinstate the time for appeal.

Held: Reversed. Properly advising a defendant of his right to appeal includes advising him of the time within which an appeal must be filed. Here, neither the trial court nor defense counsel "properly" informed Collins of his right to appeal. The Court rejected the State's argument that Collins was required to prove not only that he did not know of the time for filing his notice of appeal, but also that had he been properly informed, he would have filed a timely notice of appeal. State's cert. petition pending.

Defendant was not entitled to reinstatement of time for appeal where he admitted his guilt during allocution at sentencing and expressly waived his right to a direct appeal.

***State v. Owens*, 2012 UT App 356 (per curiam).** A jury convicted Owens of first degree murder. Owens and the State reached an agreement after verdict, that if Owens admitted his guilt at sentencing and gave information about an alleged murder-for-hire scenario that led to a prosecutable case against the alleged hirer, the State would give a favorable recommendation to the Board of Pardons. The trial court engaged Owens in a detailed colloquy, during which Owens stated that he understood that he would be waiving his right to appeal by admitting the crime at sentencing. After being sworn, Owens admitted his guilt at sentencing and the trial court found that he knowingly and voluntarily waived his right against self-incrimination and his right to a direct appeal. Owens was given 5-to-life. Owens subsequently filed two unsuccessful motions under Utah R. App. P. 4(f) and *Manning v. State*, 2005 UT 61 to reinstate the time for appeal. He claimed that he asked counsel to file an appeal and denied waiving his right to appeal. Owens then filed a third unsuccessful *Manning* motion, basically raising the same issues. Held: Based on the clear record, the district court did not err in denying this third motion to reinstate the time for appeal. Owens did not satisfy his burden of proving by a preponderance that he was unconstitutionally denied his right to appeal through no fault of his own. A defendant who knowingly and voluntarily waives his right to appeal has not been unconstitutionally denied that right.

Appeal of sentence is moot where defendant had been released from jail and case was closed.

***State v. Peterson*, 2012 UT App 363 (McHugh) (mem).** Charles Brandon Peterson was convicted of a drug offense and sentenced to jail. He appealed his sentenced, claiming various errors by the trial court. While his appeal was pending, Peterson was released from jail and his case was closed. The State thereafter filed a suggestion of mootness.

Held: Dismissed as moot. When an error occurs as sentencing, the relief is resentencing. But once a defendant is released from jail and his case is closed, resentencing is impossible and of no legal effect. The appeal is therefore moot.

CIVIL RIGHTS

Federal agents had qualified immunity in § 1983 action alleging retaliatory arrest for political speech because law not clearly established.

***Reichle v. Howards,* 132 S.CT. 2088 (2012).** The Court unanimously held that two federal law enforcement agents are entitled to qualified immunity from a §1983 action alleging they arrested respondent in retaliation for his political speech, where the agents had probable cause to arrest respondent for committing a crime. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Court held that probable cause to arrest defeats a First Amendment claim of retaliatory *prosecution*. In this case, the Court declined to decide whether a similar rule applies to a First Amendment claim of retaliatory *arrest*. Rather, the Court held that *Hartman* left the law sufficiently uncertain that it was not clearly established that an arrest supported by probable cause could still violate the First Amendment. (Petitioners are Secret Service Agents who arrested respondent after he approached Vice-President Dick Cheney in a shopping mall, expressed his disapproval of the Bush Administration's Iraq war policy, touched the Vice-President on the shoulder, and then lied about that to the agents.)

CONFRONTATION

No Confrontation Clause violation when expert witness gives opinion based on another expert's report.

***Williams v. Illinois*, 132 S.Ct. 2221 (2012).** By a 4-1-4 vote, the Court held that a defendant's Confrontation Clause rights were not violated when an expert witness, relying on the DNA testing performed – and lab report prepared – by another DNA analyst, gave her expert opinion that there was a DNA match. A four-Justice plurality (the Chief Justice and Justices Alito, Kennedy, and Breyer) reasoned that the expert could be cross-examined and that the out-of-court statements (the lab report) related by the expert to explain her assumptions "are not offered for their truth and thus fall outside the scope of the Confrontation Clause." An opinion by Justice Thomas concurring in the judgment rejected that reasoning but reached the same result based on his conclusion that the statements in the lab report "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." He specifically noted that the lab report was "neither a sworn nor a certified declaration of fact," and that although it was signed by two "reviewers," neither of them "purport[ed] to have performed the DNA testing nor certif[ied] the accuracy of those who did."

Defendant forfeited right to confrontation when he called his wife 276 times in violation of a no-contact order to influence her not to testify for the prosecution.

***State v. Zaragoza*, 2012 UT App 268 (Thorne) (mem).** Defendant beat the crap out of his wife. Her injuries were photographed and she gave two witness statements to police. In violation of a no-contact order, Defendant called his wife 276 times from jail in which he reminded her of the past, made offers and withdrawals of forgiveness, claimed to have changed, discussed their relationship, and invoked God. Before trial, Wife invoked the spousal testimonial privilege, stating that she would not testify against Defendant. The State moved to admit Wife's witness statements under the forfeiture-by-wrongdoing doctrine. The trial

court found that the 276 phone calls had procured the wife's unavailability and therefore admitted Wife's witness statements to police. Although Wife did not testify for the prosecution, she did testify for the defense.

Held: Affirmed. Defendant's confrontation right was not violated. The trial court's findings were sufficient to establish that Defendant caused his wife's unavailability when he contacted her by phone 276 times in violation of a no-contact order. But even if the trial court's ruling had been wrong, Defendant's right to confrontation was not violated where he called Wife to testify and she willingly answered defense counsel's questions. Because Defendant had a sufficient opportunity to cross-examine Wife, his right to confrontation was not implicated.

CRIMINAL PROCEDURE

Grand jury law enforcement witness has absolute immunity.

***Rehberg v. Paulk*, 132 S.Ct. 1497 (2012).** In a unanimous opinion, the Court held that a law-enforcement witness who testifies in a grand jury proceeding is entitled to the same absolute immunity from suit un 42 U.S.C. ¶ 1983 as a witness who testifies at trial.

Rule 15.5, Utah Rules of Criminal Procedure, does not require a separate showing of good cause before admitting a child's recorded statement at trial.

***State v. Nguyen*, 2012 UT 80 (Parrish).** D repeatedly sexually abused his 10- to 11- year-old stepdaughter. Just before her 12th birthday, the victim was interviewed on videotape by a detective at the Children's Justice Center. The victim described the sexual abuse in detail. Before trial, the State sought admission of the videotape under rule 15.5(a) and then-applicable Utah Code Ann. § 76-5-411. Rule 15.5(a) allows admission of such videotapes in a child sexual abuse prosecution "upon motion and for cause shown," if the child is under 14 and the trial court makes several findings regarding the recording, including that "it is sufficiently reliable and trustworthy and that the interest of justice will best be served" by its admission. The trial court made the required findings and admitted the videotape. The trial court did not make a separate finding that there was good cause to admit the videotape. After the video was played to the jury, the victim was called as a witness where she confirmed that her statements in the interview were true and where she answered general questions about the abuse and her subsequent disclosure. Defendant chose not to cross-examine the victim or present any other evidence. Defendant appealed his convictions, arguing that rule 15.5 required the trial court to independently find "good cause" before admitting the videotape. The court of appeals affirmed. *See State v. Nguyen*, 2011 UT App 2. The supreme court granted cert and affirmed.

Held: Rule 15.5 does not require an independent "good cause" finding. "Good cause" in rule 15.5 refers to the specified requirements in the rule of accuracy, reliability and trustworthiness, and the interest of justice. Once the trial court makes those findings, "good cause" exists for admitting the taped interview.

Defendant can't waive jury trial over prosecution's objection.

***State v. Greenwood*, 2012 UT 48 (Parrish).** Forty-one-year-old Greenwood is charged with having sex with her son's 15-year-old friend. On the morning of trial, Greenwood asked for a bench trial. The prosecution objected, citing Utah R. Crim. P 17(c), which allows a defendant to waive a jury trial only with the prosecution's consent. The trial judge acknowledged rule 17(c)'s unambiguous language and US Supreme Court and Utah Supreme Court equally unambiguous holdings that rule 17(c) did not violate due process. The trial judge approved Greenwood's waiver anyway and ordered a bench trial to begin the following morning. The trial judge didn't think it was fair that the prosecution could control defendant's jury trial right and that the rule violated due process. The Utah Supreme Court granted the State's petition for emergency stay and interlocutory review.

Held: Reversed. A district court cannot disregard clearly established law just because it disagrees with it. The language in rule 17(c) clearly allows a defendant to waive a jury only with the prosecution's consent. Neither the state nor federal constitutions guarantee a defendant a right to waive a jury trial. Greenwood's due process rights were not implicated by allowing the prosecution the veto her jury waiver. And trial judge erred when it suggested that it would be impossible or unlikely to seat an impartial jury in this case when it did not even attempt to seat an impartial jury by employing available procedural safeguards, such as jury questionnaires, careful voir dire, for-cause and peremptory challenges, and jury instructions, etc. US Supreme Court denied cert.

Trial courts need not make a record of the reasons for reversing a prior ruling so long as the basis for the ruling is apparent.

***State v. Ruiz*, 2012 UT 29 (Durrant).** Wolfgango Ruiz pled guilty to attempted sexual abuse of a child, a third degree felony. He then fired his attorney, obtained new counsel, and moved to withdraw his plea, claiming that his first attorney had misadvised him about the potential sentence and the immigration consequences of his plea. Based on Ruiz's affidavit, and the State's failure to present any evidence to the contrary, Judge Fuchs' granted Ruiz's motion to withdraw. The State then obtained an affidavit from Ruiz's first attorney rebutting Ruiz's claims and moved the court to reconsider its decision. By the time the motion was heard, Judge Fuchs had retired and Judge Skanchy had assumed his calendar. He granted the State's motion, noting that the first attorney's statements had rebutted Ruiz's self-serving claim. Ruiz appealed, claiming that Judge Skanchy's reversal violated the law of the case doctrine. The court of appeals reversed, holding that Judge Skanchy could properly reconsider Judge Fuchs' decision, but that he erred in failing to articulate the basis for his ruling. The court noted that prior cases from the Utah Supreme Court had held that motions to withdraw should be liberally granted. Based on those holdings and Judge Skanchy's purported failure to articulate the basis for his ruling, the court of appeals vacated Judge Skanchy's ruling. The State sought and obtained a writ of certiorari to the Utah Supreme Court.

Held: Reversed. Ruling on a motion to reconsider is within the sound discretion of the trial court. Courts are encouraged, but not required to make a record of the reasons for granting or denying a motion to reconsider. Where the reason for ruling on a motion to reconsider is not

apparent on the record, the proper remedy is remand, not reversal. Here, the basis for Judge Skanchy's ruling was apparent on the record, and the court of appeals erred in reversing his decision. The court also overturned its previous holding in *State v. Gallegos* that presentence motions to withdraw should be liberally granted. It noted that the legislature had amended the plea withdrawal statute since *Gallegos* to require that the Defendant show that his plea was not knowing and voluntary.

Justice Durham dissented in part, arguing that they courts usually establish the standard of proof and the burden of persuasion, not the legislature. She argued for a scheme in which the defendant must make a prima facie showing that his plea was not knowing and voluntary. A presumption of withdrawal would then arise that the state could only rebut by showing by a preponderance of the evidence that the plea was in fact knowing and voluntary.

Issuance and disposition of a traffic citation is not a prosecution under the single criminal episode statute; it therefore does not bar a subsequent prosecution for felony DUI arising from the same episode.

***State v. Sommerville*, 2013 UT App 40 (Roth).** Defendant was arrested for DUI. At the same time, he was cited for following too closely, as well as other misdemeanor offenses. The arresting officer later issued another citation by mail for only the following too closely offense. Defendant promptly paid the fine on that citation. Murray City subsequently filed an information in justice court charging defendant with the remaining misdemeanor offenses, including the DUI. When the City found out that defendant had paid the fine for following too closely, it moved to dismiss the charged misdemeanor offenses because it mistakenly believed that prosecution would be barred by double jeopardy. After the justice court dismissed the charges, Salt Lake County charged defendant in district court with felony DUI from the same incident because defendant had at least two prior DUI convictions. The district court denied defendant's motion to dismiss under the single criminal episode statute, double jeopardy, or res judicata. Defendant took an interlocutory appeal. In an earlier opinion, the court of appeals reversed. *See State v. Sommerville*, 2010 UT App 336, *reh'g granted* (Feb. 15, 2011). But the court of appeals then granted the State's petition for rehearing and issued this replacement opinion.

Held: Affirmed. The issuance and disposition of a citation does not constitute a prosecution under the single criminal episode statute. Defendant's payment of the following too closely citation, therefore, did not bar the subsequent prosecution of other offenses committed during the same criminal episode. The City's prosecution of the misdemeanor DUI likewise did not bar the County's subsequent prosecution under the single criminal episode statute. Under that statute, a subsequent prosecution is barred only if the former prosecution resulted in conviction, acquittal, an improper termination, or a final order or judgment that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution. None of that happened here. The single criminal episode statute, therefore, did not bar the County's subsequent felony DUI prosecution. Double jeopardy also did not bar the felony prosecution; defendant was never put in jeopardy because

his case was dismissed prior to trial. Res judicata also did not bar the felony prosecution because the misdemeanor prosecution did not result in a final judgment on the merits.

Single criminal episode doctrine did not preclude separate prosecution of offenses where county prosecutor was not aware of charges in justice court.

***State v. Selzer*, 2013 UT App 3.** On the evening of March 31, 2008, Jon Selzer raped and beat his live-in girlfriend, S.G. The two then walked to a gas station where he continued to assault and verbally berate her. The station attendant called the police, who arrived and arrested Selzer. From the jail, Selzer violated a no-contact order by calling S.G. and berating her. Provo city charged Selzer with assault and violation of a protective order for his conduct at the gas station and jail. Utah County charged Selzer with aggravated sexual assault and aggravated assault for Selzer's conduct at his and S.G.'s home. Selzer pled guilty to the Provo City charges and then moved to dismiss the Utah County charges under the single criminal episode doctrine, Utah Code 76-1-402. The district court dismissed the aggravated assault charge, but allowed the aggravated sexual assault charges to go forward. After he was convicted, Selzer appealed.

Held: Affirmed. To make out a violation of the single criminal episode doctrine, a defendant must demonstrate that the offenses charged in separate proceedings were part of a single criminal episode, that they were in the jurisdiction of a single court, and that the prosecutor in the second case was aware of the offenses in the first case at the time the defendant was arraigned on the first information. The offenses in this case were all within the jurisdiction of the district court. But Selzer offered no evidence that the prosecutor knew of the Provo City filing when he was arraigned in the justice court. The court also found that the offenses were not part of a single criminal episode because (1) there was a pause and a passage of three hours time between the sexual assault and the gas station beating; and (2) the gas station assault was not committed to further or aid the prior sexual assault and vice versa. Thus, the single criminal episode doctrine did not prohibit separate prosecutions.

Trial court did not abuse its discretion in refusing to sever defendant's cattle rustling counts.

***State v. Lamb*, 2013 UT App 5 (McHugh).** Inspectors for the state department of agriculture discovered that Lamb had kept other people's cows. Lamb was convicted of three counts of theft of lost property, a third degree felony. He appealed the trial court's refusal to sever the three counts, which involved different owners, different kinds of cows, and different days when the animals came to be in Lamb's possession.

Held: Affirmed. Although there were differences in the three counts, the trial court clearly perceived a visual connection between the three crimes. They all involved stray cattle, which were all taken from other cattlemen during seasonal cattle drives or round-ups, and which were all found in Lamb's possession after a long period of time and without him taking any reasonable measures to return them to their owners. This decision did not exceed the trial court's discretion in determining that the separate charges were part of a common scheme or plan. The court of appeals declined to reach Lamb's claim that joinder was prejudicial because it was inadequately briefed.

Rule 12's requirement that a motion to suppress be filed "at least five days prior to trial" means five days prior to the *actual* trial and not to an initial trial setting.

***State v. Smith*, 2012 UT App 370 (Orme).** Smith was charged with possession of a controlled substance and drug paraphernalia. His trial was continued four times. Two months before the actual trial was held, the defense filed a motion to suppress and asked for an evidentiary hearing. The trial court refused to entertain the motion to suppress, agreeing with the prosecutor, that a motion to suppress would be untimely under rule 12(c)(1)(B)'s requirement that a motion to suppress be filed "at least five days prior to trial." The trial court interpreted the rule as meaning at least five days prior to the initial trial setting. A jury convicted Smith as charged.

Held: Absent a court-imposed deadline for pretrial motions, Rule 12's requirement that a motion to suppress be filed at least five days prior to trial means five days before the *actual* trial and not the date for which the trial was first scheduled. The trial court therefore abused its discretion by not hearing and ruling on the motion to suppress. The error was harmless, however, because the undisputed evidence at trial defeated the only argument raised in the motion to suppress.

Dissenting opinion (Thorne): Thorne would have held that the error was not harmless and remanded for the trial court to entertain the motion to suppress, including giving defendant an evidentiary hearing to develop additional facts and perhaps add issues.

Refiling charges that were dismissed voluntarily by State after prelim was not barred by Rule 25, Utah Rules of Criminal Procedure, did not violate *Brickey* rule, and did not violate defendant's speedy trial rights.

***State v. MacNeill*, 2012 UT App 263 (Orme).** The State charged MacNeill with forcible sexual abuse and witness tampering. It succeeded in having him bound over at a preliminary hearing. Two weeks before trial, the State, without explanation, voluntarily dismissed the case. MacNeill did not object, and The court order stated only that the dismissal was "for good cause appearing." Eight months later, the State refilled the charges. The case was again bound over based on the transcript of the first preliminary hearing. MacNeill moved to dismiss the charges on due process and speedy trial grounds. The trial court denied the motion, and MacNeill obtained an interlocutory appeal. On appeal, he argued that Rule 25 prohibited refilling charges unless the charges were dismissed for unreasonable delay, lack of jurisdiction, an error in the information, or an error in the impanelling of a grand jury. He also argued that the refilling violated the rule laid out in *State v. Brickey* because the State to not present any new evidence or otherwise demonstrate good cause.

Held: Affirmed. When a case is dismissed at the discretion of the court under Rule 25(a), the dismissal is generally without prejudice. And where the reason for the dismissal is not stated on the record, the court will not infer that the dismissal is with prejudice. There was no violation of *Brickey,* because the *Brickey* rule only applies when a case is dismissed at the preliminary hearing for insufficient evidence. Defendant's speedy trial rights were not violated. The eight-month period between the dismissal and the filing is not counted against

the State. And the remainder of the delay was attributable largely to MacNeill's interlocutory appeal.

DEFENSES

Burden is on defense to prove withdrawal from a conspiracy.

***Smith v. United States*, 133 S.Ct. 714 (2013).** The Court unanimously held that once the Federal Government has proven that a defendant was a member of an unlawful conspiracy, the defendant bears the burden of proving the defense that he withdrew from the conspiracy early enough that the statute of limitations expired before prosecution. The Court ruled that neither the Constitution nor the federal conspiracy statute support treating withdrawal as an element of the offense that must be proven by the government beyond a reasonable doubt.

Self-defense not available in felony murder case or during the commission of a felony.

***State v. Soules*, 2012 UT App 238 (Voros) (mem.).** Soules killed the victim while Soules was committing an aggravated robbery. The trial court denied Soules' request for a self-defense instruction. The jury convicted Soules of both aggravated robbery and felony murder.

Held: Affirmed. Under Utah Code Ann. § 76-2-402(2)(b), the defense is not available to a person who uses force while committing a felony. Soules did not dispute that he killed the victim while he was committing a robbery. Self-defense is also not available to a charge of felony murder. Because felony murder is a strict liability offense, the defendant's subjective mental state with respect to the killing is irrelevant. Soules also argued for the first time on appeal that he was entitled to an imperfect self-defense instruction. The court of appeals declined to reach this issue because Soules did not request an imperfect self-defense instruction. In doing so, the court of appeals rejected Soules's claim that his request for a perfect self-defense instruction automatically constituted a request for an imperfect self-defense instruction.

Defendant cannot claim extreme emotional distress as a defense when his own conduct triggers the extreme emotions and stress.

***State v. Augustine*, 2013 UT App 61 (Davis).** Painful urination made Augustine think that he had an STD. He figured he got the STD from his girlfriend, who must have gotten it from her last sexual partner, J.E. So Augustine and his friend Stapely took a battle axe to J.E.'s house where they attacked him. Augustine and Stapely were charged with attempted murder. They were tried separately, with Stapely being convicted before Augustine's trial. Augustine was given an extreme emotional distress instruction. On appeal, he argued that the trial court erred in excluding a defense expert who would have testified that Augustine was under an extreme emotional distress at the time of trial. He also argued that the extreme emotional distress instruction was erroneous.

Held: Affirmed. Any error in excluding the expert or in the instructions were harmless because Augustine was not entitled to an extreme emotional distress defense in the first place. The defense cannot be based on emotions and stress that a defendant brought about himself.

Augustine claimed that the extreme emotional distress was triggered by (1) his belief that the victim was the source of his self-diagnosed STD, (2) the adrenaline spike caused by the attack, and (3) the panic he felt when his co-defendant was knocked down during the fight. The triggering stressors that Augustine enumerated were largely self-imposed. He went to the victim's house with a weapon looking for a fight. The ensuing adrenaline spike and panic were therefore of his own making and could not be used to claim an extreme emotional distress defense. (Note that extreme emotional distress is no longer an affirmative defense; it is special mitigation).

Defendant not entitled to instruction on defense of third person where harm to another was not imminent and use of deadly force was not necessary.

***State v. Berriel*, 2013 UT 19 (Durham).** Darren Berriel was convicted of aggravated assault. At trial, the court refused to issue an instruction on defense of a third person. The evidence at trial demonstrated that Berriel received a call from a friend, Rachel, who claimed that her boyfriend, Luis, was hurting her. Rachel was screaming and crying on the phone, and Berriel was aware that Luis had abused Rachel in the past. Berriel and three friends drove to Luis's house. On the way, Berriel called another friend and asked her to "get Rachel away from the house." Berriel arrived at Luis's house and waited for short time until Luis and Rachel pulled up in a car. Rachel got out the passenger's side and walked towards the house. Luis exited the driver's side and walked into the middle of the road towards Berriel. Berriel and Luis met in the middle of the road. Berriel had a knife, and Luis told him, "You don't need that knife to fight with me." Berriel then stabbed Luis with the knife and fled the scene. Rachel was at least fifteen feet and away and was not involved in the altercation.

After his conviction, Luis appealed. The court of appeals affirmed the trial court, finding no basis in the evidence to issue an instruction on defense of another person. Berriel sought and was granted a writ of certiorari.

Held: Affirmed. The evidence of Berriel's need to defend Rachel lacked both imminence and necessity, both of which are prerequisite to using deadly force. The imminence requirement ensures that the use of force is neither preemptive nor vindictive. The necessity requirement distinguishes wanton violence from force that is crucial to averting an unlawful attack. Here, Rachel was no longer in danger. She and Luis were not even arguing at the time Berriel confronted Luis. And Rachel at least 15 feet away from Luis when Berriel stabbed him. Neither Rachel prior call for help nor Luis's past abuse of Rachel justified Berriel's use of deadly force.

DOUBLE JEOPARDY

Double Jeopardy bars retrial when trial judge mistakenly holds that a particular fact is an element of the offense and then grants a directed verdict because the prosecution failed to prove that fact.

***Evans v. Michigan*, 133 S.Ct. 1069 (2013).** By an 8-1 vote, the Court held that the Double Jeopardy Clause bars retrial after the trial judge erroneously held a particular fact to be an

element of the offense and then granted a midtrial directed verdict of acquittal because the prosecution failed to prove that fact. The Court explained that it had "previously held that a judicial acquittal premised upon a 'misconstruction' of a criminal statute is an 'acquittal on the merits . . . [that] bars retrial,'" and found "no meaningful distinction between a trial court's 'misconstruction' of a statute and its erroneous addition of a statutory element."

Jury's report that it was unanimous against guilt on greater charges, but was deadlocked on lesser charges, was not a final resolution acquitting on the greater charges.

***Blueford v. Arkansas*, 132 S.Ct. 2044 (2012).** At petitioner Blueford's murder trial, the jury was instructed on the greater offense of capital murder and three lesser-included offenses, and was told it could convict on one of them or acquit on all of them. A few hours after it starting deliberating, the jury forewoman reported that the jury was unanimous against guilt on the charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide. After further deliberations, the jury reported that it could not reach a verdict, and the court declared a mistrial. By a 6-3 vote, the Court held that the Double Jeopardy Clause does not bar Arkansas from retrying Blueford on the charges of capital murder and first-degree murder. The Court concluded that the jury's report was not a final resolution that acquitted Blueford of those two charges; and that the trial court did not abuse its discretion by declaring a mistrial without ordering the jury to vote (contrary to Arkansas law) on whether to acquit on those two charges.

DUE PROCESS – FIFTH AND FOURTEENTH AMENDMENTS

Jury instruction stating that "a note is presumed to be a security" unconstitutionally shifted the burden of persuasion to defendant.

***State v. Kelson*, 2012 UT App 219 (McHugh) (cert. granted).** Grace C. Kelson was charged criminally with several counts of boring securities violations and one count of pattern of unlawful activity. The conduct giving rise to the charges occurred during a five-day period in which Kelson solicited money from several people in exchange for promissory notes repaying the money at a minimum of 600% interest. The money was to be used to acquire a letter of credit from a bank to fund a real estate development project. Kelson failed, however, to disclose her sordid financial history and the fact that some of the money would be used to pay personal expenses. The lenders never saw any return on their investment and never received the principal back. At trial, the court issued a jury instruction that stated that "a note is presumed to be a security." The instruction further explained that certain notes were not promissory notes and that other notes may not be promissory notes if they meet a four factor test. A jury convicted Kelson, and she appealed.

Held: Reversed and remanded. The Due Process Clause of the United States Constitution prohibits the state from using evidentiary presumptions to relieve itself of its burden to prove each element of an offense beyond a reasonable doubt. Jury instructions that impose mandatory presumptions violate this principle. The instruction in this case imposed a mandatory presumption, and the other instructions and closing arguments of the parties failed

to correct the mandatory nature of the presumption. The instruction thus created the possibility that the jury may have convicted Kelson based on the presumption rather than finding that the notes were, in fact, securities. The error in the instruction prejudiced Kelson because a jury could have weighed two of the four factors for determining whether a note was a security in Kelson's favor.

State's refiling of theft by receiving stolen property did not violate *Brickey*.

***State v. Dykes*, 2012 UT App 212 (Roth).** Dykes was arrested after he was caught driving a stolen ATV on Redwood Road. Dykes was charged with 2d degree felony theft by receiving, which required the State to prove either that the ATV's value exceeded $5,000 or that the ATV was an operable motor vehicle. At preliminary hearing, the State proceeded on the theory that the ATV was an operable motor vehicle and it did not put on any evidence of the ATV's value. The magistrate bound over under that theory. Dykes, however, convinced the district court that an ATV was outside the statutory definition of operable motor vehicle and the court quashed the bindover on the felony and reduced the charge to a class B misdemeanor. The district court then dismissed for lack of jurisdiction. The State refiled the theft by receiving charge as a third degree felony based on the ATV's value. Dykes moved to dismiss the refiled charge, arguing that it violated due process under *Brickey*. The prosecution presented evidence that ATV had a value between $1800 and $2690 and argued that its failure to present evidence of value at the initial preliminary hearing was an innocent miscalculation that did not implicate the due process concerns addressed in *Brickey*. The trial court agreed and Dykes took an interlocutory appeal.

Held: Affirmed. Although the State did not present any new or previously unavailable evidence when it refiled the charge, it nevertheless had good cause to refile. The State did not put on any evidence of the ATV's value at the first preliminary hearing because it was relying on a different theory for bindover. The prosecutor's alleged mistake of law was innocent and the refiling therefore did not violate *Brickey's* due process concerns.

EQUAL PROTECTION – *BATSON* CHALLENGES

Batson challenges are waived if they are not raised and ruled on before the jury is sworn and the venire dismissed.

***State v. Harris*, 2012 UT 77 (Lee).** After both sides exercised peremptory challenges, defense counsel passed the jury for cause, but immediately raised a *Batson* challenge in a poorly recorded sidebar conference. The prosecutor proffered a short, but inaudible, response. The trial court did not immediately rule on the *Batson* challenge, but told defense counsel that he could put his challenge on the record after a break. The trial court then read the names of the chosen jurors and asked if this was the jury that the parties had chosen. Defendant affirmed that it was and the trial court dismissed the venire—including the challenged juror—and swore in the jury. Sometime later, the trial court allowed defense counsel to state his *Batson* challenge on the record and the prosecutor to proffer her neutral non-discriminatory response. The court then thanked both sides and briefly recessed. Trial then proceeded and Harris was convicted of a class B misdemeanor. Harris appealed, claiming that the

prosecutor's challenge to a minority venire person violated *Batson*.

Held: A *Batson* challenge "must be raised in such a manner that the trial court is able to fashion a remedy in the event a *Batson* violation has occurred." This means that the objecting party must raise and obtain a ruling on his challenge "before the jury is sworn and the venire is dismissed." If a trial court suggests deferring a ruling, it is up to the objecting party to demand a timely ruling and resolution of his objection. Because Harris did not do so, his *Batston* claimed was waived. Harris's bid to have his unpreserved *Batson* challenge reviewed for plain error failed where he could not show that any error would have been obvious to the trial court. And his claim that counsel was ineffective for not timely obtaining a *Batson* ruling failed where Harris could not show prejudice, i.e., that his *Batson* challenge was meritorious.

Defense counsel's violation of *Batson* did not prejudice defendant and therefore did not constitute ineffective assistance of counsel.

***State v. Sessions,* 2012 UT App 273 (McHugh) (cert. granted).** Sessions violently physically and sexually assaulted his wife in front of their four-year-old daughter. He was charged with aggravated sexual assault and domestic violence in the presence of a child. Defense counsel used all five of his peremptory challenges to remove women from the jury venire. The State challenged the defense's strikes as discriminatory in violation of *Batson*. The trial court accepted defense counsel's gender-neutral explanations for three of the strikes, but not for the other two. The trial court reseated the two wrongfully struck jurors, but did not give Sessions two replacement peremptory challenges. On appeal, Sessions argued that counsel was ineffective for using all of his peremptory challenges on women and for not being prepared to give gender-neutral explanations for the two reseated jurors. Sessions also argued that the trial court committed plain error in reseating the two wrongfully struck jurors and in not letting him re-exercise his two peremptory challenges.

Held: Affirmed. Sessions argued that he should not have to show prejudice because *Batson* error is structural. Notwithstanding a *Batson* violation, Sessions could not show structural error here because this was not a case where a jury selected in violation of *Batson* rendered a verdict. The trial court here remedied any *Batson* violation by reseating the wrongfully struck jurors. At bottom, Sessions' complaint is that he ended up with two less peremptory challenges than the State. Under *State v. Menzies*, Sessions was required to show that he was prejudiced by the loss of the two peremptory challenges. To show prejudice in this context, Sessions had to show that one or both of the reseated jurors were actually biased. Because Sessions could not show that a biased juror sat, his claim failed.

EQUAL PROTECTION – SELECTIVE PROSECUTION

UHP drug interdiction exercise targeting traffic violators with out-of-state plates did not violate equal protection or implicate the right to travel.

***State v. Chettero*, 2013 UT 9 (Lee).** During three days in November 2008, the Utah Highway Patrol (UHP) conducted a drug interdiction exercise on a rural stretch of I-80 in Summit County. The timing of the exercise was prompted by reports from California law enforcement that the

recent marijuana harvest would soon be making its way east. Most of the cars stopped during the exercise had out-of-state plates. Chettero's California-plated vehicle was stopped after it crossed the fog line three times in a one-half mile stretch. Chettero had 105 pounds of marijuana in the rear compartment.

Held: (1) A traffic stop does not implicate the right to travel under the federal constitution. (2) Selective enforcement of traffic laws by targeting out-of-state vehicles does not by itself prove an equal protection violation. Rather, the defendant must also show that the classification had no conceivable relation to a legitimate government purpose or goal. Preventing drug trafficking across a state is a legitimate government goal. UHP had every reason to believe that high-volume traffic stops conducted in the middle of November, right after the California marijuana harvest, would help it achieve that goal. Making high volume traffic stops focusing on out-of-state licensed vehicles had a conceivable relation to UHP's legitimate goal of intercepting drug traffic across the state. (3) The district court's failure to consider statistical evidence in denying Chettero's Fourth Amendment claim was both affirmatively waived and harmless.

Concurring and dissenting opinion (Nehring). Nehring, joined by Durham, concurred in the majority's right to travel and equal protection analysis. He dissented from the majority's conclusion that Chettero had waived his Fourth Amendment claim and that the district court's failure to consider the statistical analysis was harmless.

ETHICS

Judge's mistake in issuing excessive warrant did not justify discipline.

***In re: Honorable Keith L. Stoney*, 2012 UT 64 (Nehring)**. On May 9, 2009, Barbara Acord was cited for driving with an expired registration. She failed to pay or appear on the citation, and the West Valley City Justice Court sent her a notice. Barbara called the court in response to the notice and belittled the clerk. The clerk set a date for her to appear on the citation and put a note in the docket about Barbara's conduct. Sometime after that docket entry, the clerk found a handwritten note from Judge Stoney directing her to issue a $10,000 warrant for Barbara's arrest. Barbara appeared as directed, pled guilty, and paid a fine. The warrant was never served and was recalled when Barbara appeared in court. Barbara later filed a complaint against Judge Stoney with the Judicial Conduct Commission. Before the Commission, Judge Stoney testified that he did not remember issuing a $10,000 warrant, that a $10,000 traffic warrant would be very unusual, and that such a high warrant would be futile, because the jail is so full that they will not hold a traffic offender no matter the amount of the warrant. Nevertheless, he did not dispute that he wrote the note, stating only that he must have transposed a comma or mixed up the warrant with a more serious case. The Commission determined that Judge Stoney issued the warrant in response to Barbara's behavior towards the clerks. It further held that such conduct violated Rule 2.1 of the Code of Judicial Conduct and issued a reprimand.

Held: Reversed. In appeals from the Judicial Conduct Commission, the Utah Supreme Court defers to the Commission's factual findings unless those findings are arbitrary or capricious, but it reserves the right to draw its own inferences from those facts. The court disagreed with the Commission's inference that Judge Stoney issued the $10,000 warrant in response to Barbara's rudeness to his clerk. It held that Judge Stoney issued the warrant by mistake and that a mistake in issuing the warrant did not violate the Code of Judicial Conduct. It further held that because judicial discipline is an original proceeding the Utah Supreme Court in which the court can take evidence, the parties to such a proceeding need not marshal the evidence.

Prosecutors comments on the evidence in closing argument did not amount to prosecutorial misconduct.

***State v. Lebeau*, 2012 UT App 235 (Orme) (cert granted).** Andrew Lebeau was charged with a host of offenses, including aggravated kidnapping, for beating his girlfriend in a jealous rage, forcing her into a car, and driving that car at nearly sixty miles per hour into another parked car. In closing argument, the prosecutor highlighted his witnesses' lack of motivation to fabricate their testimony and, conversely, the defendant's failure to corroborate his story. He also repeatedly used the word "intentionally" to describe a serious of individual acts by Lebeau leading up to the car crash and thereby suggest that Lebeau intended to crash his car. The jury convicted Lebeau. Lebeau appealed, claiming that the prosecutor committed prosecutorial misconduct in his closing argument.

Held: Affirmed. Prosecutors may ask the jury to draw permissible inferences from the evidence. These inferences may include reasons to credit the testimony of State's witnesses and reasons to discredit defense witnesses. Suggesting that Lebeau had failed to corroborate his story was fair commentary and did not impermissibly shift the burden of persuasion to Lebeau. Likewise, the repeated use of the word "intentionally" to describe the acts leading up to the crash was a fair argument to infer that Lebeau intended to crash the car.

It was not misconduct for prosecutor to defend his honor during closing by responding to defendant's assertion that the prosecutor cared only about wins and losses.

***State v. Graham*, 2013 UT App 72 (Orme).** After less than 30 days, Graham calculated that with good time credits, his 45-day jail sentence, with work release, was finished. When jail personnel refused to release him when he thought they should, he just didn't come back from work release. On cross-examination, Graham complained that the prosecutor cared more about his job and his win/loss record than he did about right and justice. During closing arguments, the prosecutor responded by stating: "I am a prosecutor, and we have special ethics, and it says that I am a minister of justice, and what that means is, I am concerned about truth and right. I'm not concerned about wins, losses." The jury convicted Graham of escape. On appeal, Graham complained that his counsel was ineffective for not objecting to the prosecutor's comments. Graham claimed that the remarks implied that defense counsel was less ethical.

Held: Affirmed. The prosecutor's brief reference to the ethical standards associated with being a prosecutor was neither improper nor prejudicial to the defendant. By referencing

those standards, the prosecutor did not in any imply that the defendant or trial counsel operated on a lower ethical plan. By accusing the prosecutor of putting wins and losses over truth and justice, the defendant opened the door to an appropriate response by the State. In context, the jury no doubt saw the prosecutor's remarks as a defense of his own ethical standards rather than an attack on defendant's or trial counsel's character or ethical standards. Counsel, therefore, was not ineffective for not objecting to the comments.

EVIDENCE

Utah Supreme Court rejects not guilty rule for weighing evidence under Rule 404(b), but embraces doctrine of chances.

***State v. Verde*, 2012 UT 60 (Lee).** James Eric Verde was charged with sexual abuse of a child for allegedly fondling the genitalia of a twelve-year old boy on 2003. At trial, the state sought to introduce evidence of prior uncharged sexual assaults by Verde against two eighteen-year old boys. The state asserted that the prior acts were necessary to prove Verde's "knowledge, intent, plan, modus operandi, and the absence of mistake or accident." Verde objected to the evidence, arguing that the mens rea of the crime was not in dispute because he was not disputing that the touching, if it occurred, was for a sexually abusive purpose. The trial court allowed the evidence in, and Verde was convicted. He appealed, and the Utah Court of Appeals relied on the "not guilty" rule to hold that the evidence was admissible to prove Verde's specific intent to sexually abuse the boy.

Held: Reversed. The technical relevance of evidence is not enough to justify the admission of evidence of prior bad acts. The "not guilty" rule is therefore rejected as a principle of Utah law. Instead when evaluating the true purpose of prior bad acts evidence and when weighing the probative value of the evidence against the danger of unfair prejudice, courts must look to the actual probative value of the evidence. In this case, Verde had stipulated that if he touched the boy that he did so with the requisite abusive intent. The prior bad acts therefore had minimal value as evidence of intent.

The court also rejected the State's claim that the prior bad acts and the instant molestation were part of a common plan to molest boys. While some courts allow evidence of similar crimes to show a common plan to repeatedly commit the same crime, Utah has rejected this formulation of "plan" evidence under rule 404(b). Instead, prior bad acts evidence is only admissible to show a plan if it forms links in a chain with the charged crime to accomplish a common design.

While the court rejected the State's claims that the evidence was relevant to show intent or plan, it accepted the assertion that the prior bad acts could be used to rebut Verde's claim that the boy fabricated the touching. But the State had not raised this argument below. So the court established a structure for doing so under the doctrine of chances and expressly left open on remand the question of whether the prior bad acts were admissible under the doctrine of chances to rebut a claim of fabrication.

Teenaged victim's unrelated sexual comments to third parties were irrelevant to whether a teacher's aide enticed him to have sex with her and were therefore inadmissible under rule 412.

***State v. Billingsley*, 2013 UT 17 (Nehring).** Billingsley, a middle school detention aide, gave 15-year-old M.M. oral sex during detention. That summer, Billingsley sent cell phone photos of her nude breasts to M.M. and his friend D.P., before taking them to a park where, in the backseat of her car, she touched both boys' penises, performed oral sex on D.P. and had sexual intercourse with M.M. Billingsley was charged with rape, forcible sodomy, and forcible sexual abuse. Except for the classroom count, the State's theory of non-consent was that Billingsley "enticed" the boys into sexual activity. Billingsley moved pretrial to admit evidence that M.M. had made inappropriate sexual advances toward a middle school teacher. The trial court excluded the evidence under rule 412, Utah Rules of Evidence. A jury convicted Billingsley on all counts. Billingsley moved for a new trial on the ground that a topless photo from her cell phone was improperly admitted into evidence. The trial court granted a new trial on different grounds. First, the trial court reversed its pretrial rule 412 ruling, concluding that M.M.'s inappropriate sexual advances toward a teacher was relevant to show that he was more than willing to have sex and that Billingsley, therefore, did not entice him. Second, the trial court identified several alleged errors that although not individually prejudicial were cumulatively prejudicial. The State appealed.

Held: Reversed and remanded for reinstatement of the jury verdict. The supreme court rejected Billingsley's argument that if a minor victim over 14 is predisposed to engage in the sexual activity, he or she cannot be enticed as a matter of law. The supreme court held that under "no plausible definition of 'entice'" would a "teenager's unrelated sexual comments to third parties" be an "element of the offense and thus admissible" under rule 412. Dictionary definitions of "entice" suggest that the inquiry under the lack-of-consent statute focuses on the defendant's conduct, not the victim's sexual experience. Requiring the State to prove that the victim was not predisposed to engage in sexual activity of any kind would defeat the purpose of the statute, which is to protect young teenagers from the wrongful sexual attentions of adults. The rule 412 evidence was therefore irrelevant and the trial court abused its discretion in granting a new trial on this ground. The other errors and irregularities cited by the trial court were harmless, both because they were innocuous and because Billingsley's guilt was supported the victims' testimony, recorded conversations in which Billingsley acknowledged her guilt to both her husband and M.M., the testimony of another student to whom Billingsley admitted having sex with M.M., and DNA evidence linking seminal fluid in the backseat of Billingsley's car to D.P. Lee, joined by Durrant, concurring. The concurrence takes the majority to task for opining on the definition of entice because that issue was not before the court, nor was it necessary to the court's resolution. However, if it had been properly before the court, the concurring justices would have agreed with the majority's definition of entice.

Defendant waived clergy-penitent privilege when he agreed to disclose to prosecution a psychosexual report containing Defendant's confidential communications to his LDS bishop.

***State v. Patterson*, 2013 UT App 11 (Davis).** Patterson sexually abused his stepdaughter, who immediately reported the abuse to her mother and then recanted. Patterson eventually admitted to his wife that he had abused her daughter twice and she moved out. Several months later, Patterson met with his LDS bishop and apparently confessed his guilt. Patterson's attorney, as was his practice, retained an expert to do a psychosexual evaluation to assist in plea negotiations and/or sentencing. Patterson offered his bishop's name as a character witness to the expert. The psychosexual evaluation included the bishop's statement to the expert that Patterson had told him "how sorry he was for what he has done." Patterson reviewed the report with the expert and his attorney before permitting it to be disclosed to the prosecution. Midtrial, the prosecutor warned defense counsel that if Patterson took the stand and denied the abuse, he would use Patterson's communication with the bishop to impeach him. Patterson, on his attorney's advice, decided not to testify. On appeal, Patterson argued that his counsel was ineffective for not arguing that the clergy-penitent privilege foreclosed the prosecution from using the communication to impeach him.

Held: Affirmed. The parties did not dispute that the communication to the bishop was privileged. But a privilege is waived when the privilege holder voluntarily consents to disclosure of the communication or "fails to take reasonable precautions against inadvertent disclosure." Both the bishop and Patterson were privilege holders and both failed to take reasonable precautions against inadvertent disclosure: the bishop when he disclosed the communication to the expert and Patterson when, despite reviewing the psychosexual evaluation, agreed to disclosing its contents to the prosecution.

Prosecution established adequate chain of custody, even though evidence had been initially mislabeled when placed in the evidence locker and even not every technician who handled the evidence testified.

***State v. Smith*, 2012 UT App 370 (Orme).** Smith was charged with possessing cocaine and a broken pipe. The officer who placed drugs and paraphernalia into a locker put the wrong case number on the evidence bag. Three days later, officers discovered the mistake and an unidentified technician relabeled the evidence with the correct case number.

Held: Testimony from officers explaining the mislabeling and identifying the evidence as that taken from defendant was sufficient foundation to admit the evidence. And the lack of testimony from every evidence technician who handled the evidence at various times implicates the weight of the evidence, not its admissibility.

Court of appeals upholds convictions for two counts of aggravated sexual abuse of a child against a variety of claims of evidentiary errors, but strikes aggravator and reduces convictions to simple sexual abuse of a child because the trial court relied on the wrong version of the sexual abuse of a child statute.

***State v. Bair*, 2012 UT App 106 (Davis).** Bair was charged with two counts of aggravated sexual abuse of a child for allegedly molesting his seven year-old daughter. The abuse was charged as "aggravated" because Bair was a natural parent, which was an aggravator added to the sexual abuse of the child statute in 1998. But the abuse was alleged to have occurred between February 1997 and December 1998, and the daughter did not report it until 2007. At trial, the state introduced, over Bair's objections, evidence of a letter Bair wrote to his wife in which he confessed to being addicted to sex, specifically "the touchy/feely-play around part of sex." The State also introduced testimony from the daughter that included testimony that she had recovered some of her memories of the abuse during counseling sessions. A detective also testified that it is not uncommon for victims of sexual abuse not to report the abuse immediately. He further testified that it is very common for victims not to disclose even when given opportunities to do so. The jury convicted Bair on both counts. Bair appealed.

Held: Affirmed in part and reversed in part. The court considered the letter under rule 404(b) and determined that it was offered to show that Bair touched his daughter with the specific intent to gratify his sexual addiction. The court also considered the letter under the *Shickles* factors and determined that it was not substantially more prejudicial than probative. The testimony that the daughter recovered some memories in counseling sessions, even if error, was harmless because the memories she may have recovered in counseling were duplicative of the testimony she gave at the CJC before the counseling. The detectives testimony was not improper bolstering of the daughter testimony. Rule 608 only bars direct testimony about the veracity of a witness and does not bar testimony from which the jury could infer the veracity of a witness. Here, the detective's testimony was limited to general statements about how victims of abuse behave. He did not directly address the daughter's veracity. Lastly, the Court determined that the State and the court had relied on the wrong version of the sexual abuse of a child statute to convict Bair. The natural parent aggravator, under which Bair was convicted, was not added to the code until 1998. But the jury was told that the abuse occurred between February 1997 and December 1998 and was not asked to identify when the abuse specifically occurred during that period. The trial court therefore committed plain error in using the natural-parent aggravator. But because the jury necessarily found all the elements of child abuse when it rendered its verdict, the court of appeals merely reduced the convictions rather than reversing them outright.

Defendant's history of jumping parole admissible under rule 404(b) to show that it was no mistake that he didn't return to jail from work release.

***State v. Graham*, 2013 UT App 72 (Orme).** After less than 30 days, Graham calculated that with good time credits, his 45-day jail sentence, with work release, was finished. When jail personnel refused to release him when he thought they should, he just didn't come back from work release. A jury convicted Graham of escape. On appeal, Graham complained that his

counsel was ineffective for not objecting to evidence that he had a history of absconding from parole.

Held: Affirmed. Evidence of Graham's prior history of absconding from parole was admissible under rule 404(b) to refute his claim that he had no idea that there was remaining time on his sentence. Counsel, therefore, was not ineffective for not objecting to the evidence.

Trial court properly admitted Intoxilyzer results under rule 702, Utah Rules of Evidence.

***State v. Turner*, 2012 UT App 189 (McHugh).** Turner was charged with felony DUI. He sought to exclude evidence of a breath test from an Intoxilyzer, claiming that it lacked the requisite reliability under rule 702. At the hearing on the motion, the State presented testimony from Utah Highway Patrol Trooper Jacob Cox, who maintained the Intoxilyzer in question. Trooper Cox testified to his training, experience, and methods for maintaining the Intoxilyzer. On cross-examination, he explained that a single breath test is sufficient to obtain an accurate result because the Intoxilyzer continuously analyzes the same sample several times a second during the test. Trooper Cox also explained that while some states require an external calibration of the Intoxilyzer before each test, Utah, and many others, do not. Turner then presented opposing evidence from retired professor of pharmacy, who testified that Intoxilyzer results are not accurate unless at least two breath samples are taken and the Intoxilyzer is externally calibrated before each test. The trial court found that the State had presented sufficient indicia of reliability to satisfy the Rule 702 threshold and denied Turner's motion to exclude. Turner appealed.

Held: Affirmed. Expert testimony is admissible under rule 702 if the principles and methods used by the expert are reliable, based on sufficient facts or data, and reliably applied to the facts of the case. Here, Trooper Cox's expertise was uncontested, so his methods were presumptively reliable. Trooper Cox also testified that he had substantial experience and knowledge in maintaining Intoxilyzers and was familiar with other states procedures. His testimony was therefore based on sufficient facts or data. Turner did not challenge whether Trooper Cox had reliably applied his principles and methods to the facts of the case.

Once trial court finds expert testimony satisfies threshold showing of reliability under rule 702, it's up to the jury to decide ultimate reliability.

***State v. Lievanos*, 2013 UT App 49 (Orme).** Three armed men committed a home invasion robbery. The intruders had flashlights, at least two wore masks, one wore white gloves, one had a cell phone with a Spanish or mariachi ringtone, and someone spilled white wax from a candle warmer. The intruders ran off when police arrived. Defendant and a companion were found hiding behind a shed several blocks away. Defendant had cell phone with a ringtone that played Spanish or mariachi music; Defendant's companion had a flashlight in his pocket and white wax all over his pants. Scattered over nearby yards, police found a shotgun, a camera stolen from the house, a ski mask, and a pair of white gloves. The State's analyst concluded that DNA on the ski mask and white gloves had a significant statistical match to

Defendant. Before trial, at the prosecutor's request, the analyst recalculated the statistical match using new guidelines issued by the Scientific Working Group on DNA Analysis Methods (SWGDAM). The new statistical guidelines did not exclude Defendant as a match to the mask and one of the gloves, but were scientifically inconclusive. But the new calculations supported a higher statistical match to the second glove. Although the new estimates were reviewed and approved by another crime lab employee, the analyst did not issue a new formal report. Defendant moved to strike the State's expert's testimony as unreliable. The trial court denied the motion, concluding that questions regarding the adequacy for of the report was an issue for the jury.

Held: Affirmed. Trial courts have only a preliminary obligation to determine whether proposed expert testimony satisfied a threshold showing of reliability. Once a trial court has found a basic foundational showing of reliability, it is up to the jury to determine the ultimate reliability of the evidence.

Evidence that rape victim was virgin and had cognitive deficiencies was proper character evidence under rule 404(a) to explain what would otherwise appear to be an odd reaction to massage therapist's advances.

***State v. Harrison*, 2012 UT App 261 (Orme) (mem.).** The 52-year-old victim went to a massage studio to get a massage to alleviate pain caused by myriad health problems. On her first visit, Defendant was randomly assigned to be her massage therapist. Defendant copped a feel of her breast. The victim did not say anything. During a second visit, Defendant was again assigned to the victim, but did not touch her inappropriately this time. On a third visit, the victim requested Defendant by name, although she later testified that she did not realize that this was the same man who had massaged her before. During this visit, Defendant massaged the victim's breasts and genitals and, after positioning her on her stomach, had intercourse with her from behind. The victim testified that she told Defendant to stop. The victim reported the rape to her mother, who reported it to police. Swabs taken from the victim confirmed the presence of Defendant's semen in her vagina. Defendant claimed that the sex was an act of compassion after the victim begged him to have sex with her because she was dying of cancer. Over Defendant's objection, the trial court allowed the State to introduce evidence that the victim was a virgin and that she had cognitive limitations. The victim testified at trial that she did not ask Defendant to stop when he touched her breasts because she had never been touched, kissed, or had sex before and didn't know how to respond. On appeal, Defendant argued that the evidence was impermissible character evidence under rule 404(a)(1). Held: Affirmed. Rule 404(a) prohibits a party from introducing evidence about a person's character "to prove that on a particular occasion the person acted in conformity with the character or trait." Here, the State did not use evidence of the victim's virginity or cognitive limitations to show that she acted in conformity with her character and therefore did not consent. Rather, the State used the evidence to counter Defendant's argument that the victim acted inconsistently with what might be expected from a non-consenting evidence.

If admission of evidence that rapist threatened and assaulted his victim was error, it was harmless; rapist was not entitled to mistake of fact instruction.

***State v. Marchet*, 2012 UT App 197 (Davis).** Azlen Adieu Farquoit Marchet was charged with rape. At trial, Marchet testified that the victim had consented. The state introduced 404(b) testimony from another woman whom Marchet had also raped. During his cross of that second victim, defense counsel elicited testimony that she had delayed reporting the rape for two years even though she seen Marchet several times after the rape. On redirect, the second victim testified, over Marchet's objection, that on those occasions she had told other women with whom Marchet was talking that he was a rapist. She also testified that on those occasions that Marchet had threatened and assault her. At the end of the trial, Marchet asked for an instruction on mistake of fact. The trial court denied the request, and the jury convicted Marchet.

Held: Affirmed. The prejudicial effect of the evidence of the assault against the second victim was tempered by (1) a jury instruction explaining the limited and proper use of 404(b) evidence; (2) defense counsel's closing argument in which he argued that the second victim falsely reported the rape as retaliation for the assault; and (3) the other evidence that the victim did not consent. The trial court did not err in refusing to issue a mistake of fact instruction because the jury instructions as a whole correctly and adequately instructed the jury on the applicable law, including the applicable mental state for rape.

Trial court did not err in admitting evidence of previous assault against victim in trial on solicitation to commit aggravated murder

***State v. Losee*, 2012 UT App 213 (McHugh).** In May 2006, Karl Grant Losee broke into the home of a female acquaintance (Victim). In a fit of jealous rage he threatened victim with a handgun and held another man in the home at gunpoint. In August of that year, while he was incarcerated pending trial, Losee solicited another inmate to murder Victim. He drew a map of how to get to Victim's home and told the inmate to make it look like the victim had overdosed on Lortab. Losee offered $500 and a box of syringes to anyone who could get the job done. The inmate reported Losee's request to a guard, and Losee was charged with soliciting aggravated murder. At trial, the State offered, over Losee's objection, evidence of the May assault, including a graphic recording of the 911 call Victim made during the assault. The jury convicted Losee, and Losee appealed.

Held: Affirmed. The trial court acted within its discretion to admit the assault evidence. The assault and particularly the 911 call were highly probative of Losee's motive to murder Victim and of his strong emotional reaction to Victim's perceived betrayal. Additionally, the trial court carefully considered in a written opinion the non-character purpose of the assault evidence and weighed the probative value of the evidence against the danger of unfair prejudice.

Rapists exculpatory statements during pretext call several days after the rape were not admissible as a present sense impression of his state of mind during the rape.
***State v. Marchet*, 2012 UT App 267 (Davis).** Azlen Adieu Farquoit Marchet was, yet again, charged with rape. At his trial, he sought to introduce evidence that during a pretext phone call several days after the rape he made several statements that indicated that he believed the sex was consensual. He argued that the evidence was admissible under Rule 803(3) as evidence of his state of mind during the rape. The trial court refused to admit the evidence. Marchet was convicted and appealed.

Held: Affirmed. Statements about past events and recollections do not fall under the present sense impression exception to the hearsay rule found in Rule 803(3). Such statements about a defendant's state of mind may be admitted by the defense only when they occur before the crime and are relevant to show the defendant's state of mind during the crime.

Testimony from parole officer that bad check-defendant was restricted from handling investment funds and had committed similar crime was unduly prejudicial.
***State v. Moody*, 2012 UT App 297 (Davis).** Over a period of several months, Gary Lee Moody solicited and obtained $4080 in investment funds from an eighty-five year-old man. Moody wrote two bad checks while soliciting the funds in order to entice his victim to give him more money. Moody was charged with exploiting a vulnerable adult and issue a bad check. At trial, his parole officer testified, over Moody's objection, that Moody owed a large restitution obligation and that he was prohibited from handling investment funds because of a conviction for a previous similar crime. A jury convicted Moody, and he appealed.

Held: Reversed. Testimony that Moody owed a large restitution obligation was relevant and not unduly prejudicial because it demonstrated that Moody was making promises of repayment to the victim that he could never hope to fulfill. But the testimony about Moody's restriction on handling investment funds and his prior conviction was irrelevant and unduly prejudicial.

Best evidence rule did not require admission of search warrant at driver's license revocation hearing.
***Assmann v. State*, 2013 UT App 81 (per curiam).** Shane Assmann was arrested for DUI and read the standard admonition and request for a chemical test. He did not ASSent to the test, so the trooper read refusal admonition. Assmann again did not ASSent. The trooper then obtained a warrant and drew a sample of Assmann's blood. The Utah Driver's License Division held a revocation hearing at which it determined that Assmann was read the admonitions and refused. Assmann appealed to a trial de novo in the district court where he was again found to have not ASSented to the test. The court affirmed the DLD's revocation of his license for 36 months. Assmann appealed, claiming for the first time that the DLD should have produced a copy of the warrant to obtain his blood. He ASSerted that the DLD relied on the warrant to demonstrated that Assmann did not ASSent and that the best evidence rule therefore required the DLD produce the warrant.

Held: Affirmed. To revoke a person license for refusing a chemical test, the DLD need only show that the person was lawfully arrested for DUI and that the person refused to submit to a chemical test. In this case, the warrant was not relevant to the issue of whether Assmann refused to ASSent to the chemical test. Thus the best evidence rule did not apply.

FIFTH AMENDMENT—SELF INCRIMINATION

Inmate was not in custody for *Miranda* purposes.

***State v. Butt*, 2012 UT 34 (Nehring) (cert. denied).** Eric Leon Butt, Jr. was incarcerated in the San Juan County Jail for theft. While incarcerated, he mailed two letters to his five year-old daughter that contained crudely drawn pictures of him. In one he was completely naked. In the other, he was biting his daughter's naked buttocks. Jail staff intercepted the letters. At some point after the letters were intercepted and before charges were filed, a deputy questioned Butt in his cell about his daughter's age. The deputy never Mirandized him. Butt told the deputy that his daughter was five. Prosecutors charged Butt with two counts of distributing material harmful to a minor. Butt testified at trial, admitting that his daughter was only five and that he drew the letters. He claimed, however, that the letters were meant as a joke and that he did not find them offensive. A jury convicted him of both counts, and he appealed, claiming that the interrogation in his cell violated *Miranda and* that the evidence was insufficient. The court of appeals certified the case to the Utah Supreme Court.

Held: Butt was not in custody for purposes of *Miranda.* The court followed the analysis used in *Howes v. Fields*, 132 S.Ct 1181(US 2012) and held that Butt was not restrained any more than was normal for a person already in jail and that he was not coerced.

Police interview of out-of-state suspect on the telephone not custodial interrogation for *Miranda* purposes.

***State v. Mills*, 2012 UT App 367 (Thorne).** While on leave in Utah from active military duty in Louisiana, 28-year-old Mills hooked up with 16-year-old C.D., the daughter of Mills' brother's ex-wife. They had sex several times before Mills returned to Louisiana. Mills convinced C.D. to send him five topless photos of herself from her cell phone, "to keep" their "relationship good." A few months later, Mills returned to Utah and he immediately had sex with C.D., who was starting to feel used. A few months later, Mills forced himself on C.D. after she refused to have sex with him. C.D. later borrowed Mills' computer and deleted a folder containing at least two of the topless photos she had sent him. Mills then returned to active duty out of state. C.D. reported the rape the following year. The assigned detective called Mills, who was then stationed in South Carolina, and Mills admitted to having had consensual sex with C.D. Mills was charged with one count of rape and several counts of unlawful sexual contact with a 16- or 17-year-old and sexual exploitation of a minor. Mills unsuccessfully moved to suppress his phone interview because the detective had not given him *Miranda* warnings before the interview.

Held: Affirmed. Mills was not in custody during the phone interview, which was a "far cry from the in-person station house interrogation that gave rise to the *Miranda* warning

requirements." There were "absolutely no objective indicia of arrest" during the phone interview, which Mills could have terminated by "simply hanging up the phone." The fact that the detective's questions were accusatory and that the investigation was focused on Mills was not enough to turn this long-distance phone conversation into a custodial interrogation.

Calling co-defendant in front of the jury to invoke his Fifth Amendment privilege against self-incrimination did not violate defendant's right to a fair trial.

***State v. Augustine*, 2013 UT App 61 (Davis).** Painful urination made Augustine think that he had an STD. He figured he got the STD from his girlfriend, who must have gotten it from her last sexual partner, J.E. So Augustine and his friend Stapely took a battle axe to J.E.'s house where they attacked him. Augustine and Stapely were charged with attempted murder. They were tried separately, with Stapely being convicted before Augustine's trial. The prosecution wanted to call Stapley to testify against Augustine. Stapely told the court outside the presence of the jury that he would refuse to testify under his Fifth Amendment right. The trial court expressed doubt whether Stapely could validly invoke the privilege given that he had testified at his own trial and been convicted. Both Stapely's and Augustine's counsel agreed that it was not clear that Stapely could validly invoke the privilege. Augustine asked that Stapely be called to claim the privilege outside the jury's presence out of concern that Stapely's refusal would lead the jury to draw prejudicial inferences against Augustine. The trial court denied Augustine's request. Stapely took the stand and refused to testify. The trial court excused Stapely and the State rested. On appeal, Augustine argued that allowing Stapely to invoke his Fifth Amendment privilege in front of the jury violated his right to a fair trial.

Held: Affirmed. A witness's exercise of the Fifth Amendment privilege may be used in a case by any party. Moreover, it is unprofessional for an attorney to call a witness to testify who he knows will claim a valid privilege not to testify. But is not unprofessional for an attorney to call a witness when the attorney has a colorable---albeit ultimately invalid---argument that the witness could not validly claim the privilege. Here, neither the trial court nor Stapely's counsel were sure as to whether Stapely could validly claim a Fifth Amendment privilege in Augustine's case. Given that uncertainty, it was reasonable for the prosecution to call Stapely to allow him the opportunity to change his mind and to determine if the trial court would accept Stapely's exercise of the privilege.

FIFTH AMENDMENT—DOUBLE JEOPARDY

Mistrial based on defense counsel's failure to comply with discovery order did not create double jeopardy bar to retrial.

***State v. Cooper*, 2012 UT App 211 (Thorne) (mem).** Cody Richard Cooper was charged and tried for several sexual offenses. At trial, his attorney tried to impeach the victim using text messages that she had sent Cooper. The State objected, claiming that defense counsel had not provided the messages in discovery. The court agreed and excluded the messages. The State and defense counsel then both moved for a mistrial, claiming that exclusion of the messages rendered defense counsels representation ineffective and required a new trial. The court agreed and declared a defense-created mistrial. Cooper was retried with new counsel

and convicted. He appealed, claiming that he second attorney was ineffective for not seeking to dismiss the second prosecution on double jeopardy grounds.

Held: Affirmed. Because Cooper joined the State's motion for a mistrial, he cannot claim double jeopardy when he is retried. And even if his counsel had not sought a mistrial, a mistrial was the only reasonable alternative to ensure justice in light of defense counsel's actions.

FREE SPEECH – FIRST AMENDMENT

The First Amendment protects false claims of receipt of military decorations.

***United States v. Alvarez*, 132 S.Ct. 2537 (2012).** Six justices ruled that the Stolen Valor Act of 2005, 18 U.S.C. §§704(b),(c), which makes it crime to falsely claim receipt of military decorations, is unconstitutional. A four-justice plurality applied an "exacting scrutiny" in holding that the Act infringes on content-based speech protected by the First Amendment. Two other justices concurring in the judgment stated they would apply intermediate scrutiny and hold that because the Stolen Valor Act would result in disproportionate harm, it fails intermediate scrutiny because the government can achieve its objective of protecting the integrity of military honors in less burdensome ways.

FOURTH AMENDMENT

While police may detain occupants of premises being searched pursuant to a search warrant, they may not detain persons who have left the immediate vicinity of those premises.

***Bailey v. United States*, 133 S.Ct. 1031 (2013).** In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court held that police officers executing a search warrant may detain the occupants of the premises. The Court here held, by a 6-3 vote, that *Summers* does not justify the detention of a person who has left "the immediate vicinity of the premises being searched." The Court reasoned that none of the three law enforcement interests that justified *Summers* – preventing occupants from endangering the officers conducting the search, preventing occupants from interfering with orderly completion of the search, and preventing flight – applies "with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises."

Drug-detection dog's certification or successful completion of recent training program enough to presume—subject to rebuttal—that dog's alert provides probable cause to search.

***Florida v. Harris*, 133 S.Ct. 1050 (2013).** The Court unanimously held that the Florida Supreme Court erred when it "created a strict evidentiary checklist" a state must satisfy to establish that an alert by a drug-detection dog provided probable cause to search a car. The Court concluded that "[i]f a bona fide organization has certified a dog after testing his reliability in a controlled setting" (or "if the dog has recently and successfully completed a training program"), "a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable

cause to search." The Court noted that a defendant may cross-examine the testifying officer and introduce his own witnesses on the issue.

Dog-detection dog's sniff at front door was warrantless search under Fourth Amendment.

***Florida v. Jardines*, 11-564**. By a 5-4 vote, the Court held that "using a drug-sniffing dog on a homeowner's porch to investigate the contents of a home is a 'search' within the meaning of the Fourth Amendment." Applying its reasoning from *United States v. Jones*, 565 U.S. ___ (2012), the Court held that the officer's actions constituted a search because they were "an unlicensed physical intrusion" of a "constitutionally protected area" (the curtilage of a home) done for the purpose of gathering information. In reaching that conclusion, the Court found that the physical invasion was not implicitly authorized by the homeowner because, while homeowners implicitly license a visitor to approach, and knock on, a home's front door, "[t]here is no customary invitation" to "introduc[e] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence."

Strip searching every detainee placed in general jail population, regardless of the nature of the offense, is reasonable under the Fourth Amendment.

***Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S.Ct. 1510 (2012).** In a 5–4 ruling, the Court affirmed the Third Circuit's rejection of petitioner's claim under 42 U.S.C. §1983 that his Fourth and Fourteenth Amendment rights were violated. The Court held that courts, absent substantial evidence to the contrary, must defer to the judgment of correction officials in implementing a policy of strip searching every detainee placed in the general jail population, regardless of the minor nature of the offense for which he or she was arrested. The Court found the policy under review reasonable to protect the safety of all concerned, including the detainee. The Court said its ruling does not address cases where the detainee may be held separately from the general jail population.

Officers not entitled to qualified immunity for allegedly unlawful arrest where arrest was for resisting an unlawful detention.

***Storey v. Taylor*, 696 F.3d 987 (10th Cir. 2012) (Tymkovich).** Police in New Mexico were dispatched to a report of loud arguing at the home of Michael Storey in Los Lunas. Storey answered the door and told officers that he had been arguing with his wife but that she had left and everything was fine. When the officers pressed him for details, Storey refused to tell them anything else. The officers asked Storey to step outside, which he refused to do. At that point, the officers pulled him outside and arrested him for failing to obey the command of a police officer. Storey later sued the officers under section 1983 for wrongful arrest. The district court granted summary judgment for the officers. Storey appealed to the tenth circuit.

Held: Reversed. The officers' command to Storey to leave his home was a warrantless seizure that required both probable cause and exigent circumstances. But no exigency existed in this case. The court conclude that since the original command to leave the house, which

Storey disobeyed, was not lawful, that his subsequent arrest for disobeying that command violated the Fourth Amendment.

Utah Supreme Court recognizes that asking a couple of questions in the middle of a traffic stop that are unrelated to the purpose of the stop does not violate the Fourth Amendment.

***State v. Simons*, 2013 UT 3 (Parrish).** Two deputies, Luke and Thomas, stopped a car for speeding and not carrying insurance. While speaking with the driver, Luke noticed some drug paraphernalia and some indicators that the driver was impaired. But before investigating the paraphernalia or the driver's impairment, Luke turned his attention briefly to the passenger, Milo Simons. He told Simons that he found some paraphernalia in the car and asked whether Simons had anything on his person that Luke ought to know about. Simons replied that he had a pipe and some meth in his pants, which he shook out and turned over to Luke. Simons was arrested and charged with drug and paraphernalia possession. He filed a motion to suppress, which the trial court denied, ruling that Luke had reasonable suspicion to inquire as to whether Simons had any drugs on him. Simons entered a Sery plea, reserving the right to appeal his motion to suppress. The court of appeals affirmed, holding that Luke's questioning of Simons did not measurably extend the duration of the stop.

Held: Affirmed. The presence of paraphernalia in the car and a possibly impaired driver provided the requisite reasonable suspicion to divert from the initial purpose of the stop and to question the passenger about drug use. But even absent such suspicion, Luke's questioning of Simons was a de minimis extension of the stop that did not violate the Fourth Amendment. The court clarified, however, that the exception for de minimis questioning only applies to questioning in the middle of the stop. Once the purpose of the stop is compete, the driver and passengers must be released without delay.

Concurrence: Justice Lee concurred in all respects except for Justice Parrish's opinion that de minimis questioning cannot occur at the end of the stop. He believes that the Fourth Amendment's reasonableness requirement and the court's reasoning in the instant case allow officers to briefly questions detainees at the end of a stop as well as in the middle.

Twenty minutes is not an unreasonable time to detain suspected shoplifters; Utah Court of Appeals declines to adopt bright-line rule under Utah Constitution that investigatory detention may not last longer than twenty minutes.

***State v. Little*, 2012 UT App 168 (Davis).** Little and a friend were stopped by police at a Target in Riverdale on suspicion of shoplifting. Officers believed a third person may have been involved and that some merchandise may have already been secreted in a car in the parking lot. Officers questioned Little for twenty minutes, but ultimately decided that they did not have enough to detain him. So they released him. Shortly thereafter, officers located Little's car in the parking lot and observed marijuana and a pipe in plain view. Little moved to suppress the evidence, claiming that he was illegally detained. The trial court denied the motion, and Little appealed.

Held: Affirmed. Under the facts of this case, twenty minutes was not an unreasonable amount of time to detain a suspected shoplifter. Additionally, there is no support in Utah's history to support a claim that the drafters of Article I, Section 14 of the Utah Constitution intended to provide greater protections for the type of detention in this case that the U.S. Constitution provides. Nor is twenty-minute limit on investigatory detentions more workable than the reasonableness test used under the U.S. Constitution.

Discovery of arrest warrant attenuated search incident arrest from illegal stop.

***State v. Strieff*, 2-12 UT App 245 (Roth) (cert granted).** South Salt Lake police received an anonymous tip that a home in South Salt Lake was a flop house. After watching the house for a few days and seeing short -term traffic consistent with drug-activity, a South Salt Lake City police officer stopped Edward Joseph Strieff as he left the house. The officer asked Strieff what he had been doing at the house and asked him for identification. A warrants check revealed an outstanding traffic warrant. The officer arrested Strieff on the warrant and, during a search incident to arrest, found methamphetamine. Upon being charged with drug possession, Strieff moved to suppress, claiming that the search incident to arrest was a product of an illegal detention. The State conceded that Strieff had been detained and that the officer lacked reasonable suspicion to detain him. But, the State argued, the discovery of the arrest warrant attenuated the search and discovery of methamphetamine from the illegal stop. The trial court agreed and denied Strieff's motion to suppress. Strieff entered a *Sery* plea and appealed.

Held: Affirmed. Utah recognizes the attenuation doctrine, and the discovery of an arrest warrant *may* be an intervening event that attenuates a search from a prior illegality. The attenuation analysis balances three factors: (1) the temporal proximity between the illegality and the search; (2) the presence of an intervening circumstance; and (3) the purpose and flagrancy of the official misconduct. In this case, the temporal proximity was very short and weighed in favor of suppression. The intervening event provided a lawful basis to arrest Strieff wholly independent from the purpose of the stop, weighing the second factor in favor of not suppressing. Lastly, the officer's conduct was not flagrant. Rather, it was merely a misjudgment as to the level of suspicion needed to justify an investigatory detention.

Dissent: Judge Thorne dissented. He argued that the fact pattern in this case was indistinguishable from *State v. Topanotes*, 2003 UT 30, a case in which the Utah Supreme Court rejected the State's inevitable discovery argument. And inevitable discovery and attenuation are sufficiently similar in their analysis that the Supreme Court would reject the State's attenuation argument in this case.

Officer did not impermissibly expand scope of traffic stop by asking a single question to confirm defendant's compliance with his alcohol-restricted license.

***State v. Adamson*, 2013 UT App 22 (Roth).** Adamson pulled out of a bar's parking lot. Officers followed him and pulled him over for two traffic violations. One officer asked for Adamson's license, registration, and insurance. Adamson produced some documents, but kept turning away when he spoke to the officer. The officer smelled a "minty scent," but not

alcohol. The officers ran a computer check, which revealed that Adamson had an alcohol restricted license, which required him to have an ignition interlock device in his vehicle. Adamson also had two prior DUI convictions. Because the officer did not at first realize that Adamson was an alcohol restricted driver, he had not noticed whether there was an ignition interlock device. Therefore, when he returned to Adamson, he asked if Adamson had one. Adamson grabbed the device, turned to the officer, and said, "Oh yeah, it's hanging right here." The officer then smelled alcohol on Adamson. He had Adamson step out of the car and he administered a field sobriety test, which Adamson failed. Adamson was arrested and his blood alcohol was measured at .26, over three times the legal limit. On Adamson's motion, the district court suppressed the evidence on the ground that by administering the field sobriety test, the officer impermissibly extended the scope of the traffic stop to an investigation of a DUI violation without reasonable suspicion of such additional criminal activity. The State appealed.

Held: Reversed and remanded. The officers did not impermissibly expand the scope of the detention by seeking to confirm Adamson's compliance with his licensing restrictions. In the course of conducting a routine traffic stop, an officer may request a driver license and vehicle registration and conduct a computer check to verify continuing driving privileges. It follows that the officer may also conduct a brief inquiry to confirm compliance with a licensing restriction that comes to the officer's attention. This kind of brief inquiry to confirm compliance with applicable licensing restrictions does not amount to an expansion of the traffic stop and therefore does not require reasonable suspicion of additional criminal activity. It was therefore reasonable for the officer to ask Adamson whether he had an ignition interlock device. When Adamson responded to the inquiry, the officer smelled alcohol, thus giving him reasonable suspicion of additional criminal activity, i.e., a violation of Adamson's alcohol restricted status and a DUI violation. The trial court therefore erred in granting the motion to suppress.

Agriculture inspector's intrusion onto defendant's open field to investigate cattle rustling did not violate the Fourth Amendment.

***State v. Lamb*, 2013 UT App 5 (McHugh).** Inspectors for the state department of agriculture heard that Lamb might be rustling other folks' cattle. From a neighbor's property, two inspectors used binoculars to view cattle on Lamb's open field. They saw that one of the calves had someone else's brand on it. They then entered Lamb's field to confirm that the calf did not belong to Lamb. They discovered two other cows with another rancher's brand on them. Several weeks later, the inspector discovered yet another lost cow bearing another brand in Lamb's herd. Lamb had put his own ear tag on that cow. Lamb argued on appeal that the inspectors' violated the Fourth Amendment when they went on his property to determine whether the cattle were stolen.

Held: Affirmed. The Fourth Amendment does not protect "open fields." An open field need not actually be open or even a field. So long as it is not part of the curtilage of a home, an open field can be a secluded field surrounded by woods, fences, chicken wire, embankments, and entirely out of public view or access. It can even be a cave, a still, a shed,

a small concrete building, a chicken coop, a hog pen, a goose pen, or an open and shared parking area adjacent to an apartment building. But whatever "open field" means, it surely applies to Lamb's field, which was out in the open. Because the State's physical intrusion on an open field is of no Fourth Amendment significance, the trial court properly denied Lamb's motion to suppress.

Narcotics warrant executed nine days after it was issued was not stale.

***United States v. Garcia*, 11-2233 (10th Cir. 2013) (O'Brien).** On August 7, 2009, a judge issued a warrant to search the home of Robert Garcia for evidence of drug trafficking. The warrant was based on evidence from a reliable informant. But it was not executed until nine days after it was issued and twelve days after the informant's tip. The search of Garcia's mobile home yielded 54 grams of methamphetamine and $30,000 cash. Garcia moved to suppress, claiming that the warrant was stale and because the officers did not execute the warrant "forthwith," as the warrant commanded. The district court denied the motion to suppress. Garcia entered a conditional guilty plea and appealed.

Held: Affirmed. A nine-day delay in executing the warrant does not render a drug warrant stale. It is well known that drug dealers and users usually keep a ready supply in their house along with other evidence of distribution. Additionally, the informant described an ongoing pattern of criminal activity, suggesting that some quantity of methamphetamine would always be present in the house. The term "forthwith" did not make the delay in executing the warrant unreasonable. The term was an anachronism left over from warrant forms drafted decades earlier when the rules of criminal procedure required officers to execute a warrant as soon as possible. The term does not make an otherwise lawful search illegal and unreasonable under the Fourth Amendment.

GUILTY PLEAS

Trial courts should look beyond the plea colloquy to determine whether plea is knowing and voluntary; standard for withdrawing plea does not include separate prejudice requirement.

***State v. Alexander*, 2012 UT 27 (Durrant).** James Alexander pled guilty to burglary with intent to commit sexual battery. Before sentencing, he moved to withdraw his plea, claiming that he was never informed of the elements of sexual battery. Neither the information nor the plea affidavit described the elements of sexual battery. During the plea colloquy, Alexander's counsel represented that he had reviewed the plea affidavit with him and explained what a second degree felony was. But the elements of sexual battery were not explained to Alexander during the plea colloquy. The district court denied the motion to withdraw. Alexander appealed. The court of appeals reversed, holding that the court's failure to inform Alexander of the elements of sexual battery violated rule 11 of the Utah Rules of Criminal Procedure. It further that because the trial court violated rule 11, the plea was not knowing and voluntary. The Utah Supreme Court granted the state's certiorari petition.

Held: Alexander is only entitled to withdraw his plea if he demonstrates that the plea was not

knowing and voluntary. The court of appeals erred by limiting its analysis to whether the trial court violated rule 11. The court of appeals should have looked beyond the colloquy to the surrounding facts and circumstances to determine whether the record demonstrated that he understood the elements of sexual battery. But despite this error, the record did not demonstrate that Alexander understood the elements of sexual battery. The court further held that rule 11(l), which instructs courts to disregard any error in the colloquy that does not affect the substantial rights of the defendant, does not impose a prejudice requirement on a motion to withdraw a plea. Rather, that subsection merely reiterates the legislature's intent that a plea only be withdraw if it is not knowing and voluntary. In this case, Alexander's plea was not knowing and voluntary because there was no evidence that he understood the elements of sexual battery. Accordingly, the court of appeals decision was affirmed.

No preliminary hearing or waiver of a preliminary hearing deprives the district court of subject matter jurisdiction to take a guilty plea.

***State v. Smith,* 2013 UT App 52 (Davis) (State's rehrg. pet. pending).** Defendant and his wife, represented by the same counsel, did joint plea deal to drug charges. Defendant pled guilty at the time set for preliminary hearing. Before taking the plea, the trial court did not ask Defendant if he waived his right to a preliminary hearing. In fact, they did not talk about preliminary hearings at all. Before sentencing, Defendant moved to withdraw his plea, alleging a conflict of interest. Defendant got a new attorney and at the sentencing hearing withdrew his motion to withdraw his plea. Before sentencing Defendant, the sentencing judge (not the one who take the plea), told Defendant about his right to a preliminary hearing and asked if he waived it; Defendant said yes. The trial court sentenced Defendant and he appealed, arguing for the first time on appeal that the district court lacked subject matter jurisdiction to accept the plea because Defendant had never been bound over. The State responded that Defendant waived all non-jurisdictional pre-plea defects and that the absence of a preliminary hearing or waiver was such an alleged defect.

Held: Failure to bind a Defendant over following a preliminary hearing or the waiver of the right to a preliminary hearing is a subject matter jurisdictional defect that renders a guilty plea void. Defendant's waiver of a preliminary hearing before announcement of sentence didn't count because it was taken after Defendant entered his plea. State had petitioned for rehearing, arguing: (1) entering a guilty plea is a waiver of the right to preliminary hearing or bindover; (2) absence of a preliminary hearing or waiver does not implicate subject matter jurisdiction; (3) under Utah law, a guilty plea is not entered until final judgment is entered; therefore Defendant's waiver here was valid.

In proving a "violation of law" under the plea in abeyance statute, the State need not show a conviction.

***Layton City v. Stevenson*, 2013 UT App 67 (Thorne).** 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 not commit any "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.

Held: Reversed and remanded. The plain meaning of the phrase "violation of law" under both the plea in abeyance statute and agreement, does not necessarily require a conviction. Rather, a "violation of law" may be supported by evidence of misconduct other than a conviction.

JURY INSTRUCTIONS

Old second degree felony aggravated assault statute required intent to cause serious bodily injury, not simply intent to engage in the conduct that caused the injury.

***State v. Hutchings*, 2012 UT 50 (Durham).** In April 2006, Larry Lewis Hutchings was charged in with aggravated assault, a second degree felony. Under the statute in effect at the time, a person committed second degree felony aggravated assault if he committed an assault and intentionally caused serious bodily injury to another. Hutchings' girlfriend claimed that he tackled and strangled her. When she resisted by scratching his face, Hutchings grabbed her wrist and threw it backwards into a wooden object, breaking her hand. Hutchings claimed that his girlfriend attacked him.

At trial, Hutchings' attorney agreed to a jury instruction on intent that recited almost verbatim Utah Code s 76-2-103. He also agreed to an elements instruction that required the jury to find that Hutchings "intentionally caused serious bodily injury." The jury believed the victim and convicted Hutchings.

Hutchings appealed to the Utah Court of Appeals, claiming that the jury instruction incorrectly described the mental state for second degree felony aggravated assault. The court of appeals disagreed, holding that a person intentionally caused serious bodily injury if the person intended to do the act that caused the injury. Hutchings sought and obtained a writ of certiorari to the Utah Supreme Court.

Held: Affirmed. The court of appeals incorrectly construed the second degree felony aggravated assault statute. There must be a showing of intent to cause the injury, not just intent to perform the act that caused the injury. Additionally, Hutchings' counsel performed deficiently by not objecting the jury instructions. By agreeing to include the entire definition of intentionally from the statute, which included a statement that a person acts intentionally if it is his conscious objective to engage in the conduct or to cause the result, counsel risked confusing the jury about the required mental state. But counsel's deficient performance did not prejudice Hutchings. He conceded that the jury believed the victim's story, and reasonable

juror could believe her story and not find that Hutchings intended to cause her serious bodily injury.

Concurrence: Justice Lee concurred in the judgment. He would have held that counsel was not deficient. In his view, not objecting to a jury instruction is exactly the kind of discretionary trial strategy that *Strickland v. Washington* leaves to counsel.

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

***State v. Bird*, 2012 UT App 239 (Thorne) (cert granted).** Dustin Lynn Bird ("Birdman") was charged with one count of failure to respond to an officer's signal to stop. At trial, an elements instruction was proposed that described the statutory elements of the offense, 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 overruled counsel's objection and issued the instruction as proposed. The jury convicted Birdman, and he appealed.

Held: Reversed. The use of the phrase "receive a visual or audible signal to stop" in the statute suggest that some level of "mental appreciation" for the signal to stop. Likewise, the use of the phrase "attempt to elude or flee" suggests that the jury find that Birdman purposefully fled. The court did not further define the required mental states and explained in footnote six that it was leaving that task to the district court.

Dissent: Judge Orme dissented without an opinion.

An "honest belief" is not an affirmative defense to theft by deception, although it may be to other theft crimes.

***State v. Cox*, 2012 UT App 234 (Roth) (plurality) (mem.).** Cox was convicted of theft by deception and forgery when she tried to cash a forged stolen check at a credit union. Cox gave police several inconsistent stories about how she came into possession of the check and whether she was authorized to cash it. The jury was instructed that it was a defense to theft by deception that a defendant acted under an honest belief that she had the right to obtain or exercise control over the property or services or that the owner, if present, would have consented. The instruction added that evidence of the honest belief defense "must be presented by the defense, and if presented, the State retains its burden of proof beyond a reasonable doubt on all elements of the offense charged." The instruction tracked the statutory language for the defense. Although Cox did not object to the instruction, she claimed on appeal that the instruction erroneously shifted the burden of proof.

Held: Affirmed. The honest belief defense does not apply to theft by deception. Theft by deception requires the prosecution to prove that the defendant obtained property by deception, i.e., by creating an impression of fact that is false and that the actor knows to be false. Thus, the lack of an honest belief is actually an element of theft by deception that the prosecution was required to prove beyond a reasonable doubt. The complained-of instruction therefore erroneously told the jury that the defendant was required to present evidence of this

defense. But the error was harmless where the State clearly bore its burden of proof and where the last line in the instruction---which Cox did not acknowledge in her brief---expressly stated that the State retained its burden of proof beyond a reasonable doubt on all elements of the offense charged.

Concurring in the result: Judge McHugh concurred in the result without an opinion and Judge Voros concurred in the result with an opinion. Judge Voros would have affirmed based on inadequate briefing.

Possession of paraphernalia is not a lesser included offense of possession of a controlled substance.

***State v. Campbell*, 2013 UT App 23 (Christiansen) (amended mem.).** Defendant was charged with possession of a controlled substance based on his possession of a cotton ball containing a small amount of heroin. Defendant wanted a lesser included offense instruction on possession of paraphernalia based on the same facts. The trial court denied the request and the jury convicted defendant as charged.

Held: Affirmed. A defendant is entitled to a lesser included offense instruction if (1) the statutory elements of the greater and lesser included offenses overlap and (2) the evidence provides a rational basis for acquitting the defendant of the charged offense and convicting him of the included offense. The defendant was not entitled to the instruction here because the statutory elements of possession of a controlled substance do not overlap with the statutory elements of possession of paraphernalia.

Robber was not entitled to lesser-included offense instructions on theft, assault, and aggravated assault.

***State v. Garcia-Vargas*, 2012 UT App 270 (Thorne).** Leonal Garcia-Vargas was charged as an accomplice with two counts of aggravated robbery for his participation in a home invasion robbery. Two versions of the robbery were told to the jury. According to the victims, Garcia-Vargas and a man known only as Freakin' Freddy entered their house, assaulted them with a metal tool and a dumbbell, and took money, a camera, and some broken cell phones. Garcia-Vargas on the other hand told police that he and Freakin' Freddy went to the house to buy drugs. While there, Garcia-Vargas pocket a couple of cell phones. Freakin' Freddy then assaulted one of the occupants and started ransacking the house. Garcia-Vargas admitted, however, that he stood watch over the victims while this happened and punched one of the victims in the face. At the end of trial, Garcia-Vargas asked for lesser-included offense instructions on robbery, theft, assault, and aggravated assault. The trial court agreed to instruct the jury on robbery, but refused the other instructions. Garcia-Vargas was convicted of robbery and appealed.

Held: Affirmed. Even by his own admission, Garcia-Vargas was a party to a robbery. He was not, therefore, entitled to instructions on theft, assault, or aggravated assault.

Jury was correctly instructed that aggravated assault requires only a reckless mental state.

***State v. Loeffel,* 2013 UT App 85 (Orme).** Officers responded to a domestic violence report. Defendant came out on his porch and screamed at officers to leave. Defendant referred to a gun and told the officers that they were "fair game" if they tried to enter his home. Officers coaxed girlfriend to leave the house and Defendant went inside. Concerned that Defendant was going to retrieve the gun he mentioned, officers immediately followed, kicking down the door. They found Defendant in the entry way holding at the "low ready" what turned out to be a loaded rifle with the safety off. Defendant started to raise the gun and the officers opened fire. Defendant was convicted of three counts of aggravated assault. Defendant asked that the jury be instructed that aggravated assault required an intentional or knowing mental state. The trial court instructed that the mental state for aggravated assault could be intentional, knowing, or reckless. Defendant appealed arguing that it was error to instruct on recklessness or, in the alternative, that the evidence was insufficient to show Defendant was reckless.

Held: Affirmed. Plain statutory language and case law make clear that aggravated assault can be committed with a reckless mental state. The assault statutes do not specify a mental state; therefore, the mental state defaults to intentional, knowing, or reckless. Threatening officers with a gun and then greeting the officers in his home with a loaded gun is at least reckless.

JURY SELECTION

Rapist was not prejudiced by his attorney's violation of *Batson* or by the trial court's reinstating the jurors his attorney peremptorily struck.

***State v. Sessions*, 2012 UT App 273 (McHugh).** Ronnie Cyril Sessions was charged with viciously beating and raping his wife. At jury selection, juror 19 indicated that she had previously served on a jury in an assault case and that her niece had been sexually assaulted. But she told the court that she could be impartial, and neither side challenged her for cause. Juror 23 raised his hand when asked if he would find testimony from a law enforcement officer more or less credible. Neither side asked any follow up questions. Both jurors 19 and 23 were passed for cause. Sessions' attorney then used his peremptory strikes to remove five women, including jurors 19 and 23. The State challenged his strikes under *Batson*. During the *Batson* colloquy, counsel could not provide a non-discriminatory reason for striking jurors 19 and 23. He also admitted that he did not realize that he could not strike jurors because they were women. The Court found a *Batson* violation and reinstated jurors 19 and 23. But it did not reinstate Sessions' strikes. Jurors 19 and 23 served on the jury, which convicted Sessions. Sessions appealed, claiming that his counsel was ineffective for violating *Batson* and for not seeking a mistrial when the court reinstated jurors 19 and 23.

Held: Affirmed. Where the jury that was seated was not selected in violation of *Batson* Sessions, no structural error occurred and the court will not presume prejudice. And Sessions cannot demonstrate that the jurors were actually biased. Thus he received a trial by an impartial jury as guaranteed by the Sixth Amendment.

MERGER

Firing 12 shots in rapid succession toward a home constituted 12 discharges of a firearm, not one.

***State v. Rasabout/Kaykeo*, 2013 UT App 71 (Voros).** The defendants drove by and fired 8 or 9 shots at a house. A few minutes later, defendants returned and fired more shots, for a total of 12. A jury convicted each defendant of 12 counts of discharge of a firearm toward a dwelling. The trial court merged the 12 convictions into one, ruling that the multiple shots were all one offense because they were all part of a single criminal episode. The State appealed.

Held: Reversed and remanded. Under the plain meaning of the discharge of a firearm statute, a discharge means to fire a weapon. The defendants here fired a weapon 12 times. Therefore, they were guilty of 12 separate offenses. The trial court erroneously relied on the single criminal episode statute in finding that the 12 shots constituted one offense. That statute is not concerned with what constitutes a separate offense for double jeopardy or multiplicity purposes. Rather, it explains only how closely separate offenses must be connected in order to require a single prosecution or trial for multiple offenses. Defendants' argument that the rule of lenity required merger was unavailing. Lenity is a rule of statutory construction which the legislature has rejected in interpreting criminal statutes, when it enacted section 76-1-106: "The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state."

POST-CONVICTION/FEDERAL HABEAS

Padilla v. Kentucky does not apply retroactively.

***Chaidez v. United States*, 133 S.Ct. 1103 (2013).** In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their counsel fail to advise them that pleading guilty to an offense will subject them to deportation. By a 7-2 vote, the Court held that under the principles of *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla* announced a new rule and therefore does not apply retroactively to cases already final on direct appeal.

State prisoners have no right to a stay of their federal habeas proceedings merely because they are incompetent to assist habeas counsel.

***Ryan v. Valencia Gonzales*, 133 S.Ct. 696 (2013).** The Court unanimously held that neither 18 U.S.C. §3599 nor 18 U.S.C. §4241 entitles a state prisoner to a stay of his federal habeas proceeding when he is found incompetent to assist habeas counsel. The Court ruled that the Ninth and Sixth Circuits erred in inferring that those statutes created a right to competence during federal habeas proceedings. The Court further held a district court properly exercises its equitable discretion when it denies a stay based on alleged incompetence when the federal habeas claims are record-based; and that any equity-based stay granted so that a petitioner may regain competence may not be indefinite. "Where there is no reasonable hope of

competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment."

Federal habeas petitioners challenging the sufficiency of the evidence supporting their state court convictions face a high, two-layer bar.

***Coleman v. Johnson*, 132 S.Ct. 2060 (2012) (per curiam).** Through a unanimous *per curiam* opinion, the Court summarily reversed a Third Circuit decision that had granted habeas relief on the ground that the evidence at trial was insufficient to support the conviction under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). The Court stated that the Third Circuit failed to afford "due respect to the role of the jury," as required by *Jackson*, and failed to afford due respect to the state courts, as required by AEDPA.

Factual dispute exists as to whether appellate counsel was ineffective in direct appeal for not investigating extreme emotional distress defense.

***Ross v. State*, 2012 UT 93 (Durrant).** In 2003, Ross went to the home of his on-again off-again girlfriend, found that she had spent the night with another guy, and killed her, and tried to kill the other guy. Ross was charged with aggravated murder and attempted aggravated murder. During trial, after closing arguments, Ross's attorney put on the record, "There was no manslaughter defense raised based on any extreme emotional disturbance because of—because of evidentiary problems as are known to Mr. Ross and myself." The trial court asked Ross if that was the strategy he had decided on. Ross responded that it was. He was convicted and sentenced to life without parole. On appeal, new counsel pursued a variety of issues, but did not raise a claim that trial counsel was ineffective for not pursuing an extreme emotional distress defense. The Utah Supreme Court affirmed Ross's aggravated murder conviction.

In 2008, Ross filed a pro se post-conviction petition alleging that his trial counsel had been ineffective for not raising an extreme emotion distress defense and that his appellate counsel had been ineffective for not raising his trial counsel's ineffectiveness on direct appeal. The State moved for summary judgment, arguing that trial counsel's ineffectiveness could have been raised on direct appeal and was thus procedurally barred in a post-conviction proceeding. It further argued that appellate counsel was not ineffective for failing to raise an ineffectiveness claim against trial counsel because trial counsel's statements after closing argument and Ross's agreement with those statements prevented Ross demonstrated a reasonable trial strategy. The trial court agreed and dismissed the post-conviction petition. Ross appealed.

Held: Reversed. Ross's petition created a factual dispute for which he is entitled to an evidentiary hearing. Ross asserted in his petition that there were facts to support extreme emotional distress defense, namely that he and the victim had a romantic relationship, that he had found her spending the night with another man, that he had forced the victim to talk about their sexual relationship, and that he had then forced the victim into a bedroom before shooting her, saying, "I can't let her hurt you like she hurt me." And trial counsel's statements after closing argument left open whether he had a strategy in refusing to assert an extreme emotional distress claim. Counsel appeared to be relying on mental health records in making

his decision, which are not necessarily relevant to an extreme emotional distress claim. And he mixed up extreme emotional distress with extreme emotional disturbance and referred to it as a manslaughter defense.

Allegations that trial counsel failed to consult or call expert witness in arson case stated a prima facie case of ineffective assistance.

***Landry v. State*, 2012 UT App 350 (Roth).** Landry was convicted of aggravated arson. His trial counsel, who had no prior experience in arson or fire investigation cases, neither consulted with nor called an expert to rebut the State's experts, who testified that the fire resulted from arson. Trial counsel relied solely on her cross-examination of the State's experts. The primary thrust of the defense was that Landry did not start the fire. Landry appealed, challenging only the sufficiency of the evidence supporting the conviction. The court of appeals affirmed the conviction. Landry then filed a post-conviction petition alleging, among other things, that appellate counsel was ineffective for not raising trial counsel's ineffectiveness for not calling an expert to present a non-arson defense. Landry attached a report from an expert challenging the State's experts' conclusion of arson. The post-conviction court denied the petition without holding an evidentiary hearing.

Held: Reversed and remanded for an evidentiary hearing on the ineffective assistance of counsel claim. Landry's petition, accompanied by the expert's report, alleged sufficient facts that, if true, presented a prima facie ineffective assistance of counsel claim on both appellate and trial counsel. The post-conviction court, therefore, should have given Landry an evidentiary hearing on this claim.

PRELIMINARY HEARINGS

Bindover: Magistrate and court of appeals overstepped their bounds in rejecting reasonable inference put forward by the prosecution at preliminary hearing in favor of the alternative inference suggested by the defendant.

***State v. Ramirez*, 2012 UT 59 (Lee).** Ramirez, in jail on unrelated drug charges, invited police to search his motel room for a clean glass pipe which he claimed would prove his innocence on his pending charges. Police found the pipe in Ramirez's bed, where he said it would be. Ramirez told police that he had a drug problem and liked to inject his drugs. He consented to the police searching his room, assuring them that they would find nothing incriminating. Ramirez was charged with possession of meth and paraphernalia after police found meth residue in a baggie and on a short tube straw in a garbage sack in the kitchenette. The magistrate refused to bindover because he found the defense-favorable inference that Ramirez did not know the contraband was there more plausible than the prosecution-favorable inference that the contraband belonged to Ramirez. A divided panel of the court of appeals affirmed. *See State v. Ramirez*, 2010 UT App 373. The U**tah Supreme Court granted cert.**

Held: Reversed. At preliminary hearing, the magistrate is tasked only with assuring that there is evidence that could sustain a reasonable inference in the prosecution's favor on each element of the charged crime. That role does not include assessing whether such an

inference is more plausible than an alternative that cuts in favor of the defense. That role is for the jury. The magistrate and court of appeals here "overstepped their bounds in rejecting the inference put forward by the prosecution in favor of the alternative suggested by Ramirez." Lack of evidence that Ramirez had exclusive control and access to the motel room did not defeat the prosecution's showing of probable cause. And the magistrate and court of appeals both erred in essentially holding the prosecution to present a "comprehensive or 'best' case against the accused.

Evidence was insufficient to bind the Defendant over on charges of obstruction of justice.

***State v. Maughn*, 2012 UT App 121 (Roth) (cert. granted).** In 1984, Brad Perry was murdered. Twenty years later, DNA evidence linked the murder to Glenn Griffen, and the State charged Griffen with capital murder. While investigating Griffen, police interviewed Wade Garrett Maughn. Maughn mad several statements that put him at the scene and implicated him in the murder, so the State charged him with capital murder. Griffen was tried first, and the State gave Maughn use immunity and subpoenaed him to testify at Griffen's trial. Maughn distrusted the scope of the use immunity and, although the court ordered him to testify, Maughn refused to testify. Griffen was convicted and Maughn was later acquitted. The State then charged Maughn with obstruction of justice. After taking evidence at a preliminary hearing, the magistrate dismissed the obstruction charge against Maughn. The court ruled that the only reasonable inference from the facts was that Maughn acted with the intent to protect himself from being prosecuted for murder, not to delay or hinder Griffen's prosecution. The State appealed.

Held: Affirmed. The State's evidence that Maughn and Griffen had been friends, that Maughn was told he had use immunity for anything he said at trial, and that Maughn refused to testify against Griffen, viewed in isolation, suggests an intent to hinder Griffen's trial. But there was also evidence that Maughn had cooperated with the police until he was charged with capital murder. Maughn also repeatedly expressed distrust of the use immunity letter and attacked the reliability and trustworthiness of the statements he had made to the police. When the evidence is considered in its totality, the State's assertion is speculative and the only reasonable inference is that Maughn was acting to protect himself.

RESTITUTION

Pyramid schemer entitled to restitution hearing to determine whether his criminal acts caused the victim's losses.

***State v. Poulson*, 2012 UT App 292 (Voros).** David Poulson pled guilty to two counts of participating in a pyramid scheme, class B misdemeanors. At the plea hearing , the following factual basis was provided: "On or about . . . March 14th of 2008 and September 26th, 2008 this individual solicited funds for a pyramid scheme, the total amount was . . . $168,400." Following the hearing, the State submitted a short request for restitution asking for $168,400. Poulson objected and sought to strike the hearing, claiming that the factual basis for his plea was insufficient, as a matter of law, to justify any restitution. The trial court denied his motion

and held a hearing to determine his ability to pay. The court ultimately imposed court-ordered restitution of $60,000 and complete restitution or $168,400. Poulson appealed.

Held: Reversed. The Pyramid Scheme Act expressly allows for recovery of restitution from those who plead guilty to participating in a pyramid scheme. But the restitution statutes require the State to show a nexus between a defendant's criminal conduct and the economic injury the victim suffered. Here, the factual basis recounted at the plea hearing is insufficient to establish that nexus, and the State proffered no other evidence at the restitution hearing. On remand, Poulson is entitled to a hearing to determine whether his criminal acts caused the victims' to lose $168, 400.

RETROACTIVITY

Statutory amendments forbidding § 402 reductions on offenses requiring sex offender registration did not apply retroactively to sentences entered before the amendments took effect.

***State v. Johnson*, 2012 UT 68 (Durham).** Johnson pled guilty in 2005 to unlawful sexual activity with a minor, a 3d degree felony, and enticing a minor over the internet, a class A misdemeanor. Both crimes required Johnson to register as a sex offender. The State agreed that if Johnson successfully completed probation, the State would not oppose a motion to reduce the degree of his offenses under Utah Code Ann. § 76-3-402. In 2006, after sentencing and before Johnson completed probation, § 402 was amended to prohibit reductions for offenses that required the defendant to register as a sex offender. Based on *State v. Shipler*, 869 P.2d 968 (Utah App. 1994), the district court ruled that the current version of § 402 applied to Johnson and that he could not, therefore, receive the reduction. While Defendant's appeal was pending, the court of appeals ruled in *State v. Holt*, 2010 UT App 138, 233 P.3d 828, that the 2006 amendments applied retroactively. After cert was denied in *Holt*, the court of appeals certified Johnson's appeal to the Utah Supreme Court. **Held:** The 2006 amendments were substantive, not procedural, and therefore did not apply retroactively to Johnson. The version of § 402 in effect at the time of sentencing is the version that applies when the defendant seeks a reduction. Both *Shipler* and *Holt* were expressly overruled.

RIGHT TO COUNSEL

Vague claim of conflict is insufficient to justify a change in appointed counsel

***State v. Alvarez-Delvalle*, 2012 UT App 96 (Christiansen).** While pending trial for rape, Jose Luis Alvarez-Devalle sent the trial court a letter requesting a change of appointed counsel. The letter merely stated that there was a conflict with his counsel and that he did not believe that his counsel had his best interests in mind. The court held a hearing at which it asked Alvarez-Delvalle for more detail. He replied, "I lost my faith in [my counsel] because he never (unintelligible) anything good in my side. How am I going to go to trial with a person that is not . . . good about me?" The court ruled that Alvarez-Delvalle had failed to show a conflict justifying a change of counsel. Alvarez-Delvalle was convicted at trial and appealed.

Held: Affirmed. Before the trial court is constitutionally required to substitute defense counsel, Defendant must establish that good cause exists for such a substitution. Good cause may be a conflict of interest or a complete breakdown of communication. Here, the trial court conducted a factually inquiry into Alvarez-Delvalle's claim of a conflict and found that Alvarez-Delvalle failed to carry his burden to show good cause.

Post-trial complaints about counsel's trial performance must be raised as ineffectiveness claims, not as claims for substitution of counsel; trial court not required to take waiver of counsel before denying *pro se* motion for new trial of represented defendant.

***State v. Hall*, 2013 UT App 4 (Voros).** Hall was charged with second-degree felony aggravated assault after he punched his employer in the face, giving him two black eyes, a severe laceration on the lip, and a broken jaw. The jury convicted him of third-degree felony aggravated assault. Hall did not ask for a self-defense instruction. At sentencing, Hall complained about his counsel's performance and said he wanted to proceed *pro se*; in the end Hall let his counsel represent him at sentencing. But right after sentencing, Hall filed two *pro se* written motions: (1) to proceed *pro se,* and (2) for a new trial. The trial court did not rule on the first motion, but denied the new trial motion after receiving a response from the State.

Held: Affirmed. First, a post-trial complaint about counsel's trial performance is not governed by *State v. Pursifell*, 746 P.2d 270 (Utah App. 1987), which requires a trial court to inquire into a defendant's pre-trial complaints about counsel. When a defendant's complaints about counsel's trial performance are first disclosed after trial has ended, his only remedy lies in an appeal challenging counsel's effectiveness. Second, Hall did not show plain error or ineffectiveness in not seeking a self-defense instruction where he could not show prejudice. In finding Hall guilty of aggravated assault, the jury necessarily found that Hall had used force likely to produce death or serious bodily injury. Hall's use of such force could qualify as self-defense only if he reasonably believed it was necessary to prevent death or serious bodily injury. But Hall claimed only that the victim had *previously* made oral threats of serious bodily harm or death and that he only waved his hands near Hall, and shoved or slapped Hall. A self-defense instruction, therefore, would have made no difference. Third, the trial court had no duty to obtain a waiver of counsel before considering Hall's *pro se* new trial motion, because Hall was represented at the time. Indeed, the trial court "probably should not have considered the motion at all." A defendant represented by counsel "generally has no authority to file *pro se* motions, and the court should not consider them."

Trial court not required to conduct inquiry into defendant's claims post-trial that he needed substitute counsel for trial because of a conflict; counsel was not ineffective for refusing to present defendant's theory at trial.

***State v. Franco*, 2012 UT App 200 (Roth).** Franco was convicted at trial of forcible sexual abuse. Post-trial, before sentencing, Franco complained to the trial court that his appointed attorney had not followed his instructions at trial and had not presented his theory of the case. He claimed that he needed a new attorney and a new trial. The trial court denied Franco's claim. Franco then repeated this claim on appeal, arguing that he was entitled to the remedy

outlined in *State v. Vessey*, 967 P.2d 960 (Utah App. 1998) of a remand for the trial court to determine whether he was entitled to new counsel.

Held: The trial court is not required to inquire post-trial whether a conflict between the attorney and client at trial warranted substitute counsel. Rather, claims of problems in the attorney-client relationship raised post-trial should be analyzed under the rubric of ineffective assistance of counsel and the standards established in *Strickland v. Washington*. In this case, the mere failure of counsel to follow his client requests to pursue a particular theory is not, by itself, deficient performance and therefore cannot sustain a claim of ineffective assistance of counsel.

Defense attorneys who were intimidated by their client were not laboring under an actual conflict of interest that adversely affected their performance.

***State v. Martinez*, 2013 UT App 39 (Orme).** Martinez was charged with attempted murder, robbery, and other serious felonies. Martinez's appointed attorneys thoroughly represented his interests from start to finish: including conducting discovery, serving subpoenas, filing appropriate pretrial motions, moving to sever counts, visiting their client in jail 3 out of 4 weeks a month, vigorous cross-examination at trial, appropriate objections at trial, mistrial motions, and active participation in jury instructions. None of this was good enough for Martinez, who before trial tried to get substitute counsel. After inquiring into the matter, the trial court denied the motion. At trial, apparently at Martinez's insistence, trial counsel asked a clearly improper question on cross-examination of one of the State's witnesses. The trial court chided counsel for asking the counsel and counsel apologized. That night, defense counsel informed the presiding judge that they felt intimidated or threatened by Martinez. The presiding judge passed this information onto the trial court, who confirmed with both defense counsel that although they felt intimidated by Martinez, they believed that they could zealously represent him. When Martinez learned that counsel were intimidated by him, he asked to disqualify them as having a conflict of interest, but then withdrew the request. The jury convicted Martinez of aggravated assault instead of attempted murder and of the other charged felonies. On appeal, Martinez argued that because his attorneys were intimidated by him, they labored under an actual conflict of interest and that the trial court improperly denied his motions for substitute counsel or, at the very least, did not inadequately inquire into the nature of the conflict between Martinez and counsel.

Held: Affirmed. From an objective standard, notwithstanding Martinez's complaints and intimidation, the record shows that counsel "commendably" and zealously represented Martinez's interests. Martinez pointed to counsel's concession in closing that he was guilty of lesser offenses as evidence that their performance was adversely affected by his intimidation. Counsel's concession, however, was a reasonable--and successful--strategy to avoid conviction on greater offenses. Martinez, therefore, did not show an actual conflict of interest that adversely affected counsel's performance. The court of appeals also concluded that the trial court adequately inquired into the nature of any conflict.

Dissenting (Thorne): Judge Thorne would have reversed because, in his view, the trial court did not adequately inquire into the nature of the conflict, resulting in structural error.

Pain-in-the-you-know-what defendant did not show legal conflict of interest with his counsel, even though they openly traded insults during bench trial.

***State v. Graham*, 2012 UT App 332 (Orme).** Graham wanted to call several witnesses who he believed would help his cause. His attorney refused because, in his opinion, the witnesses would hurt Graham's cause. Before trial, Graham asked for new counsel, the trial court refused. At his bench trial, Graham fired his attorney, and proceeded pro se with his attorney now acting as stand-by counsel. Graham and his attorney openly bickered and exchanged insults during trial. It got so bad that the trial court finally agreed to continue trial and appoint new counsel. Several months later when trial continued, new counsel represented Graham. The trial court convicted Graham, who appealed claiming that his first attorney had a conflict of interest.

Held: Affirmed. At most, Graham showed that he had a personality conflict with his attorney. But a personality conflict is not the same as a legal conflict of interest requiring disqualification. Also, a disagreement about strategy--such as what witnesses to call--does not prove a legal conflict of interest.

Man who did not rob woman at knife-point in 2003 because he was recovering from a stroke in Louisiana was not denied his choice of counsel in his 2009 drug case that was filed after he tried to buy a rock of cocaine from an undercover officer in downtown Salt Lake.

***State v. Miller*, 2012 UT App 172 (Thorne).** In 2009, Harry Miller tried to buy a rock of crack cocaine from an undercover officer in Salt Lake. He was arrested and charged with attempted distribution of a controlled substance. He hired Andrew McCullough, who appeared on his behalf and filed a motion to dismiss, which was denied. Miller thereafter had a stroke and returned to Louisiana. In July 2010, he returned to Utah and was arrested on an outstanding warrant. He requested and was appointed a public defender, and with the assistance of the public defender, he entered a guilty plea to a class A misdemeanor attempted possession of the controlled substance. Shortly thereafter, Mr. McCullough discovered that his client had been appointed a public defender and had pled guilty. He moved to withdraw Miller's guilty plea. The trial court denied the motion and sentenced Miller. Miller appealed.

Held: Affirmed. The trial court's refusal to allow Miller to withdraw his plea and proceed with Mr. McCullough as his counsel did not violate his right to counsel of his choice. Miller requested and was appointed a public defender. He never indicated that he desired any counsel other than the public defender. Miller was therefore given his counsel of choice.

Counsel was not ineffective for failing to call expert and failing to seek victim's mental health records.

***State v. King*, 2012 UT App 203 (McHugh).** Samuel King was charged with aggravated kidnapping and aggravated assault for using a knife to assault and kidnap his girlfriend. At

trial, defense counsel elicited through cross-examination of the victim and other witnesses that the victim suffered from depression, PTSD, and methamphetamine-induced psychosis. He also presented testimony that the victim has used crack cocaine and consumed alcohol on the day of the assault and that when the victim was high that her personality would change and she would ramble and speak nonsensically. Another witness testified that sometimes the victim would snap and would tell strange and outlandish stories. Despite this testimony, the jury convicted King. King appealed, claiming that his counsel was ineffective for not retaining and mental health expert and for not seeking the victim's mental health records.

Held: Affirmed. The court refused to hold that defense counsel must retain a mental health expert anytime an adverse witness has mental health issues that may affect her credibility. Similarly, defense counsel is not per se ineffective for choosing not to seek a mentally ill victim's mental health records. In this case, there was ample evidence for the jury that the victim was mentally ill and that her testimony should be scrutinized carefully. Testimony from an expert or admission of the victim's mental health records would only have been cumulative of the many mental health issues of which the victim herself and other witnesses had testified.

SENTENCING

Apprendi applies to criminal fines.

***Southern Union Company v. United States*, 132 S.Ct. 2344 (2012**). In a 6–3 ruling, the Court held that the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the Sixth Amendment requires a jury to find beyond a reasonable doubt, any fact (other than a prior conviction) that increases a criminal defendant's maximum potential sentence, also applies to sentences of criminal fines.

Absent findings to the contrary, appellate court will not presume that district court relied on improper statements by prosecutor at sentencing

***State v. Moa*, 2012 UT 28 (Durrant).** Charles Moa pled guilty to two felonies and one misdemeanor from his participation in a shooting. Before sentencing, the court reviewed a PSR that included a description of Moa's lengthy criminal history and statements from Moa that he was sorry and did not intend for the shooting to occur. The PSR also recommended consecutive sentences. At sentencing, the prosecutor told the court that there had been multiple shootings in the neighborhood where Moa's shooting had occurred and implied that Moa was responsible for those shootings. The court found that Moa was "an extreme danger to the community" and imposed consecutive sentences. But it did not refer to the prosecutor's statement or explain how it weighed the sentencing factors. Moa appealed the sentence, claiming that the court abused its discretion by relying on the prosecutor's statements in imposing consecutive sentences. The court of appeals disagreed, holding that there was no evidence that the court had in fact relied on the prosecutor's statements. The Utah Supreme Court granted certiorari.

Held: Affirmed. While trial courts may not consider irrelevant information at sentencing, they are not required to articulate the factors they consider in imposing a sentence. The court in

this case did not affirmatively state that it considered the prosecutor's statements. And so long as there was some evidence to justify the court's sentencing decision, higher courts will not assume that the sentencing court relied on improper evidence.

Court did not abuse its discretion in revoking and restarting probation for failure to maintain full-time employment.

***State v. Johnson*, 2012 UT App 118 (Davis).** Jamis Johnson was convicted of securities fraud in 2007 placed on probation required, as a condition of probation, to maintain verifiable full-time employment. Johnson purportedly obtained work as a legal assistant to an attorney. But he could never provide any verification of his employment except for an affidavit. Johnson's AP&P agent attempted to garnish Johnson's wages and sent the attorney interrogatories. The attorney replied that he was not indebted to Johnson and that Johnson had no interest in any money or property in the attorney's possession. After a hearing at which these facts came out, the trial court ruled that Johnson had violated his probation. It revoked and restarted his probation. Johnson appealed.

Held: Affirmed. The trial court factual finding that Johnson violated the terms of his probation was not clearly erroneous. Johnson's willfully violated his probation because he did not make bona fide efforts to verify his employment. Johnson could have, but did not, obtain a pay stub, W-4, or 1099 form to prove his income and employment. The trial court therefore acted within its discretion to revoke and restart Johnson's probation.

Brevity of sentencing order does not mean that the trial court did not consider all legally relevant factors.

***State v. Bowers*, 2012 UT App 353 (Orme) (mem.).** Bowers, an 8th grade math teacher had a sexual relationship with a 14-year-old former student. Bowers knew that the former student had just ended a sexual relationship with another teacher during the previous school year. The other teacher warned Bowers to knock it off. Bowers continued the relationship until the other teacher told her that she was going to turn herself into police, which made Bowers think that it was now "too risky" to continue. The other teacher went to police and about her and Bowers' sexual relationships with the student. When officers interviewed Bowers that same day, she admitted that the allegations were true. Nearly two years after being charged, Bowers pled guilty to two second degree felony counts of forcible sexual abuse. The trial court sentenced her to consecutive 1-to-15-year prison terms. Bowers appealed her sentence.

Held: Affirmed. An appellate court presumes that a sentencing court considered all the statutory factors in imposing consecutive sentence, whether or not the trial court made specific findings and whether or not the trial court discussed all the factors on the record. Here, the trial court had two extensive sentencing reports, which were discussed during the sentencing hearing. The court stated on the record that the factor it found most compelling in imposing consecutive sentences was Bowers' repeated conduct with a child and the fact that she had every opportunity to change the course of the encounter. The court of appeals rejected

Bowers' reliance on *State v. Galli*, 967 P.2d 930 (Utah 1998), partly because *Galli* had been legislatively abrogated.

Reversing trial court's inadvertent ex-post facto application of amended aggravated kidnapping sentencing statute and its consequent order merging child abuse into the kidnapping conviction.

***State v. Bryant*, 2012 UT App 264 (Thorne).** In 2004, after having sex with 15-year-old B.S., Bryant convinced B.S.'s mother to move in with him so that they could share expenses. Bryant plied B.S. with alcohol and methamphetamine and had sex with her again. In a fit of jealous rage, Bryant one night attacked B.S. and abused and tortured her all night, including handcuffing her to the bed, burning her face with a heated screwdriver, holding her head underwater, and choking her. Before B.S.'s mother returned home, Bryant drove a bound B.S. to a remote area where he continued to burn, punch, and choke her. Bryant eventually apologized, took B.S. home, and had sex with her again. Bryant showed B.S.'s mother the injuries, but she did not report them until two months later when she moved with B.S. out of Bryant's home. A jury convicted Bryant of aggravated kidnapping, child abuse, and three counts of rape. The trial court sentenced Bryant to life without parole for the kidnapping because he had caused serious bodily injury to B.S. But because it had relied on B.S.'s injuries for the kidnapping sentence, the court merged the child abuse conviction into the kidnapping. On appeal Bryant argued, among other things, that life without parole was excessive and that he was subjected to double jeopardy when he was convicted of both aggravated kidnapping and child abuse.

Held: Reversed and remanded. The Court agreed with the State's concession that life without parole was an improper sentence because in 2004, when Bryant committed his crimes, life without parole was not a possible sentence for aggravated kidnapping. Rather, the possible kidnapping sentences in 2004 was 6, 10, or 15 years to life. However, because the 2004 kidnapping statute did not have a serious bodily injury enhancement, the child abuse conviction should have been merged into the kidnapping offense.

Trial court erred in not inviting defendant to allocute before definitively announcing sentence, but cured any error by inviting defendant to speak before announcing remainder of sentence.

***West Valley City v. Walljasper*, 2012 UT App 252 (McHugh).** Defendant kept violating a protective order obtained by the mother of his child. He pled guilty in this case and the pleas were held in abeyance until Defendant violated the protective order again. By the time of sentencing, Defendant was already serving jail term on his earlier violations. After hearing from the prosecutor, defense counsel, and the victim, the trial court definitively announced sentence (essentially 30 extra days), except for the probation conditions. Defense counsel interrupted and stated that Defendant would like to speak. The trial court allowed Defendant to speak uninterrupted for two transcript pages. The trial court then finished announcing sentence without missing a beat. Defendant appealed, arguing that his right to allocution had been violated when the trial court did not invite him to speak before definitively announcing his sentence.

Held: Affirmed. The trial court erred and at least partially violated the Defendant's right to allocution when it announced sentence before inviting him to speak. But the trial court cured any error when it let Defendant speak while the court could still change its mind.

Trial court correctly sentenced defendant to statutory term in effect at time of offense rather than at time of trial.

***State v. Losee*, 2012 UT App 213 (McHugh).** In August 2006, Karl Grant Losee solicited an inmate in the Salt Lake County Jail, where he was incarcerated, to kill a female acquaintance. Losee was tried and convicted of soliciting aggravated murder in April 2008. In its 2007 session, however, the Utah Legislature changed the crime of soliciting aggravated murder from a first to a second degree felony. In 2008, it again changed it back from a second degree to a first degree felony. Thus, at Losee's sentencing in July 2008, soliciting aggravated murder was a first degree felony, and the trial court sentenced him accordingly. Losee appealed, claiming that the sentence constituted an ex post facto law.

Held: Affirmed. The ex post fact clause of the United States Constitution protects criminal defendants from receiving a greater punishment than was applicable at the time the crime was committed. The protections are grounded in fair notice and governmental restraint, not leniency. Here, Losee was sentenced to the punishment that was applicable at the time he committed the crime, nothing greater. Thus, no ex post facto violation occurred.

Life without parole sentence for aggravated kidnapping with serious bodily injury was not an abuse of discretion.

***State v. Lebeau*, 2012 UT App 235 (Orme) (cert granted).** Andrew Lebeau was charged with a host of offenses, including aggravated kidnapping, for beating his girlfriend in a jealous rage, forcing her into a car, and driving that car at nearly sixty miles per hour into another parked car. A jury convicted him. At sentencing, he argued that several mitigating factors justified a downward departure of the sentencing from life without parole. He also argued that a life without parole sentence would constitute an abuse of discretion because it would divest the parole board of its discretion to consider Lebeau's progress towards rehabilitation. The trial court considered Lebeau's arguments and then imposed the presumptive life without parole sentence.

Held: Affirmed. The trial court considered all the mitigating factors and determined that a life without parole sentence was justified. Lebeau's disagreement with that decision does not warrant reversal. Nor does the inability of the parole board to grant Lebeau an early release for rehabilitative reasons warrant reversal. The presumptive sentence was fixed by the legislature, not the court. Thus is was the legislature's discretion, not the court's discretion, that removed the parole board's role in determining the length of Lebeau's sentence.

Modification of sentence did not violate double jeopardy where court made clear at sentencing that it would modify sentence in three months; but court's refusal to allow defendant to allocate when sentence was modified warranted resentencing.

State v. Udy, 2012 UT App 244 (McHugh). After having his securities license revoked, Gary Dean Udy continued to sell securities and ripped off dozens of people. The State charged him with securities fraud and calculated that he owed $14.7 million in restitution. Udy entered into a plea in abeyance agreement and agreed to pay restitution to the victims. Nine days after sentencing, Udy solicited $50,000 from one of his previous victims. The court revoked his abeyance and entered the conviction. At sentencing, Udy claimed to have a deal in the works that would allow him to make full restitution in three months. The court imposed suspended prison terms, a year in jail, and three years probation. It then agreed to suspend the entire sentence and give him three months to repay his victims. The court set a review hearing three months out and warned Udy that if he did not repay the victims, "he was going to jail and may go to prison." The court memorialized its ruling in an unsigned minute entry. Three months later, Udy appeared in court without having made any payments towards restitution. The court expressed a belief that Udy had lied about his ability to repay his victims at the first hearing. Udy's attorney attempted to explain why Udy had not repaid restitution. The court cut him off and sent Udy to prison. Udy appealed, claiming that the first sentence was final and that the second sentence violated the Double Jeopardy clause. He also claimed that his sentence was illegal because he was not allowed to allocate at the second hearing.

Held: Reversed. The court first considered whether Udy had preserved his claims in the trial court. It held that a sentence imposed in violation of the double jeopardy clause was an illegal sentence that could be corrected at any time under Rule 22(e), thus no preservation was needed. Likewise, a sentence imposed without affording the defendant the right to allocate was a sentence imposed in an illegal manner that required no preservation under Rule 22(e). On the merits, Udy's sentence did not violate the Double Jeopardy clause because the initial sentence was not final. The court stated that it would modify the sentence in three months and did not enter a signed minute entry. Thus, Udy could have no expectation that the first sentence was final. But the second sentence was imposed in an illegal manner, because the court did not give Udy a chance to allocate. Allocution is a constitution and statutory right guaranteed in Rule 22(a), Utah Rules of Criminal Procedure. When that right is denied, the sentence is imposed in an illegal manner and must be corrected.

SIXTH AMENDMENT - INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel ineffective for not presenting and highlighting evidence that the minor sexual abuse victim might have been 14 instead of 13 at the time of the offense.

***State v. Moore*, 2012 UT 62 (Nehring).** Moore "masturbated" a young boy working on his ranch while the boy watched a pornographic video provided by Moore. The boy reported the abuse several years later. Initially, he told police in a recorded interview that the abuse happened when he was 14. He later said he was 13. Based on the latter statement, Defendant was charged with aggravated sexual abuse of a child, which requires that the victim be under 14 at the time of the offense. Defendant was also charged with dealing in material

harmful to a minor, which requires only that the victim be under 18. At trial, the victim testified that he was 13 at the time of the abuse. Defense counsel did not use the victim's prior recorded statement or highlight other trial evidence suggesting that the victim was actually 14 at the time of the offenses. On appeal, the State conceded that defense counsel's failure was ineffective assistance with respect to the aggravated sexual abuse conviction. But the State argued that counsel's deficient performance was not prejudicial with respect to dealing in harmful material, because the age of the child did not matter for that conviction. The court of appeals' reversed, holding that counsel's deficient performance was also prejudicial to dealing in harmful material charge because the Information alleged that the crimes were committed during the summer of 2002, when the victim was 13, and the jury was instructed that in order to convict, it had to find that the crimes occurred near the time alleged in the Information. The Utah Supreme Court granted the State's petition for cert on the dealing in harmful material conviction.

Held: Court of Appeals affirmed. The charged offenses in this case could not be separated in time where the victim testified that both happened on the same day. The Court rejected the State's argument that if counsel had highlighted the time discrepancy, the prosecution would have amended its information to allow the jury to consider the later date. First, the State could not have amended the information with respect to the aggravated sexual abuse charge, because the age difference would have resulted in charging a different offense. Second, it is illogical to suppose that the State would have amended to keep the lesser charge of harmful material where that would necessarily result in a loss of the greater charge. Third, Moore was not obligated to show what defense he would have offered if the charges had been amended to include the later date. In this case, it is unclear what would have happened if trial counsel had pressed the time discrepancy, how the jury would have viewed that information, and how the prosecution would have responded to it. Lee (dissenting). Majority has improperly watered down *Strickland's* prejudice element.

To show counsel was ineffective during jury selection, defendant must show that there is no plausible subjective reason for counsel not to remove the challenged juror. *State v. Smith*, 2012 UT App 338 (Thorne). Smith pulled a machete on a couple who surprised him in their Juab County barn, apparently stealing valuable stuff. Smith claimed that three jurors in this small, rural county gave answers during voir dire that suggested bias. Smith argued that his trial counsel was ineffective for not questioning these jurors further or removing them.

Held: Affirmed. Defendants have a particularly difficult burden to show ineffective assistance of counsel in the jury selection context. To meet his burden in this context, Smith had to show that the prospective jurors expressed so strong and unequivocal that counsel could have had no plausible countervailing subjective preference that would have justified the failure to remove the juror.

STATUTORY INTERPRETATION

Trial court erred in dismissing charge of eighteen year-old supplying alcohol to two other eighteen year-olds.

***State v. Morrison*, 2012 UT App 258 (Thorne).** Utah County deputies discovered eighteen year-old Xavier Morrison and two other youths who were also eighteen drinking at a campsite in Hidden Hollow. The youths all admitted that Morrison had purchased the beer using the "Hey, Mister" technique and had then shared the beer with the other youths. Utah County charged Morrison with supplying alcohol to a minor. Morrison moved to dismiss, claiming that under *In re Z.C.*, 2007 UT 54, Morrison could not be guilty of violating a statute that was designed to protect him.

Held: Reversed. *In re Z.C.* involved a thirteen year-old girl who was adjudicated delinquent of a felony sex offense for having mutually welcomed sex with her twelve year-old boyfriend. The Utah Supreme Court reversed the adjudication, holding that it would work an absurd result to apply a statute meant to protect children from predators to mutually welcomed conduct between similarly-aged children. In so doing, the Court noted the heinousness of the crime and the serious impact it would have on Z.C.'s life as well as the lack of any definable victim and perpetrator. But no such concerns exist in Morrison's case. Supplying alcohol to a minor is a minor offense compared to a felony child sex-crime. And, unlike *In re Z.C.*, there was no mutual conduct. Morrison was clearly the "perpetrator," supplying alcohol to his friends, the "victims."

SUFFICIENCY OF THE EVIDENCE

Inmate's crudely drawn pictures of himself naked that he sent to his daughter amount to distributing harmful materials to a minor.

***State v. Butt*, 2012 UT 34 (Nehring).** Eric Leon Butt, Jr. was incarcerated in the San Juan County Jail for theft. While incarcerated, he mailed two letters to his five year-old daughter that contained crudely drawn pictures of him. In one he was completely naked. In the other, he was biting his daughter's naked buttocks. Jail staff intercepted the letters. At some point after the letters were intercepted and before charges were filed, a deputy questioned Butt in his cell about his daughter's age. The deputy never Mirandized him. Butt told the deputy that his daughter was five. Prosecutors charged Butt with two counts of distributing material harmful to a minor. Butt testified at trial, admitting that his daughter was only five and that he drew the letters. He claimed, however, that the letters were meant as a joke and that he did not find them offensive. A jury convicted him of both counts, and he appealed, claiming that the interrogation in his cell violated *Miranda and* that the evidence was insufficient. The court of appeals certified the case to the Utah Supreme Court.

Held: Affirmed. The evidence was sufficient. Under Utah Code s 76-10-1201, a jury has broad discretion to determine community standards for minors and to determine whether the material in question violated that standard. Finding the material in this case harmful to minors did not exceed that discretion.

Evidence was sufficient to convict defendant under accomplice liability theory.

***State v. Jiminez*, 2012 UT 41 (Nehring).** Jesus Jiminez was convicted of homicide and aggravated robbery with a gun enhancement under an accomplice liability theory. The facts demonstrating that Jiminez was an accomplice were: he drove his car past the robbery target three times before stopping just south of it to let the principal out; he told another passenger in the back seat to get down; when a gunshot was heard, he ignored the passenger's request to drive away and instead waited for the principal to return; he then drove the principal away from the scene and helped him to change his shirt and hide the gun. Jiminez appealed his conviction, claiming that his counsel was ineffective for not seeking dismissal of the robbery charge because there was no evidence that he knew the principal had a gun. The court of appeals affirmed, holding that the aggravated robbery statute did not require that an accomplice knew that the principal had a gun. Jiminez sought and obtained a writ of certiorari to the Utah Supreme Court.

Held: The court of appeals erred. An offense only imposes strict liability when the statute defining the offense clearly indicates a legislative intent we to impose strict liability. The aggravated robbery statute bears no such intent. So, under Utah Code s 76-2-102, the state must prove a mental state of at least recklessness with respect to the presence of a gun. Any error at trial was harmless, however, because Jiminez heard the gunshot before helping the principal flee the scene. He was therefore at least reckless as to the presence of the gun during the flight from an aggravated robbery.

A person can be guilty of resisting arrest even when underlying arrest is later found to have been unlawful.

***American Fork City v. Robinson*, 2012 UT App 357 (Voros).** Robinson was charged with interfering with an arresting officer and disorderly conduct after he refused to cooperate with officers trying to detain him for questioning. Robinson was acquitted of disorderly conduct, but convicted of interfering with an arresting officer.

Held: Affirmed. Robinson argued that the resisting arrest statute explicitly required that there be a finding that an arrest or detention was lawful before he could be convicted of arresting arrest. Robinson argued that the officers' detention of him was unlawful. The court of appeals disposed of Robinson's claim on preservation grounds, but noted that his "reading of the statute" was "well off the mark," anyway. The Utah Supreme Court has clearly held that a person may be found guilty of resisting arrest even when the underlying arrest is later found to have been unlawful. The "fine question" of the legality of an arrest "must be determined in subsequent judicial proceedings, not in the street." The evidence here was sufficient to support the conviction where Robinson refused to obey an officer's order that he return back inside the courthouse.

Evidence sufficient to show that defendant possessed child pornography in Utah, even though photos no longer existed, where victim described the photos and testified that she deleted them from defendant's computer in Utah.

***State v. Mills*, 2012 UT App 367 (Thorne).** While on leave in Utah from active military duty in Louisiana, 28-year-old Mills hooked up with 16-year-old C.D., the daughter of Mills' brother's ex-wife. They had sex several times before Mills returned to Louisiana. Mills convinced C.D. to send him five topless photos of herself from her cell phone, "to keep" their "relationship good." A few months later, Mills returned to Utah and he immediately had sex with C.D., who was starting to feel used. A few months later, Mills forced himself on C.D. after she refused to have sex with him. C.D. later borrowed Mills' computer and deleted a folder containing at least two of the topless photos she had sent him. Mills then returned to active duty out of state. C.D. reported the rape the following year. The assigned detective called Mills, who was then stationed in South Carolina, and Mills admitted to having had consensual sex with C.D. Mills was charged with one count of rape and several counts of unlawful sexual contact with a 16- or 17-year-old and sexual exploitation of a minor. The State's forensic computer experts could not recover the deleted photos. But at trial C.D. described the five photos in detail and testified that she had deleted them from Mills' computer in Utah. On appeal, Mills claimed that without the photos, the State had not proved either that he possessed child pornography or that he possessed them in Utah.

Held: Affirmed. The victim's testimony describing the photos and that she produced and sent them to Mills while they were having a sexual relationship was sufficient to establish that the photos constituted partial nudity of a minor with the purpose of sexual arousal. The victim's testimony that she deleted the photos in Utah were enough to establish that Mills possessed them in Utah.

Evidence insufficient to show defendant constructively possessed meth found in the room he shared with his girlfriend, where searching officers could not definitively say that the drugs were among defendant's possessions when they entered the room.

***State v. Gonzalez-Camargo*, 2012 UT App 366 (McHugh).** Dozens of SWAT team members and a K-9 unit executed a search warrant on the upper apartments of a fourplex, which defendant shared with his girlfriend. Police found nine baggies of meth in a lockbox found in the bedroom that defendant and his girlfriend shared. They also recovered stolen laptops, cellular telephones, and other electronic devices. At trial, the searching officers were unable to state with any definitiveness where the lockbox containing the meth was when they first entered the room to search. Different officers placed the lockbox at various locations in the room and only one of them placed the lockbox in the midst of defendant's possessions. A jury convicted defendant of possessing the meth.

Held: The evidence was insufficient to show a nexus between defendant and the drugs where defendant shared the bedroom with his girlfriend and where nothing definitively connected the drugs to defendant or his possessions. There was no evidence that defendant abused drugs and the officers' conflicting testimony about where the drugs were first found made it impossible to determine whether they were in fact defendant's.

For purposes of showing a position of special trust, an adult cohabitant of the victim's parent need not have a sexual relationship with the parent.

***State v. Bryant*, 2012 UT App 264 (Thorne).** In 2004, after having sex with 15-year-old B.S., Bryant convinced B.S.'s mother to move in with him so that they could share expenses. Bryant plied B.S. with alcohol and methamphetamine and had sex with her again. In a fit of jealous rage, Bryant one night attacked B.S. and abused and tortured her all night, including handcuffing her to the bed, burning her face with a heated screwdriver, holding her head underwater, and choking her. Before B.S.'s mother returned home, Bryant drove a bound B.S. to a remote area where he continued to burn, punch, and choke her. Bryant eventually apologized, took B.S. home, and had sex with her again. Bryant showed B.S.'s mother the injuries, but she did not report them until two months later when she moved with B.S. out of Bryant's home. A jury convicted Bryant of aggravated kidnapping, child abuse, and three counts of rape. The State's theory of lack of consent on the rape counts were either that Bryant was in a position of special trust because he was an adult cohabitant of the victim's parent or that Bryant enticed B.S. On appeal, Bryant argued that for purposes of a position of special trust, adult cohabitant means either a sexual or marriage-type relationship with the victim's parent. Bryant did not challenge the alternative enticement theory.

Held: Affirmed. As the court of appeals held in *State v. Watkins*, 2011 UT app 96, *cert. granted*, a cohabitant of a victim's parent in this context does not require a sexual or marital-type relationship with the parent. Rather, it requires only that the defendant continuously live in the same residence as the parent.

Church was a dwelling for purposes of the burglary statute, where a caretaker lived in the basement.

***State v. Francis*, 2012 UT App 215 (Voros) (mem.).** Francis broke into a church. The church opened into a split entry and had two levels, each accessible from the other. The main floor housed classrooms, a sanctuary, and an office; the basement housed a kitchen, restrooms, two bedrooms, and a caretaker. Francis was convicted of a burglary of a dwelling, a 2nd degree felony. On appeal, Francis argued that the church could not be a dwelling as a matter of law.

Held: Affirmed. Under Utah's burglary statute, a "dwelling" is a "building which is usually occupied by a person lodging in the building at night, whether or not a person is actually present." Francis argued that under this definition, the structure must be the type of structure that typically houses overnight guests. Thus, a structure in which people do not typically sleep, such as a garage, officer, or church, would not be a dwelling. Francis's argument was foreclosed by *State v. McNearney*, 2011 UT App 4, which held that the key inquiry is the actual use of the structure, not the usual use of similar types of structures. Here, the church Francis burglarized is usually occupied by a person lodging in the building at night; it was thus a dwelling for purposes of the burglary statute.

Soliciting funds from several people over a five-day period did not amount to a pattern of unlawful activity.

***State v. Kelson*, 2012 UT App 219 (McHugh) (cert. granted).** Grace C. Kelson was charged criminally with several counts of boring securities violations and one count of pattern of unlawful activity. The conduct giving rise to the charges occurred during a five-day period in which Kelson solicited money from several people in exchange for promissory notes repaying the money at a minimum of 600% interest. The money was to be used to acquire a letter of credit from a bank to fund a real estate development project. Kelson failed, however, to disclose her sordid financial history and the fact that some of the money would be used to pay personal expenses. The lenders never saw any return on their investment and never received the principal back. A jury convicted Kelson, and she appealed.

Held: Reversed. A pattern of unlawful activity requires either a series of related crimes over a substantial period of time or a series of related crimes that demonstrate a threat of continuing over a substantial period of time. Here, Kelson's conduct was accomplished over a period of only five days and present no threat of continuing beyond that time period. Thus, the evidence of a pattern of unlawful activity was insufficient, and the trial court should have granted Kelson's motion for a directed verdict.

Naked man watching pornography in his living room with a couple of naked nine year-old boys is guilty of lewdness involving a child.

***State v. Titus*, 2012 UT App 231 (Voros) (mem).** Mark Scott Titus was charged with two counts of lewdness involving a child after his son's eight and nine year-old friends reported that Titus would sometimes watch pornography naked in the living room and would invited them to disrobe and join him. Titus was convicted at a bench trial and appealed, claiming that the State had failed to show that he knew that his conduct would cause affront or alarm to the boys. He claimed that his conduct was not unlike exposing one's self in a locker-room.

Held: Affirmed. Titus's conduct is very different from locker-room cases. He sexualized his nudity by watching pornography and inviting the boys to disrobe and watch pornography with him. The trial court's verdict was not, therefore, against the clear weight of the evidence.

Divided panel of the court of appeals determines that a knife is a dangerous weapon.

***Salt Lake City v. Miles*, 2013 UT App 77 (Voros)**. Wade John Miles was charged with criminal trespass, threats against life, and possession of a dangerous weapon by a restricted person following an confrontation with a UTA worker at a Trax station. Miles threatened that he had a knife and was going to kill the UTA worker if the worker did not leave him alone. When police arrested him, they found a folding knife in the pocket of a jacket in a shopping cart that Miles was pushing. The knife had a 3 ½ inch blade and a 3 ½ to 4 inch handle. Miles claimed that he forgot he had the knife and that he used it for camping. A jury convicted Miles of possession of a dangerous weapon by a restricted person. Miles appealed, claiming that there was insufficient evidence that the knife was a dangerous weapon.

Held: Affirmed. The court first considered the four factors enumerated in Utah Code § 76-1-601(6)(b) to guide fact-finders in determining whether an object is a dangerous weapon. It first determined that testimony about what type of wound the object could produce was sufficient to satisfy the second factor in that statute. It also determined that that the object need not actually be used to be a dangerous weapon. The court then held that a 3 ½ inch folding knife with a serrated blade was a dangerous weapon where it was possessed by a man who threatened to kill another person was a knife.

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