

The PROSECUTOR



Utah Supreme Court

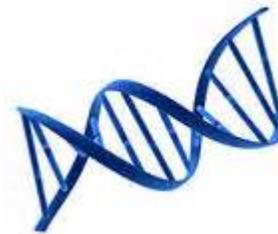
PCRA Claim Survived Death and Factual Innocence Not Established Under PCRA

Mr. Gressman was accused of rape and aggravated sexual assault by a woman he and friend gave a ride to. The woman claimed the two men fondled her and eventually raped her at a secluded location. At trial, the state's expert testified that Mr. Gressman

could not be excluded as the source of the semen collected from the victim. He was convicted of aggravated sexual assault and sentenced to a term of five years to life. After thirty-nine months of his sentence the semen was re-tested using a more advanced DNA test. The test revealed Mr. Gressman was not the source of the semen and the State moved to dismiss all charges against him.

Mr. Gressman then filed suit under the PCRA seeking to establish his factual innocence and obtain financial assistance payments. While the suit was pending, Mr. Gressman died and his counsel moved to substitute his widow. Both sides moved for summary judgment on Mr. Gressman's factual innocence petition. The district court, in a single order, granted the motion to substitute Mr. Gressman's widow, denied the State's motion to dismiss, denied the State's motion for summary judgment, and granted Mr. Gressman's widow's motion for summary judgment. The court then

awarded Mr. Gressman's widow PCRA assistance payments, including prejudgment interest. The two issues raised on appeal were: whether Mr. Gressman's claims survive his death and whether the district court properly awarded prejudgment interest on the assistance payments it awarded.



The Utah Supreme Court held that Mr. Gressman's factual innocence claim was essentially a claim for injury to the person and would abate under common law.

However, the statutory provision under Utah's general survival statute as applied to the case. The court also held Mr. Gressman's factual innocence was not established by the vacture of his conviction. The supreme court held that under the PCRA a petitioner must prove by clear and convincing evidence that the petitioner did not: (a)

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engage in the conduct for which the person was convicted; (b) engage in conduct relating to any lesser included offenses of the crime for which the person was convicted; or (c) commit any other felony arising out of or reasonably connected to the facts supporting the indictment or information upon which the person was convicted.

Here, Mr. Gressman's vacature resulted in the district court granting a new trial, not a finding of innocence. While the State did not seek a new trial, no factual innocence was ever found and so Mr. Gressman's claim for pre-judgment interest failed.

[Gressman v. State, 2013 UT 63](#)

No Reasonable Suspicion To Extend Stop

Police received a tip that two Hispanic men were



exchanging money and plastic baggies in a parking lot and that a gray dodge truck was involved. When the officers arrived there was no gray truck, but a Hispanic man in a black truck was leaving the store. The men recognized the man, but didn't remember his name until running his plates and finding out who the truck was registered to. The police then followed the truck out of the parking lot and onto the streets. The truck's turn signal was on for about three blocks and the truck's tire was on the fog line. The officers turned on their car lights to pull the truck over and continued following it. The truck did not pull over for some time and

while the officers were following the man seemed to be looking to his left side.

When defendant pulled over the officer had him exit the truck and frisked him and did a plain view search of the truck. The officers found nothing in the initial searches so they called to have a canine unit to come and search the car. However, no canine unit was available. The officer's knew defendant was on probation and so they called AP&P to report the circumstances to the on call AP&P officer. The AP&P officer asked the officers on the scene to search the vehicle for AP&P.

The officers did a more thorough search and found a used syringe, a straw with residue on it, and 2.9 grams of methamphetamine. The officers arrested defendant and reported back to AP&P of their findings. AP&P sent an officer to the scene and together they went and searched defendant's home and found more drugs and drug paraphernalia.

Defendant filed a motion to suppress all of the evidence claiming illegal detention. The district court denied the motion to suppress and defendant appealed. The Utah Supreme Court

Utah Assistant Attorney General New Bar Board Commissioner

Utah Assistant Attorney General Janise Macanas has been elected as the new Third District Utah State Bar Board Commissioner serving Tooele, Salt Lake, and Summit Counties. Macanas has been a felony prosecutor for more than 15 years for the A.G. Criminal Justice Division and will be sworn in as Commissioner on November 15, 2013.

Macanas received her J. D. from J. Reuben Clark Law School, a M.S. from Chapman University and has doctoral studies in Clinical Psychology at United States International University-San Diego. She recently served as President of the Utah Minority Bar Association and currently serves as Deputy President of Region XV of the Hispanic National Bar Association where she represents Utah attorneys at the national level.

Macanas implemented a social media platform, utilized a blog (<http://jmacanas.blogspot.com/>), YouTube videos and her 14,000 followers on Twitter @lawyergirl3 to encourage support for her candidacy. "I want to help attorneys keep pace with technology in the practice of law and have a forum where we can connect, exchange ideas, and collaborate," wrote Macanas in her campaign message.

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held the stop was justified by defendant's traffic infraction. The frisk and plain-view search were proper for the protection of the officers. However, the court held the officers lacked reasonable suspicion to prolong the investigation looking for possible drug crimes. The court reversed the district court and remanded the case. [State v. Gurule, 2013 UT 58](#)

Expert Required To Determine The Standard Of Care



The Jenkins owned a home on the 400 East block of 3300 South in Salt Lake County. A pipeline carrying water is

buried near their home. The Jordan Valley Water Conservancy District (the District) owned this pipeline when it burst and spilled water into the Jenkins home. When the leak was fixed the District voluntarily provided the Jenkins a new water heater and repaired their furnace and air conditioning system. The same pipe then burst in a different location and flooded the Jenkins home again. Before either leak had occurred the District had found that the pipe was a candidate for replacement. However, the District was waiting to replace the pipe during some other construction scheduled to take place later.

The Jenkins sued the District because the District refused to pay for the damages from the second leak. The District moved for summary judgment

on the ground that the Jenkins could not prevail because they had failed to designate an expert to establish the standard of care or if that standard had been breached.

The district court granted summary judgment on different grounds and did not discuss the issue that came before the Supreme Court. The court of appeals reversed the district court's decision holding that the Jenkins were not required to present an expert because the District had previously found that the pipe needed to be replaced.

The Utah Supreme Court held that an expert was required to determine the standard of care. The court continued that the internal determination was not enough to determine the standard of care according to tort law. The court also held that an expert was required because of the technical analysis required to determine "how a reasonable water conservancy district would act, and about whether the District failed to conform to that standard by failing to replace the 3300 South pipeline earlier." [Jenkins v. Jordan Valley Water Conservancy District, 2013 UT 59](#)

Ogden Trece Is Amendable To Suit

Ogden Trece is a street gang that has identifying signs, symbols, tattoos, graffiti, clothing and hand signs. Weber County (County) obtained a permanent injunction against Trece and its members under a



public nuisance theory pursuant to section 76-10-806 of the Utah Code, which empowers a county attorney "to institute an action in the name of the county . . . to abate a public nuisance." The County personally served many gang members and published service in the Ogden Standard Examiner and on www.utahlegals.com.

The county served the preliminary injunction on more than three hundred alleged members of Ogden Trece. Violation of the injunction is a class B misdemeanor punishable by up to six months imprisonment and up to a \$1,000 fine. UTAH CODE § 76-10-807. Alleged members of the gang that had been served with the injunction appealed and filed a petition for extraordinary writ directly with the Supreme Court challenging the injunction. The issue of whether service on the alleged members was proper was before the Supreme Court.

The Supreme Court held the appellants did not have the right to an appeal because they were not parties to the case because the case is against Ogden Trece and the appellants stated they did not represent Trece. The Supreme Court did hold it had jurisdiction to consider the petition. The court also held that Trece is an unincorporated association that is amendable to suit because they conduct business under a common name.

However, the supreme court held Trece was not properly served with process because the county did not serve an agent of Trece and did not satisfy the reasonable diligence requirement for service by publication. The County never made any "assertions that it had exercised reasonable diligence in attempting to identify or serve an

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officer or a managing or general agent of Trece” and therefore service by publication should not have been allowed. The Supreme Court held the district court lacked jurisdiction over Trece and the Injunction is void.

[Weber Co. v. Ogden Trece, 2013 UT 62](#)

Utah Court of Appeals

Defendant Failed To Challenge Use Of Specialized Software

Defendant appealed his convictions of multiple counts of sexual exploitation of a minor and possession of a dangerous weapon by a restricted person. He argued the district court erred by denying his request to amend motion to suppress evidence and by denying his motion to suppress.

Defendant’s case was previously remanded for consideration of the suppression motion. On remand, with new counsel, defendant filed a motion to amend the previously filed suppression motion to include three additional issues. The motion to suppress argued that the use of specialized software was an illegal search. The district court denied the

motion to amend and found that the detective’s use of the software was not a search.

The appellate court

declined to overturn the finding that the use of the software was not a search because defendant did not challenge the ruling that the use of the software was a search. [State v. Bergeson, 2013 UT App 257](#)

Prosecutor’s Sarcasm Not Error

Defendant and C.D. regularly used sex toys together. One day defendant brought home a “surprise” for C.D. and showed her an “enormous” dildo. C.D. said the dildo was labeled XXL and was “extremely intimidating.” She objected to using it and told defendant to return it to the store. Defendant drank six beers that night and when C.D. was in the bath he came in and forced her to get out of the bath. Once out of the bath defendant forced C.D. to bend over and raped her using the dildo and his penis.



C.D. “scream[ed] in pain and ask[ed] defendant] to stop” and unsuccessfully tried to remove the dildo herself. Defendant told her that “if [she] didn’t quit crying . . . he’d give [her] something to cry about.” Eventually defendant stopped using the dildo on C.D. and C.D. gave in to defendant’s requests for sex, hoping that he “would not try to use [the dildo] on [her] again.” Defendant was eight inches taller and 130 pounds heavier than C.D.

C.D. reported the assault to the police and a sexual-assault examination was completed. The nurse took photos and medical diagrams of the bruising on C.D.’s cervix, laceration on her anus, and visible redness around her genitals.

Defendant testified the encounter was consensual and that C.D. was accusing him because she was seeing someone else. He claimed the only objection C.D. made to the dildo was the amount of money he had spent on it because he was unemployed.

Defendant appealed his convictions for object rape and forcible sodomy alleging prosecutorial misconduct. Defendant claimed the prosecution’s sarcasm at trial was a plain error because it showed the jury the government believed the defendant was guilty. The court of appeals held the prosecutor did not engage in a course of conduct approaching the “unrelenting and pervasive” misconduct that was required to declare a mistrial. [State v. Davis, 2013 UT App 228](#)

Preliminary Testimony Admissible

Defendant and Victim had an a periodic relationship. The couple was not living together even though the Victim was pregnant with the defendant’s child at the time of the incidents. One night, defendant went to Victim’s home and asked for a key to her house. She refused and so he punched her in the ribs and back of the head and then took the key. A short time later, he returned using the key and let himself into the house. He accused her of having another man in the house and threatened to kill her. He pushed her to the ground, kicked her in the face and stabbed her in the hand with a kitchen knife.



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The victim was afraid to testify at trial and so her preliminary hearing testimony was introduced. The testimony was read by a stand-in. The jury convicted the defendant of assault, domestic violence in the presence of a child, aggravated burglary, aggravated kidnapping, aggravated assault, and violating a protective order.

On appeal defendant claimed that Victim's preliminary hearing testimony was improperly admitted at trial. The appellate court held It was not error for the court to determine Victim was unavailable because she refused to testify and was absent from trial. [State v. Garrido, 2013 UT App 245](#)

Sufficient Evidence Of Theft

Defendant was convicted of theft by deception and theft by



receiving stolen property. The victim reported the theft of a wedding ring and some other jewelry. The police conducted a "pawn check" and found that defendant had pawned several items. The victim went to the pawn store and identified her wedding ring. The pawn ticket for the ring identified defendant as selling it to the store. The victim told the police that defendant had access to the home after living there and knew the access code to the garage.

The defendant appealed claiming insufficient evidence. The state had an employee of the pawn shop, the detective and the ex-husband of the victim testify about the ring. The state

also presented the ring itself, photographs of the victim wearing the ring, and the pawn ticket showing defendant's signature and thumbprint. The court of appeals held that there was sufficient evidence and the district court did not commit pain error.

[State v. Gibson, 2013 UT App 243](#)

Flash of Knife Show of Immediate Force

Defendant was convicted of a class A misdemeanor for "having upon his person any dangerous weapon with the intent to unlawfully assault another." Defendant argued that Salt Lake City did not present sufficient evidence during the bench trial to show that he had the intent to commit an assault. Defendant claimed the store clerk, who he assaulted, was not a reliable witness because there were some inconsistencies in the clerk's story. The court of appeals held the inconsistencies of the clerk's story were irrelevant to the crime charged.

Defendant also claimed he did not use a "show of immediate force or violence" when stealing the candy bar from the store. He claimed he was ten to fifteen feet away from the clerk and backing out of the store when the knife was shown to the clerk. However, the court held that because he took the knife out of his pocket and flipped the blade open when the clerk was following him to retrieve the candy bar defendant used a "show of immediate force or violence." [Salt Lake City v. Maloch, 2013 UT App 249](#)

Speeding Affirmed Over Claim of Prudence

Defendant appealed his conviction of speeding. Defendant claimed the



district court erred by finding him guilty of speeding because his speed was reasonable and

prudent given the existing road conditions. The Utah code provides that a person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing conditions. The code also explains that any speed in excess of the posted limits is prima facie evidence that a speed is not reasonable and prudent. The record shows that the police officer testified there were a lot of cars on the road at the time and that defendant was driving significantly faster than the vehicles around him. The court held that defendant did not overcome the prima facie evidence that his speed was unlawful and affirmed the conviction. [American Fork City v. Proctor, 2013 UT App 253](#)

Evidence Supported Verdict of Depraved Indifference Murder

Defendant and his friend, Maurice Lee, were sitting around drinking when they started arguing about who would "do something." Defendant says that Lee urged him to get his pistol and pull the trigger. Defendant says he went to his bedroom got the pistol and as he was walking back to Lee he pulled the slide back to confirm there was nothing in the chamber. When he pulled the slide back to check, he chambered a round of ammunition. He then put the gun to Lee's head and told him "this one will make you flinch." When defendant

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On the Lighter Side

City Says, No Graves In The Front Yard

According to The Associated Press, James Davis, 74, had buried his wife of 48 years in 2009, as her dying wish was to "remain at their house" in Stevenson, Alabama. What followed was a series of court cases with Davis fighting the city and eventually losing.

James Davis' legal fight with the city [reached a boiling point in 2012](#), when a state court ordered the body of his wife Patty Davis to be disinterred despite James' contention that the government had no control over his "family plot."

The decision was [appealed all the way to the Alabama Supreme Court](#), which last month upheld the lower court's ruling that Davis' wife's body be removed from the property, Reuters reports. According to the AP, the state Supreme Court upheld a Jackson County judge's ruling that "state law gives cities the right to regulate and prohibit private burials," despite Davis' belief that he "broke no laws."

City officials who stood behind the decision in 2012 [worried about setting a bad precedent](#) by allowing Davis to bury his wife along "one of the main streets through the town." They worried about potential negative effects on the neighborhood's appearance and property values, reports the AP.

http://blogs.findlaw.com/legally_weird/2013/11/ala-man-cant-bury-wife-in-front-yard-courts-rule.html

Nazi Vanity Banned In California

A vanity "NOT SEE" license plate -- with the separate image of a swastika above it -- caused a San Diego Unified School District bus driver to be suspended and the license plates to be yanked by the DMV. The California Department of Motor Vehicles [canceled the "NOT SEE" license plates](#) -- which, when pronounced, sounds like the word "Nazi" -- and asked the owner, Shawn Calpito, to return them. As if channeling Tim Gunn, the California Department of Motor Vehicles makes its rule on vanity plates clear: It all comes down to common sense and good taste.

According to the California Vehicle Code, the department [has the right to refuse any combination of letters and/or numbers](#) that "may carry connotations offensive to good taste and decency, or which may be misleading or in conflict with any license plate series now issued."

http://blogs.findlaw.com/legally_weird/2013/11/not-see-license-plate-revoked-bus-driver-suspended.html



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pulled the trigger Lee was killed. Defendant was convicted of indifference murder.

On appeal, defendant claimed the facts established at trial were insufficient to support the jury's verdict of depraved indifference murder. He claimed "the State failed to carry its burden in [establishing] that he did more than just act recklessly."

The appellate court stated that the standard explained by the Utah Supreme Court is that, "[d]epraved [indifference] murder requires greater culpability than reckless manslaughter." *Standiford*, 769 P.2d at 263. This is because "the probability of the risk of death must be higher for depraved murder than for manslaughter." *Id.* at 264. A "grave risk of death" is a "highly likely probability that death will result," which is greater than the "substantial and unjustifiable risk" required to convict of manslaughter." *Id.*

Here, the appellate court held in this case, "the magnitude of the harm was extreme: death was virtually certain to result if the gun discharged. The likelihood of harm was also great: as explained above, the gun magazine was loaded and Ricks knew it was

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loaded, yet he placed the gun to Lee's forehead and pulled the

trigger." The court rejected defendant's claim of insufficiency and held the evidence supported the jury's verdict.

[State v. Ricks, 2013 UT App 238](#)

Numerical Designation Of Sentence Upheld



In 2001, a jury convicted Appellant of murder and he pled guilty to purchasing or possessing a dangerous weapon. He was sentenced to five years to life for the murder conviction and one to fifteen years for the dangerous weapon conviction. Appellant moved to correct the sentence claiming it was illegal, but the motion was denied. Appellant then challenged the district court's denial of his motion to correct an illegal sentence under rule 22(e) of the URCP.

Defendant argued that the designation that his sentence was 5-100 years for his murder conviction was beyond the statutory range and was therefore illegal. The court of appeals held that the district court's assessment that the designation as 5-100 years was "merely the numerical designation used by the Board of Pardons to reflect his five year to life sentence. The court of appeals affirmed the sentence. [State v. Todd, 2013 UT App 231](#)

Tenth Circuit Court of Appeals

Utah's Sexual Solicitation Amendments Constitutional

In 2011 Utah passed House Bill 121 amending Utah's sexual solicitation criminal code. The amendments were aimed at the fact that prostitutes were identifying undercover police officers

by asking them to engage in illegal acts contained in the statute. The amendment made it a crime when someone who was seeking to engage in prostitution asks or directs someone else to expose themselves, masturbate or touch the person's genitals. The appellants claimed the law was unconstitutionally overbroad and vague.

The Court of Appeals for the Tenth Circuit held the amendments were not unconstitutionally overbroad because they did not encompass a substantial amount of constitutionally protected conduct. Moreover, the Amendments did not place too great a burden on Appellants' speech rights because they pass the *O'Brien* test for incidental restrictions on First Amendment rights. The Circuit Court also held Section 1313(1)(c) was not unconstitutionally vague, because it provides fair notice of the prohibited conduct and sufficient guidance to law enforcement. [Bushco v. Shurtleff, 2013 BL 238889, 10th Cir., No. 12-4083, 9/9/13](#)

Victim Recommending Death Violated Rights

Defendant was convicted of two murders for the death of his next door neighbors. The victims were found face down in their apartment with their throats cut. The door was locked, there was no evidence of forced entry or of the victims being bound. Witnesses had seen the victims and defendant argue over missing drugs two nights before their deaths. Defendant also told co-workers that they had been

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murdered with their throats cut before the medical examiners had been able to determine that their throats had been cut. There were many other pieces of substantial evidence presented at the trial. Defendant received two death sentences.

At sentencing, seven relatives of the victims were allowed to give victim impact statements. Each recommended defendant receive the death penalty. Defendant argued on appeal that these statements violated his Eighth Amendment rights against cruel and unusual punishment. The Court of Appeals for the Tenth Circuit agreed and held the admission of sentencing-phase victim impact testimony recommending the death penalty violated defendant's Eighth Amendment rights. [Dodd v. Trammell, 2013 BL 248101, 10th Cir., No. 11-6225, 9/16/13](#)

Other Circuits/ States

Forcibly Medicated Inmate Cannot Be Executed

Defendant and two others took a group of employees hostage while at a restaurant. They then threatened them with guns, took their possessions and killed the manager. Defendant was convicted, sentenced to death, and his execution date was set. A month before the execution defendant filed a motion to challenge his competency to be executed.

Defendant had a well recorded history of mental illness. The trial court held defendant was incompetent to be executed. The State then filed a motion with the trial court seeking involuntary medication of appellant. The trial court heard oral arguments and found that defendant should be involuntarily medicated for his own good. Six years later, the State filed a motion with the trial court for another competency hearing to determine if defendant was competent for execution.

The court held a second competency hearing and held that defendant was competent at that time. The trial court held defendant could be executed, but only because of the effects of the forcible medication. The defendant then appealed to the Texas Court of Criminal Appeals.



The appellate court held, "Nothing in the statute permits the trial court, once it has found a defendant incompetent, to take any action other than ordering periodic reevaluation of the defendant." Therefore, because the State ordered the forcible medication of defendant to obtain competency for execution, the State exceeded its authority. The court held, "This Court will not permit the execution of an incompetent inmate who has become competent solely through an unauthorized order." [Staley v. State, 2013 BL 242417, Tex. Crim. App., No. AP-76,798, 9/11/13](#)

Probable Cause Of Parolee's Residence Required For Search

Police received an anonymous tip that someone was selling crack cocaine out of a garage. The informant called it "Looney's spot." Looney was identified as the defendant and police learned that he was on parole for a felony conviction and that he was using the garage of the Arlington apartment to sell drugs. Police watched the Arlington apartment and saw defendant come and go multiple times. Eventually, police saw defendant leave the garage sell a woman a bag of crack. They also saw defendant drive between the Arlington apartment and another apartment, the Manhattan Place apartment. When officers arrested defendant he was at the Arlington apartment and they told him they were going to search the apartment according to his parole conditions. They went into the apartment and found cocaine, a loaded gun, mail addressed to the defendant at the Manhattan Place address.



Defendant moved to suppress the evidence claiming the officers did not have probable cause to believe the Arlington apartment was his. Defendant claimed the Arlington apartment was his girlfriend's and he had only stayed there as an invited guest multiple times. The State argued that the officer's did have probable cause to search the apartment based on the totality of circumstances or that they had the right to search without a warrant because of the parole conditions.

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The Court of Appeals for the Ninth Circuit upheld the district court's finding that the officer's did not have probable cause based on the totality of circumstances. The Circuit court also held that the parole conditions that allow a search, namely "your residence and any property under your control," are triggered only when the officers have probable cause that the parolee lives at a residence. [United States v. Grandberry, 2013 BL 248649, 9th Cir., No. 11-50498, 9/17/13](#)

Defendant's Voice Is "Other Information" Gathered During Proffer Session

Defendant was arrested for selling cocaine after a government agent arranged a buy from him. The government arranged the buy over the phone and the defendant and the government agent met in a parking lot and completed the sale. Later, the defendant was interviewed at a proffer session. The government agreed to not use any statements or other information gained during the proffer session at trial. However, the

government had the officer who was present during the phone call arranging the sale of crack present at the proffer session and had him identify the voice. At trial, the Government had the officer testify that the defendant's



voice was the same as the person arranging the sale of cocaine over the phone.

Defendant was

convicted.

On appeal, defendant claimed it was plain error to allow the government to present evidence gained from the proffer session at trial. The Court of Appeals for the First Circuit agreed. The Circuit Court held the phrase "other information" included the tone, inflections and speaking characteristics of the defendant gained during the proffer session. [United States v. Melvin, 2013 BL 248644, 1st Cir., No. 12-1332, 9/17/13](#)

Warrant Was Not Overbroad Because Defendant Uploaded Video
Germany authorities alerted U.S.

officials that child pornography had been shared across the peer-to-peer website, eDonkey, to an IP address in the US. The IP address was linked to defendant's home. Vancouver City Police Department applied for a search warrant allowing them to "remove the devices from the residence and conduct analysis and recovery of data off-site in a controlled laboratory environment." The warrant also allowed for the seizure of "[a]ny computer or electronic equipment or digital data storage devices that are capable of being used" for those violations." During the search of defendant's home officer found a digital memory card for use in a camera. Later police found sexually explicit images of defendant's niece on the memory card.

Defendant moved to suppress the evidence claiming staleness. The court granted the motion to suppress, but not on the grounds defendant claimed. Rather, the court found the warrant facially deficient because it "failed to connect generalized statements about child pornography collectors to [defendant]."

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The Court of Appeals for the Ninth Circuit held that warrant affidavit was not overbroad and did connect statements about collectors of child pornography to defendant because he uploaded a video to eDonkey. The act of uploading was the same as distributing the material to others and increased the likelihood that defendant had the material on a computer and had stored more material. The court also upheld the seizure and search of the memory card from the camera holding that the officers had a reasonable expectation that illegal material could be held on the card, as it is the same as a computer in many respects. [United States v. Schesso, 2013 BL 250098, 9th Cir., No. 11-30311, 9/18/13](#)

Prosecution Must Show Indian Blood From Federally Recognized Tribe

Defendant and his brothers drove to the home of Dallas Peters on the Ak-Chin Reservation of Arizona and opened fire on the house. They injured Peters badly and defendant was arrested. Defendant was charged with many crimes and the indictment alleged that



defendant was an "Indian." The federal code, 18 U.S.C. § 1153, gives jurisdiction to the federal government over certain crimes

committed by Indians in Indian country. The statute does not define who is an Indian.

On appeal, the Court of Appeals for the Ninth Circuit held the test to be used considers two factors: the defendant's

degree of Indian blood, and (2) the defendant's tribal or government recognition as an Indian. Here, the prosecutors only introduced a Certificate of Enrollment in an Indian tribe for evidence that defendant was an Indian for purposes of the federal jurisdiction. The Circuit court held that as a matter of law the jury could not have found that defendant was an Indian because no evidence was presented to show that defendant had any blood from a federally recognized Indian tribe. The conviction was reversed. [United States v. Zepeda, 9th Cir., No. 10-10131, 9/19/13](#)



Third Party Restitution Order For Medical Bills Upheld

Appellant assaulted a fellow inmate while drinking contraband alcohol and watching the super bowl. After assaulting the victim defendant sat him up so he didn't choke on his own blood and left him for the guards to find later that night. The victim ended up in a coma that doctors say he will never come out of.

Appellant was ordered to pay \$124,396.56 in restitution to the Bureau of Prisons (BOP) under 18 U.S.C. § 3663A which requires restitution to the victim of the offense. Appellant challenges the restitution claiming the BOP is not the victim nor responsible for providing compensation to the victim of the offense. The Court of Appeals for the Sixth Circuit did not determine whether the BOP was a victim or not.

Rather, the Circuit Court held that under 18 U.S.C. § 3663A(b)(2) the appellant was required to pay for the medical and related professional services. The Circuit Court held the district court was correct when it found appellant "obligated under the statute to pay restitution to the BOP for the necessary medical expenses that it incurred on [Victim's] behalf." [United States v. Church, 2013 BL 240273, 6th Cir., No. 12-5056, 9/10/13](#)

Idaho Standard For Execution Upheld

Defendant threatened his two victims with a rifle as they arrived at their mountain cabin. He forced them inside, bound their hand and legs, stole their money and killed both of them. He was sentenced to death for the murders. He appealed claiming his death sentence was prohibited by *Atkins*, which outlaws the execution of "mentally retarded" criminals.

The Court of Appeals for the Ninth Circuit held the Supreme Court did not define mental retardation as a matter of law, but left it up to states to decide "appropriate ways to enforce the constitutional restriction." Idaho defines "mentally retarded" as "significantly sub-average general intellectual functioning that is accompanied by significant limitations in adaptive function in at least two [areas of life skills]. " Furthermore, Idaho law defines significantly sub-average general intellectual functioning as an IQ of seventy or below.

Here, defendant claims the Idaho court failed to take into account other factor

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that make his IQ less than seventy. The Circuit Court held that the State was not required to account for any other factors than what was in the statute and that Idaho's statutes were not outside of the national consensus that has developed about execution of offenders with an IQ of less than seventy.

[Pizzuto v. Blades, 2013 BL 239718, 9th Cir., No. 12-99002, 9/9/13](#)

Alford Plea May Result In Death Sentence

Defendant pleaded guilty to killing his wife and two of his daughters in 2001. When he entered his plea he entered an *Alford* plea, which allowed him to not acknowledge guilt, but concede there is sufficient evidence to support a conviction. An *Alford* plea may only be accepted by the court if the judge finds that it was knowingly, voluntarily, and intelligently made and that there is satisfactory evidentiary basis to accept the plea. Defendant was sentenced to death.

Defendant claimed that an *Alford* plea is insufficient to support capital



punishment and asked that the Supreme Court of Washington vacate his sentence and

remand to the trial court with direction to the set plea aside. The supreme court held that a capital sentence can be predicated on an *Alford* plea. The court also held that defendant entered his plea knowingly, voluntarily and

intelligently and that his calculated plan to avoid the details of his murders did not work. [In re Cross, 2013 BL 262759, Wash., No. 79761-7, 9/26/13](#)

Dwelling Defined For Burglary Statute

Defendant entered a home that was being renovated and pointed a gun at the sole construction worker in the home. Defendant told the worker to not look at him, then searched the worker's pockets, stole his car keys, wallet, and phone. Defendant then left in the worker's truck. Defendant was apprehended by police in the stolen truck. When the worker got the truck back he found that only his cell phone was missing. Defendant was convicted of burglary of a dwelling with assault or battery with a dangerous weapon, robbery with a weapon, and carjacking with a dangerous weapon.

Defendant appealed claiming the structure he entered was not a dwelling because it

was undergoing renovations at the time. The Supreme Court of Florida held the home was a dwelling because "a structure's design or suitability for habitation, rather than actual occupancy or intent to occupy, controls in determining whether a structure constitutes a dwelling." The court held that this affords unoccupied homes the same protection as homes



presently occupied. [Young v. State, 2013 BL 251759, Fla., No. SC11-2151, 9/19/13](#)

Right To Counsel Depends On Court

Defendant was convicted of misdemeanor domestic abuse in the Fort Peck Tribal Court in Montana under tribal law. At the time of his guilty plea, defendant was indigent and was not offered the assistance of court-appointed counsel. Later, defendant was indicted for being a restricted in possession of a firearm after the conviction for misdemeanor domestic violence charge. Defendant moved to dismiss the indictment because he and not been represented by counsel when he plead guilty to the domestic violence. The district court dismissed the indictment and the State appealed.



The Court of Appeals for the Ninth Circuit held the Sixth Amendment right to counsel serves as a constitutional minimum in all state and federal criminal proceedings that result in a sentence of actual imprisonment or a suspended sentence of imprisonment, but this right did not apply in tribal court criminal proceedings. However, the law had changed and the question before the Circuit Court was if the statute refers to a uniform federal meaning of right to counsel, which contained a Sixth Amendment floor or

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to the right as it existed in the predicate misdemeanor proceeding. The Circuit Court held “that while the statute includes a Sixth Amendment constitutional minimum in all state and federal proceedings, a misdemeanor conviction obtained in tribal court may qualify as a predicate offense to defendant’s prosecution for possessing a gun, so long as the defendant was provided whatever right to counsel existed in the underlying misdemeanor proceeding.” The Circuit Court affirmed the indictment because there was no right to counsel in tribal court when defendant was convicted. [United States v. First, 2013 BL 269851, 9th Cir., No. 11-30346, 10/1/13](#)

No Right To Opportunity To Withdraw Consent

Defendant was pulled over for going too slowly and not moving out of the left lane while driving on the interstate. While obtaining defendant’s information she stated she was headed to Minneapolis to visit her aunt, but wasn’t sure where her aunt lived and was still trying to make contact with her. The trooper then asked for consent to search the vehicle and the driver consented. The passenger only gave consent to search her luggage. Trooper started the search and both defendant and the passenger was moved to a squad car.



While in the squad car, the passenger said they were headed to visit her mom in California. The troopers then inspected the engine compartment and noticed that it was very clean for an older vehicle and that the air intake looked like it had been manipulated. The officer inspected the air intake and found a secret compartment. The troopers then took the car to a shop and found methamphetamines in the compartment.

Defendant appealed arguing the stop was not consensual because she could not revoke her consent while in the squad car during the search. The Court of Appeals for the Eighth Circuit held that there is no duty to ensure that an individual has the opportunity to withdraw consent and that here, defendant failed to make an effort to withdraw her consent in a timely manner. The Circuit court affirmed the district court’s denial of defendant’s motion to suppress. [United States v. Guevara, 2013 BL 271189, 8th Cir., No. 13-1340, 10/3/13](#)

Proceeds Means Receipts Under Statute

Defendant was convicted of various counts resulting from a scheme to defraud Chase Manhattan Bank by overvaluing assets used to secure and maintain a revolving line of credit. Defendant was ordered to forfeit all “receipts” of the criminal violation. The district court found that because the loan proceeds were disbursed to

corporations, the proceeds were in fact controlled by defendant and were in fact his corporate alter egos defendant was liable for the proceeds of the corporations.



Defendant appealed claiming “proceed” meant only profits and that the proceeds of the corporations were not profits of his crime. The Court of Appeals for the

Second Circuit held, “that reading “proceeds” to mean “receipts” rather than “profits” in the context of section 982(a)(2) better vindicates the primary purpose of the statute.” The Circuit court affirmed the judgment of the district court. [United States v. Peters, 2013 BL 278933, 2d Cir., No. 11-610-cr, 10/9/13](#)

Victim Allowed To Testify With Dog

Defendant was accused of using a stolen key to break into Mr. Lare’s apartment and steal his tv, vcr, dvd player, microwave, dvd’s , a shelving unit, and a collectable knife. Mr. Lare suffered from significant developmental disabilities. While Mr. Lare was 56 years old, he functioned at the mental age ranging from 6 to 12 years old. While at trial, Mr. Lare was accompanied by a facility dog. The dog is often used to comfort children who need to testify. Defense council objected claiming extreme prejudice. The trial court allowed the dog to accompany Mr. Lare during his testimony at trial. Defendant was convicted of burglary.

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On appeal, defendant argued the dog violated his right to due process and a fair trial. The Supreme Court of Washington held defendant failed to establish that his fair trial rights were violated by the presence of the dog. The court also held the district court properly balanced the competing factors of benefits and prejudice. [State v. Dye, 2013 BL 262767, Wash., No. 87929-0, 9/26/13](#)

No Right to Unsworn Allocution

Defendant was arrested for having child pornography in his possession when arriving at the airport from a trip to Brazil. After his arrest, agents



searched his office at the Wharton Graduate School of Business. Agents found numerous photos

and videos of defendant engaged in sex acts with minors from Brazil. Defendant was charged with numerous crimes relating to his sexual relationships with two minors from Brazil.

After trial, defendant appealed his sentence and the court held that there was error. The court remanded the case for re-sentencing. At the re-sentencing hearing, defendant was given the chance to make a statement. When he went to speak the district court insisted that the statement be made under oath, pursuant to that judge's individual practice. Defendant was placed under

oath and gave his statement.

On appeal, defendant challenged his sentence on many ground claiming he had the right to deliver an unsworn allocution. The Court of Appeals for the Second Circuit held there is no right to deliver an unsworn allocution. The Circuit Court also held the decision to have defendants placed under oath during allocution was the unfettered discretion of the district courts. [United States v. Ward, 2013 BL 283597, 3d Cir., No. 12-1511, 10/15/13](#)

Indigent Defendants Have Right To Transcripts of Co-defendants

Defendant was indicted for assault and terroristic threatening after an incident involving his brother Jefferson and two complainants. Jefferson was convicted by a jury following trial for the same charges as the defendant was facing. After pre-trial negotiations broke down, defense counsel moved to delay trial so that he could obtain the transcripts and videos of Jefferson's hearings and trial proceedings. The district court denied, both the request for continuation and the request for transcripts and videos.

The Supreme Court of Hawai'i applied the two-part *Britt* test to determine if the court erred in denying the transcripts and



videos. The court held, once it is determined that transcripts are "necessary for an adequate defense" and the defendant is unable to pay, the transcripts are required to be furnished." The supreme court also held the court should look to the defense counsel to determine if the transcripts are necessary for an adequate defense. The court held the trial court erred by failing to provide the transcripts and videos and ordered a new trial. [State v. Scott, Haw., No. SCWC-10-0000037, 10/16/13](#)

Terry Stop Held Legal

Officer May was patrolling in an area known for the sale of drugs and use of weapons. As he was driving he saw defendant leaning against a fence. May noticed the handle of a firearm in his waistband. May got out of the car and approached defendant, asked defendant if he had anything on him. The officer then asked if he could pat him down for weapons. When the officer patted him down he found a firearm. Defendant was arrested and charged for being a convicted felon having a concealed firearm.

Defendant moved to suppress the firearm claiming the officer did not have reasonable suspicion to conduct the *Terry* stop. The motion was denied and defendant was convicted. On appeal, the Florida Supreme Court held, under the totality of circumstances the *Terry* stop was legal. The supreme court gave deference to the officer's training, experience, the

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area of the city, and the fact that defendant lied to the officer about having the gun on his person when finding the stop legal. [Mackey v. State, 2013 BL 286694, Fla., No. SC12-573, 10/17/13](#)

Confrontation Clause Not Violated By Co-defendant Statements

Police received a tip from a confidential informant that defendant and co-defendant had just bought crack and were headed to Midland to sell it. The informant told the officer the make and model and color of the car. The informant also gave police the first three letters of the license plate.

Officer's watched for the car headed in the direction of Midland and waited until the described car drove by. The officers followed the car until it made a traffic violation. The officer then called for backup. The car was pulled over and eventually crack cocaine and cash were found hidden in the car.

At trial, prosecutors introduced the co-defendant's out-of-court confession through an officer's testimony. On appeal, defendant claimed this violated his confrontation clause rights. The US Court of Appeals for the Fifth Circuit held that under *Bruton* co-defendant's statements did not violate the confrontation clause because they did not implicate defendant. [United States v. Powell, 2013 BL 272641, 5th Cir., No. 11-51205, 10/3/13](#)

Texas Statute Preventing Online Solicitation Of A Minor Held Unconstitutional

Appellant was charged with third degree felony of communicating in a sexually

explicit manner with a person he believed to be a minor with an intent to arouse or gratify his sexual desire. He appealed alleging the subsection of the felony offense of online solicitation of a minor is facially unconstitutional for three reasons: it is overbroad, it is vague, and violated the Dormant Commerce Clause.

The Texas appellate court held the statute is a content-based restriction on speech, so the court must apply strict scrutiny. Although the State has a compelling interest in protecting children from sexual predators, the statute is not narrowly drawn to achieve that goal because it regulates only the explicit speech itself, not harmful conduct designed to induce a minor to commit an illegal sex act.

Utah has a similar statute that may be read at: <http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.33.htm#33.021>

[Ex parte Lo, No. PD-1560-12, 10/30/13](#)

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

February 27-28	SEX CRIMES CONFERENCE <i>Specialized training for prosecutors and investigators</i>	POST Academy Sandy, UT
April 10-11	SPRING CONFERENCE <i>Legislative and case law updates, civility/professionalism and more</i>	Sheraton Hotel Salt Lake City, UT

[Registration for UPC Courses](#)

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

22 dates and locations around the country	INVESTIGATION AND PROSECUTION OF MORTGAGE FRAUD AND VACANT PROPERTY CRIME <i>This 2 day course will be held in many different locations throughout the country during 2013 & early 2014</i> Flyer Full Info Lodging Scholarship Application
December 9-13	FORENSIC EVIDENCE Summary Registration Agenda Los Angeles, CA <i>Comprehensive training on the challenges inherent in violent crime cases involving scientific evidence</i>
January 27-31	SUCCESSFUL TRIAL STRATEGIES Registration Flyer San Antonio, TX <i>Up-to-the minute instruction on trial advocacy skills, trial preparation and other methodologies.</i>
February 24-28	PROSECUTING HOMICIDE CASES Summary Agenda Registration San Francisco, CA <i>Fine tune investigative techniques and enhance your trial skills and your strategic planning</i>

* For a course description, click on the “[Summary](#)” link after the course title. If an agenda has been posted there will also be an “[Agenda](#)” link. Registration for all NDAA courses is now on-line. To register for a course, click on the “[Register](#)” link. If there are no links, that information has yet to be posted by NDAA.