

The PROSECUTOR



Director's Thoughts

When you hear the term “Best Practices,” what comes to mind? Whatever comes to mind, the Department of Justice: Bureau of Justice Assistance wants to help shape those thoughts. They are so committed to government attorneys following the best practices possible, DOJ is funding “Best Practices” conferences and committees across the country. Utah has been invited to attend one

of these conferences in September to look at establishing a “Best Practices” committee here in Utah. Mark Thomas, Uintah County Attorney, and Ryan Robinson, Chief Prosecutor for West Valley City, will be attending, and I’m looking forward to the information they bring back to us.

Kristine Hamann is a visiting fellow with DOJ and is tasked with implementing this program. She will be our keynote speaker at fall conference. One of the things she has begun to do is to send out regular e-mails containing “Articles of Interest” for government attorneys. The topics vary but contain valuable information on what other attorneys are doing, or not doing, as the case may be. You’ll start seeing those e-mails on

occasion in the hopes that you can glean new ideas and ways of doing things as well as learning from the mistakes of others. The intent is clearly to make us better at our jobs.

Best,

Bob

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JOHN R. JUSTICE PROSECUTORS AND DEFENDERS INCENTIVE ACT OF 2008 (JRJ)

2013-14 UTAH APPLICATION

THE COMPLETED AND SIGNED JRJ BENEFITS APPLICATION FORM, THE SIGNED SERVICE AGREEMENT AND ALL OTHER SUPPORTING DOCUMENTS, MUST BE RECEIVED BY UTAH PROSECUTION COUNCIL NO LATER THAN

5:00 P.M. ON MONDAY, JULY 14, 2014.

NO APPLICATION RECEIVED AFTER THAT DATE AND TIME WILL BE CONSIDERED.

TYPE YOUR ANSWERS. HANDWRITTEN APPLICATIONS WILL NOT BE CONSIDERED.

<http://www.upc.utah.gov/jrj/index.html>

This application can be accessed at the JRJ website in fillable PDF format. The application can be completed on line and then printed for signing and mailing. Make sure you have the latest version of Adobe on your computer.

Utah Prosecution Council (UPC) is not equipped to receive on-line applications and will not accept faxed or e-mailed applications.

NOTE: Some people have had trouble completing the on-line form. Save the file to your desktop first, then complete it from there. Right click on the link then click on Save As, or Save Link as. If that doesn't work you may need to ask your IT folks to help configure your browser and/or your PDF reader application to allow you fill in the forms.



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Utah Supreme Court

Registering as a Sex-Offender Deemed a Collateral Consequence

Defendant, Kenneth Trotter, pled guilty to unlawful sexual contact with a minor. He did so under the advice of his counsel. After learning he would have to register as a sex-offender, Trotter filed a motion to withdraw his guilty plea. Trotter argued his plea was not made voluntarily or knowingly because he was not informed by his counsel that he would have to register as a sex-offender. In light of these circumstances, Trotter argued that his involuntary plea violated his Sixth Amendment rights. The district court denied his motion.

The Utah Supreme Court affirmed, holding his plea was made knowingly and voluntarily because Trotter was made aware of the “direct consequences” of his guilty plea. The court explained a plea is not voluntary if the defendant is not made aware of the direct consequences of the plea agreement. The court rejected Trotter’s argument that registering as a sex offender was a direct consequence of his plea, rather than a collateral one. The court reiterated the collateral-direct consequences dichotomy. Direct consequences include forfeiture of trial rights and mandatory prison sentences, while collateral consequences include those that are unrelated to “length and nature of the sentence imposed on the basis of the plea.” The court held the requirement to register as a sex-offender constitutes a collateral offense because it is unrelated to the length of the prison term imposed. Moreover, if the court determined registering as a sex-



offender to be a direct consequence, then penalties such as losing the right to vote and owning a firearm would be direct consequences also—all civil remedies. Given registering as a sex-offender is a civil remedy, the court held it is properly categorized as a collateral consequence.

As such, Trotter’s plea was voluntary, so there was no violation of his Sixth Amendment rights. [State v. Trotter, 2014 UT 17.](#)

Court Considers PRCA Funding and Ineffective Assistance of Counsel

Taberone Dave Honie (petitioner) was charged with aggravated murder and subsequently sentenced to death. At the trial stage, petitioner waived his right to jury at sentencing. Petitioner’s counsel attempted to introduce a variety of mitigating factors to reduce Petitioner’s sentence. However, given the brutal manner in which the Petitioner committed the murder, the court found that the “aggravating circumstances outweighed the mitigating circumstances and sentenced [the petitioner] to death.” The petitioner raised a variety of ineffective assistance of counsel claims during the post-conviction appeal process. The post-conviction trial court dismissed these claims and granted summary judgment in the State’s favor. The petitioner filed a 60(b) motion to set aside the post-conviction court’s decision on the basis of ineffective assistance of post-conviction counsel. The petitioner’s 60(b) motion was based on the fact that his request for additional funding under the Post Conviction Remedies Act (PRCA) to complete post-conviction discovery was denied by the post-conviction court, rendering his counsel ineffective.

The Supreme Court of Utah affirmed the decision of the post-conviction court. Citing *Strickland v. Washington*, the

court disposed of all the petitioners claims that his trial counsel was ineffective. This case presented the court’s first opportunity to review a funding determination under the PRCA. The PRCA was amended in 2008 to allow appellants to secure addi-



tional funding beyond the \$20,000 cap “upon a showing of good cause.” When determining whether a petitioner has good cause to secure additional PRCA funding, the court must consider (1) whether any future discovery will merely duplicate that which has already been duplicated and (2) whether the work already completed and any future discovery will “support post-conviction relief.” The court affirmed the decision of the post-conviction trial court to deny additional funding because the petitioner failed to show that any additional funding would likely lead to post-conviction relief. The court further affirmed the court’s denial of the petitioner’s 60(b) motion because a 60(b) motion based on ineffective counsel is only appropriate when willful and deliberate inaction or gross negligence occurs. In this case, the inability of the petitioner’s counsel to secure additional PRCA funding did not rise to such a substantial level.

[Honie v. State, 2014 UT 19.](#)

Conviction Overturned for Submitting Unsupported Alternatives to the Jury

Frank and Joan Steed were convicted of three counts of failure to file a tax return and one count of engaging in a pattern of unlawful activity. At the close of the State’s case, the Steeds submitted a motion to dismiss based on the State’s failure to provide sufficient evidence of two of the three specific intent alternatives in the

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failure-to-file statute. The Supreme Court reversed their convictions because the court should have submitted only the one remaining alternative to the jury instead of excluding the single supported intent alternative and submitting the two unsupported alternatives to the jury.

[State v. Steed, 2014 UT 16](#)

Utah Court of Appeals

Defendant's Conviction Reversed and Remanded Because of Hearsay

Chad Stewart, defendant, was convicted of aggravated robbery and receiving stolen-property. The defendant drove his Mini-Cooper(Mini) to a car dealership and test drove a BMW. The car salesman (the salesman) accompanied the defendant on the test drive. During the test drive, Steward pulled the car to the side of the highway, pointed a gun at the salesman's face, and instructed him to exit the vehicle. The salesman complied and immediately contacted the police. The police were able to quickly locate the defendant and the stolen BMW. During the investigation, the police discovered the defendant's Mini was also a stolen rental car from ZipCar. The police contacted the manager of the ZipCar where the Mini was rented. The manager confirmed the car had been stolen.

At trial, the judge allowed the State to admit as evidence the testimony of the police officer that he confirmed the Mini Cooper was stolen through the ZipCar manager. On appeal, the defendant argued the trial court erred by admitting



the police officers testimony because it was based on inadmissible hearsay. The court reiterated that "ruling the on [the] admissibility [of hearsay evidence] is reviewed for an abuse of discretion." The court further explained, even if there is an error in admitting hearsay evidence, the conviction will not overturned unless the appellant can establish the error affected the outcome of the trial.

The court held the trial courts admission of hearsay evidence would not have affected the outcome of the trial on the aggravated robbery charge. However, the court held the trial court erred in admitting the hearsay testimony of the police officer on the possession of stolen-property. The police officer testified at trial that he "was positive in his own mind that the defendant had stolen... [the mini]." The court explained that the record revealed that the defendant merely admitted he had "obtained" the Mini, which left open the possibility that he obtained the car in a legitimate fashion. As a result, by admitting the testimony of the police officer, the court held this error likely influenced the outcome of the possession of stolen property charge. The case was reversed and remanded to retry this charge.

[State v. Stewart, 2014 UT App. 112.](#)

Court Clarifies "Good Cause" Exception Under ICWA

Parents appealed the decision of the juvenile court to accept the voluntary relinquishment of their parental rights. The parents argued the juvenile court lacked jurisdiction to adjudicate the case because the matter had been transferred to the Cheyenne River Sioux Tribe pursuant to the Indian Child Welfare Act (ICWA). The ICWA mandates that any state court proceeding involving an Indian child not residing within a reservation shall be transferred unless good cause exists not to transfer the case. By the time the tribe filed

a motion to transfer the case, it was already one year old. The juvenile court claimed good cause existed to not transfer the case because it was already a year into the litigation and most of the witnesses resided in Utah. The juvenile court also stated that the good cause exception could be overcome if "the Tribe came to Utah to hold these proceedings and tried the matter at the same current level." Although the Tribe contemplated sending a judge to Utah, it expressly declined to assume jurisdiction of the case. Given the Tribe expressly declined jurisdiction, the appellate court affirmed the ruling of the juvenile court.

[In re. E.B., 2014 UT App. 115.](#)

Juvenile Court Granted Broad Discretion to Expunge Juvenile Record

D.L.H. (appellant) admitted to sexually abusing three young children in 2009. The juvenile court placed him on probation, required him to attend counseling, and to submit to psychological evaluations. The appellant successfully completed counseling and performed well enough during his probation that his probation officer recommended that the court terminate his probation early. The juvenile court subsequently released the appellant from probation early.

After the Appellant turned eighteen, he petitioned the juvenile court for expungement of his criminal record. The juvenile court denied the petition, explaining that the appellant's past criminal act was sufficiently severe to not merit expungement, given the act had occurred only three years earlier.

The appellate court affirmed. It began by reiterating the broad discretion granted to juvenile courts in adjudicating expungement petitions. The court proceeded to clarify and expand upon the three factors a court must examine when considering expungement petitions. The court held the language of the relevant statute



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PROSECUTOR PROFILE

Alan Stubbs Assistant Attorney General Utah Attorney General's Office

Law School: BYU - J. Rueben Clark Law School

Favorite Sports Team:
BYU Cougars

Favorite Movie: Lord of the Rings Trilogy

Alan Stubbs, originally from Hawaii, was actually born in the same hospital as President Obama. Much to his chagrin, Alan's parents moved to the main land when he was just six months old (he has yet to forgive them). After Allen's father accepted a teaching position in BYU's music department, his family moved to Provo. Naturally, Alan grew up around classical music and even has experience playing the oboe.

Alan attended law school at BYU - J. Rueben Clark Law School. Upon graduation, Alan joined the JAG Corps and then went onto work for the Department of the Navy, General Counsel Office as a civilian attorney. Alan spent a total of 12 years working in Wahsington, D.C. Alan is a "dyed in the wool" BYU fan (sorry Ute fans). However, he also claims to be a Ute fan as well (I thought no man could serve two masters).

More interestingly, perhaps, Alan has been able to travel abroad. In 1984, he spent the summer traveling through China and teaching English in Taiwan. 1984 was the first time the Chinese government allowed foreign tourists to travel unaccompanied by government guides.

For nearly twelve years, Alan has been working in the Child and Family Support Division of the Attorney General's office. He primarily represents the Office of Recovery Services. Fortunately, Alan maintains a wonderful perspective concerning his work. Reflecting on his work with the Child Protection Division, Alan feels privileged to have been able to make a positive impact on the lives Utah families.



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did not mandate that these three factors be equally weighed, only that the juvenile court consider each factor. Moreover, the court noted that the statute allows the court to determine if it is satisfied by the efforts of the petitioner. Given the juvenile court had considered all three factors enumerated in the statute and interpreted the statute correctly, the court held the juvenile court did not abuse its discretion by denying the petition.

[In re D.L.H., 2014 UT App 117.](#)

Intending to File Not the Same as Filing

Marchet filed a petition for post-conviction relief. The district court dismissed it after determining that it was time-barred under UCA § 78B-9-107(1). Marchet acknowledged the petition was not filed within the time permitted by the statute, however he argued the petition should be considered timely because he sent a document to the Court of Appeals that should have been considered a notice of intent to petition for post-conviction relief. The Court of Appeals found the letter could not be construed as a petition for post-conviction relief and affirmed the dismissal of his petition because a “notice of intent to file a petition” did not meet the statutory requirements for filing a timely petition.

[Marchet v. State, 2014 UT App 108](#)

Court’s Advice to Jury Not Allen Instruction

Hunt was acquitted of rape, object rape, forcible sexual abuse, and forcible sodomy, but he was convicted of unlawful sexual activity with a minor. He appealed his conviction, claiming he received ineffective assistance of counsel, that the trial court erred in excluding some evidence, and that the trial court improperly urged the jury to reach a verdict. The court found trial counsel was not ineffective because there were conceivable tactical bases for counsel’s actions during jury selection and discussion over



whether to give the jury an Allen instruction. Additionally, any error in excluding certain evidence proffered by the defendant was harmless. The Court of Appeals also concluded that the trial court did not give an Allen instruction but instead, when asked for help in reaching a verdict by the jury, obliged by accurately describing several options that did not otherwise inappropriately coerce the jury to reach a verdict. Hunt’s conviction was affirmed.

[State v. Hunt, 2014 UT App 109](#)

Courts Refuses to Implement Willfulness into Plea in Abeyance Agreements

Pantelakis appealed the trial court’s termination of her plea in abeyance agreement and entry of her guilty plea to criminal nonsupport. Pantelakis argued the willfulness standard for termination of probation should be incorporated into Utah’s statutory scheme governing termination of plea in abeyance agreements and asserted that the trial court erred in terminating her plea in abeyance agreement. The Court of Appeals refused to incorporate the willfulness standard applicable to termination of probation because the controlling statute and uniform case law requires a substantial compliance standard. It also held the trial court did not abuse its discretion in absence of an assertion she substantially complied with the terms of the agreement.

[State v. Pantelakis, 2014 UT App 113.](#)

Willful Violations Not Required to Revoke Probation

Robinson, a convicted sex offender, challenged the trial court’s revocation of his probation after he admitted multiple probation violations. He argued the court abused its discretion by revoking his probation without holding an evidentiary hearing or finding that his violations were willful. The trial court held two separate revo-

cation hearings; Robinson admitted to the allegations during those hearings and did not request an evidentiary hearing or deny that his violations were willful. The Court of Appeals ruled that Robinson failed to preserve his challenge to the lack of an evidentiary hearing and did not properly present a claim of plain error on the issue. It also held the trial court had implicitly found that Robinson’s violations were willful. Therefore, the trial court did not abuse its discretion and the revocation of Robinson’s probation was affirmed.

[State v. Robinson, 2014 UT App 114](#)

Hearsay Evidence Admissible to Terminate Parental Rights

S.M. and K.M. appeal the decision of the juvenile court to terminate their parental rights. Specifically, the parents challenged the juvenile court’s decision to admit evidence obtained from the Department of Occupational and Professional Licensing (DOPL) and the parents’ previous criminal convictions. The records obtained from DOPL revealed the parents’ prescription drug use.

The appellate court affirmed, holding the juvenile court’s decision to admit evidence will only be overturned for clear error or abuse of discretion. Further, citing Rule rules 201(a) and 403 of the Utah Rules of Evidence, the court held the trial did not abuse its discretion because the evidence obtained from DOPL was dispositive in determining whether termination would be in the best interests of the child. Also, the court held admitting the adjudication of a previous criminal charge was appropriate because the benefit outweighed any prejudice to the parents. The court further explained that hearsay evidence (such as the documents obtained from DOPL) is admissible when such evidence is relevant to the disposition of a child welfare case.

The appellate court affirmed, holding the juvenile court’s decision to admit evidence will only be overturned for clear error or abuse of discretion. Further, citing Rule rules 201(a) and 403 of the Utah Rules of Evidence, the court held the trial did not abuse its discretion because the evidence obtained from DOPL was dispositive in determining whether termination would be in the best interests of the child. Also, the court held admitting the adjudication of a previous criminal charge was appropriate because the benefit outweighed any prejudice to the parents. The court further explained that hearsay evidence (such as the documents obtained from DOPL) is admissible when such evidence is relevant to the disposition of a child welfare case.

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[In re Z.M., 2014 UT App 118.](#)

Rule 22(e) Not an Appropriate Vehicle to Challenge Conviction

Steven Thurman (defendant) appeal the trial court's denial of his rule 22(e) motion to correct an illegal sentence. The appellate court affirmed. The court explained that rule 22(e) "presupposes a valid conviction and therefore cannot be used as a veiled attempt to challenge the underlying conviction by challenging the sentence." All the challenges the defendant raised were outside the scope of rule 22(e) and were only attempts to challenge his conviction rather than correct his sentence. Consequently, the court affirmed the district court's denial.

[State v. Thurman, 2014 UT App 119.](#)

Court Must Advise Defendants of Risk of Deportation

Jaime Ramirez-Gil (defendant) appealed the district court's denial of his petition for post-conviction relief. Defendant was charged with thirteen various felonies and misdemeanors but pleaded down to one count of third-degree felony stalking. Petitioner received a suspended jail sentence. Following his release, the defendant was apprehended by Immigration and Customs Management (ICE) and informed he would be deported. Prior to his removal, the defendant filed a petition for post-conviction relief. Defendant argued his trial attorney offered constitutionally ineffective assistance because the attorney did not advise his client of the risk that he could be deported. The State moved for summary judgment in regards to the petition. The post-conviction court granted the motion.

The appellate court affirmed. The court reiterated the two-part test for ineffective assistance of counsel claims: (1) the defendant must show the attorney's counsel was objectively deficient and (2) the

counsel's actions prejudiced the defendant and the outcome of the case. The court noted that in cases where deportation is a possible consequence of a plea agreement, an attorney has an obligation to inform his client of that consequence. The court held the attorney's counsel was not deficient because the attorney clearly made the defendant aware of the risk of deportation, and the plea agreement that the defendant signed clearly indicated the risk of deportation. The court also held that, even if the defendant's attorney did not advise him of the risk of deportation, he was not prejudiced because the record and evidence suggested that the defendant did not "have any realistic options that could avoid deportation." Moreover, the court held the mere fact that the defendant asserted speculative alternatives to plea bargaining does not constitute an inference a court may draw in the petitioners favors to survive summary judgment.

[Ramirez-Gil v. State, 2014 UT App 122.](#)

Rule 65(c) Does Not Always Supersede Other Rules of Civil Procedure

Eugene McNair (appellant) was charged and pled guilty to rape. Following his arrest, appellant submitted to DNA testing. However, before ever learning the results of the

test, McNair pled guilty to one count of rape on the advice of counsel. While in prison, appellant filed a *pro se* petition for post-conviction relief. Although the motion was filed one month after the statute of limitations expired, appellant described that he suffered from an array of mental disabilities as a result of Fetal Alcohol Syndrome, so he was unaware that he could file for post-conviction relief. Consequently, appellant requested that the court accept his petition in the interest of justice. The state filed a 12(b)(6) motion,

arguing that the interest of justice provision under the old Post Conviction Relief Act (PRCA) was abrogated by a tolling provision. Because the appellant failed to argue that his mental incapacity should trigger the tolling provision, his petition was untimely. The post-conviction court granted the states motion.

The appellate court reversed. The court began by explaining that, although rule 65(c) governs in post-conviction petitions, if rule 65(c) is silent concerning a particular pleading standard, then the other rules of civil procedure fully apply. As a result, rule 8(f) also applied to McNair's petition, so the court held his petition must comply with rule 65(c) but also be "construed liberally" to promote substantial justice. Moreover, the court held *pro se* petitions are to be held to less stringent standards than formal pleadings drafted by attorneys.

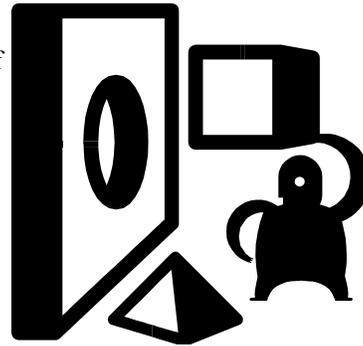
After examining the appellant's petition, the court reversed the district court's decision to grant the State's 12(b)(6) motion. The court held the appellant's petition sufficiently alluded to his mental incapacity to invoke the tolling provision of the PRCA. When construed liberally to promote justice, the court held the petition made enough factual allegations related to the petitioner's mental incapacity to survive a 12(b)(6) motion.

[McNair v. State, 2014 UT App 127.](#)

Absence of Record Does Not Imply Plain Error

Juan Mardoniz-Rosado (appellant) pled guilty to misdemeanor retail theft in 1996. The transcript of the 1996 trial contained neither a record of the plea colloquy nor the written waiver. Sixteen years after completing his sentence, appellant filed a motion with the district court to withdraw his guilty plea. The dis-

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district court denied the motion but did not explain its reasoning.

Rosado appealed the district court's denial of his motion. Although his appeal clearly fell outside of the thirty-day time limit to file the motion to withdraw his plea, the appellant argued that he should have been allowed to file the motion because he was never advised of the time limits as required by Rule 11(e) of the Utah Rules of Criminal Procedure.

The appellate court affirmed. The court began by recognizing that failing to advise the defendant about the time restrictions to withdraw a plea may be grounds to extend the deadline. However, because the record was devoid of the district court's reasoning for denying the motion to withdraw the plea, the court was unwilling to merely assume the appellant was never advised pursuant to rule 11(e). The court explained that the appellant has the burden of proof to produce affirmative evidence that he was not advised of the time limitations to withdraw his plea. To assume otherwise would effectually require the courts to assume irregularity in prior proceedings. A court will not assume error simply because the record is unavailable. As a result, the court held the appellant's motion was not timely filed.

[State v. Mardoniz-Rosado, 2014 UT App 128.](#)

District Court Possesses Inherent Power to Impose Sanctions

Walter Keane was sanctioned by the district court for initiating a frivolous lawsuit. After the action was dismissed, Keane drafted an order that stated his action was brought in good-faith. Opposing counsel objected to the order, asserting the district court never determined whether Keane's lawsuit was brought in good-faith. Keane was eventually sanctioned and ordered to pay attorney's fees for pursuing

and intentionally delaying the suit. The court of appeals affirmed the order, holding courts of general jurisdiction "possess certain inherent power to impose monetary sanctions on attorneys who by their conduct thwart the court's scheduling and movement of cases through the court." Given the record indicated that Keane knew the district court never found that the action was brought in good-faith, the court found the sanctions were a permissible exercise of the court's power to

control the conduct of attorneys whose action interfere with the administration of justice.

[Maxwell v. Woodall, 2014 UT App 125.](#)

County Sheriff Found Negligent for Failing to Execute Writ Properly

Jim Nebeker, appellee, filed a complaint against John Rhineer's estate for embezzlement. Rhineer allegedly embezzled funds from Nebeker's bank account when he acted as Nebeker's accountant. Nebeker secured a prejudgment writ against Rhineer's estate. The writ instructed the Summit County Sheriff to "attach and keep safe all property" held by the Rhineer estate, including a condominium. The sheriff executed the writ properly, but he failed to attach a legal description of the property to the county recorder pursuant to Rule 64(c) of the Utah Rules of Civil Procedure. As a result, the condo was sold to a third party. Nebeker secured a judgment against the Rhineer's estate but lost the value of the condo due to the county's failure to properly execute the above mentioned writ.

Nebeker brought suit against the county for negligence. The district court found in favor of Nebeker and entered a judgment for \$221,400. The county appealed, alleging the sheriff did not breach his legal duty when he executed the writ against the Rhineer's estate.

The court of appeals affirmed the judgment. After establishing that the county owed a legal duty to Nebeker, the court held the sheriff did breach his duty by failing to attach a description of the property when he delivered the writ to the county recorder. The court reasoned that a plain reading of Rule 64(c) clearly imposes a legal duty on the sheriff to deliver the writ to the county recorder with a physical description of the relevant property. Strictly construing the statute, the court held this duty was mandatory rather than discretionary as the county suggested. As a result, the court held the county acted negligently and affirmed the decision of the district court.

[Nebeker v. Summit County, 2014 UT App 137.](#)

Court Explains Definition of Cohabitant Under CAA

Sachin Patole filed a motion for a protective order against his father-in-law Mark Marksberry. Concluding that Patole and Marksberry did not meet the definition of "cohabitants" under the Cohabitant Abuse Act (CAA), the district court denied the motion.

The court of appeals reversed, holding the district court committed plain error by construing the CAA too narrowly.

Although cohabitant may have narrower meanings in other contexts, under the CAA, cohabitant "includes many categories of persons who do not live together as husband and wife." The appellate



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court specifically rejected the district court's suggestion that definitional limitations may be inserted into the CAA, especially when the statute and case law made it quite clear that cohabitant was intended to be broadly defined. Given Patole and Marksberry were related by marriage, the court held they were cohabitants as defined by the CAA and reversed the district court's ruling.

[Patole v. Marsberry, 2014 UT App 132.](#)

Court Describes Abuse of Discretion Standard for ALJ

While employed at Wal Mart, Rene Borja injured his back while operating a pallet jack. Borja later consulted with his private physician who advised Borja that he would need spinal fusion surgery to correct the injury. After examining Borja, Wal Mart's physician disagreed with Borja's private physician and concluded Borja did not have any permanent injuries. Also, Wal Mart's physician noted Borja exhibited "Waddell Signs," which indicate the patient's pain is illegitimate or exaggerated for non-organic reasons. Waddell signs indicate the victim's lack of credibility. Because of the conflicting reports, the ALJ referred Borja's case to a medical panel.

The panel determined Borja did indeed exhibit Waddell Signs along with other signs of non-organic, non-physiologic forms of pain. The ALJ took the panel's findings into consideration and ultimately denied Borja's request to be eligible for permanent disability benefits. Borja appealed and requested a new objective hearing, asserting that the medical panel unfairly considered Waddell Signs, which have been criticized for their lack of reliability. The ALJ denied this request because the panel's conclusions were based on several other factors, not just Waddell Signs.

Borja then filed a motion for re-

view. The Utah Court of Appeals affirmed, holding the ALJ did not abuse their discretion in denying Borja's request for a new hearing. The court explained that, because the medical panel's findings were based on factors other than Waddell Signs, Borja could not have presented any new evidence that would have altered the panel's decision. Consequently, even if Waddell signs are unreliable, the ALJ did not abuse its discretion in denying a new hearing.

[Borja v. Labor Commission, 2014 UT App 123.](#)

Claimant Not Eligible for Unemployment if Other Work Is Available

Yaron Steinhauer petitioned the Department of Workforce Services (DWS) for unemployment benefits after he was laid off at a Park City Ski Resort. Steinhauer was also employed at Wal-Mart, working 15-20 hours per week. The ski resort offered Steinhauer his job back after the ski season resumed. Prior to the start of ski season, Steinhauer asked his supervisor at Wal Mart for time off to "get ready for ski season." The request was granted. As a result, Steinhauer denied himself the opportunity to work when Wal Mart had available shifts for him. Steinhauer applied for unemployment benefits for the time between taking a leave of absence from Wal Mart and resuming work in Park City. The DWS denied his petition because he did not accept available work. Steinhauer appealed, and the court affirmed the decision of the DWS. After reiterating the deferential standard of review toward administrative hearings, the court affirmed. It held Steinhauer was clearly unavailable for unemployment benefits because accepting available work is a condition precedent for eligibility.

[Steinhauer v. Department of Workforce Services, 2014 UT App 121.](#)

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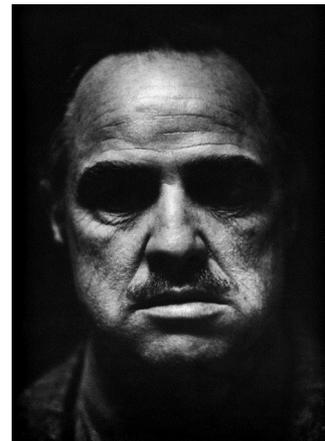


Other Circuits/ States

Restitution Order Abates Upon Death of Defendant

Samuel Volpendesto, defendant, was convicted of several felonies after a life-time of criminal activity while involved with organized crime. After the defendant was convicted, he was ordered to pay approximately \$500,000 in restitution to the victims of the crimes. The defendant appealed his conviction but died before the appeal could be heard.

Although the defendant passed away before the oral arguments were heard, Volpendesto's estate pursued the appeal. The Seventh Circuit considered whether a restitution order abates upon the death of the defendant. The court began by reiterating that the doctrine of abatement



"provides that 'death pending direct review of a criminal conviction abates not only the appeal but also all the proceedings had in the prosecution from its inception.'"

Abatement only applies while the appeal is pending. The court reasoned that a defendant's criminal conviction becomes moot if the defendant dies pending the appeal because the principle of substantive due process requires that a criminal defendant not stand convicted without resolution of the

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merits of his appeal. After looking at the decisions of other circuits, the court held restitution orders are subject to the rule of abatement because they are inextricably connected to the sentence that underlies the conviction. As a result, Volpendesto's death abated his restitution order. Although the State argued this approach severely disadvantaged the victims, the court did not find this argument persuasive because the abatement order did not preclude the victims from pursuing other civil remedies. [United States v. Volpendesto, 2014 BL 158468, No. 11 3020 \(7th Cir.\)](#)



and talk.” Once the state troopers arrived, the defendant threatened Gillespie that he would kill her if she spoke with the police. Gillespie eventually allowed the troopers to inspect the premises. The troopers recovered razor blades covered with cocaine residue and subsequently arrested the defendant.

On appeal, the defendant argued that the trial court erred in admitting evidence recovered from Gillespie's trailer because it was obtained through an unlawful search in violation of the Fourth Amendment. Citing the “overnight guest doctrine,” the defendant argued he had a reasonable right to privacy at Gillespie's residence because he had been an overnight guest there for over three weeks. The court rejected this argument, holding an overnight guest's reasonable expectation of privacy is relinquished when the hosts allows law enforcement officials to inspect the premises. Moreover, any reasonable expectation of privacy terminates when the guest maintains his permission to be in the home through coercion or other threats of violence.

Given the defendant threatened to kill Gillespie if she allowed the police to

enter her home and that Gillespie eventually allowed the state troopers to enter, the defendant had no reasonable expectation of privacy. As a result, the court held the evidence obtained through the search of Gillespie's trailer did not violate the defendant's Fourth Amendment rights.

[State v. Dorsey, No. 12-1486 \(W. Va.\)](#)

Denial of Motion to Withdraw Guilty Plea Affirmed Despite Fabricated Evidence

Larry Wilkins, defendant, was convicted of drug-distribution after selling cocaine to an undercover cop. Following his arrest, Wilkins' drug cache was recovered and sent to a state-run laboratory where the drugs were confirmed to be cocaine. Wilkins pled guilty following the result of the lab test. Seven months later, a chemist at the same state-testing laboratory admitted to falsely certifying numerous drug-test results. After learning of this scandal, Wilkins filed a motion to set aside his guilty plea because it was not made voluntarily pursuant to the



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Unwelcome Guest Has No Reasonable Expectation of Privacy

Lamar Dorsey, defendant, was convicted of conspiracy to deliver and possession of a Schedule II controlled substance—crack cocaine. In 2010, the defendant moved in with Wendi Gillespie. The defendant sold cocaine out of Gillespie's trailer. In 2011, State Police trooper's received a tip that the defendant was selling cocaine out of Gillespie's trailer. Given that this phone tip was not enough to secure a warrant, the police decided to visit Gillespie's trailer and conduct a “knock

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standard articulated in *Brady v. United States*. The court denied the motion because it was not timely filed as required by 28 U.S.C. § 2255.

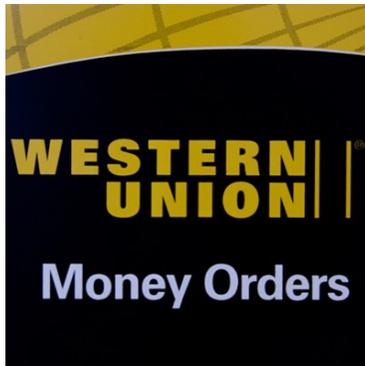
The First Circuit Court of Appeals affirmed. The court began by explaining that, pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure, a petitioner may only set aside a guilty plea on direct appeal or collateral attack. Because Wilkins did not directly challenge his plea, his only available avenue to set aside his guilty plea was through collateral attack. The court explained a prisoner may challenge his plea on the grounds that it was not made knowingly or voluntarily because of absence of significant evidence at the time of the plea. In order to prevail on a collateral attack, the prisoner must show (1) egregious misconduct by the government and (2) the newly discovered evidence would have influenced the decision to plead guilty.

After reviewing the record de novo, the court affirmed, holding Wilkins failed to show a reasonable probability that the new evidence would have influenced his decision to plead guilty. The evidence admitted at trial was so stacked against him that it was not likely he would have changed his plea, even in light of the chemist's nefarious actions. Wilkin's own admission that he was in possession of cocaine at the time of his arrest was especially probative in determining whether the new evidence would have influenced his plea.

[Wilkins v. United States, No. 13-1637 \(1st Cir.\)](#)

Indictment Defect Does Not Strip Court of Jurisdiction

Danielle Brown, defendant, pled guilty to knowingly receiving 481 United States Postal Money Orders from a foreign



country with the intent to publish and pass the same, which was in violation of 18 U.S.C. § 473. Insofar as federal law permitted, Brown waived her right to appeal her conviction or sentence. However, after being sentenced to 61 months in prison,

Brown challenged her conviction, alleging the district court lacked jurisdiction because the indictment did not include the required mens rea element of the crime for which she was charged.

The Eleventh Circuit Court of Appeals affirmed. The court held, although certain indictment defects may undermine a court's power to adjudicate a case, omitting certain elements of a crime does not negate a district court's jurisdiction over a case. This is because U.S.C. § 3231 gives federal districts courts statutory authority over all "offenses against the United States." After comprehensively reviewing relevant case law, the court held indictments need not allege *all* elements of an offense but only allege the defendant has violated *a* law in the United States Code. Although failure to specify certain elements may render an indictment insufficient for other reasons, it does not strip a federal court of its statutory jurisdiction. Because the United States charged Brown with an offense specifically outlined in the United States Code, the government's failure to omit the mens rea element of the offense did not amount to a jurisdictional defect.

[United States v. Brown, No. 13-10023 \(11th Cir.\)](#)

Sixth Circuit Examines Enhancements Under ACCA

Lerondrick Elliott, defendant, while a passenger in his friend's vehicle,

was stopped by a Louisville police officer. Elliott fled the vehicle and discarded a semi-automatic pistol and \$4,000 in counterfeit currency. He later pled guilty to being a felon in possession of a firearm and counterfeiting. Prior to this conviction, Elliott had been convicted of three different felonies, including facilitation to robbery. Pursuant to the Armed Career Criminal Act (ACCA), federal defendants who have three prior convictions receive enhanced sentences when one of the prior offenses includes a "violent felony." The district court determined facilitation of robbery to be a violent felony, so Elliott was deemed an armed career criminal and sentenced to 180 months in prison, pursuant to the ACCA. Elliott challenged the findings of the district court, alleging the court incorrectly interpreted facilitation of robbery to be a violent crime under the ACCA.

The Sixth Circuit Court of Appeals affirmed the district court's interpretation of "violent felony" under the ACCA. In interpreting a violent felony under the ACCA, the court explained a violent felony is determined generically, that is in terms of how the law defines the offense rather than how the defendant committed the offense. Moreover, the court explained



a prior conviction qualifies as an enumerated felony when its statutory elements are the same as or narrower than the generic offense. However, the court also reiterated the Supreme Courts modified approach involves looking to additional documents

beyond the elements of a crime, only when a criminal statute is "divisible," i.e., if it provides for alternative elements, some of which satisfy the elements of the generic offense and some of which do not." Employing this analysis, the court held facilitation of robbery necessarily includes a

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force element because an accomplice cannot be convicted unless the actual crime is completed. Because the district court was only required to review the elements of the offense rather than the manner in which it was committed, the court held facilitation of robbery constituted a violent felony, which evoked the enhancement guidelines of the ACCA.

[United States v. Elliott, No. 13-5427 \(6th Cir.\)](#)

Six-year Delay Between Indictment and Trial Not a Violation of Sixth Amendment

Agustin Rodriguez-Valencia, defendant, was suspected of trafficking methamphetamine. He was indicted for conspiracy to distribute methamphetamine. However, the defendant disappeared before he could be arrested and arraigned. After a six-year man hunt, the United States Marshals Service located the defendant. At trial, Valencia moved to dismiss the indictment, arguing the six-year gap between the indictment and his arrest violated his right to a speedy trial per the Sixth Amendment. The trial court denied the motion. The defendant eventually pled guilty and was sentenced to seventy months imprisonment.

On appeal, the defendant once again challenged the trial court's dismissal of his motion to dismiss the indictment. The Eighth Circuit Court of Appeals affirmed the district court's decision. The court began by reiterating the four-part test in *Barker v. Wingo* to determine whether a defendant's right to a speedy trial



has been violated. The court emphasized that none of the four factors are determinative but all must be balanced collectively. After examining the record, the court held the efforts of the United States to locate the defendant were reasonably diligent and the defendant was not prejudiced by the delay.

Indeed, the defendant did not even know about the criminal charges. As a result, although this was an admittedly close case, the court emphasized the deferential standard of review in cases such as these and affirmed the decision of the district court.

[United States v. Rodriguez-Valencia, No. 13-3247 \(8th Cir.\)](#)

Private Conduct Attributed to State Action for Civil Liability

Clifford George, plaintiff, was arrested for being in possession of a handgun while on parole. After being taken to the police station, officers began to conduct a strip search on George. George fell to the ground and apparently began to suffer a seizure. During the alleged seizure, the arresting officers testified that they saw George stuff a plastic baggie of cocaine up his anus. George was subsequently transported to a local emergency room. The officers informed the emergency room physician that George had either swallowed a bag of cocaine or stuffed it up his anus. After significantly resisting the doctor's attempts to remove the baggie, the physician sedated George, invasively removed the baggie with a scope and forceps, and intubated George to administer a potent laxative. George later filed a complaint against the arresting police officers and the attending physician. George eventually dismissed his complaint

against the doctor but sued the officers for violating his Fourth and Fourteenth Amendment rights. The district court granted summary judgment in favor of the officers, finding the officers were entitled to qualified immunity and the private conduct of the physician could not be attribut-

ed to the state. The court of appeals held the district court erred in granting the officers motion for summary judgment and remanded the case. The court held state officials may not avoid the requirements of the Fourth Amendment "by inducing coercing...or encouraging private parties to perform searches they would not otherwise perform." The record revealed that a reasonable jury could have concluded that the officers gave misleading information to the emergency-room physician with the intent to induce the search of George's rectum. As a result, the actions of the physician could be attributed to the state for purposes of liability. The court further held the manner in which the search was conducted violated the Fourth Amendment because the invasive nature of the search outweighed its utility and expediency. Finally, the court held the police officers were not entitled to qualified immunity. To lose the protection of qualified immunity, "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." After reviewing the record, the court held a jury could have reasonably concluded the officers were clearly aware that the search of George's rectum was unlawful.

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[George v. Edholm, No. 11-57075 \(9th Cir.\)](#)

Brady Disclosures Not Required at Plea Bargaining

Six individuals (the appellants) who had been arrested for drug trafficking sued several law enforcement officers (appellees) for constitutional violations and other civil claims. Specifically, the appellants sued the various law enforcement

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officials for malicious prosecution under the Fourth Amendment. The appellants alleged that the various appellees misled and lied to a grand jury to obtain the indictments against the appellants. Moreover, the appellants alleged the appellees knowingly withheld exculpatory information, violating the principles drawn from *Brady v. Maryland*. The appellees moved for summary judgment under the doctrine of qualified immunity. The district court granted the motion and foreclosed the appellant's *Brady* claims based on the Supreme Court's ruling in *United States v. Ruiz*.

The Sixth Circuit Court of Appeals affirmed. The court held the appellees were entitled to qualified immunity because, although one of the appellees did admit to lying to a grand jury, the appellants produced no evidence that any of the appellees knowingly lied to a grand jury to obtain a warrant or indictment. The court also held *Brady* material does not have to be disclosed



during the plea bargaining phase. The court relied on the Supreme Court's holding in *Ruiz* in which the court held, "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." Even if the appellees had failed to reveal valuable exculpatory evidence, they were under no obligation to do so. As a result, the district court's decision to grant the appellees motion for summary judgment was affirmed.

[Robertson v. Lucas, Nos. 12-3877/ 3882/ 3886/3889/ 3890/ 3897 \(6th Cir.\)](#)

Police Phone Call Not an Illegal Seizure

Steven Avey, defendant, was involved in a minor traffic accident after pulling out of parking stall onto a busy

street. Avey exchanged insurance and contact information with the other party. After the other party informed Avey that he had called the police, Avey left the scene of the accident. A police officer arrived, and the other party informed the officer that Avey had left the scene. The officer contacted Avey and asked him to return to the scene of the accident. Once Avey returned, the officer noticed Avey's eyes appeared glassy and the smell of alcohol. Avey consented to a field sobriety test and was subsequently issued a citation for driving under the influence.

At trial, Avey filed a motion to suppress the evidence obtained during the traffic stop. Avey alleged that he was illegally seized when the officer contacted him and asked him to return to the scene of the accident. The court denied the motion, and Avey was convicted of driving under the influence of alcohol and failing to yield.

Avey appealed the trial court's denial of his motion to suppress the evidence obtained through the traffic stop. The Supreme Court of Nebraska affirmed. The court began by explaining that "[a] seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave." The court held that Avey's Fourth Amendment rights were not violated because the officer merely asked Avey to return to the scene of the accident. He did not command or otherwise coerce Avey to return. Although the officer told Avey that he could be cited for fleeing the scene of an accident, the court held Avey's action were congruent with one who voluntarily accompanies police for questioning. No unlawful seizure occurred as a result of the police officer's phone call to Avey.

[State v. Avey, 288 Neb. 233 \(2014\)](#).



WE WANT YOU!

Over the coming months you may start to see some changes to our monthly newsletter. We want you to be part of those changes so please start sending us:

- ◆ Photos from events you hold or sponsor.
- ◆ Really cool photos you've taken.
- ◆ Guest articles.
- ◆ Articles of interest.
- ◆ Unique issues you're facing.
- ◆ New defense strategies you're seeing.
- ◆ Your "a-ha" moments.
- ◆ Copies of forms, checklists, motions, etc.
- ◆ Things you have in your "Tool-box."
- ◆ Anything you believe would be of interest or benefit to the rest of us.

Send your submissions to the new UPC Prosecutor Newsletter e-mail address at:

upcprosecutor@utah.gov

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On the Lighter Side

Pot Belly...

Christopher “Biggie” Mitchell was pulled over in Florida when a police officer noticed he was not wearing his seat belt. In Florida, failing to wear a seat belt is sufficient in of itself to justify a traffic stop. Why, you ask, was Biggie not wearing his seat belt ? Well, he weighs-in at a hearty 450 pounds!!! So, naturally, he could not fit the seat belt around his love handles. During the traffic stop, the officer smelled marijuana, which prompted him to search the vehicle. Biggie was concealing his stash where any reasonable, overweight, cannabis connoisseur would—underneath his belly fat. The officer found 23 grams of weed hidden underneath Biggie’s pot belly. (Get it ?). <http://www.nydailynews.com/news/crime/florida-man-fat-boy->



[Continue to Training Calendar](#)

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

June 18-20	UTAH PROSECUTORIAL ASSISTANTS ASSN. ANNUAL CONFERENCE <i>Training for non-attorney staff in prosecutor offices</i>	Location TBA Wasatch Front
July 31 - August 1	UTAH MUNICIPAL PROSECUTORS ASSN SUMMER CONFERENCE <i>Training for city prosecutors and others who carry a misdemeanor case load</i>	Crystal Inn Cedar City, UT
August 18-22	BASIC PROSECUTOR COURSE <i>Trial advocacy and substantive legal instruction for new prosecutors</i>	University Inn Logan, UT
September 10-12	FALL PROSECUTORS TRAINING CONFERENCE <i>The annual CLE and idea sharing event for all Utah prosecutors</i>	Courtyard by Marriott St George, UT
October 15-17	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>Training designed specifically for civil side attorneys from counties and cities</i>	Zion Park Inn Springdale, UT
November	ADVANCED TRIAL SKILLS COURSE <i>For felony prosecutors with 3+ years of prosecution experience</i>	Location TBA Salt Lake Valley

NATIONAL CRIMINAL JUSTICE ACADEMY

(NDAA will pay or reimburse all travel, lodging and meal expenses - just like the old NAC)

March 10-14	TRIAL ADVOCACY I Summary Agenda Application <i>Hands on trial advocacy training for prosecutors with 2-3 years experience</i>	Salt Lake City, UT
May 12-16	TRIAL ADVOCACY I Summary Agenda Application <i>Hands on trial advocacy training for prosecutors with 2-3 years experience</i>	Salt Lake City, UT
June 2-6	OFFICE ADMINISTRATION Summary Agenda Registration	Salem MA
June 9-13	TRIAL ADVOCACY I Summary Agenda Application <i>Hands on trial advocacy training for prosecutors with 2-3 years experience</i>	Salt Lake City, UT
June 9-18	CAREER PROSECUTOR COURSE Flyer Registration Hotel Info	San Diego, CA
June 2-6	OFFICE ADMINISTRATION Agenda Summary Registration <i>For Chief Prosecutors, First Assistants, Supervisors of Trial Teams and Administrative Professional Staff</i>	Salem, MA
June 16-25	CAREER PROSECUTOR COURSE Flyer Registration <i>NDAA's flagship course for those who have committed to prosecution as a career</i>	San Diego, CA
June 23-27	INVESTIGATION & PROSECUTION OF CHILD PHYSICAL ABUSE & FATALITIES Summary Registration	Baltimore, MD

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Calendar

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

June 23-27	UNSAFE HAVENS I	<i>Registration Closed</i>	Dulles, VA
	<i>Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation. No registration fee for this course, which will be taught at AOL headquarters campus.</i>		
July 7-11	TRIAL ADVOCACY I	Summary Agenda Application	Salt Lake City, UT
	<i>Hands on trial advocacy training for prosecutors with 2-3 years experience</i>		
July 14-17	ChildProtect	Summary Agenda Application	Winona, MN
	<i>Trial Advocacy for Civil Child Protection Attorneys. By application only. 30 attys. will be selected to attend</i>		
November	UNSAFE HAVENS II	(registration link forthcoming)	Dulles, VA
	<i>Advanced Trial Advocacy for Prosecution of Technology Facilitated Crimes Against Children. No registration fee for this course. The course is by application and only 30 prosecutors will be selected to attend.</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.