

2020 Utah Prosecution Council Fall Conference
CRIMINAL CASE LAW UPDATE¹

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State v. Martinez, 2019 UT App 166 (Christensen Forster).	16
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<u>State v. Williams, 2020 UT App 67 (Hagen).</u>	<u>19</u>
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Defense counsel must advise clients about the sufficiency of the state’s evidence to convict on charges that he is pleading guilty to.	19
<u>State v. Wright, 2019 UT App 66 (Orme).</u>	<u>19</u>
A defendant cannot show prejudice from an elements instruction with an incorrect knowing mental state where the evidence overwhelmingly showed that he acted intentionally.	20
<u>State v. Apodaca, 2019 UT 54 (Himonas).</u>	<u>20</u>
Defense counsel does not perform deficiently by not objecting when a police officer offers lay testimony that a victim’s wounds appear “fresh,” and by not objecting to the prosecutor’s brief statement in closing argument that the victim came forward because she did not want to be abused anymore.	20
<u>State v. Hulse, 2019 UT App 105 (Orme).</u>	<u>20</u>
Counsel does not perform deficiently by not arguing for a communications fraud mental state that has not been settled in either Utah or federal case law, or for arguing that a standard applicable in civil fraud cases applies in criminal cases (BUT SEE <i>State v. Silva</i> , 2019 UT 36).	20
<u>State v. Squires, 2019 UT App 113 (Pohlman).</u>	<u>20</u>
Defense counsel does not perform deficiently by deciding not to press an extreme emotional disturbance defense if his client is unwilling to admit guilt on the underlying crime.	21
<u>Ross v. State, 2019 UT 48 (Pearce).</u>	<u>21</u>

Counsel correctly chose not to object to obstruction instruction that correctly listed two mental states: knowingly or intentionally lying to police, and intent to hinder, delay, or prevent apprehension or prosecution.	21
State v. Vigil, 2019 UT App 131 (Appleby).	21
Counsel was not ineffective for stipulating to admit hearsay and not asking about potential bias on immigration status.	21
State v. Escobar-Florez, 2019 UT App 135 (Pohlman).	21
Counsel was not ineffective for not moving to withdraw a plea, get a new trial, or to arrest judgment based on alleged new evidence discovered post-plea.	22
State v. Archuleta, 2019 UT App 136 (Harris).	22
Counsel is not ineffective for approving instructions that, as a whole, contain the correct mental state for a charged offense; and objecting to the jury having access to the defendant’s police interview would have been futile.	22
State v. Eyre, 2019 UT App 162 (Appleby).	22
Defense counsel does not perform deficiently by asking for a jury instruction based on a regulatory code that furthers the defense theory.	22
State v. Bowen, 2019 UT App 163 (Mortensen).	22
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State v. Hatch, 2019 UT App 203 (Orme).	23
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State v. Alires, 2019 UT App 106 (Hagen).	23
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State v. Hart, 2020 UT App 25 (Mortensen).	23
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State v. Boyer, 2020 UT App 23 (Hagen).	24

SIXTH AMENDMENT—JURY TRIAL _____ 24

Congress cannot take away a district court’s discretion by requiring it to impose a certain time in jail for a new offense while on supervised release.	24
United States v. Haymond, 17-1672 (Gorsuch + Breyer).	24
No colloquy is required for defendants who waive their right to jury trial.	24
State v. Sagal, 2019 UT App 95 (Christensen Forster).	24
The Sixth and Fourteenth Amendments require state juries to issue unanimous verdicts.	25
Ramos v. Louisiana, 18-5924 (Gorsuch).	25

SUFFICIENCY OF THE EVIDENCE _____ 25

A defendant’s confession and corroborating circumstantial evidence—like his location near the robbery when arrested, his being seen running away from the robbery, and clothing similar to what the robber wore—is enough to prove his identity as a robber.	25
State v. Quintana, 2019 UT App 139 (Hagen).	25
Witness testimony is not inherently improbable just because it is inconsistent in some ways with prior statements.	25
State v. Jok, 2019 UT App 138 (Mortensen).	25
Simulated child porn has to appear to be the real thing to be prosecutable, unless there are real nude children and the context shows intent to sexually gratify.	25
State v. Hatfield, 2020 UT 1 (Pearce).	25

Evidence sufficed for murder where the defendant had motive, opportunity, injury, and similar DNA to that found at the scene. _____	25
<u>State v. Wall, 2019 UT App 205 (Hagen).</u> _____	25
A general motion for directed verdict does not preserve an inherently improbability argument, and the victim’s testimony was not plainly inherently improbable. _____	26
<u>State v. Skinner, 2020 UT App 3 (Harris)</u> _____	26
The evidence was sufficient to show lewdness where two witnesses testified, and the defendant admitted, that he displayed his penis through a see-through mesh covering. _____	26
<u>State v. Powell, 2020 UT App 63 (Pohlman).</u> _____	26
Small inconsistencies do not render testimony inherently improbable, and there was ample evidence of identity and serious bodily injury. _____	26
<u>State v. Lyden, 2020 UT App 66 (Mortensen).</u> _____	26

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<u>State v. Bess, 2019 UT 22 (Peterson).</u> _____	26

APPELLATE PROCEDURE

A defendant is entitled to a remand hearing on an allegation that defense counsel should have called additional witnesses.

[State v. Popp, 2019 UT App 173 \(Harris\)](#). Popp was convicted of child sex abuse. On appeal, he argued that his attorney was ineffective for not calling several witnesses, including his grandmother, his friend, and his mother's friend, and asked the court of appeals to remand for a hearing under rule 23B of appellate procedure. The court of appeals held that he was entitled to a hearing because he provided affidavits that, if true, would support a finding that counsel was ineffective because the allegations surfaced during contentious divorce proceedings, and the proffered witnesses would have provided additional context and motive for the accusations.

CIVIL RIGHTS

The statute of limitations on a fabricated evidence claim runs from the time of the acquittal, not from the first use of the evidence in the criminal justice process.

[McDonough v. Smith, 18-485 \(Sotomayor\)](#). By a 6-3 vote, the Court held that the statute of limitations for a §1983 claim alleging that a prosecutor presented fabricated evidence does not begin to run until the favorable termination of the challenged prosecution. The Court analogized the false-evidence claim to another claim challenging the integrity of criminal prosecution—malicious prosecution. The Court found that the pragmatic concerns that motivated malicious prosecution's favorable-termination requirement—avoiding parallel criminal and civil litigation over the same subject matter and the possibility of conflicting criminal and civil judgment—apply with equal force to false-evidence claims. The Court found the soundness of its conclusion reinforced by the consequences that would follow from a discovery rule: in jurisdictions where prosecutions regularly last longer than the limitations period, defendant would have to choose between letting their claims expire and filing a civil suit against the person currently prosecuting them.

COMPETENCY

Counsel is not ineffective for stipulating to competency even though his client has a low IQ.

[State v. Galindo, 2019 UT App 171 \(Pohlman\)](#). Galindo has a really low IQ. Counsel moved for a competency evaluation, and both evaluators found him competent, so counsel stipulated to competency. On appeal, he alleged that his counsel was ineffective for stipulating to competency, but he did not show that he was actually incompetent—he just had really low IQ, which is not enough.

CRIMINAL LAW

Illegal firearms possession cases based on immigration status require proof that the person knew that they were in the country illegally.

[Rehaif v. United States, 17-9560 \(Breyer\)](#). Federal law makes it unlawful for certain individuals to possess firearms, including felons and aliens unlawfully in the United States. A separate provision adds that anyone who “knowingly violates” that law shall be fined or imprisoned for up to 10 years. By a 7-2 vote, the Court held that the term “knowingly” applies both to the defendant’s conduct and to the defendant’s status. In other words, “[t]o convict a defendant, the Government . . . must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

Burglary is a violent felony under the Armed Career Criminal Act.

[Quarles v. United States, 17-778 \(Kavanaugh\)](#). The Armed Career Criminal Act of 1984, 18 U.S.C. §924(e)(1), requires judges to impose a 15-year minimum sentence upon a felon convicted of unlawfully possessing a firearm if the offender has three or more convictions for a “violent felony,” which is defined to include “burglary.” In *Taylor v. United States*, 495 U.S. 575 (1990), the Court held that §924(e) uses the term “burglary” in its generic sense, to cover any crime “having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” The Court here unanimously held that “remaining in” burglary “occurs when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure.” The Court rejected petitioner’s contention that it occurs only “if a person has the intent to commit a crime at the exact moment when he or she first unlawfully remains in a building or structure.”

Proving a pattern of unlawful activity requires proof of continuity.

[State v. Squires, 2019 UT App 113 \(Pohlman\)](#). Squires lied to his uncle to get a bunch of money in an attempt to close a real estate deal and impress his boss. The deal failed and Squires lost the uncle’s money. He was convicted of communications fraud and pattern of unlawful activity. The fraud lasted only a few months and involved only one victim—the uncle. Under these circumstances, the State had not shown enough evidence of a “pattern” of unlawful activity because there was not enough continuity—that the fraud existed over a “substantial period of time or threatened future criminal conduct.”

Someone convicted of a registerable sex offense in another state must register in Utah, even if that conviction is later dismissed under a plea in abeyance agreement.

[Holste v. State, 2019 UT 52 \(Durrant\)](#). Holste got the equivalent of a plea in abeyance in an Idaho sex case. He had to register in Idaho. He then moved to Utah, where he was told he had to register. He did. His plea in abeyance was then dismissed in Idaho, and he filed for a declaratory judgment, asking that he be excused from registering in Utah because he no longer

had a conviction. But the plea in abeyance counts, because he's still required to register in Idaho, and thus in Utah.

Under prior version of rule, a defendant is not deprived of the right to appeal merely because he did not know about the right to counsel on appeal.

[State v. Stewart, 2019 UT 39 \(Lee\)](#). Stewart was charged with several securities fraud counts. He didn't get along with his public defender and represented himself at trial. He was convicted (shocker). The trial court told him at sentencing that he had 30 days to appeal, but did not tell him that he had the right to counsel on appeal. He filed a pro se docketing statement, but failed to file a brief (even after being warned that it would be dismissed if he didn't). Twelve years later, he filed a motion to reinstate his appeal because he hadn't been told about the right to counsel on appeal. The trial court denied reinstatement, saying it was his own fault. The court of appeals reversed, saying that not knowing about the right to appeal deprived Stewart of his right to appeal through no fault of his own. The supreme court reversed, saying that even if it was best practice to inform Stewart of the right to counsel on appeal, the rule at the time did not require it, and he did not show that he had been deprived of the right to appeal.

A defendant cannot claim compulsion if a specific, imminent threat is not directed at him.

[State v. Smith, 2019 UT App 141 \(Christensen Forster\)](#). Smith killed someone at the behest of his friend, Ashton. Ashton shot two people, then told Smith to "take care of" a third. At trial, Smith requested a compulsion instruction, saying that seeing Ashton kill two people made him fearful that he could be next if he did not help kill the third. But compulsion requires a specific threat directed at the defendant, and this did not qualify.

The "great risk of death" aggravator for aggravated murder need not stem from the murderous act itself, but can spring from the short time span during which the murderous act and related acts happened.

[State v. Sosa-Hurtado, 2019 UT 65 \(Lee\)](#). Sosa-Hurtado was hanging out in front of a smoke shop with his car parked in a way dangerous to customers. When the shop owner asked Sosa-Hurtado to leave, Sosa-Hurtado refused. The shop owner's son then went and asked him, and Sosa-Hurtado punched the son. The son punched back and beat Sosa-Hurtado. Sosa-Hurtado vowed revenge, and returned a short time later with an assault rifle. He shot at the store owner, then turned and shot the son, killing him. He was convicted of aggravated murder with the "great risk of death to another" aggravator. The Supreme Court held that the risk did not need to stem from the kill shot only, but could be inferred from all the shots that happened within a short span of time.

A defendant charged with violating a protective order cannot collaterally challenge the protective order's requirements in a criminal prosecution for violating it.

[State v. Baize, 2019 UT App 202 \(Christensen Forster\)](#). Baize's ex-wife got a protective order against him that required him to communicate civilly with her and only about custody

exchanges. When he was charged with violating those provisions, he claimed that they were vague and constituted a prior restraint on speech. But the court of appeals held that he could not challenge the protective order's terms in a prosecution for violating them.

A defendant is not entrapped into committing enticement where an officer pretends to be a teenager interested in sex and initiates contact.

[State v. Hatchett, 2020 UT App 61 \(Orme\)](#). Hatchett posted an ad on Craigslist that he was a "Dad" looking for a "Son" (an older gay man seeking a relationship with a younger gay man). An officer posing as a 13-year-old asked Hatchett how young was too young for him; Hatchett asked how old he was and yada yada yada eventually agreed to meet to have sex and do drugs. He claimed that the officer entrapped him, and that he only showed up to the meet (with drugs, of course) to see if the boy was really that young; if he was, Hatchett claimed, he would have just left. Uh huh. The court of appeals agreed that the officer did not entrap him because the officer merely gave him the opportunity to commit an offense.

A defendant is not entrapped in a prostitution sting just because an attractive officer approaches the defendant and initiates contact.

[State v. Hernandez, 2020 UT App 58 \(Mortensen\)](#). Hernandez went to a McDonald's parking lot that was commonly used to pick up prostitutes. An attractive undercover cop approached him pretending to be a prostitute. He agreed to pay for sex. He later claimed he was entrapped, and the trial court agreed, essentially saying that the officer's good looks made him willing to agree to money for sex. The court of appeals reversed, explaining that good looks were not enough; the police needed to use emotional appeals or threats or something.

CRIMINAL PROCEDURE

Trial courts must articulate their reason(s) for granting new trials so that the appellate court may meaningfully review the decision.

[State v. De La Rosa, 2019 UT App 110 \(Orme\)](#). After a jury conviction for theft and drug offenses, De La Rosa moved for a new trial on five different bases, including alleged jury instruction, evidentiary, procedural, and other errors. The trial court granted the motion, without explaining the basis for that decision. The State appealed and the court of appeals reversed, holding that trial courts must give their reasons for granting new trials so that the exercise of their discretion could be reviewed on appeal.

The Utah Constitution does not require jury trials for infractions (for now).

[South Salt Lake City v. Maese, 2019 UT 58 \(Pearce\)](#). Maese went up and down the Wasatch Front getting speeding tickets and trying to get jury trials on them. The Utah Supreme Court held that while there was some historical evidence for jury trials on minor offenses, it was not enough to prove that the framers intended for jury trials on infractions (offenses for which the

punishment was one month or less incarceration). The Court left open the possibility that further evidence on this might change the result in another case.

Rebuttal witnesses are proper if they refute, modify, or explain the opposing party's evidence.

State v. Bowen, 2019 UT App 163 (Mortensen). Bowen and some friends started a homebuilding business that depended on lot sales to finish infrastructure and finance the builds. She knew that buildability relied on making a certain number of sales, but lied to get there, telling all buyers that the lots were ready to build. She also did not disclose her financial interest in all the sales (which appeared to be from the developer, but were actually from a shell company of hers). She was charged with communications fraud. To support that the company actually was ready to build the homes (and thought the lots were buildable), she introduced a business license showing that the company had hired a general contractor. Marketing materials also came in at trial showing that the company held out the general contractor's son as the general contractor. In rebuttal, the State proposed to call the contractor for him to explain that they just used his name, that his son was not a general contractor, and that the contractor did not do anything other than visit the site once. The trial court allowed this testimony over defense objection, and the court of appeals affirmed, holding that the contractor's testimony was proper to refute and explain the business license.

A judge does not have to be disqualified from ruling on a new trial motion just because he praises the victim at sentencing and berates the defendant.

State v. Boyer, 2020 UT App 23 (Hagen). Boyer molested his son's best friend for years. She disclosed to Boyer's ex after they divorced. He was convicted of various sex offenses. At sentencing, the trial court praised the victim and said he believed her and called the defendant a coward for not owning up to what he did. New defense counsel later filed a new trial motion and asked the judge to recuse, saying that he could not fairly decide the motion based on his statements at sentencing. The presiding judge denied the motion to recuse, and the court of appeals affirmed, explaining that the judge's feelings about the case were inherent in the case. And besides, the same judge had previously granted a mistrial in the case, so he was clearly willing to lay his personal feelings aside to rule on the law.

An aggravated robbery based on a car jacking in Ogden is part of the same criminal episode as possessing the same car in Provo.

State v. Sisneros, 2020 UT app 60 (Orme). Sisneros car-jacked a guy in Ogden, the drove the car to Provo. He was charged and pled guilty in Fourth District with possessing the car and obstruction (for ditching the car and the keys). He was later charged with agg robbery in Second District. Under the single criminal episode statute, these should have been charged together because the Provo prosecutor had notice through the PC statement of the robbery, all the charges could have been brought in Second District, they happened close in time, and were all about the same criminal objective—getting and keeping the car.

DEATH PENALTY

The Eighth Amendment does not guarantee a painless execution.

Bucklew v. Precythe, 17-8151 (Gorsuch). Bucklew abused, raped, and murdered his girlfriend, and tried to murder her son and mother. He was sentenced to death, which in Missouri is carried out by lethal injection. By a 5-4 vote, the Court his claim that, because of his unusual medical condition, Missouri’s one-drug lethal injection protocol would impose cruel and unusual punishment upon him. In *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 576 U.S. ___ (2015), the Court held that an inmate may successfully challenge a state’s lethal injection protocol only if he identifies “an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain.” Here, the Court first held that that rule governs as-applied challenges to a state’s chosen method of execution, not just facial challenges to them (as had been at issue in *Baze* and *Glossip*). The Court explained that the Eighth Amendment does not require a painless death. Rather, it bars punishment that “superadds’ pain well beyond what’s needed to effectuate a death sentence. And answering that question has always involved a comparison with available alternatives[.]” The Court then held that the inmate failed to satisfy the *Baze-Glossip* test. He failed adequately to allege that his proposed alternative (nitrogen hypoxia) could be readily implemented; and he failed to show that using nitrogen rather than the one-drug lethal injection protocol would significantly reduce a substantial risk of severe pain.

DUE PROCESS – FIFTH AND FOURTEENTH AMENDMENTS

A court can consider a prosecutor’s strikes in past mistrials and hung verdicts in deciding whether the prosecutor violated *Batson*.

Flowers v. Mississippi, 17-9572 (Kavanaugh). By a 7-2 vote, the Court held that a prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986), when he struck five of the six prospective black jurors at Flowers’ most recent trial. Flowers had been tried five prior times for the same murders: thrice his convictions were reversed on appeal (once because of a *Batson* violation); twice the jury hung. In finding a *Batson* violation at his sixth trial, the Court pointed to four critical facts: “in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck”; “in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors”; at the most recent trial, “the State engaged in dramatically disparate questioning of black and white prospective jurors”; and “the State then struck at least one black prospective juror . . . who was similarly situated to white prospective jurors who were not struck by the State.”

Due process does not forbid States from narrowing the common law insanity defense.

Kahler v. Kansas, 18-6135 (Kagan). Under Kansas law, a defendant cannot be wholly exonerated “on the ground that his [mental] illness prevented him from recognizing his criminal

act as morally wrong.” But a defendant “can invoke mental illness to show that he lacked the requisite mens rea (intent) for a crime”; and “to justify either reduced term of imprisonment or commitment to a mental health facility.” By a 6-3 vote, the Court held that the Due Process Clause permits this regime. The Court rejected petitioner’s contention that history firmly establishes, and therefore the Due Process Clause requires, states to adopt “a specific test of legal insanity — namely, whether mental illness prevented a defendant from understanding his act as immoral.”

DOUBLE JEOPARDY

The dual sovereign doctrine remains valid.

[Gamble v. United States, 17-646 \(Alito\)](#). By a 7-2 vote, the Court declined to overrule the “dual sovereign” exception to the Double Jeopardy Clause, which allows a person to be prosecuted twice for the same criminal conduct if the prosecutions are brought by two separate sovereigns. The Court found that text and its cases support the doctrine. And it found the historic evidence insufficient to justify overruling its longstanding precedents embracing the exception. In the Court’s words, “All told, this evidence does not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns’ laws—much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years.”

EIGHTH AMENDMENT

The Eighth Amendment does not guarantee a painless execution.

[Bucklew v. Precythe, 17-8151 \(Gorsuch\)](#). Bucklew abused, raped, and murdered his girlfriend, and tried to murder her son and mother. He was sentenced to death, which in Missouri is carried out by lethal injection. By a 5-4 vote, the Court his claim that, because of his unusual medical condition, Missouri’s one-drug lethal injection protocol would impose cruel and unusual punishment upon him. In *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 576 U.S. ___ (2015), the Court held that an inmate may successfully challenge a state’s lethal injection protocol only if he identifies “an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain.” Here, the Court first held that that rule governs as-applied challenges to a state’s chosen method of execution, not just facial challenges to them (as had been at issue in *Baze* and *Glossip*). The Court explained that the Eighth Amendment does not require a painless death. Rather, it bars punishment that “superadds’ pain well beyond what’s needed to effectuate a death sentence. And answering that question has always involved a comparison with available alternatives[.]” The Court then held that the inmate failed to satisfy the *Baze-Glossip* test. He failed adequately to allege that his proposed alternative (nitrogen hypoxia) could be readily implemented; and he failed to show that using nitrogen rather than the one-drug lethal injection protocol would significantly reduce a substantial risk of severe pain.

EVIDENCE

Evidence is admissible under the doctrine of chances to rebut a fabrication defense.

[State v. Murphy, 2019 UT App 64 \(Orme\)](#). Murphy got drunk and sexually abused and detained his wife. He also beat her pretty severely. The State moved to admit his abuse of four exes to show that the wife wasn't making it up, and offered statistical evidence to show how rare it is to be accused of rape at all, let alone by several unrelated people. The trial court admitted the evidence, and the court of appeals affirmed, holding that the doctrine of chances logic applies to rebut fabrication defenses. Judge Harris concurred, saying that the opinion follows the current state of the law, but would re-think that the doctrine of chances applies in this context.

There is no surveillance location privilege in Utah.

[State v. Ahmed, 2019 UT app 65 \(Orme\)](#). Ahmed was arrested by the homeless shelter by a surveillance-and-takedown team, with one officer watching him (from a secret location) deal drugs, while a team of officers arrested him. He moved to discover the exact location of the surveillance location, and the trial court denied it, saying that general information (how far away, angle of view) was enough. The court of appeals reversed, holding that Utah does not recognize a surveillance location privilege, and that there was thus no reason to deny the defense discovery request.

Rule 606 is constitutional, and unless a defendant can meet one of the rule's exceptions, he cannot introduce juror affidavits to support a new trial request.

[State v. Bess, 2019 UT 22 \(Peterson\)](#). Lance Bess was an off-duty cop duck hunting with his family. An inexperienced hunter in another group fired, unknowingly, in the direction of Bess and his family. Bess angrily confronted the other group while carrying his service revolver. He was charged with brandishing. After trial, he got an affidavit from a juror purporting to show that the jury was not unanimous (the juror claimed to cave rather than really believe in the verdict). He argued that rule 606 was unconstitutional, but the supreme court disagreed, noting the need for finality.

Absent other training and experience, police officers are not qualified to testify about alcohol burnoff rates simply because they cursorily learned about them in the police academy.

[State v. Harvey, 2019 UT App 108 \(Mortensen\)](#). Harvey was arrested for DUI and refused a breath test. The officer got a warrant and two blood results that on average put his BAC at just below .08 at the time of the test. The officer testified at trial that based on the average alcoholic burn-off rate, Harvey's BAC would have been higher at the time he was driving. Defense counsel objected for lack of foundation, and Harvey said that he learned the average burn-off rate at the police academy. The district court overruled the objection, but the court of appeals held that the officer was not qualified to testify about burn-off rates.

Grisly victim and crime scene photos can be admissible to show that a murder was committed in an especially heinous, cruel, or depraved manner.

[State v. Smith, 2019 UT App 141 \(Christensen Forster\)](#). Smith killed someone at the behest of his friend, Ashton. Ashton shot two people, then told Smith to “take care of” a third. He did so by bashing in her head repeatedly with a socket wrench, slamming her head to the ground, slashing her throat repeatedly, and choking her. Over Smith’s objection, the trial court admitted pictures of the victim’s wounds and crime scene to show the viciousness of the murder. The court of appeals affirmed, holding that the risk for unfair prejudice did not overcome the probative value of the photos under rule 403.

The constitutional exception to rule 412 does not permit admitting evidence that a child sex abuse victim engaged in sexual touching with an age mate where those instances differed vastly from what the defendant was alleged to have done.

[State v. Rhodes, 2019 UT App 143 \(Appleby\)](#). Rhodes sexually abused his roommate’s son. Before trial, Rhodes moved to introduce evidence that the boy had done some sexual things with a neighborhood boy. He argued that this fell under the constitutional right-to-make-a-defense exception to show that the boy was confusing events. The trial court disagreed, as did the court of appeals, because the circumstances and sort of touching were so minor in the other events that the child would not have been confused about whether Rhodes did what he was alleged to have done.

Admission of hearsay (that everyone in Tooele was saying that the defendant was trying to kill the victim) is harmless where the same substance (threats from defendant to victim) came in through other nonhearsay evidence.

[State v. Martinez, 2019 UT App 166 \(Christensen Forster\)](#). Martinez shot at and tried to kill his wife’s lover (whom he had been threatening to kill for some time). The victim testified at trial that “everybody” in Tooele said that Martinez was looking for victim to kill him. But defendant also told victim directly that “sooner or later I will kill you.” He also told his brother-in-law that he planned to kill victim, and showed the brother-in-law his gun. Even if the victim’s “everybody in Tooele” statement were erroneously admitted, these other statements made that admission harmless.

Getting in prior allegations from the victim requires a threshold showing by preponderance that the prior allegation was false.

[State v. Hatch, 2019 UT App 203 \(Orme\)](#). Hatch sexually abused his stepdaughter in a bunch of ways and was charged with a bunch of offenses. Defense counsel wanted to get in evidence that the victim had previously accused her brother of molesting her, but later recanted. The court of appeals held that he did not meet this showing because he proffered no evidence that the victim actually recanted or that her allegation was false.

Missing allele DNA testing can be admissible under rule 702.

[State v. Wall, 2019 UT App 205 \(Hagen\)](#). Johnny Wall killed his ex-wife Uta. Part of the evidence against him was DNA from Uta's bed that the state got by using an M-Vac that gave only partial DNA profiles that could not exclude Wall (his entire profile was present, but three of the alleles were detected below the analytical threshold). Through crime lab witnesses, the State laid the necessary foundation for the evidence.

Eyewitness identification is now governed by evidence rule 617.

[State v. Lujan, 2020 UT 5 \(Lee\)](#). The facts and holding here are really an afterthought. The real news is that the court creates a new rule of evidence to govern admissibility of eyewitness identifications. Read and follow the rule, because there's too much to explain here.

A defendant is not entitled to reconstruct the record with documents he wasn't entitled to get an in camera review of in the first place.

[State v. Boyer, 2020 UT App 23 \(Hagen\)](#). Boyer molested his son's best friend for years. She disclosed to Boyer's ex after they divorced. He was convicted of various sex offenses. Before trial, the parties stipulated to have the trial court review in camera some victim mental health records. The trial court found nothing exculpatory in them and destroyed them without objection from defense counsel. On appeal, Boyer argued that the judge should have allowed reconstruction of the record with those mental health records. The court of appeals held that because counsel got more than they were entitled to in the first place under rule 506 by getting in camera review, he could not show prejudice from the lack of the records in the record.

Evidence that someone is a serial public masturbator is admissible to show intent and lack of mistake.

[State v. Richins, 2020 UT App 27 \(Christensen Forster\)](#). Richins masturbated in front of a neighborhood girl. He claimed that she was mistaken, but he had done this several times before. The court of appeals upheld the admission of the prior acts to show that the victim was not mistaken this time and that Richins meant to do it.

A police report describing a video may be admissible as a business record when offered by the defense, but it wouldn't make any difference where the jury saw the video for themselves and could decide what it showed.

[State v. Barner, 2020 UT App 68 \(Hagen\)](#). D walks into 7-Eleven, grabs beer, leaves without paying. Clerk follows him out, gets in front of his car as he tries to leave. They make eye contact. D accelerates out of the parking lot, brushing the clerk on the way out. After viewing store's video, Officer opines D may not have meant to hit clerk. D is charged with agg robbery. Clerk testifies he's not sure D intentionally hit the clerk. Store's video is played but does not show one way or the other. Jury convicts of robbery. On appeal, D argues officer's report and testimony re video should have been admitted as business record under Bertul. Court of appeals upholds trial court's ruling that even if admissible as business record, it was

inadmissible because it would not help jury, where jury could view the video and decide for itself what the video showed.

A 911 call made shortly after a home invasion burglary was admissible as an excited utterance. [State v. Williams, 2020 UT App 67 \(Hagen\)](#). D broke into his Dad's motor home and viciously beat Dad and Brother. Neither Dad nor Bro were available for trial. The prosecutor (Tad May) relied on Dad's 8-9 minute 9-1-1 call, both sons' birth certificates, Dad's driver-license photo, and the responding officer's testimony, including crime-scene photos of Dad's injuries and damaged motor home, to prove the case. The call was admissible as an excited utterance because, among other things, the evidence supported that assault was close in time to the 9-1-1 call, that the assault was an unexpected and traumatic event, and that Dad's voice was labored and breathing and he spontaneously exclaimed, among other things, "we're hurting man," and "he's a fucking danger." Last, D was still at large and Dad and Bro had no protection should D choose to return to the now doorless motor home.

EYEWITNESS IDENTIFICATION

Eyewitness identification is now governed by evidence rule 617.

[State v. Lujan, 2020 UT 5 \(Lee\)](#). The facts and holding here are really an afterthought. The real news is that the court creates a new rule of evidence to govern admissibility of eyewitness identifications. Read and follow the rule, because there's too much to explain here.

FIFTH AMENDMENT—SELF INCRIMINATION

A defendant's statements are not coerced by a police officer telling him that he will relay the defendant's cooperation to the prosecutor.

[State v. Apodaca, 2019 UT 54 \(Himonas\)](#). Apodaca and some buddies kidnapped a drug dealer, robbed him, shot him, and left him on the roadside for dead. Police violated *Miranda*, so Apodaca's police interview didn't come in during the State's case-in-chief. Apodaca also claimed that his statements were coerced, and thus not useable for impeachment should he testify. He alleged that police had promised him that he would be released if he gave them a statement, and also that he was denied medication. The officer's testimony and recordings refuted Apodaca's claims of coercion. At most, the officer agreed to tell the prosecutor that Apodaca had cooperated, though he could not promise a particular outcome. This is not coercion. The supreme court affirmed the court of appeals, but emphasized that the coercion test is not reducible to a set of factors, but should focus on the overall question of whether someone's will was overborn.

An officer telling a suspect that an attorney will be appointed for him “if it comes to that” does not render a *Miranda* waiver invalid; and a suspect saying he could not afford a lawyer was not an unambiguous invocation of the right to counsel.

State v. Smith, 2019 UT App 141 (Christensen Forster). Smith killed someone at the behest of his friend. When police read him *Miranda*, the officer said that he would be appointed counsel “if it comes to that.” Smith argued that this rendered the warning inadequate, because it made it seem as if he could not have an attorney present during questioning. The court of appeals disagreed, saying that the statement merely reflected the timing of appointment, not whether he could later have the attorney present for questioning. Smith also said during the interview that he could not afford a lawyer. Because this was at best an ambiguous request for counsel, it did not qualify as a request for counsel under Supreme Court caselaw requiring requests to be unequivocal.

FIFTH AMENDMENT—VAGUENESS

The Armed Career Criminal Act’s residual clause is vague, and thus void.

United States v. Davis, 18-431 (Gorsuch). By a 5-4 vote, the Court held that the residual clause in 18 U.S.C. §924(c) is unconstitutionally vague. Federal law makes it a crime to use a firearm in connection with certain crimes, including a “crime of violence.” 18 U.S.C. §924(c)(1)(A). Section 924(c)(3)(B) specifies that the term “crime of violence” includes any “offense that is a felony . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Holding that the provision is applied by using the categorical approach, just like the similar residual clauses at issue in *Sessions v. Dimaya*, 584 U.S. ___ (2018), and *Johnson v. United States*, 576 U.S. ___ (2015), it reached the same result as those cases. The Court rejected the government’s contention (adopted by the dissenters) that courts should apply §924(c)(3)(B) on a case-by-case basis, not through the categorical approach. The Court concluded that “the statute’s text, context, and history . . . simply cannot support the government’s newly minted case-specific theory.”

FIRST AMENDMENT

Probable cause for an arrest (almost) always defeats a retaliatory arrest claim.

Nieves v. Bartlett, 17-1174 (Roberts). By a 6-3 vote, the Court held that the existence of probable cause to arrest generally defeats a First Amendment retaliatory arrest claim. The Court reasoned that “speech is often a ‘wholly legitimate consideration’ for officers when deciding whether to make an arrest”; that creates “causal complexities” only a probable-cause requirement can cure. Without that requirement, officers could not “go about their work without undue apprehension of being sued.” The Court added a caveat, however: “the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.”

FOURTH AMENDMENT

If police have probable cause that a person is DUI and that person's need to go to the hospital don't leave enough time to do standard breath tests, there is an exigency to test the blood without a warrant.

[Mitchell v. Wisconsin, 18-6210 \(Alito and Thomas\)](#). By a 5-4 vote (with the 5 consisting of a 4-Justice plurality and a 1-Justice concurrence), the Court held that “[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver’s unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver’s BAC” under the exigent circumstances exception to the Fourth Amendment’s warrant requirement. (Actually, that’s what the plurality concluded, but that’s effectively the Court’s holding under the Marks rule.).

A warrant to get a DNA sample carries the implied authority to use reasonable force to execute it, and police can restrain someone to swab their cheek if they resist.

[State v. Evans, 2019 UT App 145 \(Harris\)](#). Evans murdered a man he thought was sleeping with his (Evans’s) fiancée. He left behind a hat at the scene. Police got a warrant to get a buccal swab to compare his DNA to the hat. Evans was uncooperative, and had to be restrained to swab his cheek. The test showed it was his DNA. He argued that the warrant did not give police authority to use force, or if it did, they exceeded whatever implied force they could use. The court of appeals disagreed, holding that warrants carry an implied use of reasonable force to execute them, and that holding him down to swab his cheek—when he was fighting them—was reasonable.

Police have reasonable suspicion to pull over a car if the owner lacks a valid license and there is nothing indicating that someone else is driving the car.

[Kansas v. Glover, 18-556 \(Thomas\)](#). By an 8-1 vote, the Court ruled that a police officer does not “violate[] the Fourth Amendment by initiating an investigative traffic stop after running a vehicle’s license plate and learning that the registered owner has a revoked driver’s license.” The Court held “that when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable.” A police officer was on a routine patrol when he ran the license plate of a pickup truck. The records showed that the truck was registered to Charles Glover Jr. and that Glover had a revoked driver’s license in Kansas. The officer assumed Glover was driving the truck, initiated a traffic stop, and then identified the driver as Glover. Glover was charged with driving as a habitual violator. The district court granted Glover’s motion to suppress, the court of appeals reversed, but the Kansas Supreme Court reversed in turn. It held that the officer lacked reasonable suspicion to initiate the stop because he had “only a hunch” that the registered owner (Glover) was the driver of the truck, and wrongly

assumed that “the owner will likely disregard the suspension or revocation order and continue to drive.” In an opinion by Justice Thomas, the Court reversed.

The Court began by reaffirming that reasonable suspicion is a “less demanding” standard than probable cause or preponderance of the evidence, and “must permit officers to make ‘commonsense judgments and inferences about human behavior.’” The Court found that the officer here drew just such a commonsense inference—“that Glover was likely the driver of the vehicle.” The Court noted empirical studies which show that “[d]rivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians.” And the Court observed that Kansas’s “license-revocation scheme covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive.”

The Court rejected Glover and the dissent’s contention that the officer’s “inference was unreasonable because it was not grounded in his law enforcement training experience.” The Court declared that “[n]othing in [its] Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience.” To the contrary, the Court has recognized that officers can use ordinary common sense based on “knowledge they have acquired in their everyday lives.” Although law enforcement experience can play a significant role in investigations, it “is not required in every instance.” The Court next rejected Glover and the dissent’s objection that its ruling would allow police to “rely exclusively on probabilities.” First, probabilities are relevant to the reasonable-suspicion assessment. Second, the officer here relied on more: on facts specific to the car Glover was driving. Finally, the Court cautioned that its holding is narrow, for “the presence of additional facts might dispel reasonable suspicion.” For example, a stop would be inappropriate if the registered owner is in his mid-60s but the officer sees that the driver is in her mid-20s.

Police can rely on an entry in the UCJIS/Insure-Rite database for reasonable suspicion to stop. [West Valley City v. Temblador-Tropete, 2020 UT App 64 \(Pohlman\)](#). Police were following TT and saw that his car showed up as insurance “not found.” They pulled him over and he admitted he didn’t have insurance. He argued that the police lacked reasonable suspicion because the UCJIS database was updated only every two weeks by a company called Insure-Rite. The court of appeals disagreed, holding that reasonable suspicion was a low bar, and police did not need to rule out innocent conduct. The database is reliable enough for police to rely on it.

GUILTY PLEAS

Mere drug use does not render a plea unknowing and involuntary, and after-the-fact claims to being intoxicated during change of plea cannot overcome a defendant's own statements and a trial court's observations.

[State v. Ciccolelli, 2019 UT App 102 \(Pohlman\)](#). Ciccolelli pled guilty to theft, gun possession, and DUI. During the colloquy, he said orally and in writing that he wanted to change his plea, knew what he was doing, and was voluntarily doing it. Weeks later, he moved to withdraw his plea, claiming that he was intoxicated when he pled. These after-the-fact claims were not enough to overcome his prior statements and the trial court's observations.

Ditto.

[State v. Archuleta, 2019 UT App 136 \(Harris\)](#). Archuleta pled guilty to burglary and aggravated assault for his participation in a home-invasion robbery. At the time of the plea, he said he was thinking clearly and acting voluntarily. Before sentencing, he moved to withdraw his plea, claiming that he had been intoxicated at the time. The trial court didn't believe this claim, and believed that he was telling the truth at the change-of-plea hearing. The court of appeals affirmed for identical reasons from *Ciccolelli*.

JURY INSTRUCTIONS

Performance of duties and self-defense are affirmative defenses, not elements of brandishing; also, the model deadlock instruction is not coercive.

[State v. Bess, 2019 UT 22 \(Peterson\)](#). Lance Bess was an off-duty cop duck hunting with his family. An inexperienced hunter in another group fired, unknowingly, in the direction of Bess and his family. Bess angrily confronted the other group while carrying his service revolver. He was charged with brandishing. He asked the trial court to instruct the jury, at the beginning of trial, that the State had to disprove both performance of duties and self-defense as elements of brandishing. The court disagreed, saying that they were affirmative defenses that did not arise until the defense put on some evidence of them. The supreme court affirmed, holding that performance of duties and self-defense, though listed in the brandishing statute, were affirmative defenses requiring some evidence before they were relevant at trial.

During deliberations, the jury sent a note telling the court the jurors were deadlocked. The court gave the model deadlock instruction, and the jury continued deliberating until it reached a verdict. This was not coercive because the jury took several hours of further deliberation to convict, and it did not require the jurors to surrender their convictions.

The unlawful firearm possession statute does not include an innocent possession defense.

[State v. Sanders, 2019 UT 25 \(Pearce\)](#). Sanders, a felon, got upset that his girlfriend's son left a hunting rifle in the yard. He went and got the gun and put it in his closet. He was charged with unlawful possession, and argued that he innocently possessed the rifle. The trial court and the

supreme court disagreed. Though innocent possession exists for controlled substances under some circumstances, that defense is rooted in the controlled substance statutes. The unlawful firearm possession statute is different, and does not include the defense. Even if a rare case could meet the justification exception, it would not be met under the facts here, where there were plenty of lawful alternatives available to Sanders.

Moving, twice avoiding police interviews, and disappearing for nearly a decade justify giving a flight instruction.

[State v. Escobar-Florez, 2019 UT App 135 \(Pohlman\)](#). Heading kinda says it all.

If you include a recklessness mental state in a jury instruction for an offense that doesn't have one, it doesn't matter that defense counsel was okay with it—you will likely lose your conviction.

[State v. Grunwald, 2020 UT 9 \(Durrant\)](#). Grunwald was convicted of aggravated murder for helping her boyfriend kill a police officer during a traffic stop. The jury instruction permitted conviction if she recklessly helped her boyfriend to commit the murder. The court held that counsel was ineffective for not objecting to the instruction and that Grunwald was prejudiced because the evidence of her mental state was equivocal.

MERGER

Felony discharge of a firearm does not merge with attempted murder...

[State v. Martinez, 2019 UT App 166 \(Christensen Forster\)](#). Martinez shot at and tried to kill his wife's lover (whom he had been threatening to kill for some time). He was charged with attempted murder and felony discharge of a firearm. But because the murder statute has an anti-merger provision, the two crimes did not merge.

...but does merge with attempted aggravated murder.

[State v. Bowden, 2019 UT App 167 \(Christensen Forster\)](#). Bowen shot at a cop six times and hit him in the chest once. He was charged with, among other things, attempted aggravated murder and six counts of felony firearm discharge. The court of appeals held that the two crimes merged under the "same act" form of statutory merger because the anti-merger provision in the aggravated murder statute did not include felony firearm discharge.

POST-CONVICTION

Unless you're a post-conviction attorney, you probably won't find this case interesting. Even then...

[Hattritch v. State, 2019 UT App 142 \(Christensen Forster\)](#). Hattritch abused three boys and was charged with dozens of sexual abuse counts. He pled guilty to three, reserving the right to appeal various issues. The court of appeals affirmed. He then filed a post-conviction petition,

alleging that his plea was not knowingly and voluntarily made because the court of appeals did not address the merits of all his appellate claims. But his plea permitted him to raise only issues that the trial court had addressed, so no problem. He re-raised issues from his direct appeal, but those were procedurally barred under the PCRA. His new issues lacked merit. He moved for discovery on one claim, but the district court denied it because Hattritch gave no reason why he could not present the necessary facts in his petition.

PREEMPTION

The IRCA does not preempt State fraud laws.

[Kansas v. Garcia, 17-834 \(Thomas\)](#). By a 5-4 vote, the Court held that the Immigration Reform and Control Act of 1986 (IRCA) does not expressly or impliedly preempt Kansas prosecutions of respondents for identity theft for using another person's Social Security number on state and federal tax-withholding forms they submitted when obtaining employment. IRCA makes it illegal to employ unauthorized aliens; requires employees to complete a form (I-9) attesting that they are authorized to work in the United States; and provides that information "contained in . . . such form may not be used" for any purposes other than enforcement of the Immigration and Nationality Act and several other specified provisions of federal law. The Court reversed the Kansas Supreme Court's conclusion that the latter provision expressly preempts Kansas' prosecutions. It concluded that the Kansas prosecutions don't fall within any field occupied by federal law. And it held that the "mere fact that state laws like the Kansas provisions at issue overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemption."

PRELIMINARY HEARINGS

Testimony that a jail nurse deviated from the standard of care and that an inmate suffered for days before she died sufficed to show probable cause for negligent homicide.

[State v. Clyde, 2019 UT App 101 \(Pohlman\)](#). Clyde was a nurse at a county jail. One of the inmates was suffering from withdrawal symptoms and repeatedly asked for medical attention. Clyde gave her Gatorade, but otherwise ignored her requests for help. The inmate died after about a week from severe dehydration and malnutrition. At prelim, the State presented evidence that Clyde's responses deviated from the standard of care for nurses. The magistrate refused bindover because the State's expert never said that it was a "gross" deviation. The State appealed and the court of appeals reversed, holding that the grossness of the deviation was a reasonable inference from the evidence.

A magistrate must bind over both car occupants for marijuana possession where the occupants smell of marijuana, and there is over 10 pounds of marijuana in the trunk, mingled with the belongings of both occupants.

[State v. Nihells & Burzak, 2019 UT App 210/211 \(Orme\)](#). Title covers it.

PROSECUTORIAL MISCONDUCT

Disparaging the defense theory is not the same as disparaging defense counsel.

[State v. Lyden, 2020 UT App 66 \(Mortensen\)](#). Lyden and two friends broke into the victim's house looking to beat up the victim's son. When the victim interrupted them, Lyden and his codefendants beat the victim with a bat and brass knuckles. During rebuttal closing, the prosecutor praised defense counsel but disparaged their theory: "Attorneys have only so much we can do, based off of the evidence that we have So, this is no reflection on these two good attorneys, but their argument and theory is not good." Defense counsel objected, saying this was "getting to the level of prosecutorial misconduct with respect to commenting on the defense theory." The court overruled the objection, and the prosecutor again said, "These are two good attorneys. But what their client has given them is not good evidence." Defense counsel argued that this disparaged the defense. For the objected-to statement, the court bought our distinction between disparaging defense counsel (not good) to disparaging their theory (which is called being a lawyer). For the unobjected-to statements, the court held that any error would have been harmless given the overwhelming evidence of guilt.

RESTITUTION

SEPARATION OF POWERS—FEDERAL

Sex registration requirements set out by the U.S. Attorney General follow an intelligible principle set out by Congress and thus do not violate the nondelegation doctrine.

[Gundy v. United States, 17-6086 \(Kagan + Alito\)](#). By a 5-3 vote (with the 5 divided into a 4-Justice plurality and a concurring opinion), the Court held that Congress did not unconstitutionally delegate legislative power by authorizing the Attorney General to "specify the applicability of the requirements" of the Sex Offender Registration and Notification Act to sex offenders convicted prior to SORNA's enactment. The plurality found the statute adequately set out an intelligible principle to guide the Attorney General's exercise of authority, requiring that he apply SORNA to pre-Act offenders as soon as feasible and limiting his discretion to considering and addressing feasibility issues. Justice Alito concurred and agreed that the statute did not lack an adequately discernable standard under the nondelegation approach applied by the Court over the past 84 years, but would reconsider that approach were a majority of the Court willing to do so.

SIXTH AMENDMENT—CONFRONTATION

A confrontation violation was harmless beyond a reasonable doubt where the admitted hearsay was cumulative.

[State v. Salazar, 2019 UT App 169 \(Christensen Forster\)](#). Salazar and his wife drove a guy named Steve Young to a home where he went in and stole some stuff. They later dropped him off at a gas station, where he gave the couple some stolen pills and then took off. Both Salazar and his wife told police that they assumed Young was going into the house to steal stuff. Wife died before trial. Young said at trial that he told the couple he was just going inside to get some of his things out of a house he used to live in. The state impeached Young with Salazar's and wife's statements to police. The hearsay from wife was harmless beyond a reasonable doubt because the same info came in through Salazar's statements and other evidence (like surveillance video).

Admitting a 911 call did not violate the defendant's confrontation right because its primary purpose was to aid police in an ongoing emergency, and it was thus not testimonial.

[State v. Williams, 2020 UT App 67 \(Hagen\)](#). D broke into his Dad's motor home and viciously beat Dad and Brother. Neither Dad nor Bro were available for trial. The prosecutor (Tad May) relied on Dad's 8-9 minute 9-1-1 call, both sons' birth certificates, Dad's driver-license photo, and the responding officer's testimony, including crime-scene photos of Dad's injuries and damaged motor home, to prove the case. Because the father was still emotional and in pain and his son was still at large, the court of appeals held that the district court properly admitted the entire 9-1-1 call because it was non-testimonial, or its primary purpose was to enable police assistance to meet an ongoing emergency.

SIXTH AMENDMENT —INEFFECTIVE ASSISTANCE OF COUNSEL

Defense counsel must advise clients about the sufficiency of the state's evidence to convict on charges that he is pleading guilty to.

[State v. Wright, 2019 UT App 66 \(Orme\)](#). Wright beat up his mother and held her at gunpoint. She later almost died from her injuries. He was charged with a bunch of offenses, including attempted murder and aggravated kidnapping. During his mother's testimony at trial, the jury broke into tears. Sensing the certainty of a conviction, he urged his attorney to get a plea deal. The prosecutor agreed to let him plead as charged, but took LWOP off of the table for the agg kidnapping count. After pleading guilty, he moved to withdraw his plea, alleging that his counsel was ineffective for not telling him that his aggravated kidnapping conviction was not supported with enough evidence of unlawful detention (he had refused to open the garage until his mother agreed to lie to doctors when she went to the hospital). The court of appeals agreed, and vacated his agg kidnapping conviction, but affirmed the other convictions and rejected a bevy of other ineffective assistance claims.

A defendant cannot show prejudice from an elements instruction with an incorrect knowing mental state where the evidence overwhelmingly showed that he acted intentionally.

State v. Apodaca, 2019 UT 54 (Himonas). Apodaca and some buddies kidnapped a drug dealer, robbed him, shot him, and left him on the roadside for dead. The elements instruction for robbery included Apodaca acting knowingly, but robbery must be committed intentionally. Apocada claimed that his counsel was ineffective for not objecting to the erroneous instruction. The court of appeals held that counsel performed deficiently, but it was not prejudicial because the evidence overwhelmingly showed that Apodaca acted intentionally.

Defense counsel does not perform deficiently by not objecting when a police officer offers lay testimony that a victim's wounds appear "fresh," and by not objecting to the prosecutor's brief statement in closing argument that the victim came forward because she did not want to be abused anymore.

State v. Hulse, 2019 UT App 105 (Orme). Hulse briefly held his girlfriend captive and assaulted her. During his trial for aggravated assault and unlawful detention, a police officer testified that the victim's wounds appeared "fresh." Hulse was convicted and argued on appeal that his attorney was ineffective for not objecting to the "fresh" testimony as surprise expert testimony. The court of appeals held that under the circumstances, the officer's testimony was simply lay testimony that did not require notice, so counsel did not perform deficiently by not objecting to it.

In closing argument, the prosecutor said that the victim came forward because she was sick of Hulse's abuse and didn't want to live that life anymore. Hulse argued on appeal that his attorney was ineffective for not objecting to this statement, but the court of appeals held that counsel could reasonably decide not to highlight this brief statement—and Hulse's abuse of the victim—and refrain from objecting.

Counsel does not perform deficiently by not arguing for a communications fraud mental state that has not been settled in either Utah or federal case law, or for arguing that a standard applicable in civil fraud cases applies in criminal cases (BUT SEE *State v. Silva*, 2019 UT 36).

State v. Squires, 2019 UT App 113 (Pohlman). Squires lied to his uncle to get a bunch of money in an attempt to close a real estate deal and impress his boss. The deal failed and Squires lost the uncle's money. He was convicted of communications fraud and pattern of unlawful activity. He argued that his counsel was ineffective for not arguing that comm fraud requires a specific intent to defraud. But the caselaw on that was not settled, either in Utah or in Federal cases. Counsel thus did not perform deficiently. He also argued that his counsel should have asked to instruct the jury that the fraud had to go to a "presently existing fact," a standard in civil fraud cases. But again, no case law mandated this, so no deficient performance.

Defense counsel does not perform deficiently by deciding not to press an extreme emotional disturbance defense if his client is unwilling to admit guilt on the underlying crime.

[Ross v. State, 2019 UT 48 \(Pearce\)](#). Trovon Ross went to his ex-girlfriend's house, murdered her, and tried to murder her boyfriend. He was convicted of aggravated murder. Counsel said he did not want to pursue an EED defense "because of evidentiary issues known" to him and Ross. Ross lost at trial and on appeal. In post-conviction, he claimed that counsel was ineffective for not pressing an EED defense, in essence because there was nothing to lose. But counsel could reasonably decide not to do that where Ross wouldn't admit that he killed anyone, and the "he-didn't-do-it-but-if-he-did.." defense isn't a great pitch to a jury, particularly in a capital case in which counsel was able to bargain for Ross's life.

Counsel correctly chose not to object to obstruction instruction that correctly listed two mental states: knowingly or intentionally lying to police, and intent to hinder, delay, or prevent apprehension or prosecution.

[State v. Vigil, 2019 UT App 131 \(Appleby\)](#). Erika Vigil got in a fight with her boyfriend, who thought she was a snitch. She got out of his car. She went up to a man asking for help and to use his phone; he obliged. Boyfriend then came by and tried to force Vigil back into his car; when the man tried to take a picture with his cell phone, Boyfriend robbed him. Vigil later refused to tell police who Boyfriend was, claiming it was someone that she hardly knew. She was charged with obstruction, and at trial, the prosecutor proposed an elements instruction that required two mental states for obstruction: knowingly or intentionally lying, and having specific intent to obstruct. She was convicted. On appeal, she argued that her attorney was ineffective for not objecting to the elements instruction because the jury might have applied the knowing standard to the obstruction element. The court of appeals rejected this claim, saying that the instruction made clear which mental state applied to which element.

Counsel was not ineffective for stipulating to admit hearsay and not asking about potential bias on immigration status.

[State v. Escobar-Florez, 2019 UT App 135 \(Pohlman\)](#). Escobar-Florez—an illegal immigrant—raped the daughter of a family that he lived with, then he fled for about a decade. During jury selection, counsel did not ask jurors whether they were biased against illegal immigrants. Escobar-Florez claimed that his counsel was ineffective, but he could not show the requisite prejudice—that an actually biased juror sat.

The State learned that a couple of the officers would not be in town during trial, so counsel stipulated that their police reports could come into evidence. The court of appeals held that this was not deficient performance because it permitted the trial to go forward sooner, which is what Escobar-Florez wanted. And some of the information in the reports (such as prior inconsistent statements of the victim) was useful to the defense. Though some was also damaging, this did not make the decision unreasonable. This same analysis applied to a DCFS caseworker's report.

Counsel was not ineffective for not moving to withdraw a plea, get a new trial, or to arrest judgment based on alleged new evidence discovered post-plea.

[State v. Archuleta, 2019 UT App 136 \(Harris\)](#). Archuleta pled guilty to burglary and aggravated assault for his participation in a home-invasion robbery. He later claimed that his attorney was ineffective for not doing something—moving to withdraw the plea, moving to arrest judgment, or moving for a new trial—after he told counsel about alleged evidence of his innocence. But counsel could not have made any of those motions based on new evidence. A guilty plea may be withdrawn only when the plea was unknowing or involuntary, and newly discovered evidence does not affect that. A motion to arrest judgment must be based on some extraordinary circumstance, such as when the facts do not prove a public offense, or when the defendant is mentally ill, so that wouldn't work. And a motion for a new trial presupposes the existence of a trial, and is not available to one who pleads guilty.

Counsel is not ineffective for approving instructions that, as a whole, contain the correct mental state for a charged offense; and objecting to the jury having access to the defendant's police interview would have been futile.

[State v. Eyre, 2019 UT App 162 \(Appleby\)](#). Eyre and two friends carjacked a couple, and Eyre was charged with aggravated robbery as an accomplice. He claimed that his counsel was ineffective in two ways: (1) approving a jury instruction that purportedly misstated the mental state for accomplice agg robbery; and (2) letting the jury have access to a testimonial exhibit (Eyre's police interview). The court of appeals held that the mental state was ambiguous based solely on the elements instructions, but another instruction cleared up the ambiguity, and instructions must be read as a whole. And any objection to letting the jury watch Eyre's police interview would have been futile because a defendant's own statements are not testimonial evidence.

Defense counsel does not perform deficiently by asking for a jury instruction based on a regulatory code that furthers the defense theory.

[State v. Bowen, 2019 UT App 163 \(Mortensen\)](#). Bowen and some friends started a homebuilding business that depended on lot sales to finish infrastructure and finance the builds. She knew that buildability relied on making a certain number of sales, but lied to get there, telling all buyers that the lots were ready to build. She also did not disclose her financial interest in all the sales (which appeared to be from the developer, but were actually from a shell company of hers). She was charged with communications fraud. Her defense, in part, was that she complied with her disclosure duties because she did not own or operate the shell company. To support this defense, counsel requested (and got) a jury instruction based on the regulations governing real estate agent disclosures. On appeal, Bowen argued that counsel was ineffective for requesting the instruction, because the jury might have been confused that a violation of the regulation itself was criminal. The court of appeals disagreed, saying that the instruction arguably heightened the state's burden because it required her to have a financial

interest in or control of the shell company, rather than an indirect interest.

Trial counsel acts reasonably in deciding to try and use the State’s own exhibits against it.

[State v. Morley, 2019 UT App 172 \(Appleby\)](#). Morley ran a daycare at her home. One of the children suffered a skull fracture while in her care. She claimed that one of the other children had done it. To show that this didn’t happen, the State made a video of the other child trying to lift a CPR doll, which was shorter and lighter than the victim. The other child could not lift the doll. Rather than object to use of the doll or the video, defense counsel pointed out things that might have affected the video experiment. This was reasonable.

Trial counsel could reasonably decide not to move to merge aggravated sexual abuse of a child and sodomy on a child because they are alternative charges and were based on separate conduct.

[State v. Hatch, 2019 UT App 203 \(Orme\)](#). Hatch sexually abused his stepdaughter in a bunch of ways and was charged with a bunch of offenses. Two of them were aggravated child sex abuse and child sodomy, based on his touching and licking the victim’s vagina. He was convicted on both of those counts, and argued on appeal that his counsel was ineffective for not moving to merge them. The court of appeals disagreed, saying that sodomy on a child is not a lesser-included of aggravated child sex abuse, but they are alternative charges and were based on different conduct.

Trial counsel is ineffective for not making clear that the jury must be unanimous on which act constitutes which sexual abuse count.

[State v. Alires, 2019 UT App 106 \(Hagen\)](#). Alires groped his daughter’s friend at a sleepover and was later charged with several counts of forcible sexual abuse. The instructions did not require the jury to be unanimous on which touching constituted each count. The court of appeals held that this was ineffective assistance, because to be convicted of a crime, the jury must unanimously agree on the conduct constituting the crime. This is not a theory case, because each touching is a separate offense.

Counsel isn’t ineffective for not objecting just because the objection might have been sustained; counsel gets to choose how to react reasonably.

[State v. Hart, 2020 UT App 25 \(Mortensen\)](#). Hart and a buddy tried to rob a drug dealer and ended up killing someone. Hart was convicted of aggravated murder and argued that his counsel was ineffective in several ways. First was not objecting to the State’s gun expert’s testimony. He said that he compared the bullet with two guns—the murder weapon and another gun. The other gun belonged to Hart, but the expert didn’t say that, so it didn’t matter. Second was not objecting to testimony that Hart had been to prison. But counsel used this testimony to undermine a witness’s credibility. Finally, counsel was not ineffective for not objecting to an officer’s lack of expertise, because he chose instead to use the testimony to undermine the quality of the investigation without permitting the state to perhaps lay the foundation he claimed the testimony lacked.

Defense counsel should pick and choose which ineffectiveness claims they're going to run. [State v. Boyer, 2020 UT App 23 \(Hagen\)](#). Boyer molested his son's best friend for years. She disclosed to Boyer's ex after they divorced. Boyer was convicted of various sex offenses and appealed, claiming numerous instances of ineffective assistance too detailed to list here. The court of appeals rejected them all and chided appellate counsel for using a kitchen-sink approach to advocacy.

SIXTH AMENDMENT—JURY TRIAL

Congress cannot take away a district court's discretion by requiring it to impose a certain time in jail for a new offense while on supervised release.

[United States v. Haymond, 17-1672 \(Gorsuch + Breyer\)](#). Under 18 U.S.C. §3583(k), when a federal judge finds by a preponderance of the evidence that a sex offender subject to the Sex Offender Registration and Notification Act commits certain criminal offenses during a term of supervised release, the court must revoke the supervised release and require the defendant to serve in prison at least the first five years of the term of supervised release. By a 5-4 vote (with the 5 consisting of a 4-Justice plurality and a concurring opinion), the Court held that §3583(k) violates the defendant's Sixth Amendment right to a jury trial. The plurality reasoned that just as a fact that requires a mandatory minimum sentence must be found by a jury, *see Alleyne v. United States*, 570 U. S. 99 (2013), so too must a fact found for purposes of §3583(k), which "increased 'the legally prescribed range of allowable sentences.'" Justice Breyer issued the decisive concurring opinion in which he distinguished §3583(k) from typical supervised-release-revocation laws. He found decisive that §3583(k) "applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute"; "takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long"; and imposes a five-year mandatory minimum term of imprisonment "upon a judge's finding that a defendant has 'commit[ted] any' listed 'criminal offense.'" "Taken together," he concluded, "these features of §3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution."

No colloquy is required for defendants who waive their right to jury trial.

[State v. Sagal, 2019 UT App 95 \(Christensen Forster\)](#). Sagal was charged with child sex offenses. His attorney suggested that Sagal ask for a bench trial for various reasons, and explained the difference between jury and bench trials. Sagal agreed. The trial court accepted the waiver without asking many questions. On appeal, Sagal argued that the trial court should have conducted a colloquy with him, explaining the details of bench v. jury trials. The court of appeals held that no such colloquy was required.

The Sixth and Fourteenth Amendments require state juries to issue unanimous verdicts. [Ramos v. Louisiana, 18-5924 \(Gorsuch\)](#). By a fractured 6-3 vote, the Court held that the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict. The Court reaffirmed that the Sixth Amendment right to “trial by an impartial jury” guarantees a right to a unanimous verdict in order to convict. And it overruled *Apodaca v. Oregon*, 406 U.S. 404 (1972), to hold that this right is incorporated so as to apply to the states.

SUFFICIENCY OF THE EVIDENCE

A defendant’s confession and corroborating circumstantial evidence—like his location near the robbery when arrested, his being seen running away from the robbery, and clothing similar to what the robber wore—is enough to prove his identity as a robber. [State v. Quintana, 2019 UT App 139 \(Hagen\)](#). The title here says it all.

Witness testimony is not inherently improbable just because it is inconsistent in some ways with prior statements.

[State v. Jok, 2019 UT App 138 \(Mortensen\)](#). Jok and a buddy raped and assaulted a girl after a party. She immediately reported it. Some of what the victim told police varied from her testimony at trial—like the time she went to sleep, the order of abuse, etc. This wasn’t enough to make her testimony inherently improbable under *Robbins/Prater*. This case has some really good language if you’re dealing with this issue.

Simulated child porn has to appear to be the real thing to be prosecutable, unless there are real nude children and the context shows intent to sexually gratify.

[State v. Hatfield, 2020 UT 1 \(Pearce\)](#). Hatfield was a middle-school teacher who made his own child porn collages. He argued that the images were not realistic enough to qualify as simulated child porn under the statute. The court agreed, in part. Cut-and-paste images of simulated masturbation were not realistic enough to qualify, but real images of nude children placed next to adult sex acts and genitalia qualified as child porn.

Evidence sufficed for murder where the defendant had motive, opportunity, injury, and similar DNA to that found at the scene.

[State v. Wall, 2019 UT App 205 \(Hagen\)](#). Johnny Wall killed his ex-wife Uta. The case against him was circumstantial, and included a mountain of evidence, including: he fantasized about Uta being gone; he was incredibly difficult to work with when dealing with child custody and visitation, and was extraordinarily relieved when she was found dead; he got a prescription for the medication in her system that helped kill her (which she did not have a prescription for); he was missing from both dropping his kids off at school and from work shortly after the murder; he had a scratch on his eye consistent with a defensive wound; DNA consistent with his was found on Uta’s bed. This was more than enough to convict him of murder.

A general motion for directed verdict does not preserve an inherently improbability argument, and the victim's testimony was not plainly inherently improbable.

[State v. Skinner, 2020 UT App 3 \(Harris\)](#). Skinner hired an escort to be his submissive. He got upset when she wouldn't play along or have sex with him, so he forced her to at gunpoint. They struggled over the gun and both got shot. The victim's testimony had some very minor inconsistencies in it. Skinner's attorney moved for a directed verdict, but did not argue that the victim's testimony was inherently improbable. On appeal, he argued that, but the court held that it wasn't preserved, and under plain error, the victim's testimony was not plainly inherently improbable.

The evidence was sufficient to show lewdness where two witnesses testified, and the defendant admitted, that he displayed his penis through a see-through mesh covering.

[State v. Powell, 2020 UT App 63 \(Pohlman\)](#). Pretty much sums it up.

Small inconsistencies do not render testimony inherently improbable, and there was ample evidence of identity and serious bodily injury.

[State v. Lyden, 2020 UT App 66 \(Mortensen\)](#). Lyden and two friends broke into the victim's house looking to beat up the victim's son. When the victim interrupted them, Lyden and his codefendants beat the victim with a bat and brass knuckles. The victim identified Lyden as a potential assailant, Lyden's sister testified that Lyden was one of the assailants, and other evidence corroborated these identifications. This was more than enough to prove identity and nowhere near inherently improbable. There was also ample evidence that the victim suffered serious bodily injury where he still suffered adverse effects a year after the attack.

UTAH CONSTITUTION—RIGHT TO JURY TRIAL

[State v. Bess, 2019 UT 22 \(Peterson\)](#). Lance Bess was an off-duty cop duck hunting with his family. An inexperienced hunter in another group fired, unknowingly, in the direction of Bess and his family. Bess angrily confronted the other group while carrying his service revolver. He was charged with brandishing. After trial, he got an affidavit from a juror purporting to show that the jury was not unanimous (the juror claimed to cave rather than really believe in the verdict). He argued that rule 606 was unconstitutional, but the supreme court disagreed, noting the need for finality.