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# Contents

# UTAH JOURNAL OF CRIMINAL LAW

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The Utah Association of Criminal Defense Lawyers ("UACDL") and the Criminal Law Section of the Utah State Bar jointly publish the *Utah Journal of Criminal Law* as a service to their members. Further, all judges in the State of Utah receive free copies. The journal is published twice a year in the spring and fall.

The materials expressed in the journal are solely the opinions of the authors and do not reflect any official views of UACDL, the Criminal Law Section, or the Utah State Bar. Judges' involvement in the journal is limited to identifying potential legal issues that may be relevant to a complete legal discussion of criminal law issues. Nothing published by the journal should be construed as an official position of any individual judge or the Utah State Judiciary. Nor does any view expressed in the journal reflect an advisory judicial opinion on any issue.

The Editorial Board welcomes submissions of an academic nature including original articles, case notes, comments, practice checklists and pointers, book reviews, tributes, etc. Articles may be defense- or prosecution-oriented but must be balanced discussions of an academic nature.

Persons interested in submitting articles for publication should email submissions to executivedirector@uacdl.org. The deadline for the spring issue is September 1 and March 1for the fall issue. Articles accepted for publication will be edited by a judge, criminal defense lawyer, and prosecutor for completeness and scholarly content. The journal generally follows *The Bluebook: A Uniform System of Citation* (19th ed. 2010) but emphasizes all easily readable and understandable citations forms. Cite as: 1 UTAH J. CRIM. L. ___ (2014).

Interested persons may subscribe to the journal for $15 per year or $10 per issue. To purchase copies of the journal, contact Editor-in-Chief Kent Hart at executivedirector@uacdl.org or at UACDL. P.O. Box 510846, Salt Lake City, Utah 84151.

# THE UTAH JOURNAL OF CRIMINAL LAW

Volume 1 Spring 2014 Issue 1

A semi-annual publication by the Utah Association of Criminal Defense Lawyers and the Utah State Bar Criminal Law Section

UTAH JOURNAL OF CRIMINAL LAW

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## BOARD OF EDITORS

# THE UTAH JOURNAL OF CRIMINAL LAW: ADVERSARIES COLLABORATING FOR A BETTER CRIMINAL JUSTICE SYSTEM

KENT R. HART[1]

As Editor-in-Chief, I am pleased to introduce the inaugural issue of the *Utah Journal of Criminal Law*. I use the title "Editor-in-Chief" hesitantly because this project has been a collaboration among many people who share the common goals of improving the practice of criminal law in Utah and building camaraderie among criminal defense lawyers, prosecutors, judges, and the academic community. The concept of a criminal law journal sprang from a group of prosecutors and criminal defense lawyers who share a passion for learning, a commitment to excellence, and a genuine desire to ensure justice. Given that this project has been a shared labor of love among all participants, the title of Editor-in-Chief is more ceremonial than substantive.

This clarification is important because one of the main purposes of the *Journal* is to improve communication among and respect for the various actors in the criminal justice system. As a general rule, criminal law practitioners already enjoy professional relationships with each other. The recent Civility Movement within state bar associations nationally has revealed that criminal law practitioners treat each other more civilly than their civil counterparts.[2] This difference is likely due to more frequent interactions among criminal defense lawyers and prosecutors and the need for trust to resolve large numbers of criminal cases. Nevertheless, conflicts still arise among criminal law practitioners. Mutual understanding can always improve.

Improving communication and understanding is particularly important in criminal law given the severe consequences of a criminal conviction. In addition to incarceration and related restrictions on personal liberty, a conviction results in lost civil rights, alienation from loved ones, disruptions in income, family conflict, and poverty for the defendant and family members. An ever increasing number of collateral restrictions further restrain liberty, including limitations on employment, professional licenses, housing, custody and visitation of children, immigration status, etc.[3] These drastic consequences give defense lawyers and prosecutors great incentives to develop positive working relationships with each other.

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[1] *Executive Director, Utah Association of Criminal Defense Lawyers and Research and Writing Attorney, Utah Federal Public Defender Office*

[2] JOHN WESLEY HALL, JR. PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE § 34:6 (3D ED. 2013).

[3] Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1790-91 (2012).

Perhaps even more importantly, greater understanding among criminal law practitioners is needed because American constitutional law elevates individual liberty and fairness above all other legal concepts and values. Thus, depriving persons of their liberty requires carefully considering evidence, thorough investigation, challenging assumptions about forensic tools, the causes of crime, recidivism, individual culpability, the efficacy of punishment, and a host of other considerations that question the very authority of the government to punish its citizens. Further, claims of innocence and false convictions continually haunt judges, prosecutors, and criminal defense lawyers alike. Criminal law is simply too serious to treat as territorial and purely adversarial.

With these concerns in mind, the Board of Directors of the Utah Association of Criminal Defense Lawyers ("UACDL") learned that in 2010 the Family Law Section of the Utah State Bar had begun publishing the *Utah Journal of Family Law*. Family Law Section members teamed with judges and court commissioners to publish articles on areas of common interest to all family law practitioners. Two UACDL members—Brian Arnold and David Read—were also members of the Family Law Section as well as editors of that journal. They presented the idea of a criminal law journal to the UACDL Board of Directors. The Board agreed that the creation of a journal could improve the quality of the practice of criminal law, promote fairness, and increase understanding among prosecutors and criminal defense lawyers.

With these goals in mind, the Board of Directors approached the leaders of the Criminal Law Section of the Utah State Bar about creating a criminal law journal. That section consists of both criminal defense lawyers and prosecutors and has historically held Continuing Legal Education ("CLE") seminars on common issues in criminal law. But, because defense lawyers' and prosecutors' ethical duties and practical educational needs often diverge, finding joint areas of interest has been difficult. Even more of a practical problem, UACDL and the Utah Prosecution Council expend great time and resources planning CLE events that are geared specifically for their members. As a result, these two groups have little incentive for educational collaboration outside the courtroom.

To address this void, UACDL and the leaders of the Criminal Law Section discussed creating an academic journal to promote interaction and understanding between criminal defense lawyers and prosecutors. These talks revealed a shared desire to explore novel legal questions, address thorny legal issues, and explore creative solutions to crime and its effects on society. All parties agreed that the journal should be academic in nature and of high quality to ensure its utility among both defense lawyers and prosecutors. To produce a professional resource, the journal founders determined that criminal law professors were an essential component to the journal's quality.

As talks continued, all concerned recognized that the journal also presented an unique opportunity to engage with judges on criminal law

topics. Modern courthouse security measures coupled with ethical rules have created significant barriers to attorneys interacting with judges outside the courtroom. Both prosecutors and defense lawyers viewed the journal as a means to collaborate with judges without fear of influencing judicial decision making or creating an appearance of impropriety. Interacting with judges would also expand the goal of mutual understanding to another component group in the criminal justice system.

After several fits and starts to the creation of the journal, the Editorial Board presents the first issue here. The journal will be published twice a year and will include scholarly articles that are designed to elevate the discussion and quality of criminal law practice in the state. Articles will be written by judges, criminal defense lawyers, prosecutors, and academics on areas affecting both the defense and prosecution of criminal defendants. All members of UACDL and Criminal Law Section as well as all judges in the State of Utah will receive copies.

To ensure high-quality, scholarly material, the Editorial Board will review article submissions and approve them before being accepted for publication. Each article will be edited by a criminal defense lawyer, prosecutor, and judge to ensure objectivity and completeness. Law students will review articles for correct citation formatting and content. Articles may be defense or prosecution oriented but the overall goal is to provide balanced discussions of an academic nature. Persons interested in submitting articles for publication should email submissions to executivedirector@uacdl.org. Submission deadlines are March 1 and September 1 of each year.

The current political and academic climate presents an opportune time for establishing a criminal law journal because several forces are combining to make cooperation among all parties in the criminal justice system essential. The Great Recession of 2008 has resulted in governments across the country suffering from severe financial crises.[4] At the same time, prison and jail populations have soared as tough on crime laws have increased incarceration levels and the length of sentences.[5] Corrections budgets have not kept pace with the demands associated with higher prison populations and the needs of inmates. Driving much of these problems has been the war on drugs of the past 40 to 50 years that prompted legislators to impose mandatory minimum sentences and tougher penalties on drug users.[6]

At the same time that these forces have combined to strain budgets, social scientists have developed research, for the first time, that proves which responses to crime are effective and which are not. These proven strategies have resulted in a body of literature called Evidence-Based Practices

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[4] Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 No. Car. L. Rev. 581, 587-94 (2012).

[5] *Id.;* J.C. Oleson, *The Punitive Coma*, 90 Calif. L. Rev. 829, 833-44 (2002); Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Calif. L. Rev. 943, 978-81 (1999).

[6] Fan, *supra* note 4 at 589.

("EBP").[7] EBP identifies practices and policies that reduce reliance on incarceration while also lowering recidivism. This movement presents an unprecedented opportunity for prosecutors, defense lawyers, judges, elected officials, and policy makers to unite to find solutions to crime and recidivism. By applying EBP, the costs of crime reduce, the need for prisons falls, and convicted persons are given better opportunities for reform. The promise of fiscal savings provides political cover for elected officials and promotes the common goals of more effective responses to crime and a safer citizenry.[8]

The Editorial Board hopes to spur interest and discussion about similar innovations that not only stimulate academic discussion but also provide real answers for difficult questions. Although the law is adversarial in nature, finding common ground that serves justice, respects individual liberties, protects the public, and enhances criminal defendants' lives provides a perfect response to the complicated and emotional effects of criminal conduct. If such solutions are available, all participants in the criminal justice system have a moral obligation to seek them out and adopt them.

[7] *See, e.g.,* Fan, *supra* note 4 at 637-40; Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 Ind. L.J. 1307 (2007)
[8] Fan, *supra* note 4 at 633-36.

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# THE CONSTITUTIONAL RIGHT TO COUNSEL: EVALUATING THE HEALTH OF UTAH'S INDIGENT DEFENSE SYSTEM

HON. DEREK P. PULLAN[1]

*In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence.*
--U.S. Const., Amend. VI

*In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel.*
--Utah Const., Art. I, Sec. 12

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Enshrined in the United States Constitution and the Utah Constitution is the right of the accused to the assistance of counsel.[2] This right is "necessary to insure fundamental human rights of life and liberty."[3] It is an "essential barrier[] against arbitrary or unjust deprivation of human rights"[4] and "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . . "[5]

The need of the accused for a lawyer is perhaps best stated by Supreme Court Justice Sutherland in the seminal case, *Gideon v. Wainwright*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and

[1] District Court Judge, Utah Fourth Judicial District
[2] U.S. CONST, amend. IV; UTAH CONST., art. I, § 12. *See also* UTAH CODE ANN. § 77-1-6(1)(a) (West 2012) ("In criminal prosecutions the defendant is entitled: to appear in person and defend in person or by counsel.").
[3] Johnson v. Zerbst, 304 U.S. 458, 462 (1938).
[4] *Id*.
[5] *Id*. at 463.

> knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[6]

Sadly, not every person charged with a crime has equal opportunity to retain counsel. In *Gideon*, the U.S. Supreme Court acknowledged this "obvious truth"—"in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[7] The ideal of equality before the law "cannot be realized if the poor man charged with a crime [must] face his accusers without a lawyer to assist him." [8] The Court concluded that the Sixth Amendment requires the states to provide indigent criminal defendants with legal counsel at public expense.[9]

This right is one that touches more Utah citizens than one might expect. In 2000, the U.S. Department of Justice estimated that "[p]oor people account for more than 80% of individuals prosecuted."[10] In 2012, public defenders represented more than twenty-one thousand people charged with crimes in Utah district courts alone.[11]

While the duty to provide legal counsel to the indigent ultimately rests with the State of Utah, the Utah legislature has delegated to counties,

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[6] Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).
[7] *Gideon*, 372 U.S. at 796.
[8] *Id.* 796–97.
[9] The Sixth Amendment right to counsel is a fundamental right made obligatory upon the State by the due process clause of the Fourteenth Amendment. *Id*. at 795–96.
[10] Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1034 (2006).
[11] At the request of the author, information analysts at the Utah Administrative Office of the Courts reviewed district court dockets statewide to determine the number of cases to which public defenders were assigned. The following table shows the number of public defender cases by judicial district in calendar year 2012:

| Judicial District | Public Defender Cases |
|---|---|
| First District | 865 |
| Second District | 3,689 |
| Third District | 8,455 |
| Fourth District | 3,879 |
| Fifth District | 2,268 |
| Sixth District | 436 |
| Seventh District | 656 |
| Eighth District | 983 |
| **Total:** | 21,231 |

cities, and towns the responsibility to provide and fund public defenders.[12] The legislature has allowed political subdivisions broad discretion in determining how to do this,[13] but has encouraged counties and cities to "enter into interlocal cooperation agreements . . . for the provision of legal defense."[14] To date, this legislative invitation to cooperate has not been accepted. Public defender services continue to be provided on a county-by-county basis.

Finally, consistent with U.S. Supreme Court case law,[15] the Utah legislature has recognized that the right to counsel encompasses more than representation at trial. It also includes the right to adequate defense resources at public expense, including "a competent investigator, expert witnesses, scientific or medical testing, or other appropriate means necessary for an effective defense."[16]

Around the country, state indigent defense systems face a constitutional crisis.[17] Utah's own system has been the subject of recent public criticism.[18] The fundamental question is how to assess the health of the Utah's indigent defense system—what factors or principles indicate constitutional health or disease? In different terms, through what lenses may one view an indigent defense system to determine its constitutional sufficiency?

In assessing the constitutional viability of a public defense system, one must distinguish between "probabilistic evidence" and constitutional injury. As Professor Emily Chiang observed:

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[12] UTAH CODE ANN. § 77-32-301(1) (West 2012).

[13] UTAH CODE ANN. § 77-32-306(1), (2), and (6) (West 2012) (permitting counties to [1] contract with a defense service provider, [2] authorize the court to appoint qualified attorneys, [3] create a legal defender's office, or [4] "provide for some other means which are constitutionally adequate for legal defense of indigents.").

[14] UTAH CODE ANN. § 77-32-306(4) (West 2012).

[15] *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (Sixth Amendment right to counsel presumes the right to effective assistance of counsel); Strickland v. Washington, 466 U.S. 668 (1984) (Sixth Amendment right to counsel envisions counsel playing a role critical to the ability of the adversarial system to produce just results and a fair trial); Powell v. Alabama, 287 U.S. 45, 57 (1932) (Sixth Amendment required that defendants be afforded the right to consultation, thorough-going investigation, and preparation prior to trial); Padilla v. Kentucky, 559 U.S. 356 (2010) (counsel engaged in deficient performance by failing to advise client that guilty plea to drug charges would result in client's automatic deportation); Missouri v. Frye, 132 S. Ct. 1399 (2012) (Sixth Amendment right to counsel extends to consideration of a plea bargaining).

[16] UTAH CODE ANN. § 77-32-201(3) (West 2012) (defining defense resources); UTAH CODE ANN. § 77-32-303(3) (outlining circumstances under which defense resources shall be provided at public expense when the accused has retained private counsel).

[17] *See* Backus & Marcus, *supra* note 9; Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 448–50 nn. 30–38 (2010).

[18] AM. CIVIL LIBERTIES UNION OF UTAH, FAILING GIDEON: UTAH'S FLAWED COUNTY-BY-COUNTY PUBLIC DEFENDER SYSTEM (2011), *available at* http://www.acluutah.org/Failing_Gideon.pdf.

> Evidence of systemic shortcomings in the jurisdiction--such as violations of guidelines, checklists, or administrative standards on issues like caseloads, training, or access to investigators--is relevant insofar as it demonstrates the probability of harm that indigent criminal defendants face, but such probabilistic evidence does not in and of itself constitute constitutional injury. In other words, the fact that caseloads are high or that none of the public defenders receive any training in a given jurisdiction does not mean any injury has necessarily taken place--individual criminal defendants do not have a right to a public defender with a caseload below a certain limit or who has attended a certain list of training sessions.[19]

Still, probabilistic evidence is telling. A public defender system exhibiting many symptoms of poor health is more likely to be constitutionally unfit. To assess the health of a patient, the doctor considers a host of symptoms which together may indicate illness, injury, or disease (i.e. temperature, blood pressure, elevated white blood cell counts, location and intensity of pain). We can similarly assess the health of Utah's public defense system using the following factors:

1. **Independent representation.** The defense service provider must be free to defend the client zealously without concern for retaliation (i.e. termination of employment, reduction in pay, reduction in personnel, or reduction in defense resources). Clearly, the county attorney and judges should not be involved in the hiring and supervising of public defenders.

2. **Representation without conflicts of interest.** In deciding whether an attorney provided ineffective assistance of counsel, courts presume prejudice to the client when counsel is burdened with a conflict of interest.[20] These conflicts of interest can be personal to the defense provider, or systemic. Systemic conflicts of interest can arise in the contract terms of engagement, the manner of selection, funding, and payment of defense counsel.[21] Like all attorneys, public

[19] Chiang, *supra* note 17, at 474.
[20] *Strickland*, 466 U.S. 668 (1984).
[21] The Utah Supreme Court has suggested that minimal compensation of public defenders may create a conflict of interest resulting in ineffective assistance of counsel, either in an individual case or in a system-wide challenge. State v. Taylor, 947 P.2d 681, 688 n.3.

defenders must screen for conflicts of interest between clients, and withdraw from a case when non-waivable conflicts arise.[22]

3. **Representation without interference.** In deciding whether an attorney provided ineffective assistance of counsel, courts presume prejudice if the state interferes with the assistance of counsel. State interference can take many forms. Obviously, it occurs when custodial authorities deny an attorney meaningful access to his or her client at the jail. However, interference can be more subtle. Delay in notifying the defender of appointment or the lack of a private place for consultation can interfere with effective representation.

4. **Representation at all critical stages.** The accused is entitled to legal counsel at all critical stages of the proceeding. The Sixth Amendment right extends to custodial interrogation, lineups, initial appearance, bail hearings, preliminary examination, arraignment, plea bargaining, sentencing, and the first appeal of right.[23]

5. **Representation That Ensures Meaningful Adversarial Testing Of The State's Evidence—"The Fair Fight."** In 1984, the United States Supreme Court held:

> The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.[24]

The following factors materially impact the adversarial nature of proceedings:

a. ***Qualified Counsel—Ability, Training, and Experience.*** The Sixth Amendment does not guarantee the individual right to a public defender with a certain number of continuing legal education hours. However, it does contemplate counsel with ability, training, and experience commensurate to the complexity and seriousness of the case. Public defenders

[22] *See,* Utah R. Prof. Cond. 1.7, 1.8, 1.9, 1.10, and 1.11.
[23] *See* Chiang, *supra* note 17 at 452, nn. 46–52.
[24] United States v. Cronic, 466 U.S. 648, 656–57 (1984).

fresh from the bar exam should not be representing clients charged with rape of a child or aggravated murder.

b. ***Access To Defense Resources.*** By statute, counties and cities are required to provide defense resources at public expense. These include "a competent investigator, expert witnesses, scientific or medical testing, or other appropriate means necessary, for an effective defense."[25] Access to relevant continuing legal education and training is also critical.

c. ***Reasonable Caseload Standards.*** The Sixth Amendment does not entitle the accused to a public defender with a particular number of cases annually. But the "fair fight" is clearly impacted by the amount of time a public defender can devote to each case. National caseload standards may be instructive, but not outcome determinative for Utah. As Professor Backus observed:

> Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.[26]

6. **Fair Compensation and Proper Incentives.** Public defenders should be fairly compensated for their work. The public defender system should not create incentives that undermine the effective assistance of counsel.[27]

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[25] UTAH CODE ANN. § 77-32-201(3).
[26] Backus & Marcus, *supra* note 9, at 1125.
[27] *Taylor*, 947 P.2d at 688, n.2 (noting that due to minimal pay, attorneys "often fail to spend the time needed to prepare for a case. Instead, in order to survive economically, they must take on other cases that also demand time") (citing Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995); Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases,* 43 RUTGERS L. REV. 281 (1991)).

a. ***Fair Compensation Rather Than Parity.*** Some have argued for parity in compensation and benefits for prosecutors and public defenders. Examining the pay and benefits afforded to prosecutors may be instructive, but fair compensation, not parity should be the ultimate goal. This is true for several reasons. In a complex system, fair compensation can turn on a host of legitimate factors. The prosecution and defense functions are dissimilar in material ways. Parity in compensation with a prosecutor who is not herself fairly compensated achieves little. Finally, parity on its own is a principle that may be hijacked by self-interest.

b. ***Proper Incentives.*** Contracts for defense services should not create incentives that undermine the effective assistance of counsel. For example, a public defender may be paid a lump sum from which the costs of investigation, expert witnesses, scientific or medical testing, and appeal must be deducted. This defense contract creates a financial incentive not to investigate, hire experts, test evidence, and appeal. Concrete caps on total compensation per assigned case can have the same effect.[28] The right to counsel is compromised when losing the case is more profitable to the attorney than providing an effective defense.[29] Finally, contracts should encourage the public defender to declare conflicts of interest. Clearly, a requirement that the public defender pay for conflicts counsel in such cases creates the wrong incentive.

7. **Case-Specific and Systemic Quality Control.** Any public defense system should safeguard against both case-specific and systemic violations of the right to counsel. Individual public defenders should meet minimum performance standards and be meaningfully supervised. Data about the factors discussed in this article should be collected so that the health of the public defender system can be regularly evaluated. Taxpayers can then assess the quality of the public defender system they finance.

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[28] Section 77-32-304.5 of the Indigent Defense Act caps total compensation at: (1) $3,500.00 for each assigned attorney in felony cases; (2) $1,000 for each assigned attorney in misdemeanor cases; and (3) $2,500.00 for each assigned attorney in the representation of an indigent in an appellate court on a first appeal of right. Defense counsel can seek court approval to exceed these caps. However, the uncertainty of having a request for excess compensation granted by the court may deter qualified attorneys from seeking defense appointments.

[29] *Taylor,* 947 P.2d at 688, n.2.

It has been fifty years since the Supreme Court's decision in *Gideon*—a good time to ask whether the indigent accused have in fact realized the promise of effective assistance of counsel. While there is room for honest disagreement about the health of Utah's public defender system, there is room for improvement. One thing is clear. No matter what method is used to provide public defense, the promise of *Gideon* will not be achieved in a one-time effort at reform. Rather, we must commit to long-term treatment. We must correctly identify symptoms of constitutional injury, commit to regular and honest examination the patient, and then act timely to maintain constitutional health.

# WHY HAVING A DOMESTIC VIOLENCE CONVICTION IN UTAH DOES NOT NECESSARILY RESTRICT A PERSON FROM POSSESSING A GUN

EDWARD A. BERKOVICH[1]

## Introduction

The recent mass shootings in Aurora, Colorado and Newtown, Connecticut have intensified the ongoing national gun control debate. Some believe more restrictions are needed to prevent the wrong people from accessing guns. Others believe almost any such restriction violates Second Amendment rights. Currently, the 1996 Lautenberg Amendment to the Gun Control Act of 1968 is the federal legislation aimed at restricting persons with misdemeanor domestic violence convictions from possessing a firearm.[2]

Readers may be surprised to learn that, despite the impact of the Lautenberg Amendment, there are an undetermined number of convicted misdemeanor domestic violence offenders in Utah who could nevertheless purchase a gun at a retail store by close of business today. This is because not all Utah domestic violence offenses render an offender a disqualified/restricted person under controlling federal law. Even where a conviction requires disqualification, unless it is recorded on the docket or judgment and conviction (J&C) in a specific way, the Utah Bureau of Criminal Identification (BCI) will approve the convicted offender's application to buy a gun.

Perhaps unaware of doing so, some prosecutors and defense counsel have been negotiating pleas and courts have been recording those dispositions while giving sometimes incorrect firearm-prohibition advisories to offenders. This is due to an incomplete understanding of the specific requirements of applicable federal

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[1] Assistant Attorney General, Utah Attorney General's Office. The content, suggestions and views expressed herein are mine; they do not necessarily represent those of the Utah Attorney General's Office. I thank Lance Tyler, Brady Section Chief, Utah Bureau of Criminal Identification, for his significant contributions to this article. He also deserves recognition for his persistence in trying to find a solution to the problem described herein. This article is a substantially revised version of Edward A. Berkovich, *So You Think A Domestic Violence Conviction Will Make An Offender A Restricted Person? It Might Not.*, The Prosecutor (Utah Prosecution Council, Salt Lake City, Utah), Mar. 2012, at 8-13.

[2] 18 U.S.C. § 922(g) (2012).

firearms law and the impact of data entry regarding in-court proceedings on gun disqualification determinations.

The following statistics illustrate the problem. In 2011, of the 181 people with a conviction for a misdemeanor crime of domestic violence (MCDV) from a state, military or tribal court who applied to buy a gun in Utah, 65 of their convictions were recorded in a manner insufficient for BCI to make a disqualified/restricted person determination. In 2012, of 169 such applicants, 103 of their convictions were insufficiently recorded. For January to May 2013, of 72 such applicants, 56 of their convictions were insufficiently recorded.[3] When BCI cannot determine if a conviction is disqualifying, its statutorily-mandated[4] default position is to grant the firearm purchase application. Thus, in 29 months BCI approved 224 applications for offenders who possibly should have been disqualified.

These statistics should not be understood to assign blame to prosecutors, defense counsel, judges or administrators. Not all of the insufficiently recorded convictions referenced above came from Utah courts. In addition, states around the country are grappling with the issues related to determining the firearm eligibility status for those with an MCDV conviction, and Utah is one of only 16 states making headway in this area.[5]

This Utah-specific article will: (1) review current procedure for recording domestic violence convictions; (2) demonstrate why that procedure is ineffective under applicable statutes and case law, using Utah's assault statute as an example; (3) recommend guidelines for prosecutors, defense counsel and trial court judges to follow in plea dispositions that will effectuate the parties' intended consequence on disqualified/restricted person status; (4) recommend that jury

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[3] Lance Tyler, *Brady Report Workbook* 2-4 (Utah Bureau of Criminal Identification, Working File, 2013). As implied by the text accompanying this note, BCI and its sister agencies in other states perform reciprocal MCDV background checks. The increased rate of approved applications reflected in these statistics is due to BCI's refining its determination criteria. Telephone interview with Lance Tyler, Brady Section Chief, Utah Bureau of Criminal Identification (June 7, 2013) ("Tyler Interview").

[4] 18 U.S.C. §§ 922(t), 925A (2012).

[5] Tyler Interview. Notwithstanding these challenges, Utah's efforts have included: the Administrative Office of the Courts modifying its Courts Information System (CORIS) to accommodate recording convictions on dockets with detail sufficient for disqualification/restricted person determinations; aspects of this article's content have been presented (or made available in webinar format) at various meetings and conferences to judges, prosecutors, defense counsel, victim advocates and justice court clerks by personnel from the U.S. Attorney's Office – District of Utah, Lance Tyler, and the author. One example of a related issue states have grappled with is whether a state statute must designate an offense as a domestic violence offense for it to be disqualifying. *United States v. Hayes*, 129 S.Ct. 1079 (2009).

instructions be modified to facilitate verdicts that will either restrict or not restrict gun access, depending on what the jury as fact finder decides; (5) recommend guidelines applicable to additional disqualifying offenses other than assault; and (6) recommend that Rule 11(g), Utah Rules of Criminal Procedure, be amended to make it consistent with applicable law.

This is not a policy article intended to contribute additional arguments to the gun control debate generally. Nor does it address the merits of allowing some convicted domestic violence offenders to possess firearms while disqualifying others.[6] That decision has already been made by Congress and the courts. Nor does this article seek to elicit defense counsel to assist in restricting their clients' rights. Rather, its aim is to inform all officers of the court about the current state of the law applicable to disqualified/restricted persons, and about the ineffectiveness of the current structure for providing accurate disqualified/restricted person information to BCI, regardless whether that information will lead to disqualification. Once so informed, prosecutors and defense counsel will be better able to represent their interests and clients, respectively, in plea negotiations so that a conviction will have its agreed-upon intended consequence on whether disqualification should occur. Courts will then be able to record dispositions in a manner that will facilitate BCI to meet its responsibility to decide whether a convicted domestic violence offender is a disqualified/restricted person based on his or her conviction.

### Current procedure for recording domestic violence convictions

When a person is convicted of any crime, including a domestic violence offense, the notation of that conviction is hand-written down by the court clerk. When court recesses, the clerk enters the information into the Courts Information System (CORIS). CORIS transmits it to the Utah Criminal Justice Information System (UCJIS)

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[6] For readers interested in that discussion, according to federal data, in 2005 approximately 40% of female homicide victims ages 15-50 were killed by a current or former intimate partner. In 55% of those homicides the perpetrator used a gun. For male homicide victims 15-50 years of age, 2% were killed by a current or former intimate partner. In approximately 37% of those homicides the perpetrator used a gun. *Intimate Partner Violence and Firearms*, Johns Hopkins Bloomberg School of Public Health Center for Gun Policy and Research Fact Sheet (Baltimore, MD), at 1, *citing* J. A. Fox & M. W. Zawitz, *Homicide Trends in the United States*, U. S. Bureau of Justice Statistics (2006), available at: http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/IPV_Guns.pdf (last visited June 8, 2013).

and that conviction information is entered onto a person's criminal history, often colloquially referred to as their BCI record.

When any person, including a person previously convicted of a domestic violence offense, prepares to buy a firearm, he or she fills out two forms: an ATF Form 4473[7] and a Request for Firearm Transaction Background Check,[8] and the information on those forms is transmitted to BCI by phone, fax or Internet. Then, while the applicant is waiting at the gun store, BCI personnel research the applicant's BCI record to determine whether there are any convictions which may render the applicant a disqualified/restricted person. If there are such possible convictions, BCI personnel access the pertinent dockets. When an applicant has a domestic violence conviction BCI usually cannot immediately determine from the docket whether it merits disqualification/restriction. In those circumstances the purchase application is placed on hold, and the applicant must wait. BCI personnel will then contact police agencies, courts and prosecutors to get police reports, dockets, J&Cs, and charging documents, to read and try and make the disqualified/restricted person determination. Even after undertaking those cumbersome administrative efforts, BCI all too often still cannot determine whether the underlying domestic violence conviction renders the applicant a disqualified/restricted person. When BCI cannot make that determination, its statutorily-mandated[9] default position is to grant the firearm purchase application.

## Applicable statutes, decisions and rules

The applicable statutes are 18 U.S.C. §§ 921-925A. Section 922(g)(9) makes it unlawful for a person "who has been convicted in any court of a misdemeanor crime of domestic violence" [10] to possess

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[7] The ATF Form 4473 requires a prospective buyer's identifying information, criminal history, chemical dependency history, mental health history, prior military status, immigration status, and seller disclosures, accessible at: http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf (last visited June 7, 2013).

[8] The Request for Firearm Transaction Background Check is a Utah-specific form requiring only buyer identifying information and citizenship status, and seller/dealer identifying and licensure information, accessible at: http://publicsafety.utah.gov/bci/documents/BRADYFAXTRANSACTIONFORM-A_001.pdf (last visited June 7, 2013).

[9] 18 U.S.C. §§ 922(t), 925A (2012).

[10] 18 U.S.C. § 922(g)(9) (2012) more fully states: "It shall be unlawful for any person…who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

a firearm. Section 921(a)(33)(A) defines misdemeanor crime of domestic violence as:

> [A]n offense that—(i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.[11]

Under this controlling federal statute, state-law definitions of domestic violence[12] and cohabitant[13] are not relevant to disqualified/restricted person determinations, and not all domestic violence convictions, even if recorded accurately, disqualify an offender. To disqualify, the offense, regardless of how it is designated under state law, must have "as an element, the use or

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[11] 18 U.S.C. § 921(a)(33)(A) (2012). In addition: (1) the rights to counsel and jury trial must be exercised or knowingly and intelligently waived for the conviction to render the offender a disqualified/restricted person. 18 U.S.C. § 921(a)(33)(B) (2012). (2) Pleas held in abeyance do not render the offender a disqualified/restricted person, unless the offender does not comply with the terms and conditions thereof and the plea held in abeyance is eventually entered as a conviction. 18 U.S.C. § 921(a)(33)(B)(ii) (2012); UTAH CODE ANN. § 77-2a-1(1) (LexisNexis 1993); 77-36-1.1(3) (LexisNexis 2005).

[12] Under UTAH CODE ANN. § 77-36-1(4) (LexisNexis 2012), there are numerous offenses, plus a catch-all, that can constitute a domestic violence offense if committed by one "cohabitant" against another, as that term is defined in UTAH CODE ANN. § 78B-7-102(2) (LexisNexis 2008). The listed offenses are: assault, criminal homicide, harassment, electronic communication harassment, kidnapping, child kidnapping, aggravated kidnapping, mayhem, sexual offenses, stalking, unlawful detention, unlawful detention of a minor, violation of a protective order or ex parte protective order, property offenses, possession of a deadly weapon with the intent to assault, discharge of a firearm, disorderly conduct, child abuse.

[13] The state law definition of "cohabitant" differs from the federal law definition of "intimate partner." UTAH CODE ANN. § 78B-7-102(2) (LexisNexis 2005) defines "cohabitant" as "an emancipated person…or a person who is 16 years of age or older who: (a) is or was a spouse of the other party; (b) is or was living as if a spouse of the other party; (c) is related by blood or marriage to the other party; (d) has or had one or more children in common with the other party; (e) is the biological parent of the other party's unborn child; or (f) resides or has resided in the same residence as the other party." 18 U.S.C. § 921(a)(33)(ii) (2012) defines "intimate partner" as "a current or former spouse, parent, or guardian of the victim, [ ] a person with whom the victim shares a child in common, [ ] a person who is cohabitating with or has cohabited with the victim as a spouse, parent, or guardian, or [ ] a person similarly situated to a spouse, parent, or guardian of the victim." Because federal law controls, the difference in these definitions of relationships does not affect disqualified/restricted person analysis.

attempted use of physical force"[14] ("force element") against a person in one of the federally defined "intimate partner" [15] relationships above.

To illustrate, if X and Y are in a relationship that meets the definition of "intimate partner," and if X forcefully strikes Y on the chest or head, and X is convicted of the assault charge, *and that conviction is recorded with specificity in the manner suggested in this article*, X becomes a restricted person because X has used physical force against Y. However, if X takes a golf club and smashes the windshield of Y's car that is parked in the driveway while Y is still in the house, and if X is convicted of the criminal mischief charge, X does not become a restricted person because X has not used physical force against a person; rather, X has used physical force against a car.[16]

Use or attempted use of physical force was not always determinative. In Utah, before the now-controlling decision in *United States v. Hays,*[17] every state-law domestic violence offense committed by one federally defined intimate partner against another rendered the offender a disqualified/restricted person.[18] BCI would have denied X's gun purchase application based on either the assault conviction or the criminal mischief conviction. *Hays* changed that.

Hays was indicted under 18 U.S.C. §§ 922 (g)(9) and 924(a)(2) for possessing a firearm after having been convicted of a misdemeanor crime of domestic violence under Wyoming's simple assault statute, under which a person can be convicted "if he unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another."[19] Hays sought dismissal, arguing that since one prong of the statute prohibited conduct that did not involve the use or attempted use of physical force – i.e., touching another in a rude, insolent or angry manner – his underlying assault conviction was not a crime of domestic violence as defined in federal law. After his motion was denied he conditionally pled guilty and appealed.

As a threshold matter the Tenth Circuit determined that since "[t]he record does not indicate which prong of the statute Mr. Hays violated…either *both* prongs of the Wyoming statute must satisfy the federal definition of a "crime of domestic violence," including its

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[14] 18 U.S.C. § 921(a)(33)(A) (2012).
[15] See *supra* n. 13 for federal "intimate partner" definition.
[16] Readers may well think, from a policy perspective, that X's conduct should render him or her a disqualified/restricted person under the criminal mischief scenario above, but that is not the law.
[17] 526 F.3d 674 (10th Cir. 2008).
[18] Tyler Interview.
[19] WYO. STAT. ANN. § 6-2-501(b) (West 1977).

"physical force" component, or [the] conviction cannot support the charge in the federal indictment."[20] The court then ruled the first prong, forbidding "rude, insolent or angry touching"[21] "embraces conduct that does not include use or attempted use of physical force."[22] Thus, it did "not categorically satisfy the definition of "misdemeanor crime of domestic violence" found in § 921(a)(33)(A)."[23] Consequently, Hays' conviction, which was not specific as to which prong he was convicted of violating, could not support his federal indictment.

To support its decision, the Tenth Circuit cited *United States v. Belless*,[24] which construed "physical force" under § 921(a)(3) to require more than mere touching:

> Any touching constitutes 'physical force' in the sense of Newtonian mechanics. Mass is accelerated, and atoms are displaced. Our purpose in this statutory construction exercise, though, is to assign criminal responsibility, not to do physics. As a matter of law, we hold that the physical force to which the federal statute refers is not *de minimus*.[25]

The Tenth Circuit noted there are "any number of [*de minimus*] "touchings" that might be considered "rude" or "insolent" in a domestic setting but would not rise to the level of physical force"[26] contemplated by the statute:

> [I]n the midst of an argument, a wife might angrily point her finger at her husband and he, in response, might swat it away with his hand. This touch might very well be considered "rude" or "insolent" in the context of a vehement verbal argument, but it does not entail "use of physical force" in anything other than an exceedingly technical and scientific way. Similarly, "indirect" contact such as throwing "a snowball, spitball, or paper airplane," or water at one's spouse or domestic partner, without causing harm or injury, could be considered rude or insolent touching under the Wyoming statute. We doubt this kind of contact was the type

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[20] 526 F.3d at 678 (emphasis in original).
[21] WYO. STAT. ANN. § 6-2-501(b) (West 1977).
[22] 526 F.3d at 679 (internal quotation marks omitted).
[23] *Id.* (internal quotation marks in original).
[24] 338 F.3d 1063 (9th Cir. 2003). Though the court cited other decisions interpreting the meaning of "force," *Belless* was the only one interpreting the meaning of "force" specifically in the context of § 921(a)(3). *Hays*, 526 F.3d at 678-80.
[25] *Id.* at 1067-68.
[26] 526 F.3d at 679.

> of crime of domestic violence that Congress had in mind when it passed § 922(g)(9).[27]

Regardless of whether one agrees with the *Hays* ruling, it established the rule for states in the Tenth Circuit: where an offender is convicted of violating an assault or other statute for conduct against his or her intimate partner, and where the statute has at least one subsection that does not contain a force element, and where that conviction is recorded by a court without specificity as to which subsection was violated, that conviction will not render the offender a disqualified/restricted person. That is, unless the BCI-like agency can "resolve the resulting ambiguity by consulting reliable judicial records, such as the charging document, plea agreement, or plea colloquy."[28]

As stated above, when BCI attempts to resolve the ambiguity in this cumbersome way but cannot do so, its statutorily-mandated[29] default position is to grant the application, resulting in an undetermined number of domestic violence offenders who perhaps should be disqualified but are not.

Most domestic violence offenses in Utah are charged under its assault statute.[30] However, only two of the three subsections of that statute, upon conviction, may *possibly* render the offender a disqualified/restricted person. This is because only two of the three subsections contain a force element. Section 76-5-102, in relevant part reads:

> (1) Assault is:
> (a) an attempt, with unlawful force or violence, to do bodily injury to another;
> (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
> (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.[31]

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[27] *Id.* (internal citation omitted).
[28] *Id.* at 676. After *Hays* was decided Wyoming amended its simple assault statute "to clarify the elements of the offense of simple battery for the purpose of federal law, addressed in the [*Hays*] decision." WYO. STAT. ANN. § 6-2-501(b) (Historical and Statutory Notes) (West 2013); 2009 Wyo. Sess. Laws 379. Section 6-2-501(b) now reads: "A person is guilty of battery if he intentionally, knowingly or recklessly causes bodily injury by use of physical force."
[29] 18 U.S.C. §§ 922(t), 925A (2012).
[30] UTAH CODE ANN. § 76-5-102 (LexisNexis 2003).
[31] *Id.*

The Federal Bureau of Investigation's Legal Research and Analysis Team ("FBI LRAT"), which provides guidance to state agencies like BCI, has provided a letter analyzing Utah's assault statute, stating that a conviction for violating subsection (a) or (c) may possibly render the offender a disqualified/restricted person, while a conviction to subsection (b) cannot.[32] If BCI receives a docket or J&C for a domestic violence conviction, and that record simply shows a conviction to § 76-5-102, that is not sufficient for BCI to determine disqualified/restricted person status. Neither is a record showing a conviction to § 76-5-102(1). A statement on the docket such as "THIS CASE INVOLVES DOMESTIC VIOLENCE" is also insufficient. Rather, the record of conviction[33] must indicate the specific subsection the offender violated: § 76-5-102(1)(a), § 76-5-102(1)(b), or § 76-5-102(1)(c). Receiving a record showing the specific subsection is the starting point for BCI.

Guidance for prosecutors, defense counsel and trial court judges at plea dispositions

FBI LRAT's analysis for determining whether a conviction for violating subsection (a) or (c) meets the force element is:

> A conviction for violating [subsection (a)] would remain possible for the force element until court documentation is provided to explain the actual *conduct supporting the conviction*. … As an example, this documentation might contain such language as the following: "John Smith is adjudicated guilty of assault 1953 § 76-5-102 (a) [sic] because he attempted to strike Jane Smith on the mouth with the intent of causing her bodily injury." [This] would MEET [sic] the force element because an attempted strike falls within the federal definition of physical force as…used in Section 922(g)(9).[34]

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[32] Letter from Paul Wysopal, Section Chief, National Instant Criminal Background Check System (NICS), to Lance Tyler, Brady Section Chief, Utah State Bureau of Criminal Identification (October 12, 2012) ("Wysopal letter"). The Wysopal letter had not been written when the earlier version of this article was published, *see supra* n. 1, which accounts for the incomplete analysis and suggestions there. In a partial attempt to resolve the issues discussed herein, the Wysopal letter has been circulated to Utah prosecutors by the author and to defense counsel via the Utah Association of Criminal Defense Lawyers. It has also been sent to selected justice court judges, with a request that it be circulated. The author is unaware how widely the Wysopal letter has been circulated among justice or district court judges.

[33] A docket is the preferable record because BCI has immediate electronic access to dockets via the Utah State Courts XChange Case Search system. Tyler Interview.

[34] Wysopal letter at 3 (emphasis in original).

The same analysis applies to subsection (c).[35] Thus, a docket specifically showing a conviction for violating subsection (a) or (c), containing language describing the actual conduct constituting the force element, and containing a finding that the offender and victim are or were in a relationship meeting the federal definition of "intimate partner", will supply BCI with the necessary information to disqualify an applicant from purchasing a firearm.

Where the offender is pleading guilty to subsection (b), the docket should show that with specificity. That domestic violence offender will not be disqualified,[36] and if he or she later wants to purchase a firearm, BCI will approve their application.

Thus, in cases resolved by plea negotiation, the following should be agreed upon prior to plea colloquy:

- The specific subsection of the assault statute the offender is pleading to.

- The actual conduct constituting the force element.

- The exact relationship between the offender and the victim and whether that relationship meets the federal intimate partner definition.

- While not strictly a matter for plea negotiation, officers of the court are informed that pleas held in abeyance do not disqualify,[37] and the rights to counsel and jury trial must be afforded or knowingly and intelligently waived, or a conviction cannot disqualify.[38]

The above agreed-upon information should be provided to the trial court judge by the prosecutor or defense counsel. The judge then should direct the court clerk to enter that specific information into CORIS. Ideally, to make BCI's research easier, all of that information should appear at the top of the docket, not just the specific subsection.

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[35] Wysopal letter at 4.
[36] Wysopal letter at 4.
[37] 18 U.S.C. § 921(a)(33)(B)(ii) (2012); Utah Code §§ 77-2a-1(1) (LexisNexis 1993); 77-36-1.1(3) (LexisNexis 2005). Of course, if the plea in abeyance agreement is violated, and a conviction is entered, the offense disqualifies.
[38] 18 U.S.C. § 921(a)(33)(B) (2012).

Once implemented, this procedure would substantially reduce BCI's current workload,[39] resolve the problem of frequent default determinations to approve a firearm purchase application for lack of specific information, disqualify offenders who should be disqualified, and not require offenders who should not be disqualified to wait prior to purchase. Second Amendment rights advocates may support such measures because until ambiguities are resolved, some domestic violence offenders who are permitted under federal law to purchase and possess firearms are having their purchase applications delayed while BCI tries to research and resolve the force element question.[40]

CORIS is now set up so it can accept an information charging assault un-specifically, as either § 76-5-102 or § 76-5-102(1) and then, at entry of plea, record the conviction as to the specific subsection. This data-entry/modification is accomplished by the court clerk clicking the "find violation" key on the CORIS screen, then entering "assault*" or "76-5-102*" after which "76-5-102(1)(a)," "76-5-102(1)(b)" and "76-5-102(1)(c)" appear as choices to click.

The importance of what gets entered into CORIS cannot be overstated. Consider a police report that reads something like, "I, Officer Jones, arrived at the scene and saw X punch his [or her] cohabitant Y three times in the head very forcefully and violently before I separated the parties." The report by itself is not sufficient for BCI to disqualify, even though the facts, as stated, indicate the offense involved the use of physical force against a person, where the docket only shows a conviction to § 76-5-102 or to § 76-5-102(1), instead of the requisite § 76-5-102(1)(a) or § 76-5-102(1)(c).

### Guidance for prosecutors, defense counsel and trial court judges for cases that go to trial

Jury instructions should be modified to include all three subsections of the assault statute as alternatives for which the jury may convict the offender. How the actual conduct constituting the force element, and how the federal intimate partner determination will be specified in jury trials, remain matters for development.

### Guidance regarding Utah statutes other than assault

The following Utah statutes are other instances where convictions must be recorded as to the specific subsection, where the

[39] Tyler Interview.
[40] *Id.*

facts support, to render the offender a disqualified/restricted person. CORIS is now set up to accept these dispositions as well, including when they are charged generally, and then convicted as to the specific subsection:

- Disorderly conduct – must be recorded as a conviction for violating:
  - § 76-9-102(1)(b)(i). Note, only the clause in subsection (1)(b)(i) that reads "engages in fighting" behavior is disqualifying, so if convicting pursuant to subsection (1)(b)(i), the record should reflect that specific subsection, a notation on the docket indicating the actual conduct supporting the conviction, such as: "The court finds defendant engaged in fighting behavior because he [or she] grabbed Pat Smith by the shoulders and pushed and pulled her [or him] with physical force." The federal intimate partner finding must also be made and appear on the docket. Prosecutors who use municipal ordinances to prosecute disorderly conduct/disturbing the peace are invited to email those statutes to the author, so they can be evaluated for whether violations thereof render the offender a disqualified/restricted person. [41]

- Child abuse – must be recorded as a conviction for violating:
  - § 76-5-109(2)(a), or
  - § 76-5-109(2)(b), or
  - § 76-5-109(2)(c), or
  - § 76-5-109(3)(a), or
  - § 76-5-109(3)(b), or
  - § 76-5-109(3)(c). Note, in child abuse cases, a conviction pursuant to any of the six subsections above is only disqualifying if the offender is the parent of the victim, and that parent inflicted the serious bodily injury on the victim. Therefore, after

[41] Under both the preemption doctrine and *Hays*, the language in UTAH CODE ANN. § 77-36-1(4)(o) (LexisNexis 2012) stating that a conviction for disorderly conduct amended down from another domestic violence offense is not subject to the provisions of 18 U.S.C. § 921 (2012) is arguably incorrect. If the docket shows a defendant was convicted of violating UTAH CODE ANN. § 76-9-102(1)(b)(i) (LexisNexis 1999), by engaging in fighting behavior that meets the force element, and the victim was his or her intimate partner as defined in 18 U.S.C. § 921(a)(33)(ii) (2012), he or she should be disqualified.

> making a record of conviction as to the specific subsection, the record must indicate the parental relationship of the defendant to the victim and that the defendant inflicted the serious physical injury on the victim using language describing the actual conduct supporting the conviction and what the serious physical injury was.

Using the two examples above, records should be made analogously for the offenses below:

- Damage to or interruption of a communication device – must be recorded as a conviction for violating:
  - § 76-6-108(2)(a). Note, only the clause in subsection (2)(a) that reads "uses force" is disqualifying.

- Threatening with or using a dangerous weapon in fight or quarrel – must be recorded as a conviction for violating:
  - § 76-10-506(2). Note, only the clause in subsection (2) that reads "or unlawfully uses a dangerous weapon in a fight or quarrel" is disqualifying.

- Unlawful detention – must be recorded as a conviction for violating:
  - § 76-5-304(1). Note, the clause in subsection (1) that reads "detains or restrains the victim" is the disqualifying language.

The solutions suggested above are not comprehensive. Some courts take pleas in domestic violence cases without a prosecutor being present. In those courts, the judge may not be able to get a reliable factual basis to make the force element determination, record the conviction as to the specific subsection, or make the intimate partner finding. Once the bulk of convictions are being recorded as suggested above, however, BCI may have the resources to research non-specific convictions.

## Possible Amendment to Rule 11(g), Utah Rules of Criminal Procedure

The Supreme Court Advisory Committee on the Rules of Criminal Procedure should consider whether to recommend that Rule 11(g) be amended. It currently reads:

> If the defendant pleads guilty, no contest, or guilty and mentally ill to a misdemeanor crime of domestic violence, as defined in Utah Code Section 77-36-1, the court shall advise the defendant orally or in writing that, as a result of the plea, it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.[42]

As discussed throughout, since only force element convictions trigger disqualification, the rule requiring the advisement to all domestic violence offenders currently requires the court to misinform defendants convicted of non-force element offenses.

## Conclusion

While federal law controls whether a conviction for a domestic violence offense will render the offender a disqualified/restricted person, the bulk of those offenses are prosecuted in state courts. The burden of recording sufficiently accurate information for firearm possession eligibility determinations thus falls largely on those practicing, adjudicating and administrating in the state court system. Current recording practices are often insufficient to meet that burden. Implementing the relatively modest suggestions proposed herein would remedy this to a significant degree. The policy aim underlying the foregoing discussion of statutes, decisions, administrative burdens, clicks and key strokes is to meet the Congressional mandate that steps be taken to protect domestic violence victims from gun-inflicted injury or death. With that in mind, the author hopes those in a position to implement the suggestions herein will consider them.

[42] Rule 11(g), Utah Rules of Criminal Procedure (LexisNexis 2013).

# FREE OUR CHILDREN: IT IS TIME TO STOP INDISCRIMINATELY SHACKLING CHILDREN WHO APPEAR BEFORE UTAH'S JUVENILE COURTS

By ROBERT L. DONOHOE[1]

Shackling juveniles in courtroom proceedings is "repugnant, degrading, humiliating, and contrary to the … primary purposes of the juvenile justice system."[2] It is antithetical to the juvenile court goals of rehabilitation and treatment. Where this issue as been litigated, psychological and medical experts have offered opinions that children suffer emotionally, psychologically, and medically when held in shackles or other mechanical restraints.[3] In 2012, one in every 15 Utah children spent time locked in detention.[4] Yet, despite the harm that arises from indiscriminate shackling, every one of these detained children, whatever his or her alleged act of delinquency, was required to be transported and appear before Utah's juvenile courts in shackles.[5]

The use of mechanical restraints humiliates, stigmatizes and traumatizes juveniles.[6] Shackling also interferes with the attorney-client relationship, chills due process protections afforded by the U.S. and Utah Constitutions, runs counter to the presumption of innocence, and diminishes the dignity of the court. Furthermore, the indiscriminate use of shackling of children in Utah's juvenile justice system is contrary to the fundamental purpose of Utah's juvenile courts, which were established to promote accountability, rehabilitation, education and treatment of juveniles.[7] It is time for Utah to do away with its system of shackling all detained children who appear before its juvenile courts. It is time for Utah to move to a

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[2] *In re Amendments to the Fla. Rules of Juvenile Procedure*, 26 So.3d 552, 556 (Fla. 2009).

[3] Memorandum on Proposed Delinquency Rule regarding the Use of Restraints on the Juvenile in the courtroom, Chris Provost, Alaska Department of Administration, Office of Public Policy at 2 (2010).

[4] 2012 Div. of Juv. Justice Serv. Ann. Rep., at 8.

[5] *See* Briand D. Gallagher, John C. Lore III, *Shackling Children in Juvenile Court: The Growing Debate, Recent Trends and the Way to Protect Everyone's Interest*, 12 U.C. Davis J. Juv. L. & Pol'y 453, 455-56 (2008).

[6] *See* Kim M. McLaurin, *Children In Chains: Indiscriminate Shackling of Juveniles*, 38 Wash. U. J.L. & Pol'y 213, 228-231 (2012).

[7] Utah Code Section 78A-6-102 (1953).

more enlightened rule that requires an individualized judicial determination of need before any child is allowed to appear in court in shackles. Such determinations should be based on finding that a child is a safety threat to him or herself or others, likely to attempt an escape, or presents some other overwhelming security risk. After all, United States courts stopped indiscriminately shackling adults more than 30 years ago.[8]

**Nothing Signals Guilt to the Fact Finder Like Shackling the Accused.**

In 1982, the United States Supreme Court held that where a person is not detained for punishment as a convicted criminal, due process forbids the use of restraints "except when and to the extent professional judgment deems this necessary."[9] In 2005, the Supreme Court extended that rule to the guilt phase of an adult proceeding.[10] In declaring the end of the practice of indiscriminately shackling adult defendants, *Deck* held that trial courts may not shackle defendants routinely, but may do so only if there is a particular reason, such as an overriding security need posed by a particularly dangerous defendant.[11]

American courts have generally followed the English common law rule, permitting the use of shackles and other mechanical restraints only in extreme and exceptional cases where the safety and peace of the courtroom is in jeopardy.[12] Thus, the prohibition against the use of restraints in court without a compelling reason is now a deep-rooted principle in adult criminal justice systems.

Two cases got us there. In 1970, the United States Supreme Court held that "the use of shackles, binds, or gags on a defendant who is unwilling to behave appropriately at trial may be necessary," but these techniques may only be used as a last resort.[13] The Court took pains to emphasize the use of shackles should be severely limited. Requiring a defendant to wear shackles, the Court said, "is

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[8] *Youngberg v. Romero,* 457 U.S. 307 (1982).
[9] *Id.* at 324.
[10] *Deck v. Missouri*, 544 U.S. 622, 627 (2005). In so holding, the Court noted that at early 18th century English common law, courts were required to bring defendants before the court "without irons, or any manner of shackles or bonds; unless there be evidence danger of an escape," *Id.* (c*iting* 4 W. Blackstone, Commentaries on the Laws of England 317 (1769).
[11] *Id.*
[12] Gallagher and Lore, *supra* note 5, at 459.
[13] Anita Nabha, *Shuffling to Justice: Why Children Should Not Be Shackled In Court*, 73 Brook. L. Rev. 1549, 1555 (2008) (citing *Illinois v. Allen*, 398 U.S. 337 (1970)).

an offense to a fair and impartial criminal justice system," and should only be used in the most extreme circumstances.[14] In 1986, the Court noted that among several prejudicial techniques that could be used to keep courtrooms safe, shackling was the worst of all.[15] In finding that a defendant's constitutional right to a fair trial is not violated if additional uniformed guards sit in the courtroom during the trial, the Court emphasized the sight of additional uniformed officers at trial is significantly less prejudicial than the sight of physical restraints on a defendant. In the Court's view, courtroom shackling, more than anything else, signals to the fact finder the criminality of the accused.[16] Thus, this general prohibition against shackling adult defendants, except in extreme circumstances, has been extended to juveniles in several states.[17] It is a change rooted not only in due process, but also in the unique purposes of juvenile courts.

**Shackling Doesn't Fit With the Rehabilitative Focus of Juvenile Court.**

The first juvenile court in America was established in Cook County, Illinois in 1899, and the purpose of the court was rehabilitative, contrasted with the more punitatively-oriented adult criminal justice system.[18] The first juvenile courts focused on treatment and rehabilitation of child offenders, and sought to promote the best interests of the child.[19] Throughout much of the twentieth century, attorneys were not present, and the juvenile courts operated without application of the constitutional protections afforded adult criminal defendants.

This paternalistic court model was eventually scrutinized and restructured. The United States Supreme Court first addressed constitutional problems with juvenile courts in *Kent v. United States*.[20] In *Kent*, the Court held that juvenile court transfer proceedings must comply with the requirements of due process and fair treatment, holding that a juvenile court judge who waived jurisdiction over a defendant without giving a statement of reasons or considerations for that action had violated due process requirements.[21] This set the stage for the holding in *In re Gault*, a

[14] *Id*. at 1556.
[15] *Holbrook v. Flynn*, 475 U.S. 560 (1986).
[16] Nabha, *supra*, note 13, at 1556.
[17] Provost, *supra*; and Martinez, *infra*, at 30.
[18] *Id*. at 1559-60.
[19] *Id*. at 1560.
[20] 383 U.S. 541 (1966).
[21] Nabha, *supra* note 13, at 1562-63.

landmark case in juvenile jurisprudence, which held "due process protections must be extended to juvenile delinquency proceedings."[22] The United States Supreme Court held several specific due process protections applied to juvenile delinquency proceedings, including: (1) the right to formal notice; (2) the right to counsel; (3) the right of juvenile defendants to confront witnesses against them; (4) the right to cross-examination; and (5) the privilege against self-incrimination.[23] *Gault* started a shift towards a more adversarial model of the juvenile courts but did not force the complete abandonment of the rehabilitative model upon which the system was founded. The shift towards an adversarial model continued with *In re Winship*, wherein the United States Supreme Court held that every element of a juvenile delinquency case had to be proven beyond a reasonable doubt.[24]

The court slowed its progression toward a fully adversarial model in *McKeiver v. Pennsylvania*.[25] In *McKeiver*, the Court held juveniles do not have a constitutional right to a jury trial, and fell short of guaranteeing juveniles the full protections afforded to adults in criminal proceedings.[26] *McKeiver,* inasmuch as it recognized the value of the rehabilitative and therapeutic traditions upon which juvenile courts have operated, including the supposed informality of juvenile courts, somewhat limited the holding in *Gault.* The practical effect was to allow juvenile courts to ignore subsequent Supreme Court decisions that applied constitutional requirements to purely adult criminal matters. For this reason, juvenile courts were slow to apply *Deck* and its progeny to juvenile court proceedings. One result is that indiscriminate shackling remains common in juvenile courts. As previously mentioned, it is the default procedure in Utah's juvenile courts.

**The Justifications For Shackling Are Flimsy and Easily Remediated.**

Three major justifications have routinely been offered for indiscriminate shackling of juveniles in court proceedings: (1) the need for courtroom security, and a lack of resources to maintain security; (2) the presumption that judges will not be inappropriately moved by the appearance of shackles because they are impartial arbiters, somehow immune to the prejudices that might sway a

[22] *In re Gualt,* 387 U.S. 1 (1967).
[23] *Id.*, at 33-34, 41, 55-57 (1967).
[24] 397 U.S. 358, 367 (1970).
[2525] 403 U.S. 528 (1971).
[26] 403 U.S. 528, 545 (1971).

jury;[27] and (3) a presumed potential that shackling deters juveniles from further crime because of the shame, humiliation, and punitive effect of being in restraints.[28]

As we have seen, the Supreme Court has resoundingly rejected such arguments in adult criminal proceedings. Among the reasons supporting the extension of this rationale to juvenile courts: (1) the threat to courtroom security – minimal in the first place – can be addressed in less restrictive, harmful, and degrading ways; (2) shackling negatively impacts the decorum and dignity of a juvenile courtroom and possibly prejudices an accused child; (3) shackles imply the accused is dangerous, and is counter to the presumption of innocence; (4) shackles interfere with the child's right to representation by counsel; and (5) shackling is harmful to children in ways not applicable to adults.

Shackling simply does not address many of the security issues it seeks to avoid. The presence of extra security, when necessary, will always be preferable to shackling.[29] But extra security, let alone shackling, is rarely necessary. The experience in Florida is illustrative, and has belied security needs as a rationalization for indiscriminate shackling: "Though more than 20,000 detained children have stood before a juvenile judge in Miami-Dade County since blanket shackling ended in 2006, there has been only one incident. A boy started for the exit of the courtroom, and a Public Defender employee stopped him. No unchained child has hurt anyone or escaped."[30] Two incidents in Massachusetts, widely cited as justification for that state's since-abandoned indiscriminate shackling policies, demonstrate the ineffectiveness of shackling. Judge Leah Rabinowitz wrote of those incidents:

In Massachusetts, all juveniles brought to court from detainment are transported in shackles, remain shackled during their proceedings, and, if they are not released from custody, escorted back to detainment in shackles. . . . The justification arose from two courtroom disruptions – one in which a juvenile flipped a counsel table over, breaking the glass pane on top, and another in which a juvenile made rude comments to an assistant district attorney as he

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[27] Gallagher and Lore, *supra,* at 470.

[28] Nabha, *supra* note 13, at 1571, 74; and *see also*, Bernard P. Perlmutter, *Unchain the Children: Gault, Therapeutic Jurisprudence, and Shackling*, 9 Barry L. Rev. 1, 6-7 (2007). Also, the Supreme Court's holding in *McKeiver* that juveniles are not afforded the right to a jury trial because juvenile courts are rehabilitative, less formal and less adversarial, is often cited as a reason why mechanical restraints in juvenile proceedings are no prejudicial.

[29] *See, Holbrook* and *Deck*, *supra.*

[30] *See* Carlos J. Martinez, *Unchain the Children: Five Years Later in Florida*, 2011, at 1.

was escorted behind the Commonwealth's table. However, hindsight suggests that shackling would not have prevented either of these two incidents, because a handcuffed juvenile could still muster enough leverage to flip a table, and shackles cannot prevent rude comments.[31]

Secondly, the dignity and gravity of the proceeding and courtroom decorum are enhanced when an accused child sitting before the court is not in chains. Long ago, the United States Supreme Court established that juvenile proceedings should emulate the formality of the adult court, stating, "the condition of being a boy does not justify a kangaroo court."[32] The *Deck* court had more to say about this:

> Judges must seek to maintain a judicial process that is a dignified process. The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue … and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. … As this Court has said, the use of shackles at trial "affronts" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold."[33]

Thirdly, shackling eviscerates the presumption of innocence that "lies at the foundation of the administration of our criminal law," especially from a child's perspective.[34] The presumption of innocence is a cornerstone in our American criminal system, adult or juvenile, but shackling sends the message to children that they are presumed guilty.[35] To a child, shackling suggests the court sees a need to separate a child defendant from the community at large before it has even determined guilt.[36] As a result, a juvenile in shackles may feel ostracized from the community regardless of his guilt or innocence, and regardless of the outcome of the case.[37]

Fourthly, as *Deck* pointed out, shackling a defendant "tends to confuse and embarrass his mental facilities, thereby tending materially to abridge and prejudicially affect his constitutional rights,

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[31] L. Rabinowitz, *Due Process Restrained: The Dual Dilemmas of Discriminate and Indiscriminate Shackling in Juvenile Delinquency Proceedings*, 29 B.C. Third World L. J. 401, 406 (2009).
[32] *In re Gault,* 387 U.S. at 28.
[33] *Deck*, 544 U.S. at 631.
[34] *Deck*, 544 U.S. at 630.
[35] Gallagher and Lore, *supra* note 5, at 462.
[36] McLaurin, *supra* note 6, at 229.
[37] *See*, *for example,* Nabha, *supra*, note 13, at 1578.

including his Sixth Amendment right to counsel."[38] This is even more true when the shackled person is a child. A juvenile in shackles has difficulty with judgment, decision-making, and the ability to develop trust and open communications that are integral for an effective attorney-client relationship.[39] For example, any movements a shackled juvenile must make to write a note to the attorney, or say something confidentially, would result in noise that would attract unwanted attention, and would dissuade active participation in the case. Shackling may even have a coercive effect on a juvenile's ability to freely and voluntarily choose whether to engage in a plea bargain, or to proceed to trial.[40] In fact, shackles may coerce a juvenile "to believe that he must waive rights to counsel, to trial, or to plea bargain in order to have the shackles removed."[41]

Finally, shackling may have a more profound effect on juveniles than it does on adults, because adolescents are not likely to have a secure sense of identity, and are therefore tend to be more susceptible to the opinions of others.[42] Social services and child welfare professionals have documented the negative psychological and emotional effects mechanical restraints have on children. Renowned child psychologist Marty Beyer supported a motion to prohibit the mandatory courtroom shackling of all detained juveniles in Florida's Miami-Dade county.[43] In her opinion, shackling juveniles is needlessly traumatizing and is counter to the ultimate goal of rehabilitation.[44] Beyer points out that "[j]uvenile and family courts are based on the recognition that adolescents are different from adults and more susceptible to harm because they are in the process of developing."[45] She continues:

> Adolescents gradually develop a strong positive identity. Approval of others is a powerful influence on adolescents' self-esteem. The experience of being shackled in the courthouse, in front of family and strangers, makes a young person feel disapproved of and ashamed. Being shackled in public is humiliating for young people, whose sense of identity is vulnerable. The young person who feels he/she is being treated like a dangerous animal will think less of him/herself. Children and adolescents are more vulnerable to

[38] *Deck*, 544 U.S. at 630.
[39] McLaurin, *supra* note 6, at 229-30 (quoting the brief for the NAACP Legal Defense and Educational Fund).
[40] Perlmutter, *supra* note 28, at 37.
[41] *Id*.
[42] McLaurin, *supra* note 5, at 228.
[43] Gallagher and Lore, *supra* note 5, at 461.
[44] *Id*., at 462.
[45] Affidavit of Dr. Marty Beyer, 2006, at para. 8.

> lasting harm from feeling humiliation and shame than adults.[46]

In fact, medical and mental health professionals generally believe that using mechanical restraints on juveniles should only be done as a last resort.[47] These experts believe the use of shackles may further traumatize and re-victimize those juveniles who have already experienced violence, trauma, or sexual abuse in their lives.[48] This is particularly significant in light of the fact that previously abused and traumatized children constitute a significant segment of those accused of delinquent offenses.[49]

In addition to mental and psychiatric issues, mechanical restraints present physical problems for juveniles. Children who have been required to wear shackles have complained of bruising, cuts, and pain around their wrists and ankles.[50] Moreover, experts caution that shackles are more harmful to juveniles than adults because they can damage a child's growth plates at a critical time of during physical development.[51]

**Indiscriminate Shackling: A Passing Fancy?**

All of these arguments have been persuasive to appellate courts, which began signaling their aversion to the indiscriminate shackling of juveniles as early as 1976. That year, the Appellate Court of Illinois reversed a juvenile's delinquency adjudication simply because the juvenile was in shackles during his trial.[52] Even though the court acknowledged there was not a chance of prejudice to a jury (because it was a bench trial), it nonetheless concluded that failing to conduct a thorough hearing on the issue of shackling constituted reversible error.[53] The court was concerned restraints impaired the juvenile's ability to effectively assist in his defense by communicating with counsel, that it was destructive to the dignity and decorum of the court and judicial process, and the State had not

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[46] *Id.* at paragraphs 9 and 10.
[47] Nabha, *supra* note 13, at 1576 (citing an article by the American Psychiatric Association on the use of restraints and seclusion in correctional mental health).
[48] *See* Nabha, *supra* note 13, at 1576.
[49] *See* Cathy Spatz Widom, *Victims of Childhood Sexual Abuse – Later Criminal Consequences*, National Institute of Justice, Research in Brief, U.S. Dept. of Justice, at 4, March 1995. "[Twenty-six] percent of the people who were abused and/or neglected were later arrested as juveniles."
[50] Nabha, *supra* note 13, at 1575-76.
[51] *Id*. at 1576.
[52] *In re Staley*, 352 N.E.2d 3 Ill. App. Ct. (1976).
[53] *Id*. at 5-6.

shown a good reason for shackling the juvenile during the trial.[54] The court rejected arguments for shackling that relied upon courtroom safety, escape prevention, and disruption of proceedings, stating that without case-specific findings regarding these issues, less intrusive means such as additional security were sufficient to meet such concerns.[55]

Similarly, a 1990 Florida Court of Appeals case, which ultimately upheld a juvenile's delinquency adjudication, "question[ed] the propriety of the issuance of a blanket order shackling juveniles in the manner in which it was done."[56] Following this case, a suit was filed in Florida Federal Court, challenging the same blanket shackling policies.[57] Although the case was dismissed on procedural grounds—finding that the federal court was an improper venue – the district court judge nevertheless suggested the county being sued should adopt the policies of its neighboring counties, which only shackled juveniles who posed a risk to courtroom safety.[58]

In 2007, the California Court of Appeals held that a case-by-case determination regarding the need for shackles is required.[59] The court rested its decision on the principles of *Deck* and its finding the use of shackles is antithetical to the purpose of the juvenile justice system.[60] The *Tiffany A.* court also noted it would be contrary to the principles of *McKeiver* to require all juveniles to wear shackles during court proceedings, regardless of the charges against them or their behavior in detention, because doing so transforms the proceeding from a juvenile adjudication into an adversarial criminal case.[61]

Finally, in 2009, the Florida Supreme Court adopted a rule proposed by the state's Juvenile Rules Committee that mandated removal of shackles and other restraints prior to a juvenile's appearance in court, unless a court specifically found the use of restraints necessary. A necessity finding must be based on one of three factors – shackling must be necessary to prevent physical harm to the child or another, because the child has a history of disruptive, harmful courtroom behavior, or because he or she presents a

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[54] *Id*.
[55] *Id*. at 6.
[56] *S.Y. v. McMillan*, 563 SO.2d 807 Fla. Ct. App. (1990).
[57] Gallagher and Lore, *supra* note 5, at 473.
[58] *Id*.
[59] *Tiffany A. v. Superior Court of Los Angeles County*, 59 Cal.Rptr.3d 363 (2007) at 374-75.
[60] *Id*.
[61] *Id*. at 375

substantial risk of doing so, or substantial risk of flight.[62] When adopting the rule, the court declared:

> We find the indiscriminate shackling of children in Florida courtrooms . . . repugnant, degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system and to the principles of therapeutic justice. … We also recognize, without deciding, that indiscriminate use of restraints on children in the courtroom in juvenile delinquency proceedings may violate the children's due process rights and infringe on their right to counsel. We agree . . . the presumption should be that children are not restrained when appearing in court and that restraints may be used only upon an individualized determination that such restraint is necessary.[63]

Now, Illinois, Oregon, California, Connecticut, Massachusetts, New York, North Carolina and North Dakota have also ended the practice of indiscriminate shackling of children.

**Shackling is Repugnant to the Mission of Utah's Juvenile Courts.**

Utah, unfortunately, continues to practice indiscriminate shackling. Any Utah child held in detention is transported in mechanical restraints and remains shackled throughout the duration of all court appearances. This practice continues, despite the focus in Utah's juvenile courts – like other juvenile courts around the country -- on rehabilitation: "The purpose of the [juvenile] court . . . is to [among other things] promote . . . individual accountability . . . development of responsible citizenship . . . order rehabilitation, reeducation, and treatment [and] consistent with the ends of justice, act in the best interests of the minor in all cases and preserve and strengthen family ties."[64] This purpose reflects the unique needs of children and their unique relationship with juvenile courts. The indiscriminate use of shackles on detained juveniles is repugnant to such a purpose.

This simple fact, while not recognized by Utah's juvenile courts, is recognized by Juvenile Justice Services ("JJS"), the state agency tasked with the care of those youthful offenders once they have been committed to secure confinement, such as Decker Lake

[62] Fla.R.Juv.P. 8.100(b) (2009).
[63] *In re Amendments to the Fla. Rules of Juvenile Procedure*, 26 So.3d 552 (Fla. 2009).
[64] Utah Code Ann. 78A-6-102 (1953).

Youth Center, or supervision and treatment in the community.[65] Accordingly, JJS has the authority to promulgate rules and policy pertaining to the control or detainment of juveniles in its custody.[66] JJS policy restricts the use of shackles "to instances of justifiable self-defense, protection of juveniles and others, protection of property and prevention of escapes."[67] Further, the use of restraints is only allowable "when necessary to control juveniles and in accordance with the principle of least restrictive action."[68]

In fact, JJS considers the use of mechanical restraints, at least in the context of non-secure community programs, to be a form of cruel and unusual punishment.[69] JJS has determined that, except during transport, "mechanical restraints will be used only after other less restrictive options have proven unsuccessful . . . [and] shall be used with caution and only to the extent necessary to avoid a security risk."[70] JJS further limits the use of mechanical restraints to the amount of time necessary to gain control of a juvenile, and that juveniles should never be left alone while restrained."[71] JJS has further limited the use of mechanical restraints to four scenarios: (1) precaution against escape *during transfer*; (2) protection of the juvenile against self-injury; (3) prevention of injury to others; and (4) prevention of *extreme* property damage.[72]

Unlike JJS, Utah's juvenile judges continue to forebear the indiscriminate use of mechanical restraints on detained juveniles appearing before them. Despite the guidance of *Deck*, *Staley*, *Tiffany A.*, the Florida Supreme Court and the courts and legislatures of other states, Utah's children continue to be shackled, as a matter of policy, whenever they appear in Utah's juvenile courts. The far better policy – for Utah's juvenile courts and the children appearing before them - is that shackling should be addressed on a case-by-case basis, with the presumption at the outset against shackling. Utah's children deserve something better than the routine humiliation, stigma and trauma that go along with being shackled before Utah's juvenile court judges. Due process, justice, compassion and common sense require nothing less.

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[65] Utah Code Ann. Section 62A-7-104(1) (1953).
[66] *Id*. at § 104(6).
[67] Utah Admin. Code at r.547-3(11)(e), r.547-7(22).
[68] *Id*.
[69] *Id*. at r.547-1-8(18)(m).
[70] *See generally,* Utah Department of Human Services, Division of Juvenile Justice Services Policy and Procedures, Policy No. 05-06 (2012), http://hspolicy.utah.gov/files/jjs/Section%2005%20%20Safety,%20Security,%20Supervision/05-06%20Use%20of%20Restraints.pdf
[71] Division of Juvenile Justice Services, Policy No. 05-06, *supra* note 73, at 2.
[72] *Id*. at 1 (emphasis added).

# DEVELOPMENTS IN UTAH LAW: SIGNIFICANT 2012-13 CASES

MATTHEW D. BATES[1] AND MATTHEW REID MORRISE[2]

In 2012, courts around the country added thousands of cases to the canon of American jurisprudence. Locally, the Utah Supreme Court issued 94 opinions and the Utah Court of Appeals issued 374. The United States Supreme Court issued 79 cases in its 2012 Term. The combined weight of these opinions is enough to crush even the most studious of practitioners. In an effort to assist criminal practitioners in keeping abreast of changes in the law, we have culled the cases issued in the last year down to six must-know cases: three from a defense attorney and three from a prosecutor.

## FLORIDA V. JARDINES
No. 11-564 (U.S. March 26, 2013)

In its 2011 term, the United States Supreme Court issued a landmark case that reaffirmed the doctrine of physical trespass as a search. *United States v. Jones* held that placing a GPS tracker on the exterior of a car was a search, not because it violated any expectation of privacy, but because it constituted a trespass upon the owner's "effects."[3]

This term, the Court again relied on the physical trespass view of the Fourth Amendment to hold that bringing a drug-sniffing dog into the curtilage of a home constitutes a search. In *Florida v. Jardines*, detectives with the Miami-Dade Police Department received an unverified tip that Joelis Jardines was growing marijuana in his home. Two detectives, one with a drug-sniffing dog, went to Jardines' home and, after watching the home for a short time and seeing no activity, approached the front of the home with the dog. As the dog approached the porch, he sensed the odor of narcotics and began frantically darting back and forth in the yard trying to pinpoint the source. The dog's nose ultimately lead him to the front door of Jardines' home where he sat down, indicating the strongest source of the narcotic odor.

Relying on the dog's alert, detectives obtained a search warrant for Jardines' home. In the search that followed, authorities discovered several marijuana plants and ultimately filed state charges for narcotics trafficking. In the trial court, Jardines successfully

[1] Assistant Summit County Attorney
[2] Utah County Public Defender Association
[3] 132 S.Ct. 945 at 949

moved to suppress the evidence, claiming that the dog sniff was an unreasonable search of his home. Florida's intermediate appellate court reversed but the Florida Supreme Court reinstated the trial court's decision. The United States Supreme Court granted Florida's petition for certiorari to decide whether using a drug-sniffing dog to detect the odor of narcotics on a homeowner's porch is a search under the Fourth Amendment.

Writing for a five-justice majority that included Justices Kagen, Sotomayor, Thomas, and Ginsberg, Justice Scalia began his analysis by quoting *United States v. Jones* and noting that the Court's precedent made Jardines' case straightforward. Obtaining information by physically intruding on persons, houses, papers, or effects--the exact terms used in the Fourth Amendment--is a search within the original meaning of that Amendment. Moreover, the protections afforded a home have traditionally extended to the curtilage of the home. Thus, the detectives' investigation occurred in a constitutionally protected area and violated the Fourth Amendment unless the detectives had the consent of the owner.

Because the detectives did not have Jardines' express consent to be within the curtilage of his home, the Court considered whether the detectives could rely on implied consent. Courts have long recognized an implied right of the public to approach the front door of home and knock or ring the bell. Such an invitation applies equally to the police as to the general public. Thus, a police officer may approach a home and knock just as any private citizen might do.

In this case, however, the officers did more than might be expected from the general public. Hanging a knocker on door is not an invitation for the public to bring blood hounds, metal detectors, or other tools of discovery to search the property. The scope of consent--express or implied--is limited both to a specific area and to a specific purpose. Consent during a traffic stop to look for a body in the trunk does not permit the officer to rummage through purses and backpacks for narcotics. Thus, while an officer's purpose in a search or a seizure is usually disregarded in favor of his objectively reasonable conduct, when an officer acts with the consent of the involved parties, purpose is relevant. And here, the officers' purpose in approaching the porch with a drug-sniffing dog was to search the property for narcotics, a purpose clearly outside the scope of the implied consent granted to the public.

Justice Kagen, joined by Justices Ginsberg and Sotomayor, concurred in the majority opinion, but wrote separately to opine that the case could also have easily been decided under an expectation of privacy test à la *Katz v. United States*.[4] Privacy interests are at their

[4] 389 U.S. 347 (1967).

greatest where the home is concerned. And the Court has already forbid a warrantless non-physical intrusion into the home using a sensory-enhancing device such as the thermal-imaging device at issue in *Kyllo v. United States*.[5] A dog is no different. Bloodhounds, while used by humankind for centuries, are not in general public use, and their use to detect the presence of certain, albeit illegal, substances violates a reasonable expectation of privacy.

Justice Kagen distinguished *Illinois v. Caballes*,[6] in which the Court upheld the warrantless use of a drug-sniffing dog to detect drugs in an automobile during a traffic stop, by pointing out the Court has traditionally afforded a lesser expectation of privacy to automobiles.

Justice Alito dissented and was joined by Chief Justice Roberts and by Justices Kennedy and Bryer. He took issue with both the trespass test used by the majority and with the expectation of privacy test advocated by Justice Kagen.

The dissent found no basis in the history of property rights to convert an otherwise lawful entry upon property into a trespass because of the subjective and covert nefarious purpose of the invitee. It further noted that police officers routinely approach the front door of a home and speak to the home's occupants with a covert purpose—to investigate crime—yet that is not viewed as a trespass. The analysis does not change, according to the dissent, merely because a dog accompanied the officer. Dogs have been used for thousands of years by humans to track odors, and at common law an unleashed dog could wander onto private property and not commit a trespass. This case, therefore, is the first of its kind.

The dissent also criticized Justice Kagen's reliance on *Kyllo*. The *Kyllo* opinion prohibited the warrantless use of a thermal imaging device because it was new technology that was not in general public use. But dogs have been in use for thousands of years. The dissent viewed the expectation of privacy argument advance by Justice Kagen to be foreclosed by *Illinois v. Caballes.* If one's privacy is not violated by a dog standing on a public sidewalk sniffing odors that waft from a home, it should not be violated by that same dog accompanying its owner to the door.

## STATE V. VERDE
## 2012 UT 60

For at least eighteen years, Utah's trial courts and the Utah Court of Appeals have relied on the "not guilty" rule to determine

[5] 533 U.S. 27 (2001).
[6] 543 U.S. 405 (2005).

whether evidence offered under Rule 404(b), Utah Rules of Evidence, is relevant to a disputed issue of fact.[7] By pleading not-guilty, a defendant put at issue every element of the offense and opened the door for the State to introduce prior acts evidence, even when there was little actual dispute over the element that evidence supported. *State v. Verde* rejects the not-guilty rule. But in closing one door, the court opens another: *Verde* approves the doctrine of chances as a viable theory of logical relevance under Rule 404(b).

James Eric Verde was charged with sexual abuse of a child for allegedly fondling the genitals of a twelve-year old boy in 2003. At trial, the state sought to introduce evidence of prior uncharged sexual assaults by Verde against two eighteen-year old boys. The state asserted the prior acts were necessary to prove Verde's "knowledge, intent, plan, modus operandi, and the absence of mistake or accident." Verde objected to the evidence, arguing that the *mens rea* of the crime was not in dispute. He asserted the touching, if it occurred, was clearly for a sexually abusive purpose. Verde even went so far as offering to stipulate that if the jury found that the touching occurred that it necessarily occurred with the requisite intent. The trial court admitted the evidence and Verde was convicted.

The Utah Court of Appeals affirmed. It noted that although Verde had not really disputed the intent element, he had nevertheless put intent at issue by pleading not-guilty. The prior uncharged acts were thus relevant to show his specific intent to arouse or gratify the sexual desire of any person. The Court also held that the prior acts were admissible to rebut Verde's claim at trial that the victim had fabricated the abuse. Verde sought and was granted certiorari review in the Utah Supreme Court.

The Utah Supreme Court reversed in a unanimous decision written by Justice Lee. The court first made a small modification to the traditional three-part 404(b) analysis. It explained that 404(b) evidence is often capable of both a permissible non-character inference and an impermissible character inference. The possibility of these dual inferences requires trial courts to make a threshold determination of whether the evidence is in fact offered for a permissible non-character purpose. It is no longer enough to accept a proffered justification at face value. Courts should carefully consider whether the evidence is genuinely being offered for a proper, non-character purpose, or whether the evidence might be aimed at sustaining an improper inference that a person acted in conformity with bad character. If the evidence supports "both proper and improper inferences under rule 404(b), the court should balance

[7] *See, e.g., State v. Teuscher*, 883 P.2d 922, 927 (Utah Ct. App. 1994).

the two against each other under rule 403, excluding the bad acts evidence it its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose.[8] Once the court determines that the evidence is offered for a proper purpose, it should then consider relevance under Rule 402 and prejudicial effect under Rule 403.

Having clarified the proper analysis, the court then considered the State's three theories of admitting the prior acts evidence in Verde's case: (1) evidence of specific intent under the "not-guilty" rule; (2) evidence of a plan to entice teenage males and exploit their trust; and (3) evidence to rebut a charge that the victim had fabricated the abuse allegations. With respect to the first theory, intent, the court found the premises of the "not-guilty" rule unpersuasive. "[T]he technical relevance of evidence of a defendant's intent is not enough to justify the admissibility of evidence of prior bad acts purportedly aimed at establishing intent under rule 404(b)." Rather, trial courts must evaluate the true purpose of the prior acts evidence. And in Verde's case, he did nothing, other than pleading not-guilty, to make an issue of intent. Under the facts of this case, even the State conceded that the intent was inferable from the act. And where intent is uncontested and readily inferable from other evidence, 404(b) evidence is largely tangential and duplicative. Thus, the proffered prior acts evidence could not plausibly be needed to demonstrate intent.

The court also rejected the State's theory that the prior acts were admissible as evidence of a plan to entice and molest teenage boys. But a plan, the court clarified, requires a series of acts aimed at accomplishing a common goal. Prior acts evidence is only admissible as evidence of a plan where the prior act is part of a link in a chain forming a common design. Here, the prior acts were not preparatory acts leading toward the enticement and molestation of the victim. They were wholly independent events with unique victims. The prior acts thus did not qualify as evidence of a plan.

Lastly, the court considered whether the prior acts could be admitted to rebut Verde's claim that the victim had fabricated the abuse. The court acknowledged that, in theory, a defendant's prior misdeeds could be admissible to rebut a charge that the victim is lying. But because the State did not preserve that claim in the trial court, the supreme court refused to rely on it as a ground to affirm. But the court nevertheless provided some guidance on remand for applying what has come to be known as the doctrine of chances.

The doctrine of chances is a theory of logical relevance that rests on the improbability of the same rare events happening to a

[8] 2012 UT 60, ¶ 18.

person repeatedly, such as repeated accusations of rape or financial fraud. Among the innocent population, accusations of serious criminal conduct are relatively rare. And the repeated occurrence of a rare event to the same person suggests something in the person's conduct that is causing the event. In other words, if a person wins the lottery once, he is congratulated. But if he wins it twice, he is investigated.[9]

On remand, the court directed the trial court to consider four factors to determine whether prior acts are admissible as doctrine of chances evidence: (1) materiality—the evidence must be relevant to fact that is actually in dispute, (2) similarity—the prior act must be roughly similar to the charged crime, (3) independence—the act and the charged crime must be sufficiently independent as to dispel any possibility of collusion, and (4) frequency—the defendant must be accused of the crime or have suffered a loss more frequently than the average person. These four factors are now, presumably, the litmus test in Utah for admitting evidence under the doctrine of chance.

## STATE V. SIMONS
## 2013 UT 3

In 2010, the Utah Supreme Court held that once an officer has completed the purposes of a traffic stop, no de minimus exception to the Fourth Amendment allows that officer to continue detaining the occupants of the car to conduct a brief canine sniff. At that time, the Court stated, "[W]e have made clear that any detention of an individual after the purpose for the initial detention has concluded violates the Fourth Amendment."[10] Three years later, in *State v. Simons*, the Court revisits the scope of a detention during a traffic stop and held a de minimus exception does exist in the middle of a traffic stop.

Deputies stopped a car for speeding near Springville, Utah. Milo Simons was a passenger in that car. While speaking with the driver, the deputy noticed that he had very watery bloodshot eyes and very rapid speech, movement, and body language. He therefore, suspected the driver was impaired. While conducting a records check, the deputy observed the driver seemed agitated and was constantly touching the rearview mirror and moving his head.

When the deputy returned to the car to speak to the driver a second time, the driver blurted out, "I'm not drunk, I haven't been

[9] The *Verde* court noted that Utah courts, although not explicitly referring to the doctrine of chances, have relied on doctrine-of-chances-type reasoning to admit prior acts evidence in *State v. Nelson-Waggoner*, 2000 UT 59 and *State v. Bradley*, 2002 UT App 348.

[10] *State v. Baker*, 2010 UT 18, ¶ 31.

drinking, look at my eyes." The deputy asked the driver to step out of the car. As the driver did so, the deputy noticed several chewed-up baggies in the driver's side door pocket, at least one of which had small amount of white crystal residue in it. The deputy recognized the baggies as drug paraphernalia.

At that point, the deputy turned his attention to Milo Simons and asked him whether he had any contraband on his person. Simons admitted to having a pipe in his underwear and shook the pipe out of his pants. The deputy then resumed his investigation of the driver's impairment, ultimately arresting him and discovering methamphetamine on his person. Shortly after the driver was arrested, Simons admitted that he too had methamphetamine on his person.

The State charged Simons with possession of drugs and paraphernalia. Simons moved to suppress, claiming the stop and detention had violated the Fourth Amendment. The trial court denied the motion, and Simons entered a conditional guilty plea, reserving the right to appeal the denial of his motion to suppress.

The Utah Court of Appeals affirmed. It brushed aside Simons' claim the deputy lacked reasonable suspicion to ask him about contraband. Instead, it focused on the duration of the stop and held that the deputy's question to Simons did not measurably extend the duration of the traffic stop. Simons sought and was granted certiorari review in the Utah Supreme Court.

The court affirmed in an opinion written by Justice Parrish and joined in full by Chief Justice Durant and Justices Durham and Nehring. It first noted that the driver was lawfully stopped for a speeding violation and that Simons, as his passenger, was lawfully detained incident to the driver's detention. The court then turned to the deputy's questioning of Simons and whether those questions unlawfully extended the duration of the detention. It ultimately held that the duration was appropriate under two alternative grounds.

First, the court held that the deputy had sufficient reasonable suspicion of criminal activity to justify briefly diverting his attention from the driver to Simons and questioning Simons. Viewing the facts in their totality, and giving deference to the deputy's ability to distinguish between innocent and suspicious conduct, the court explained the presence of chewed up baggies, at least one of which contained a white powder, gave rise to a reasonable suspicion Simons was using or possessing illegal drugs.

In reaching this holding, the court contrasted *Maryland v. Pringle* and *Ybarra v. Illinois*.[11] In *Pringle*, the Court found probable cause to believe the occupants of a car had committed a

[11] 540 U.S. 366 (2003) and 444 U.S. 85 (1979), respectively.

felony where officers found five baggies and money in a car. Although none of the occupants claimed ownership of the baggies or money, the Court held that it was reasonable to infer a common enterprise among the car's occupants. In *Ybarra*, the Court refused to allow officers serving a search warrant on a bar to search every person in the bar merely because the individuals were present. The distinguishing fact between those two cases was the confined private space of an automobile. *Pringle*, the Utah Supreme Court reasoned, supports the proposition that when an officer finds drugs or paraphernalia in a car, he may detain and question the car's occupants.

The second ground on which the court affirmed was the brief nature of the questioning. Four years ago, in *Arizona v. Johnson*, the United States Supreme Court held that "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."[12] But that Court never defined the term "measurably extend."

To define that term, the Utah Supreme Court looked to cases from the fourth and sixth federal circuit courts which had upheld questioning of one to one and half minutes. Those cases noted that questioning that is unrelated to the purpose of the stop is permissible so long as it does not extend the detention of the motorist beyond the time reasonably necessary to complete such a stop under normal circumstances. Considering the holdings of those cases, and the fact-intensive nature of a Fourth Amendment inquiry, the Utah Supreme Court determined that the deputy's single question did not measurably extend the duration of the stop. It thus held that a de minimus exception does exist for questioning during the stop.

But the court clarified it was not overruling *Baker*. Once an officer concludes his investigation and terminates the stop, he must allow the driver and passengers to proceed unless he develops fresh reasonable suspicion. That is not to say that unrelated questioning must always occur in the middle of the stop, rather than towards the end. But once the stop is complete, the officer must release his detainees.

Justice Lee wrote a concurring opinion in which he agreed with the judgment and most of the court's analysis. But he took issue with those last paragraphs of the court's opinion in which the court reminded readers that any detention after a stop is concluded is unlawful. Justice Lee noted that such a hard-and-fast rule was incompatible with the reasonableness requirement of the Fourth

[12] 555 U.S. 232, 333 (2009).

Amendment and with the court's precedent in *State v. Morris*.[13] Rather than prohibit any questioning after the stop is concluded, Justice Lee would have disavowed any such language in early cases and held that the same reasonableness test applies both during and after the stop.

STATE V. RAMIREZ
2012 UT 59

Ramirez was in jail in Washington County on drug charges. He called a member of the Washington County Drug Task Force and invited the Task Force to search his motel room for a clean glass pipe, suggesting the pipe would "clear his name." While Ramirez remained on the phone, officers searched the motel room and found the pipe in the location predicted by Ramirez. Ramirez then admitted he had the pipe because he "ha[d] a problem."

A Task Force officer then requested Ramirez's permission to search the rest of the room. Ramirez consented and asserted the officers would find nothing else. However, Task Force officers located methamphetamine and paraphernalia in a trash bag. They also found papers and a prescription bottle with Ramirez's name on them.

At a preliminary hearing on possession and paraphernalia charges stemming from the contraband found in the motel room, the investigating officer acknowledged that although officers did not find property belonging to anyone besides Ramirez, others, including the manager and housekeeping staff, may have had access to the room. There was no testimony from the motel manager or housekeeping staff.

The magistrate refused to bind Ramirez over for trial. The magistrate found probable cause that Ramirez had control over the motel room, but ruled that the strongest inference from the evidence was that Ramirez was unaware of the illegal items in his room. Otherwise, the magistrate ruled, Ramirez would not have given consent to search the motel room.

The Court of Appeals affirmed by a 2-1 vote. The majority (Judges Orme and McHugh) concluded that the State's contention that Ramirez had exclusive control over the room was purely speculative because the motel manager did not testify at preliminary hearing about such exclusivity. Judge Thorne dissented, believing that the evidence gave rise to two conflicting, but reasonable, inferences: either 1) Ramirez did not know that methamphetamine and paraphernalia were in the room, or 2) Ramirez did know about

[13] 2011 UT 40.

the items, but assumed they wouldn't be found because he had discarded them. In Judge Thorne's view, the magistrate was required to resolve these conflicting inferences in the State's favor and bind Ramirez over for trial.

The Supreme Court agreed with Judge Thorne and reversed the Court of Appeals and the magistrate. In an opinion by Justice Lee, writing for a unanimous Court, the Court held that the only thing required at preliminary hearing was reasonably believable evidence sufficient to establish the elements of the crimes charged. The magistrate's sole function, the Court held, was to determine whether the evidence supported a reasonable inference that the defendant committed the crime charged. The magistrate was not permitted to weigh reasonable but conflicting inferences, regardless of their relative strength, in favor of the defendant, unless the inference in favor of the State fell to a level of inconsistency or incredibility such that no reasonable jury could accept it.

STATE V. NGUYEN
2012 UT 80

Nguyen was accused of multiple sex offenses involving a young girl. The girl was interviewed at the Children's Justice Center shortly before her twelfth birthday. During the interview, she described the alleged offenses in detail.

At trial, the court admitted a redacted video recording of the interview under the then-applicable provisions of Utah Code § 76-5-411 and Utah R. Crim. P. 15.5(1). The court ruled that the interview satisfied the reliability requirements of section 76-5-411 and rule 15.5, and that admitting the interview was in the interest of justice as required by rule 15.5.

However, the trial court ruled that a separate finding of "good cause" was not required, notwithstanding rule 15.5's provision that "the oral statement of a victim or witness younger than 14 years of age may be recorded prior to the filing of an information or indictment, and upon motion *and for good cause shown* is admissible as evidence in any court proceeding…"[14] The State showed the redacted recording to the jury, and Nguyen was convicted on all counts.

Nguyen appealed the trial court's conclusion that a separate finding of good cause was not required, specifically arguing that the phrase "for good cause" required a showing that the video recording

[14] Rule 15.5 has since been amended to comply with *Crawford v. Washington*, 541 U.S. 36 (2004). However, the current version of the rule repeats the "good cause" language of the old rule verbatim, with the addition of commas to set off the clause "upon motion and for good cause shown." *See Nguyen*, 2012 UT 80 at ¶ 12 n. 2.

was needed and the child was unavailable. The Court of Appeals affirmed the trial court, finding that the requirement of "good cause" was fulfilled because the conditions for admissibility enumerated in rule 15.5, namely reliability, trustworthiness, and the interest of justice, were met.

The Utah Supreme Court unanimously affirmed. In an opinion by Justice Parrish, the Court dismissed Nguyen's argument that the phrase "for good cause" in rule 15.5 required the trial court to conduct a comparative need analysis or find that the child was unavailable to testify. The dictionary definition of "need," the Court held, was far narrower than the dictionary definition of "good cause." Furthermore, the availability or unavailability of the child was irrelevant because the rule itself provided that if the child was unavailable, a recorded interview was inadmissible unless Nguyen had a prior opportunity to cross-examine the child.

The Court concluded by citing the major policy goals of rule 15.5: 1) to ensure that the jury heard the most accurate testimony from the victim, and 2) to prevent the victim from the trauma of testifying in open court. The Court was persuaded that the video-recorded interview may have been more reliable than the victim's in-court testimony, as it was made closer in time to the incident and did not have the pressures of in-court testimony. The Court was also persuaded that allowing the video recording prevented the victim from being "victimized twice" by rigorous cross-examination in open court.

In sum, the Court concluded that rule 15.5 struck an appropriate balance between Nguyen's right to confrontation and the protection of the child victim. This was so because the rule required the video-recorded interview to be reliable and trustworthy while guaranteeing Nguyen's opportunity to cross-examine the victim.

## ROSS V. STATE
## 2012 UT 93

Ross was charged with aggravated murder and attempted aggravated murder based on an incident in which he shot his girlfriend and another man after finding them in circumstances suggesting they had spent the night together. After closing arguments, trial counsel stated in chambers that "[t]here was no manslaughter defense raised based on any extreme emotional disturbance because of -- because of evidentiary problems as are known to Mr. Ross and myself." The trial judge asked Ross whether that was, in fact, the strategy he had decided on. Ross responded, "Yes, your honor." He was convicted of both counts.

Ross did not allege ineffective assistance of trial counsel in a largely unsuccessful direct appeal. However, Ross subsequently raised ineffective assistance of counsel in a petition for post-conviction relief, claiming that trial counsel gave ineffective assistance when counsel failed to present an extreme emotional distress defense. Ross further claimed that appeal counsel also gave ineffective assistance by failing to assert ineffective assistance of trial counsel.

The post-conviction court granted summary judgment in favor of the State on Ross's ineffective assistance of counsel claims, ruling that ineffective assistance of trial counsel could have been raised on direct appeal, and appeal counsel was not ineffective for failing to raise it. The court held that, as evidenced by the in-chambers discussion, Ross had specifically agreed to forego an extreme emotional distress defense at trial. Thus, a claim of ineffective assistance of trial counsel would not have been clear to appeal counsel from the trial record. Ross appealed.

In an unanimous opinion written by Chief Justice Durrant, the Utah Supreme Court reversed the post-conviction court's grant of summary judgment. Notwithstanding the in-chambers discussion, the Court doubted the reasonableness of trial counsel's decision to sacrifice an extreme emotional distress defense. The Court called trial counsel's in-chambers remarks "confusing" and concluded that they "indicate[d] that [trial counsel] misunderstood the governing law and how it would apply to Mr. Ross's situation."

The Court took particular issue with trial counsel's expression "extreme emotional *disturbance*" because the statute specified the relevant defense as "extreme emotional *distress*." The Court also criticized trial counsel's reference to the defense as a "*manslaughter* defense" because an extreme emotional distress defense would only have reduced a conviction for aggravated murder to attempted aggravated murder and a conviction for attempted aggravated murder to attempted murder. Finally, the Court pointed to language in Ross's *pro se* post-conviction petition which indicated that Ross himself was unclear about the extreme emotional distress defense at the time of the in-chambers discussion.

These issues, coupled with appeal counsel's apparent failure to investigate the issue of ineffective assistance of trial counsel, prompted the Court to hold that there were genuine issues of material fact as to whether appeal counsel was ineffective. Thus, the Court reversed the post-conviction court's grant of summary judgment and remanded for appointment of counsel and a full hearing of Ross's ineffective assistance of counsel claims.

# NOTABLE STATUTORY CHANGES IN UTAH CRIMINAL LAW: 2013

MATTHEW D. BATES[1] AND STEVEN K. BURTON[2]

## Sex Offense Amendments
## House Bill 10

House Bill 10 makes three changes to section 76-5-401.2, unlawful sexual conduct with a 16- or 17-year-old. The principal amendment changes the prohibited age difference between the perpetrator and the victim. Originally, only persons who were ten or more years older than their victim could commit unlawful sexual conduct with a 16- or 17-year-old. A person less than ten years older than his 16- or 17-year-old paramour was free to engage in the full range of lawful sexual activity, risking only the wrath of his young lover's father or brother. H.B. 10, which became effective upon its enactment, broadens the pool of potential perpetrators by reducing that age difference to only seven years or more.

Second, H.B. 10 adds unlawful sexual conduct with a 16- or 17-year-old to the list of crimes in section 76-2-304.5 for which mistake of age is not a defense—but only for a perpetrator who is ten or more years older than his victim. When the crime of unlawful sexual conduct with a 16- or 17-year-old was enacted in 1998, knowledge of the victim's age was not an element.[3] And the Legislature never added it to the list of crimes in section 76-2-304.5. This created some ambiguity as to whether mistake of age was a defense to a charge of unlawful sexual conduct with a 16- or 17-year-old. But the question was never presented to Utah's appellate courts, and most practitioners seemed to assume that, like all other sexual offenses against minors, mistake of age was not a defense. H.B. 10 clarifies that mistake of age is not a defense for anyone ten or more years older than their victim.

Lastly, H.B. 10 establishes a mental state element for a person who is seven years or more, but less than ten years older than his victim. For that cradle-robbing Casanova, the statute requires that he "knew or reasonably should have known" that his young lover was underage.[4] The phrase "reasonably should have known" is little used in Utah's criminal code and thus may prove difficult to apply. It appears in only two other crimes. A person who murders certain categories of law enforcement-related public servants, including jurors, is guilty of aggravated murder if he "knew or reasonably should have known" that his victim held that official position.[5]

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1 Prosecuting Attorney, Summit County.
2 Criminal Defense Attorney, Intermountain Legal, P.C.
3 *See* 1998 Utah Laws Ch. 183 § 1.
4 *See* 2013 Utah Laws Ch. 34 § 2.
5 *See* Utah Code § 76-5-202(1)(m).

And a person commits mail theft if he "buys, receives, conceals, or possesses mail and knows or reasonably should have known that the mail was unlawfully taken or obtained."[6] Utah's appellate courts have not yet considered the meaning of the "reasonably should have known" standard in either of these statutes.

**Enticing a Minor**
**Using the Internet Amendments**
**House Bill 31**

In 2001, Utah enacted a bill entitled "Penalties for Soliciting Minors" that criminalized using a computer to ask a minor to engage in any sexual activity in violation of state law. Since the creation of that offense, advances in technology and grammar have necessitated the occasional amendment. This session, House Bill 31 made three important amendments to the offense of enticing a minor.

The first change clarifies that a person may entice a minor using any electronic device. The original statutory language simply referred to using "a computer" to entice a minor.[7] As text messaging increased in popularity over the years, the statute was amended to include messages and photographs transmitted to the minor over a computer or a telephone.[8] The newest amendment in H.B. 31 expands the statute to include text and photographs sent or received by "a telephone, computer, or other electronic communication device." Presumably, enticement by an iPad, iPod Touch, or another tablet now falls within the ambit of the statute.

The bill also makes an important grammatical change. The statute originally prohibited using "a computer to solicit, seduce, lure, or entice, or attempt to solicit, seduce, lure, or entice a minor."[9] In 2003, the Legislature amended the statute to make clear that an attempt to solicit must also involve a computer. It thus amended the statute to apply to a person who "attempts to use a computer to solicit, seduce, lure, or entice a minor."[10] But in amending the statute, the Legislature violated rule sixteen of Strunk and White's *The Elements of Style*: keep related words together.[11] This language persisted through various amendments and, since 2003 section 76-4-401 could have plausibly been read to prohibit attempting to use a computer, rather than attempting to entice a minor. H.B. 31 removes the ambiguity by placing "attempt" next to "solicit" rather than "use."

Lastly, and most importantly, H.B. 31 clarifies the mental state for enticing a minor. The Legislature originally intended to protect minors from

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[6] *See* Utah Code § 76-6-1003.
[7] *See* 2001 Utah Laws Ch. 353 § 1.
[8] *See* 2008 Utah Laws Ch. 342 § 1.
[9] *See* 2001 Utah Laws Ch. 353 § 1.
[10] *See* 2003 Utah Laws Ch. 334 § 1.
[11] *See* WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 28 (4th ed. 2000).

predators by stopping and punishing the predatory behavior at the solicitation stage. The Legislature never intended that the statute should apply only to persons who actually intended to commit an illegal sex act with a minor. Rather, the Legislature intended that the crime be complete at the keyboard with a mere request to engage in illegal sexual activity.[12]

But prior versions of the enticement statute appeared to base the penalty on the perpetrator's intent. For example, "enticement of a minor . . . with intent to commit a first degree felony is a second degree felony . . . ."[13] This language left some question as to whether the State had to prove that the defendant actually intended to commit the solicited offense. And at least one defendant successfully argued that he had no intent to commit the underlying offense and was merely engaging in a fantasy.[14] H.B. 31 corrected this by removing the word "intent." The statute now reads, "Enticement to engage in sexual activity which would be a first degree felony for the actor is a: (i) second degree felony . . . ."

## Expungement Process Amendments
## House Bill 33

In 2012, several legislators expressed interest in amending the expungement statute to provide more leniency in expunging drug-related crimes. A "Drug-Related Expungement Committee" was established and discussed several drug-related and non-drug-related amendments. House Bill 33 is the result of that committee's work.

First, after examining the previous statute and speaking with the Board of Pardons and Paroles, the Committee found that the statute placed an undue burden on the few people who receive a pardon. Under the prior statute, the granting of a pardon did not automatically expunge a conviction. Rather, a person who received a pardon had to complete the entire expungement process. Hence, H.B. 33 gives the Board of Pardons and Paroles new authority to issue orders of expungement in conjunction with the grant of a pardon. These orders now have the same effect as a court-ordered expungement, but do not require approval from the State Bureau of Criminal Identification or any court.[15]

Second, the bill's wider reaching provision makes it easier to expunge convictions for "drug possession offenses" and explicitly defines what qualifies as a "drug possession offense." Nearly all of the simple drug possession and possession of paraphernalia offenses fall within the bill's

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[12] *See Enticing a Minor Amendments: Hearing on H.B. 31 before the Senate Judiciary, Law Enforcement, and Criminal Justice Committee*, 2013 General Session (March 5, 2013) (statement of Paul Boyden, Director, Statewide Association of Prosecutors), audio recording available at http://le.utah.gov/~2013/bills/static/HB0031.html.
[13] *See* 2001 Utah Laws Ch. 353 § 1.
[14] *See* Senate Judiciary, Law Enforcement, and Criminal Justice Committee *supra* note 10.
[15] Utah Code § 77-27-5.1.

scope. The bill defines "drug possession offense" as any drug possession offense under subsection 58-37-8 (2), except for the most serious offenses such as possession of 100 pounds or more of marijuana, possession in a correctional facility, or driving with a controlled substance in the person's body and negligently causing the death of another. It also includes all possession of paraphernalia offenses under section 58-37a-5 (1), possession of an imitation controlled substance under section 58-37b-6, and any local ordinance substantially similar to any of the above-listed offenses.[16] The definition does not include drug distribution-related crimes.

In effect, the bill classifies a person's criminal convictions into non-drug possession offenses and drug possession offenses and evaluates eligibility of the two categories separately. For non-drug possession offenses, the criteria for expungement eligibility remain the same, and drug possession offenses are completely excluded from the calculation. Offenses in the drug possession category are evaluated separately with some modified criteria set forth in the statute. The following table shows the differences between the traditional criteria for expungement eligibility and the new criteria for drug possession offenses. Other factors not listed in the table, such as non-expungeable crimes and the requirement to pay all fines and restitution, remain the same for both categories.

| Amount of time that must elapse before a conviction can be expunged[17] | |
|---|---|
| Non-Drug Possession Offenses | Drug Possession Offenses |
| 10 years: Any drug- or alcohol-related driving offense<br>7 years: Expungement-eligible felonies<br>5 years: Class A misdemeanors<br>4 years: Class B misdemeanors<br>3 years: Class C misdemeanors and infractions | 5 years: Felonies and class A Misdemeanors<br>4 years: Class B misdemeanors<br>3 years: Class C misdemeanors and infractions |
| Number of convictions rendering a person ineligible for expungement[18] | |
| Non-Drug Possession Offenses | Drug Possession Offenses |
| 2 or more: Felony Convictions<br>3 or more: Total convictions, 2 of which are class A misdemeanors<br>4 or more: Total convictions, 3 of which are class B misdemeanors | 3 or more: Felony possession convictions<br>5 or more: Total possession convictions |

[16] *Id*. § 77-40-102(7).
[17] Time periods are calculated from the time the person was convicted or released from incarceration, probation or parole, whichever occurred last. *Id*. § 77-40-105 (3)(c).
[18] All convictions resulting from a single criminal episode count as one conviction. *Id*. § 77-40-105 (5).

| | |
|---|---|
| 5 or more: Total convictions, regardless of degree | |

When evaluating the criteria for expungement, if a single criminal episode involves both a drug possession offense and a non-drug possession offense, and if any conviction in that criminal episode is a felony or class A misdemeanor or has the same or longer waiting period than any drug possession offense in that same episode, then that criminal episode shall be counted as a non-drug possession offense.[19]

For both types of offenses, if a person meets the statutory requirements, he or she must still petition the court where the conviction is recorded and show by clear and convincing evidence that the expungement is not contrary to the interests of the public. Finally, the statute now requires that for drug possession offenses a petitioner must also show by clear and convincing evidence that he or she is not using controlled substances and is successfully managing any substance addiction.[20]

**Dating Violence Protection Act**
**House Bill 50**

House Bill 50 is the newest inductee into the notorious list of 50 ways to leave your lover. In addition to slipping out the back, Jack, and making a new plan, Stan, now you can get a "Dating Violence Protective Order" ex parte, Mae. This bill is the younger, newly popular sibling to Utah's current protective order statute. And like a sibling, it shares many of the characteristics—both desirable and undesirable—of its kin.

The bill enacts sections 78B-7-401 to –407, and provides for the issuance, modification, and enforcement of a "Dating Violence Protective Order" where:

- the parties are <u>not</u> cohabitants,
- the respondent is 18 years of age or older,
- the parties have been in a "dating relationship," and
- the petitioner is subjected to, or there is a substantial likelihood the person will be subjected to "abuse" or "dating violence" by the respondent.

A dating relationship is defined as "a social relationship of a romantic or intimate nature, or a relationship which has romance or intimacy as a goal by *one or both* parties, regardless of whether the relationship involves sexual intimacy."[21] This would presumably include the oft-poeticized one-sided love affair.

[19] *Id.* § 77-40-105 (6).
[20] *Id*. § 77-40-107 (8).
[21] *Id*. § 78B-7-402(3)(a) (emphasis added).

The procedure is similar to that of Cohabitant Protective Orders with some notable differences. In contrast to Cohabitant Protective Orders, Dating Violence Protective Orders will automatically expire in 180 days.[22] Additionally, the respondent shall not be prohibited from possessing firearms under the order unless the petitioner can show by clear and convincing evidence that the respondent's possession of a firearm poses a serious threat of harm to the petitioner or any designated family member (mother, child, etc.).[23] Also, the court may not enter an order that excludes the respondent from his or her schoolyard or place of employment, but may enter an order "governing the respondent's conduct" in those places. Finally, the law makes a violation of a dating violence protective order a class B misdemeanor and mandates an arrest when there is probable cause to believe that a violation has occurred.

The bill's proponents assert that it allows for protective orders in extramarital situations or other situations where the parties never lived together and it avoids the cumbersome process of getting a stalking injunction or civil restraining order, thereby bridging the gaps left by the troubled Cohabitant Abuse Act.

Opponents argue that any way you look at it you lose—the benefits touted by the proponents are the exact features that cause the law to be problematic. Because of the vague definitions, low standards of proof, absence of penalties for petitioners who file frivolous or untruthful petitions, and judges' inclinations to be "better safe than sorry," the system is ripe for abuse. Additionally, truly violent offenders are not likely to be deterred, and those most negatively affected are the law-abiding respondents. And, since there are no established ways to expunge a civil proceeding, if a person's relationship with Cecilia, Julio, or Mrs. Robinson stops being so groovy, the consequences may be long-lasting.

### Traffic Violation Amendments
### House Bill 93

House Bill 93 amends section 41-6a-202 in two ways. It prohibits a person who receives a citation for a traffic violation from pleading guilty

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[22] *Id*. § 78B-7-404(6).

[23] *Id*. § 78B-7-404(5). This provision of the statute is designed to function differently than Utah's Cohabitant Abuse Act under both state and federal law. Under the Cohabitant Abuse Act, a person can be prohibited from possessing a firearm if a state court finds by a preponderance of evidence that the "possession of a weapon *may pose* a serious threat of harm," *id*. § 78B-7-106(2)(d) (emphasis added), whereas under the Dating Violence Protection Act, a court must find by clear and convincing evidence that the respondent's "possession of a firearm *poses* a serious threat of harm," *id*. § 78B-7-404(5). Under federal law, if a cohabitant abuse protective order is entered, a respondent will also be prohibited from possession of a firearm by 18 U.S.C. section 922(g), whereas the entry of a dating violence protective order should not invoke the same federal prohibition because it does not involve an "intimate partner" as defined by 18 U.S.C. section 921(a)(32).

without the consent of a prosecutor when the violation results in a collision and any person involved in the collision sustains serious bodily injury or is killed. The bill also requires law enforcement officers to note on a citation when a traffic violation results in a collision and any person involved in the collision sustains serious bodily injury or is killed. The bill effectively functions as companion legislation to the Utah Court of Appeals decision in *State v. Sommerville*, 2013 UT App 40, 297 P.3d 665. While it was only a coincidence that *Sommerville* was decided during the same legislative session that H.B. 93 was passed, they address the same issue: potential bars to prosecution for related offenses after a person pleads guilty or forfeits bail on a traffic citation.

Under section 76-1-403, a person who is both prosecuted for and convicted of a traffic violation may not be prosecuted later for crimes or violations that were part of the same criminal episode. For example, if a person is prosecuted and convicted of failing to maintain his lane of travel, section 76-1-403 may bar a subsequent prosecution for driving under the influence or reckless driving that occurred during the same episode. This rule has occasionally motivated traffic offenders to rush court to plead guilty before a prosecuting attorney can file more serious charges based on facts that arise after police issue a citation, such as a toxicology report indicating that the offender was DUI. And a guilty plea in such a case may result in a substantial injustice where the traffic offense involves an accident and the other party is seriously injured or killed.

In *Sommerville*, the Utah Court of Appeals provided a partial solution to this problem by holding that a person who merely pays and forfeits the bail on a traffic citation is not "prosecuted" under section 76-1-403.[24] The person may therefore be charged later by a prosecutor with other traffic offenses that occurred in the same criminal episode, such as DUI.[25] H.B. 93 is a corollary legislative prophylactic. By prohibiting a guilty plea without prosecutorial consent on traffic citations that involve serious injury or death, the bill gives police and prosecutors time to fully investigate and properly charge traffic and criminal offenses arising out of a traffic accident.

**Wireless Telephone Use Restrictions**
**House Bill 103**

If you are the parent of a driving teenager, you may already know more than you would like to about this bill. For everyone else, House Bill 103 is the new law that makes it illegal for a person younger than 18 to make cell phone calls while driving, except in limited situations.

H.B. 103 adds section 41-8-4 to the Motor Vehicles Code and makes it an infraction for persons younger than 18 to use a wireless telephone to

[24] 2013 UT App 40, ¶ 16.
[25] *Id.*

communicate with another person while operating a motor vehicle on a highway unless one of the listed affirmative defenses applies. The affirmative defenses allow for the use of a cell phone:

- during a medical emergency,
- when reporting a safety hazard or requesting assistance with a hazard
- when reporting a criminal activity or requesting assistance relating to such activity, or
- when communicating with a parent or legal guardian.

The penalties for violations of this law are minor. The statute establishes a maximum fine of $25 for each offense and states that a violation of this section is not a reportable violation, nor is it an offense which can result in points being added to a person's driving record. Although the language of this statute specifically makes it illegal to "communicate" with another person, 16- or 17-year-olds who text or email while driving would still be subject to class C or B misdemeanor penalties under the preexisting texting statute.

The bill undoubtedly has public safety value in that it deters young drivers from being distracted by cell phone conversations while they are still not 100% sure which pedal is the clutch and which is the brake. However, from a civil liberties standpoint, it remains to be seen whether this law will become a new convenient way for law enforcement to stop young drivers and attempt to search their vehicles.

The fiscal note points out that, thanks to this bill, an estimated 2,765 transgressing high schoolers will be annually contributing $34 on average, for a total of $94,000 to State and local governments.

**Serious Youth Offender Amendments**
**House Bill 105**

House Bill 105 amends the serious youth offender procedures in section 78A-6-702 to give juvenile court judges greater discretion in determining which youth offenders should be transferred to district court and tried as adults. Before H.B. 105 was passed, the Juvenile Court Act required judges to bind a juvenile over to district court when he was charged with any of the enumerated violent felonies unless the judge found the existence of three retention factors: (1) the juvenile had not been previously adjudicated delinquent for a felony offense involving a weapon; (2) the juvenile had a lesser degree of culpability than his codefendant (if there were codefendants); and (3) the juvenile did not commit the offense in a violent, aggressive, or premeditated manner. This procedure was created in 1995 to address growing concern for violent offenses committed by juveniles and was meant to apply to the worst youth offenders who had exhausted the resources of the juvenile court system. By trying these offenders as adults,

the State could house them in adult correctional facilities and hold them in those facilities for longer periods than allowed in the juvenile system.[26]

Over time, prosecutors, judges, and defense attorneys discovered that the serious youth offender procedures corralled too many juveniles into an adult system and that the adult system was poorly equipped to manage juvenile offenders. And because juvenile court judges had no discretion to retain jurisdiction if the retention factors were not met, juveniles with no criminal history and who had never been provided services by the juvenile court were being transferred to district court and tried as adults merely because they had committed one of the enumerated violent felonies. In district court, these juveniles typically received probation with little supervision or rehabilitative programming as compared to what they would have received in the juvenile court system. This in turn caused prosecutors to begin charging some juveniles with lesser felonies not included in the serious youth offender list in order to keep juveniles in the juvenile court system.

H.B. 105 corrects this problem by increasing the discretion of the juvenile court judge in determining which juveniles should be tried in the adult system. Instead of finding all three retention factors, the judge need only make a more amorphous finding that "it would be contrary to the best interests of the minor and to the public to bind the defendant over to the jurisdiction of the district court."[27] The bill gives judges a list of non-binding factors to consider that include (1) the original three retention factors; (2) the number and nature of the juvenile's prior adjudications in juvenile court; and (3) whether public safety is better served by adjudicating the minor in district or juvenile court. Ultimately, the standard is simply a balancing, best-interests test, that gives judges substantial discretion. The burden remains on the juvenile, however, to convince the court by clear and convincing evidence that he should remain in juvenile court.

## DNA Collection and Retention Amendments
## House Bill 170

Until this year, collection of DNA from Utah criminal defendants was limited to those 14 and older who had been convicted of a felony or class A misdemeanor and people who had been booked into jail for a "violent felony." House Bill 170 expanded the list of crimes which require an individual to provide a DNA sample upon booking, before a conviction, to include additional "egregious" crimes.

Previously, DNA collection upon booking was mandated for approximately 51 felonies which were enumerated in section 76-3-203.5 and

[26] *Serious Youth Offender Amendments: Hearing on H.B. 105 before the House Judiciary Committee*, 2013 General Session (February 22, 2013) (statement of Jacey Skinner, Director, Utah Sentencing Commission), available at http://le.utah.gov/~2013/bills/static/HB0105.html.
[27] House Bill 105 lines 57–58.

classified as "violent felonies." H.B. 170 broadened the list beyond violent felonies by adding 26 crimes to the list. The new list includes more serious crimes, such as Aggravated Human Trafficking and Sale or Use of Body Parts, as well as less serious crimes, such as Commercial Obstruction and Violation of Condition of Release After Domestic Violence Arrest. The 26 new charges are enumerated in section 53-10-403(2)(C)(ii – xxvii).

Less than a month after H.B. 170 took effect, the U.S. Supreme Court decided *Maryland v. King,* which dealt with collection of DNA upon arrest.[28] It is unclear whether the case will have a direct impact on the Utah statute. DNA collection under the previous statute did not appear to conflict with *King*. However, some of the pre-conviction DNA collection for new crimes added under H.B. 170 could run afoul of the Fourth Amendment. In *King*, the defendant was arrested for first- and second-degree assault for menacing a group of people with a shotgun. The jail collected a cheek swab DNA sample from King which matched a previous sample from a years-old rape case. The Court concluded in a 5-4 decision that when police make an arrest for a "serious offense" which is supported by probable cause, a cheek swab of the arrestee's DNA is a legitimate booking procedure and is reasonable under the Fourth Amendment.[29]

The predominant ambiguity in *King* is what constitutes a "serious offense" for the purposes of pre-conviction DNA collection. Presumably, the enumerated list of violent felonies in the previous statute would all qualify as serious offenses, as would the more serious of the newly added crimes. However, *King* leaves the door open to attack DNA collection for crimes which appear less serious and do not as strongly support the reasonableness of systemized, suspicionless searches. For example, the above-mentioned offenses of Commercial Obstruction and Violation of Condition of Release after Domestic Violence Arrest, as well as a Repeat Violation of a Protective Order, may not rise to the level of a "serious offense" as contemplated in *King*. Therefore, it remains an open question whether pre-conviction DNA collection is constitutionally permissible in these situations.

**Assault Amendments**
**Senate Bill 131**

Senate Bill 131 increases the penalties found in section 76-5-102.4 for assaulting a peace office or a military service member in uniform.[30] In most cases under the new bill, an assault against a peace officer will be one degree higher than the same assault against a citizen.

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[28] 133 S. Ct. 1958 (2013).
[29] *Id.* at 1980.
[30] The crime and its penalties apply equally to both peace officers acting within the scope of their duties and military service members who are in uniform. But for ease of description, this summary will refer only to peace officers.

Before this bill, a simple assault against a peace officer was a class A misdemeanor and a second conviction for that crime was a third degree felony. The penalty did not increase, however, for greater injury or the use of a weapon. In such cases, an assault against a peace officer was punished the same as an assault against any citizen.

S.B. 131 elevates to a third degree felony an assault against a peace officer that results in substantial bodily injury. An assault against a peace officer that involves a dangerous weapon or a means of force likely to cause death or serious bodily injury is now a second degree felony. But the penalty increase does not continue for assaults that cause serious bodily injury. In that case, the assault remains a second degree felony, just as for any citizen.

S.B. 131 retains the enhancement for a prior conviction of assault against a police officer, but makes one small clarification. The enhancement only applies to class A or felony violations of section 76-5-102.5. If a defendant pleads guilty to an attempted assault against a police officer as a class B misdemeanor, that conviction does not enhance any subsequent convictions.

**Restitution Amendments**
**Senate Bill 161**

Senate Bill 161 sets forth additional procedures and requirements for defendants in criminal cases where restitution is or may be at issue. The purpose of the bill is to assist crime victims to collect restitution. However, the bill also creates additional criminal penalties for defendants and imposes new obligations on criminal defense attorneys.

S.B. 161 expands the role and duties of the Office of State Debt Collection. Before this bill, the Office was only permitted to collect on debts owed to the State of Utah. The Office may now collect "any restitution to victims referred to the office by a court."[31] The Office may also now intervene as a real party in interest in any criminal case where restitution is ordered.[32] The practical implications are that the office may pursue motions for contempt and garnishment actions in criminal cases. The office may also seize a criminal defendant's tax refund and apply the refund toward a restitution order.[33]

To assist the Office of State Debt Collection, section 77-38a-203 *et seq.,* as amended by S.B. 161, now requires all criminal defendants to file a complete financial declaration in any case "where the prosecutor has indicated that restitution may be ordered."[34] Thus, before a defendant is found guilty of any crime or any restitution order is entered, the defendant may now be required to disclose to the prosecutor and the court their private

[31] Utah Code § 63A-3-502.
[32] *Id*.
[33] *Id.* § 59-10-529.
[34] *Id.*§ 77-38a-204.

financial information, including ownership of any real property, vehicles, jewelry, other personal property, bank accounts, retirement accounts, intellectual property, and debts.[35] The financial declaration must be filed before sentencing, but may be requested earlier by the court.[36]

There are a number of concerns with the financial declaration requirement, including the ethical and legal concerns that may arise if a defendant is required to provide the prosecution with private information that could potentially be used against him in later proceedings. Criminal defendants may also be concerned with filing private financial information in a public court record. Financial declarations have long been required in domestic relations cases. However, due to the high volume of private information involved in domestic relations cases, all domestic relations files are now private and not accessible to the public absent court order.[37]

Most important for practitioners, S.B. 161 creates a new criminal offense. Pursuant to section 77-38a-203 *et seq.,* as amended by S.B. 161, "a false statement made in the financial declaration form is punishable as a class B misdemeanor under Section §76-8-504 (Written False Statement)."[38] Defense attorneys will need to advise their clients of the potential criminal penalties related to the financial declaration. In addition, defense attorneys may need to spend additional time reviewing financial documentation and verifying financial information.

[35] *Id*.
[36] *Id*.
[37] Rule 4-202.02(4).
[38] Utah Code § 77-38a-204.

# THOUGHTS FROM THE HOLDING CELL

DENISE M. PORTER[1]

For any practitioner entering the world of criminal defense either as a private or public defender, the task can be daunting. There is much to learn and precious little time to do so prior to standing at the lectern asking your first judge to impose a probationary sentence. Please find below a list of hints and tips for the budding criminal defense practitioner. While the list is geared toward a newer attorney in the field, more well-seasoned practitioners may also find an item or two helpful or at least a small refresher[2].

1. Offer every client a copy of his redacted discovery materials at your first available opportunity. Providing a full and complete copy of discovery materials to your client as soon after assignment or retention shows an excellent level of preparedness and will give you and the client the best possible chance to have a productive discussion as to how to move his case forward.
2. When first meeting your client, ask him if he has any other open cases or active probations. Explain to the client that any conviction in this new matter may be a probation violation and what a probation violation means. Try to wrap that violation into any negotiation you may do for the client. Verify the client's responses with an XChange search through www.utcourts.gov.
3. It is not rude or inappropriate to ask your client if they have had any serious medical or mental health issues. This information may materially alter the way you proceed in the case. Reliably document any of these medical or mental health issues for the court prior to sentencing if you are asking the court to take them into account. Have HIPAA-compliant releases of information ready for client signature either at court or at initial consultation to speed records production.
4. Many, if not most, clients have a lot of fear surrounding their participation in the criminal justice process. Help them manage that fear by asking them early on to articulate their end goal for their

[1] Salt Lake Legal Defender Association

[2] Many thanks to all of my colleagues, both public and private, who helped assemble this list and helped process the ideas contained here. Your help was invaluable! This list is based on all of our personal experiences in our criminal defense practices and the suggestions provided are given only as thoughts to consider as everyone develops their own style.

case. One client may not care about a felony conviction but wants to avoid prison at all costs while another's life is undone completely if they lose their driver's license. Defining the client's end goal early helps keep the client focused throughout the case and gives you valuable information as to how you can best help each client.

5. Answer or return client phone calls whenever practicable. It has been stated and restated hundreds of times - answering client concerns quickly and thoroughly maintains good client relationships and may ultimately lower the number of times the client actually calls because his questions have already been answered. Additionally, answering questions from client's family members can also be very helpful providing no privileged information is disclosed.
6. Explain the names of the court hearings and their attendant procedures to the client before they step to the podium. As practitioners, we know arraignments are not scary and that our client is not likely to be hauled off in handcuffs, but our client may not.
7. Whenever possible, seek a stipulation from opposing counsel. Even the most mundane of matters gets handled more quickly by the court when a stipulation is attached.
8. You will have tremendously difficult clients. The client may be just painfully difficult or they could be under the influence of drugs/alcohol or they could need the benefit of drugs (properly prescribed, of course). Knowing which one of the above applies will help you manage the client and his case without pulling your hair out in the process.
9. Clients with intellectual disabilities do not "look" a certain way or have specific physical characteristics. Many individuals with traumatic brain injuries or mental retardation[3] look perfectly normal and work very hard to keep up that façade. Failure to have your client properly tested and assessed can mean setting up the client for failure with probationary terms they cannot possible meet due to their disability. Talk to client family members and secure records to help make this assessment. School records are particularly helpful in this regard. If you are concerned or even just unsure of your client's

[3] The term 'intellectual disability' is now the preferred term when describing low intellectual functioning and is generally replacing the term 'mental retardation.' For further information, please see the American Association on Intellectual and Developmental Disabilities website at www.aaidd.org.

abilities, ask about and document traumatic brain injuries and/or have your client's IQ tested.

10. If at all possible, do not allow your client to enter a change of plea or request a sentence of incarceration at the first court hearing. A brief continuance, even just 48 hours, is sufficient to make sure the client is making a knowing and voluntary choice they can live with and will likely help avoid a panicked call from the client later when they realize they have made a rash decision and wish to change their mind.
11. Keep your word to your client. If you tell a client you will see them at the jail by a certain date, do it. If something unavoidable happens and that word is broken, acknowledge the failure and apologize. Also, explain to your client when your court schedule is a mess and they will likely have a long morning waiting for you. Knowing you will be waiting is always better than wondering why your attorney has not yet arrived.
12. In a drug case, or any case where you know your client to have a substance abuse issue, remind him there are only two options in criminal court – sobriety or incarceration. Explain to them if they continue to use, they will eventually get caught and they will be taken into custody. Relapse may be a part of recovery, but it is not often part of a successful probation.
13. Prior to any trial and as soon after the alleged date of offense, visit the alleged crime scene if practicable. Take your own photographs and video your visit. Your ability to cross examine anyone testifying about the scene or photographs of the scene will be infinitely improved.
14. Never give your client permission to be absent from court or release the client from court early without the court's prior permission. The one time you do this, it will surely backfire.
15. When reviewing a change of plea form with your client, make sure they understand and accept the factual basis for the offense you have included in the plea form. Remind the client that for now and all eternity, they have admitted and accepted responsibility for what you wrote down. This simple step helps a client accept responsibility in their pre-sentence report, and lowers the numbers of requests to withdraw pleas. It also minimizes the risk of the cringe-worthy plea-gone-wrong at the lectern.

16. Prepare judges and prosecutors for big issues prior to stepping to the lectern. A quick conference in chambers or at the bench roadmaps your process on sensitive subjects and keeps all of your hard work moving along smoothly.
17. It is acceptable and sometimes even advisable to speak to complaining witnesses or family members who have suffered terrible losses. It is acceptable to express to them your condolences for their loss as long as those condolences are genuine. That conversation is difficult to have – those individuals may not want to hear from you, but if they do, sometimes everyone gets a little closer to a middle ground. Make sure to secure client permission before engaging in that conversation. If financial resources allow, utilization of a defense initiated victim outreach (DIVO) specialist is also a great alternative for this type of sensitive communication.
18. Outcomes differ depending on the court, the prosecutor, the AP&P agent and sometimes, the time of day. Know the law, know your judge, know your prosecutor and give your client the most honest, best idea you have of what to expect without ever guaranteeing results. Additionally, please try not to overpromise. Telling someone what they want to hear is almost always a disservice to the client, to you, or to anyone who takes over the case after you and has to deal with unrealistic expectations.
19. This job comes with tough days and even tougher results. Try not to internalize them.
20. When in doubt, consult with fellow practitioners. Ask for help if you are in the weeds! The lines waiting to get to the podium are long these days, bounce something off someone if you would like some feedback. Process the issue with a friend; discuss it with your spouse, mom, dad or favorite canine. In a difficult world with difficult cases, we all need to do our best to keep a centered perspective.

# MEL WILSON (1943-2012): PROSECUTOR AND CRIME VICTIM RIGHTS ADVOCATE

BY HONORABLE C. DANE NOLAN[1]

Mel Wilson, a long-time Davis County Attorney and staunch crime victim rights pioneer, died of pancreatic cancer on October 19, 2012. Mel was admitted to the Utah State Bar in 1971 and, following a few years in private practice, devoted the rest of his professional life to serving the citizens of his community. After stints as the Clearfield City Attorney and a Deputy Davis County Attorney, he was elected as *the* Davis County Attorney in 1986, a position he held until his retirement in 2006. The voters of Davis County re-elected him four times. In 2006 Governor Jon Huntsman appointed Mel to be the Director of the Utah Office of Crime Victims Reparations (since renamed the Utah Office of Victims of Crime). He served in that capacity until his death.

As a prosecutor Mel saw first-hand the trauma and heartache suffered by victims of crime, particularly violent crime. He understood what victims were going through and had real empathy for them. He was one of the first Utahns to champion the idea that victims are entitled to rights within the criminal justice system and deserve care and protection. In 1994 he helped formulate and draft crime victims rights legislation and successfully advocated that such laws be enacted by the Utah Legislature. The Utah Constitution now contains a crime victims Bill of Rights.

Mel was very dedicated to protecting children and was the first county attorney in Utah to attach and directly manage a Children's Justice Center through a prosecution office. In the late 1990s he helped establish a system where victims, mostly women, who needed protection from abusers could seek free legal representation from local attorneys. That program lives on today through the Davis County Safe Harbor Crisis Center. Safe Harbor advocates help women draft petitions and file for protective orders and currently there are over 40 volunteer attorneys who donate their time and expertise representing these victims in court. Over one thousand domestic violence victims have received help since the program's inception.

During his years as the Director of the Office of Victims of Crime Mel worked closely with Governors Huntsman and Herbert and Utah legislators (including his son Rep. Brad Wilson) to see that the interests of victims were protected. In August 2012 the Office presented him with the Melvin C. Wilson Lifetime Achievement Award for his service to crime victims.

Mel was a highly skilled and dedicated attorney and prosecutor. He

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1 Presiding Judge, Utah Third Juvenile District Court

was a gentleman at all times and was scrupulous in his adherence to his ethical obligations and the rules of civility and professionalism. Judges, attorneys, witnesses, jurors, and his staff loved his kind and avuncular manner. He encouraged and supported his young prosecutors and inspired them to become better advocates. His reputation among Utah's defense attorneys was peerless; they considered him to be extremely trustworthy and a man of his word. There was no need for a plea deal to be put in writing because Mel's opponents knew they could take what he said to the bank. They appreciated his office's open-file policy. Mel understood very well the prosecutor's role in the criminal justice system and had compassion for everyone involved in the court process, including defendants; he was always willing to listen to the accused's side of a case. Mel knew it was his job to aggressively represent the interests of the state but also understood that this did not mean, necessarily, every case needed to result in a conviction. His duty was to do justice.

Mel cared more about people than politics; there were times when he did the right thing even when it was not politically expedient for him.

Mel Wilson was born on November 14, 1943 in Salt Lake City, the fifth of seven children, to Henry Bytheway Wilson, a commercial painter and farmer, and Wynona Curtis Wilson, a homemaker. All of his siblings survive him. He is predeceased by both his mother and father, who were healthy and active into their 90s.

Mel grew up in Clearfield and graduated from Davis High School. In 1964 he married Gay Gunnel and together they had five children. He earned a Political Science degree from the University of Utah in 1967 and his law degree from the University of Utah College of Law in 1971. He and Gay later divorced.

While working as a deputy county attorney Mel met Suzy Spooner who worked in the juvenile court. They married in 1979. Suzy, who survives him, had a long career with the Department of Corrections as an probation/parole officer. Suzy, who is beautiful, and Mel, who was only somewhat handsome, adored and respected one another and supported each other's career. Mel adopted Suzy's two daughters and is survived by his seven children, Brooke, Brad, Kim, Holly, Heidi, Kate, and Clark. Brooke currently works for the South Salt Lake Police Department as a crime victims advocate. Kim is a former juvenile probation officer with the Utah Third District Juvenile Court. During the summer of 2012, Brooke threw her parents a party during which Mel and Suzy renewed their marital vows.

Mel was a loving husband, father and grandfather and was active in his church.

Mel had an easy smile and was friendly, humble, wry, patriotic, kind, and confident. He liked to fish, hike, and golf and to be outdoors and loved vacationing in Maui, Hawaii with Suzy. He enjoyed his family tradition, started by is parents, of going fishing most summers near Yellowstone National Park. He rooted for the Denver Broncos.

On the Wasatch Front it is unusual for an elected prosecutor to

actually pursue cases in the courtroom. Mel did so with great vigor; he enjoyed handling cases himself and going to court, and was particularly effective with juries. He had the rare ability to connect with jurors and to communicate the essence of a case to them. They responded to his common sense and passionate, yet polite, approach.

Mel personally prosecuted Thomas Randolph who Mel believed had murdered his wife (Becky Randolph) and tried to make it look like a suicide. It was a death penalty case. The jury convicted Mr. Randolph of witness tampering but not homicide. The jury's verdict taught Mel the valuable lesson that when seeking the death penalty a prosecutor needs an exceedingly strong case.

Mel also prosecuted Mark Ott for killing a 6-year old girl, Lacey Lawrence, and seriously wounding her father and his paramour. Lacey was killed when Ott set fire to the home where the attacks took place. Mel put his heart and sole into the prosecution. While the case was ongoing he would often look at, and was haunted by, a crime scene photo of Lacey's burned body.

Mel also prosecuted Dr. Robert Weitzel for allegedly killing several elderly hospital patients by over medicating them. Mel was not afraid to file a tough case and was willing to take on a powerful doctor who he believed had overstepped the law's bounds. The Weitzel trial lasted six weeks, the longest criminal trial in Davis County history. The case was tried before Judge Thomas L. Kay by Mel and Drs. Weitzel's counsel Peter Stirba. It was a hotly contested matter and resulted in a mixed verdict. Judge Kay later vacated the conviction. Peter found Mel to be a gentleman and completely honest and professional. It is easy for attorneys after a difficult and emotional case to harbor ill feelings towards opposing counsel. This did not happen to Mel or Peter. A few years after the case concluded, when Mel and his office were sued in an unrelated matter, Mel hired Peter to represent him. Peter considered it a high compliment and a testament to Mel's good character.

Perhaps Mel's professional life was shaped by his experience as a young man when he became the victim of an armed robbery. While in law school Mel worked part-time as a store manager at Stimsons Market, a drive through gas station/convenience store in Ogden. With children and a wife at home, Mel was working one night when a man came into the store and robbed him and took him hostage. Mel was physically taken from Stimsons and held against his will for several hours before he talked the perpetrator into letting him go. Mel was very scared and truly believed he was going to be killed. It was a harrowing, traumatic experience which Mel never forgot.

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