Wyoming Dependency Docket 2013

By Jennifer Johnigan, Wyoming Guardian *ad Litem* Program Extern, Summer 2013

I. DELINQUENCY OF A MINOR

Anthony Brett Haynes v. State of Wyoming, 2012 WY 151, 288 P.3d 1225 (Wyo. 2012).

"**THE RECORD CLEARLY REFLECTS THAT APPELLANT WAS ADJUDGED DELINQUENT, THEN CRIMINALLY PROSECUTED AND PUNISHED FOR THE SAME OFFENSE. THE DOUBLE JEOPARDY PROVISIONS OF OUR STATE AND FEDERAL CONSTITUTIONS PROVIDE A CLEAR AND UNEQUIVOCAL RULE OF LAW PROHIBITING THAT SUBSEQUENT CRIMINAL PROSECUTION AND PUNISHMENT, AND THIS RULE OF LAW WAS CLEARLY AND OBVIOUSLY TRANSGRESSED. THE PROHIBITED CRIMINAL CONVICTION AND PUNISHMENT ADVERSELY AFFECT APPELLANT'S SUBSTANTIAL RIGHTS AND RESULT IN MATERIAL PREJUDICE TO HIM."** *Id.* at 1228.

When Mr. Haynes was 16 years old, he was charged as an adult for first degree sexual abuse of a minor and second degree sexual abuse of a minor on May 13, 2009. The court denied the motion to transfer to juvenile court. The district court arraigned him on October 13, 2009, and he pled guilty to second degree sexual abuse of a minor and the State dismissed the charge of first degree sexual abuse of a minor. The district court deferred acceptance of the guilty plea and delayed sentencing to accommodate Mr. Haynes participation in a program at the Wyoming Boys' School. On March 23, 2010, a delinquency petition was filed against Mr. Haynes in juvenile court alleging the same act which brought about the second degree sexual abuse of a minor charge in criminal court. On April 12, 2010, Mr. Haynes admitted the allegations of the petition, and he was adjudicated as a delinquent child in juvenile court and was ordered to remain in the custody of the Wyoming Boys' School. On June 1, 2010, Mr. Haynes guilty plea in the criminal case against him was accepted by the district court, and he was sentenced to ten to fifteen years incarceration which was suspended in lieu of eight years of supervised probation.

On November 22, 2011, Mr. Haynes filed a petition for post-conviction relief which alleged that there was a violation of the constitutional prohibition against double jeopardy. Both the State and Mr. Haynes agreed that in juvenile proceedings, double jeopardy protections apply, both parties citing the U.S. Supreme Court case *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975). The Wyoming Supreme Court found that jeopardy attached to the date that Haynes was adjudicated delinquent, therefore, any subsequent criminal prosecution and punishment would be precluded for the same offense. The Court cited *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978), a 1978 Idaho case which stated "[o]nce a juvenile adjudication is made, double jeopardy attaches to preclude adult criminal prosecution. *Wolf* at 1014. The Court, citing several United States Court of Appeals cases, stated that jeopardy attaches when the court accepts a guilty plea, not when the defendant pleads guilty. In this case the district court did not

accept Mr. Hayne's guilty plea until after the adjudication of delinquency. Therefore, Mr. Hayne's guilty plea did not preclude the juvenile proceedings since the district court did not accept his plea. However, the adjudication precluded any criminal conviction and punishment for the same offense at issue. Therefore, the Wyoming Supreme Court reversed Mr. Haynes conviction.

Wyatt L. Bear Cloud v. The State of Wyoming, 2013 WY 18, 294 P.3d 36 (Wyo. 2013).

"ON REMAND, WE HOLD IN LIGHT OF THE *MILLER* DECISION THAT MR. BEAR CLOUD'S SENTENCE FOR HIS FIRST-DEGREE MURDER CONVICTION VIOLATES THE EIGHTH AMENDMENT AND RELATED UNITED STATES SUPREME COURT CASE LAW. CONSEQUENTLY, WE WILL REMAND THE MATTER TO THE DISTRICT COURT WITH INSTRUCTIONS TO RESENTENCE MR. BEAR CLOUD ON THE FIRST-DEGREE MURDER CONVICTION SO AS TO CONFORM TO EIGHTH AMENDMENT JURISPRUDENCE AND THIS OPINION." *Id.* at 39.

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"ACCORDINGLY, WE HOLD THAT WYOMING STATUTES §§ 6-10-301(c)[1] AND 7-13-402(a)[2] ARE UNCONSTITUTIONAL AS APPLIED TO JUVENILES WHO HAVE BEEN SENTENCED TO LIFE IMPRISONMENT ACCORDING TO LAW UNDER WYOMING STATUTE § 6-2-101(b)[3]. … THESE STATUTES PREVENT A JUVENILE WHO HAS BEEN SENTENCED TO LIFE IMPRISONMENT FOR FIRST-DEGREE MURDER FROM HAVING A MEANINGFUL OPPORTUNITY FOR PAROLE IN VIOLATION OF THE EIGHTH AMENDMENT. THESE STATUTES ALSO FAIL TO PROVIDE A SENTENCING COURT THE DISCRETION TO DETERMINE WHETHER A JUVENILE HOMICIDE OFFENDER SHOULD BE ELIGIBLE FOR PAROLE AT SOME POINT IN THE FUTURE, AS UNITED STATES SUPREME COURT CASE LAW REQUIRES." *Id.* at 46.

Mr. Bear Cloud, at the age of 16, entered a home with Mr. Sen who was 15 years old, and Mr. Poitra, Jr. who was 18 years old, in order to commit a burglary. During the burglary, Mr. Sen shot and killed one of the residents of the home with a handgun that Mr. Bear Cloud and Mr. Sen stole out of a truck they had broken into.

Mr. Bear Cloud entered guilty pleas to the charges of aggravated burglary, first degree murder, and conspiracy to commit aggravated burglary. Mr. Bear Cloud was convicted for murder in the first degree (felony murder), in violation of Wyo. Stat. Ann. § 6-2-101(a)[4]. The Court held in the first appeal in this matter that his life imprisonment sentence without parole mandated under Wyo. Stat. Ann. § 6-2-101(b)[3] for first-degree murder was constitutional under the United States Constitution's Eighth Amendment. Mr. Bear Cloud contended that the mandatory life sentence was cruel and unusual punishment considering his position as a juvenile at the time of the crime. The United States Supreme Court vacated the judgment and remanded the case in light of *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). In *Miller*, the United States Supreme Court decided in 2012 that it was a violation of the Eighth

Amendment of the United States Constitution to have mandatory sentences of life without parole for juveniles. *Miller* requires every juvenile who is convicted of first-degree murder to have an individualized sentencing hearing in which the court must consider "the individual, the factors of youth, and the nature of the homicide" when determining whether a sentence that does not include the possibility of parole would be appropriate.

To conform with *Miller*, the Wyoming Supreme Court decided Mr. Bear Cloud's sentence violated the Eighth Amendment and United States Supreme Court case law and, therefore, vacated his sentence for the conviction of first-degree murder and remanded his case to the district court for a new sentencing hearing.

Dharminder Vir Sen v. The State of Wyoming, 2013 WY 47 (Wyo. 2013).

"CONSISTENT WITH OUR DECISION IN *BEAR CLOUD II*, WE FIND THAT SEN'S SENTENCE WAS IMPOSED PURSUANT TO A STATUTORY SENTENCING SCHEME THAT WAS UNCONSTITUTIONAL AS APPLIED TO JUVENILES BECAUSE IT EFFECTIVELY MANDATED A SENTENCE OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE FOR JUVENILES CONVICTED OF FIRST-DEGREE MURDER."

…

"SEN IS ENTITLED TO A SENTENCING DECISION THAT IS INFORMED BY THE SUPREME COURT'S HOLDING IN *MILLER* AND ITS DISCUSSION OF THE DISTINCTIVE CHARACTERISTICS OF YOUTH. WHILE A SENTENCE OF LIFE WITHOUT PAROLE FOR A JUVENILE CONVICTED OF FIRST-DEGREE MURDER REMAINS A CONSTITUTIONALLY PERMISSIBLE SENTENCE UNDER *MILLER*, THE SUPREME COURT STATED THAT SUCH SENTENCES SHOULD BE UNCOMMON IN LIGHT OF THE SIGNIFICANT DIFFERENCES BETWEEN JUVENILES AND ADULTS[.]"

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"WE FIND NO ERROR IMPACTING SEN'S CONVICTIONS AND, ACCORDINGLY, WE AFFIRM THOSE CONVICTIONS. HOWEVER, SEN'S SENTENCE OF LIFE WITHOUT PAROLE WAS IMPOSED UNDER A SENTENCING SCHEME THAT PRECLUDED THE POSSIBILITY OF PAROLE. AS A RESULT, SEN'S SENTENCE VIOLATED THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND RELEVANT SUPREME COURT PRECEDENT. ACCORDINGLY, WE VACATE SEN'S SENTENCE AND REMAND TO THE DISTRICT COURT FOR RESENTENCING ON ALL COUNTS."

Mr. Sen, at the age of 15, along with Mr. Bear Cloud, 16, and Mr. Poitra, Jr., 18, on August 26, 2009, entered a home in order to commit a burglary. During the burglary, Mr. Sen shot and killed one of the residents of the home with a handgun that Mr. Sen and Mr. Bear Cloud stole out of a truck they had broken into.

Mr. Sen was convicted of first-degree felony murder under Wyo. Stat. Ann. § 6-2-101(a)[4], aggravated burglary under Wyo. Stat. Ann. §§ 6-3-301(a) and (c)(i), and conspiracy to

commit aggravated burglary under Wyo. Stat. Ann. §§ 6-1-303(a) and 6-3-301(a) and (c)(i). He challenged the convictions on several grounds including the grounds that his mandatory sentence for first-degree felony murder of life without the possibility of parole was unconstitutional under the 2012 United States Supreme Court case *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) and the Wyoming Supreme Court case *Bear Cloud v. State,* 2013 WY 18, 294 P.3d 36 (Wyo. 2013) (*Bear Cloud II).* These cases held that a sentencing scheme which mandated a sentence for life imprisonment without a possibility of parole constituted cruel and unusual punishment for juvenile offenders and violated the Eighth Amendment of the United States Constitution.

Mr. Sen presented six issues to the Wyoming Supreme Court. The first issue was whether the court abused its discretion when it did not grant his motion to transfer his case to the juvenile court. Mr. Sen claimed transfer weighed in his favor because of his lack of maturity and opportunity for rehabilitation. Under Wyo. Stat. Ann. § 14-6-203(f)(iv)[5], if a minor defendant has been charged with a violent felony and has reached the age of fourteen, their case may take place in either juvenile or district court. If in district court, a transfer hearing may be held to determine if the case should be transferred to the juvenile court. There are several factors set forth in Wyo. Stat. Ann. § 14-6-237(b)[6] that a judge may weigh when deciding whether a transfer would be appropriate. These factors include: the seriousness of the offense as it relates to the community and whether community protection is needed; whether the offense alleged was aggressive, violent, premeditated or willful; whether the offense was against persons or property; the possibility of trial and disposition in one court where participants in the offense alleged are adults; the sophistication and maturity of the minor charged; the minor's previous history and record; and the prospects for rehabilitation and protection of the public.

The district court determined that the factors weighed against a transfer to the juvenile court because of the nature of the crime which was aggressive, violent, premeditated and willful and resulted in a death, the need for community protection, and Mr. Sen's prior record and contacts with law enforcement. These factors, according to the court, outweighed the factors of possibilities for rehabilitation and consideration of Mr. Sen's maturity. Therefore, the district court denied the motion for transfer to the juvenile court. The Court found the district court had made no serious mistakes when it weighed the factors and decided not to transfer the case to juvenile court.

The second issue Mr. Sen presented was whether the trial court erred when it denied Mr. Sen's motion to suppress his confession because he argued the confession was the product of coercion. Further, Mr. Sen did not knowingly and intelligently waive his right to an attorney. When statements by juveniles are made, the Court has recognized that great care must be taken to make sure the statement was voluntary and not the product of immaturity, ignorance, or coercion based on a totality of the circumstances analysis. The Court found that the totality of the circumstances indicated that Mr. Sen waived of his rights voluntarily and "was the result of free and deliberate choice." Mr. Sen had previous contacts with law enforcement, and during his interrogation he acknowledged he was read his Miranda rights and indicated he understood those rights and consequences that may result from the waiver of those rights.

The third issue presented was whether the trial court erred when it admitted the gunshot residue kit at trial, knowing it was obtained without a warrant during an interrogation in violation of his Fourth amendment constitutional right against unreasonable search and seizure. The district court concluded the test was a lawful warrantless search because it was incident to the arrest, and the Court agreed.

The fourth issue Mr. Sen brought forth was whether the trial court violated Mr. Sen's Sixth Amendment right to present a defense when it excluded the expert testimony of Dr. Banich, as her testimony related to the specific intent element of aggravated burglary. The State claimed that the testimony was irrelevant, because the expert was to testify as part of a "diminished capacity" defense, a defense not recognized in Wyoming. Mr. Sen contends the testimony was meant to show that a fifteen year old does not have the mental capability to form specific intent. The court determined the defense was inadmissible. The Wyoming Supreme Court agreed the testimony was not relevant because a defense based on incapacity based on age is not applied in criminal proceedings.

The fifth issue was whether Mr. Sen was denied the effective assistance of counsel because his attorney failed to investigate and raise significant issues during sentencing. In order to show ineffective assistance of counsel, Mr. Sen needed to show under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) that performance was deficient and his defense was prejudiced because of it. The Court found that Mr. Sen failed to establish his counsel as ineffective.

The final issue was whether the statutorily imposed mandatory life imprisonment without the possibility of parole sentence for a juvenile offender violated Mr. Sen's constitutional protection under the Wyoming and United States constitutions of protection against cruel and unusual punishment. The Court found that consistent with *Bear Cloud II*, Sen's sentence was imposed by an unconstitutional statutory scheme as it applied to juveniles. Because the mandatory sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment and recent case law, the Court ordered Mr. Sen's sentences to be vacated and remanded to the district court.

In the Interest of SWM v. The State of Wyoming, 2013 WY 49, 299 P.3d 673(Wyo. 2013).

"**ACCORDINGLY, WE HOLD THAT THE STATUTORY STANDARDS FOR DETERMINING THE COMPETENCY OF A DEFENDANT TO STAND TRIAL, SET FORTH IN WYO. STAT. ANN. §§ 7-11-302[7] and -303[8], ARE ALSO THE STANDARDS TO USE IN DETERMINING THE COMPETENCY OF A CHILD TO PARTICIPATE IN ADJUDICATION PROCEEDINGS IN JUVENILE COURT, BUT THOSE STANDARDS MUST BE APPLIED IN LIGHT OF JUVENILE NORMS RATHER THAN ADULT NORMS.**

ALTHOUGH THE JUVENILE COURT ORDERED A COMPETENCY EVALUATION AND RULED THAT SWM WAS COMPETENT TO PROCEED, IT DID

NOT EVALUATE SWM UNDER THE CORRECT STANDARDS. THE JUVENILE COURT EXPLICITLY DECLINED TO CONSIDER THOSE STANDARDS SET FORTH IN WYO. STAT. ANN. §§ 7-11-302[7] AND -303[8]. BECAUSE SWM WAS EVALUATED USING INCORRECT STANDARDS, HIS DUE PROCESS RIGHT NOT TO PROCEED UNLESS COMPETENT WAS NOT PROPERLY PROTECTED." *Id.* at 683.

At the age of 12 years old, S.W.M. allegedly committed two delinquent acts of sexual abuse of a minor in the fourth degree in violation of Wyo. Stat. Ann. § 6-2-317(a)(i). The State filed a petition in the juvenile court on December 23, 2011. During S.W.M.'s initial appearance he was advised of his rights guaranteed to him by the United States and Wyoming Constitutions, and that juvenile court and criminal court were different, but if S.W.M. was adjudicated delinquent in the juvenile court, he was subject to significant sanctions.

The juvenile court entered a "denial" of allegations on behalf of S.W.M. Shortly after, court appointed counsel filed a "Motion to Suspend Proceedings for Evaluation under 7-11-303[8] and 14-6-219[9]" on the grounds that S.W.M. lacked understanding of the proceedings and the seriousness of the allegations against him. The motion was based on his age, development, and nature of the charges against him. The juvenile court granted the motion and required a written report of the examination to be filed with "[d]etailed findings[,]… [a]n opinion as to whether the Minor has a mental illness or deficiency, and its probable durations[,]…[a]n opinion as to whether the Minor, as a result of mental illness or deficiency, lacks the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed[,]…[a] recommendation as to whether the Minor should be held in a designated facility for treatment pending determination by the Court of the issue of mental fitness to proceed[,]…[a] recommendation as to whether the Minor, if found by the Court to be mentally fit to proceed, should be detained in a designated facility pending further proceedings." *Id.* at 674.

The filed report noted S.W.M. was in special education classes, he had borderline intellectual functioning, Attention Deficit Hyperactivity Disorder, and deficits in expressive language and language comprehension. The psychologist concluded S.W.M. was competent to proceed to juvenile court under Wyo. Stat. Ann. § 14-6-219[9], but S.W.M. did not have the capacities to proceed under Wyo. Stat. Ann. § 7-11-303[8]. The State filed a "Motion to Strike Portions of Evaluation Beyond the Scope of the Juvenile Justice Act" to strike the portions of the evaluations related to Wyo. Stat. Ann. § 7-11-303[8] as irrelevant. S.W.M. filed a resistance to the motion stating "that failure to perform a proper competency evaluation impacted SWM.'s constitutional due process rights." *Id.* at 675. The juvenile court did not strike the Wyo. Stat. Ann. § 7-11-303[8] portion of the report, but it disregarded the findings and concluded Wyo. Stat. Ann. § 7-11-303[8] only applies to criminal proceedings, not to juvenile proceedings. S.W.M. sought another competency evaluation and a hearing to determine competency. The district court denied the second evaluation and found S.W.M. was competent to proceed. The Court found that the transcript reflected S.W.M. held little understanding regarding his rights and the significance of the charges against him.

S.W.M. contended that the juvenile court did not apply the correct standard when it found him competent, and since the Wyoming Juvenile Justice Act does not set a competency standard in Wyo. Stat. Ann. §§ 14-6-201 *et. seq.*, competency should be evaluated under the Wyoming Criminal Code under Wyo. Stat. Ann. §§ 7-11-301 *et. seq.* The State contended that because actions brought under the Juvenile Justice act are civil, not criminal, the Wyoming Criminal Code is inapplicable, and competency questions in delinquency proceedings are governed by Wyo. Stat. Ann. § 14-6-219[9].

The Wyoming Supreme Court reviewed the case pursuant to a *de novo* standard and decided the applicable standards for determining a minor's competency. The Court pointed to *In re Gault*, 387 U.S. 1, 87 S. Ct.1428, 18 L. Ed. 2d 527 (1967), in which the United States Supreme Court decided that children in juvenile court have due process rights including the right to notice of the charges against them, the right to counsel, the privilege against self-incrimination, and the right to confront witnesses. The Court points out the U.S. Supreme Court did not state in that case or any subsequent case that a juvenile must be found competent in order to be adjudicated delinquent. However, the Court did find that other states have found that a due process right to be found competent apples to juvenile proceedings. The Court determined that a minor who is not competent will not be able to adequately understand the charges against them and recognize their due process rights in order to exercise them. The Court found the juvenile court did make the determination that S.W.M. was competent.

The Court, however, found there was insufficient protection of a juvenile's due process right to not face adjudication unless found competent because of the lack of standards available to the juvenile court in determining competency. The Court found that W.R.Cr.P. 12(c), which incorporates Wyo. Sta. Ann. §§ 7-11-302[7] and 7-11-303[8], is applicable to juvenile proceedings because it is not inconsistent with the Juvenile Justice Act. The Court held that Wyo. Stat. Ann. § § 7-11-302[7] and 7-11-303[8] are applicable in juvenile court adjudication proceedings. The Court also recognized that minors and adults generally have different levels of understanding. The Court held that in applying the statutory standards, they must be applied according to juvenile norms, not adult norms.

The Court concluded the juvenile court found S.W.M. competent, but did not do so under the correct standards, therefore, S.W.M.'s due process right to not proceed through the adjudication proceedings unless found competent was not protected. The Wyoming Supreme Court reversed and remanded the decision of the juvenile court.

JB v. The State of Wyoming, 2013 WY 85 (Wyo. 2013).

"THE PETITIONER, JB, IS A MINOR WHO WAS CHARGED AS AN ADULT WITH NINE FELONIES ARISING FROM A HOME INVASION AND THE RESULTING DEATHS OF TWO INDIVIDUALS. HE WAS FIFTEEN AT THE TIME OF THE CRIMES. PRIOR TO TRIAL, JB FILED A MOTION TO TRANSFER PROCEEDINGS TO JUVENILE COURT. THE DISTRICT COURT DENIED THE MOTION. JB THEN FILED A PETITION FOR WRIT OF REVIEW SEEKING INTERLOCUTORY REVIEW OF THAT DECISION. IN SUPPORT OF HIS PETITION,

HE CLAIMED THAT THE DISTRICT COURT IMPROPERLY PLACED THE BURDEN ON HIM TO ESTABLISH THAT THE CASE SHOULD BE TRANSFERRED TO JUVENILE COURT. WE GRANTED THE PETITION. UPON REVIEW, WE CONCLUDE THAT THE DISTRICT COURT ERRED IN FAILING TO ASSIGN THE BURDEN OF PERSUASION TO THE STATE TO ESTABLISH THAT THE CASE SHOULD NOT BE TRANSFERRED TO JUVENILE COURT. ACCORDINGLY, WE REVERSE AND REMAND FOR FURTHER PROCEEDINGS." *Id.*

The petitioner, JB, who was fifteen years old at the time the alleged crimes took place, was charged with two counts of first degree murder, two counts of conspiracy to commit first degree murder, two counts of aggravated robbery, two counts of conspiracy to commit aggravated robbery, and one count of first degree arson. The charges arose from an event in which the prosecution alleged JB assisted three adults in a robbery and killing of two victims. It was alleged that JB acted as a lookout and messenger, he entered the home, he followed through with an instruction by an adult participating in the event to strike a victim with a dresser drawer, and then he and one of the adults made an attempt to set fire to the home. JB was charged in district court as an adult, and he moved to transfer his case to juvenile court asserting that he did not plan the crimes, and was "coerced into participating by the adults" emphasizing his state as being developmentally challenged and immature. He also claimed that it was likely that he could be rehabilitated by the services available to the juvenile court. When determining whether to grant a motion to transfer, the court is to consider the factors in Wyo. Stat. Ann. § 14-6-237(b)[6]. The district court denied JB's motion stating that JB "has the burden of demonstrating, by a preponderance of the evidence, that this case should be transferred from District Court to Juvenile Court" and JB had failed to do so. *Id.*

On appeal, JB relied on the Wyoming Supreme Court case *Hansen v. State*, 904 P.2d 811 (Wyo. 1995) contending that the district court erred when it assigned the burden of persuasion to JB. In *Hansen,* the Court established that the burden of persuasion is assigned to the State in transfer motions. The State first claimed that JB waived his objection to being assigned the burden of persuasion. The Court found there was no valid waiver made which was made knowingly and voluntarily. The Court also pointed out that the State cited no authority to support the contention that a waiver was allowed. The State's second contention was because the Wyoming statutes have not assigned the burden of persuasion to either party in this situation, it may be assigned judicially or legislatively. The Court states that the Court had already judicially assigned the burden of persuasion in *Hansen*, and "district courts may not disregard that precedent and reassign the burden on a case-by-case basis. " *Id.* The Court reversed the district court's denial of the motion to transfer the case from district court to juvenile court, and remanded the case to the district court to re-weigh the factors in a manner consistent with the Wyoming Supreme Court's opinion.

II. TERMINATION OF PARENTAL RIGHTS

In the Matter of the Termination of Parental Rights to KAT, SAT, and JGS, Minor Children; NLT v. The State of Wyoming, Department of Family Services / *In the Matter of the Termination of Parental Rights to JGS, Minor Child; MDS v. The State of Wyoming, Department of Family Services*, 2012 WY 150, 288 P.3d 1217 (Wyo. 2012).

"DFS PRESENTED CLEAR AND CONVINCING EVIDENCE AT TRIAL TO SUPPORT THE DISTRICT COURT'S DECISION TO TERMINATE NLT'S PARENTAL RIGHTS TO KAT, SAT, AND JGS, PURSUANT TO WYO. STAT. ANN. § 14-2-309(a)(v)[10]. THE EVIDENCE DEMONSTRATED THAT ALL OF THE CHILDREN HAD BEEN IN FOSTER CARE FOR 15 OF THE MOST RECENT 22 MONTHS, AND THAT NLT CONTINUOUSLY PUT HER CHILDREN IN DANGEROUS SITUATIONS, PLACED THE WANTS AND DESIRES OF HER EX-HUSBAND AND BOYFRIENDS AHEAD OF THE WELFARE OF HER CHILDREN, AND CANNOT MEET THE BASIC FINANCIAL AND PARENTAL NEEDS OF THE CHILDREN. THE EVIDENCE ALSO SHOWED THAT NLT WOULD NEVER BE ABLE TO PROVIDE ADEQUATE CARE FOR HER CHILDREN ABSENT EXTRAORDINARY HELP FROM SERVICE PROVIDERS. DFS ALSO PRESENTED CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE DISTRICT COURT'S DECISION TO TERMINATE MDS'S PARENTAL RIGHTS TO JGS, PURSUANT TO WYO. STAT. ANN. § 14-2-309(a)(iv)[10]. MDS IS CURRENTLY SERVING TWO CONSECUTIVE SENTENCES OF NOT LESS THAN 20 YEARS NOR MORE THAN 35 YEARS IN PRISON FOR SEXUALLY ABUSING KAT. MDS CANNOT APPROPRIATELY CARE FOR JGS'S ONGOING PHYSICAL, MENTAL OR EMOTIONAL NEEDS WHILE HE IS IN PRISON AND WILL NOT BE ELIGIBLE FOR PAROLE UNTIL JGS IS IN HIS ADULTHOOD. FURTHER, THE EVIDENCE DEMONSTRATES THAT MDS IS A SEXUAL OFFENDER WHO SUFFERS FROM SUCH MORAL DELINQUENCY THAT HE CANNOT BE CONSIDERED A FIT PARENT. WE AFFIRM BOTH OF THE DISTRICT COURT ORDERS TERMINATING NLT'S AND MDS'S RIGHTS TO KAT, SAT, AND JGS." *Id.* at 1225.

NLT is the mother of four children, three of which, KAT, SAT, and JGS, are at issue here. MDS is the father of JGS. Prior to having JGS and living with MDS, at the age of 17, NLT married a 45 year old convicted sex offender (CRT) who fathered her first three children, KAT, CT, and SAT. In 2007 and 2008, there had been three contacts with NLT and the Department of Family Services (DFS). The first was when NLT decided to report to the Hope Agency the sexual abuse of KAT perpetrated by the child's uncle. DFS was notified, but no action was taken. The second contact was a report of SAT being left outside during the winter in inappropriate dress and the third contact was a report for excessive punishment. DFS offered services including parenting classes for the family which NLT and MDS accepted, and counseling for KAT, which they declined.

In January 2009, NLT admitted to a social service aide and an officer that she had assisted CRT with sexually abusing KAT. When the officer disclosed this information to DFS, the police chief, and the county attorney, the decision was made to take NLT's children into protective custody. On February 3, 2009, a neglect petition was filed against NLT and a shelter care hearing was held where the juvenile court ordered that JGS could be returned to MDS's custody, but KAT and SAT were to remain in DFS custody for foster care placement. During an interview with the Children's Advocacy Project, KAT disclosed that she had been sexually abused by her father, her uncle, and MDS. This prompted MDS's arrest and JGS's placement in protective custody. DFS, pursuant to Wyo. Stat. Ann. § 14-2-309(a)(iii) and (v)[10] filed a petition to terminate NLT's parental rights to KAT, SAT, and JGS, and MDS's parental rights to JGS pursuant to Wyo. Stat. Ann. § 14-2-309(a)(ii), (iv), and (v)[10] on August 31, 2010. In June 2011, the district court terminated NLT's and MDS's parental rights.

NLT and MDS argued on appeal that DFS failed to present the clear and convincing evidence necessary to support the district court's decision to terminate NLT's parental rights to KAT, SAT, and JGS, and MDS's parental rights to JGS. To seek termination of parental rights pursuant to Wyo. Stat. Ann. §14-2-309(a)(iii)[10], DFS needed to "prove by clear and convincing evidence that the children have been abused or neglected by the parent, that DFS has made reasonable efforts to rehabilitate the family, and that the children's health and safety would be seriously jeopardized if returned to the parent." Pursuant to Wyo. Stat. Ann. § 14-2-309(a)(v)[10], DFS must prove by clear and convincing evidence that the children have been in foster care 15 of the most recent 22 months and that the parent is unfit to have custody and control of his or her children. Pursuant to Wyo. Stat. Ann. § 14-2-309(a)(iv)[10], DFS must prove by clear and convincing evidence that the parent is incarcerated due to a felony conviction and that he or she is unfit to have custody and control of the child or children. The Wyoming Supreme Court found that DFS did meet the clear and convincing standard.

With regards to NLT, DFS presented evidence including NLT's decisions to marry and have children and allow visitation and living arrangements with CRT while knowing that he had been convicted of sexually abusing his son from a prior relationship, that he was abusive towards NLT, that CRT was sexually abusing at least one child, and that NLT had participated in the abuse of at least KAT. DFS also noted that the family was receiving services from Early Head Start, but the service providers testified NLT and MDS were not working on the parenting skills. NLT also failed to find an adequate home and full-time employment. The Court stated NTL "knowingly and routinely put the children into harm's way at the behest of others." *Id.* at 1223. With regards to MDS, the Court found that MDS's abuse of his child's half-sister, the reason why he was incarcerated, demonstrated MDS was an unfit parent. The Wyoming Supreme Court affirmed the district court's order terminating NLT's and MDS's parental rights to KAT, SAT, and JGS.

In the Matter of the Termination of the Parental Rights to: SMH, KDH, MJH, and APH, Minor Children; HMH, a/k/a HM and HB v. State of Wyoming, Department of Family Services, 2012 WY 165, 290 P.3d 1104 (Wyo. 2012).

"**EXAMINING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO DFS, WE FIND CLEAR AND CONVINCING EVIDENCE TO ESTABLISH THAT MOTHER IS UNFIT TO CARE FOR HER CHILDREN. THE EVIDENCE SHOWED THAT MOTHER COULD NOT POSSIBLY MEET THE MENTAL AND EMOTIONAL NEEDS OF HER CHILDREN WHILE REFUSING TO ACKNOWLEDGE THAT THEY WERE AFRAID OF EW AND THAT THEY DID NOT WANT TO LIVE WITH HIM. WHILE WE NOTE THAT MOTHER'S MINIMIZATION OF THE CHILDREN'S FEARS WAS HARMFUL TO THE CHILDREN REGARDLESS OF WHETHER THEIR ALLEGATIONS OF ABUSE WERE TRUE, WE FIND THAT THE EVIDENCE STRONGLY SUGGESTS THAT THE CHILDREN WERE, IN FACT, ABUSED BY EW, AND THAT HE THEREFORE POSED A DIRECT THREAT TO THE SAFETY AND WELL-BEING OF MOTHER'S CHILDREN. AGAIN, HOWEVER, NOTWITHSTANDING THE VERACITY OF THE CHILDREN'S ALLEGATIONS, MOTHER'S REFUSAL TO ADDRESS HER CHILDREN'S CONCERNS AND HER FAILURE TO RECOGNIZE THE DAMAGE CAUSED BY HER CONTINUED ASSOCIATION WITH EW SHOWS THAT SHE IS NOT FIT TO CARE FOR HER CHILDREN. FURTHER, THE EVIDENCE CLEARLY INDICATES THAT MOTHER HAS NOT BEEN ABLE TO MAINTAIN SOBRIETY, DESPITE MULTIPLE ATTEMPTS BY DFS TO HELP HER OBTAIN TREATMENT. MOTHER'S CONTINUED DRUG AND ALCOHOL ABUSE FURTHER DEMONSTRATES THAT SHE IS NOT FIT TO CARE FOR HER CHILDREN. IN LIGHT OF THIS EVIDENCE, WE FIND THAT TERMINATION OF PARENTAL RIGHTS IS JUSTIFIED UNDER WYO. STAT. ANN. § 14-2-309(a)(v)[10]. AS A RESULT, WE NEED NOT CONSIDER WHETHER TERMINATION WAS ALSO WARRANTED UNDER WYO. STAT. ANN. § 14-2-309(a)(iii)[10]."** *Id*. at 1114-1115.

HMH, the mother of the minor children, SMH, KDH, MJH, and APH became involved with the Department of Family Services (DFS) after they received a report concerning her substance abuse in August 2008. DFS offered services to her following the report, but HMH declined. In October 2008 and January 2009, DFS received reports that the minor children were locked outside without the proper attire for an extended period of time. DFS offered HMH parenting classes, counseling services for the minor children, help filling out a subsidized housing application, finding employment, and obtaining a driver's license. HMH accepted these services. On April 2, 2009, law enforcement was called after HMH went to a parenting class on Xanax and methadone. The officers discovered that HMH had filled two methadone prescriptions, which were found in her house. HMH was arrested for interference with a peace officer, use of a controlled substance, and deception in purchasing prescription medication. Subsequently the minor children were placed in protective custody, into non-relative foster care. The children were found to have had significant dental and vision needs. SMH and KDH were diagnosed with attention-deficit hyperactivity disorder and placed on prescription medications.

On April 6, 2009, the county attorney filed a neglect petition in the juvenile court, and HMH admitted to the allegations in a stipulated order. DFS developed a family service plan which required HMH to obtain acceptable housing, have one month of clean drug tests, to successfully complete an intensive outpatient drug abuse treatment program, continue individual counseling, and follow recommendations from the treatment facility. A multi-disciplinary team (MDT) identified a goal of reunification. While HMH was in jail, she entered, and after 18 days left an inpatient substance abuse program. In June 2009, she enrolled in an outpatient program, but she was dropped due to "sporadic participation." In October 2009, HMH was reunified with the children. On October 23, 2009, HMH and her boyfriend EW tested positive for methamphetamine, violating both of their probations. They were arrested, and the children lived with their grandfather for three weeks, and then were again placed in non-relative foster care. MJH had reported physical abuse perpetrated by EW on his brothers, and SMH reported that EW was also sexually abusive. All of the children had symptoms of mental health problems and they all expressed fears about EW. When informed of the physical and sexual abuse, HMH denied that any such abuse occurred.

DFS developed a new case plan which required HMH "to live her life free of drugs", complete an inpatient substance abuse treatment program, and obtain housing and employment upon her release. The goal of the case plan was adoption concurrent with the goal of reunification. While HMH entered an inpatient treatment program, she failed to be consistent with the recommended outpatient program and missed drug tests, which according to the program are considered positive results. In March of 2010, law enforcement responded to a domestic dispute between HMH and EW, where HMH had admitted that she had been drinking. In April 2010, the MDT recommended the permanency goal should be changed to adoption. The same day as the MDT, officers discovered that HMH was an intoxicated passenger in a vehicle which was reported for a suspicion of drunk driving.

On May 3, the juvenile court changed the goal of the permanency plan from reunification to termination of parental rights and adoption of the children finding "clear and convincing evidence that it is not in the best interests of the children to return home." The court found that DFS made reasonable efforts towards reunification, HMH had failed her rehabilitative efforts, and if in the mother's care, the minor children's health and safety would be jeopardized. DFS filed a petition to terminate HMH's parental rights in December. They had two statutory grounds, Wyo. Stat. Ann. § 14-2-309(a)(iii) and § 14-2-309(a)(v)[10]. Under § 14-2-309(a)(v)[10] two elements must be shown. First, DFS must show that the child has been under the State's responsibility in foster care for at least 15 of the most recent 22 months. Second, they must show that the mother is unfit to have custody and control of the children. The trial was set for October 2011. Prior to the trial, while HMH was pregnant, she was involved in a domestic dispute with EW who was arrested, taken into custody, and convicted of domestic battery.

At the district court trial, DFS claimed that HMH had not made significant progress in order to reunite with her children. HMH claimed that DFS did not make reasonable efforts for rehabilitation and that DFS did not give her enough time to address the concerns with EW. On January 27, 2012, the court issued an order where the court determined that clear and convincing evidence was established that supported the termination of HMH's parental rights under both statutes, and the mother appealed. HMH appealed the district court's order which under Wyo.

Stat. Ann. §§ 14-2-309(a)(iii) and 14-2-309(a)(v)[10] terminated her parental rights. HMH contends that clear and convincing evidence must be established in a finding for termination of parental rights and the standard was not met by the state when they failed to have clear and convincing evidence showing that HMH was unfit to have custody and control over her children. The Court disagreed with HMH and found there was clear and convincing evidence that established she was unfit to have custody and control of the children. The Court found HMH had failed to make progress in treating the substance abuse issue. The Wyoming Supreme Court affirmed the district court's order.

In the Matter of the Attorney's Fees and Costs in the Termination of Parental Rights to: NRF and JWF, Minor Children, Donald Lee Tolin, Attorney for LMB, Natural Mother v. State of Wyoming, Department of Family Services, 2013 WY 9 (Wyo. 2013).

THE DISTRICT COURT FOUND THAT ALTHOUGH MR. TOLIN'S HOURLY RATE AND EXPENSES WERE REASONABLE FOR THE WORK HE DID WHILE REPRESENTING LMB IN A TERMINATION OF PARENTAL RIGHTS ACTION, THE COURT FOUND THAT THE AMOUNT OF HOURS MR. TOLIN CLAIMED WAS EXCESSIVE AND UNREASONABLE CONSIDERING THE TYPE OF WORK THAT WAS DONE AND THE ACTUAL WORK THAT WAS DONE. THE WYOMING SUPREME COURT AFFIRMED THE DISTRICT COURT'S FINDING.

The Department of Family Services is obligated to pay for an indigent parent's attorney fees. The attorney, Mr. Tolin, was appointed by the district court to represent an indigent parent, LMB, in a parental rights termination action. On October 26, 2011, Mr. Tolin filed his motion for an order approving payment of his attorney's fees. He claimed 487.17 hours at an hourly rate of $100, totaling $48,717.00, plus expenses of $334.30. The hearing was held on December 15, 2011 and on January 10, 2012, a judge awarded Mr. Tolin $24,358.50, $334.30 in expenses and a fifty percent reduction in his fees.

Mr. Tolin appealed the district court's reduction of the amount he requested for attorney fees by fifty percent claiming an abuse of discretion. The rate of $100 per hour and the $334.30 were not at issue. The issue in front of the Wyoming Supreme Court was whether the number of hours (487.17) was a reasonable amount. The district court pointed to several reasons why it decided to reduce the hours including the finding that much of the time being billed was excessive for the kind of work done and the actual work done. The Court found that Mr. Tolin "failed to exercise billing judgment" and that some of the time periods billed for were clearly excessive and not reasonable. The Court deferred to the district court's findings and affirmed.

III. ABUSE AND NEGLECT PETITIONS

In the Interest of NC and AM, Minor Children; SC and FC, III. v. State of Wyoming, Department of Family Services, 2013 WY 2, 294 P.3d 866 (Wyo. 2013).

"THE DISTRICT COURT WAS PRESENTED WITH PETITIONS ALLEGING ABUSE OF NC AND AM. PURSUANT TO ITS EMERGENCY JURISDICTION, AND BASED ON ITS PRELIMINARY FINDING OF ABUSE, THE DISTRICT COURT HAD AUTHORITY TO ORDER PROTECTIVE CUSTODY FOR NC AND AM. TO THE EXTENT THAT THE COURT'S SHELTER CARE ORDERS RESULTED IN A PRELIMINARY FINDING OF ABUSE AND PROTECTIVE CUSTODY BASED ON THAT FINDING, AND THE ADJUDICATION ORDERS RESULTED IN AN EVIDENTIARY FINDING OF ABUSE AND PROTECTIVE CUSTODY BASED ON THAT FINDING, WE CONCLUDE THAT THE DISTRICT COURT ACTED CONSISTENT WITH ITS EMERGENCY JURISDICTION UNDER THE UCCJEA. TO THE EXTENT THAT THE DISTRICT COURT'S ORDERS WENT BEYOND ADDRESSING THE IMMEDIATE EMERGENCY BEFORE THE COURT, WE CONCLUDE THAT THE COURT ACTED OUTSIDE ITS JURISDICTION. THAT IS, TO THE EXTENT THE DISTRICT COURT ADJUDICATED THE CHILDREN AS NEGLECTED AND ENTERED ORDERS, INCLUDING ITS DISPOSITIONAL ORDER, DIRECTING MOTHER, HER BOYFRIEND, AND THE TWO PURPORTED FATHERS TO SUBMIT TO TESTING, EVALUATIONS AND COUNSELING AND PSYCHOLOGICAL SERVICES, THE COURT EXCEEDED ITS EMERGENCY JURISDICTION UNDER THE UCCJEA." *Id.* at 877.

In April of 2011, the mother, SC, contacted the maternal grandmother, SR, to inform her that the mother's boyfriend, FC, III, had bitten her two children, NC and AM, and that she was going to inform law enforcement and move in with her sister. A short time after, the mother moved back in with the boyfriend. The grandmother traveled to Texas to check on the mother and children in July 2011, after becoming concerned about their well-being. The mother and grandmother talked about moving the mother and children to Wyoming. After two weeks had passed, the grandmother came back to Texas to bring them to Wyoming, but the mother decided she was going to stay in Texas with the boyfriend. She allowed the grandmother to take the children to Wyoming until the mother would come to retrieve them. When the grandmother and children returned to Wyoming, grandmother contacted the Wyoming Department of Family Services (DFS) who investigated the abuse and interviewed the children.

The State filed juvenile petitions on each of the girls alleging under Wyoming statute, each child was neglected. At the initial appearance and shelter care hearing, the mother's attorney disclosed to the court about pending custody proceedings occurring in Texas, and he contested the court's subject matter jurisdiction. The juvenile court ordered that the children were to be placed in legal and physical custody of DFS, with physical placement with the grandmother. The mother and boyfriend filed a joint motion to dismiss for the lack of subject matter jurisdiction since the abuse occurred outside of Wyoming and for failure to state a claim. The juvenile court denied the motion.

At the January 3, 2012 adjudication hearing, the juvenile court entered findings that the children had been abused by the boyfriend and neglected by the mother. After a hearing on February 6, 2012, the juvenile court issued an Order of Disposition which directed the mother and boyfriend to participate in counseling and instructional services that were approved by DFS. The order directed that DNA testing be performed on Raul M. and Steven C. in order to establish paternity of the children, and that the man/men who is/are the established father(s) undergo substance abuse and psychological evaluations and counseling.

The mother and boyfriend appealed. The issue in this case was whether the juvenile court in Wyoming was correct when it determined that it had the requisite subject matter jurisdiction to hear and determine findings of abuse, neglect, and custody. The Court determined that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) applied to the case at issue. Under the UCCJEA the child's home state has preemptive authority to determine custody and visitation. The home state is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months immediately before the commencement of the child custody proceeding". Wyo. Stat. Ann. §20-5-202(a)(vii) (LexisNexis 2012). The Court determined from the record that Texas was the home state of the children and Texas had exercised initial child custody jurisdiction, and therefore, Texas had initial custody jurisdiction under the UCCJEA.

The Court, however, did determine that the juvenile court in Wyoming did have jurisdiction over the juvenile petitions under the provisions governing emergency jurisdiction in the UCCJEA in Wyo. Stat. Ann. § 20-5-304(a)[11]. In order for emergency jurisdiction to exist a child who is present in the state would have to have been subjected to or threatened with abuse. The court found that the children were present in the state of Wyoming when the neglect petitions were filed and the record supported the finding that if the children were to return to Texas they would be at risk of mistreatment or abuse. The Court pointed out that emergency jurisdiction is limited and temporary and it does not include the authority to make permanent custody determinations. *In re State ex rel. M.C.*, 94 P.3d 1220, 1225 (Colo. Ct. App. 2004); *In re Brode*, 566 S.E.2d 858, 860-861 (N.C. Ct. App. 2002); *In re C.T.*, 121 Cal.Rptr.2d 897, 904 (Cal. Ct. App. 2002).

The Court held that the juvenile court was within the emergency jurisdiction guidelines under the UCCJEA to make preliminary findings for the shelter care orders with regards to the petitions of abuse and neglect and order protective custody, but the district court did not have the appropriate jurisdiction to adjudicate the children as neglected and issue orders, including the dispositional order.

In the Interest of: MC, HC and CC, Minor Children; DL v. State of Wyoming, Department of Family Services, 2013 WY 43, 299 P.3d 75 (Wyo. 2013).

"THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR FAIL TO PROVIDE FUNDAMENTAL DUE PROCESS BY VIRTUE OF ITS RULING ON THE PARTIES' DISCOVERY DISPUTE. THE EVIDENCE PRESENTED AT THE ADJUDICATORY HEARING WAS SUFFICIENT TO SUPPORT A FINDING OF NEGLECT." *Id.* at 88.

CC, who was 12 years old at the time, claimed that he was "baked" meaning he was suffering from the effects of smoking marijuana the night before. The school resource officer, Deputy Simeral, responded and learned that CC's older brother, MC, age 16, had asked CC if he wanted to get high. When CC agreed, they went to the appellant's, DL's, bedroom to retrieve a glass pipe and a bud of marijuana from a red tin. Deputy Simeral obtained and executed a search warrant of DL's house. The red tin, which contained buds of marijuana, a glass pipe, pipe cleaners, and lighters were found. The appellant was arrested and taken into custody for violating Wyo. Stat. Ann. § 35-7-1031(c)(i)(A), possession of a controlled substance. The children were placed in temporary protective custody. The shelter care hearing was held on January 27, 2012. The parties stipulated that the mother would clean her home and that the children would be returned to her and help her with the process. The juvenile court agreed and required that DFS be permitted to periodically inspect the home and that the appellant undergo random drug testing. The juvenile court scheduled an adjudicatory hearing for the State to prove the allegations of abuse or neglect for April 23, 2012.

Two weeks prior to the hearing, DL had sent a letter to the county attorney about discovery and a UA test that CC had provided, but she had no information about the results. The county attorney said that DFS indicated in a report that no UA was done although CC was asked to do one and was unable to do so. A sample was taken later in the day by an unspecified agency. The Thursday before the hearing, when the county attorney met with DFS, he found out that CC had provided a negative sample, information which he shared with the counsel for DL the next day. A motion to dismiss was filed the day of the hearing by the appellant's counsel claiming that the State had failed to comply with the discovery rules under the Wyoming Rules of Procedure for Juvenile Courts (W.R.P.J.C.) and her due process rights had been violated because the State failed to provide a witness list before the hearing violating W.R.P.J.C. 3(b)(3). In the alternative, it was asked that the court strike the State's witnesses. The State and guardian *ad litem* argued that counsel for the appellant should have filed a motion to compel under W.R.P.J.C. 3(f), and that the reports and documents provided would have provided the appellant's counsel the sufficient amount of information to identify witnesses and the likely testimony. The juvenile court denied the motion and did not strike any witnesses.

At the adjudicatory hearing, witnesses testified as to the conditions of the house. They testified that the house smelled "foul" and was unkempt with dirty clothes, food, animal feces, dried bloody cloth rags, and other items scattered throughout the home. MC testified that DL smoked marijuana often and stayed in her room, and that the red tin that contained the marijuana buds was accessible to all of the children. DL testified against MC's credibility, that the children were responsible for the cleanliness of the common areas of the home and their rooms, that she

does not smoke marijuana around the children, that she had health reasons why her UA's were coming back positive, and that she was trying to quit smoking marijuana through a church program. The juvenile court issued a written order that found that the petition's allegations were true. After a predisposition report and hearing, the children were ordered to return to the appellant's home with conditions including DFS oversight. In October 2012, the appellant was incarcerated for violating her probation. As a result, the children lived with the appellant's sister. A Multi-Disciplinary Team recommended that the two younger children be placed in a permanent guardianship with the aunt, and that MC was to be placed in foster care to transition to independent living at the age of 18. DL challenged the trial court's decision in the adjudicatory hearing that found that she had neglected her three children on two grounds.

First, she contended that she was denied fundamental due process rights because the court did not grant a motion to dismiss or strike witnesses for the claimed discovery violations by the State. The Court agrees there was no valid reason why the State did not provide a witness list. However, the Court did find that the counsel for DL should have filed a motion to compel for the witness list under Rule 3(f), instead of waiting until the hearing. The Court points out the record gives no indication that the appellant's counsel was not prepared for the State's witnesses. The Court also points out that there were a number of opportunities and options that DL could have exercised before and during the hearings to address any of the prejudices claimed. The Court discussed the drastic consequences of a dismissal or the striking of all of the witnesses in a neglect or abuse case against children. The Court determined that the trial court did not abuse its discretion when it did not grant the dismissal or striking remedies asked for by the appellant's counsel because the trial court did not have the opportunity to address any of the problems.

Second, DL claims the evidence was insufficient to support a finding of neglect. She claimed the conditions of her home were a single instance due to illness. The Court reasoned that because the trial court is the finder of fact, the Court will defer to the trial court's decision as to disputes of fact. The Court decided there was sufficient evidence to support the finding of neglect that the trial court made about the unsanitary and unkempt conditions of the home, DL's interactions or lack thereof with the children when she was under the influence of marijuana, and the accessibility of the marijuana and the pipe to the children. Therefore, the Court affirmed the trial court's findings.

IV. GUARDIANSHIP

In the Matter of the Guardianship of LNP, A Minor Child; KC v. CC and EC, 2013 WY 20, 294 P.3d 904 (Wyo. 2013).

THE GRANDPARENTS OF THE CHILD AT ISSUE WERE APPOINTED THE PERMANENT GUARDIANS OF THE CHILD AFTER THE DISTRICT COURT ISSUED AN ORDER THAT FOUND THAT THE MOTHER WAS UNFIT TO PARENT UNDER WYO. STAT. ANN. § 3-2-104(b), AND THAT RETURNING THE CHILD TO THE MOTHER WOULD LIKELY CAUSE SERIOUS EMOTIONAL DAMAGE TO THE CHILD UNDER ICWA SECTION 1912(e). THE MOTHER CHALLENGED THE DISTRICT COURT'S ORDER ON THREE GROUNDS UNDER THE INDIAN CHILD WELFARE ACT (ICWA). FIRST, SHE CLAIMED THE DISTRICT COURT FAILED TO FULFILL THE TEN DAY NOTICE REQUIREMENT UNDER ICWA. THE WYOMING SUPREME COURT FOUND THAT WHILE THE DISTRICT COURT HAD ERRED, THE ERROR WAS HARMLESS GIVEN THE CIRCUMSTANCES. SECOND, SHE CHALLENGED WHETHER THE EXPERT WITNESS WAS A QUALIFIED EXPERT WITNESS UNDER ICWA. THE WYOMING SUPREME COURT FOUND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THE WITNESS TO BE A QUALIFIED EXPERT WITNESS SINCE THE EXPERIENCE AND EXPERTISE IN TRIBAL CUSTOMS WAS NOT RELEVANT TO THE CASE AT ISSUE. FINALLY, SHE CHALLENGED THE DISTRICT COURT'S FINDING THAT THE CHILD WILL LIKELY BE SUBJECT TO EMOTIONAL OR PHYSICAL DAMAGE IF RETURNED THE PARENT'S CUSTODY. THE WYOMING SUPREME COURT FOUND THAT THE DISTRICT COURT FOUND THROUGH CLEAR AND CONVINCING EVIDENCE THAT THE CHILD WILL BE SUBJECT TO EMOTIONAL AND PHYSICAL DAMAGE IF RETURNED TO THE MOTHER'S CUSTODY.

LNP began to live with the grandparents, CC and EC, in September 2010 after the mother, KC, told the grandparents that she was struggling and wrote a handwritten letter which consented to a "guardianship" of the grandparents over LNP. While in the grandparents care, LNP was diagnosed with disruptive behavior disorder by a licensed professional counselor, Sherri Rubeck, who concluded that LNP had been sexually abused.

The grandparents filed a "Petition for the Appointment of Emergency Temporary Guardians" in Laramie County District Court on June 17, 2011. After a hearing held on June 22, the court issued an order appointing the grandparents as LNP's temporary guardians. The grandparents filed a motion to convert the temporary guardianship to a plenary guardianship on September 30, 2011 and attached a "Consent to Appointment of Guardian" signed by the mother on June 25. Two weeks after the filed motion, the mother filed a motion to terminate the temporary guardianship and object to the conversion. November 21, the mother filed a motion to vacate the temporary guardianship claiming that LNP was an "Indian child' under the Indian Child Welfare Act (ICWA), and asserting the court failed to comply with ICWA. The district court issued an opinion and order concluding the mother was unfit to parent under Wyo. Stat. Ann. § 3-2-104(b), and that returning the child to the mother would likely cause serious

emotional damage to the child under Section 1912(e) of the ICWA. The court granted the guardianship petition and denied the motion to terminate the guardianship. The court would terminate the guardianship if the mother became a "fit" parent.

The mother challenged the district court decision which appointed the grandparents as permanent guardians of the minor child LNP, on the basis that the guardianship proceedings were subject to the requirements of the Indian Child Welfare Act (ICWA), therefore, the district court erred when it established a plenary guardianship and when it concluded that returning the child to the mother would likely result in serious emotional or physical damage. The issues before the Wyoming Supreme Court asked whether the court failed to comply with ICWA's ten day notice requirement, whether the court received testimony from a qualified expert witness under ICWA, and whether there was clear and convincing evidence under ICWA that showed that the minor child's return to the mother would likely result in serious or emotional or physical damage.

On the notice issue, the mother claims that under ICWA the grandparents failed to provide the required ten-day notice of the guardianship hearing to LNP's tribe. The grandparents claim that they had no evidence that LNP was an "Indian child" before the hearing, and even if notice was required, the failure to provide notice constituted harmless error. The Court found that the district court erred in failing to require adequate notice to the tribe prior to the guardianship hearing, but found that the error was harmless under the circumstances since the court held the record open in case the tribe decided to intervene, and the tribe decided that it was not going to intervene.

On the qualified expert witness issue, the mother claimed that the district court did not receive testimony from a qualified expert witness that is required by ICWA, that would support the child's placement outside of the mother's home, and that Ms. Rubeck was not qualified as a witness because she lacked the qualifications, experience, and expertise of Indian children. The grandparents claimed that such knowledge has no bearing on the case at issue. The Court found that tribal customs had no relevance to the case and the district court did not abuse its discretion when it determined that Ms. Rubeck was a qualified expert witness.

On the issue of the likelihood of the serious emotional or physical damage to the child, the mother claims that there was no evidence that the child's return to the custody of the mother will result in serious emotional or physical damage. The grandparents and Ms. Rubeck testified as to LNP's behavior and how it is indicative of a sexual abuse victim. There was also testimony related to the inability of the mother to provide stable housing. The Court found by clear and convincing evidence that returning the child to the mother's care would result in "serious physical or emotional damage."

V. CHILD SUPPORT

The State of Wyoming, Department of Family Services v. Tanya S. Currier and Ronnie Hauck, 2013 WY 16, 295 P.3d 837 (Wyo. 2013).

"THIS COURT GRANTED THE STATE OF WYOMING, DEPARTMENT OF FAMILY SERVICES' (DFS) PETITION FOR A WRIT OF REVIEW OF THE DISTRICT COURT'S RULING THAT DUE PROCESS REQUIRES THE STATE TO PROVIDE AN INDIGENT PARTY WITH COUNSEL IN A CIVIL CONTEMPT PROCEEDING FOR NON-PAYMENT OF CHILD SUPPORT WHEN INCARCERATION IS ONE OF THE POSSIBLE PENALTIES. WE CONCLUDE THAT APPOINTMENT OF COUNSEL IS NOT REQUIRED BECAUSE WYOMING HAS SUFFICIENT SUBSTITUTE PROCEDURAL SAFEGUARDS TO PROTECT INDIGENT OBLIGORS AGAINST THE POSSIBILITY OF WRONGFUL INCARCERATION. CONSEQUENTLY, WE REVERSE." *Id.* at 839.

On June 10, 2011, the Department of Family Services (DFS) "filed a petition for an order to show cause as to why the father should not be held in contempt of court for failing to pay child support." *Id.* at 839. The petition alleged that he owed $7,996.25 to the mother and $1,685.00 to DFS. A possible sanction for contempt included in the petition was a jail sentence. After a hearing on September 12, 2011, where the father appeared without counsel, the district court advised him that if he was indigent, counsel could be appointed to represent him at the state's expense. After the father completed an affidavit for appointed counsel, he was appointed a public defender to represent him. DFS objected and the district court vacated the order of the appointment. However, the district court then denied DFS's objection and ordered DFS to make the arrangements necessary to compensate counsel and have an attorney enter an appearance within fifteen days. The court stated that "due process does require court-appointed counsel when the State of Wyoming, through legal counsel, brings a child support enforcement proceeding against an indigent defendant." *Id.*

The Department of Family Services (DFS) presented two issues for the Court. The first issue was whether the Due Process Clause gives indigent litigants the right to appointment of counsel in a child support civil contempt proceeding where incarceration is a possibility. The second issue was whether the State of Wyoming Department of Family Serves is required to pay for the litigant's attorney's fees. The Wyoming Supreme Court applied the factors from *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), in order to determine if the Due Process Clause provided safeguards that would be required to make a civil proceeding "fundamentally fair." These factors included, "(1) the nature of the 'the private interest that will be affected,' (2) the comparative 'risk' of an 'erroneous deprivation' of that interest with and without 'additional or substitute procedural safeguards,' and (3) the nature and magnitude of any countervailing interest in not providing 'additional or substitute procedural requirement[s].'" *Id.* at 841. The Court discussed the United States Supreme Court case *Turner v. Rogers*, ___U.S. ___, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011), and then applied the factors to the case at issue. Although the Court did find that the private interest affected was great, the Court weighed the factors against counsel because it found that adequate safeguards existed and that delay, fiscal and administrative burdens would be "considerable" to a point that fairness of such proceedings

would be hindered and payments to needy families would be even slower. The Court found that "indigent obligors are not entitled to appointed counsel in child support enforcement contempt proceedings, even if DFS is the opposing party". *Id.* at 843. However, the court did leave the possibility open that indigent obligors could be appointed counsel under certain circumstances. The Court, finding those circumstances did not exist in this case, reversed and remanded the district court's ruling. Because the first issue was resolved in such a way, the Court did not address the second issue.

The State of Wyoming, Department of Family Services, Child Support Enforcement v. Connie M. Powell, 2013 WY 56, 300 P.3d 858 (Wyo. 2013).

"THE DISTRICT COURT WAS WITHOUT JURISDICTION TO MODIFY THE AUGUST 2003 CHILD SUPPORT ORDER WHERE NO PETITION TO MODIFY HAD BEEN FILED." *Id.* at 864.

In 1990, the father (Ferree) and the mother (Powell) divorced. In 1999, they stipulated to a modification of their divorce decree where the father would have primary custody of the children and the mother would be responsible for half of the medical expenses and half of the travel expenses, but she would not be responsible for child support. The district court approved the modification except to the child support stipulation. The court found such a stipulation was contrary to law and it ordered the parties to take further action. Neither mother nor the father took any action until May 2003, when the father filed a Motion for Order to Appear and Show Cause in which father alleged that mother made no payments towards her half of expenses nor did she make any child support payments. The district court entered an order in August of 2003 that granted the father medical care and transportation costs, as well as child support which was set to be retroactive to the date of the 1999 order. In December 2003, the mother filed a Petition for Modification of Order asking that she be awarded custody of one of the children. In February 2004, the father filed a Motion to Modify Visitation, asking that the mother only be allowed supervised visitation with the children, and he filed a Motion for Order to Appear and Show Cause, in which he alleged that the mother failed to comply with the order from August 2003. A hearing was held, but there was no record or order issued.

On October 14, 2009, the Department of Family Services (DFS) filed an Affidavit and Motion for Order to Show Cause and for Judgment of Contempt against the mother for her failure to pay child support and expenses. On March 31, 2010, an Order Denying Contempt and Requiring Information to be Submitted to the Court was issued by the court in which the court found that the mother's failure to pay was the result of confusion over what had occurred at the 2004 hearing. After the May 2012 hearing, the district court issued an order that set aside the August 2003 judgment. The issue in this case was whether the district court abused its discretion when it retroactively modified a child support order and set aside the judgment without a proper petition or a motion from a party requesting such relief. The Wyoming Supreme Court found that because none of the parties moved for a modification of the child support order and that other statutory circumstances did not exist, the district court was not statutorily authorized to modify the 2003 child support order nor was the court authorized to make the modifications retroactive.

VI. CHILD CARE ASSISTANCE BENEFITS

State of Wyoming ex. rel. Department of Family Services v. Lisa Kisling, 2013 WY 91 (Wyo. 2013).

THE WYOMING SUPREME COURT ESTABLISHED THAT THE DEPARTMENT HAD INTERPRETED THE STATUTES CORRECTLY WHEN IT DETERMINED THAT A FOSTER PARENT OR GUARDIAN WHO WAS PARTICIPATING IN A GRADUATE LEVEL EDUCATIONAL PROGRAM SUCH AS LAW SCHOOL WAS NOT ELIGIBLE FOR CHILD CARE ASSISTANCE BENEFITS. THE COURT ALSO DETERMINED THAT BECAUSE THE EQUITABLE ESTOPPEL ISSUE WAS NOT PRESENTED DURING THE OAH PROCEEDINGS, THE DISTRICT COURT WAS PRECLUDED FROM CONSIDERING IT ON APPEAL. THE WYOMING SUPREME COURT REVERSED THE DISTRICT COURT'S ORDER AND REMANDED THE CASE WITH INSTRUCTIONS TO AFFIRM THE OAH DECISION.

In July 2007, Ms. Kisling and her husband became foster parents to K.S. and H.S., two children with special needs. In 2009, they considered becoming guardians for the two children and contacted DFS to find out if their child care benefits would be affected by this change. DFS said the benefits would not be affected. Ms. Kisling began to attend law school in August 2009. In October 2009, she and her husband became the guardians for the two children. She continued to receive benefits, and each time she applied, she informed DFS that she was enrolled in law school. Following Ms. Kisling's second year she participated in an unpaid externship. At this point she requested a change in child care provider. A Benefits and Eligibility Specialist with DFS was alerted to Ms. Kisling's participation in the externship, and contacted the Department Administer questioning Ms. Kisling's eligibility. The Administrator determined that she was not eligible for benefits. DFS notified Ms. Kisling in June 2011 that her child care benefits were terminated due to her participation in a graduate program (law school) which was not a qualifying work/study program for child care assistance. The Office of Administrative Hearings (OAH) upheld the denial. The district court reversed the decision finding that DFS was equitably estopped from denying the benefits to Ms. Kisling.

On appeal, three issues were presented for review. The first issue was whether DFS was correct in interpreting the statutes and rules which precluded a person in Ms. Kisling's position who was attending a graduate-level program, such as law school, from receiving child care assistance benefits. A statute at issue provides that DFS shall "[l]imit approved educational programs under paragraph (iv) of this subsection to educational courses not to exceed the baccalaureate level, or to one (1) vocational training program". Wyo. Stat. Ann. § 42-2-103(b)(viii). The Court cited several other statutes and acts that support the conclusion that a person who participates in a graduate-level educational program is not eligible for the child care assistance benefits.

The second issue was whether the district court erred when it considered the equitable estoppel issue on review. The third issue was whether the district court erred when it determined that DFS was equitably estopped from terminating and denying the child care assistance benefits to Ms. Kisling while she attended law school. Ms. Kisling claimed in a brief to the district court

that she was never informed of any change in her eligibility for assistance when she was receiving the benefits during her first two years of law school. On appeal, DFS claimed that because the equitable estoppel claim was not raised in the OAH proceedings by Ms. Kisling, the claim had been waived and could not be considered by the district court. The Court found that there was nothing in the record that indicated that Ms. Kisling clearly raised the issue of equitable estoppel before the OAH. Because previous case law in Wyoming has established that issues not raised during an administrative action could not be considered for the first time on appeal, the Wyoming Supreme Court determined that the district court had erred when it considered the equitable estoppel claim. Therefore, the Court reversed the district court's order and remanded the case with instructions to affirm the OAH decision.

VII. FEDERAL CASE LAW

A. Supreme Court of the United States and Related Federal Court Decisions

Miller v. Alabama, 567 U.S.__, 132 S. Ct. 2455; 183 L.Ed.2d 407 (2012).

"**WE THEREFORE HOLD THAT MANDATORY LIFE WITHOUT PAROLE FOR THOSE UNDER THE AGE OF 18 AT THE TIME OF THEIR CRIMES VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION ON 'CRUEL AND UNUSUAL PUNISHMENTS.'"** *Id.* at 2459.

In this case, the United States Supreme Court discussed two cases in which a 14 year old was convicted of murder and they were sentenced to a mandatory term of life imprisonment without the possibility of parole. The Court discussed the case of *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2011), and stated that mandatory penalty schemes contravene the foundational principle in *Graham* that severe penalties on juvenile offenders cannot proceed without consideration given to the fact that they are children because children are constitutionally different from adults for sentencing purposes. The Court points out that a mandatory sentencing scheme precludes consideration of factors such as age, immaturity, and the ability to appreciate risks and consequences. The Court found that a "sentencer" needs to examine all of the circumstances before concluding that the severe penalty of life imprisonment without parole is the appropriate penalty for a juvenile. The Court held that the Eighth Amendment forbids a mandatory sentencing scheme that mandates life imprisonment without parole for juvenile offenders.

- *In Re Morgan*, 713 F.3d 1365 (11th Cir. 2013)

In this case from the United States Court of Appeals, Eleventh Circuit, as well as the unreported Fifth Circuit case of *Craig v. Cain*, the courts found that *Miller* was not retroactively applicable to cases where the juvenile's statutorily imposed mandatory sentence of life imprisonment without parole was made final prior to the Supreme Court's decision in *Miller*. The courts come to this conclusion after finding that the U.S. Supreme Court's decision was not based on precedent, and that the Court did not hold that the new rule would be applicable to those cases on collateral review.

Adoptive Couple v. Baby Girl, A Minor Child, 570 U.S. ___ (2013).

"THE INDIAN CHILD WELFARE ACT WAS ENACTED TO HELP PRESERVE THE CULTURAL IDENTITY AMD HERITAGE OF INDIAN TRIBES, BUT UNDER THE STATE SUPREME COURT'S READING, THE ACT WOULD PUT CERTAIN VULNERABLE CHILDREN AT A GREAT DISADVANTAGE SOLELY BECAUSE AN ANCESTOR-EVEN A REMOTE ONE-WAS AN INDIAN. AS THE STATE SUPREME COURT READ §§1912(d) AND (f), A BIOLOGICAL INDIAN FATHER COULD ABANDON HIS CHILD *IN UTERO* AND REFUSE ANY SUPPORT FOR THE BIRTH MOTHER-PERHAPS CONTRIBUTING TO THE MOTHER'S DECISION TO PUT THE CHILD UP FOR ADOPTION-AND THEN COULD PLAY HIS ICWA TRUMP CARD AT THE ELEVENTH HOUR TO OVERRIDE THE MOTHER'S DECISION AND THE CHILD'S BEST INTEREST. IF THIS WERE POSSIBLE, MANY PROSPECTIVE ADOPTIVE PARENTS WOULD SURELY PAUSE BEFORE ADOPTING ANY CHILD WHO MIGHT POSSIBLY QUALIFY AS AN INDIAN UNDER THE ICWA. SUCH AN INTERPRETATION WOULD RAISE EQUAL PROTECTION CONCERNS, BUT THE PLAIN TEXT OF §§1912(f) AND (d) MAKES CLEAR THAT NEITHER PROVISION APPLIES IN THE PRESENT CONTEXT. NOR DO §1915(a)'S REBUTTABLE ADOPTION PREFERENCES APPLY WHEN NO ALTERNATIVE PARTY HAS FORMALLY SOUGHT TO ADOPT THE CHILD. WE THEREFORE REVERSE THE JUDGMENT OF THE SOUTH CAROLINA SUPREME COURT AND REMAND THE CASE FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION." *Id.*

The child at issue in this case was Baby Girl who is 1.2% (3/256) Cherokee, therefore the Indian Child Welfare Act of 1978 (ICWA) was applicable to this case. When the birth mother was pregnant with Baby Girl, the biological father agreed to relinquish his parental rights over a text message. The biological father is a member of the Cherokee Nation. The mother decided to put Baby Girl up for adoption through a private agency. The mother selected Adoptive Couple to adopt Baby Girl. Adoptive Couple are "non-Indians". The mother signed the forms relinquishing her rights and consenting to the adoption, therefore, adoption proceedings began. The Court discussed that the father at no point during the pregnancy made any "meaningful attempts to assume his responsibility of parenthood". Four months after Baby Girl's birth, Adoptive Couple served the father with a notice of the adoption. He signed papers stating that he was not contesting the adoption. However, he testified that when he signed the papers he thought he was relinquishing his rights to the mother, not the Adoptive Couple. The day after signing the papers, the father contacted a lawyer. A stay of adoption proceedings was subsequently requested. In the adoption proceedings, the father took a paternity test that verified he was Baby Girl's biological father, and he sought custody of Baby Girl and stated that he did not consent to Baby Girl's adoption. In the South Carolina Family Court on September 2011, a trial took place when Baby Girl was two years old and to this point had only lived with Adoptive Couple. The court had concluded that the burden under ICWA §1912(f) had not been met because it was not proven that if the father had custody, Baby Girl would have suffered serious emotional or physical damage. The court denied the petition for adoption and custody was awarded to the father. The South Carolina Supreme Court affirmed.

The United States Supreme Court looked towards the plain language of §1920(f) which stated "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt,…that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *Id.* The Court found, based on this language, that §1912 does not apply where an Indian parent never had custody of the child. The Court stated that the father never had legal or physical custody of Baby Girl. The Court also looked to §1912(d) which states that "any party [seeking to terminate parental rights] shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Id.* The Court found that because the father abandoned Baby Girl prior to her birth, and never had physical or legal custody of the child, there will be no breakup of an Indian family to prevent. The Court states the purpose of §1912(d) was to alleviate the removal of the child from their Indian parents, not to facilitate the transfer of the child to an Indian parent. The Court also discussed §1915(a) which discusses who has the preference in making adoption decisions. The Court concluded that §1915(a) was not applicable to the father because he was not seeking to adopt Baby Girl, but was arguing that his parental rights should not be terminated. The Court reversed the South Carolina's Supreme Court decision and remanded the case.

B. United States Court of Appeals

a. Juvenile Adjudications and Criminal History Scores

United States v. Fletcher (5th Cir. 2013).

This unpublished opinion from the Fifth Circuit, is one of many cases where a federal court has held that a court may include juvenile adjudications in criminal history scores when determining sentencing for an adult criminal offense. The defendant in this case, Mr. Fletcher, was sentenced for felon in possession of a firearm. He was assigned two criminal history points for a juvenile assault conviction in accordance with the U.S. Sentencing Guidelines Manual § 4A1.2(d)(2)(A) which directs that two points are to be added to a person's criminal history score "for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense." *Id.* Mr. Fletcher objected to the assignment of the two criminal history points for his juvenile conviction claiming that he had completed his indeterminate sentence when he was discharged from the Texas Youth Commission which was before the five year period prior to the current offense. The Government argued that under the Fifth Circuit case law, "the maximum possible term under an indeterminate sentence determines the length of the sentence imposed, and not the amount of time actually served." *Id.* The Government stated that because Mr. Fletcher's indeterminate sentence ended on his twenty-first birthday, it would have been within the five year period prior to the offense at issue. The court reviewed the issue for plain error in which Mr. Fletcher needed to show "(1) an error (2) that is plain or obvious and (3) that affected his substantial rights." *Id.* The court found that there was no error that was plain or obvious since there was no Fifth Circuit case law which addressed whether the discharge of a juvenile from custody would constitute a release under the sentencing guidelines or not. The court affirmed Mr. Fletcher's sentence.

b. Governmental Responsibility for Detainees in Juvenile Detention Centers

White v. New Jersey (3rd Cir. 2013).

This unpublished opinion from the Third Circuit involves an inmate, Mr. White, who was at a juvenile detention center. Mr. White claimed that prison officials were liable for injuries he sustained in an attack he suffered while at the center. He was attacked by other inmates in a gang motivated "hit" after a Corrections Officer permitted an inmate to open the emergency exit door to White's pod so that an area that was being painted could be ventilated. The officer also disabled the alarms that would alert to the doors opening. Mr. White required a tracheotomy and a feeding tube, and he suffered extensive head trauma, fractures, and possible brain injury. Mr. White filed a complaint in June 2009. In April 2012, the District of New Jersey Court granted summary judgment for the defendants. On appeal, the circuit court stated that in order for liability of prison officials to exist, two conditions must be met, (1) "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm" and (2) "that the defendant prison official was deliberately indifferent to prisoner health or safety." *Id.* The court determined the record did not support a finding that opening the emergency exit door created an obvious risk of substantial harm to Mr. White and there was insufficient evidence to conclude that the defendants in this case acted with deliberate indifference to Mr. White's safety. The court affirmed the holding of the district court.

Clyce v. Hunt County, Texas (5th Cir. 2013).

In this unpublished opinion from the Fifth Circuit, the parents of C.C., a detainee at a juvenile detention center, sued detention officers under 42 U.S.C. § 1983, claiming that their son's constitutional right to medical care was violated. C.C. had complained of pain on March 4, 2008. The detention center staff scheduled an appointment with a physician for C.C. on March 10, 2008. Prior to the appointment C.C. continued to have pain and did not eat or leave his room. On March 8, 2008, C.C. was visited by his mother who, after seeing her son's physical condition, asked the detention officers to take him to the emergency room. The probation officer said the detention center had permission to take C.C. to the emergency room if he needed to go. Because C.C.'s condition had not worsened, the staff waited until C.C.'s scheduled appointment. He was diagnosed with a bruised hip, bruised ribs, a muscle pull, and an arm fracture. He returned to the detention center and continued to complain of pain. His sister visited him the next day, and she requested he be taken to the emergency room, but the staff declined. The next day a court hearing was held, where a probation officer observed C.C.'s condition and diverted him to the emergency room. C.C. was diagnosed with a life-threatening methicillin-resistant staphylococcus aureus (MRSA) infection which required several surgeries and has severe complications as a result of the infection. The parents filed suit claiming that the detention officers violated C.C.'s right to reasonable access to medical care and that Hunt County "failed to train or supervise its employees properly". *Id.* The district court granted summary judgment for the detention officers and Hunt County. The parents appealed the summary judgment for Hunt County. The court found the parents failed to show that the legal minimum of training was inadequate and that deliberate indifference was shown to C.C. The court affirmed the judgment of the district court.

c. Procedural and Substantive Due Process Violations Arising Out of Child Abuse Investigations and Removal of Children

Mulholland v. The Government County of Berks, Pennsylvania, 706 F.3d 227 (3rd Cir. 2013).

This case is one of several cases where parents have brought suit under 42 U.S.C. § 1983, claiming a violation of their procedural and substantive due process rights that have arisen out of a child abuse investigation and removal of children. The court stated that in a § 1983 action courts may recognize municipal liability if the allegation is based on policy or custom. To state a claim for procedural due process violations, the plaintiff must allege that "(1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of 'life, liberty, or property,' and that (2) the procedures available to him did not provide 'due process of law.'" *Id.* at 238. To state a claim for violations of substantive due process, a plaintiff must show that "executive action was 'so ill-conceived or malicious that it shocks the conscience.'" *Id.* at 241. The court found that the plaintiff's in this case were not able to show any violations, and it affirmed the decision of the district court which granted the County's motion for judgment as a matter of law.

d. A Governmental Actor's Duty to Act in Suspected Child Abuse Cases

The Estate of B.I.C., A Minor Child v. Gillen, 710 F.3d 1168 (10th Cir. 2013).

Grandparents' adopted daughter died suddenly, and her children were removed from the grandparent's home to live with the children's father. The grandparents and school began to notice signs of abuse on the children soon after. After contacting the social worker on several occasions, the grandparents claimed that the social worker stated that it wasn't her job to investigate child abuse, it was the police's job. Her only job was to preserve the family unit. The grandparents claimed to have had problems with this particular social worker in the past during the adoption of their daughter. Soon after the complaints were made, B.I.C., the granddaughter was hospitalized with a brain bleed that resulted from a blow to the head and brain damage resulting from Shaken Baby Syndrome. She died three days later. The father's girlfriend was found guilty of murder and at the time she claimed to be suffering from a methamphetamine addiction. Following B.I.C.'s death, twelve of the social worker's cases were investigated by the Director for the Abuse, Neglect, and Exploitation Unit of the Kansas Attorney General's Office. The Director found that the social worker had treated this case involving the grandchildren differently from the others, and she had failed to fulfill responsibilities to the two children.

The grandparents brought a § 1983 action against the social worker claiming that the social worker's failure to act created the danger which caused the death of their granddaughter and denied their rights to familial association. The district court granted the social worker a summary judgment and held that the social worker was entitled to qualified immunity because her "conduct did not shock the conscience." *Id.* at 1172. The Tenth Circuit Court disagreed and held there was a genuine issue of material fact as to whether the social worker's conduct, in failing to act to protect the grandchild, was outrageous and conscience-shocking given the specific facts of the case in which the social worker refused to accept evidence of child abuse

from the grandparents. However, the circuit court did affirm the district court's finding that the social worker did not violate the grandparents' due process right to associate with the grandchild by failing to act. To show the deprivation of the right to familial association, the plaintiff must show "that the state actor intended to deprive him or her of a specially protected familial relationship." *Id.* at 1175. The court found there was absolutely no evidence that the social worker intended to interfere with the grandparent's relationship with the children. The circuit court affirmed in part, reversed in part, and remanded the case for further proceedings.

STATUTES CITED

[1]Wyo. Stat. Ann. § 6-10-301(c) (LexisNexis 2012)

> (c) A sentence specifically designated as a sentence of life imprisonment without parole is not subject to commutation by the governor. A sentence of life or life imprisonment which is not specifically designated as a sentence of life imprisonment without parole is subject to commutation by the governor. A person sentenced to life or life imprisonment is not eligible for parole unless the governor has commuted the person's sentence to a term of years.

[2]Wyo. Stat. Ann. § 7-13-402(a) (LexisNexis 2012)

> (a) The board may grant a parole to any person imprisoned in any institution under sentence, except a sentence of life imprisonment without parole or a life sentence, ordered by any district court of this state, provided the person has served the minimum term pronounced by the trial court less good time, if any, granted under rules promulgated pursuant to W.S. 7-13-420.

[3]Wyo. Stat. Ann. § 6-2-101(b) (LexisNexis 2012)

> (b) A person convicted of murder in the first degree shall be punished by death, life imprisonment without parole or life imprisonment according to law, except that no person shall be subject to the penalty of death for any murder committed before the defendant attained the age of eighteen (18) years.

[4]Wyo. Stat. Ann. § 6-2-101(a) (LexisNexis 2012)

> (a) Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any sexual assault, sexual abuse of a minor, arson, robbery, burglary, escape, resisting arrest, kidnapping or abuse of a child under the age of sixteen (16) years, kills any human being is guilty of murder in the first degree.

[5]Wyo. Stat. Ann. § 14-6-203(f)(iv) (LexisNexis 2012)

> (f) The district attorney shall establish objective criteria, screening and assessment procedures for determining the court for appropriate disposition in cooperation and coordination with each municipality in the jurisdiction of the district court. The district attorney shall serve as the single point of entry for all minors alleged to have committed a crime. Except as otherwise provided in this section, copies of all charging documents, reports or citations for cases provided in this subsection shall be forwarded to the district attorney prior to the filing of the charge, report or citation in municipal or city court. The following cases, excluding status offenses, may be originally commenced either in the juvenile court or in the district court or inferior court having jurisdiction:
>
> (iv) Cases in which the minor has attained the age of fourteen (14) years and is charged with a violent felony as defined by W.S. 6-1-104(a)(xii).

[6]Wyo. Stat. Ann. § 14-6-237(b) (LexisNexis 2012)

(b) The court shall order the matter transferred to the appropriate court for prosecution if after the transfer hearing it finds that proper reason therefor exists. The determinative factors to be considered by the judge in deciding whether the juvenile court's jurisdiction over such offenses will be waived are the following:
  (i) The seriousness of the alleged offense to the community and whether the protection of the community required waiver;
  (ii) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
  (iii) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted;
  (iv) The desirability of trail and disposition of the entire offense in one (1) court when the juvenile's associates in the alleged offense are adults who will be charged with a crime;
  (v) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living;
  (vi) The record and previous history of the juvenile, including previous contacts with the law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this court, or prior commitments to juvenile institutions;
  (vii) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court.

[7]Wyo. Stat. Ann. § 7-11-302 (LexisNexis 2013)

(a) No person shall be tried, sentenced or punished for the commission of an offense while, as a result of mental illness or deficiency, he lacks the capacity, to:
  (i) Comprehend his position;
  (ii) Understand the nature and object of the proceedings against him;
  (iii) Conduct his defense in a rational manner; and
  (iv) Cooperate with his counsel to the end that any available defense may be interposed.

[8]Wyo. Stat. Ann. § 7-11-303 (LexisNexis 2013)

(a) If it appears at any stage of a criminal proceeding, by motion or upon the court's own motion, that there is reasonable cause to believe that the accused has a mental illness or deficiency making him unfit the proceed, all further proceedings shall be suspended.
(b) The court shall order an examination of the accused by a designated examiner. The order may include, but is not limited to, an examination of the accused at the Wyoming state hospital on an inpatient or outpatient basis, at a local mental health center on an inpatient or outpatient basis, or at his place of detention. In selecting the examination site, the court may consider proximity to the court, availability of an examiner, and the necessity for security precautions. If the order provides for commitment of the accused to a designated facility, the commitment shall continue no longer that a thirty (30) day period for the study of the mental condition of the accused. The prosecuting attorney and counsel for the accused shall cooperate in providing the relevant information and materials to the designated examiner, and the court may order as necessary that relevant information be provided to the examiner.
(c) Written reports of the examination shall be filed with the clerk of court. The report shall include:
  (i) Detailed findings;
  (ii) An opinion as to whether the accused has a mental illness or deficiency, and its probable duration;
  (iii) An opinion as to whether the accused, as a result of mental illness or deficiency, lacks capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed;
  (iv) Repealed by Laws 2009, ch. 31 § 2.
  (v) A recommendation as to whether the accused should be held in a designated facility for treatment pending determination by the court of the issue of mental fitness to proceed; and
  (vi) A recommendation as to whether the accused, if found by the court to be mentally fit to proceed, should be detained in a designated facility pending further proceedings.

(d) The clerk of the court shall deliver copies of the report to the district attorney and to the accused or his counsel. The report is not a public record or open to the public. After receiving a copy of the report, both the accused and the state may, upon written request and for good cause shown, obtain an order granting them an examination of the accused by a designated examiner of their own choosing. For each examination ordered, a report conforming to the requirements of subsection (c) of this section shall be furnished to the court and the opposing party.

(e) If the initial report contains the recommendation that the accused should be held in a designated facility pending determination of the issue of mental fitness to proceed, the court may order that the accused be committed to or held in a designated facility pending determination of mental fitness to proceed. The court may order the involuntary administration of antipsychotic medications to a person accused of a serious crime as defined in W.S. 7-6-102(a)(v) to render the accused competent to stand trial, provided the court finds:

(i) There are important governmental interests at stake including, but not limited to:

(A) Bringing the accused to trial;

(B) Timely prosecution;

(C) Assuring the accused has a fair trial.

(ii) The involuntary administration of antipsychotic medications will significantly further the governmental interest and the administration of the medication is:

(A) Substantially likely to render the accused competent to stand trial; and

(B) Substantially unlikely to have side effects that will interfere significantly with the ability of the accused to assist counsel in conducting a trial defense, thereby rendering the trial unfair.

(iii) That any alternative and less intrusive treatments are unlikely to achieve substantially the same results; and

(iv) The administration pursuant to a prescription by a licensed psychiatrist of the antipsychotic medications is medically appropriate and is in the best medical interests of the accused in light of the accused's medical condition.

(f) If neither the state, nor the accused or his counsel contests the opinion referred to in paragraph (c)(iii) of this section relative to fitness to proceed, the court may make a determination and finding of record on this issue on the basis of the report filed or the court may hold a hearing on its own motion. If the opinion relative to fitness to proceed is contested the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue. The party contesting any opinion relative to fitness to proceed has the right to summon and cross-examine the persons who rendered the opinion and to offer evidence upon the issue.

(g) If the court determines that the accused is mentally fit to proceed, the court may order that the accused be held in confinement, be committed to a designated facility pending further proceedings, or be released on bail or other conditions. If the court determines that the accused lacks mental fitness to proceed, the proceedings against him shall be suspended and the court shall commit him to a designated facility to determine whether there is substantial probability that the accused will regain his fitness to proceed:

(i) The examiner shall provide a full report to the court, the prosecuting attorney and the accused or his counsel within ninety (90) days of arrival of the accused at the designated treating facility. If the examiner is unable to complete the assessment within ninety (90) days the examiner shall provide to the court and counsel a summary progress report which informs the court that additional time is necessary to complete the assessment, in which case the examiner may have up to an additional ninety (90) days to provide the full report for good cause shown, as follows:

(A) The full report shall assess:

(I) The facility's or program's capacity to provide appropriate treatment for the accused;

(II) The nature of treatments provided to the accused;

(III) What progress toward competency restoration has been made with respect to the factors identified by the court in its initial order;

(IV) The accused's current level of mental disorder or mental deficiency and need for treatment, if any; and

(V) The likelihood of restoration of competency and the amount of time estimated to achieve competency.

(B) Upon receipt of the full report, the court shall hold a hearing to determine the accused's current status. The burden of proving that the accused is fit to proceed shall be on the proponent of the assertion. Following the hearing, the court shall determine by a preponderance of the evidence whether the accused is:

(I) Fit to proceed;

(II) Not fit to proceed with a substantial probability that the accused may become fit to proceed in the foreseeable future; or

(III) Not fit to proceed without a substantial probability that the accused may become fit to proceed in the foreseeable future.

(C) If the court makes a determination pursuant to subdivision (B)(I) of this paragraph, the court shall proceed with the trial or any other procedures as may be necessary to adjudicate the charges;

(D) If the court makes a determination pursuant to subdivision (B)(II) of this paragraph, the court may order that the accused remain committed to the custody of the designated facility for the purpose of treatment intended to restore the accused to competency;

(E) If the court makes a determination pursuant to subdivision (B)(III) of this paragraph, the court shall order the accused released from the custody of the designated facility unless proper civil commitment proceedings have been instituted and held as provided in title 25 of the Wyoming statutes. The continued retention, hospitalization and discharge of the accused shall be the same as for other patients.

(ii) If it is determined pursuant to subdivision (i)B(II) of this subsection that there is substantial probability that the accused will regain his fitness to proceed, the commitment of the accused at a designated facility shall continue until the head of the facility reports to the court that in his opinion the accused is fit to proceed. If this opinion is not contested by the state, the accused or his counsel, the criminal proceeding shall be resumed. If the opinion is contested, the court shall hold a hearing as provided in subsection (f) of this section. While the accused remains at a designated facility under this subsection, the head of the facility shall issue a full report at least once every three (3) months in accordance with the requirements of subparagraph (i)(A) of this subsection on the progress the accused is making towards regaining his fitness to proceed.

(h) A finding by the court that the accused is mentally fit to proceed shall not prejudice the accused in a defense to the crime charged on the ground that at the time of the act he was afflicted with a mental illness or deficiency excluding responsibility. Nor shall the finding be introduced in evidence on that issue or otherwise brought to the notice of the jury. No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any person in the course of the examination or treatment shall be admitted in evidence in any criminal proceeding them or thereafter pending on any issue other than that of the mental condition of the accused.

(j) Notwithstanding any provision of this section, counsel for the accused may make any and all legal objections which are susceptible of a fair determination prior to trial without the personal participation of the accused.

[9]Wyo. Stat. Ann. § 14-6-219 (LexisNexis 2013)

(a) Any time after the filing of a petition, on motion of the district attorney or the child's parents, guardian, custodian or attorney or on motion of the court, the court may order the child to be examined by a licensed and qualified physician, surgeon, psychiatrist or psychologist designated by the court to aid in determining the physical and mental condition of the child. The examination shall be conducted on an outpatient basis, but the court may commit the child to a suitable medical facility or institution for examination if deemed necessary. Commitment for examination shall not exceed fifteen (15) days. Any time after the filing of a petition, the court on its own motion of motion of the district attorney or the child's parents, guardian, custodian or attorney, may order the child's parents, guardians or other custodial members of the child's family to undergo a substance abuse assessment at the expense of the child's parents, guardians or other custodial members of the child's family and to fully comply with all

findings and recommendations set forth in the assessment. Failure to comply may result in contempt proceedings as set forth in W.S. 14-6-242.

(b) If a child has been committed to a medical facility or institution for mental examination prior to adjudication of the petition and if it appears to the court from the mental examination that the child is competent to participate in further proceedings and is not suffering from mental illness or intellectual disability to a degree rendering the child subject to involuntary commitment to the Wyoming state hospital or the Wyoming life resource center, the court shall order the child returned to the court without delay.

(c) If it appears to the court by mental examination conducted before adjudication of the petition that a child alleged to be delinquent is incompetent to participate in further proceedings by reason of mental illness or intellectual disability to a degree rendering the child subject to involuntary commitment to the Wyoming state hospital or the Wyoming life resource center, the court shall hold further proceedings under the act in abeyance. The district attorney shall then commence proceedings in the district court for commitment of the child to the appropriate institution as provided by law.

(d) The juvenile court shall retain jurisdiction of the child on the petition pending final determination of the commitment proceedings in the district court. If proceedings in the district court commit the child to the Wyoming state hospital, the Wyoming life resource center or any other facility or institution for treatment and care of people with a mental illness or an intellectual disability, the petition shall be dismissed and further proceedings under this act terminate. If proceedings in the district court determine the child does not have a mental illness or an intellectual disability to a degree rendering him subject to involuntary commitment, the court shall proceed to a final adjudication of the petition and disposition of the child under the provisions of this act.

[10] Wyo. Stat. Ann. § 14-2-309(a) (LexisNexis 2012)

(a) The parent-child legal relationship may be terminated if any one (1) or more of the following facts is established by clear and convincing evidence:

(i) The child has been left in the care of another person without person without provision for the child's support and without communication from the absent parent for a period of at least one (1) year. In making the above determination, the court may disregard occasional contributions, or incidental contacts and communications. For purposes of this paragraph, a court order of custody shall not preclude a finding that a child has been left in the care of another person;

(ii) The child has been abandoned with no means of identification for at least three (3) months and efforts to locate the parent have been unsuccessful;

(iii) The child has been abused or neglected by the parent and reasonable efforts by an authorized agency or mental health professional have been unsuccessful in rehabilitating the family or the family has refused rehabilitative treatment, and it is shown that the child's health and safety would be seriously jeopardized by remaining with or returning to the parent;

(iv) The parent is incarcerated due to the conviction of a felony and a showing that the parent is unfit to have the custody and control of the child;

(v) The child has been in foster care under the responsibility of the state of Wyoming for fifteen (15) of the most recent twenty-two (22) months, and a showing that the parent is unfit to have custody and control of the child;

(vi) The child is abandoned at less than (1) year of age and has been abandoned for at least six (6) months;

(vii) The child was relinquished to a safe haven provider in accordance with W.S. 14-11-101 through 14-11-109, and neither parent has affirmatively sought the return of the child within three (3) months from the date of relinquishment;

(viii) The parent is convicted of murder or homicide of the other parent of the child under W.S. 6-2-101 through 6-2-104.

[11] Wyo. Stat. Ann. § 20-5-304(a) (LexisNexis 2012)

(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, the child's sibling or a parent of the child is subjected to or threatened with mistreatment or abuse.