

# CRIMINAL LAW SUMMARIES

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## Donald Clyde Davis v. State of Wyoming, 2018 WY 40 decided April 13, 2018.

In 1982, when Mr. Davis was seventeen (17) years old, he and a friend picked up a hitchhiker, robbed, and murdered him. Davis pled guilty to first degree murder, felony murder, and aggravated robbery, and he was sentenced to life imprisonment with a consecutive sentence of twenty-to-fifty-years for the aggravated robbery. He served thirty-three (33) years of these sentences before the Wyoming Legislature amended Wyo. Stat. Ann. § 6-10-301(c) in response to the decisions of the United States Supreme Court in *Miller v. Alabama* and the Wyoming Supreme Court in *Bear Cloud v. State*. On June 25, 2013, Davis filed a motion to correct an illegal sentence and his life sentence was converted to life with the possibility of parole after twenty-five years. On December 15, 2015, he was paroled from the life sentence and began serving time on the consecutive twenty-to-fifty-year sentence for the aggravated robbery.

Davis then supplemented his original motion and argued the aggregate sentence was still a de facto life sentence and that he had no real chance of release during his life. He was granted an individualized sentencing hearing in July, 2016. The district court declined to modify Mr. Davis' sentence. The Wyoming Supreme Court held that because the district court held an individualized sentencing hearing before his resentencing, the fact that the sentence could be life without parole did not make it unconstitutional. The Wyoming Supreme Court also held that at a *Miller* hearing, it is the

State's burden to prove beyond a reasonable doubt to demonstrate a juvenile is irreparably corrupt to rebut the presumption against the imposition of a functional equivalent to a life-without-parole sentence. The Wyoming Supreme Court opined that if a court sentences a juvenile offender to life or the functional equivalent, it must make a specific finding that it considered all of the *Miller* factors and determined the crime was a reflection of irreparable corruption and not simply transient immaturity. Also, if the sentencing court decides not to consider a factor, it must explain the reasons for doing so. Expert testimony to support a *Miller* determination is not necessarily required and must be decided on a case-by-case basis. For retroactive *Miller* decisions, the resentencing court may consider any relevant evidence at the time of the resentencing, including Davis's prison record. The Wyoming Supreme Court determined a sentencing court's legal conclusions would be reviewed de novo.

The Wyoming Supreme Court reversed and remanded for a resentencing hearing taking in to account the procedure, burdens and potentially relevant evidence for a *Miller* determination.

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## Aventura H. Palomo, Jr. v. State of Wyoming, 2018 WY 42 decided April 17, 2018.

An officer from the Cheyenne Police Department received a call about a fight between Mr. Palomo and his brother. When the officer arrived, both men ran, and the officer ordered them to stop before chasing them. When the officer caught up to Palomo, he grabbed the officer's ballistic vest and shook her. The officer used her remote door popper to release the canine unit from the police vehicle. The canine unit bit and held onto Palomo's brother. The officer pushed Palomo aside and worked to have the canine unit release the brother. Palomo began kicking the dog, and the officer ordered him to stop. When he refused, she knocked him onto the porch, and the two tumbled to the ground. Palomo landed on top of the officer and began punching her in the head and face before the canine unit intervened.

Palomo was charged with one felony count of interference with a peace officer for inflicting bodily injury, one misdemeanor count of interference with a peace officer for resisting arrest and one misde-

meanor count of cruelty to animals and was appointed a public defender. Trial was initially set for February 16, 2016 but was continued by Palomo on multiple occasions. Prior to a reset May 16, 2016, trial setting, Palomo requested a change of plea hearing, which was scheduled for May 5, 2016.

At the change of plea hearing, Palomo told the court he was rejecting the State's offer and wanted to proceed to trial. The district court scheduled the trial to begin July 20, 2016; but, private counsel for Palomo entered an appearance on Friday July 15, 2016, and filed a motion to continue to facilitate preparation for trial. Private counsel asserted the State did not object to the continuance. The court held a hearing on the motion on Monday, July 18, 2016, and determined that Palomo had misrepresented the State's position on the continuance and denied the same. Private counsel filed another motion to continue on July 19, 2016, which was considered the morning of trial and denied. The Jury found Palomo guilty of both interference counts and not guilty on the animal cruelty charge.

Palomo appealed arguing the district court abused its discretion when it denied the motions to continue filed by private counsel. The Wyoming Supreme Court found the district court had weighed all of the relevant factors found in *United States v. Mendoza-Salgado* and adopted in *Secrest v. State*, 2013 WY 102 (Wyo. 2013), and the denials were reasonable under the circumstances. Palomo also argued his written sentence was illegal because it was contrary to the oral sentence. The Wyoming Supreme Court determined the written sentence was not illegal because it did not exceed statutory limits. However, the Court did note the written sentence was not in conformance with the oral sentence and should be corrected.

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## Debora McEwan v. State of Wyoming, 2018 WY 65 decided June 14, 2018

McEwan was charged with three felonies to obtain public welfare benefits by misrepresentation in 2010. She entered a no contest plea to one of the three charges and restitution was fixed at \$18,733. McEwan filed a motion requesting the district court find she did not have the ability to pay the restitution due to evidence that she was on disability, lived on a fixed income and

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had been granted a discharge in Chapter 7 bankruptcy proceedings. The State argued McEwan may have the ability to pay restitution in the future.

The district court issued an Order on Sentencing and Reconsideration of Defendant's Inability to Pay Restitution, which fixed the amount of restitution, but did not require her to pay it. McEwan appealed the oral pronouncement allowing the State to reduce the restitution to a civil judgment arguing it exceeded statutory authority. The Wyoming Supreme Court found because the district court did not actually order restitution, it erred as a matter of law when it then allowed the State to reduce to a civil judgment. The Court also found the district court erred when it failed to make a finding on whether McEwan lacked a future ability to pay.

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### **Don Birch v. State of Wyoming,** 2018 WY 73 decided July 3, 2018.

Birch and his wife were neighbors with the Johnsons in Moran, Wyoming, but the neighbors did not have a civil relationship due to property line disputes. On November 1, 2016, Birch was visiting another neighbor, Leeper, and told him how he wanted to shoot Mr. Johnson in the leg. On November 2, 2016, Leeper awoke to gunfire and could see Birch yelling the Johnsons' names and firing his gun. On November 7, 2016, Birch was outside shouting profanities outside of the Johnson's home while shooting his gun. Birch was charged with aggravated assault and battery.

At trial, Birch proposed a jury instruction defining threatens to use. The district court declined to give the proposed instruction and gave the pattern jury instruction defining threatens to use. The Wyoming Supreme Court determined the district court had not abused its discretion when declining to give the instruction because the terms are afforded their common and ordinary meaning and did not require a further definition.

The State filed a notice of intent to introduce evidence of Birch's conduct on November 1st and 2nd arguing it was intrinsic to the charged offense and not evidence of uncharged misconduct. The district court ruled the statements and November 2nd incident were included in the affidavit of

probable cause in support of the Information and was not prohibited by 404(b). The Wyoming Supreme Court opined the facts were not so inextricably intertwined to make it intrinsic to the November 7th events, and the November 2nd incident clearly was uncharged misconduct. However, the Court found there was not a reasonable probability the verdict would have been more favorable towards Birch if the error had not occurred.

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### **Stephen Richard Haskell v.** **State of Wyoming,** 2018 WY 85 decided August 1, 2018.

Haskell was convicted of obtaining property by false pretenses, acting as a public officer before qualifying, submitting false claims with intent to defraud, and wrongfully taking or disposing of property. Haskell won the primary election in 2014 for Sublette County Sheriff. One of his platforms included purchasing new officer uniforms. After the general election in November, he became the sheriff-elect, and as part of preparing of office, he had a meeting with two of the county commissioners to discuss purchasing new uniforms. The commissioners did not authorize Haskell to order them. Without authorization from the county commissioners or sitting sheriff, Haskell ordered the new uniforms, including patches and badges, and placed the order in the name of the sheriff's office. Haskell and his new command staff arrived for the swearing in ceremony on January 5, 2015 with new uniforms.

Haskell told the commissioners he would pay for any items ordered before his swearing in ceremony. After that meeting, an employee who processed invoices from one of the companies noticed the order dates were prior to the swearing-in ceremony and contacted Haskell about this information. Haskell called the company and requested a change in the order dates to reflect a date after January 5, 2015, which the company did. Haskell then told the county employee to shred the original invoices and told her new invoices would be received. In early February, the commissioners learned Haskell had ordered more items than originally represented. Haskell again told commissioners he would pay for any items ordered prior to January 5, 2015, but did not disclose the modification to invoices. The commissioners approved payments of

about \$12,000.00.

A few weeks later, a county dispatcher located a recording of the call Haskell made to the company requesting the modification of order dates and the commissioners requested the assistance of the Division of Criminal Investigation. The jury found Haskell guilty on all charges and he appealed asserting insufficient evidence and erroneous jury instructions.

The Wyoming Supreme Court reaffirmed their interpretation of the word "obtain" from the *Bohling* decision to include "both title to and possession of the victim's property" reversed the conviction of obtaining property by false pretenses because no property or money passed from the county to Haskell and affirmed the remaining convictions.

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### **Jacob Alan Buszkiewicz v.** **State of Wyoming,** 2018 WY 100 decided August 23, 2018.

Buszkiewicz was convicted of two counts of strangulation of a household member and appealed alleging the prosecutor made statements during closing argument that deprived him of a fair trial. Buszkiewicz claimed the prosecutor made an improper "golden rule" argument when asking the jurors to put themselves in the victim's position the night of the incident. The Wyoming Supreme Court noted a golden rule argument that asks a juror to draw inferences from the evidence based on a how a reasonable person in the same position as the victim would act is not improper. The Court noted this prosecutor was not appealing to the jury to decide the case because of sympathy or bias, but asking that they use their own life experiences and common sense.

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### **Robert William Guty v.** **State of Wyoming,** 2018 WY 106 decided September 10, 2018.

Guty was a nurse when he was charged with sexually assaulting a sedated female patient while she was under anesthesia for a surgical procedure. The State of Wyoming filed 404(b) notice specifying testimony from five nurses regarding their suspicions of Guty and observations related to his hands being outside expected places during surgery of female patients. The dis-

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trict court ruled the testimony was admissible under W.R.E. 404(b) and Gutty then entered into a conditional plea, preserving the issue of the admissibility of the 404(b) evidence at trial. The agreement was that if Gutty prevailed in the appeal, he was allowed to withdraw his plea, and the State would dismiss with prejudice. The parties agreed a decision by the Supreme Court would dispose of the case.

The Wyoming Supreme Court found that the decision was not dispositive, and the case was reversed and remanded. The Court looked to *Matthews v. State* for the four elements to determine if a valid conditional plea exists. The Court also noted a Defendant should not be allowed to appeal a matter that could have been developed if the case proceeded to trial. The Court found the fourth element, whether the decision of the Supreme Court would dispose of the case, because there was too much uncertainty as to the Court's ruling. For example, if the Court had ruled that some of the nurses could testify, but others could not. Therefore, the Court reversed and remanded.

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### Steven Jacob Mitchell v. State of Wyoming, 2018 WY 110 decided September 24, 2018.

This case involves a lengthy custody dispute involving state and tribal courts. The parties had agreed that the child would reside with mother and Mitchell could have liberal visitation. Mitchell picked the child up for a visit and during it, noticed the child was ill. It was determined she had a coin lodged in her throat. After it was surgically removed, Mitchell refused to return the child to her mother alleging the child was abused and neglected.

The mother repeatedly attempted to see her daughter. The parties ultimately entered a temporary custody agreement, which was entered by the district court in 2013. Mitchell refused to abide by it despite a motion for an order to show cause. He instead attempted to modify the temporary custody schedule. The district court found Mitchell in contempt and ordered visitation to commence. He again failed to follow the court's orders. The mother filed another motion for an order to show cause, and Mitchell was again

found in contempt of court. Mitchell failed to appear at the custody trial in 2015, and the court awarded primary custody to the mother, but Mitchell continued to refuse to give the child to the mother. The district court then issued a bench warrant for Mitchell's arrest.

In 2016, Mitchell, acting pro se, filed a motion requesting the district court relinquish jurisdiction to the tribal court. When it was denied, Mitchell turned himself in to the Weston County Sheriff in October of 2016, and he still did not give the child to the mother.

The district court held Mitchell in civil contempt and ordered he was to remain jailed until he complied with the custody order by relinquishing custody to the mother. Later that day, he appeared in circuit court and bond was set at \$100,000.00 with the added condition that bond could be revisited after there was proof the child had been returned to Sheridan County and/or to her mother. The case was bound over to district court, where the district court judge denied a bond modification. In February 2017, the State amended their information to include an additional count of interference with custody for a different time period. Mitchell entered a plea agreement and a presentence investigation was ordered. Mitchell was sentenced to three and one-half years to five years of imprisonment set to commence after the civil contempt confinement ended. Mitchell was awarded no credit for time served prior to sentence being entered.

Mitchell appealed and argued the sentence for interference with custody violates double jeopardy. The Wyoming Supreme Court noted the double jeopardy clause only protects from multiple criminal punishments for the same offense being imposed, and in this case, Mitchell was held in civil contempt. Therefore, the double jeopardy prohibitions was not imposed.

Mitchell also argued his sentence was illegal because he was not given credit for his presentence confinement. The Supreme Court opined a Defendant is entitled to presentence confinement time if he was unable to post bond for the offense in which he was convicted. The Court noted Mitchell could have purged the contempt, but chose not to do so. The presentence confinement for the civil contempt was independent from the criminal case bond and was not incarceration time that qualified for credit against his sentence.

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### George Daniel Nitchman v. State of Wyoming, 2018 WY 116 decided October 16, 2018.

Nitchman was sentenced to consecutive sentences of seven to ten years on the first count and three to five years on the second count. He filed a motion for sentence reduction which was granted and allowed if he completed eighteen months of incarceration without incident, the remainder of the sentence of the first count would be suspended and he would be released on probation to complete a drug treatment program. If he successfully completed that program, the second count sentence would be suspended and he would receive five years of probation on the first count and five years probation on the second count.

Nitchman was indicted by a federal grand jury stemming from the same conduct that resulted in the State charges from this case. He was taken from the custody of the Wyoming Department of Corrections into federal custody four months before he was scheduled to be released and placed on probation on a state level. The state sentence created issues in reaching a federal court plea deal and counsel for Nitchman and the State filed a stipulated motion for sentence reduction. This order was granted. Nitchman was ultimately released from federal prison and began serving state probation, but a few years later, the State revoked his probation and reinstated the original sentence with credit for time already served. Nitchman appealed arguing the sentence was illegal because there was an impermissible break in his state sentence pursuant to *Cothren I* and *Cothren II*.

The Wyoming Supreme Court noted periods of incarceration cannot be interrupted by periods of probation. However, the Court opined that in this case, Nitchman's modified reduced state sentence did not have interrupted periods of incarceration because he served the first part of his state sentence, was released to serve his federal sentence and then was not returned to state incarceration. Instead, he was placed on probation. ●