

PROSECUTOR



United States Supreme Court

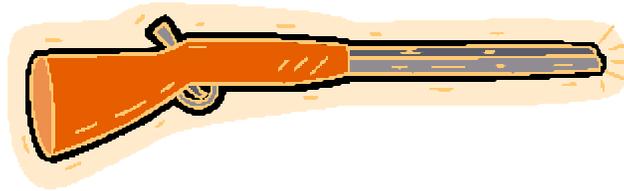
Bearing arms in the home is protected by the 2nd Amendment

The Second Amendment protects the individual right to have and use weapons for self-defense, and the District of Columbia's ban on handguns in the home violates that right. This was the court's first comprehen-

sive look at the amendment, which states that a "well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The court reasoned that the prefatory clause's reference

to the militia reflected concerns that the federal government not eliminate state militias, but it does not limit the second, "operative" clause's recognition of a pre-existing individual right to have and carry weapons. The amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," the court said. The D.C. laws are invalid because they frustrate that core right, it said.



At issue were D.C. ordinances that, with certain exceptions, (1) bar registration (and thus possession) of handguns, (2) prohibit carrying a handgun without a license is-

sued by the chief of police, and (3) require that lawfully owned firearms, such as long guns, be kept "unloaded and disassembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities. The plaintiff, who was denied a registration certificate for a handgun that he wished to keep at home, charged that these ordinances violated the Second Amendment to the extent that they barred use of "functional firearms in the home."

The district court dismissed the law-

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suit, ruling that the amendment, at most, protects an individual's right to "bear arms for service in the militia." The D.C. Circuit, agreeing with the Fifth Circuit, reversed. It found that the amendment protects an individual right to possess firearms and that the city's total ban on handguns, and the disassemble-or-lock requirement for lawful firearms, violated that right. *District of Columbia v. Heller*, United States Supreme Court, No. 07-290 (June 26, 2008)

Confrontation, hearsay, and forfeiture by wrongdoing

The U.S. Supreme Court rejected a version of an equitable doctrine that would have made it easier for prosecutors to present the hearsay statements of crime victims and other witnesses whom defendants have wrongfully made

unavailable to testify at trial. The forfeiture-by-wrongdoing exception to the Sixth Amendment right to cross-examination does not allow prosecutors to present this type of hearsay in the absence of a showing that, at the time the accused engaged in the wrongful acts that rendered a declarant unavailable, the accused was acting with an intent to prevent the declarant from testifying, the court decided.

Many jurisdictions' rules of evidence expressly require proof of a defendant's intent to keep a hearsay declarant from testifying. Some state courts, however, had held that this was an additional measure of protection not required by the Confrontation Clause itself.

The Supreme Court found no historical support for this interpretation. It also suggested that its rejection of the



more permissive version of the forfeiture-by-wrongdoing exception will not prevent law enforcement authorities from making cases against domestic abusers because it is not that hard for prosecutors to show that abusers intended to keep their victims from testi-

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Case Summaries

United States Supreme Court (p. 1-3)

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fying.

In *Crawford v. Washington*, 541 U.S. 36, (2004), the court overturned decades of precedent to declare that prosecutors may no longer present hearsay that is "testimonial" in nature simply because a trial judge deemed the evidence to be reliable. Instead, prosecutors must now have the declarant testify, or else show that the declarant is unavailable and that the accused had a prior opportunity for cross-examination. This new regime has posed particular problems for prosecutors in cases involving domestic abuse of women and children, who are more often reluctant or unable to testify at trial. However, in both *Crawford* and *Davis v. Washington*, 547 U.S. 813 (2006), the court reaffirmed the continuing viability of the forfeiture-by-wrongdoing doctrine. The court reported that the manner in which the rule was applied in the early cases "makes plain that uncontroverted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying." *Giles v. California*, United States Supreme Court, No. 07-6053 (June 25, 2008)



No death penalty allowed for rape of a child

The Eighth Amendment prohibits the imposition of the death penalty for the crime of raping a child. Applying the "evolving standards of decency" analysis it employs in capital cases, the Court concluded that a sentence of death is disproportionate to the crime when the victim's death did not result and was not intended.

The habeas corpus petitioner was sentenced to die under a 1995 Louisiana law that authorizes execution when a rape victim is under the age of 12. He was convicted of raping his stepdaughter, who was 8 years old at the time and suffered severe internal injuries in the attack.

The Court found that the trend goes against expanding the death penalty, and that if it were to approve capital punishment in this context, the number of people subject to the death penalty would skyrocket given the prevalence of sex crimes against children. It warned that "[e]volving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. "As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken," the court said. *Kennedy v. Louisiana*, United States Supreme Court, No. 07-343 (June 25, 2008)

Utah Supreme Court

Unnecessary rigor in confinement

Defendants Bosko and Sanns appeal the denial of their motion to dismiss Plaintiff Dexter's personal injury claim arising from injuries he sustained while he was in the Defendant's custody and was being transported as a prisoner. Dexter brought his claims under the unnecessary rigor in confinement clause of Article I, Section 9 of the Utah Constitution.

Corrections personnel Bosko



and Sanns transported eight prisoners via a 15-passenger van from the Utah State Prison to the Beaver County Jail. The prisoners were shackled and handcuffed, and although the van was equipped with seatbelts and several asked to be belted, Bosko and Sanns did not oblige. During the trip, Bosko, who was driving, overcorrected after becoming distracted and caused the van to roll, ejecting Dexter who became paralyzed after the accident and eventually died from complications due to his injuries. Dexter filed a complaint contending that prison officials' failure to place him in a seatbelt during his transport

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PROSECUTOR PROFILE



Edward Berkovich, Domestic Violence / Traffic Safety Resource Prosecutor, UPC

Ed is the newest member of the Utah Prosecution Council, having joined us a month ago as the new Domestic Violence/Traffic Safety Resource Prosecutor.

Ed was born in Thompson, Manitoba, Canada (a small mining town) as the fourth of five children and grew up in Southern Peru, Eastern Canada and California. His father was a chemist and his mother was a homemaker, and he counts his parents as the individuals who have most influenced his life. As a youngster, Ed wanted to be a guard in the NBA and lists his favorite sports team as the 1972 Soviet National Hockey team.

In 1989 Ed graduated from Golden Gate University with a Bachelor's in Politics and attended the University of Utah S.J. Quinney College of Law, from which he graduated in 1992. Ed entered prosecution out of law school and worked as a prosecutor for the City of Orem for four years and recently for Salt Lake City for three years. He also worked in private practice in between those two positions. His most embarrassing moment as a prosecutor came when he forgot the facts of a case and lost his train of thought in the middle of a closing argument in a retail theft jury trial. Ed thinks the most important characteristics a prosecutor can possess are preparation and perspective.

Ed quit law at one point in his career with the intention of traveling the world for a year. That year stretched into three, including teaching and living stints in China for a year and Vietnam for nine months. If he could go anywhere now, he'd go to Northern Japan or back to India. His favorite book is *Shantaram* by Greg Roberts, and the last book he read was *The Prosecution of George W. Bush for Murder* by Vincent Bugliosi. His favorite movie is *The Russia House* and he enjoys classic rock, cooking, hiking, researching for his Slavic ancestors and spending time outdoors.

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PREFERRED NAME

Ed

FAMILY

Fourth of five children; three brothers, one sister

HOMETOWN

Southern Peru, Eastern Canada, California

BIRTHPLACE

Thompson, Manitoba, Canada

FIRST JOB

House painter

CHILDHOOD DREAM JOB

Guard in the NBA

FAVORITE MUSIC

Classic rock

HOBBIES

Hiking, spending time outdoors



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violated his rights under Article I, Section 9 of the Utah Constitution. Defendants filed a motion to dismiss—which was denied by the trial court—and then filed an interlocutory appeal from the denial.

The question before the Court concerned what the scope of the unnecessary rigor clause is and its application to the facts of the case, if any. Article I, Section 9 of the Utah Constitution sets forth that persons arrested or imprisoned are not to be subjected to unnecessary rigor. A prisoner suffers from unnecessary rigor when subject to unreasonably harsh, strict or severe treatment. When a claim of unnecessary rigor arises from an injury, a constitutional violation is made out only when the act complained of presented a substantial risk of serious injury for which there was no justification at the time. The allegations in Dexter's complaint do not address the risk or necessity of Bosko and Sanns acts. The conduct by Bosko and Sanns must be determined by the fact finder to be more than negligent to be actionable. Defendants argue that even if not providing seatbelts violated the unnecessary rigor clause, their failure to act did not constitute a flagrant violation. The Supreme Court remanded the case to the trial court for resolution of the legal questions raised in the appeal. *Dexter v. Bosko, et al.*, Utah Supreme Court, No. 20060526 (April 11, 2008)

Utah Court of Appeals

Detaining passengers unlawfully during a traffic stop

Baker appeals from his conviction on the basis that the trial court improperly denied his motion to suppress. From the moment the driver (of the vehicle in which Baker was a passenger) was placed under arrest, Baker was unlawfully detained by police.

The police stopped the car and arrested the driver for driving with a suspended license. The reason for the original suspension was



drugs, so a K-9 unit was called to search the vehicle. The officers on the scene confiscated twelve knives from the other passengers in the vehicle and detained them until the K-9 unit arrived. After a vehicle search, a glass pipe and meth was found on Baker.

The Court of Appeals ruled that there was no lawful reason for the passengers in the vehicle to be detained while the officers awaited the arrival of the K-9 unit. The desire

of the officers to check the vehicle for controlled substances did not require the presence of the passengers. In this case, the mere presence of knives which the officers confiscated did not constitute a specific and articulable fact which, when taken together with rational inferences from that fact, would lead a reasonable to conclude that a suspect may be armed and dangerous as ruled by the Utah Supreme Court in *State v. Warren*. Additionally, the frisk of Baker occurred only after officers collected the knives and only after the K-9 unit indicated the presence of drugs and not as a response to a perceived threat of danger toward the officers. Consequently, the Court ruled that the frisk violated the purpose of such an action as discussed in *Terry v. Ohio* by the U.S. Supreme Court. Baker was unlawfully detained and his conviction was reversed. *State of Utah v. Baker*, Utah Court of Appeals, No. 20060218-CA (April 3, 2008)

Statutes of limitation in suits to quiet title to real property

Jarmacc appeals the trial court's grant of Bangerter's summary judgment motion, arguing that the court erred in determining that the sale of Bangerter's home by the sher-



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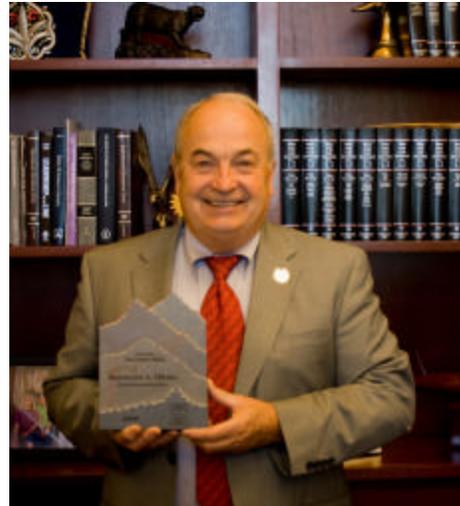


PRESS RELEASE

August 14, 2008

A.G. CHIEF DEPUTY WINS PUBLIC SERVICE AWARD

An unsung hero at the Utah Attorney Generals Office has received a major award for his behind-the-scenes legal work that impacted the West. The Conference of Western Attorneys General (CWAG) honored Chief Deputy Attorney General Ray Hintze with the 2008 Jim Jones Public Service Award. This special honor is given to an attorney who has achieved significant results and has shown a commitment to public service on multi-state matters.



Ray has long been the unsung hero at the Utah Attorney Generals Office, wrote Attorney General Mark Shurtleff in his nomination letter. He has quietly handled some of our most difficult assignments with diplomacy and skill.

Hintze received a standing ovation as he received the award at the CWAG annual meeting in Seattle on August 4. The chief deputy has been involved in numerous multi-state and high profile issues, including:

*Utah's efforts to keep nuclear waste from being temporarily stored on the Goshute Reservation.

*Removal of Warren Jeffs from a \$200 million trust in order to protect homes, businesses and assets of nearly 10,000 people living on the Utah-Arizona border.

*Utah's lawsuit against the Census Bureau which was heard by the United States Supreme Court.

Hintze has also been actively involved in tobacco litigation and has written numerous reports and reviews to help improve the office practices of attorneys general in other states.

It was an incredibly great honor but it was humbling to be recognized like that by your peers, says Hintze.

The chief deputy will be retiring at the end of this year after 14 years at the Utah Attorney Generals Office and 22 years in private practice. After all those years, Attorney General Mark Shurtleff says Hintze keeps going like the Energizer bunny.



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iff was void and that a statute of limitations applies to Bangerter's suit.

Bangerter's property was levied because of an overdue dental bill that went to collections, resulting in a judgment against Bangerter in 1995. The deputy sheriff signed an execution of sale thereafter, and Jarmacc purchased the property. In Bangerter's 1999 bankruptcy petition, Jarmacc was listed as a creditor for \$1200. Bangerter paid Jarmacc in full. Jarmacc was aware of the filing and accepted payments from Bangerter.

In 2004, Bangerter filed an action seeking to quiet title to the property, and her motion for summary judgment in the matter was granted in 2006. Jarmacc appealed, arguing that several statutes of limitations bar Bangerter's action. While Bangerter argued that the issue of statute of limitations was not plead or proved at trial, it is apparent in Jarmacc's memorandum in support of its motion for summary judgment that the issue had been raised and ruled on by the trial court. That court held that, as in *In Re: Hoopiiana Trust* (Utah Supreme Court, 2006 UT 53), no statute of limitation applies to a suit brought to quiet the title to real property. However, the Court of Appeals held that Bangerter's claim is not a true quiet title claim because it is predicated on a challenge to the validity of the sheriff's sale and resulting title deed. Therefore, a statute of limitations would apply and Bangerter's suit was barred. The ruling was reversed and the Court of Appeals directed the trial court to grant summary judgment in favor of Jarmacc. *Bangerter v. Petty, et al.*,

Utah Court of Appeals, No. 20060511-CA (May 1, 2008)

IAD inter-state compact

Defendant Barney appealed his conditional plea of no contest to theft and attempted burglary. In 2003, Barney began serving a 10-year prison sentence in Montana. In 2005, his release to a halfway house was canceled when prison officials discovered he had an outstanding warrant for theft and attempted burglary in Utah. Barney began communicating with law enforcement in Utah in October and November of 2005 and requested the speedy disposition of his charges from the Utah court in January 2006. Barney was transported to Utah and trial was set



for June 2006.

Barney filed a motion to dismiss because he was not brought to trial within 180 days of his request for disposition. The IAD is a compact between 48 states, the federal government, and the District of Columbia to gain custody of a prisoner incarcerated in another jurisdiction to try him on criminal charges. Detainer is a notice given to prison officials that a prisoner in custody faces charges pending in another state. Detainer must be lodged against a pris-

oner before he can invoke protections of IAD's Article III, which requires that a prisoner be tried within 180 days following detainer. Barney argued that his warrant was a detainer and that the state failed to prosecute him in a timely manner, consistent with IAD. The Court of Appeals followed the majority, which has held that an arrest warrant does not qualify as a detainer. Barney's 2005 communications did not start the 180-day clock because no detainer was filed with the Montana prison by the Utah authorities. In January 2006, Barney did request disposition after Utah had filed detainer. A June 2006 trial date was well within the 180-day limit set forth by the IAD. *State of Utah v. Barney*, Utah Court of Appeals, No. 20060767-CA (June 26, 2008)

Rule 403 and drug evidence

Defendant Downs appealed her conviction of unlawful possession of a controlled substance in a correctional facility, arguing that the trial court erred in allowing the state to admit evidence that was in violation of the Utah Rules of Evidence 403.

Downs was arrested at her home following a search there that yielded drugs and drug distribution materials. At the jail, despite insisting she wasn't carrying drugs, Downs was found with a baggy of methamphetamine in her pants pocket. At trial, Downs claimed she'd borrowed the pants from a friend and did not know there were drugs in the pocket. Over Downs' objections, the trial court allowed admission of state's evidence of the drugs found in

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the search of Downs' home, as well as prior drug trafficking surveillance at the residence. The jury convicted



Downs, who argues that the evidence allowed by the trial court was unduly prejudicial, confusing to the jury, and in violation of URE 403.

Rule 403 provides that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. The Court of Appeals, reviewing the trial court's decision under the abuse of discretion standard, held that the probative value of the evidence was high given Down's testimony that she had no knowledge of the drugs. The trial court determined that the evidence was not confusing and gave the jury context, and that it was not more prejudicial that Downs possessed drugs in her pocket than in her house—evidence that was coming in anyway. The Court of Appeals found that the trial court ruled appropriately within its discretion and affirmed the ruling. *State of Utah v. Downs*, Utah Court of Appeals, No. 20070526-CA (June 26, 2008)

Calibration certificates not testimonial evidence for purposes of Sixth Amendment

Defendant George petitioned

for an interlocutory appeal from a pretrial order denying his motion in limine to exclude calibration certificates in lieu of live testimony from the officer who prepared the certificates.

George was parked in his vehicle at a neighborhood park where police officers observed him with open alcohol bottles. George failed field sobriety tests administered to him at the park and was taken by the officers to the police station, where a breath test showed his blood alcohol level to be .13. George was charged with DUI while a minor was in the vehicle, open container in a vehicle, and violating park curfew. At the scheduled jury trial, the State desired to admit two calibration certificates in lieu of testimony by the calibration technician, Officer Camacho, as foundation for intoxilyzer results the State sought to admit at trial. The State argued the records are an exception to the hearsay rule because they are non-testimonial business



records. George objected, saying the certificates were prepared for prosecution purposes and were testimonial. Both parties filed motions in limine regarding the records, and George's was denied.

George argues on appeal of that ruling that the certificates are testimonial hearsay that their admission in lieu of Camacho's live testimony is a violation of his Sixth Amendment right to confrontation. George contends that the documents were prepared for the prosecution and that Camacho knew they would be used for that purpose when he prepared them. *Crawford* (541 US at 68) provides that (in accordance with the Sixth Amendment), testimonial statements may be admitted only if the declarant is unavailable and if there has been an opportunity to cross examine. In *Crawford*, the United States Supreme Court determined two types of statements that are testimonial under any test: ex parte testimony at a preliminary hearing and statements taken by police officers in the course of an interrogation. The Court held that certificates/affidavits made in the course of a machine calibration are not related to the prosecution of a specific defendant and are not testimonial, as they are prepared on a routine basis and may be used in accordance with U.C.A. § 41-6a-515 (made to prove alcohol analysis was made and the instrument used was accurate). *State of Utah v. George*, Utah Court of Appeals, No. 20060591-CA (July 3, 2008)

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Other Circuits

Alien cannot sue law enforcement for claim of violation of Vienna Convention

A foreign national has no right to sue law enforcement authorities for damages on the basis of their failure to inform him following his arrest of his right under Article 36 of the Vienna Convention to contact his nation's consulate. Ruling on an issue that has divided other circuits, the Court decided that the treaty does not create judicially enforceable individual rights.

Article 36 provides that authorities who arrest a foreign national must inform him of his rights to contact the consulate of his home country



and to have the consulate notified of his arrest upon his request. Whether this right is an individually enforceable one has been the subject of quite a bit of debate. The U.S. Supreme Court decided in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, that, even assuming the provision does create individual rights, suppression of evidence in a criminal prosecution is not the appropriate remedy for a violation. The Seventh Circuit subsequently held

that an alien arrested in this country does have an individual right to sue government officials under 42 U.S.C. §1983 for failing to advise him of his consular-notification right. *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007). On the other hand, the Ninth Circuit ruled in *Cornejo v. San Diego County*, 504 F.3d 853 (9th Cir. 2007), that individuals cannot demand enforcement of Article 36 or seek redress in U.S. courts for a violation of it.

The Second Circuit concluded that alleged Article 36 violations cannot provide a basis for dismissing an indictment and, therefore, a defense attorney did not provide ineffective assistance in failing to move for dismissal on that ground. *United States v. De La Pava*, 268 F.3d 157 (2d Cir. 2001). The Court agreed with the Ninth Circuit that Article 36 confers legal rights only on states, not on individuals. The creation of individually enforceable rights under a treaty must be clear, the Court said; treaties are presumed to entail state-to-state obligations, not privately enforceable rights, absent explicit terms to the contrary. Drafters of treaties commonly signal their intent to confer individually enforceable rights by using phrases such as "freedom of access to the courts of justice" and "appear in the courts either as plaintiffs or defendants," it said. The drafters of Article 36 signaled no such intent. Consequently, the Court held that the district court properly dismissed the case. *Mora v. People*, 2nd Circuit Court of Appeals, No. 06-0341 (April 24, 2008)

Other States

Juror challenge may be forfeited if discrimination occurred

A trial judge who has found that a party exercised a peremptory juror challenge in a discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), has discretion to remedy the equal protection violation by requiring the party to forfeit the strike. The court explained, however, that such a severe remedy may not be warranted in every case.

In the case before the court, the trial judge determined that the defense used two peremptory challenges against women in a discriminatory manner, in violation of the 14th Amendment's equal protection clause as interpreted in *Batson*. The judge seated the jurors and told defense



counsel that those two challenges had been exercised and used up.

New York law provides that each side in a criminal trial "must be allowed" the requisite number of peremptory challenges and that the court "must exclude" each juror so challenged. N.Y. Crim. Proc. Law §270.25. The defendant argued, and the intermediate court agreed, that this language prohibits the forfeiture remedy because the practical effect would be to deprive a litigant of the statuto-

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rily mandated number of peremptory challenges.

The Court of Appeals decided that forfeiture of an unconstitutionally exercised peremptory challenge is neither required nor prohibited by the state criminal procedure provision, and it ruled that forfeiture is a permissible remedy to be exercised in a trial judge's discretion. The Court further said that the interest of potential jurors in not being unconstitutionally denied the opportunity to serve tilts the scales toward permitting the forfeiture remedy. *People v. Luciano*, New York Court of Appeals, No. 78 (June 3, 2008)

Patient may not prevent state health department from sharing medical records with law enforcement

A person who seeks treatment from a state-affiliated health department has no Fourth Amendment or state constitutional right to prevent the health department from sharing medical records with law enforcement.

The defendant was convicted of transferring bodily fluid that may contain the HIV virus and appealed on Fourth Amendment grounds. He had

received HIV-related services from a local health department, before which he executed a number of documents certifying his HIV-positive status and other forms regarding his status and privacy. Later, a prosecutor requested that the health department disclose information about HIV-positive men in response to a report that an unknown male who was HIV-positive had had sexual activity with two women without informing them of his status. The department's compliance with the prosecutor's request led to the defendant's arrest.

In *United States v. Miller*, 425 U.S. 435 (1976), the U.S. Supreme Court made clear that a person does not have a Fourth Amendment right associated with information he voluntarily turns over to third parties. In that case, which involved bank records, the Supreme Court said it makes no difference if the person revealed the information assuming that it would be used for only a limited purpose and that the confidence placed in the third party would not be betrayed.

The Court found this case fell under *Miller*. It noted that the defendant turned his medical reports over to the health department in order to obtain HIV-related services. Under *Miller*, he thereby assumed the risk that the reports could be further disclosed. The defendant had no protected Fourth Amendment interest in such documents, the court concluded. *State of Idaho v. Mubita*, Idaho Supreme Court, No. 33252 (June 11, 2008)

Police need a warrant to examine evidence observed by an informer
The Washington Supreme

Court relied on the state constitution to reject a Fourth Amendment doctrine that relieves law enforcement officers of the need to obtain a search warrant to look at evidence already observed by a private informer. Although police do not need a warrant to seize evidence turned over to them by a private actor, they do need a search warrant before entering residential premises to examine evidence an informer left in place, the court decided.

A repairman called by the defendant's landlord observed marijuana and other suspicious items in the defendant's house. The repairman called police and led the responding officers on a tour of what he had seen. The officers then used their observations to obtain a warrant for a more thorough search, which turned up evidence used to convict the defendant of growing marijuana.

Under the Fourth Amendment as interpreted in *Walter v. United States*, 447 U.S. 649 (1980), and *United States v. Jacobsen*, 466 U.S. 109 (1984), lawful intrusions by a private actor destroy an individual's reasonable expectation of privacy in an area and permit a later warrantless government search that is no more intrusive or extensive than the earlier private search. The Court decided to "reject the private search doctrine and adopt a bright line rule holding it inapplicable under article I, section 7 of the Washington Constitution." The Court pointed out that it has previously held that the state constitution protects privacy in a number of contexts where the Fourth Amendment does not, including searches of trash, surveillance of the numbers dialed from a telephone, and searches pursuant to the permission of a third party who

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had apparent but not actual authority to consent. From these cases, the court concluded, "The individual's privacy interest protected by article I, section 7 survives the exposure that occurs when it is intruded upon by a private actor. Unlike the reasonable expectation of privacy protected by the Fourth Amendment, the individual's privacy interest is not extinguished simply because a private actor has actually intruded upon, or is likely to intrude upon, the interest." *State of Washington v. Eisfeldt*, Washington Supreme Court, No. 79947-4 (June 5, 2008)

Street clothes at trial for prison witnesses

A judge's decision in a prison-murder trial to allow inmates testifying for the prosecution to take the stand in street clothes but compel defense witnesses to appear in prison attire and shackles violated the defendant's constitutional right to a fair trial. The defendant argued that the disparate appearance of the state and defense witnesses placed him at an unfair disadvantage in front of the jury, and the West Virginia Supreme Court agreed.

The Court acknowledged that defendants in the state have no constitutional right to have witnesses appear without restraints. However, as the court said in *State ex rel. McMannis v. Mohn*, 254 S.E.2d 805 (W.Va. 1979), "there may be occasions when forcing the defendant's witnesses to testify in physical restraints [or prison attire] may create sufficient prejudice that reversible error will occur."

The prison murder case came down to a battle over the credibility of the prosecution's and the defendant's witnesses, the court noted. It concluded

that, "[u]nder the unique facts of this case, where seven crucial defense witnesses testified before the jury in



prison garb and shackles while the State's two witnesses testified in civilian clothing and without shackles, it would be illogical to conclude that the witnesses' contrasting appearance did not appreciably impact the jury's assessment of the witnesses' credibility." The court said that "the drastic contrast in the physical appearance of the parties' incarcerated witnesses--each of whom provided crucial testimony at trial--unfairly influenced the jury's judgment of the witnesses' credibility." *Gibson v. McBride*, West Virginia Supreme Court, No. 33321 (June 12, 2008)

Prosecutor's closing argument comment prevented fair trial

A trial judge denied a defendant a fair trial by permitting the prosecutor to argue to the jury that a victim's exculpatory testimony was not credible because he was following "the law of the streets," that the jurors should protect their community and clean up the streets, and that they

should teach the defendant not to abide by the "laws of the streets" in settling disputes.

The Court said one problem with the argument was that there was nothing in the record to indicate to the jury what "the law of the streets" meant. Therefore, the prosecutor's comments left the jurors to speculate as to what was contemplated by the phrase, the court noted. Further, in asserting that jurors should consider their own interests and those of their fellow citizens, and in urging them to clean up the streets to protect their community, the state clearly invoked the prohibited "golden rule" argument, the court said. Essentially, it explained, the state was calling for the jury to indulge in a form of vigilante justice rather than engaging in a deliberative process of evaluation of the evidence. It added that, even if the comments asked the jurors merely to teach the defendant a lesson rather than to send a message to the entire community, they still called upon the jurors to view the evidence in terms of their own personal interests rather



than from an objective standpoint. Concluding that the errors were not harmless, the court reversed the defendant's conviction. *Lee v. State of Maryland*, Maryland Court of Appeals, No. 132 (June 13, 2008)

Calendar

Utah Prosecution Council (UPC) And Other Utah CLE Conferences

August 18-22	BASIC PROSECUTOR COURSE <i>Substantive and trial skills training for new prosecutors</i>	University Inn Logan, UT
September 10-12	FALL PROSECUTORS TRAINING CONFERENCE <i>The annual fall meeting for all Utah prosecutors</i>	Iron Cnty Conf Center Cedar City, UT
October 15-17	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>Specifically for civil side attorneys from county and city offices</i>	Zion Park Inn Springdale, UT
November 3-5	JOINING FORCES : 21ST ANNUAL CONFERENCE ON CHILD AND FAMILY VIOLENCE <i>Focuses on prevention, investigation, prosecution and treatment. Sponsored by Prevent Child Abuse Utah. To register on-line go to www.preventchildabuseutah.org</i>	Salt Lake City, UT
November 5-7	ADVANCED TRIAL SKILLS TRAINING <i>This will probably be a homicide related course</i>	Courtyard Marriott St. George, UT
November 12-14	COUNTY ATTORNEYS' EXECUTIVE MEETING & UAC CONF. <i>The only opportunity during the year for county/district attorneys to meet together as a group to discuss issues of common concern.</i>	Dixie Center St. George, UT

National Advocacy Center (NAC)

A description of and application form for NAC courses can be accessed by clicking on the course title or by contacting Utah Prosecution Council at (801) 366-0202; e-mail: mnash@utah.gov. Restoration of federal funding for the National Advocacy Center is still being sought. In the meantime, NDAA continues to offer courses at the NAC, albeit without full reimbursement of expenses. Students at the NAC will be responsible for their travel, lodging and partial meal expenses. For specifics on NAC expenses, [click here](#).

October 27-31	PROSECUTOR BOOT CAMP <i>Basic training for new prosecutors - Registration deadline is Aug. 22, 2008</i>	NAC Columbia, SC
November 17-21	TRIAL ADVOCACY II <i>Hands-on trial skills training for mid-level prosecutors.</i>	NAC Columbia, SC
December 8-12	<i>Registration deadlines: Nov. 17th course: Sept. 19; Dec. 8th course: October 10th</i>	

See NAC SCHEDULE on page 13

NAC SCHEDULE *continued from page 12*

December 2-5	COURTROOM TECHNOLOGY <i>Using technology to enhance your courtroom case presentation</i> <i>The registration deadline is October 3, 2008</i>	NAC Columbia, SC
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National College of District Attorneys (NCDA) and American Prosecutors Research Institute (APRI) and Other National CLE Conferences

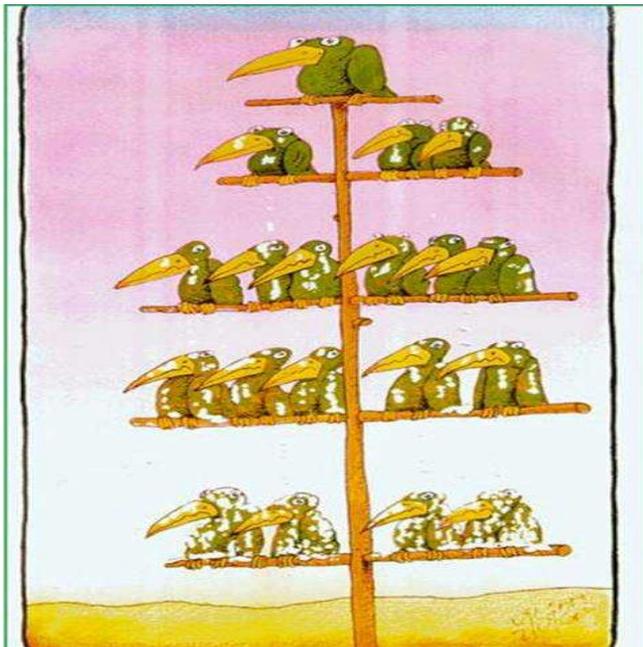
August 27-30	ASSN. OF GOVERNMENT ATTORNEYS IN CAPITOL LITIGATION <i>AGACL is a must if you have a capitol case. For more information call Jan Dyer at (623) 979-4846.</i>	San Francisco, CA
September 7-11	EXPERTS - NCDA*	San Diego, CA
September 21-25	FINANCIAL CRIMES - NCDA*	TBA
October 4-7	NATIONAL CONFERENCE ON DOMESTIC VIOLENCE - NCDA*	San Diego, CA
October 11-15	THE EXECUTIVE PROGRAM - NCDA* <i>Specifically for elected prosecutors and chief deputies</i>	Marco Island, FL
October 12-16	EVIDENCE FOR PROSECUTORS - NCDA*	Mesa, AZ
October 26-30	PROSECUTING DRUG CASES - NCDA*	San Diego, CA
November 2-6	PROSECUTING HOMICIDE CASES - NCDA*	San Francisco, CA
November 16-20	PROSECUTING SEXUAL ASSAULTS AND RELATED VIOLENT CRIMES - NCDA*	TBA
December 7-11	FORENSIC EVIDENCE - NCDA*	San Francisco, CA
December 7-11	GOVERNMENT CIVIL PRACTICE - NCDA*	Savannah, GA

* For a course description and on-line registration for this course, click on the course title (if the course title is not hyperlinked, the college has not yet put a course description on line) or call Prosecution Council at (801) 366-0202 or e-mail: . To access the interactive NCDA on-line registration form, click on either [Spring 2008 Courses](#) or [Fall 2008 Courses](#), depending upon the date of the course.



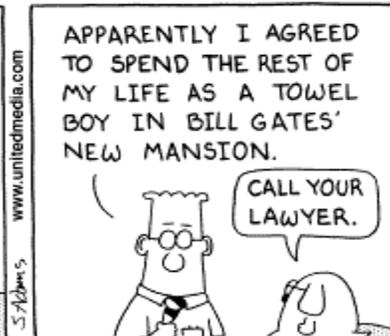
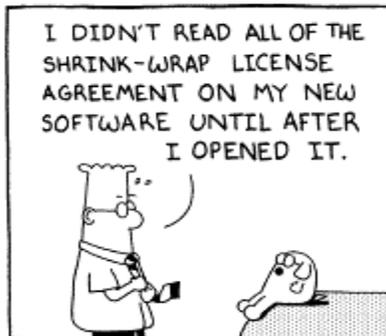
On the Lighter Side

WHY IT'S BETTER TO BE THE BOSS...



Stu's Views

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