

PROSECUTOR



United States Supreme Court

There is no presumption of prejudice under *Cronic* where a defendant's counsel was absent for a plea hearing but communicated with the court by speakerphone. *Strickland* is applicable in this case.

Van Patten was charged with first-degree intentional homicide. He pleaded no contest to a reduced charge of first-degree homicide. At the plea hearing, his counsel was absent but was linked to the court through a speakerphone. After receiving a sentence of 25 years in prison, Van Patten hired another attorney and sought to withdraw his no-contest plea. He claimed that his Sixth Amendment right to counsel was violated because his attorney was not present in the courtroom during the plea hearing. The Wisconsin Court of Appeals found that his argument failed the ineffective assistance of counsel test in *Strickland v. Washington*, 466 U.S. 668 (1984). The Seventh Circuit reversed finding that the claim should have been reviewed under *United States v. Cronic*, 466 U.S. 648 (1984) where the court found that a *Strickland* inquiry need not be made in a circumstance that is "so likely to prejudice the accused that the cost of litigating their effect [...] is unjustified." *Id.* at 658. One of these circumstances is when counsel is absent during a critical stage of the proceeding. The United States Supreme Court reversed. It found that mere telephone contact did not amount to an absence and, therefore, did not invoke

Cronic. Thus, the claim falls under a *Strickland* analysis. The Court deferred to the ruling of the Wisconsin Court of Appeals that counsel's performance in this case was constitutionally effective. *Wright v. Van Patten*, 552 U.S. ____ (2008).

Utah Supreme Court

The Utah death penalty statute is not unconstitutionally vague. Impaneling of an anonymous jury is allowed if it is necessary for jury members' protection and no prejudice results. Attempted aggravated murder merges into aggravated murder, if it is the sole aggravating factor which elevates murder to aggravated murder, and the defendant cannot be separately

See BRIEFS on page 2

In This Issue :

1 Case Summaries

4 Prosecutor Profile:
Bryan Sidwell,
Daggett County Attorney

7-9 NDAA Brief Bank

11 On the Lighter Side

14-16 Training Calendar



Continued from **BRIEFS** on page 1

punished for trying to kill a second victim.

Carrying a loaded gun, Ross entered the home of his ex-girlfriend, Christensen. She was there with her boyfriend, May. Ross forced Christensen into a bedroom where he shot her three times, killing her. May fled, attempting to escape in his car, which would not start. He then took flight on foot. Ross shot at May six times, hitting him once. However, May was able to escape. Neighbors reported the gunshots and told dispatchers they saw a white van quickly leave the scene. Shortly after the shootings, Ross made a call to Christensen's father and told him that he had murdered Christensen and was "on [his] way to [Mr. Christensen's] home to finish the job." Cops spotted the van on their way to the crime scene and were able to corner it and arrest Ross. Ross was convicted of aggravated murder and attempted aggravated murder and received

concurrent prison terms of life without parole and five years to life. He appealed on the ground that (1) the Utah death penalty statute is unconstitutionally vague, (2) the aggravated murder conviction and attempted



aggravated murder conviction should merge, (3) the impaneling of an anonymous jury was prejudicial, and (4) prosecutorial misconduct during closing arguments required a new trial. The court found, in response to the

first argument, that Ross did not have standing to challenge the death penalty statute because he was not sentenced to death. It also found that the statute is not unconstitutionally vague. As to the third issue on appeal, the court found that the trial court was justified in impaneling an anonymous jury because of the need to protect the jury from media exposure. It also found that the trial court took all necessary measures to prevent the defendant from being prejudiced. The trial court provided voir dire to expose bias among the jury members and explained to the jury that anonymity was not to be taken as an inference of the defendant's guilt. On the fourth issue, the court found that the State's exaggeration of the facts during closing arguments were harmless error because of the great weight of evidence against Ross. The court agreed with Ross' second argument that the attempted aggravated murder of the victim's boyfriend merged into the aggravated murder, where it was the sole

See **BRIEFS** on page 3

Case Summaries

United States Supreme Court (p. 1)

Wright v. Van Patten-Ineffective assistance of counsel, *Cronic*

Utah Supreme Court (p.2-3)

State v. Ross-Merger of murder charges, death penalty

Utah Court of Appeals (p. 3,5,6)

State v. Prows-Traffic stop, articulable suspicion

State v. Baker-Collateral Estoppel

McCowin v. SLC Corp.-Applications for building

State v. Johnson-Crime of threatening a judge

State v. Candedo-Probationary sentences

Tenth Circuit Court (p. 6,10,12,13)

U.S. v. Garduno-Motion to withdraw a guilty plea

U.S. v. Wright-Conspiracy

Simons v. UHCSS-Employment, municipal liability

U.S. v. Avalos-Sequestering witnesses, career offender law

Moore v. Comm'rs of Leavenworth-Procedural due process

Nichols v. Comm'rs of La Plata-Collateral estoppel, zoning

Supreme Court of Michigan (p. 13)

Michigan v. Stamper-Children's dying declarations



Continued from BRIEFS on page 2

aggravating factor elevating murder to aggravated murder. Although two of the five Justices of the Supreme Court would have allowed the attempted aggravated murder conviction to stand, the majority, citing Utah precedent regarding merger, ruled that, absent action by the Legislature, it could not. *State v. Ross*, No. 20041073 (Utah Nov. 7, 2007).

NOTE: The Attorney General's Office (Pat Nolan and Creighton Horton) are shepherding SB 150, Criminal Penalties Revisions, which is designed to fix the merger problem in this case.

Utah Court of Appeals

Reasonable articulable suspicion may be based on the totality of the circumstances and collective knowledge. Frisking a suspect is within the scope of the initial stop if there is a high likelihood of danger. A defendant may not challenge the constitutionality of a search if the property searched does not belong to her.

At 2:30 am Polumbo, a watchman for a mountain gated community, overheard three people loading items from his friend's vacant cabin into the back of a pickup truck. He called the police. Sheriff Larsen arrived at the scene and Polumbo told him that the truck had driven south. The Sheriff pursued and caught sight of the vehicle, but lost it through the trees. He radioed Officer Greenwell and told him where he could intercept the vehicle. Greenwell observed a truck coming from the area of the subdivision at 65 miles per hour in a 45 zone. He pulled it over, or-

dered Prows out of the car, patted her down, and handcuffed her. Captain Larsen arrived and ordered Williams, the owner of the car, out of the car after seeing a knife and shell castings in the vehicle. He asked if he could search the vehicle and Williams consented. The officers found marijuana, drug paraphernalia, and large tools stolen from the cabin. Defendant entered a guilty plea for burglary and theft but appealed on the ground that the trial court erred in denying her motion to suppress the evidence because (1) Greenwell didn't have reasonable articulable suspicion to effectuate a stop for burglary, (2) Greenwell exceeded



the scope of the stop when he frisked her, and (3) law enforcement went beyond the scope of the stop when they searched the vehicle. The Utah Court of Appeals disagreed. It found that Greenwell did have reasonable articulable suspicion under the collective knowledge doctrine, which says that suspicion is to be based upon the totality of the circumstances and the knowledge of all the officers collectively. This suspicion arose, not only from Greenwell's experience but also from the citizen informant who was reliable and described the crime in sufficient detail. Taking into account the informant's tip, Sheriff Larson's warning that the vehicle was heading south, and Greenwell's observations, there was an articulable suspicion. The court also

found that Greenwell did not exceed the scope of the stop when he frisked Prows because it was reasonable in light of the suspicion of burglary and the high likelihood of danger the situation posed to Greenwell. Finally, the court said that Prows lacks standing to challenge the search of the vehicle because the vehicle does not belong to her. *State v. Prows*, No. 20060273 (Utah Ct. App. Dec. 28, 2007).

Collateral estoppel applies where there is a different cause of action but the issues in the second suit were fully litigated in the first. Issue preclusion and claim preclusion applies in civil and criminal cases alike.

Baker was sentenced to ten years to life for aggravated sexual abuse of a child. He appealed on an ineffective assistance of counsel claim. The Utah Court of Appeals denied the appeal on the ground that he is precluded from raising the issue under res judicata because the court ruled on that matter in an earlier appeal. The court explained that res judicata has two branches: claim preclusion and issue preclusion. Claim preclusion involves the same parties and the same cause of action and precludes any issues that were litigated or could have been litigated. Issue preclusion, or collateral estoppel, arises from a different cause of action but precludes issues in a second suit that were fully litigated in the first. The court said that claim and issue preclusion apply in criminal cases as well as civil cases. Defendant in this case is collaterally estopped from bringing his ineffective assistance of counsel claim because he was a party to the prior action, the issues raised on both appeals are identical, the parties litigated "completely, fully, and fairly . . ." and the decision on the prior appeal "resulted on a final judgment on the merits." The Defendant argued that collateral estoppel does not apply because the issue on this appeal arises under a different set of facts where different charges were being

See BRIEFS on page 5

PROSECUTOR PROFILE:



Bryan Sidwell, Daggett County Attorney

Bryan was appointed as Daggett County Attorney in January 2007. Because the county has the least number of permanent residents in the state, he is responsible for all of the criminal and civil law in the county.

Bryan has a full schedule that includes such activities as going to commission meeting, going to planning and zoning meeting, answering questions about subdivisions, building permits, reviewing contracts, assisting the sheriff's office with sheriff's sales, advising the commission and county clerk about questions relating to the open meeting laws, preparing resolutions, preparing ordinances, advise the recorder on recording issues, preparing subpoenas, and conducting preliminary hearings and jury trials and much more.

"I couple of months ago I brought my 9 year old son to work with me for the day," says Bryan. "At the end of the day, I asked him what I do as an attorney. He said, 'All day long people come in your office and ask you questions, and you have to give them an answer'. That pretty much sums up my day."

Bryan grew up in Utah, Idaho, Washington, and Wyoming and graduated from Cheyenne Central High School. He attended college at the University of Wyoming where he earned Bachelor's degrees in Psychology and Social Science, a Juris Doctorate, and a Master's degree in Public Administration.

When asked what he would do to change the criminal justice system, Bryan said: "I would change the Justice Court system. However, I strongly disagree with the changes that the Utah Supreme Court has proposed. Their proposal causes more problems without fixing the real substantive problems with the system."

In his personal time, Bryan loves running and raising livestock. He has owned and cared for all kinds of animals including pigeons, quail, chickens, ducks, rabbits, cats, dogs, parakeets, hamsters, cows, sheep, goats, horses, pigs and fish.

Bryan has been married to his wife Jill for over sixteen years. They have four children: Sarah, 14; Erika, 13; Megan, 11; and Kyle, 9.

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>Hobbies:

Raising Livestock, riding horses and running. Bryan runs a race every month, a 5k, 10k, half marathon, marathon or triathlon

>Favorite Music:

Country

>Favorite Books:

Biographies. The last book he read was John Adam's biography.

>Place in Family:

3rd of 11 children

>Foreign Languages:

Norwegian

>Places Traveled:

Bryan has been to Canada, Japan, Mexico, Denmark and Norway. Bryan also worked in Alaska one summer in the fishing industry.



Continued from BRIEFS on page 3

pursued and resulted in a different sentence. However, the court said that the arguments on counsel's deficient performance are based on the same actions during a single sentencing hearing and, therefore, collateral estoppel applies. *State v. Baker*, No. 20060289 (Utah Ct. App. Jan. 10, 2008).

Notice of an application for building under SLC, Utah, Code § 21A.10.010.E.1 does not require exact information regarding the substance of the application. The City is not required to give dimensions of structures that fall within the City's approved dimensions for that structure type.

McCowin sought injunctive relief in order to halt construction of a two-story garage built near his residence. Rasmussen and Hammond submitted an application to the Salt Lake City Historic Landmark Commission (the "Commission") to get authorization to erect the building. City Code requires a public hearing to discuss proposals of this type. Notice must be given to landowners within 85 feet of the property including date and time of the public hearing and the substance of the application. There was no opposition to building the garage at the public meeting, so the application was approved. After construction had begun, McCowin who resided near the property, challenged the decision once he realized that the garage was a two-story structure. He argued that the substance of the notice was deceptive because it described the structure as a "garage" but did not give its dimensions. He argues that the definition of "garage" implies a small one-story structure and so the lack of detail constituted inadequate notice. The Utah Court of Appeals disagreed. It held that the Commission was not required to give specific

details regarding the footage of the structure and that the building did fall within the City Code's definition of a "garage" as "a building, or portion thereof, used to store or keep a motor vehicle." Salt Lake City, Utah, Code §21A.62.040. Also, the dimensions of the garage in this case fall within the City Code's approved dimensions for a garage. Furthermore, the phone number of the city planning staff was made available in the notice if property owners have questions. Therefore, the court denied injunctive relief. *McCowin v. Salt Lake City Corp.*, No. 20061114 (Ut. App. Ct. Jan. 10, 2007).



The crime of threatening a judge does not require specific intent that the judge actually hear the threat. Stipulating to the admission of privileged information amounts to a waiver of the attorney-client privilege.

In conversations with his divorce attorney, Johnson threatened the lives of opposing counsel and Judges Lyman and Mower. After losing in divorce court, Johnson stated that the problem was 'leaving [opposing counsel] alive.' He later telephoned his counsel and said that, "[opposing counsel's] life will end," and that Judges Mower and Lyman were "right up there" with opposing counsel. His divorce attorney later called him and re-

corded their conversation where Johnson said, Judge Mower is "[G]oing to have what's coming to him" and other threatening statements. Defendant was charged with two counts of threatening a judge. At a preliminary hearing, Johnson's new defense counsel stipulated to admission of the tape that Johnson's divorce attorney had made. The magistrate found that there was probable cause to believe that the defendant did threaten a Judge Mower. On appeal, Defendant asserted that the State had failed to establish probable cause for retaliation because he did not reasonably expect Judge Mower to learn of the threats.

The defendant also made a motion in limine to keep out the tape recorder on the ground that admission of the tape violated the attorney-client privilege. The Utah Court of Appeals rejected these arguments. Defendant claimed that under *State v. Fixel*, 945 P.2d 149 (Utah Ct. App. 1997) threatening a judge is a specific intent crime that requires the Defendant to intend for the judge hear the threat. The court said that neither *Fixel* nor the applicable statute support this assertion. The court in *Fixel* found that the statute was satisfied because a jury could find that the defendant had the specific intent to retaliate against the judge by upsetting him.

The specific intent mentioned by the court does not amount to a requirement; it rather amounted to additional evidence by which to uphold the conviction. Additionally, the court found that the tape recording was admissible. After privileged material is disclosed, it is no longer protected under the attorney-client privilege. By stipulating to the tape's admission, the defendant disclosed the material and waived his right under the attorney-client privilege. *State v. Johnson*, No. 20060602 (Utah Ct. App. Jan. 4, 2008).

There are no legislative limits on a trial court's ability to decide the duration of a probationary sentence. Utah Rule of

See BRIEFS on page 6



Continued from BRIEFS on page 5

Criminal Procedure 22(e) and the exceptional circumstances doctrine cannot save an issue not preserved for appeal unless there is a manifest injustice.

Candedo was convicted for one count of Securities Fraud, one count of Sales by an Unlicensed Agent, and one count of Employing of an Unlicensed Agent. He was sentenced to 108 months of probation. Candedo argued that the trial court exceeded its authority by sentencing him to such a long probationary period and that the Utah statute doesn't give the trial court authority to sentence for consecutive terms. The Utah Court of Appeals found that the court did not state that it was sentencing him to consecutive terms. Plus, the legislature has not limited probation periods to any specific amount of time and under *State v. Wallace*, 150 P. 540 (Utah 2006) 108 months is not excessive. Candedo also argued that the probation statute, as interpreted by *Wallace*, violates his due process rights. He admits that he did not preserve this argument for appeal, however, he claims it should still be addressed under Utah Rules of Criminal Procedure rule 22(e) and the exceptional circumstances doctrine. The court disagreed. It held that rule 22(e) only applies to situations where there has been a "manifestly illegal sentence." According to *Wallace*, 108 months is not manifestly illegal. Finally, Candedo's claims cannot be preserved under the exceptional circumstances doctrine. Candedo claims that because the Utah Supreme Court had not yet held that trial courts could sentence for unlimited probationary periods, he had no need to argue the probation statute violated due process. The court found this argument unconvincing. It did not see how his confidence in the claim had anything to do with whether it was preserved on appeal. Plus, he was on notice because the trial court imposed such a long probationary period. Therefore, the court did not extend the

exceptional circumstances exception to Candedo's case. *State v. Candedo*, No. 20050899 (Ut. Ct. App. Jan. 4, 2008).

Tenth Circuit

A motion to withdraw a guilty plea must be entered before the court "imposes" or enters a sentence. The time limit for a notice of appeal can only be tolled for motions of judgment of acquittal, motions for a new trial, and motions for arrest of judgment.

Garduno plead guilty to involuntary manslaughter and assault for causing a fatal car accident that resulted in the death of one driver and serious injury of another. She



received her sentence on August 3rd. Garduno filed a motion to withdraw her guilty plea on September 6th, alleging that she plead guilty only because of the ineffective assistance of her appointed counsel. She also made a motion to appeal the judgment on October 26th. The court denied both motions on the ground that they were untimely. A motion to withdraw the guilty plea must be entered "before [the court] imposes sentence" under Fed. R. Crim. P. 11 (D)(2)(B) and a motion to appeal must

be made within ten days of sentencing. Garduno exceeded both of these time limits even though the court gave her a thirty-day extension on the deadline to appeal the judgment. Garduno appealed the denial of the motions. She argued that a sentence is "imposed" once the defendant begins serving the sentence rather than when it is declared by the court. The Tenth Circuit disagreed. It found that "impose" means "to make, frame, or apply...as compulsory, obligatory or enforceable" as defined in Webster's Third New International Dictionary 1136 (1993) and not "commence" as Garduno defines it. Furthermore, the court's definition is consistent with case law. She also argued that her notice of appeal was not untimely because the statutory time limit tolled while her motion to withdraw a guilty plea was pending. The court again disagreed. It found that, under Fed. R. App. P. 4(b), the time limit for appeal is only tolled for motions for judgment of acquittal, motions for a new trial, and motions for arrest of judgment. The court denied Garduno's contention that her motion to withdraw a guilty plea was essentially a motion for a new trial. They also denied her argument that the untimeliness of her motion was excusable under the "unique circumstances" exception in *Thompson v. INS*, 375 U.S. 384 (1964). The court responded that the *Thompson* case was a civil case and that there is no authority extending the same exception to criminal cases. *United States of America v. Garduno*, No. 06-2317 (10th Cir. Nov. 6, 2007).

A buyer-seller relationship isn't sufficient to tie defendants to a larger conspiracy, but can support conviction for a small conspiracy. Denial for an application for leave to interview

See BRIEFS on page 9



NDAAs Brief Bank Announcement

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In order to facilitate your further research, many of the cases provide the case citation (in public domain format) as well as the web address to locate the brief on the state court website (note the web address is not link because the brief is run from a secured site). The citation is provided to allow you to find the courts opinion in that particular case. For the briefs that do not list a case citation or web address, the text of each brief contains the first and last name of the defendant in that case. This is to aid in finding what is probably an unpublished court opinion, through your own additional research.

The brief bank is not intended to substitute for original research in current sources of authority. Each brief provides a clear and concise argument with relevant legal support. However, because current case law is constantly evolving, you should always conduct further research to insure you are citing good law.

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See BRIEF BANK ANNOUNCEMENT on page 8

Brief Bank Announcement Con't

BRIEF BANK ANNOUNCEMENT *continued from page 7*

The purpose of having the forms sent to Prosecution Council is for us to confirm to NYPTI that the applicant is, indeed, a prosecutor in Utah. NDAA and NYPTI are very adamant that the brief bank be limited to currently active prosecutors. After UPC has reviewed and approved the application, you will be contacted by a technician from NYPTI who will provide your username and password, and will walk you through the certification process. Once your security certification is complete, and you have your username and password, you are ready to access the brief bank.

IMPORTANT!! It is vital that you complete the certification process on the computer you intent to use for your research. **ONLY** the computer you use for certification can thereafter be used to access the brief bank. Additionally, you may only access the brief bank using <https://kemmlerandco.com>. Note the “s” in the <https://> portion of the address. This creates the secure connection and is necessary to access the NDAA website.

It is important to note that all portions of the NDAA/NYPTI brief bank will be open to any prosecutor who has access rights. Therefore, while the Utah section of the brief bank, containing briefs from our Appeals Division, may prove most helpful on most issues, users will find briefs from a number of states on a variety of issues in the brief bank.

Finally, please note that the original NDAA/NYPTI brief bank was created exclusively for briefs of capital homicide cases. As such you will notice that the title of the bank you will use is Homicide Prosecutions. Despite this label, the Utah section of the brief bank contains issues from all areas of criminal law, and is not limited to homicide prosecutions. As NDAA/NYPTI make multiple bank titles available we will add those titles to the brief bank. For the time being, please search the Homicide Prosecutions bank for all criminal law related issues.

The UPC is excited to be able to provide this service to Utah Prosecutors. We believe that the brief bank will be a valuable asset that will expedite the research process in each case that you prosecute. The brief bank will continue to grow as we are able to review and index more and more cases. In the near future the Council will be determining a procedure for adding briefs from offices other than the AG's Appeals Division. For now, the brief bank is ready to use as soon as you have completed the security certification.

Sincerely,
Debi Buckner
Utah Prosecution Council

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Signed

Date

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Continued from BRIEFS on page 6

a juror is appropriate where the judge has interviewed the juror and found nothing that is admissible in evidence.

Wright was convicted of conspiracy to distribute more than 50 grams of crack cocaine. Law enforcement arrested Wright, Kenneth Robinson, and Jerry Robinson while they were trying to flee with drugs from the “Mildred House,” a well-known drug house. Jerry Robinson was questioned by Agent Pamela Bennett and later testified at trial. Jerry testified that he had seen Kenneth and Wright sell cocaine from the Mildred House and that he never sold drugs from the Mildred House but made sales in his own neighborhood and acquired some of the cocaine that he sold from Wright. Wright appealed his conviction on the ground that there was not sufficient evidence for a finding of conspiracy. The Tenth Circuit Court agreed that the evidence was scant, however, the verdict should still be sustained. There was evidence that Jerry Robinson and Wright did agree to sell cocaine for profit. According to the buyer-seller rule, a buyer-seller relationship is not sufficient to tie either party to a *larger* conspiracy. However, the court said that in this case the evidence is sufficient to support a conviction for a two-man conspiracy. Wright also argued that the court erred in denying his motion for production of Agent Bennett’s case notes. The defense sought to discover agent Bennett’s notes because they felt it could establish the fact that the sale from Wright to Jerry Robinson was not conducted at the Mildred House. The court found that refusing production was harmless error and even if the defense was able to establish this fact, there would still be enough evidence to support conviction. Finally, Wright argued that the district court judge erred in denying an application for leave to interview a juror. After trial, a juror approached defense counsel “very distraught” and concerned about the outcome of the trial. The Judge saw this and called them back into the courtroom, re-

minding them that attorneys are not supposed to talk to jurors without permission of the court. The Tenth Circuit found there was no abuse of discretion here. The judge interviewed the juror and did not find anything admissible in evidence. *United States v. Wright*, No. 06-3063 (10th Cir. Nov. 6, 2007).



A municipality is not only liable for the actions of employees following their policies, but for the decisions of the municipality’s policymaking bodies.

Simmons was the longtime administrator for a nursing home owned by Uintah County. The County turned the home over to the District, a political subdivision, for administrative control of the home. The District Board created a Reduction in Force (“RIF”) plan that authorized downsizing as a last resort if there was a lack of funds. The plan required, among other things, that the employee would be transferred or reassigned before dismissed and that the employee would be given two weeks notice of dismissal and an opportunity for administrative review. The District sought to turn the management of the home over to Traditions Health Care for more cheap and efficient management. To effectuate this move, Simmons would have

to be fired. There was some evidence that Simmons could be fired for cause, but the Board decided to fire her under the RIF policy. However, the Board did not comply with the RIF policies. The district court held that, though there was non-compliance, the District is only liable for the actions of employees taken in compliance with District policies. The Tenth Circuit disagreed. It found that municipalities can be held responsible for actions taken by the municipalities final policymaking authority, which was the Board in this case. The decisions made by the Board are binding government policies and may render the municipality liable for mismanagement. Otherwise, municipalities would have little reason to abide by the policies they set. The District Court also found no liability because even if the Board had followed the RIF policy, Simmons would have still been fired. The Tenth Circuit said that this point is only relevant as to the extent of her damages and not on the District’s liability. The judgment of the district court was reversed and remanded. *Simmons v. Uintah Health Care Special Service District*, No. 06-4187 (10th Cir. Nov. 6, 2007).

The court need not sequester witnesses who are government agents at the request of defense counsel. There is no reversible error if a court adopts the sentencing suggestions in the PSR. Escape from jail is a “crime of violence” under the career offender statute.

Elmer Hayes agreed to assist Special Agent James Hurley to make a drug transaction with Avalos. While at Hurley’s office, Hayes got in contact with Avalos and agreed to buy an ounce of methamphetamine from Avalos at a nearby 7-11. Before the planned meeting, Agent Harley drove to the 7-11 with Agent Shane Skinner to set up surveillance. While there, they saw a man by a

See BRIEFS on page 12



(From <http://www.cagle.com/news/ValentinesDay2006/main.asp>)

Putting your foot in the client's mouth

(From <http://www.re-quest.net/g2g/humor/courtroom/index.htm>)

Plaintiff's Attorney: What doctor treated you for the injuries you sustained while at work?

Plaintiff: Dr. Johnson.

Plaintiff's Attorney: And what kind of physician is Dr. Johnson?

Plaintiff: Well, I'm not sure, but I remember that you said he was a good plaintiff's doctor.

Motion Granted

(From <http://www.re-quest.net/g2g/humor/courtroom/index.htm>)

Defendant: Judge, I want you to appoint me another lawyer.

The Court: And why is that?

Defendant: Because the Public Defender I have isn't interested in my case.

The Court (addressing the public defender): Do you have any comments on the defendant's motion?

Public Defender: I'm sorry, I wasn't listening.





Continued from BRIEFS on page 10

white Oldsmobile. Skinner, who was familiar with Avalos, told Agent Harley that this was him. Hayes arrived with Agent Gary Chavez who was posing as his friend. Hayes approached the Oldsmobile while Chavez stood several feet away. Chavez said that he saw Avalos conduct the transaction while sitting in the driver's seat.

Avalos was arrested. He told cops that he had sold drugs in Farmington but not on the date in question. At trial Agent Skinner, Agent Chavez, and Hayes testified against Avalos. The jury returned a guilty verdict. Avalos was sentenced to 262 months incarceration after the court found that he was a "career offender." Avalos argued that (1) the court erred in admitting his drug trafficking statement into evidence, (2) the court erred when it failed to sequester witnesses, (3) there was insufficient evidence, (4) the court erred in

adopting facts in the presentence report without conducting an evidentiary hearing, (5) the court erred in applying the career offender enhancement. To the first argument, the Tenth Circuit said that admitting Avalos' statement about his drug activities was harmless error because of the great amount of evidence offered against him. In response to the second argument, while witnesses generally need to be sequestered upon the request of defense counsel, under the applicable rule, Fed. R. Evid. 615(2), sequestration does not require that the court exclude "an officer or employee of a party which is not a natural person designated by its representative by its attorney." Most circuits have interpreted this to extend to government agents, therefore, sequestering the agents was unnecessary. Third, the court said that the testimony of the witnesses was sufficient for a juror to reasonably find guilt. In response to the fourth argument, a court may accept any undisputed portion of the PSR as fact, so there was no error on that point. Finally, Avalos argued that the career offender

statute does not apply to him because his previous felony—escape from jail—is not a "crime of violence." Courts have long held that escape from jail is a crime of violence because it presents a substantial risk of injury to another. *United States v. Avalos*, No. 06-2228 (10th Cir. Oct. 23, 2007).



Procedural due process requires some kind of procedure before depriving a party of her rights. Plaintiffs cannot prevail in a procedural due process claim in a tort action because there cannot be a pre-deprivation hearing.

Deputy Peterman and Moore, a firefighter, were both dispatched to the site of an automobile accident. Moore was in his personal vehicle that did not have lights or a siren and Peterman was in his police car. Peterman switched on his lights but not his siren. Peterman was behind Moore traveling North on the same two lane road. The speed limit was 50 mph but Peterman was traveling 90. Moore began to slow to take a left turn, and Peterman couldn't brake in time and collided with him at 84 mph. Moore was ejected from the vehicle and died a few hours later. Plaintiffs, family members of Moore, brought a claim against Peterman and, through his actions,

the Board of County Commissioners, alleging that the defendants violated their son's Constitutional right to procedural due process. They argue that Moore had a constitutionally protected liberty interest in his life and a property interest in the County's compliance with restricting the speed of emergency vehicles. Procedural due process requires some kind of procedure such as a hearing before being deprived of their rights. The process that was due to Moore, compliance with the speed policies, is a substantive, not a procedural matter. As far as procedural matters go, though Moore was deprived of his right to life, he had no right to a pre-deprivation hearing. Essentially what the plaintiffs were asserting is that Moore had a constitutional right to have notice that Peterman was speeding toward him and an opportunity to protest that action in a "hearing" of some kind. Pre-deprivation hearings cannot anticipate a state actor's wrongful act. Besides, plaintiffs have been offered a post-deprivation tort remedy. Therefore, their claim must fail. *Moore v. Bd. of County Comm'rs of the County of Leavenworth*, No. 07-3053 (10th Cir. Nov. 20, 2007).

Collateral estoppel does not apply unless the issue in question has been litigated. Settlements do not fall into this category. The Plaintiff did not have a constitutionally protected property right in a permit modification request.

The Nichols own Bueno Tiempo Ranch in La Plata County, Colorado. The code for the district in which the ranch is located does not permit commercial mining operations. In 2002, the Nichols approached the board to get authorization to build a lake on their property and sell the topsoil removed during the construction. The Director of La Plata County, Crain, said that any

See BRIEFS on page 13



Continued from **BRIEFS** on page 12

sale of topsoil is considered a commercial use of the land and is, therefore, not allowed. However, he said that “temporary sale of topsoil in preparation of expanded recreational use of the property could be considered” if regulated through a Special Use Permit. The Nichols applied for a Special Use Permit, which the Board approved but prohibited screening or processing of material on the site. Nichols then requested the permit be modified to eliminate these restrictions, but the Board refused. In 2004, the Nichols again sought a modification. They based their request on a settlement the Board made with VanDenBerg. VanDenBerg and the Board entered into a Settlement agreement that permitted limited screening, stockpiling, and retail operations on his property. Despite this prior transaction, the Board again denied the modification request. The Nichols brought suit alleging that the doctrine of collateral estoppel had prohibited the Board from relitigating the effect of the criteria listed in the VanDenBerg settlement. Also, they claimed that their substantive and procedural due process rights were violated by the denial of their request for modification. The Tenth Circuit disagreed. It found that collateral estoppel does not apply in this case because it requires that “the issue precluded is identical to an issue actually litigated.” In this case, the VanDenBerg settlement was not

actually litigated and there is no authority that says settlements are litigation or are “actually determined by the adjudicatory body.” In response to the due process argument, the court said that the Nichols did not have a constitutionally protected property right in the approval of the permit modification request, and the VanDenBerg settlement doesn’t make that so. The Nichols did not have privity in the VanDenBerg settlement and there is no evidence that the Board wished for the settlement to apply to Special Use Permits generally. *Nichols v. Bd. of County Comm’rs of the County of La Plata, Co.*, No. 06-1427 (10th Cir. Oct. 22, 2007).

Michigan Supreme Court

The age of a victim does not preclude their statements from being admitted under the dying declaration exception to hearsay. Even young children may be aware of impending death.

Jake Logan, the victim in this case, was four years old when he was brutally beaten and later died at the hospital. Michael Stamper, boyfriend of Gloria Logan, Jake Logan’s mother, gave Jake a bath. Gloria could hear Jake crying during the bath and noticed afterward that he was losing consciousness. After his mom asked him to open his eyes, he said, “Mom, I can’t, I’m dead.” Jake was admitted to the hospital and physicians discovered bruises on his neck, arms, chest, abdomen, groin, testicles, and legs. A nurse asked Jake how he got the bruises. He said, “from Mike.” The victim died shortly thereafter. Jake’s statements were admitted at the trial court under the dying declaration exception to the hearsay rule. Under the dying declarations exception, statements can only be admitted if the declarant believed his or her death was imminent. The Michigan Supreme Court affirmed. It found that Jake’s statements indicate that Jake was aware of his own impending death. The court rejected the argument of defendant that a four-year-old child cannot be aware of impending death. The evidence in this case suggests that Jake was very aware of his condition and age does not preclude the admission of a dying declaration. *Michigan v. Stamper*, No. 132887 (Mich. Dec. 27, 2007).

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Calendar

Utah Prosecution Council (UPC) And Other Utah CLE Conferences

April 3-4	ANNUAL SPRING CONFERENCE <i>Case law update, legislative update, ethics and more</i>	Red Lion Hotel Salt Lake City, UT
May 13-15	ANNUAL DOMESTIC VIOLENCE CONFERENCE <i>Held this year in conjunction with the annual CJC conference</i>	Zermat Resort Midway, UT
August 7-8	UTAH MUNICIPAL PROSECUTORS SUMMER CONFERENCE <i>Really good stuff for all whose caseload includes primarily misdemeanors</i>	Zion Park Inn Springdale, UT
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 2008	ADVANCED TRIAL SKILLS TRAINING <i>This will probably be a homicide related course</i>	Date & Location TBA location pending
November 12-14	COUNTY ATTORNEYS' EXECUTIVE MEETING & UAC CONFERENCE <i>The only opportunity during the year for county/district attorneys to meet</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.

Federal funding for the National Advocacy Center has yet to be resolved. In the meantime, NDAA continues to offer courses at the NAC, albeit not with full reimbursement of expenses as in the past. Students who attend the NAC are asked to pay for most of their expenses. For specifics, contact the NAC directly.

See the table
for course dates
on the following page.

TRIAL ADVOCACY I
A practical, hands-on training course for prosecutors

NAC
Columbia, SC

See NAC SCHEDULE on page 15

Calendar con't

NAC SCHEDULE continued from page 14

<i>Course Date</i>	<i>Course Number</i>	<i>Registration Deadline</i>
July 21-25	11-08-TA1	March 21st
July 28 - August	12-08-TA1	March 28th
August 18-22	13-08-TA1	April 18th
September 8-12	14-08-TA1	May 2nd
September 29 - October 3	15-08-TA1	Mar 23rd

April 7-11 June 16-20 August 11-15	BOOTCAMP: AN INTRODUCTION TO PROSECUTION <i>A course for newly hired prosecutors</i> Reg. deadlines: Jan. 30th for the April course; Feb. 15th for the June course; April 11th for the Aug. course	NAC Columbia, SC
June 30 - July 2	GANG RESPONSE <i>A comprehensive response to gang crime for prosecutors and law enforcement</i> The registration deadline is February 29th	NAC Columbia, SC
July 8-11	COURTROOM TECHNOLOGY <i>Upper Level PowerPoint®; Sanction II; Audio/Video Editing (Audacity, Windows Movie Maker); 2-D and 3-D Crime Scenes (SmardDraw, Sketchup®); Design Tactics</i> The registration deadline is March 7th	NAC Columbia, SC
July 14-18	IMPAIRED DRIVER The registration deadline is March 14th	NAC Columbia, SC
August 25-28	CROSS-EXAMINATION <i>A complete review of cross-examination theory and practice</i> The registration deadline is April 25th	NAC Columbia, SC
September 22 - 26	TRIAL ADVOCACY II <i>Practical instruction for experienced trial prosecutors</i> The registration deadline is May 16th	NAC Columbia, SC
August 4-8	UNSAFE HAVENS II <i>Prosecuting on-line crimes against children</i> The registration deadline is March 21st	NAC Columbia, SC

See NCDA SCHEDULE on page 16

RAINING SCHEDULE *continued from page 15*

National College of District Attorneys (NCDA) and American Prosecutors Research Institute (APRI)

February 17-21	EVIDENCE FOR PROSECUTORS - NCDA*	Las Vegas, NV
March 2-6	PROSECUTING HOMICIDE CASES - NCDA*	Orlando, FL
March 2-6	SOLVING PROSECUTION PROBLEMS - NCDA*	Mesa, AZ
March 30 - April 3	PROSECUTING DRUG CASES - NCDA	Myrtle Beach, SC
April 6-10	CONTEMPORARY TRIAL ISSUES - NCDA*	Lake Tahoe, NV
April 21-25	MEETING CHALLENGES IN PROSECUTION & VICTIM ADVOCACY*	Chicago, IL
May 4-8	SPECIAL PROSECUTIONS COURSE - NCDA*	San Diego, CA
May 18-22	OFFICE ADMINISTRATION COURSE - NCDA*	Marco Island, FL
June 1-11	CAREER PROSECUTOR COURSE - NCDA* <i>The one course that should be attended by everyone who make prosecution their career</i>	Charleston, SC
June 22-26	CRIME SCENE INVESTIGATIONS - NCDA*	Las Vegas, NV

* For a course description and on-line registration for this course, click on the course title or call Prosecution Council at (801) 366-0202, e-mail: mnash@utah.gov.