



## United States Supreme Court

### ACCA, state recidivism statutes and predicate offenses

Defendant Rodriguez was convicted of being a felon in possession of a firearm. According to the Armed Career Criminal Act (ACCA, 18 U.S.C. §924(e), the minimum prison term requirement for his offense given at least three prior convictions of violent felo-

nies/serious drug crimes was 15 years.

The district court was not convinced Rodriguez' previous convictions qualified as serious drug offenses for the purposes of enhancement under the ACCA because the maximum prison term for first time offenders of those crimes was 5 years. The government argued that the convictions did qualify as predicate offenses because the defendant faced up to 10 years under the state recidivism statute. The district court ruled that the recidivist provision is separate from the substantive drug law in Rodriguez' case, and that facially, the statutory definition of offenses prevented them from serving as ACCA predicates.

The Supreme Court disagreed, ruling that the defendant's prior record does bear on the seriousness of the offense in question, since an offense committed by a repeat offender is thought to reflect greater culpability and merit greater punishment. ACCA is a recidivist statute; Congress must have had state recidivist provisions in

mind and understood that maximum penalties, as prescribed by state law, may be increased by state recidivist provisions. *United States v. Rodriguez*, No. 06-1646, May 19, 2008



### Carrying explosives "during" the commission of a felony

The federal statute outlawing explosives during the commission any federal felony offense requires no relationship between the act of carrying the explosives and the underlying felony. Only a temporal connection need exist between the two acts.

The defendant had plans to detonate explosives at the Los Angeles

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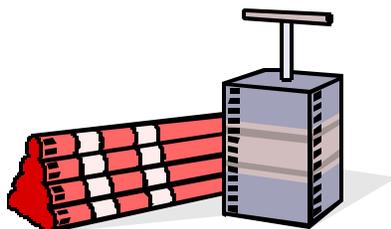
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International Airport. While attempting to cross the border in Washington state, he lied to customs agents, who found explosives in his vehicle during a search.

The defendant was convicted of making false statements to customs agents and of carrying explosives during that felony in violation of 18 U.S.C. § 844(h)(2), which provides that one who "(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States" is subject to 10 years' imprisonment on top of the punishment for the underlying felony.

The 9th Circuit reversed the defendant's conviction on the latter charge, ruling that the statute requires some nexus between carrying explosives and the underlying crime. The Supreme Court reversed the 9th Circuit, holding

that both the clear language of the statute and the legislative history undermine the notion that there need be any relationship between the two acts committed by the defendant. The Court determined that the term "during" in the statute denotes a temporal link between the carrying of explosives and the underlying felony, and that because the defendant had the explosives at the time he made the false statements, he was carrying them "during" the commission of that offense. *United States v. Ressam*, No. 07-455, May 19, 2008



## **Consent of defendant not necessary for magistrate judge to preside over jury selection.**

The personal consent of a criminal defendant is not required before a federal magistrate judge may rely on defense counsel's consent to preside over jury selection in a federal felony prosecution. The Federal Magistrates Act, at 28 U.S.C. §636(b)(1)(A), permits the district court to designate any pretrial matter to the determination of the magistrate judge, with the exception of eight enumerated types of motions. Section 636(b)(3) allows delegation to magistrate judges of "such additional duties as are not inconsistent with the Constitution and laws of the United States."

In prior decisions, the Court has established that the "additional duties" that the statute permits a magistrate

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## Case Summaries

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judge to undertake include presiding at voir dire and jury selection provided there is consent but not if there is an objection. The court has also held that some rights, such as the right to plead guilty or the right to counsel, are so fundamental that a court may not rely on a waiver by defense counsel and must ensure that an accused has personally made an informed waiver. The court explained that the distinction between those rights that require personal, informed waivers by defendants themselves and those rights whose waivers may be effected by counsel turns on the "nature of the right at issue." Emphasizing the "practical necessity" of giving attorneys authority to make tactical decisions, the court decided that requiring personal approval from defendants themselves could necessitate lengthy explanations that may be difficult for lay people to understand at the moment "and that might distract from more pressing matters as the attorney seeks to prepare the best defense." *Gonzalez v. United States*, No. 06-11612, May 12, 2008

### **Sixth Amendment right to counsel attaches at first instance defendant is before a judge.**

Petitioner Rothgery was arrested for possession of a firearm based on erroneous information that he had a previously committed a felony. Rothgery was brought before a magistrate judge for a "15.17" probable cause hearing with an officer. Rothgery was then committed to jail and released after posting bond. An indigent defendant, Rothgery made several written and oral attempts to receive counsel but was ignored. He was subsequently indicted and rearrested, his bond was

increased, and he was jailed. He then received an attorney.

Rothgery brought a 42 USC §1983 action against Gillespie County, claiming that his Sixth Amendment right to counsel had been violated. Had he been provided an attorney within a



reasonable time, Rothgery argued he would not have been indicted, rearrested, or jailed. Gillespie County argued that its unwritten policy was to deny indigent defendants counsel until an indictment is entered, but not at a "15.17" hearing, during which prosecutors are not present or involved. The Supreme Court held that the point of attachment of counsel for Sixth Amendment purposes is the first instance when a defendant is brought before a judge, learns the charge against him, and his freedom is restricted. Prosecutor involvement does not determine right to counsel. The Supreme Court vacated the ruling and remanded the case. *Rothgery v. Gillespie County, Texas*, No. 07-440, June 23, 2008

## Utah Supreme Court

### **GRAMA classifications**

Marcia Rice, former employee at the Salt Lake County Clerk's Office, filed a sexual harassment complaint against Chief Deputy Nick Floros and an EEOC complaint against Floros, the County, and County Clerk Sherrie Swensen. Independent attorneys retained by District Attorney David Yocum to investigate the case found that Floros engaged in "egregious violations" of county policy in his behavior toward Rice. While a brief summary of

the report investigating sexual harassment was released, the County classified the full report (and all sexual harassment investigation reports) as protected and denied a GRAMA request by the Deseret News to release the report. The Deseret News filed suit.

The trial court found that the County's classification was permissible because the report contained information that, if released, constituted a "clearly unwarranted invasion of personal privacy" - an exception to disclosure provided by GRAMA. The Deseret News appealed the trial court's ruling.

The purpose of GRAMA is to advance the cause of governmental transparency and accountability. When competing interests fight to a draw, disclosure wins. The Utah Supreme Court held that the government's allegiance must be to the goals of GRAMA and not to its pre-determined

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# PROSECUTOR PROFILE

## J. Mark Smedley, Heber City Attorney



J. Mark Smedley (or Mark, as he prefers to be called), became interested in practicing law while growing up watching his father, Stanley Mark Smedley, practice law in David County with Bean, Bean & Smedley. Of his father, Mark says, “His greatest qualities were his integrity, his diligence at whatever he was working at, and the fact that he didn’t take himself too seriously.” Mark graduated from with a Bachelor’s degree in English and Literature in 1988 and attended law school at the University of Utah, graduating in 1992.

Mark began working as a prosecutor after moving to Heber to assist his uncle Jim, who was the city attorney at the time. The most challenging aspect of his job as a prosecutor has been “weighing what is fair and just given the many different fact scenarios when determining whether to prosecute.” His most rewarding experiences have come through DUI convictions and interactions with victims in domestic cases. Of his favorite memory as a prosecutor, Mark says, “Soon after my marriage, when I was a young prosecutor in Heber, my new bride and her family came to watch her new husband prosecute a series of cases. The most interesting case that whole morning was a dog-bite matter. As much as I wanted to impress my new bride and family, there’s just so much you can put into a dog-bite case. I asked as many questions and made it as interesting as I could. It has become a fun story told at the family reunions as new son-in-laws marry into the family, how the young prosecutor tried to squeeze out as much drama as he could in a dog-bite case.”

Mark thinks the most important qualities a prosecutor can have are preparedness, a thick skin, the ability to make decisions independently and objectively, the courage to do the right thing even if it’s unpopular or difficult, and a kind heart. Mark would like to see more courts, more judges, and more jail space in the criminal justice system. Mark thinks there will be more crime in the future, because “the population is growing, particularly here in the Western United States. I think the disintegration of the family is having a direct affect on delinquency of the youth and unlawful practices of the adults, and I don’t see the trend of marriage and family improving substantially in the near future.” About himself as a prosecutor, Mark says, “[I have an] ability to draw from a broad spectrum of experiences in a typical everyday Norman Rockwell-type life. I like to think I am approachable and not easily angered. But even as I find that unique, it may not be anything different than your general prosecutor anywhere in the state of Utah.” Of his profession, Mark says “I derive an abiding satisfaction with the practice of law. However, that is just one aspect and component of my life. I have many other interests and some are more important than others, but all seem to contribute to and enhance my ability as an attorney.”

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### NICKNAME

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### FAMILY

Oldest of six children; married to Lynette with 5 children

### HOMETOWN

Bountiful, Utah

### FIRST JOB

Painter with a native Dutchman

### CHILDHOOD DREAM JOB

Forest ranger

### HOBBIES

Fishing, camping and hiking, coaching soccer, mountain biking, and yard work

### FAVORITE QUOTE

People are about as happy as they make their minds up to be. - Abraham Lincoln



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record classification. The County had an obligation to conduct a neutral evaluation of the GRAMA status of the report without regard to its existing classification. The Court ruled that the record in question did not fit into any of the statutorily protected classes of GRAMA and that despite the personal nature of sexual harassment reports, considerations of public interest might overwhelm privacy concerns, particularly in regard to public officials engaging in misconduct during performance of their public duties. The Court reversed the lower court's ruling and determined that the report had been incorrectly classified as protected.



*Deseret News v. Salt Lake City Corp.*, Utah Sup. Ct., No. 20060454, March 28, 2008

### **Tax deficiency is a necessary element of tax evasion.**

Defendant Eyre appealed his conviction on six counts of felony tax evasion. He argued that the government did not prove the existence of a tax deficiency, which is a necessary element of tax evasion, and claimed he received ineffective assistance of counsel.

Eyre claimed at trial that during the years he did not file a State tax return, he had no tax liability. He provided worksheets on which he calculated his income and loss estimates for

that period, but they were not admitted into evidence. His counsel did not research the basis for Eyre's estimates and did not call a tax expert to analyze Eyre's tax status. Following his conviction, Eyre retained new counsel for the sentencing phase of his trial, and that counsel called an expert to prepare and discuss Eyre's returns, which revealed little or no tax deficiency for all the years in question.

On appeal, the Supreme Court ruled that a tax deficiency is a necessary element of tax evasion, and that the government must show tax was due and owing - not simply that Eyre earned income and did not file a tax return. The question of whether Eyre had a tax deficiency was never submitted to the jury, and Eyre's trial counsel never objected to that omission in the jury instructions. The Court found that the trial counsel's actions met the Strickland standard because counsel's performance was deficient and that deficiency led to a prejudiced defense, affecting the outcome of Eyre's case. The Court reversed Eyre's convictions, and remanded the case. *Utah v. Eyre*, Utah Sup. Ct., No. 20050664, February 22, 2008

## Utah Court of Appeals

### **DUI and breath test suppression**

Where a DUI charge originates in justice court and the breath test is suppressed, the prosecution may properly appeal the suppression order to the district court by certifying that the suppression order "prevents continued prosecution," even where there is other unsuppressed evidence of impairment

which could support continued prosecution on the "under the influence" prong, and the district court may not evaluate the merits of the prosecution's certification. However, if the district court affirms the justice court suppression order, the DUI charge must be dismissed in its entirety, notwithstanding the remaining unsuppressed evidence of impairment. One effect of this decision is that municipal prosecutors who originate misdemeanor DUI charges in justice court have lesser appellate remedies than their counterparts who originate misdemeanor DUI charges in district court, since breath test suppression orders in district court could receive interlocutory review by the court of appeals (which is a matter of discretion) without the appellate ruling being dispositive of the entire DUI charge - this effect seems nonsen-



sical since most DUIs around the state originate in justice court. *Salt Lake City v. Hon. McCleve*, Utah Sup. Ct., 2008 UT 41

### **Trial court's latitude in restricting expert testimony.**

Clopten appeals his conviction for murder, failure to respond to a police command, and possession of a dangerous weapon by a restricted person. At a concert

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# Cases of Note

## Murder or Suicide?

**At the 1994 annual awards dinner given for Forensic Science, AAFS President Dr. Don Harper Mills astounded his audience with the legal complications of a bizarre death. Here is the story.**

On March 23, 1994 the medical examiner viewed the body of Ronald Opus and concluded that he died from a shotgun wound to the head. Mr. Opus had jumped from the top of a ten-story building intending to commit suicide. He left a note to the effect indicating his despondency.

As he fell past the ninth floor, his life was interrupted by a shotgun blast passing through a window, which killed him instantly. Neither the shooter nor the deceased was aware that a safety net had been installed just below the eighth floor level to protect some building workers and that Ronald Opus would not have been able to complete his suicide the way he had planned.

“Ordinarily,” Dr. Mills continued, “a person who sets out to commit suicide and ultimately succeeds, even though the mechanism might not be what he intended, is still defined as committing suicide.” That Mr. Opus was shot on the way to certain death, but probably would not have been successful because of the safety net, caused the medical examiner to feel that he had a homicide on his hands.

The room on the ninth floor, where the shotgun blast emanated, was occupied by an elderly man and his wife. They were arguing vigorously and he was threatening her with a shotgun. The man was so upset that when he pulled the trigger he completely missed his wife and the pellets went through the window striking Mr. Opus. When one intends to kill subject “A” but kills subject “B” in the attempt, one is guilty of the murder of subject “B.”

When confronted with the murder charge the old man and his wife were both adamant and both said that they thought the shotgun was unloaded. The old man said it was a long-standing habit to threaten his wife with the unloaded shotgun. He had no intention to murder her. Therefore the killing of Mr. Opus appeared to be an accident; that is, if the gun had been accidentally loaded.

The continuing investigation turned up a witness who saw the old couple’s son loading the shotgun about six weeks prior to the fatal accident. It transpired that the old lady had cut off her son’s financial support and the son, knowing the propensity of his father to use the shotgun threateningly, loaded the gun with the expectation that his father would shoot his mother.

Since the loader of the gun was aware of this, he was guilty of the murder even though he didn’t actually pull the trigger. The case now becomes one of murder on the part of the son for the death of Ronald Opus. Now comes the exquisite twist.

Further investigation revealed that the son was, in fact, Ronald Opus. He had become increasingly despondent over the failure of his attempt to engineer his mother’s murder. This led him to jump off the ten-story building on March 23, only to be killed by a shotgun blast passing through the ninth-story window. The son had actually murdered himself so the medical examiner closed the case as a suicide. Bizarre or what?

A true story from the Associated Press. Reported by Kurt Westervelt.

Taken from DUTY FIRST —Vol. 7, No. 2—Spring 2006, p. 22



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in 2002, Clopten and his group had an altercation with the victim and his group. After the concert, multiple witnesses saw Clopten approach the victim and shoot him twice in the head. Clopten argues that the trial court erred when it excluded expert testimony regarding the fallibility of eyewitness identifications. Additionally, he claims he received ineffective assistance of counsel.

The trial court has wide discretion in determining the admissibility of expert testimony, and review of such is made under the abuse of discretion standard and will not be reversed unless it exceeds the limits of reasonability. The trial court issued a jury instruction regarding the fallibility of eyewitness identifications, which was nearly verbatim to the instruction recommended by the Utah Supreme Court in such cases. Clopten's appeal is not based on the instruction, but the Court followed precedent and allowed the trial court significant deference to exclude expert testimony, finding no abuse of discretion.

Clopten argued ineffective assistance of counsel because his attorney did not obtain documents regarding a sentencing reduction for one of the eyewitnesses to the crime. Since counsel thoroughly cross-examined the witness and testimony about the reduction was included, it is unlikely that the inclusion of the documents would have had any bearing on the outcome of the trial. Counsel's performance was not so deficient as to fall below an objective standard of reasonableness. *State of Utah v. Clopten*, Utah Ct. of App., No. 20060254-CA, May 30, 2008

**Trial court errors not impacting the outcome of the proceedings are not grounds for a reversal.**

Defendant Otterson appealed conviction for solicitation to commit aggravated murder, arguing the trial court made numerous errors. While awaiting trial on forcible sex abuse of a child, sodomy of a child, and other crimes, Otterson wrote a letter to his wife confessing to his crimes and several others previously unknown. His wife alerted jail authorities, and prosecutor Sturgill offered Otterson a plea deal for several of the crimes Otterson confessed to, which he accepted.

Otterson began speaking with inmates Hill and Watson about hiring a hitman to kill Sturgill. Both inmates contacted jail authorities about Otterson's requests, and an undercover police officer posing as a hitman had jailhouse conversations with Otterson about killing Sturgill. Otterson's mother provided cash for the hit, and Otterson was arrested and charged.

Otterson argued that the trial court erred in omitting a portion of the testimony offered by inmate Cummings regarding inmate Hill, who testified for the prosecution. The Court held that Otterson was able to impugn



Hill's testimony on the stand, and that any error in limiting the testimony was harmless given ample evidence supporting Hill's testimony against Otter-

son. Additionally, Otterson argued the trial court erred in excluding his confession letter from evidence. While the Court of Appeals was unsure why Otterson believed the letter cut in his favor, it held that Otterson was able to testify as to its contents and that defense counsel referred to it in closing arguments. If error existed by the trial court, no prejudice resulted.

Finally, Otterson argued cumulative error on the part of the trial court, and the Court of Appeals found either no error in the alleged instances or error that, if it existed, had no bearing on the outcome of the proceedings. The Court of Appeals affirmed Otterson's conviction. *State of Utah v. Otterson*, Utah Ct. of App., No. 20061080-CA, April 17, 2008

**Appropriate screening must occur if defendant's counsel joins a prosecutor's office.**

Defendant McClellan appealed his rape conviction. Attorney Hadfield represented him until three days before trial, then took a position with the Utah County Attorney's Office - the agency prosecuting McClellan. McClellan argues that the trial court committed plain error when it failed to disqualify the entire Utah County Attorney's Office after his former attorney joined the office.

The Court of Appeals adopted the majority rule on this issue, which holds that to ensure faith and integrity in the criminal justice system, an entire prosecutor's office will be assumed to be privy to the confidences obtained by a former defense counsel and must be disqualified. However, the prosecutor may rebut by showing that appropriate screening processes took place, isolating the former counsel from the related criminal prosecu-

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tion. In McClellan's case, the record was incomplete as to the screening processes for his former counsel. In such a case, the inadequacy of the record must be construed against the defendant unless he can show his counsel acted ineffectively in assisting him. McClellan did not show a clear, specific deficiency of his trial counsel. The Court of Appeals affirmed. *State of Utah v. McClellan*, Utah Ct. of App., No. 20051048-CA, February 22, 2008

### **Theft enhancement offenses**

Defendant Hall appealed his conviction for theft as a 3<sup>rd</sup> degree felony, arguing that the district court wrongly enhanced the charge from a Class B misdemeanor based on prior convictions for theft and burglary of a vehicle. Hall claims that although the theft conviction qualifies as an enhancing offense, the vehicle burglary does not qualify as a burglary for theft enhancement purposes.

Utah Code Annotated § 76-6-412(1)(b)(ii) states that an "actor who has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft" may have his offense enhanced. The use of the "any burglary" phrase indicates the legislature's awareness that several types of burglary exist and indicate its intent to include in the statute any burglary that satisfies the intent requirement. The Court of Appeals ruled that Hall's reading of the statute, which was so narrow as to exclude burglary of a vehicle, contradicted the plain meaning of the statute and undermined the apparent legislative intent in creating an enhancement penalty for those who repeatedly commit theft-related

offenses. Hall's conviction was affirmed. *State of Utah v. Hall*, Utah Ct. of App., No. 20070350-CA, April 24, 2008

### **Testimony immaterial to any fact of a criminal charge cannot be admitted to be used solely for context**

Defendant Havatone appealed her conviction for possession of a controlled

evidence existed in the record to support the contention.

The Court of Appeals ruled that the trial court erred when it allowed testimony about the arrest warrant for forgery, a detail that did not prove a fact material to the drug charge and should not have been admitted solely for context or to paint a picture for the jury. Similarly, Havatone's admission is not material to any fact of the drug charge and should have been omitted. The Court of Appeals reversed the conviction based on the cumulative error doctrine. *State of Utah v. Havatone*, Utah Ct. of App., No. 20070135-CA, April 10, 2008

### **Reasonable suspicion for search and seizure may be gleaned from facts gained through a dispatch report**

Defendant Martinez appeals his conviction and the trial court's denial of his motion to suppress evidence, arguing that his arresting officer had no reasonable, articulable suspicion of criminal behavior when he conducted a traffic stop on the vehicle Martinez was a passenger in, violating his constitutional rights.

In February 2006, a worker at an Ogden Texaco called police regarding the suspicious behavior of three individuals outside her convenience store. When police arrived, the individuals had driven away in their vehicle but were eventually stopped down the road. A check on the occupants--who were acting suspiciously in the vehicle prior to the stop--yielded a no bail warrant on Martinez. A search of his backpack revealed marijuana and other controlled



substance, arguing that the trial court abused its discretion by allowing testimony, cross examination, and closing argument statements regarding a prior forgery conviction.

Before trial, the parties agreed that Havatone's forgery conviction and her admission that she had committed forgery would not be mentioned at her trial for possession of a controlled substance. The morning of trial, the prosecution wanted to bring evidence of the admission, and the trial court allowed it. The arresting officer testified about Havatone's arrest warrant for forgery and during cross examination of Havatone, the prosecutor questioned her at length about her forgery. Additionally, during closing arguments, the prosecutor spoke about Havatone's forgery and indicated she had been convicted of passing bad checks, although no

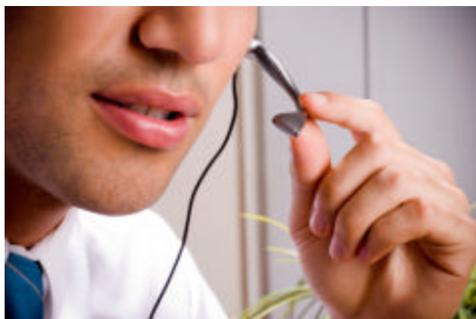
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substances.

The stop was initiated under level 2 of *State v. Markland*, in which an officer may seize a person if he has an articulable suspicion that the person has committed or is about to commit a crime. The Court of Appeals held that the officer's suspicion may come from facts he has not observed, but that came from a dispatch report. In this case, the



officer arrived at the scene and found the persons, vehicle and location to be substantially the same as what he received in the dispatch report from the eyewitness. In comparing authoritative search and seizure cases such as *Terry v. Ohio* and *United States v. Cortez* (both United States Supreme Court), the Court of Appeals ruled that reasonable, articulable suspicion existed, warranting a search and seizure, and that the officer's actions did not violate Martinez' Fourth Amendment rights. *State of Utah v. Martinez*, Utah Ct. of App., No. 20061010-CA, March 13, 2008

### **Defendant must "marshal" all evidence from trial related to issue of his appeal**

Defendant Chavez-Espinoza's cousin, Ramirez, returned cocaine he purchased from Defendant's friend, angering the Defendant, who went to Ramirez' home to fight him. He hit Ramirez numerous times and eventually cut him with a knife. Defendant appealed his conviction

of burglary, simple assault and aggravated assault, alleging numerous errors by the trial court an ineffective assistance of counsel.

The Court of Appeals refused to address many of the Defendant's claims because of lack of preservation, inadequate briefing, or failure to marshal the evidence. The Defendant did not point in the record to issues of verdict inconsistency or jury instruction that were preserved. The Defendant failed to show he was prejudiced by the striking of two jurors over defense counsel's objections or that he appropriately preserved objections to jury composition. Additionally, the Defendant failed to show his counsel performed deficiently or failed to make legally warranted objections during trial.

Defendant challenged the sufficiency of evidence on the burglary charge. In *West Valley City v. Majestic Inv. Co.*, the Utah Supreme Court ruled that a defendant making such an appeal must present "every scrap of competent evidence introduced at trial supporting the findings the defendant resists." 818 P.2d 1311, 1315. Where the defendant (as in this case) doesn't "marshal" evidence to meet the *West Valley City* requirement, the evidence is presumed to support the verdict. The Court of Appeals affirmed the conviction. *State of Utah v. Chavez-Espinoza*, Utah Ct. of App., No. 20061090-CA, May 22, 2008

### **Jury can assign weight of sobriety test refusal as it sees fit**

Defendant Longoria appeals his conviction for DUI and reckless driving. He received a new trial after objecting to two jury instructions; during the second trial, he again objected to two jury instructions concerning his refusal to submit to field sobriety tests. Longoria ar-

gues the instructions did not include language stating his refusal to submit to the tests may be supported by innocent reasons. The Court of Appeals determined that the language of the instructions did not adversely affect Longoria's presumption of innocence and did not shift the burden to his defense, stating rather that the jury could assign the weight of refusal evidence as it saw fit. *Orem City v. Longoria*, Utah Ct. of App., No. 20070218-CA, May 15, 2008

## Tenth Circuit

### **Driving at a slow speed alone does not constitute obstructing or impeding traffic**

A police officer who observed a



pickup truck traveling 45 mph in a 55 mph zone lacked the reasonable suspicion required by the Fourth Amendment to justify a traffic stop for impeding traffic, according to the

10<sup>th</sup> Circuit.

The defendant was stopped on a road with multiple blind curves during good driving conditions. His covered truck had some illegal aliens in it, and he was charged with transporting them in violation of federal law. N.M. Stat. Ann. § 66-7-305(A), forbids driving "at such a slow speed as to impede the normal and reasonable movement of traf-

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fic." The 10<sup>th</sup> Circuit held that "driving at a speed moderately below the speed limit does not, without more, of itself constitute obstructing or impeding traffic." *United States v. Valadez-Valadez*, 10th Cir. Ct. of App., No. 06-2341, May 12, 2008

### Habeas after *Musladin*

Under the standard for granting federal habeas relief set out in the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §2254(d)(1), a federal court may not grant relief on a claim of legal error adjudicated by a state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal Law as determined by the Supreme Court of the United States."

In *Musladin*, however, the Supreme Court said that the fact that it had never issued any rulings directly addressing the impact of private individuals' conduct on the fairness of trials barred the lower federal courts from granting relief on the basis of trial spectators' conduct. The 10<sup>th</sup> Circuit held that post-*Musladin*, federal courts are to treat federal law as clearly established only if there is Supreme Court case law involving facts at least closely related or similar to the case under consideration. It added that, although the legal rule at issue need not have had its genesis in the closely related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context. The court said that *Musladin* further clarified that a habeas court's threshold determination that there is no clearly established federal law is analytically dispositive. Therefore, in the absence of clearly established federal law, a federal court need not assess whether a state court's decision was

"contrary to" or involved an "unreasonable application" of such law.



This was not so clear prior to *Musladin*, it said. The court added that its own prior decisions evinced a lack of clarity on that issue. *House v. Hatch*, 10th Cir. Ct. of App., No. 05-2129, May 6, 2008

### Arrest at home without a warrant not allowed by *Payton*

A Defendant was subjected to a de facto warrantless arrest in his home, in violation of the Fourth Amendment, when he emerged from his home at the request of officers who made telephone calls to his home and repeatedly knock at his door in the wee hours of the morning.

The Defendant was sought in connection with an assault earlier in the day. There were reports he had a firearm. At about 3 a.m., four officers went to the motel room where the defendant had been living. After repeated unanswered calls from the front desk, the officers knocked loudly on his door and windows for 20 minutes, announcing themselves as police. Finally, the Defendant stepped out and was formally arrested.

In *Payton v. New York*, 445 U.S. 573 (1980), the U.S. Supreme

Court decided that "the Fourth Amendment has drawn a firm line at the entrance to the house," and it established a general rule that police must have a warrant to arrest someone in his or her home. The Court held that although the arresting officers remained outside the defendant's residence, it is the location of the arrested person, not the officers, that determines the place of arrest for *Payton* purposes. And although there was no direct evidence that the officers ordered the defendant to open the door, their actions amounted to such a command, the court ruled. It said that the number and manner of the officers in this case would lead a reasonable person to conclude he was not free to ignore them. *United States v. Reeves*, 10th Cir. Ct. of App., No. 07-8028, May 7, 2008

## Other Circuits

### Trial court must both identify and apply correct governing principle of law from Supreme Court precedent

Habeas petitioner Brown was convicted of the rape of a 9-year-old. At trial, the prosecution's expert testified correctly that there was a 1 in 300,000 chance the DNA recovered was the petitioner's. When pressed, he incorrectly stated that the DNA recovered at the scene had a 99.99967% chance of being the petitioner's.

The Mueller Report, presented as evidence by the petitioner in subsequent proceedings, discusses the "prosecutor's fallacy"—wrongly conflating the probability of a random match of DNA with the probability of a defendant's guilt. The Nevada Supreme Court upheld Brown's conviction, find-

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ing that the “1 in 300,000” figure could alone lead a jury to reasonably be convinced of the defendant’s guilt. The 9<sup>th</sup> Circuit ruled that the Nevada Supreme Court’s holding that the evidence was sufficient to sustain a conviction was contrary to established Supreme Court precedent for sufficiency of evidence as set forth in *Jackson v. Virginia*, 43 US 301 (1979). The Court held that the Nevada Supreme Court’s standard required a “reasonable jury—not a rational one” and didn’t focus on evidence of the essential elements of the crime. Nevada identified the correct governing principle from U.S. Supreme Court decisions but did not reasonably apply that principle to the facts. The 9<sup>th</sup> Circuit held that the Nevada Supreme Court should have excluded all of the DNA expert testimony from its assessment of the sufficiency of evidence of guilt. Not doing so rendered the trial “fundamentally unfair,” resulting in the 9<sup>th</sup> Circuit overturning Brown’s conviction. *Brown v. Farwell*, 9th Cir. Ct. of App., No. 07-15592, May 5, 2008

## **Sarbanes-Oxley Act has application to crimes outside the realm of white-collar offenses**

A provision of the 2002 Sarbanes-Oxley Act that criminalizes knowingly making false entries in records with the intent to impede or obstruct a federal investigation can apply to lies entered in a police use-of-force report. The 11<sup>th</sup> Circuit rejected an argument that application of the statute outside the context of white collar crime is a denial of the due process requirement of fair notice.

The statute, 18 U.S.C. §1519, applies to anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, ob-

struct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States ... , or in relation to or contemplation of any such matter or case.” The defendant in this case, a police officer, was convicted under Section 1519 on the basis of a false statement he made in a use-of-force report concerning an incident in which an arrestee was seriously injured. The defendant wrote the report to make it look as though the use of force was justified even though it was not. Fol-



lowing his conviction, the defendant argued that applying Section 1519 to his actions deprived him of due process because his conduct was not the type contemplated by Congress when it passed the statute and, therefore, he was not placed on fair notice that his behavior was criminal.

The 11<sup>th</sup> Circuit ruled that nothing in the statute suggested it applies only in the narrow context suggested by the defendant and concluded he was not denied fair notice that his conduct in falsifying a use-of-force report would violate the statute. The statute unambiguously describes the conduct engaged in by the defendant, the Court decided, and a person of ordinary intelligence would understand this. *United States v. Hunt*, 11th Cir. Ct. of App., No. 06-16641, May 5, 2008

## **Other States**

### **Defendant may volunteer information to police absent counsel without violating his Sixth Amendment rights**

Maldonado was arrested and jailed for sexual abuse of a child. After the indictment and appointment of counsel, a detective (who did not know counsel had been appointed) went to see Maldonado in jail. Maldonado volunteered a written statement about the incident to the detective, who asked if Maldonado wanted to talk to her (he did). The detective advised Maldonado of his Miranda rights, and he waived them. Maldonado claimed his statement violated his Sixth Amendment right to counsel.

Supreme Court has ruled that a formally-charged defendant who has legal counsel may voluntarily initiate a conversation with police in the absence of legal counsel. The test for admissibility of such statements is guided by an old case, *Massiah v. United States*, 377 U.S. 201 (1964), in which the Court barred the admissibility of a defendant’s incriminating statements that are “deliberately elicited” by police in the absence of the defendant’s attorney. Merely listening to a legally represented, formally charged defendant’s voluntary statements does not constitute “deliberate elicitation.” Maldonado had volunteered the information, which had not been elicited by the detective. The court disagreed that the Sixth Amendment had been violated and ordered that the letter and subsequent interrogation was admissible. *State of Texas v. Maldonado*, 2008 WL 2261776, Texas Crim. App. Ct. 2008

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## Taser International found liable for death of suspect apprehended by police

Taser International has lost what is believed to be its first ever products liability lawsuit. Salinas, California police fired a Taser at Robert Heston when he failed to cooperate with officers after they were twice called to Heston's parent's home. Heston became unconscious and stopped breathing and died at a local hospital on the following day.

A federal court jury ruled that the officers did not use excessive force, but found that Taser International "knew or reasonably should have known that the Taser ECD [electronic control device] was dangerous or likely to be dangerous because prolonged exposure to electric shock from the device potentially causes acidosis to a degree which poses a risk of cardiac arrest in a person against whom the device is deployed." The jury also found that Taser failed to warn Taser purchasers and users of that risk. The jury awarded compensatory damages and punitive damages to both Heston's estate and to Heston's parents. However, the jury found that Heston was 85% responsible for his injuries, so Taser International was required to pay only 15% of the damage awards. *Heston v. City of Salinas*, No. C 05-03658, N.D. California, San Jose Div., June 6, 2008

## Miranda requirements and police custody

In *Elmarr*, a defendant who was asked if he would mind accompanying detectives to a police station to talk about his former wife's death, and who was never physically restrained, was nevertheless subjected to custodial interrogation for purposes of *Miranda v.*

Arizona, 384 U.S. 436 (1966). Conversely in *Madrid*, a police officer did not subject a slaying suspect to custodial interrogation prior to *Miranda*



warnings when he told the man he should think of his family, that the officer knew that the shooting was "probably not planned" and might have been a mistake, and that "we need to try and figure out why and what the reasons behind it were."

For purposes of determining whether *Miranda* warnings are required, a suspect is in custody when his or her freedom of action is curtailed to a degree associated with formal arrest. In *Elmarr*, the Supreme Court found that the totality of the circumstances combined to create a "custodial atmosphere" in regards to the defendant. In *Madrid*, when assessing the totality of the circumstances, the Court concluded that the officers' comments were not the functional equivalent of interrogation. While the better practice would have been to *Mirandize* the defendant immediately, the court said, nothing the detective said appears to have been aimed at eliciting inculpatory statements. *People v. Elmarr*, Colorado Sup. Ct., No. 07SA379, April 21, 2008; *People v. Madrid*, Colorado Sup. Ct., No. 07SA326, April 7, 2008

## Excited utterances

Under the Texas evidence rules' hearsay exception for excited utterances, the event about which the utterance is made need not be the same one that sparked the declarant's excited state.

In this case, the defendant's original trial for indecency with his stepdaughter ended in a mistrial, and several years later he was tried on that and other similar charges. The state sought to introduce as an excited utterance something the stepdaughter had said. The defendant unsuccessfully objected to the admission of the statement on the

ground that the utterance had to be about the event--the tickling--that generated the girl's excitement. Texas R. Evid. 803(2) describes an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

The Court held that the statement was properly admitted and the defendant was equating the excited-utterance exception to the more rigorous present-sense-impression exception found in Rule 803(1), which says that a statement made by someone who is describing an event or condition while he perceives it or immediately thereafter. The excited-utterance exception is less strict. The Court ruled that the concerns for excited utterances remain the same as they were for spontaneous utterances: (1) the exciting event must be startling enough to evoke a truly spontaneous reaction, (2) the reaction must be quick enough to avoid fabrication, and (3) the statement must be sufficiently "related to" the event to ensure reliability. *McCarty v. State*, Tex. Crim. App., No. PD-1139-07, June 25, 2008

# Calendar

## Utah Prosecution Council (UPC) And Other Utah CLE Conferences

August 7-8	<b>UTAH MUNICIPAL PROSECUTORS SUMMER CONFERENCE</b> <i>Really good stuff for all whose caseload includes primarily misdemeanors</i>	Zion Park Inn Springdale, UT
August 18-22	<b>BASIC PROSECUTOR COURSE</b> <i>Substantive and trial skills training for new prosecutors</i>	University Inn Logan, UT
September 10-12	<b>FALL PROSECUTORS TRAINING CONFERENCE</b> <i>The annual fall meeting for all Utah prosecutors</i>	Iron Cnty Conf Center Cedar City, UT
October 15-17	<b>GOVERNMENT CIVIL PRACTICE CONFERENCE</b> <i>Specifically for civil side attorneys from county and city offices</i>	Zion Park Inn Springdale, UT
November 3-5	<b>JOINING FORCES : 21ST ANNUAL CONFERENCE ON CHILD AND FAMILY VIOLENCE</b> <i>Focuses on prevention, investigation, prosecution and treatment. Sponsored by Prevent Child Abuse Utah. To register on-line go to <a href="http://www.preventchildabuseutah.org">www.preventchildabuseutah.org</a></i>	Salt Lake City, UT
November 5-7	<b>ADVANCED TRIAL SKILLS TRAINING</b> <i>This will probably be a homicide related course</i>	Courtyard Marriott St. George, UT
November 12-14	<b>COUNTY ATTORNEYS' EXECUTIVE MEETING &amp; UAC CONF.</b> <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](mailto: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](#).

### TRIAL ADVOCACY I

*A practical, hands-on training course for prosecutors*

COURSE DATE	NUMBER
July 21-25, 2008	11-08-TAI
August 18-22, 2008	13-08-TAI
September 8-12, 2008	14-08-TAI
September 29-October 3, 2008	15-08-TAI

### NAC

Columbia, SC

REGISTRATION DUE

May 23 (extended)
June 13 (extended)
June 11 (extended)
July 25 (extended)

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NAC SCHEDULE *continued from page 13*

September 22 - 26    TRIAL ADVOCACY II    NAC  
*Practical instruction for experienced trial prosecutors*  
*The registration deadline has been extended to July 25, 2008*  
 Columbia, SC

## National College of District Attorneys (NCDA) and American Prosecutors Research Institute (APRI) and Other National CLE Conferences

August 4-7	STRATEGIC CROSS-EXAMINATION COURSE - NCDA* <i>Prosecutors will work with case scenarios involving four types of expert witnesses: medical doctors, psychologists, DNA experts and toxicologists.</i>	Chicago, IL
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

From <http://www.swapmeetdave.com/Humor/Lawyer.htm>



"There is no shortage of lawyers in Washington, D.C. In fact, there may be more lawyers than people." - Sandra Day O'Connor

Having just moved to a new home, a young boy meets the boy next door. "Hi, my name is Billy," he says, "what's yours?" "Tommy," replied the other. "My daddy's an accountant," says Billy. "What does your daddy do?" "He's a lawyer," Tommy answers. "Honest?" says Billy. "No, just the regular kind."



*"If we were lawyers, this would be billable time."*

Taking his seat in chambers, the judge faced the opposing lawyers. "I have been presented by both of you with a bribe," the judge began. Both lawyers squirmed uncomfortably. "You, Attorney Leoni, gave me \$15,000. And you, Attorney Campos, gave me \$10,000." The judge reached in his pocket and pulled out a check, which he handed to Leoni. "Now, then, I'm returning \$5,000, and we are going to decide this case solely on its merits."

Two physicians boarded a flight out of Seattle. One sat in the window seat, the other sat in the middle seat. Just before take-off, an attorney got on and took the aisle seat next to the two physicians. The attorney kicked off his shoes, wiggled his toes and was settling in when the physician in the window seat said, "I think I'll get up and get a coke." "No problem," said the attorney, "I'll get it for you." While he was gone, one of the physicians picked up the attorney's shoe and put a thumbtack in it. When he returned with the coke, the other physician said, "That looks good, I think I'll have one too." Again, the attorney obligingly went to fetch it and while he was gone, the other physician picked up the other shoe and put a tack in it. The attorney returned and they all sat back and enjoyed the flight. As the plane was landing, the attorney slipped his feet into his shoes and knew immediately what had happened. "How long must this go on?" he asked. "This fighting between our professions? This hatred? This animosity? This putting tacks in shoes and spitting in cokes?"

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