



## Director's Thoughts

### Fall Conference and Other Training

We just finished a successful Fall Prosecutors Conference. Attendees enjoyed an excellent agenda. In addition to the two outstanding out-of-state speakers, thanks must go to our Utah presenters who, for no personal remuneration, expended the effort to prepare and present for you, their colleagues. Without the willingness of so many to give of their time and professional expertise in support of UPC's training effort, that effort could not be what it is. Make sure to review our centerfold spread of candid photos taken during the conference to see if

yours is there. (Unfortunately, our photographer failed to get pictures of Don Linton's striptease.)

### Expanding the Trainer Pool

Having brought up the topic of willing presenters, the UPC Training Committee is always looking for prosecutors who have not yet availed themselves of the opportunity to present for us. Trouble is, I and the other committee members do not know everyone in the state, especially many of you who are a bit younger than some of us old greybeards. So please, if you have a few years of prosecution under your belt and are interested in presenting at a future UPC conference, or have a colleague who would do a good job, please give me a call or send me an e-mail.

### Homicide Conference

It has been many years since UPC presented a homicide conference. That

will be remedied on November 5-7 in St. George. Felony prosecutors will already have received the conference brochure. The planning committee for this conference consisted of a group of the most experienced prosecutors in the state. They have put together an innovative agenda, filled with highly qualified presenters, that is divided between non-capital and capital murder.

### Civility/Professionalism Training

As most of you are aware, our Supreme Court has mandated that all attorneys licensed to practice here in Utah receive, as part of their mandatory three hours of ethics, at least one hour of civility/professionalism instruction. In an effort to make the civility component easily available to all prosecutors – and any others who want to take advantage – we are going to make an hour of civility training available on DVD or by download from the UPC website. You will then be able to

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## Utah Supreme Court

**Manslaughter instructions and  
affirmative defenses**

Defendant Low was convicted of the manslaughter of Michael Hirschev and argues on appeal that the trial court erred in instructing the jury on imperfect self defense manslaughter and extreme emotional distress manslaughter.

Defendant met victim Hirschev and his two friends at a Park City bar in May 2003. The group went to Hirschev's apartment and began ingesting cocaine. Throughout the evening, Hirschev and his friends harassed and belittled Low. The victim showed the group his gun collection, and after giving Low a "wedgie" and embarrassing him, Low shot Hirschev. When police arrived, Low surrendered and made incriminating statements. At the police

station, he asked an officer how long one remains in jail for killing someone, and also told a fellow inmate he was in jail for killing someone.

At trial, Low was convicted of a concealed weapons charge but a mistrial was declared on his murder charge. At his second trial, the court allowed manslaughter instructions on both imperfect self defense manslaughter and extreme emotional distress manslaughter, and Low was convicted of manslaughter. Low argues that the trial court erred in its jury instruction because both types of manslaughter are affirmative defenses that are raised at the defendant's discretion. The Supreme Court holds that the trial court plainly erred in issuing in-

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## Case Summaries

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struction on extreme emotional distress manslaughter, because Low never presented evidence indicating extreme emotional distress and thus the court was allowing instruction that assigned Low that defense. However it was proper to instruct the jury on imperfect self defense manslaughter because Low presented evidence of perfect self defense. Notwithstanding, the Court reversed Low's manslaughter conviction. Double jeopardy prevents retrial on murder, imperfect self defense manslaughter and extreme emotional distress manslaughter, but the Court held the State may re-try on other forms of manslaughter or lesser charges. *State of Utah v. Low*, Utah Supreme Court, No. 20050807 (July 1, 2008)



## **Administrative remedies not exhausted when zoning applications not complete/appealed**

The Salt Lake City Mission ("Mission") appeals the dismissal of its claims of violation of religious freedom under the Utah and U.S. constitutions. The Mission was moving locations and considered five properties for itself. Given its activities, the Mission needed a Conditional Use Permit (CUP) in order to be in compliance with zoning regulations at each of the

five locations. The Mission claims it was prevented from applying for a CUP at four of the locations and was denied the CUP after applying for one at the fifth location. It filed suit, alleging violation of its right to free exercise of religion under the state and federal constitutions. Defendants filed a motion for summary judgment, arguing that Mission's claims are non-judicible.

In regards to the Utah constitution, the Court affirmed the dismissal of Mission's claims because it had not exhausted all administrative remedies available to it. It never applied for a CUP on four of the properties and showed no compelling evidence that it was prevented from doing so. It also never appealed the denial of the CUP on the fifth property. With respect to its federal constitutional claims, the Court held that the Mission's claims were not ripe. The Mission failed to obtain a final decision on any of the five properties in question and offered no reason why obtaining such a decision would be unfair/unreasonable. Summary judgment affirmed. *Salt Lake City Mission v. Salt Lake City*, Utah Supreme Court, No. 20060962 (April 22, 2008)

## **Utah Court of Appeals**

### **Court can determine weight of aggravating factors but must assure veracity of pre-sentencing diagnostic evaluation**

Defendant Scott pled guilty to three counts of sodomy on a child. On appeal, Scott argues that the trial court abused its discretion by failing to mod-

ify the diagnostic evaluation and considering inappropriate factors during sentencing.

At the sentencing hearing, defense counsel indicated that while the victim (the 6-year-old daughter of Scott's girlfriend) had tested positive for chlamydia, Scott had not. Defense counsel requested that the diagnostic evaluation reflect that. The trial court chose not to amend the evaluation, inferring that Scott had given the victim the sexually transmitted disease although he has not been tested for it. Scott was sentenced to three 10-to-life terms, with the first two running concurrently and the third running consecutively.

The Court of Appeals held that the trial court did not comply with UT Code §77-18(6)(a), requiring that the trial court resolve presentencing investigation report inaccuracies. The trial court did not allow defense counsel to present evidence on the matter and made an inference based on the victim's chlamydia. The Court remanded the case for a hearing on the issues related to any inaccuracies in the diagnostic evaluation.

Scott argues the trial court abused its discretion by using unreliable or irrelevant factors in determining his sentence. The trial court, at the sentencing hearing, adopted a lengthy list of aggravating factors presented by the prosecution. Scott argues with three of the factors while admitting to 8. The Court affirms the sentence, holding that the trial court has discretion to determine whether sentences are consecutive or concurrent and in assessing the weight of aggravating factors. *State of Utah v. Scott*, Utah Court of Appeals, No. 20060211-CA (March 6, 2008)

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watch it at your leisure and turn in your self study form to the MCLE office. The presentation will be taped at the video studio at the Department of Public Safety to ensure quality and should be available by early November.

### PIMS

Most of you are already using the Prosecutor Information Management System (PIMS) in your offices. Some really exciting expansions of PIMS are underway and will soon appear on a computer near you. For the past year or better, work has been underway on PIMS Phase II – the forging of an electronic connection between PIMS and CORIS, the state courts' information management system. Testing on the link between PIMS and CORIS will begin in October, with "live" testing to take place in November or early December. We expect the Salt Lake District Attorney's Office to go on-line in January or early February. This link with CORIS will enable electronic filing of Informations and all other documents that are now hand filed. It will also allow electronic receipt of judgment and sentencing information and other rulings from the courts directly into PIMS, thereby obviating the need for the prosecutor to frantically scribble notes while the judge

pronounces judgment. The full court file will be accessible from your computer. We anticipate that we will also be able to receive calendaring information into PIMS from the courts.

Equally exciting, and more ambitious, is what we call PIMS Phase III. Work is beginning on an electronic connection between PIMS and Public Safety. That link will enable police reports, including full narrative and even things like photos, to be transferred from your local law enforcement agency's case management software, through the Public Safety link, into PIMS. The relevant information fields in PIMS will be automatically populated. Prosecutors' secretaries will no longer have to type in case information from paper police reports. As to a time line on Phase III, probably not earlier than mid-2010. The legislature has appropriated a chunk of money to help effectuate full communication between all components of the criminal justice system. Even with the legislative money, however, there are limits to how many balls we can keep in the air at the same time. Most of the work on Phase III will have to await completion of Phase II.

### Student Loan Relief

I continue to receive inquiries

from prosecutors concerning progress on the effort to get student loan relief for prosecutors and public defenders. (Actually, none of my callers have expressed any concern about relief for public defenders, but they are included in the legislative package.) After a number of years of effort by the National District Attorneys Association, Congress, this summer, passed and the president signed HR 4137, the Higher Education Opportunity Act. Included in that bill is the "John R. Justice Prosecutors and Defenders Incentive Act of 2008," named for the late John R. Justice, a long time South Carolina Solicitor (that's what they call DAs) and a past president of the National District Attorneys Association. Part JJ of HR 4137 provides for student loan relief of up to \$10,000 per year, not to exceed an aggregate amount of \$60,000, for any one borrower. The relief is for law school loans only, not undergraduate loans. Applicants must be either full time prosecutors or full time public defenders and must have been so employed for at least three years. The program will be run through the Department of Justice.

HOWEVER, before any of you inadequately compensated, deeply indebted public servants blow your next few months' loan payment on a new(er) car, HR 4137

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is *ONLY* the spending authorization. Before any loan relief becomes available congress must appropriate money for the program. So far, not a dime has been so appropriate. This year's election already had the federal budget picture confused and the Wall Street bailout has only added to the confusion. With two wars going on, hundreds of billions going to hopefully stabilize the economy, the continuing clamor from those already in the federal budget and a new administration about to come to town, I'll let you guess how likely it is that congress will any time soon appropriate money to help lawyers pay off their student loans. Don't give up hope, however. NDAA continues the fight on the hill. The amount needed for this program amounts to little more than "budget dust" in context of the entire federal budget. I expect, however, that any further progress will have to await a new administration and a new congress. Stay tuned.

## **The National Advocacy Center**

Many of you have attended training courses at the National District Attorneys Association's National Advocacy Center (NAC) in Columbia, SC, appreciating not only the excellence of the instruction but also the fact that the NAC was able to pay for all of your travel and lodging expenses. You're probably also aware that, for the past two years, the NAC has been without the federal funding that supported it from its inception. I just received news that congress has passed and the president has signed HR 6083, a bill "To authorize funding to conduct a national training program

for State and local prosecutors." The bill authorizes the Attorney General to grant money "... to a national nonprofit organization (such as the National District Attorneys Association) to conduct a national training program for State and local prosecutors . . ." \$4.75 million is authorized to be appropriated to the Attorney General in each of the fiscal years 2009 - 2012. As with loan relief, no money has actually been appropriated.

## **National District Attorneys Assn.**

This and student loan relief have been NDAA's top legislative priorities. Despite facing serious financial challenges, NDAA continues to represent you and your interests on a national basis. I urge each of you, especially all County Attorneys, to become members of NDAA. To join, go to [www.ndaa.org](http://www.ndaa.org) and then click on "Join NDAA" in the left column.

## **Another of Our Own Goes to the Bench**

Congratulations to Piute and Wayne Counties Attorney Marvin Bagley on his nomination by Governor Huntsman to the Sixth Judicial District bench. Marvin has well served the legal needs of two of the state's smallest counties for many years, at the same time carrying on a successful law practice in Richfield. Once his nomination is confirmed by the Senate Marvin will put on his robes and join former Garfield County Attorney Wallace Lee on the bench in the Sixth District.

## **Remember to Take Care of #1**

As I sit here at my desk in mid October, there is a perfect fall day going on outside. Cold, snow and ice will, however, be here all too soon. Ole Doc Nash reminds you to make sure your personal batteries are fully charged before winter sets in. Take a leisurely two or three day drive in the mountains; hike a few miles in the crisp air during those two days; walk across a lawn and kick the leaves ahead of you; visit one or two of our southern parks – the air is clear and the temps are just right; if hunting is your thing, now is the time; if you're a golfer get in a last round or two; take a long lunch and walk a couple of miles around town; help an elderly or widowed neighbor get their yard/house ready for winter; get in a last backyard BBQ; dress up in your team's colors and catch some football.

## **Happy Halloween, everyone.**



You can reach Mark Nash, Director of the Utah Prosecution Council, at 801-366-0201 or at [mnash@utah.gov](mailto:mnash@utah.gov)



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## Ordinances do not protect City from private nuisance claims

Plaintiffs Mr. & Mrs. Whaley appeal the trial court's dismissal of their takings claim and grant of summary judgment to defendants on nuisance claims and claims to invalidate certain Park City ordinances.

This case relates to a noise dispute over outdoor concerts held in close proximity to Plaintiffs' home on lower Main Street in Old Town Park City. Park City authorized downtown concerts in 1999 by issuing permits and passed ordinances in 2000 and 2001 regarding outdoor music events. Concerts were authorized to play for up to 5 hours per day, 2 days per week at a level of 90 decibels or less. Two venues permitted were 400 feet or less away from Plaintiffs' home and were developed after they had moved in. Plaintiffs argue basic life activities in their home were made impossible due to the loud noise of outdoor concerts and made numerous complaints, ultimately filing suit. The trial court granted defendant's summary judgment motion, and the Whaleys appealed. This Court found that Park City's actions were specifically authorized by license and later by statute, and as such were not public nuisances. However, inasmuch as Plaintiffs claim some concerts did not conform with the terms of the ordinance, summary judgment was reversed to determine whether a public nuisance existed. Private nuisance claims do not require defendant's actions to be unlawful, as do public nuisance claims, and a license or ordinance authorization is not a defense to such claims. Summary judgment was reversed to determine as a matter of

fact whether noise was excessive and a nuisance existed. The trial court dismissed Plaintiff's takings claims because it held that administrative remedies had not been exhausted. The Court reversed, holding that Plaintiffs did exhaust administrative remedies available to them under the definitions of applicable Park City Land Management Codes. *Whaley v. Park City*, Utah Court of Appeals, No. 20050982-CA (June 19, 2008)



## Finding a special relationship of trust between sexual assault victim and perpetrator

Defendant Rowley was convicted of two counts of aggravated sexual abuse of a child. He appeals his convictions, arguing that insufficient evidence exists to prove aggravation because he did not have a special relationship of trust with the victim.

The victim, A.R., was molested by Rowley when she slept over at his home—he being the father of her best friend. A.R. had slept over previously on numerous occasions, and Rowley had been the supervising adult in the home on some of those occasions. According to Utah Code § 76-5-404.1(4)(h), aggravated sexual abuse occurs when the perpetrator has a spe-

cial relationship of trust with the victim. The State presented evidence of Rowley's relationship, which he argues does not meet the statute. The Court held that although his relationship with A.R. was not a close, intimate one, it satisfied the statute because he was the father of her best friend and was the supervising adult in the home. Given the evidence, it is reasonable for a jury to conclude that his relationship with the victim allowed him to exert undue influence on her. Conviction was affirmed. *State of Utah v. Rowley*, Utah Court of Appeals, No. 20070053-CA (June 19, 2008)

## Tenth Circuit Court of Appeals

### Firearms rights and criminal conviction expungement

A Wyoming statute that provides a procedure for expunging misdemeanor convictions "for the purposes of restoring any firearms rights lost" cannot serve as the basis for restoring federal firearms rights to someone with a conviction of a misdemeanor crime of domestic violence. The Court decided that the federal law authorizing restoration of gun rights to offenders whose convictions have been "expunged or set aside" requires "a state procedure that completely removes the effects of the misdemeanor conviction in question."

Under 18 U.S.C. §922(g)(9), a person who has been convicted of a federal, state, or local misdemeanor that has an element the use of force, or attempted force, against someone in a domestic relation-

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ship with the defendant may not own a firearm. However, 18 U.S.C. § 921(a)(33)(B)(ii) removes that disability if the offender's conviction "has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored."

The Wyoming law designed to satisfy the federal expungement exception, Wyo. Stat. Ann. § 7-13-1501, provides, at subsection (k): An expungement granted pursuant to this section shall only be used for the purposes of restoring firearm rights that have been lost to persons convicted of misdemeanors. Nothing in this section shall be construed to affect the enhancement of penalties for second or subsequent convictions of misdemeanors under the laws of this state.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives, informed the state that

the provision could not support the restoration of federal firearms rights. Wyoming filed an action in federal court pursuant to the Administrative Procedure Act, seeking injunctive and declaratory relief.

The ATF took the position that the Wyoming statute does not result in true expungement because it does not require destruction of criminal records and leaves those records available to law enforcement. The court said, "[W]e find this interpretation offers persuasive support in favor of our conclusion that § 921(a)(33)(B)(ii) requires the complete removal of all effects of a prior conviction to constitute either an expungement or a set aside." *Wyoming*



*v. United States*, 10th Circuit Court of Appeals, No. 07-8046 (August 26, 2008)

## Honoring plea agreements not yet accepted by courts

Absent extraordinary circumstances, once a defendant's guilty plea has been accepted by the court, the government is bound by its promise in a plea agreement to make certain sentencing recommendations even if the agreement has not yet been accepted by the court, regardless of whether the court ultimately rejects the deal. In this case, the government promised to recommend that the defendant receive a sentence reduction for acceptance of responsibility and to support a low-end guidelines sentence. However, after the defendant's guilty plea was accepted by the district court and while the court was deciding whether to accept the plea agreement, the government made sentencing recommendations that were at odds with its promises. It argued that it had no duty to act in accordance with an agreement that had not yet been accepted by the court.

The Tenth Circuit said that a defendant, by entering an accepted guilty plea in connection with a plea agreement, has detrimentally relied on the agreement, at least unless and until it is set aside by the district court. Thus, under general principles of contract law, the plea agreement generally is enforceable against the government at that point. There is no public interest in allowing the government to breach its promise concerning sentencing recommendations simply because the district court has not yet accepted the plea agreement. Such a rule could lead a district court to reject a plea agreement on the basis of government statements

that were contrary to its promises in the agreement. *United States v. Villa-Vasquez*, 10th Circuit Court of Appeals, No. 07-3160 (August 20, 2008)

## Other Circuits

### Lineup identifications

A lineup identification procedure in which the participants were directed to repeat a statement made by the perpetrator was rendered unduly suggestive by the fact that only one participant had the particular accent that the witness reported the perpetrator had. The defendant was convicted of taking part in a carjacking in which a group of masked men with Dominican accents beat the victim and ransacked his San Juan penthouse apartment. The defendant was charged after the victim identified him in a lineup in which all the participants were asked to repeat a statement in Spanish that the victim overheard one of his assailants say.

Because the victim's description of the assailants to the police highlighted their Dominican accents, the fact that the defendant was the only lineup participant who possessed "this salient characteristic" rendered the entire identification procedure impermissibly suggestive. In support of its decision, the court cited a Second Circuit case in which only one participant in a lineup wore dreadlocks.

Nevertheless, the Due Process Clause as interpreted in *Neil v. Biggers*, 409 U.S. 188 (1972), permits the admission of evidence derived from an unduly suggestive identification procedure so long as the surrounding circumstances indicate that the identification was

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reliable. The First Circuit held that the circumstances surrounding the identification in this case, including the victim's confidence in his identification, demonstrated that the identification of the defendant was sufficiently reliable. *United States v. Garcia-Alvarez*, 1st Circuit Court of Appeals, No. 07-1571 (September 4, 2008)

### **Terry v. Ohio does not permit search of a cell phone**

A law enforcement agent exceeded the bounds of a lawful investigative stop of a vehicle when he flipped open the motorist's cell phone and found the subscriber number associated with it. The First Circuit Court of Appeals held that the search of the phone was not permissible under *Terry v. Ohio*, 392 U.S. 1 (1968), saying, "Without a warrant or consent, Terry permits only a limited pat-down search to determine whether the suspect is carrying a weapon." Searching the cell phone went far beyond a protective search, the court said.

The government also made an argument that the search of the phone was equivalent to running a license check during a traffic stop. The court disagreed, holding that police officers conducting traffic stops certainly may perform routine, quick checks to determine whether the driver has any outstanding warrants or whether the vehi-

cle is registered or stolen. Motorists have no reasonable expectation in privacy in their driver's licenses, vehicle registration, or insurance information, it noted. Cell phones are another matter entirely, however, the court said. They contain "a wealth of private information" that give rise to a reasonable expectation of privacy, the court ruled. The agent in this case, the court ruled, "could not search [the defendant]'s cell phone for other incriminating evidence without consent or probable cause," neither of which were present. *United States v. Zavala*, 5th Circuit Court of Appeals, No. 07-20200 (August 22, 2008)



### **Ineffective assistance results when an attorney fails to inform the client of his rights under the Vienna Convention**

Criminal defense attorneys can render ineffective assistance of counsel in violation of the Sixth Amendment by failing to ensure that their clients are apprised of the right to consular assistance provided by Article 36 of the Vienna Convention on Consular Relations. The Court rejected the Justice Department's argument that, as a matter of law, defense counsel's failure to object to a violation of Article 36 can never satisfy the two-part counsel-ineffectiveness test from *Strickland v. Washington*, 466 U.S. 2 (1984).

Article 36 and the federal regulations implementing it require that foreign nationals arrested in this country be promptly advised of their right to consult with their country's consular mission. The Nigerian heroin dealer before the Seventh Circuit pleaded guilty in federal court in Illinois after federal agents caught him selling drugs to an informer. Later, in a pro se motion for post-conviction relief, the defendant contended that he was deprived of his Sixth Amendment right to counsel when his attorney did not object to the government's failure to advise him that he could avail himself of the advice and resources of the Nigerian consulate in the United States.

The Strickland test generally requires a defendant claiming that his attorney was unconstitutionally ineffective to both identify how counsel's performance fell below professional norms and demonstrate that the deficient performance prejudiced the defense. The government argued that reasonably competent defense attorneys would not raise objections to violations of Article 36 because there is no remedy for treaty violations available in a criminal prosecution. Unconvinced, the Seventh Circuit pointed out that at the time of the defendant's prosecution, numerous federal district courts—including the court in which the defendant was prosecuted and two others in Illinois—had held that Article 36 does confer individual rights. The Court also pointed out that the Illinois Institute for Continuing Legal Education's Guide for Defending Illinois Criminal Cases stated "in unequivocal terms" at the time that defense attorneys should advise their noncitizen clients that they have a right to consular assistance and

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should invoke the right to police and prosecutors. *Osagiede v. United States*, 7th Circuit Court of Appeals, No. 07-1131 (September 9, 2008)

## Law enforcement's impressions of code words admissible as lay opinion testimony

The testimony of a law enforcement officer concerning his "impressions" of code words in intercepted telephone conversations among members of a drug conspiracy was admissible under the federal evidence rule that allows lay opinion testimony that is "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue," Fed. R. Evid. 701. The court said that, when an officer's source of background knowledge is a particular investigation, as opposed to investigations in general, the officer's opinions do not have to satisfy the requirements for admitting expert testimony.

A major prosecution witness at the defendant's trial was a drug agent who testified regarding his "impression" as to the meaning of portions of several dozen recorded conversations between drug conspirators. Specifically, the agent testified that particular numbers referred to amounts of or prices for illegal drugs, and that certain words were code words for illegal drugs. The Court acknowledged that the testimony approached the line dividing lay and expert opinion testimony. However, it continued, "we find no error in the district court's decision to allow the 'impressions' testimony where, as here, it is based on the agent's perceptions derived from the investigation of this particular conspiracy." The court said it was guided by

its recent decision in *United States v. Oriedo*, 498 F.3d 593 (7th Cir. 2007), in which it held that an agent's testimony about how drug dealers use baggies to package drugs was erroneously admitted as lay opinion testimony. The Oriedo court reasoned that the testimony in question was not limited to facts derived exclusively from that particular investigation; instead, it derived from the agent's entire experience as a narcotics officer. *United States v. Rollins*, 7th Circuit Court of Appeals, No. 07-2649 (September 15, 2008)



## Maps drawn by co-defendant don't qualify as testimonial evidence for purposes of Sixth Amendment

Maps to murder victims' bodies that a co-defendant drew for a fellow inmate who turned them over to authorities did not qualify as "testimonial" evidence for purposes of the Sixth Amendment right to confront one's accusers. Under *Crawford v. Washington*, 541 U.S. 36 (2004), testimonial out-of-court statements by an unavailable declarant may be admitted only if the defendant has had a prior opportunity to cross-examine the declarant.

In the case before the Eighth Circuit, the defendant was convicted of the capital murders of the family of a witness who was to testify against him. While the defendant's girlfriend was in jail, a fellow inmate tricked her into drawing a map to the victims' hidden graves by convincing her that he could recruit a lifer to take the rap for the

murders if the co-defendant provided him with some evidence to back up the lifer's false claims. The Court held that the admission of the girlfriend's maps did not violate the defendant's confrontation rights. Although the informer likely anticipated that the maps would be used in the prosecution of the defendant, what matters is the expectation of the girlfriend when she drew the maps, the court said. Quoting from *Crawford*, the court stressed that the girlfriend did not draw the maps "for the purpose of establishing or proving some fact" against the defendant and that the maps were more like a "casual remark to an acquaintance" than a "solemn declaration" or a "formal statement." *United States v. Honken*, 8th Circuit Court of Appeals, No. 05-3871 (September 12, 2008)



## Circumstances for custodial v. non-custodial interviews in suspect's home

The U.S. Court of Appeals for the Ninth Circuit provided guidance on circumstances that can render police officers' interview of a suspect in his home "custodial" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966). Telling a suspect he is free to leave may ring particularly hollow when he is al-

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ready in his ultimate sanctuary, the court stressed. It ultimately decided that a defendant was in custody for Fifth Amendment purposes when he was questioned by armed law enforcement officers in a closed room of his house while other officers executed a search warrant, even though he was told he was not under arrest, that the interview was voluntary, and that he could leave if he wished. The defendant was eventually charged with child pornography offenses, and he moved to suppress his statements on the ground that he should have received a Miranda advisory prior to the interview.

The Court said that whether an in-home interrogation was custodial in nature depends upon "the extent to which the circumstances of the interrogation turned otherwise comfortable and familiar surroundings of the home into a 'police-dominated atmosphere.'" The court recited a nonexhaustive list of factors relevant to that determination: "(1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made." Applying these factors to the case before it, the court noted that "the presence of a large number of visibly armed law enforcement officers goes a long way towards making the suspect's home a police-dominated atmosphere." It decided that the presence of eight armed officers in the defendant's house was enough to lead a reasonable person to feel his home was dominated by police. Particularly significant, the court

said, was that the officers represented several different agencies, which the defendant claimed led him to doubt whether the FBI agent spoke for all the agencies when she said he was free to leave.

The Court allowed that the agent's assurances that the questioning was voluntary and the defendant was free to go or end the interview "weighs against a finding of custody." However, it continued, "The mere recitation of the statement that the suspect is free to leave or terminate the interview ... does not render an interrogation non-custodial per se." Such remarks "may have more or less resonance" depending on whether the suspect can retreat to his home or whether he is, in fact, already there, it said. Taking all the circumstances into account, the court concluded that "Craighead's home had become a police-dominated atmosphere. Escorted to a storage room in his



own home, sitting on a box, and observing an armed guard by the door, Craighead reasonably believed that there was simply nowhere for him to go." Accordingly, his statements elicited in the absence of Miranda warnings should have been suppressed, it held. *United States v. Craighead*, 9th Circuit Court of Appeals, No. 07-10135 (August 21, 2008)

## Other States

### **Less violent alternatives in committing murder should not be considered by jury**

An Arizona capital sentencing jury deciding whether a murder was gratuitously violent should not be instructed to consider whether there was another, less violent means of accomplishing the killing. The jury found that the defendant deserved the death penalty because he committed the murders in question in an especially heinous and depraved manner. One factor the state urged to support its allegation that the murders were especially heinous or depraved was that they were gratuitously violent. On that issue, the jury was instructed that, "[i]n deciding whether the defendant inflicted gratuitous violence, you may consider whether the defendant had available less violent alternatives to cause death."

The Arizona Supreme Court held that a "less violent alternative" instruction is not appropriate in gratuitous-violence capital cases. What the jurors should focus on is whether "the defendant continued to inflict violence after he knew or should have known that a fatal action had occurred," it explained. In this case, the defendant bludgeoned his victims even though a firearm was available. Determining whether one potential murder weapon is less violent than another is fraught with conceptual peril, the Court said. The manner in which the weapon was used counts more than the choice of weapon, it reasoned. Further, the defendant's use of one weapon rather than another one that is available does not establish his state of mind, it stressed. Defendant's death sentences were vacated. *State of Arizona v. Wallace*, Ariz. Sup. Ct., No. CR-05-0149-AP (August 22, 2008)

# Fall 2008 Conference



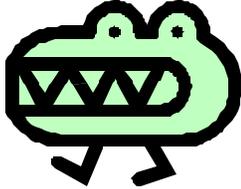
# Fall 2008 Conference cont'd





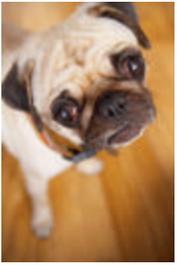
# On the Lighter Side

A man walked into a bar with his alligator and asked the bartender, "Do you serve lawyers here?". "Sure do," replied the bartender. "Good," said the man. "Give me a beer, and I'll have a lawyer for my 'gator."



If you laid all of the lawyers in the world, end to end, on the equator...it would be a good idea to just leave them there.

A lawyer's dog, running about unleashed, beelines for a butcher shop and steals a roast. The Butcher goes to lawyer's office and asks, "if a dog running unleashed steals a piece of meat from my store, do I have



a right to demand payment for the meat from the dog's owner?" The lawyer answers, "Absolutely." "Then you owe me \$8.50. Your dog was loose and stole a roast from me today." The lawyer, without a word, writes the butcher a check for \$8.50. Several days later the butcher opens the mail and finds an envelope from the lawyer: \$20 due for a consultation.

Q: What's the difference between a good lawyer and a bad lawyer?



A: A bad lawyer can let a case drag out for several years. A good lawyer can make it last even longer.

What's wrong with Lawyer jokes? Lawyers don't think they're funny, and nobody else thinks they're jokes.

When asked, "What is a contingent fee?" a lawyer answered, "A contingent fee to a lawyer means, if I don't win your suit, I get nothing. If I do win it, you get nothing."



A junior partner in a firm was sent to a far-away state to represent a long-term client accused of robbery. After days of trial, the case was won, the client acquitted and released. Excited about his success, the attorney telegraphed the firm: "Justice prevailed." The senior partner replied in haste: "Appeal immediately."

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# Calendar

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

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
April 16-17	<b>SPRING CONFERENCE.</b> <i>Case law update, legislative update, ethics and more</i>	Red Lion Hotel Salt Lake City, 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](#).

November 17-21	<b>TRIAL ADVOCACY II - COURSE #01-09-TA2</b> <i>Practical trial advocacy skills for experienced prosecutors</i>	NAC Columbia, SC
December 2-5	<b>COURTROOM TECHNOLOGY - COURSE #01-09-CT</b> <i>Upper level PowerPoint; Sanction II; Audio/Video editing (Audacity, Windows Movie Maker); 2D and 3D crime scenes (SmartDraw, Sketchup); Design Tactics</i>	NAC Columbia, SC
December 8-12	<b>TRIAL ADVOCACY I - COURSE #01-09-TA1</b> <i>A Practical, "Hands-On" Training Course for Trial Prosecutors</i>	NAC Columbia, SC

NAC SCHEDULE continued on page 15

# Calendar con't

NAC SCHEDULE *continued from page 14*

January 5-9	PROSECUTOR BOOTCAMP – Course #03-09-BCP <i>A course for newly hired prosecutors The application deadline is November 21, 2008</i>	NAC Columbia, SC
January 12-16 January 26-30	TRIAL ADVOCACY I – Course #03-09-TA1 & #04-09-TA1 <i>A Practical, "Hands-On" Training Course for Trial Prosecutors The application deadlines are: Nov. 28th for the Jan. 12th course; Dec. 12th for the Jan. 26th course</i>	NAC Columbia, SC

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

November 16-20	PROSECUTING SEXUAL ASSAULTS AND OTHER RELATED VIOLENT CRIMES	NCDA* Orlando, FL
December 7-11	FORENSIC EVIDENCE	NCDA* San Francisco, CA
December 7-11	GOVERNMENT CIVIL PRACTICE	NCDA* Savannah, GA
February 16-20	PROSECUTING DRUG CASES	NCDA* Las Vegas, NV
March 1-5	EVIDENCE FOR PROSECUTORS	NCDA* Orlando, FL
March 15-19	SPECIAL PROSECUTIONS	NCDA* Myrtle Beach, SC
April 26-30	PROSECUTING HOMICIDE CASES	NCDA* San Francisco, CA
May 10-14	OFFICE ADMINISTRATION	NCDA* San Francisco, CA
May 17-21	SOLVING PROSECUTION PROBLEMS	NCDA* Marco Island, FL
May 30-June 9	CAREER PROSECUTOR COURSE	NCDA* Charleston, SC

\* 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 Fall 2008.