



## United States Supreme Court

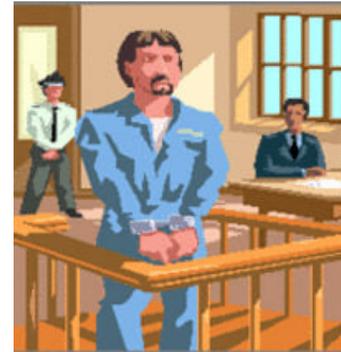
### Accused Who Is Competent to Stand Trial May Be Barred From Representing Himself

Criminal courts do not violate the Sixth Amendment when they withhold the right to self-representation from mentally ill defendants who have been found competent to stand trial. The court conceded that its precedent

in this area could be read as going the other way; however, it distinguished prior decisions by making clear that competency to represent oneself will mean different things for different defendants and in different circumstances.

The due process standard for competency to stand trial, as established in *Dusky v. United States*, 362 U.S. 402 (1960), requires that a defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have "a rational as well as factual understanding of the proceedings against him." There is a "gray area," the Court observed "between Dusky's minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose," such as self-representation. The court answered this question by holding that "the Constitution permits States to insist upon representation by counsel for those compe-

tent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." The *Dusky* standard and the court's prior opinions discussing competency to stand trial have focused on the defendant's ability to consult with counsel and to assist with the defense. This suggests, the court said, that a different standard is called for when the defendant must shoulder the burden of defending himself alone. *Indiana v. Edwards*, United States Supreme Court, No. 07-208 (June 19, 2008)



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## Utah Court of Appeals

### Restitution upheld although Defendant did not admit to stealing items

Defendant Hight appeals the amount of restitution subsequent to his guilty pleas to burglary, possession of a controlled substance with intent to distribute, and criminal mischief. The trial court had wide latitude and discretion in sentencing, and the appeals court will not disturb an order of restitution unless it exceeds what is prescribed by law, or the trial court has abused its discretion.

Hight argues that the calculation of restitution was based on items missing

from the property he admitted to burglarizing, but that did that he not claim responsibility for taking them and they were not part of his plea. Following his guilty plea for the broad offense of burglary, Hight claims his responsibility for any particular missing item must “be firmly established...before the Court can order restitution [for them]” State v. Watson, 1999 UT App. 273, 275. However, the Court held as the State argued, that it is only the initial crime for which liability must be legally certain. The trial court was within its broad discretion, at the restitution hearing, when it ordered restitution for the damages clearly resulting from the burglary after the presentation of the evidence. At the restitution hearing, the homeowner/victim testified as to the damages and missing items and the testimony was

unopposed. Hight did not present witnesses at the restitution hearing and no record evidence on appeal to counter the testimony of the homeowner, and the Court affirmed the trial court ruling. State of Utah v. Hight, Utah Court of App., No. 20060919-CA (April 3., 2008)



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## Case Summaries

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## Tenth Circuit Court of Appeals

### Assessing the affect of both preserved and unpreserved errors

When an appeal identifies preserved and unpreserved errors--each of which is sufficient by itself to require reversal--a reviewing court should look at the cumulative effect of the preserved errors by themselves and then, if that effect does not require reversal, the court should apply plain-error analysis to all of the errors, the court said.

When a defendant objects to an error at trial and then proves that error on appeal, Fed. R. Crim. P. 52 calls for "harmless error review," which mandates reversal of the conviction unless the government shows that the defendant's substantial rights were not affected. On the other hand, when a defendant had an opportunity to raise an objection to an error in the district court and did not do so, the rule calls for "plain error review." In order to obtain reversal of a conviction under this standard, the defendant must demonstrate (1) error, that (2) is plain, that (3) affects substantial rights, and that (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Review under the rule becomes more difficult to apply when a defendant's appeal establishes both preserved and unpreserved errors. Reversal on harmless-error review is mandatory when the error is sufficiently prejudicial, whereas reversal for unpreserved error on plain-error review is discretionary. The court

decided that, if it simply reviewed the cumulation of preserved and unpreserved error for harmless error, it would undermine plain-error review.

[W]hen there are both preserved and unpreserved errors, cumulative-error analysis should proceed as follows: First, the preserved errors should be considered as a group under harmless-error review. If, cumulatively, they are not harmless, reversal is required. If, however, they are cumulatively harmless, the court should consider whether those preserved errors, when considered in conjunction with the unpreserved errors, are sufficient to overcome the hurdles necessary to establish plain error. In other words, the prejudice from the unpreserved error is examined in light of any preserved error that may have occurred. If a defendant was not able to establish prejudice from the cumulation of all the unpreserved errors but was able to show that he was prejudiced after factoring in the preserved errors, the reviewing court would then go on to determine whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings, the court explained. *United States v. Caraway*, 10th Circuit Court of App., No. 07-3229 (July 28, 2008)

### Prosecutor breached plea agreement in urging prison sentence to prevent future crimes

The government materially breached a promise in a plea agreement not to oppose a 30-year prison sentence when the prosecutor urged the district court to give serious consideration to a prison term that would protect the public from the defendant "in any and all future events."

The defendant was convicted

of participating in a crack cocaine conspiracy and carrying a firearm during a drug-trafficking offense. As part of the plea bargain, the government pledged not to object to the imposition of a 30-year sentence so long as the defendant did not misrepresent the facts at sentencing. The district court calculated a U.S. Sentencing Guidelines range of 30 years to life imprisonment. The government did not expressly object to the 30-year term sought by the defense, but the prosecutor did say that, given the defendant's criminal history, his character, and his drug dealing and use of firearms, "this Court should strongly consider a penalty that will protect society from him in any and all future events." The district court imposed a sentence of 35 years.

The Court concluded that the prosecutor's remark "violated both the letter and the spirit of the plea agreement" and required resentencing. It explained, "This statement is irreconcilable with the government's promise to refrain from advocating for a sentence in excess of thirty years. The government explicitly proffers a sentence in excess of thirty years and asks the court to protect society in all future events, clearly suggesting a life sentence." *United States v. Cudjoe*, 10th Circuit Court of App., No. 07-6166 (July 29, 2008)



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# PROSECUTOR PROFILE

## Scott W. Reed, Chief of the Criminal Justice Division Utah Attorney General's Office



"Call me irresponsible, call me unreliable-throw in undependable, too." In describing himself while plagiarizing an old Sammy Cahn tune, Scott Reed's quick wit and self-deprecating sense of humor are hard to miss. Formerly the Division Chief for both the Child Protection and Commercial Enforcement divisions within the AG's office, Scott is now Chief of the Criminal Justice Division-proving, he insists, that he can't hold down a job.

Scott Walter Reed (not to be confused with the Army Medical Center in Washington, DC) grew up in Montana and Idaho as the oldest of four children. Of his parents (his father was with the U.S. Forest Service), Scott says, "Just as youth is wasted on the young, the wisdom of our parents is never fully appreciated until well after the time when we could best benefit from it. I guess the best thing we can do is pass it on to our children, and let them do the same." As a boy, Scott wanted to be Mike Nelson (played by Lloyd Bridges) on the TV series "Seahunt," but gave up on the dream, having realized that there are no oceans in Montana. He attended the University of Utah on a full-ride athletic scholarship (football - go Utes!), earning a BS in Psychology ('76) and a Masters in Social Work (1980). He worked for four years as a Psychiatric Specialist (non-medical) at Primary Children's Hospital.

Scott went to law school, as he says, "because social workers don't make enough money." Of his family's reaction to his decision, he says, "My family was very supportive of the idea of not having to support me anymore." He graduated from the University of Puget Sound (now Seattle University) Law School in 1983. Rather than accept the brown suit and commercial driver's license that accompanies every diploma from UPS, Scott decided to practice law. After spending four years "on the dark side," Scott received his first prosecutor job from David Yocom at the Salt Lake County Attorney's office. He decided to be a prosecutor because he enjoys "being the good guy, following the rules, making a difference in people's lives-and prosecutors get to do all that." The change he'd most like to see in the criminal justice system is an increase in the effort to make victims financially whole and in the enforcement of restitution orders.

Scott's favorite musicians are James Taylor, Paul Simon, Billy Joel, Elton John, Randy Newman, and Creedence Clearwater Revival. Born in Minneapolis, he reluctantly confesses to being an "inveterate fan" of the Minnesota Vikings and Twins.

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### PREFERRED NAME

Scott, Scottie, Scooter, Reeder, Radar, and (mother's favorite) Kamere Ritenow!

### FAMILY

First of four children; father to Jessica (23) and Benjamin (14)

### BIRTHPLACE

Minneapolis, Minnesota

### FIRST JOB

Truck driver with Silver Bow County Road Crew in Butte, Montana

### FAVORITE BOOK

Black's Law Dictionary

### LAST BOOK HE READ

*Team of Rivals*, Doris Kearns Goodwin (about Lincoln and his Cabinet)

### WORDS OF WISDOM

"Good luck with that, and let us know how it turns out."



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## “Fellow Officer Rule” allows for an arrest based on another officer’s request

The Fourth Amendment's collective-knowledge doctrine, also known as the "fellow officer rule," permits a law enforcement officer to make an arrest on the basis of a request by other officers who have developed facts establishing probable cause but who did not communicate those facts to the arresting officer.

The Tenth Circuit has previously agreed with other courts that have decided that this conclusion is supported by dicta in *Whiteley v. Warden*, 401 U.S. 560 (1971), so long as there is some communication regarding the basis for the suspicion between the officers with the probable cause and the arresting officer. The Court decided that "an officer, like Patrolman Chavez, who was not intimately involved in an investigation can rely on the collective knowledge of the investigators to stop and search a vehicle when justifiable conclusions of the collective investigation are conveyed to him." *United States v. Chavez*, 10th Circuit Court of App., No. 07-2008 (July 29, 2008)



## Prosecutor’s closing argument referring to Defendant’s silence is affair rebuttal

The defendants in this case were charged with conspiring to murder a witness. The government had recorded conversations between the defendants in which they had used the term "money" in a fashion that, prosecutors argued, showed it was a code word for murdering the witness. In closing argument, counsel for one of the defendants observed that no witness testified that "money" means killing and that the only person to suggest that it did was the prosecutor. The prosecutor responded by saying that "the only persons who used the term 'money' in the recorded conversations were not witnesses that could be called by the Government." The defendants objected to the comment and moved for a mistrial. The trial court denied the motion, but it instructed the jury to disregard the prosecutor's comment, that the defendants had an absolute right not to testify, and that the jury should not consider their silence.

The Court stressed that, in *United States v. Robinson*, 485 U.S. 25 (1988), the Supreme Court recognized an "important limitation" on this the Fifth Amendment rule against self-incrimination and it's relation to defendant's lack of testimony when a statement by the prosecutor is a fair response to an argument by a defendant. "To be sure, the prosecutor's remark referred to the failure of the Defendants to testify, but the remark's purpose was not to encourage the jury to infer guilt from silence by suggesting that a defendant who does not testify must have something to hide. Rather, the clear intent was to explain why the

jury must rely on circumstantial evidence to interpret the recorded conversation," the court explained. It added that the trial court's instructions to disregard the comment further reduced the danger that the jury would infer guilt from silence. *United States v. Ivory*, 10th Circuit Court of App., No. 06-3194 (July 14, 2008)



## Independent-source doctrine doesn't require two entirely separate searches

The Fourth Amendment doctrine that evidence uncovered in the wake of a constitutional violation is admissible if it is discovered through a source independent of the violation does not require that there have been two discrete searches, one unlawful and one lawful. Accordingly, the court held that there was no basis to suppress marijuana that border agents discovered inside the cab of a tractor-trailer truck after a drug dog's alert provided them with probable cause to conduct a search, even though minutes earlier the agents had conducted a presumably illegal-but fruitless--search of the truck's trailer.

The defendant moved to suppress the marijuana at trial. The district court assumed that the search of the trailer violated the Fourth Amendment

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# The "CSI Effect" is Really The "Tech Effect": Coping With the New Forensic Reality

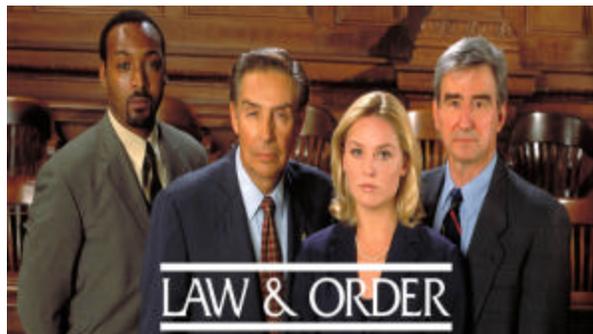
By Hon. Donald E. Shelton

Film and television have long found fodder in courtroom dramas. However, in recent years the media's use of the courtroom as a vehicle has not only proliferated, it has changed its focus. Now many media representations of the courtroom are based on actual cases and an apparent fascination with our criminal justice process. *Court TV* now makes live "gavel to gavel" internet coverage of ordinary trials available on a subscription basis.

But then the media also clouds the line between real trials and pure fiction. The blurring of reality begins with the so-called crime magazine television shows, such as *48 Hours Mystery*, *American Justice*, and even *Dateline NBC* on occasion. These shows portray actual cases but only after editing and narrating for dramatic effect.

A next level of reality distortion about the criminal justice system includes the extremely popular crime fiction television programs. *Law and Order* is everywhere on television now and promotes its plots as "ripped from the headlines," as it replicates some issue in an actual case that was widely disseminated in the rest of the media.

However, the most popular courtroom portrayals, whether actual or edited or purely fictional, have been about the use of new science and technology to solve crimes. *CSI* has been called the most popular television show in the world. It is so popular that it has spawned other versions of itself that dominate the traditional television ratings. Its success has also produced similar forensic dramas, like *Cold Case*, *Bones*, *Numb3rs*, and many others.



Many prosecutors, judges and journalists have claimed that watching television programs like *CSI* have caused jurors to wrongfully acquit guilty defendants when no scientific evidence is presented. As one prosecutor complained, "jurors...expect us to have the most advanced technology possible, and they expect it to look like it does on television." These complaints are based primarily on anecdotes without any empirical support.

Working with Professors Greg Barak and Young Kim of Eastern Michigan University, we undertook the first empirical study to determine whether this so-called "CSI Effect" exists. The complete results of the study were recently published in the *Vanderbilt Journal of Entertainment and Technology Law* and are available online at <http://law.vanderbilt.edu/publications/journal-entertainment-technology-law/archive/index.aspx>.

We set out to answer three basic questions: do jurors expect prosecutors to present scientific evidence?; do jurors demand scientific evidence as a condition for a guilty verdict?; are juror expectations and demands for scientific evidence related to watching law related television shows?

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# The "CSI Effect" is Really The "Tech Effect" (continued)

We surveyed 1,027 persons called for jury duty in Washtenaw Circuit Court between June and August of 2006. The anonymous survey was administered prior to jury selection or any preliminary instruction and jurors were assured that it was unrelated to their potential selection as a juror. First we asked about their television watching habits in six categories of crime related shows and whether they believed those shows accurately portrayed the criminal justice system. Next we asked them what types of evidence, both scientific and non-scientific, they expected the prosecutor to present in several different case scenarios.

We wanted to find out not only if jurors expected scientific evidence but also whether they would demand to see scientific evidence before they would find a defendant guilty. To do so, we asked them for their probable verdict in case scenarios with various types of evidence. So that they would be in a similar legal position, we gave them the standard presumption of innocence and reasonable doubt instructions. We also obtained demographic data about the jurors for analysis purposes.

Our findings about television watching habits were not surprising:

- *Law and Order* (44.6%) and *CSI* (41.8%) are the two most frequently watched crime related TV programs.
- Frequent *CSI* watchers also watch other law-related programs frequently.
- The more frequently jurors watch a given program, the more accurately they perceive the program to be.
- Demographically, *CSI* watchers are more likely to be female, political moderates with less education.

Do these modern jurors really expect the prosecution to present more scientific evidence? Our survey indicates that they do. Indeed, 46.3% of jurors expect to see some kind of scientific evidence in every criminal case. But these jurors' expectations were not just blanket expectations for scientific evidence but rather the expectations for particular kinds of scientific evidence seem to be rational.



What does *CSI* have to do with these expectations? In fact, they may be more discriminating jurors. *CSI* watchers as a group have higher expectations about scientific evidence that is more likely to be relevant to a particular crime than non-*CSI* watchers, and they have lower expectations about evidence that is less likely to be relevant to a particular crime than do non-*CSI* watchers.

So jurors do have high expectations for scientific evidence. The more important question

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# The "CSI Effect" is Really The "Tech Effect" (continued)

is whether those expectations will result in an acquittal if they are not met. Do jurors demand to see scientific evidence before they will find a defendant guilty? The results may surprise you. Where the jury hears the testimony of the victim or other witnesses but gets no scientific evidence more would find the defendant guilty in every kind of case, except a rape case. On the other hand, if the prosecutor is relying on circumstantial evidence, jurors *will* demand some kind of scientific evidence before they will return a guilty verdict.

So is this all because of *CSI*? All that television watching must be the cause of these demands for scientific evidence, right? In fact, our survey did *not* find that watching *CSI* had a significant impact on whether jurors were likely to acquit a defendant without scientific evidence:



- Significant statistical differences between *CSI* and non-*CSI* watchers exist in only four out of thirteen scenarios and in three of those the difference is only marginal.

- In "every criminal case" *CSI* watchers are actually *more* likely than non-*CSI* watchers to find a defendant guilty without any scientific evidence if eyewitness testimony is presented.

- *CSI* watchers are actually *more* likely than non-*CSI* watchers to find the defendant guilty in "breaking and entering" and "theft" cases without any fingerprint evidence.

- *CSI* watchers are actually *less* likely than non-*CSI* watchers to find a defendant guilty not guilty if there is testimony from a victim even without DNA evidence.

We concluded that, generally, juror expectations that they will be presented with scientific evidence are high and that jurors' demand for scientific evidence as a condition of guilt is high in all rape cases, and in all other types of cases that rely on circumstantial evidence but there apparently is no "CSI Effect" that results in acquittals.

Well if it is not watching *CSI*, what caused the increased expectations and demands? Blaming *CSI* or similar television shows for this effect is just too simplistic. We suggest that a broader "tech effect" of changes in our culture may more likely account for these increased expectations and demands of jurors.

This is an amazing technological age. The last thirty years have brought about such scientific discoveries and developments that some justifiably called it a technology revolution. At

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# The "CSI Effect" is Really The "Tech Effect" (continued)

the same time, new technology has been used to create another revolution in information availability and transmission. These developments in science and information are not contemporaneous; they feed off of each other. The information technology system uses its media to grab scientific discoveries and quickly make them part of our popular culture. Ordinary people know, or at least think they know, more about science and technology from what they have learned in the media than they ever learned in school. Every week, this new scientific and information age comes marching through the courtroom door in the psyche of almost every juror that claims a seat in the box.

Perhaps jurors are right in expecting much more from the prosecution today than they have in the past. Our legal system demands proof beyond a reasonable doubt before the government is allowed to punish alleged criminals. Where there is an available scientific test that would produce evidence of guilt or innocence, and the prosecution chooses not to perform that test and present its results to the jury, it may not be unreasonable for the jury to have a doubt about the strength of the government's case. Jurors appear to have decided that today it is "reasonable" to expect more from the prosecution in the way of scientific evidence than they have expected in the past.

How should the prosecution respond to these findings? The obvious answer is to get the evidence the jury wants. That will take a major commitment to increase law enforcement resources by equipping investigating agencies with the modern forensic science equipment that

jurors know is available and providing significant increases in forensic science personnel that will enable the results of forensic testing to be available in a timely manner. Public crime laboratories must be brought up to modern standards and the police must have enough laboratories and personnel to meet the demands of our criminal justice system.



How are we meeting this challenge? Not very well. In Michigan, it was even proposed last year that two of the state crime laboratories be closed as a budget cutting measure. The last federal study was based on 2002 reports and indicated that at that time state labs ended the year with over 500,000 backlogged requests for forensic services—a more than 70% increase in the backlog of requests compared to the beginning of the year. They found that about 1,900 additional FTEs would have been needed to achieve a 30-day turnaround for all 2002 requests for forensic services. Based on starting salaries for analysts or examiners in these labs, the estimated cost of the additional FTEs exceeded \$70.2 million at that time.

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# The "CSI Effect" is Really The "Tech Effect" (continued)

A second suggestion for law enforcement is less expensive but more difficult. Prosecutors need to find better ways to address these expectations and demands of jurors, especially when those expectations are not rational or relevant to a particular case. When scientific evidence is not relevant, prosecutors need to find better ways of explaining the lack of relevance to



jurors. This may necessitate the use of anticipatory, negative evidence, such as having an investigator or an expert explain why certain types of evidence are not possible or reasonable under the circumstances.

One thing is sure. Playing the "Luddite" no longer works. The Lud-

dites were a sect that opposed almost all of the innovations of the industrial revolution—they started by opposing the use of looms in the weaving industry rather than the traditional weaving by hand. Lawyers love to use the same tactic. Lawyers think it is endearing, or even cute, to tell the jury *"I don't know anything about these computers and all this DNA stuff. Shucks I can't even program the remote on my TV to watch football."* Well, all the jurors do know about those things and they don't think it is cute anymore. They think, rightly, that the government is not getting very good representation.

Everyone in the criminal justice system needs to adapt to this new jury. Most importantly attorneys must understand, and address, the fact that jurors come into the courtroom filled with a great deal of knowledge about the criminal justice system and the availability of scientific evidence. And they are usually right.

The criminal justice system must find ways to adapt to, rather than fight against, this "tech effect." It may take a paradigm shift and it may cost a lot of money. But unless that happens, juries may well conclude that there is "reasonable doubt" that the criminal justice system is doing its job. If the government does not respond, it is placing the safety and security of our citizens in peril.

*Judge Donald E. Shelton has been on the bench as a trial judge since 1990 and is the presiding judge of the Civil/Criminal Division of the 22<sup>nd</sup> Circuit Court in Ann Arbor, Michigan. Born in Jackson, Michigan, Judge Jackson is a 1969 graduate of the University of Michigan Law School. After five years in the Judge Advocate General's Corp of the U.S. Army, he was in private practice as a litigation attorney for 15 years before his appointment to the bench.*

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but denied the motion on the ground that the agents had developed probable cause to search the cab from an independent source, the dog alert. On appeal, the defendant argued that the independent-source doctrine demands two separate, discrete searches.

Under the independent-source doctrine, "evidence that has been discovered by means wholly independent of any constitutional violation" need not be suppressed regardless of any prior violations of the Fourth Amendment. As the U.S. Supreme Court explained in *Nix v. Williams*, 467 U.S. 431 (1984), if an "independent source" leads authorities to tainted evidence, the evidence should be deemed admissible because its exclusion "would put the police in a worse position that they would have been ... absent any error or violation." The Court held that nothing that happened with respect to the cab resulted from an unlawful search of the trailer, despite the temporal closeness of the two searches. It explained that "the sole and independent source of the evidence was the legal canine sniff, which provided the agents with the necessary probable cause to enter the tractor's cab and search for contraband." *United States v. Forbes*, 10th Circuit Court of App., No. 07-2191 (June 17, 2008)



## Defendant's good character evidence admissible when acts with a prohibited state of mind are at issue

The defendant in the case, a police officer, was convicted of obstructing an official proceeding, conspiring to obstruct, and providing unlawful notice of a search or seizure warrant. He argued on appeal that the district court misapplied Fed. R. Evid. 404(a)(1) and 405 when it refused to admit evidence at trial of his good character and law-abiding nature. He maintained that the evidence was directly relevant to the charges.

Rule 404(a)(1) provides that a defendant may adduce "evidence of a pertinent trait of character." Rule 405 (a) provides that "proof [of character] may be made by testimony as to reputation or by testimony in the form of an opinion." The Court held that these two rules make clear that, although propensity evidence generally is not allowed, an exception exists for situations in which the defendant concedes he engaged in the conduct alleged but seeks to prove he did not act with a prohibited mind set. It pointed to a 1959 case in which it stated that "a defendant may offer his good character to evidence the improbability of his doing the act charged." The court concluded that, because the district court's decision to exclude the defendant's character witnesses was based on a legally erroneous reading of the applicable evidentiary rules, it abused its discretion in excluding the proffered evidence. Further, the court held, because the district court's error deprived the defendant of important evidence relevant to the heart of his defense, his substantial rights were affected and he is entitled to a new trial. *United States v. Yarbrough*, 10th Circuit Court of App., No. 06-5229 (June 3, 2008)

## Other Circuits

### No misconduct when prosecutor referred to what witness will say "if he testifies truthfully"

At the habeas corpus petitioner's state trial, the prosecution presented a witness who had been expected to either testify for the defense or claim a lack of memory. During his opening statement, the prosecutor said he could not guarantee what the witness would say on the stand, but "if he testifies truthfully"--that is, consistently with what he had told the police just after the crime--he would implicate the defendant. In seeking federal habeas relief, the petitioner claimed that this comment constituted impermissible vouching.

Vouching occurs when a prosecutor places the authority of the government behind a witness's credibility through personal assurances of veracity or by suggesting to the jury that the prosecutor possesses information that has not been placed before the jury that supports the witness's testimony. Such vouching implicates a defendant's due process right to a fair trial.



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The Ninth Circuit held that the petitioner was not entitled to relief. It noted that the state court, in denying relief, considered whether the prosecutor's remark placed the prestige of the government behind the witness's testimony or suggested that the testimony was supported by information unknown to the jurors. These were the correct factors to consider, under the U.S. Supreme Court's decision in *United States v. Young*, 470 U.S. 1 (1985), the court observed. Inasmuch as the state court's ruling was not an unreasonable application of federal law, the petitioner was not entitled to habeas relief. *King v. Schriro*, 9th Circuit Court of App., No. 06-9906 (August 11, 2008)

### **Suspect's objection to search of home expires once he is arrested and taken away**

A suspect's presence at his home when he objects to a police search does not prevent law enforcement officers from arresting him, removing him from the premises, and then searching the residence pursuant to some other resident's consent. The court's holding minimizes the significance of the U.S. Supreme Court's statement in *Georgia v. Randolph*, 547 U.S. 103 (2006), that police may not rely on a co-tenant's consent to search a shared residence if they "removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection."

Police officers responded to a report of a domestic disturbance and were told by the defendant's wife that he had illegal items in their house. Defendant Henderson objected to the officers' entry of his home. The officers

arrested the defendant for domestic abuse and removed him from the scene before obtaining his wife's permission to search the home. Once inside, they found drugs, firearms, and fireworks used to charge the defendant with violations of federal law.

The Court held that although Henderson was initially at home and objected to the presence of the police when they arrived, his objection lost its force when he was validly arrested and taken to jail for domestic battery. At that point his co-tenant wife was free to consent to a search notwithstanding Henderson's prior objection. The Court held that nothing in *Randolph* constituted a continuing objection following removal by a resident who disagrees with the proposed search and that, as such, the rule is not inconsistent with *Randolph*.

*United States v. Henderson*, 7th Circuit Court of App., No. 07-1014 (August 6, 2008)

### **Police can get around objection to search by returning to home while objector is away**

The rule, recognized in *Georgia v. Randolph*, 547 U.S. 103 (2006), that police cannot circumvent a suspect's likely refusal to grant permission for a search by removing him from the scene and asking somebody else, does not apply unless the police take an "active role" in arranging the suspect's absence from the premises.

Accordingly, the court held that law enforcement officers who were faced with a suspect's refusal to consent to a search of his home did not violate the Fourth Amendment by waiting to request consent from a co-tenant on a day and time that they knew the suspect would be at work.

The Defendant is an ex-con who is forbidden by federal law to possess firearms. Police responded to his home after gunshots were reported. Even after police found spent shotgun



shells at the scene, the defendant claimed that he had been shooting off fireworks and refused the officers' repeated requests to search his residence. An officer, un-

able to obtain a search warrant, found the Defendant and his co-habitant girlfriend's work schedules and returned to the residence when the Defendant was gone but the girlfriend was not. The officer then obtained the girlfriend's permission for a search and found .22 caliber ammunition that was used to convict the defendant of a federal firearms offense. The Defendant appealed his conviction on Fourth Amendment grounds.

The Court held that the defendant was not present on the premises as required by *Randolph* and that the police played no active role in securing the defendant's absence. "[T]hat the government agents waited until Groves was at work to seek Foster's consent

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did not undermine the validity of the search because they had no active role in securing Groves' absence," the court said. The girlfriend's consent was valid. *United States v. Groves*, 7th Circuit Court of App., No. 07-1217 (June 27, 1980)

### **Media have a qualified First Amendment right to obtain names of jurors in criminal trials**

The news media have a presumptive First Amendment right of access in criminal cases to obtain the names of both prospective and seated jurors prior to the impanelment of the jury. In *Wecht*, the defendant was a prominent former county coroner who faces trial on charges alleging that he used his public office for private gain. The district judge ordered the empanelment of an "anonymous trial jury," the selection of which would be conducted by means of written questionnaires without identifying information. The defendant objected, and several media companies unsuccessfully intervened to challenge that decision.

The Third Circuit vacated the district court's order and directed the disclosure of the names of prospective and seated jurors to the media as well as to the defense. In *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980), *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*), *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), and the U.S. Supreme Court established that the First Amendment affords both the general public and the media a right of access and a right to gather information at criminal trials and that the First Amendment requires that voir dire examination be presumptively open to

the public. Courts across the nation are divided as to what this means for access to juror records, but have established an "experience and logic" test for determining which aspects of a criminal trial are subject to a presumptive right of public access under the First Amendment. Under the experience prong, a court must consider "whether the place and process have historically been open to the press and general public." The logic prong calls for an assessment of "whether public access plays a significant positive role in the functioning of the particular process in question." If a court determines that a presumptive right of access exists, it must examine the particular facts of the case to see whether a compelling government interest outweighs the presumption.

The Court went on to decide that the findings made by the district court in this case in support of keeping jurors' names confidential were inadequate. *United States v. Wecht*, 3rd Circuit Court of App., No. 07-4767 (August 1, 2008)



## Other States

### **First Amendment affords no right to child marriage**

The First Amendment right to the free exercise of religion provides no defense to crimes involving sex with a minor. Defendant Fischer was convicted of sexual conduct with a minor when he took the minor as his plural wife, a practice consistent with tenets of his religion, as a member of the Fundamentalist Church of Jesus Christ of Latter-Day Saints. He sought to dismiss the prosecution on the ground that it violated his constitutional right to freely exercise his religion and argued he should have been allowed to raise the affirmative defense that the victim was his spouse, but that he was precluded from doing so by the state's prohibition of plural marriage.

In *Reynolds v. United States*, 98 U.S. 145 (1878), the U.S. Supreme Court upheld the federal bigamy conviction of a member of the Church of Jesus Christ of Latter-Day Saints based on his practice of polygamy in accord with religious beliefs. The Court said in *Fischer* that the underlying reasoning of *Reynolds* remains valid and that defendant had no First Amendment right to plural marriage. *State of Arizona v. Fischer*, Arizona Court of App., No. 1 CA-CR 06-0682 (August 6, 2008)

### **First Amendment affords no right to marijuana sacrament**

The Free Exercise Clause affords no defense to violations of state laws criminalizing the possession of marijuana and drug paraphernalia. Defendant Hardesty was a member of the Church of Cognizance, which is based on neo-Zoroastrian tenets. The consumption of marijuana is the primary religious sacrament of the church. The defendant argued that he should have been allowed to advance a free-exercise defense to charges arising from his possession of marijuana and paraphernalia.

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The Court pointed out that the defendant's free-exercise claim pertained to conduct, not belief, and thus it may be subject to governmental regulation without offending the Free Exercise Clause. The court distinguished cases in which criminal statutes that were enacted with particular religious practices in mind were held to unconstitutionally burden free exercise. The marijuana laws challenged by the defendant are laws of general applicability, it pointed out. The court also rejected the defendant's claim that his conduct was protected by the state's Free Exercise of Religion Act. *State of Arizona v. Hardesty*, Arizona Court of App., No. 1 CA-CR 06-0966 (July 31, 2008)

## **Allocation is not denied when defendant's desire to express remorse is grounds for rebuttal**

A capital defendant was not denied his state right of allocution at sentencing when the trial judge ruled that any expression of remorse during allocution would open the door for rebuttal by the state.

At re-sentencing on capital charges, the defendant listed remorse among the mitigating circumstances he intended to prove during the penalty phase. The state subsequently gave notice that, as part of its mitigation rebuttal, it intended to present the defendant's testimony at the first proceeding denying culpability for the killings. This prompted the defendant to remove remorse as a mitigating circumstance. The trial court then made it clear to the defendant that, if he expressed remorse during his allocution, the state would be permitted to present his prior testimony denying responsibility for the crime. The defendant argued that this ruling constituted an unconstitutional restriction on his right of allocution.

The Court held that the defendant's right to express remorse was not denied and his right of allocution was not unduly restricted. Under these facts, the Court said that the defendant was free to express remorse, but he declined to do so. It observed that, in effect, the defendant was arguing that he should have been able to shift a mitigating circumstance from his mitigation case into his allocution and thereby insulate that mitigating circumstance from rebuttal evidence, which he had no right to do. *State of Arizona v. Armstrong*, Arizona Supreme Court, No. CR-06-0443-AP (July 29, 2008)



## **Pre-charge delay in DNA 'cold hit' cases does not cause unconstitutional prejudice**

The prejudice to defendants' ability to mount a defense that is caused by the long pre-indictment delays in so-called "cold hit" DNA cases is outweighed by officials' prerogative to allocate investigative resources in the way they deem most appropriate. It held that the unavailability of defense witnesses and the loss of other evidence caused by a 26-year delay in filing murder charges did not deprive the defendant of the fair trial guaranteed by the California Constitution.

Police investigating a rape and

murder in 1976 recovered the victim's semen-stained sweater. They questioned the defendant in connection with their investigation, but his mother-in-law provided an alibi for at least some of the time during which the crimes were believed to have occurred. Unable to develop enough evidence to bring any charges, the police shelved the case. In 2001, investigators tested the DNA on the semen-stained sweater and used evidence of the match to convict the defendant.

The U.S. Supreme Court has held that defendants claiming they were deprived of their right to a fair trial by a pre-charging delay must demonstrate that the prejudice from the delay outweighs the justifications for the delay proffered by the government. The California Supreme Court has previously interpreted this precedent as requiring a defendant to prove that a pre-charging delay was deliberately caused by government officials to obtain a tactical advantage in the prosecution. The Court emphasized that "the delay was the result of insufficient evidence to identify defendant as a suspect and the limits of forensic technology" and that "the record does not even establish prosecutorial negligence." When the forensic technology became available to identify the defendant as a suspect and to establish his guilt, "the prosecution proceeded with promptness," the Court added. *People v. Nelson*, California Supreme Court, No. S147051 (June 16, 2008)



# Calendar

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

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](#).

November 17-21	<b>TRIAL ADVOCACY II</b>	NAC
December 8-12	<i>Hands-on trial skills training for mid-level prosecutors.</i> <b>Registration deadlines: Nov. 17th course: Sept. 19; Dec. 8th course: October 10th</b>	Columbia, SC
December 2-5	<b>COURTROOM TECHNOLOGY</b> <i>Using technology to enhance your courtroom case presentation</i> <b>The registration deadline is October 3, 2008</b>	NAC Columbia, SC

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

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*	TBA
November 2-6	PROSECUTING HOMICIDE CASES - NCDA*	San Francisco, CA
November 16-20	PROSECUTING SEXUAL ASSAULTS AND RELATED VIOLENT CRIMES - NCDA*	Orlando, FL
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 [mnash@utah.gov](mailto:mnash@utah.gov). To access the interactive NCDA on-line registration form, click on [Fall 2008 Courses](#).

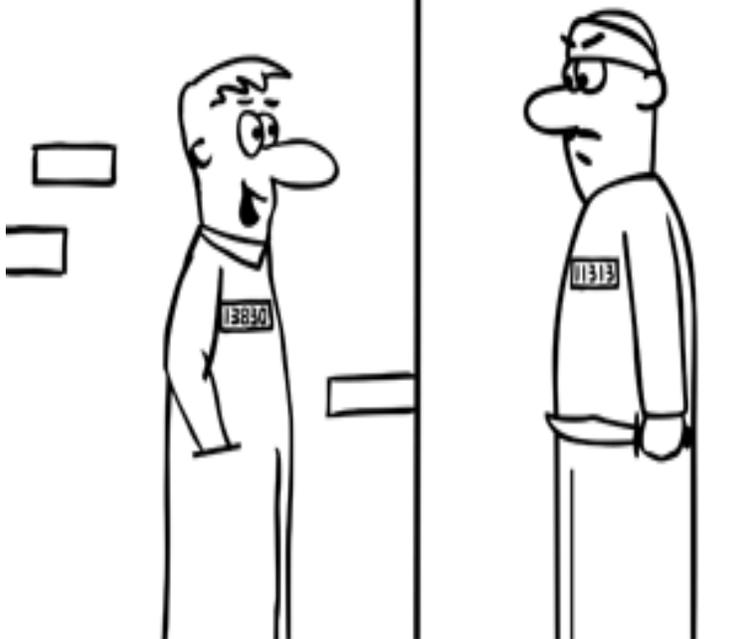


# On the Lighter Side

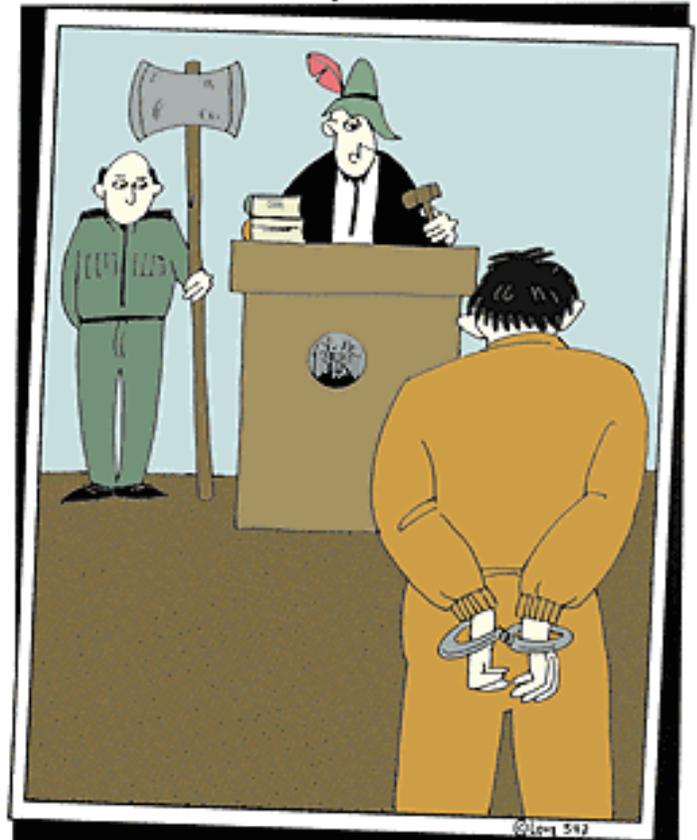
Stu's Views

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My investment scheme cleared \$18 million after fines, and only got me 3 years. It's funny you got life for a \$57 robbery.



## SNAPSHOTS by Jason Love



"Mr. Johnson, I regret to inform you that it is 'Medieval Times Week' here at the courthouse, so we're going to have you beheaded in public."

## The Utah Prosecution Counsel

**Mark Nash**, Director, [mnash@utah.gov](mailto:mnash@utah.gov)

**Ed Berkovich**, DV/TSRP, [eberkovich@utah.gov](mailto:eberkovich@utah.gov)

**Marilyn Jasperson**, Training Coordinator, [mjasperson@utah.gov](mailto:mjasperson@utah.gov)

**Ron Weight**, Prosecutor Dialog Program Manager, [rweight@utah.gov](mailto:rweight@utah.gov)

**Stan Tanner**, Technical Support Specialist, [swtanner@utah.gov](mailto:swtanner@utah.gov)

**Brittany Cameron**, Editor/Law Clerk, [brittanycameron@utah.gov](mailto:brittanycameron@utah.gov)

Visit the UPC online at  
[www.upc.utah.gov](http://www.upc.utah.gov)

