

The PROSECUTOR



United States Supreme Court

Exclusion of donated monument not subject to Free Speech Clause.

Summum, a religious organization, brought § 1983 action alleging that its free speech rights were violated by Pleasant Grove City's denial of its application to erect a monument in the city park. The proposed monument contained the Seven Aphorisms of Summum. Upon denial of the request, the City explained that it limited monuments to those either directly related to the

City's history or donated by groups with longstanding ties to the community. In the park, several other privately donated displays were permanently erected, including a Ten Commandments monument. The United States District Court for the District of Utah denied Summum's request for a preliminary injunction. Summum appealed. The United States Court of Appeals for the Tenth Circuit, reversed, and certiorari was granted.

Although public parks have traditionally been regarded as public forums, the display of the permanent monument was not subject to forum analysis. Rather, the Court determined that the city's rejection of the donated monument was a form of exercising government speech and therefore not subject to the Free Speech Clause. The city is not required to allow Summum to put its Seven Aphorisms monument in the city park and can keep the monument of the Ten Commandments in the park. *Pleasant Grove City v. Summum*, United States Supreme Court, No. 07-665 (February 24, 2009).

Possession of a firearm after a domestic violence conviction

In the U.S. District Court for the Northern District of West Virginia, Hayes was convicted of possessing a firearm after having been convicted of a misdemeanor domestic violence offense. The domestic violence conviction involved Hayes' spouse who was also the mother of his child. He appealed. The Court of Appeals for the Fourth Circuit reversed and remanded.

On grant of certiorari, the Supreme Court reversed and remanded. Although the domestic relationship must be established, it is not required to be a defining element of the predicate offense in order to support a conviction for possession of a firearm by a person convicted of misdemeanor domestic violence crime. *United States v. Hayes*, United States Supreme Court, No. 07-608 (February 24, 2009).



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LEGAL BRIEFS



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Officers can ensure a person is not armed and dangerous before they leave a traffic stop.

Johnson was a passenger in a vehicle stopped by law enforcement. The officers involved in the traffic stop were gang investigators, but the basis of the stop was an insurance-related traffic violation. Pursuant to the stop, one of the officers identified Johnson's clothing as similar to that of the Crips gang. She asked him to step out of the car so she could talk to him and to hopefully gain intelligence on gang activity. Upon Johnson exiting the vehicle, the officer immediately patted him down for weapons and discovered a gun. Johnson was convicted of unlawful possession of weapon as a prohibited possessor. He appealed. The Court of Appeals reversed

and the Arizona Supreme Court denied review. Certiorari was granted.

As previously held in *Muehler v. Mena*, an officer's inquiries into matters not directly related to the purpose of the traffic stop, do not become a lawful seizure as long as the discussion doesn't extend the stops' duration. 544 U.S. 93 (2005). The Fourth Amendment does not require the officer to allow a person to leave a traffic stop without ensuring he is not armed and dangerous. Accordingly, the Supreme Court held the pat down of Johnson was lawful. *Arizona v. Johnson*, United States Supreme Court, No. 07-1122 (January 26, 2009).

Saucier test for assessing qualified immunity is modified.

An informant working for a drug task force purchased a gram of

methamphetamine from Callahan. Upon giving the bust signal, police entered the home and Callahan was arrested. He was charged with unlawful possession and distribution of methamphetamine. Callahan brought a § 1983 action, alleging that law enforcement entered his home without a warrant, violating his Fourth Amendment rights. Summary judgment based on qualified immunity was granted to the officers. The U.S. Court of Appeals



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Case Summaries

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United States v. Hayes - Firearm possession post domestic violence conviction

Arizona v. Johnson - Pat down during traffic stop was lawful

Pearson v. Callahan - Saucier test for qualified immunity is modified

Van de Kamp v. Goldstein - Supervisory attorneys entitled to prosecutorial immunity

Herring v. United States - Evidence from illegal arrest may be admissible under good-faith rule

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United States v. Al Nasser (9th Circuit) - Not a traffic stop unless police intend it as one

United States v. Farias-Gonzalez (11th Circuit) - Identity evidence not suppressible.

Utah Supreme Court (p. 12-13)

State v. Yazzie, State v. Anderson - Consecutive and concurrent sentencing designations

State v. Moreno - Juvenile Court's conditions on parents

Nicholls v. State - Post-conviction relief on mental illness claim

Other States (p. 13)

State of Idaho v. Grist - Uncharged crimes not admissible



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for the Tenth Circuit reversed. Certiorari was granted.

The Supreme Court held that the officers were entitled to qualified immunity. The *Saucier v. Katz* decision mandates a two-step procedure in addressing qualified immunity claims. 533 U.S. 194 (2001). The Supreme Court reconsidered that ruling and now holds that “while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.” In this case, where it was not clearly established that their conduct was unconstitutional, the officers are entitled to qualified immunity. Reversed. *Pearson v. Callahan*, United States Supreme Court, No. 07-751 (January 21, 2009).

Supervisory attorneys entitled to prosecutorial immunity.

Goldstein filed a habeas corpus action in 1998, following his murder conviction in 1980. He claimed that a jailhouse informant’s testimony was false and given in exchange for a reduced sentence. He further claimed that the prosecutor’s office had not provided Goldstein’s attorney with information regarding the deal with the informant and that the prosecution’s failure to share that information had led to his erroneous conviction. The District Court agreed with Goldstein, finding that the informant had not been truthful and had the prosecution revealed the reward for the favorable testimony, the outcome may have differed. The Court ordered that he either be granted a new trial or released. The Court of Appeals affirmed. Rather than order a new trial, the State decided to release Goldstein, who had already served 24 years of his sentence. Goldstein filed a § 1983 action alleging the district attorney’s

office violated its constitutional duty to train, supervise, or establish a system for attorney’s to access information relevant to the benefits provided to jailhouse informants. The Ninth Circuit agreed. Certiorari was granted.

The Supreme Court reversed and remanded. It concluded that supervisory attorneys are entitled to absolute prosecutorial immunity in respect to claims that their supervision, training or information system management was inadequate and responsible for a constitutional error. *Van De Kamp v. Goldstein*, United States Supreme Court, No. 07-854 (January 26, 2009).



Jury can consider evidence from an illegal arrest under good-faith rule.

Police officers arrested Herring based on a warrant out of another county’s law enforcement database. A search conducted incident to arrest produced methamphetamine and a gun. It was later revealed that although some months prior the warrant had been recalled, the database had never been updated with that information. Herring was indicted on federal gun and drug possession offenses. The parties agreed that the arrest was a Fourth Amendment violation; however, they disputed whether contraband found during the search should be suppressed in a later prosecution. Herring filed a motion to

motion to suppress the evidence on the basis that the initial arrest was illegal. The trial court denied the motion and convicted. The Eleventh Circuit affirmed the trial court’s decision holding that the evidence was admissible under the good-faith rule. The Eleventh Circuit’s holding was in conflict with other circuits and therefore certiorari was granted

The Supreme Court relied on *United States v. Leon*, and affirmed the Eleventh Circuit’s holding that the evidence was admissible under the good-faith rule. 468 U.S. 897 (1984). It further stated that when error results from “isolated negligence attenuated from the arrest” the exclusionary rule does not apply and the jury is not prevented from considering all the evidence. *Herring v. United States*, United States Supreme Court, No. 07-513 (January 14, 2009).

Failure to report is not a “violent felony” ACCA’s definition.

Chambers was convicted of being a felon in possession of a firearm. § 922(g). At sentencing the government requested application of the Armed Career Criminal Act’s (ACCA) mandatory 15-year prison term premised on the claim that his prior convictions qualified as an ACCA “serious drug offense” or “violent felony.” Chambers agreed that his convictions for robbery and aggravated battery in 1998 and for a drug crime in 1999 fit within the scope of ACCA’s definitions. However, he contested the eligibility of the third conviction of failing to report to the local prison to serve four of his eleven weekends of incarceration, which arose from his 1998 offenses. The District Court ruled the conviction qualified as a “violent felony” and imposed the requested sentence. On appeal, the

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PROSECUTOR PROFILE



Bruce Ward

Prosecutor, Layton City Attorney's Office

Bruce Ward recently joined the Layton City Attorney's Office after eleven and a half years at the Cache County Attorney's Office. He was born in Ogden, Utah, but grew up moving around the intermountain west while his father worked as a forest ranger. He gained a great love for wild places, flora and fauna from his father and continues to love outdoor activities such as backpacking, skiing and cycling.

His greatest love, of course, is for his family. He met his lovely wife Karen while attending Utah State University. They were in chemistry class, and yes, as Bruce says, "The chemistry was right." They have had many adventures over the years including living on the beach in Mexico for four months! To celebrate their 25th anniversary, they spent a week in the Bay Islands. They have four children and celebrate 27 years in June.

As a kid, all Bruce ever had was a long list of things he knew he DID NOT want to be, but Bruce's mother had her heart set on her only son becoming a doctor. So, with a degree in biology from Utah State University, he headed to dental school at the University of Nebraska. But alas, after seeing his first dental patient, the difference between learning and practicing dentistry was brought into sharp relief. Within weeks of that experience, he quit dental school and applied to law school. It was a leap into the void that has worked out well. Bruce was accepted at the University of Utah and graduated in 1989

After graduating from law school, Bruce clerked at the Nevada Supreme Court and then clerked for a firm in Anchorage Alaska. "You haven't lived until you've walked to work in minus 85 (wind chill) for several weeks" says Bruce in that flippant, yet dry humorous tone for which he is known. While working there, one of the partners was appointed by the federal magistrate to represent a defendant charged with possession of cocaine. Bruce helped with the case and knew his career path was criminal prosecution. His first real job was in the Bethel (Alaska) District Attorney's Office. After that he took a year sabbatical and subsequently spent the next year commuting from Logan to Bethel doing criminal defense. After a year of America's longest commute, he joined the Cache County Attorney's Office.

Bruce's favorite memory is being in chambers with the senior Superior Court judge to explain the memory he would most like to forget..., and having him tell Bruce he understood why it happened and that based on his demonstrated performance in court there would be nothing except the personal reprimand he was giving him, but that in no uncertain terms it had better never happen again. So what was the memory he'd most like to forget? Flipping the judge off as he was leaving the bench.

Love him or hate him, Bruce wants to be described as honest and fair. He believes personal and professional integrity are the most important characteristics a prosecutor can have and says, "I enjoy a very high degree of job satisfaction, ergo life is better for having become a prosecutor." So what does the future hold for Bruce? He's currently learning Spanish; he'll continue to pursue his love of cooking, his passion for learning, his appreciation for jazz music and yes, when he's home alone he even breaks out the opera. He hopes to travel to such places as Nepal, Tibet, Africa, and the great art museums of the world. But, until he moves on to the next stage of life, such sentiments as, "All this and a paycheck too," and "I'm telling you, if I didn't have bills to pay, I would do this for free" will be heard in the halls at Layton City, and they couldn't be more pleased about that!

PREFERRED NAME - Bruce
Nickname - Brewster

BIRTHPLACE
Ogden, Utah

Q FAMILY
U First of four children;
I Father to Brian (25), Isaac (23),
C Steven (20), and Ashley (18)

I PETS
C Two chocolate labs, sisters

K FIRST JOB
Clerking for the Nevada Supreme Court

F FAVORITE BOOK
One River by Wade Davis

A LAST BOOK HE READ
C Terror and Consent: The Wars
T for the Twenty First Century, by
S Philip Bobbitt

WORDS OF WISDOM
"If you jump, the net will
appear." - Julia Cameron

ADVICE TO OTHERS
Everyone should take a little time
each day to dream.



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Seventh Circuit affirmed. Certiorari was granted.

The Supreme Court determined that Chamber's third conviction was a "crime punishable by imprisonment for a term exceeding one year" as delineated within the "violent felony" definition of § 924(e)(2)(B). Nonetheless, the crime did not satisfy any of the other parts, most specifically; it lacked the element of "use, attempted use, or threatened use of physical force" and was a passive crime that did not involve "conduct that presents a serious potential risk of physical injury to another." As such, the Court held that the conviction did not qualify as a "violent felony" under the ACCA. Reversed and remanded. *Chambers v. United States*, United States Supreme Court, No. 06-11206 (January 13, 2009).



The anti-retaliation provision of Title VII extends to employees who answer questions.

During an investigation into rumors of sexual harassment, Crawford was asked if she had ever witnessed inappropriate behavior perpetrated by Dr. Hughes, an employee relations director. Crawford answered affirmatively and described several instances when she had been subjected to his sexually harassing behavior. After the investigation was finished, Crawford was fired for embezzlement.

Crawford filed a charge of a Title VII violation with the EEOC as well as this lawsuit, alleging retaliation. The District Court entered summary judgment for the employer, holding that Crawford could not satisfy the opposition clause because she had merely answered questions during the investigation and not "instigated or initiated any complaint." The Court of Appeals for the Sixth Circuit affirmed, holding that an employee's response to questions did not violate the opposition clause. Certiorari was granted.

The opposition clause is defined as prohibiting an employer from "discriminat[ing] against any ... employee ... because he has opposed any practice made ... unlawful ... by this subchapter." § 2000e-3(a). The Supreme Court relied on *Perrin v. United States*, stating that since the statute did not define "oppose," it carried its ordinary meaning. 444 U.S. 37, 42 (1979). The ordinary meaning is defined as "to resist or antagonize..., to contend against; to confront; resist; withstand." Webster's New International Dictionary 1710 (2d ed. 1958). Crawford claims her statement, which outlined sexually harassing behavior direct toward her by Dr. Hughes, antagonized the employer and resulted in her being fired on a false pretense. The Supreme Court held that the anti-retaliation provision of Title VII does extend to any employee who provides information about a sexual harassment investigation, even if the employee did not instigate the investigation and such information was received only through the course of answering questions during the investigation. Reversed and remanded. *Crawford v. Metropolitan Government*, United States Supreme Court, No. 06-1595 (January 1, 26, 009).

Tenth Circuit Court of Appeals

Probable cause depends on an alert by a qualified narcotics dog.

Officer Sutera ("Sutera") conducted a traffic stop involving Clarkson for lack of insurance and expired registration. Officer Anderson ("Anderson") arrived to assist and warned Sutera that a vehicle of similar description had been involved in an armed robbery the prior night. Sutera had Clarkson step out of the vehicle and Anderson, who was a narcotics canine handler, walked his dog around the car. The dog indicated by the front passenger area of the car. Further search resulted in finding a handgun and glass pipe but no narcotics. Clarkson sought suppression of the evidence because the dog was not current on required training for certification as a narcotics detection canine. The District Court denied the motion, finding that, absent evidence suggesting Sutera knew the dog was not reliable, his reliance on the dog's alert was reasonable for Fourth Amendment purposes. Clarkson appealed.

The Court of Appeals held that the good-faith exception to the exclusionary rule was not applicable to Sutera's reliance on Anderson's representation that the dog was certified. To allow the rule to apply in this case would mean the improper conducting of a search with an uncertified dog would not be deterred and therefore "contravene the purpose of the exclusionary rule" reasoned the court. Since probable cause depends on an alert by a qualified narcotics dog, the court reversed and remanded. *United States v. Clarkson*, 10th Circuit Court of App., No. 08-4054 (January 6, 2009).

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HISTORY EXAM

Everyone over 40 should have a pretty easy time at this exam. If you are under 40 you can claim a handicap. This is for those who don't mind seeing how much they really remember about what went on in their life.

Get paper and pencil and number from 1 to 20. Write the letter of each answer and score at the end.

- In the 1940s, where were automobile headlight dimmer switches located?
 - On the floor shift knob.
 - On the floor board, to the left of the clutch.
 - Next to the horn.
- The bottle top of a Royal Crown Cola bottle had holes in it. For what was it used?
 - Capture lightning bugs.
 - To sprinkle clothes before ironing.
 - Large salt shaker.
- Why was having milk delivered a problem in northern winters?
 - Cows got cold and wouldn't produce milk.
 - Ice on highways forced delivery by dog sled.
 - Milkmen left deliveries outside and milk would freeze, expanding and pushing up the cardboard bottle top.
- What was the popular chewing gum named for a game of chance?
 - Blackjack
 - Gin
 - Craps
- What method did women use to look as if they were wearing stockings when none were available due to rationing during WW II.
 - Suntan
 - Leg painting
 - Wearing slacks
- What postwar car turned automotive design on its ear when you couldn't tell whether it was coming or going?
 - Studebaker
 - Nash Metro
 - Tucker
- Which was a popular candy when you were a kid?
 - Strips of dried peanut butter.
 - Chocolate licorice bars.
 - Wax coke-shaped bottles with colored sugar water inside.
- How was Butch wax used?
 - To stiffen a flat-top haircut so it stood up.
 - To make floors shiny and prevent scuffing.
 - On the wheels of roller skates to prevent rust.
- Before inline skates, how did you keep your roller skates attached to your shoes?
 - With clamps, tightened by a skate key.
 - Woven straps that crossed the foot.
 - Long pieces of twine.
- As a kid, what was considered the best way to reach a decision?
 - Consider all the facts.
 - Ask Mom.
 - Eeny-meeny-miney-MO.
- What was the most dreaded disease in the 1940s and 1950s?
 - Smallpox
 - AIDS
 - Polio
- I'll be down to get you in a _____, Honey!
 - SUV
 - Taxi
 - Streetcar
- What was the name of Caroline Kennedy's pony?
 - Old Blue
 - Paint
 - Macaroni
- What was a Duck-and-Cover Drill?
 - Part of the game of hide and seek.
 - What you did when your Mom called you in to do chores.
 - Hiding under your desk, and covering your head with your arms in an A-bomb drill.
- What was the Indian Princess's name on the Howdy Doody show?
 - Princess Summerfallwinterspring
 - Princess Sacajawea
 - Princess Moonshadow
- What did all the really savvy students do when mimeographed tests were handed out in school?
 - Sniffed the purple ink, as this was believed to get you high.
 - Made paper airplanes to see who could sail theirs out the window.
 - Wrote another pupil's name on the top, to avoid failure.
- Why did Mom shop in stores that gave green stamps?
 - To keep you out of mischief by licking the backs, which tasted like bubble gum.
 - They could be put in special books and redeemed for various household items.
 - They were given to the kids to be used as stick-on tattoos.
- Praise the Lord , and pass the _____?
 - Meatballs
 - Dames
 - Ammunition
- What was the name of the singing group that made the song 'Cabdriver' a hit?
 - The Ink Spots
 - The Supremes
 - The Esquires
- Who left his heart in San Francisco ?
 - Tony Bennett
 - Xavier Cugat
 - George Gershwin

ANSWERS, on page 7

HISTORY EXAM ANSWERS

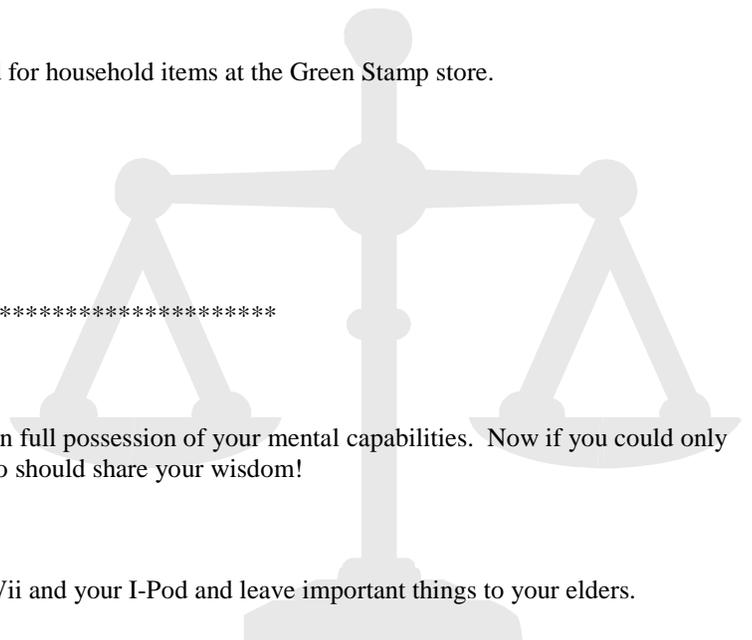
1. (b) On the floor, to the left of the clutch. Hand controls, popular in Europe , took till the late '60's to catch on.
2. (b) To sprinkle clothes before ironing. Who had a steam iron?
3. (c) Cold weather caused the milk to freeze and expand, popping the bottle top.
4. (a) Blackjack Gum.
5. (b) Special makeup was applied, followed by drawing a seam down the back of the leg with an eyebrow pencil.
6. (a) 1946 Studebaker.
7. (c) Wax coke bottles containing super-sweet colored water.
8. (a) Wax for your flat top (butch) haircut.
9. (a) With clamps, tightened by a skate key, which you wore on a shoestring around your neck.
10. (c) Eeny-meeny-miney-mo.
11. (c) Polio. At the beginning of August, swimming pools, movies and other public gathering places were closed to try to prevent spread of the disease.
12. (b) Taxi. Better be ready by half-past eight!
13. (c) Macaroni.
14. (c) Hiding under your desk, and covering your head with your arms in an A-bomb drill.
15. (a) Princess Summerfallwinterspring. She was another puppet.
16. (a) Immediately sniffed the purple ink to get a high.
17. (b) Put in a special stamp book. They could be traded for household items at the Green Stamp store.
18. (c) Ammunition, and we'll all be free.
19. (a) The widely famous 50's group: The Inkspots.
20. (a) Tony Bennett, and he sounds just as good today.

SCORING

17- 20 correct: You're older than dirt, and obviously still in full possession of your mental capabilities. Now if you could only find your glasses. Definitely someone who should share your wisdom!

12 -16 correct: Not quite dirt yet, but you're getting there.

0 -11 correct: Still a kid. Stick to your Play Station your Wii and your I-Pod and leave important things to your elders.



Attorney Perspectives on Expert Testimony of Violence Risk

by Anton Tolman and R. Scott Stone
Utah Valley University

Concern with violence and the assessment of risk for *future* violence are integral aspects of both civil and criminal law. For example, in determining custody, the court may be faced with allegations that one partner or the other presents a potential risk for violent behavior towards the children or the ex-partner. In criminal cases, violence risk is directly relevant to the final determination in capital cases, but it is also pertinent to bail decisions and sentencing outcomes for a wide variety of cases including domestic violence, stalking, sexual crimes, assault, and homicide cases. The public tends to believe that all sex offenders share a common level of risk (high) and that violent offenders tend to recidivate violently at similar rates. Of course, this description is far from reality. Each case needs to be evaluated on its own merits, and some offenders are significantly more dangerous than others, even if they are currently charged with the same crime.

In order to balance the justice goals of protecting individual rights while also protecting society, attorneys, judges, and experts must work together to provide the most accurate information to assist in making decisions in these cases. Unfortunately, observation and experience suggest that there are systemic problems and obstacles that interfere with achieving these goals. Relatively little is empirically known, however, about how much attorneys understand about risk factors for violence and how they view experts who provide input on these situations.

This article reports on a study conducted at Utah Valley University evaluating attorneys' background level of understanding of key issues in violence risk assessment, including their understanding of psychopathy (a serious personality disorder linked to violence) and their understanding of expert assessment in this area. In addition, the study explored attorneys' perspectives on when expert testimony for the purpose of risk assessment should be used, what type of experts are typically chosen, how those experts were identified in the selection process, and what type of reports were being produced for the courts' use.

The sample for this study included 66 Prosecutors from the state of Utah (73% male), and 22 Defense attorneys (50% male). This represents approximately 15% of all Utah prosecutors. There were no differences between older and younger attorneys in terms of the number of cases involving both adult and juvenile violent or sex offenders on an annual basis.

The assessment of psychopathy is particularly relevant to assessment of violence risk. The scientific definition of psychopathy is a persistent personality disorder characterized by lack of empathy and emotional responsiveness coupled with impulsiveness and strong links to predatory violence. The study of psychopathy is a significant scientific field of inquiry grounded in the original work of Robert Hare, Hervey Cleckley and others. Studies over the past couple of decades have consistently found that psychopaths violently recidivate at 2-3 times the rate of non-psychopathic violent offenders and that there are links between psychopathy and sexual deviance that predict the most dangerous sex offenders. Thus, it is vital that attorneys understand the role of psychopathy in assessing violence risk and are able to



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Attorney Perspectives on Expert Testimony of Violence Risk (continued)

evaluate expert information purportedly related to violence risk either on direct testimony or cross-examination.

Because there is frequently a confusion of terms, attorneys were asked whether "sociopath", "psychopath", and "antisocial personality disorder", all of which have distinct scientific meanings, were the same condition. 76% of attorneys correctly noted that sociopaths and psychopaths are not the same; only 5% did not indicate a difference. Further, 75% correctly stated that psychopathy and antisocial personality disorder were not the same condition; 7% did not know the difference between these conditions. Unfortunately, only 11% of attorneys indicated that they were familiar with the scientific definition of psychopathy while 52% indicated they felt "somewhat familiar" with the definition and 37% claimed they were unfamiliar with it. However, when attorneys were asked to describe *their own* definition of a psychopath, 36% expressed concepts similar to key components of the scientific definition, 15% were confused with no clear idea, 33% confused it with a mental disorder, usually psychosis, and 15% believed it was nothing more than another name for antisocial behavior. The confusion between psychopathy and psychosis is also common in the general population, but these conditions are significantly different and have different legal ramifications. Overall, these results suggest that many attorneys actually have a more functional understanding of psychopathy than they think they do. However, detailed analyses indicated that frequent exposure to cases involving violent offenders did *not* lead to a greater understanding of the relevance and significance of psychopathy to violence risk. This knowledge is apparently not gained solely by experience in working with these types of cases.

With regard to the use of experts in cases involving violence risk, 80% of defense attorneys and 52% of Prosecuting Attorneys indicated they have dealt with expert testimony in this area. This discrepancy is surprisingly large and could reflect a defense bias towards using experts in such cases, a prosecution bias of caution in using experts in these cases, or some of both. Although the majority of prosecutors and a significant majority of defense attorneys had experience with experts in these cases, 68% indicated that the use of such experts never happened or was rare (only 1-3 times per year). 7% of attorneys indicated that they had used experts in this area 4-7 times per year and only 15% of attorneys indicated they used experts fairly commonly (more than 10 times per year) to provide information relevant to violence risk. These data suggest that the use of expert input regarding violence risk may be underutilized.



Experts may not be used very much due to poor quality of reports and information received by attorneys and the court. About 60% of attorneys indicated that they preferred to work with professional with specific forensic training over those with mostly *clinical* training. This is important because other studies have shown that professionals with only clinical training usually produce *substandard* quality reports for these purposes, often producing information that is irrelevant or poorly grounded in evidence and scientific theory. In Psychology, these fields are

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Attorney Perspectives on Expert Testimony of Violence Risk (continued)

considered distinct sub-specialties. A key aspect of being able to evaluate whether an expert has produced quality reports or information regarding violence risk is the attorney's ability to recognize that appropriate procedures and instruments were used in the evaluation.

Unfortunately, *less than 10%* of attorneys recognized one or two of 10 possible forensic instruments appropriate for use in risk evaluations. On the other hand, over 60% of attorneys identified most or all of the clinical instruments listed which are not generally suitable for this type of evaluation. These data suggest that attorneys generally are *not* being exposed to up-to-date, scientifically sound instruments and expert testimony that is appropriate for these types of cases. Instead, they are more familiar with instruments and expert testimony useful for *clinical diagnosis* and treatment that have little relationship, specifically, to issues of violence risk. This hampers an attorney's ability to select appropriate experts, to recognize quality (versus poorly performed) forensic risk evaluations, and to effectively cross-examine opposing experts.

Overall, we conclude that among attorneys there is a generalized lack of understanding of the scientific definition of psychopathy and the significance of this disorder in cases involving violence risk. This is important because psychopathy is a key variable that should be part of almost every risk evaluation. While attorneys express a preference for forensic specialists, the amount of exposure to these specialists seems to be insufficient for attorneys to recognize qualified experts and to effectively evaluate testimony and cross-examine. In order to provide quality information to the courts for legal decision-making both attorneys and clinicians have a responsibility to work together to improve this situation.

FEDERAL STUDENT LOAN FORGIVENESS

By Thomas M. Robertson, Executive Secretary, Michigan Prosecuting Attorneys Coordinating Council

THERE ARE TWO RECENTLY ENACTED FEDERAL LAWS THAT REDUCE OR ELIMINATE STUDENT LOAN PAYMENTS FOR PROSECUTING ATTORNEYS

(1) *The College Cost Reduction and Access Act* applies to any college graduate who takes a public service job. The student's loan payments are reduced by a formula that caps their loan payment at 15% of discretionary income. Discretionary income is defined as adjusted gross income minus 150% of the poverty level for the borrower's family. Here is an example of how loan payments would be reduced for a single person with \$100,000 in student loans who accepts a \$40,000 salary as an assistant prosecutor.

1. The federal poverty rate for a single person household is \$10,210. $10,210 \times 150 = \$15,310$ which is subtracted from the annual salary of \$40,000, leaving discretionary income of \$24,690.
2. A payment of 15% based upon discretionary income of \$24,690 would be \$309, as opposed to \$1,151 under a standard ten year repayment agreement. When the APA receives salary increases, the loan payment will also be increased.
3. If the APA makes the reduced payments for 10 years, and remains in a public service position for that ten year period, the balance of the remaining debt is forgiven. Under this example, the APA would pay approximately \$49,000 on the \$100,000 loan, and the savings in principal and interest to the APA would be over \$118,000. For more information about this program, visit

(2) *The John R. Justice Act* only applies to prosecutors and public defenders. It authorizes an appropriation of \$25,000,000 per year for 5 years to directly repay the student loans of prosecutors and public defenders who serve at least three years in that capacity. The maximum annual payment is \$10,000 and the maximum payment for the life of the loan is \$60,000. Funds for this program have not yet been appropriated, and the Attorney General has not yet promulgated regulations to implement the Act. NDAA is working diligently on obtaining an appropriation, and we'll keep you posted.



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Admission of an incomplete document not prohibited.

James S. Phillips, provided legal assistance to undocumented workers in filing applications (Form ETA-750) for permission to stay in the United States for employment purposes. The form must contain the signature of a sponsoring employer. It was discovered during a review and investigation by the Department of Labor that employer signatures had been forged. Mr. Phillips, and his wife and secretary, Alicia Morales-Phillips, were convicted by a jury on eight counts of willingly making a false statement to a federal agency in violation of 18 U.S.C. § 1001, eight counts of immigration fraud in violation of 18 U.S.C. § 1546(a) and aiding and abetting the other's conduct in violation of 18 U.S.C. § 2. All defendants appealed, arguing that (1) the district court violated the rule of completeness (Rule 106) when it admitted a partial I-589 application; (2) it violated the best evidence rule when it admitted a copy of the I-589 application; (3) it violated the Federal Rule of Evidence 1005, governing the admissibility of public records, when it admitted copies of the ETA-750s; (4) the conduct supporting the § 1546 (a) convictions did not fall within the scope of that statute; and (5) Phillips further argued that evidence was insufficient to support a conviction on any of his charges.

The Tenth Circuit reversed in part and affirmed in part as follows: (1) Rule 106 does not prohibit admission of an incomplete document; rather, it allows the party against whom the document is introduced to provide the remainder and place it in evidence without additional evidentiary foundation.

(2) Since a genuine issue was not raised as to the authenticity of the document copy, it was appropriately admitted under Federal Rule 1003.

(3) The government exercised reasonable diligence in its attempt to obtain an original copy, as required by Federal Rule 1005, and therefore could introduce a duplicate copy instead.

(4) The court reversed the convictions under § 1546(a) because the ETA-750s and I-589s cannot be used to obtain entry into the United States and as such, do not fall within the scope of this statute. (5) Finally, the court held that the evidence presented was sufficient and that a rational jury could come to the conclusion to convict the defendants. *United States v. Phillips*, 10th Circuit Court of App. No. 07-3135 (October 1, 2008).

Other Circuits

Vehicle stop - no seizure unless police intend one.

During nighttime hours border patrol agents stopped two cars near the Mexican border, which resulted in illegal alien and alcohol violation investigations. While agents were processing the two vehicles, Al Nasser drove by in his car. One of the agents shone his flashlight at the car as it drove by in an effort to be seen and thus avoid being hit. As the car passed, the agent, who was quite tall, saw people hiding behind the front seat. However, with two cars already detained, he decided not to affect another stop. Nonetheless, Al Nasser pulled over just beyond the agent. At that point, the agents ran over to the defendant's car and discovered illegal aliens in his car as well. Al Nasser was

convicted in the United States District Court for the District of Arizona, of knowingly transporting an illegal alien and he appealed.

The Court of Appeals affirmed and held that, "[s]ince there was no intentional government action directed at Al Nasser to bring about the stop of his vehicle," no Fourth Amendment seizure occurred. Affirmed. *United States v. Al Nasser*, 9th Circuit Court of App., No. 05-10466 (February 4, 2009)



Identity-related evidence obtained in violation of Fourth Amendment not suppressible if solely to identify.

Farias-Gonzalez was convicted of being an illegal alien present in the U.S. This case involves his appeal of a prior order of the United States District Court for the Northern District of Georgia. The order denied his motion to suppress identity-related evidence, including fingerprint evidence, photographs, and his "alien file." The defendant claims immigration officers violated his Fourth Amendment rights and that the items were the result of an unconstitutional search.

The Court of Appeals held that under "the cost-benefit balancing test used by the Supreme Court" in *Hudson*

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v. Michigan (547 U.S. 586 (2006)), identity-related evidence obtained as a result of violating a defendant's rights, is not suppressible if it's offered only to prove the defendant's identity. Affirmed. *United States v. Farias-Gonzalez*, 11th Circuit Court of App., No. 08-10508 (February 3, 2009).

Utah Supreme Court

An illegal sentence can be corrected by the court at any time.

Brandon Yazzie entered guilty pleas to two counts of second degree forcible sexual abuse. Judge Fuchs sentenced him to two terms of one to fifteen years, suspended, upon completion of thirty-six months probation. Two years later Yazzie was convicted on criminal mischief and burglary charges, each a third degree felony. Judge McCleve sentenced him to two consecutive prison terms not to exceed five years, both of which were also suspended. Yazzie was ordered to serve 365 days in jail and to complete 36 months probation. At the time of sentencing, Judge McCleve made no mention of whether her sentence should run consecutive or concurrent to Judge Fuchs. On the same day, Judge Fuchs revoked and restarted probation. Yazzie served his jail time, only to be arrested again two months after release. Both Judge Fuchs and Judge McCleve revoked probation in their respective cases and executed the terms of incarceration. At the probation violation hearing, Judge McCleve ordered her sentence to run consecutive to Judge Fuchs. Yazzie objected but Judge McCleve believed there was a presumption of consecutive sentencing and overruled the objection.

Yazzie appealed, arguing that Judge McCleve could not impose consecutive sentences at the probation hearing (rather than at the original sentencing hearing) and that double jeopardy provisions were violated when the illegally imposed sentence was corrected.

Similarly, David Anderson entered a guilty plea to a felony theft charge and was sentenced to zero to five years in prison, suspended upon completion of probation. One year later he was convicted of two counts of aggravated robbery. In the robbery case the judge sentenced him to spend two indeterminate terms of not less than six years but failed to state whether that sentence would be consecutive or concurrent to the prior theft sentence. When Anderson went back before the court for violating probation on the theft charge, a new judge had replaced the original judge. The new judge revoked probation and imposed the prison term of zero to five years. He also ordered that the sentence was to run consecutive to the prison term imposed in the robbery case. Anderson appealed on the basis that the new judge in the theft case could not impose a consecutive sentence; instead, only the judge in the robbery case had the authority to make that determination.

In each case the Supreme Court held that the determination of whether a sentence is to run consecutively or concurrently must be decided at the original sentencing hearing, not at a subsequent hearing. Accordingly, a judge revoking probation can only impose the terms of the original sentence. The *Yazzie* court further held that in order to follow the statutory requirements of *Utah Code* § 76-3-401 the judge must make the

concurrent or consecutive determination whenever a defendant is already on probation or incarcerated for a prior offense. Therefore, Judge McCleve was the appropriate judge to impose the consecutive sentence, but it should have been done at the time of final judgment. Since the court can correct an illegally imposed sentence at any time without violating a defendant's right to double jeopardy, Judge McCleve's later sentence corrected her prior illegal sentence. *Utah R. Crim. P. 22(e)*. *State v. Yazzie*, No. 20060525 (February 17, 2009), *State v. Anderson*, No. 20070328 (February 17, 2009).



Juvenile Court's conditions on parents must be reasonable.

Moreno's daughter was adjudicated delinquent in juvenile court for possession of illegal drugs. As part of his daughter's proceeding, Moreno was ordered to submit to drug testing. The juvenile court held that it could order the drug testing because it has been given power by the Legislature to impose reasonable conditions on parents whose children are under the jurisdiction of the court. *Utah Code Ann.* § 78A-6-117 (2008). When Moreno failed to submit to the testing, he was held in contempt. Moreno appeals the juvenile court's denial of his motion to dismiss a contempt charge and his motion to vacate a guilty plea to an earlier contempt charge. He argues that

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the juvenile court lacked jurisdiction to require him to undergo drug testing.

On Certification from the Utah Court of Appeals, the Supreme Court reversed the order of the juvenile court. The Supreme Court held that a condition could be imposed on a parent in a child delinquency proceeding if it was not punitive and if there was a connection between the child's behaviors, the parent's alleged act and the condition being imposed by the court. However, even if these requirements are met, a condition could still be found 'unreasonable' if it violated the parent's constitutional right. In this case, because the court ordered the drug testing without probable cause that Moreno was using drugs, the order violated his Fourth Amendment rights and the imposed condition was found to be unreasonable. Reversed. *State v. Moreno*, No. 20070240 (February 20, 2009).

No error in denying post-conviction relief on claim of mental illness

Nicholls entered a guilty plea to one count of aggravated murder, a capital felony, in exchange for the dismissal of a felony firearm charge and the State's recommendation for a sentence of life in prison without the possibility of parole. A discussion between Nicholls and the court occurred during the hearing, followed by the court accepting his plea. The time for sentencing was waived, and the court sentenced according to the State's recommendation. After several unsuccessful filings of various motions on appeal, Nicholls filed a petition for relief under the Post-Conviction Remedies Act (PCRA). In turn, the State filed a motion to dismiss and a supporting legal memorandum. The First District Court granted the State's motion and dismissed the petition. Nicholls appeals and claims the court erred in dismissing his petition on the basis that his plea was not knowing and

voluntary due to mental illness and that he received ineffective assistance of counsel.

The Supreme Court affirmed the district court's dismissal of the petition. It held that based on the facts before the court at the time of sentencing; there was no reason to suspect Nicholls was not competent to enter a guilty plea. He provided suitable answers at appropriate times during the colloquy with the court. Lacking evidence of any mental illness that could cause his plea to be involuntary and unknowing, the trial court did not err in denying post-conviction relief. The court further held that Nicholls failed to show his counsel was ineffective. Counsel's advice to accept a plea bargain that spared Nicholls a possible death sentence and unsupported allegations that counsel did not spend enough time with him were not sufficient to show deficient performance. *Nicholls v. State*, No. 20080022 (February 13, 2009).

that evidence pertaining to prior uncharged incidences of sexual abuse involving an ex-wife's daughter, was improperly admitted.

The Supreme Court of Idaho held that the trial court erred in admitting evidence of the uncharged prior sexual abuse because it failed to make a finding (1) of sufficient evidence to establish the alleged misconduct, or (2) whether it deemed the admitted evidence as probative of common scheme or corroborative of the victim's testimony. The Supreme Court further held that pursuant to the rules of evidence, evidence of uncharged misconduct may not be admitted when its probative value is entirely dependent upon its use to demonstrate a defendant's propensity to engage in the alleged behavior. (Overruling *State v. Moore*, 120 Idaho 743, 819 P.2d 1143; *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304). Vacated and remanded. *State v. Grist*, Idaho Supreme Court, No. 33652 (January 29, 2009).

Other States

Evidence of uncharged conduct may not be admitted.

For over eight years, Grist sexually abused his live-in girlfriend's daughter. It began when the child was 10 years old and progressed, as she grew older. The abuse included Grist touching her breasts, buttocks, and vagina, as well as forcing her to undress for him. The abuse finally stopped when the victim graduated from high school and moved out. Grist was convicted of seven counts of lewd conduct with a minor under age 16, two counts of sexual battery of a minor, and one count of sexual abuse of a child under age 16. He appealed and argued





On the Lighter Side

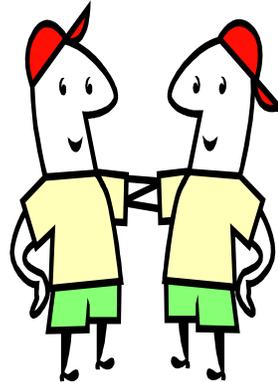
One parent says to another, "From now on, my kids won't be watching any more crime shows on TV. Last night, my teenager shook me down for his allowance!"



A new father confesses to a co-worker, "Having a new family can be confusing. Like this morning, I walked the baby and burped the dog."

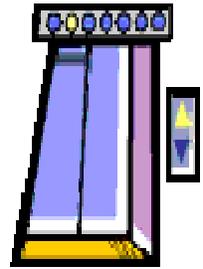


A defendant, after pleading guilty to a drug offense, resisted complying with the court's order to give up a DNA sample, because he was afraid it would be used to create a clone of him. Said the prosecutor, reassuringly, "I really doubt the state wants to create another one of you."



I heard two guys talking in the elevator the other day. First guy said, "All I want is a wife who will raise my kids, keep the house clean, have dinner ready when I come home at night." The other guy said, "Man, that's one of the most chauvinistic

attitudes I've ever heard." The first guy says, "Hey, I'm not chauvinistic. I'd still let her get a job if she wanted to."



The most fattening words are:
All right, just ONE more piece!

They use very intelligent referees at the Yale-Harvard games. They have to. The obscenities are in Latin.



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Visit the UPC online at

www.upc.utah.gov



Calendar

Utah Prosecution Council (UPC) And Other Utah CLE Conferences

April 16-17	SPRING CONFERENCE <i>Case law update, legislative update, ethics and more</i>	Red Lion Hotel Salt Lake City, UT
May 6-8	UTAH MUNICIPAL ATTORNEYS ASSOC. SPRING CONFERENCE <i>Sponsored by UMAA. For information, e-mail dcarlson@southsaltlakecity.com</i>	Moab Valley Inn Moab, UT
May 12-14	DOMESTIC VIOLENCE / CJC CONFERENCE <i>Once again the DV Conf. will be combined with the Children's Justice Conf.</i>	Zermatt Resort Midway, UT
June 18-19	UTAH PROSECUTORIAL ASSISTANTS ASSN ANNUAL CONFERENCE <i>Professional training for the non-attorney staff in prosecution offices</i>	The RiverWoods Logan, UT
June 22-26	UTAH VICTIM ASSISTANCE ACADEMY (CLE's pending) <i>Exceptional training designed for anyone who works with crime victims</i>	Weber State Univ. Ogden, UT
August 6-7	UTAH MUNICIPAL PROSECUTORS ASSN ANNUAL CONFERENCE <i>Instruction aimed specifically at municipal prosecutors</i>	Ruby's Inn Bryce, UT
August 17-22	BASIC PROSECUTOR COURSE <i>Substantive and trial skills training for newly minted prosecutors</i>	University Inn Logan, UT
September 16-18	FALL PROSECUTOR TRAINING CONFERENCE <i>Our annual prosecutor gathering. Don't miss it.</i>	The Riverwoods Logan, UT
October 14-16	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>Training for those who keep the Commission and Council happy</i>	Moab Valley Inn Moab, UT
November 3-5	JOINING FORCES: PREVENTION, INVESTIGATION, PROSECUTION AND TREATMENT OF CHILD ABUSE <i>Sponsored by Prevent Child Abuse Utah (UPC is a co-sponsor)</i>	Davis Co Conf Ctr Layton, UT
November 11-13	COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR <i>Executive discussion and training for the bosses and their chief deputies</i>	Dixie Center St. George, UT
November 18-20	ADVANCED TRIAL SKILLS TRAINING – CHILD SEX ABUSE CASES <i>The third annual advanced trial skills training for experienced prosecutors</i>	Courtyard by Marriott St. George, UT

Calendar cont'd

National Advocacy Center (NAC)

A description of and application form for NAC courses can be accessed by clicking on the course title or by contacting Utah Prosecution Council at (801) 366-0202; E-mail: mnash@utah.gov.

Restoration of federal funding for the NAC is still being sought. In the meantime, NDAA continues to offer courses at the NAC, albeit without 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.](#)

All courses are subject to cancellation and dates are subject to change. Applicants will be notified of any changes as early as possible. [Click here to access the NAC on-line application form.](#)

May 20-22	DNA - TRUE IDENTITY <i>DNA "fingerprinting" on the witness stand</i> <i>Application deadline is March 20, 2009</i>	NAC Columbia, SC
June 1-5 July 20-24 August 24-28	BOOTCAMP: AN INTRODUCTION TO PROSECUTION <i>A course for newly hired prosecutors</i> <i>Application deadlines: April 3rd for June course, May 22nd for July course, June 26th for August course.</i>	NAC Columbia, SC
June 22-26 August 3-7 Sept 28 - Oct 2	TRIAL ADVOCACY I <i>A practical, hands-on training course for trial prosecutors</i> <i>Application deadlines: May 15th for June course; June 5th for August course; July 31st for September course</i>	NAC Columbia, SC
June 22-26	TRIAL ADVOCACY II <i>Practical instruction for experienced prosecutors</i> <i>Application deadline is April 24, 2009</i>	NAC Columbia, SC
July 27-31	PROSECUTOR AND THE JURY <i>Focusing on selection, opening and summation</i> <i>Application deadline is May 29, 2009</i>	NAC Columbia, SC
Sept 15-18	COURTROOM TECHNOLOGY <i>The electronic litigator from case analysis/prep to courtroom presentations</i> <i>Application deadline is July 17, 2009</i>	NAC Columbia, SC

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Calendar cont'd

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

April 19-23	CONTEMPORARY TRIAL ISSUES - NCDA*	Colorado Springs, CO
April 26-30	PROSECUTING HOMICIDE CASES - NCDA*	San Francisco, CA
May 4-8	EQUAL JUSTICE FOR CHILDREN - APRI* <i>Investigation and prosecution of child abuse</i>	Denver, CO
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* <i>A must course for all who plan to make prosecution their career.</i>	Charleston, SC
July 29 - August 1	30TH ANNUAL AGACL CONFERENCE <i>Sponsored by the Association of Government Attorneys in Capital Litigation</i> <i>For more information go to www.agacl.com, or call (623) 979-4846</i>	Miami, FL
September 13-17	GOVERNMENT CIVIL PRACTICE - NCDA*	San Diego, CA
September 21-23	PROSECUTING DRUG CASES - NCDA*	TBA
October 24-28	THE EXECUTIVE PROGRAM - NCDA* <i>Designed specifically for elected prosecutors and chief deputies</i>	TBA
Oct. 31 - Nov. 4	NATIONAL CONFERENCE ON DOMESTIC VIOLENCE - NCDA*	San Antonio, TX
November 8-12	WHITE COLLAR CRIME - NCDA*	San Francisco, CA
November 16-18	PROSECUTING HOMICIDE CASES - NCDA*	TBA
December 6-10	FORENSIC EVIDENCE - NCDA*	San Diego, CA
December 6-10	PROSECUTING SEXUAL ASSAULTS - NCDA*	Washington, DC

- For a course description and on-line registration for this course, click on the course title (if the course title is not hyperlinked, the sponsor has yet to put a course description on line) or call Prosecution Council at (801) 366-0202 or e-mail: mnash@utah.gov. To access the interactive NCDA on-line registration form, click on 2009 Courses.