Newsletter of the Utah Prosecution Council

The PROSECUTOR

RECENT CASES

United States Supreme Court

CIVIL RIGHTS ACTIONS

Javaid Iqbal, a Muslim and Pakistan citizen, was arrested in the United States after the 9/11 terrorist attacks. He was charged criminally and held in federal custody. He pleaded guilty to the charges, completed his term of imprisonment, and was sent back to Pakistan. Iqbal filed a complaint with the district court alleging he had been subjected to harsh treatment as a result of an unconstitutional policy based on race, religion, or national origin. Petitioner's argued they had qualified immunity and filed a motion to dismiss. The district court denied the motion and held the "complaint was sufficient to state a claim." The Court of Appeals for the Second Circuit, assumed it had jurisdiction over the denial of the motion and affirmed the lower court's decision. Certiorari granted.

The United States Supreme Court agreed that the appellate court had subject matter jurisdiction to affirm the district court's order. It then turned to whether the respondent "plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights." The Court held that the pleadings were insufficient and failed to shift the claims beyond conceivable to plausible. Reversed and remanded. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

SUPREME COURT OVERRULES RULE OF MICHIGAN V. JACKSON

Jesse Montejo was arrested on suspicion of murder in the death of Lewis Ferrari. He waived Miranda and was interrogated by deputies. Montejo repeatedly changed his story about what took place. Within 72 hours, as required by law, he appeared before a judge and an attorney was appointed to represent him, as a matter of routine. Later that same day and prior to meeting with his attorney, deputies requested Montejo's assistance in locating the murder weapon. He was read his Miranda rights again, and agreed to go along. During the excursion, Montejo wrote a letter of apology to Ferrari's widow. After he returned, Montejo finally met with his attorney who was upset that his client had been interrogated in his absence. The letter of apology was admitted at trial, despite the defense's objection, and Montejo was convicted of first-degree murder and sentenced to death. The Louisiana Supreme Court relied

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on *Michigan v. Jackson*, 475 U.S. 625 (1986), in holding that because Montejo stood silent and "[i]n the absence of an affirmative assertion, … there was no Sixth Amendment violation." Certiorari granted.

The Supreme Court held that the rule adopted by the Louisiana Supreme Court created a hazy distinction, in varying states, between defendants who asserted their right to counsel and those appointed counsel as a matter of routine. It further reasoned that it was unjustified to presume that a defendant's consent to additional police interrogation was involuntary merely because he'd been appointed counsel prior. Defendants are protected under the overlapping rules of *Miranda v. Arizona*, 384 U.S. 436 (1966), *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Minnick v. Mississippi*, 498 U.S. 146 (1990), from coerced confessions. Accordingly, the Court held that when the "marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, … the rule … should be and now is overruled." The Court reversed and remanded to provide the defendant opportunity to argue the suppression of the letter on some basis, other than Jackson. *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

USING A CELL PHONE FOR A DRUG DEAL DOESN'T SUPPORT A FELONY

"The Controlled Substances Act (CSA) makes it a felony "to use any communication facility in committing or in causing or facilitating" certain felonies prohibited by the statute. 84 Stat. 1263, 21 U.S.C. § 843(b)." Salman Khade Abuelhawa communicated with Mohammed Said, by phone, on six different occasions and arranged to buy cocaine. Each of the two purchases were for one gram of cocaine which resulted in misdemeanor charges for Abuelhawa and felony distribution charges for Said. The government also charged Abuelhawa with six felonies for each of the phone calls "causing or facilitating" Said's felony distribution charges. Abuelhawa argued that his actions in the commission of misdemeanor offenses could not be used to support the felony charges. The District Court denied his motion and he was convicted on all six counts. The United States Court of Appeals for the

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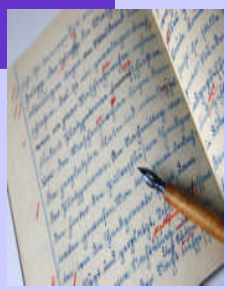

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Fourth Circuit affirmed. Certiorari was granted.

The Supreme Court acknowledged Congress' intent to "impede illicit drug transactions by penalizing the use of communication devices." However, it did not agree that Congress intended to expose the first-time drug buyer, who uses a phone to make a drug deal, to a substantially more severe punishment than a repeat offender who makes a deal in person. Accordingly, the court derived the rule that, "where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature." As such, the Court held that the use of a telephone to make a misdemeanor drug purchase does not violate the Controlled Substances Act for "causing or facilitating" the commission of the felony distribution offense. Reversed and Remanded. *Abuelhawa v. United States*, 129 S.Ct. 2102 (2009).

Utah Supreme Court

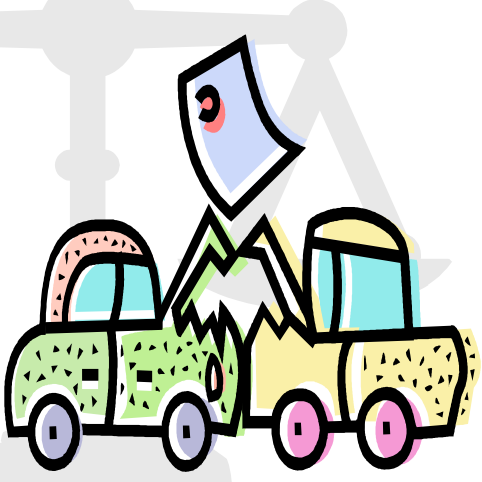
LIMITATION TO UTAH'S ANTI-SLAPP ACT

In 1992, American Fork City adopted ordinances that created an issue as to whether certain city employees were prohibited from holding a city council seat. In 1997, the city attorney researched the issue and concluded that the ordinances did not create a prohibition for city employees. In 1999, two city employees, Tom Hunter and Rick Storrs, sought seats on the council. William Jacob believed both candidates should be disqualified because of conflicts of interest in their positions as employees. Hunter and Storrs "sought and received the city council's permission to continue their quests for seats on the council." In the final publication of the local city newspaper, prior to election, Jacob prepared and paid for a political flyer to be published. He again claimed the ordinances prohibited Hunter and Storrs from holding city council seats because they were city employees. Hunter and Storrs complained to the paper's editor, Mr. Bezzant, that the flyer contained false information and because of the timeliness they had no opportunity to refute the published claims. Bezzant subsequently published an "Urgent Election Notice" containing an apology to the candidates, "reassert[ing] that the ordinances did not bar the men's eligibility…," and identifying Jacob as the author of the flyer. The notice was delivered by mail and by hand delivery to all city residents and was posted on the newspaper's website. Following the election, in which Hunter and Storrs successfully acquired city council seats, Jacobs sued Bezzant for defamation. Bezzant responded and claimed he was shielded from liability by Utah's Anti-SLAPP Act contained in Utah Code Ann. § 78B-6-1401 to –1405 (2008). The trial court granted Summary Judgment in favor of Bezzant, reasoning that Jacob filed suit to chill Bezzant's "political speech and thereby preventing or interfering with Bezzant's proper participation in the process of government." Jacob appeals the trial court's decision and raises a claim that the Act violates the open courts clause of the Utah Constitution.

The court of appeals disagreed with the trial court and held that Utah's Anti-SLAPP Act is limited to protection of "political speech that is an exercise of the First Amendment right to influence legislative and executive decision making." Bezzant's Election Notice was addressed to "All American Fork Residents" and published in connection to the election. As such, it was for the purpose of influencing voters rather than influencing the city council or mayor and not shielded by the act. In addition, the court refused to address whether the Act violated the open courts clause of the Utah Constitution because the argument was raised for the first time on appeal and did not involve any exceptional circumstances to allow a review. *Jacob v. Bezzant*, 2009 UT 37.

VICTIMS LACK STANDING TO APPEAL CRIMINAL CASE

In February 2005, the victims, Peggy and Patricia Hay, and their husbands, brothers Dan and John Hay, were traveling eastbound while the defendant, Lane, was traveling westbound on a two-lane highway. Lane attempted to pass a semi truck at an excessive rate of speed despite wet



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PROSECUTOR PROFILE

Rick Westmoreland,
Deputy Davis County Attorney

Born in Ogden and raised in South Ogden, Rick describes himself as "playful" and someone who likes to have fun. He's the guy that sneaks around corners and scares people and from his picture, it doesn't seem that even the arm of the law is too intimidating to him! Otherwise, he says he's pretty laid back and wants to enjoy life. As a child, he wanted to be a grown up… "now I just want to be a child." He is the doting father of four children and has an exceptional relationship with his former wife. Rick lived in Germany for a couple of years and speaks German. He would like to travel all the back roads of the United States as well as take all the slow trains to all the small cities in Germany. His hobbies include coaching and his motorcycle. Rick loves Sushi and the Las Vegas steak from Don's Meats, but if he's in need of a quick snack he's looking for a Rice Crispie Treat. Rick's favorite movie is Shawshank Redemption but his favorite TV series is a toss up between House, Chuck and Boston Legal. His favorite music is AC/DC – Thunderstruck. Anything Sooners and Red Sox baseball are his favorite sports teams.

Rick has worked as a Deputy County Attorney at the Davis County Attorney's Office for more than five years. Rick's undergraduate degree is in Child and Family Studies/ Psychology. His professional career started in youth corrections but after a few years he realized that he was doing what the judge was doing and the judge made a lot more money! He attended graduate school at Utah State University in the Marriage and Family Therapy program and was three classes shy of his masters degree when he left the program. He noticed he lacked empathy, and "apparently people think that's an important trait in a therapist." So, he decided to go to law school. His family and friends supported him and told him he was finally doing something that fit his personality. Rick still isn't quite sure how to take that! He attended the University of Oklahoma and graduated in 1998. For him, prosecution is a way of doing the right thing all the time. In his mind, it was the only area of law where you have complete control as the attorney without worrying about clients or money. He says, "We all know there's no money in this game, so we just play for the warm fuzzies we get every day." The best part about being a prosecutor is making a difference in the lives of people, including the defendants who have gone on to doing great things. When he runs into one of those people or has a former defendant living in his neighborhood and successfully raising his daughter, to Rick, "that is what it's all about." The greatest challenge is to leave all the evidence in the hands of eight people to come up with the right decision, especially when they haven't always done that.

Over the years, Rick has had some notable experiences. One of those experiences, although Rick thinks Bill Daines may remember it differently, involved a case that was initially filed as a negligent homicide. His 'baby prosecutor' instincts just didn't see it that way, and fortunately the very humble defense attorney didn't either, just the opposite way. So, after having a very tenacious detective go back over all the evidence and do some wonderful follow up, the young man that could've walked away with a class A misdemeanor is still in prison for murder. "Once again," Rick says, "it's all about doing the right thing." On a more humorous note, he tells of a time when, as a young prosecutor, he was given a factual basis for a plea to a burglary charge. As he was going through the facts, he started describing this rectangular type "pillow holder thing" that the defendant used to put the stolen items in. Needless to say, the next week, a lovely polka dot pillow case was left on his chair, signed by all the important people in the courtroom at the time. He says, "It still hangs on my wall to remind me just how smart I really am!"

Doing good for the community is the most satisfying aspect of Rick's life, whether it is fulfilling his role in the military, fulfilling his role as a father or fulfilling his role as a prosecutor. So, life will continue with the same energy he's always invested and everyone else just needs to watch for him hiding around the corner!

QUICK FACTS

PREFERRED NAME - Rick

BIRTHPLACE
Ogden, Utah

FAMILY
Father of four children ages 15, 13, 9, and 7

FIRST JOB
Landscaping

FAVORITE BOOK
Summer for the Gods
by Edward J. Larson

LAST BOOK HE READ
Proust was a Neuroscientist
by Jonah Lehrer

WORDS OF WISDOM
"I do not think that all those who choose wrong roads perish; but their rescue consists of being put back on the right road. A sum can be put right: but only by going back till you find the error and working it afresh from that point, never by simply going on. Evil can be undone, but it cannot 'develop' into good."
~~ C.S. Lewis

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and foggy road conditions. In doing so, he crashed head on with the victims' vehicle, seriously injuring Peggy and Patricia Hay and killing Dan and John Hay. Lane was charged with two counts of negligent homicide, a class A misdemeanor. In August 2005, the prosecutor met with the victims to discuss a possible plea bargain. The victims allege that during this meeting the prosecutor deliberately deceived them as to the details and consequences of the plea bargain and told them the upcoming hearing on September 12, 2005, was only a status hearing to which they did not need to attend. The victims expressed their desire to address the court at the time the plea would be entered and also advised they intended to request restitution.

At the September 12th hearing, Lane entered into a plea agreement differing from what was allegedly explained to the victims. A minimal amount of restitution was proposed but when the State stated that restitution would be much greater than the $1,500 agreed to, the court turned the amount into a fee and did not award any restitution to the victims. The victims were not present based on the representations of the prosecutor that it was only a status hearing. The victims filed a complaint and the Third District Victims' Rights Committee concluded that their "rights had been violated: the victims were not treated with fairness, dignity, and respect; they were deprived of their right to be present and heard; and they were stripped of their right to restitution." Relying on these findings the victims filed a Motion to Set Aside Plea and for Evidentiary Hearing. The trial court denied the motion. While the victims' appeal of the trial court's decision was pending, Lane requested his plea in abeyance be dismissed because his pleas had been held in excess of 18 months in violation of Utah Code Ann. § 77-2a-2(5). The trial court dismissed the case. The victims appealed this decision and both appeals were consolidated and certified to the Utah Supreme Court.

The Utah Supreme Court acknowledged that neither the State nor Lane appealed the dismissal, leaving the question as to whether the victims had standing to appeal the dismissal. The court held that the victims lacked standing and reasoned that only the State and the defendant are parties to a criminal case and under the Utah Code of Criminal Procedure are the only proper persons to file an appeal. "Moreover, if a case is dismissed and neither party appeals, the dismissal is final, the case is moot, and any appeal by a nonparty is moot. Even if the case were not moot, the victims lack standing to appeal the dismissal of Lane's plea in abeyance because the express language of the Utah Constitution bars them. *See* Utah Const. Art. I, § 28." *State v. Lane*, 2009 UT 35.

RULING ON STANDING AS AN ADVERSELY AFFECTED PARTY IS REVERSED.

CME applied in 2003 for a conditional use permit to store radioactive waste. Energy Solutions had applied for and been granted a permit for similar purposes in 1987. CME's request was denied because CME failed to prove the need for another radioactive waste facility. CME then sold part of its parcel of land to Broken Arrow, Inc. and the remaining land to EnergySolutions. The Tooele County Board of Commissioners enacted an ordinance that greatly reduced the size of the hazardous waste corridor where radioactive waste facilities were required to be located. Immediately after, EnergySolutions requested an amendment to their permit to include the additional land purchased from CME. Their request was granted and CME filed suit claiming that the reduction in the size of the hazardous waste corridor "ignored existing land use ordinances [and] notice requirements," and the amendment to EnergySolution's permit evidenced a bias in favor of EnergySolutions. EnergySolutions moved for summary judgment arguing that CME lacked standing and CME responded with a cross-motion for summary judgment arguing the County's actions were arbitrary, capricious, or illegal. The trial court granted summary judgment in favor of EnergySolutions, holding that CME lacked standing and that their claims were moot. CME appealed.

The Supreme Court reversed the district courts ruling and held that CME had standing as "an adversely affected party" pursuant to CLUDMA and as an "appropriate party to raise an issue of public importance" pursuant to the alternative standing test. It further held that CME's claims were not moot because "reversing the County's actions would affect CME's rights, as well." The case was remanded for a "determination of whether the county's land use decisions were valid." *Cedar Mt. Envtl., Inc. v. Tooele County*, 2009 UT 34.

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How Melendez-Diaz v. Massachusetts may affect DUI prosecutions in Utah

By Edward A. Berkovich, Utah Prosecution Council

The following discusses how Melendez-Diaz v. Massachusetts, 557 U.S. ___ (2009), may affect DUI prosecutions in Utah. Justice Kennedy calls this decision "a windfall to defendants."

Melendez-Diaz was charged with distributing and trafficking in cocaine. At trial bags of white powder found in his possession were admitted. Also admitted were certificates of analysis ("certificates") sworn before a notary public by state crime lab analysts asserting the white powder was cocaine. The certificates were admitted at trial without the analysts' presence, and over defendant's objection that the Confrontation Clause decision of Crawford v. Washington, 541 U.S. 36 (2004), required the analysts' presence. Defendant was convicted and appealed.

The U.S. Supreme Court held defendant was entitled to "be confronted with" the analysts at trial and reversed. Some relevant opinion language the defense bar will cite:

> There is little doubt that the documents … fall within the "core class of testimonial statements" thus described. … The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits: "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths. [citation omitted] They are incontrovertibly a "'solemn declaration or affirmation made for the purpose of establishing or proving some past fact.'" [citation omitted] The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The "certificates" are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination. [citation omitted].
>
> Here, moreover, not only were the affidavits "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" [cite omitted] but under Massachusetts law the sole purpose of the affidavits was to provide "prima facie evidence of the composition, quality, and net weight" of the analyzed substance…. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state law provision—was reprinted on the affidavits themselves. [citation omitted]
>
> In short … the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for the purposes of the Sixth Amendment. … [Thus,] petitioner was entitled to "'be confronted with'" the analysts at trial. Melendez-Diaz, 557 U.S. at ___ (2009) (emphasis in original).

Breath-test cases

The three admissible documents in DUI breath-test cases are the: (1) Intoxilyzer test result card/receipt – identifying defendant, date, time and place of test, BAC level, arresting officer, instrument serial number and whatever else is on there; (2) checklist; (3) Intoxilyzer calibration certificates a/k/a "Intoxilyzer affidavits."

(1) Intoxilyzer test result card/receipt: Melendez-Diaz precludes admission without the presence at trial of the officer who operated the Intoxilyzer when defendant blew into it producing his or her test result card/ receipt. Since this is obvious and will not be litigated I'm omitting analysis. This will not change anything Utah prosecutors have been doing all along. While one or more states have sometimes allowed admission of the test result card without the officer's presence at trial, at least pre-Crawford, Utah does not, cf., Kehl v. Schwendiman, 735 P.2d 413 (Utah Ct. App. 1987), and that has not been local practice.

(2) Checklist: Same answer.

(3) Intoxilyzer calibration certificates aka "Intoxilyzer affidavits" ("calibration certificates"): That was litigated post-Crawford in Utah (and around the country) and our court of appeals held calibration certificates are admissible without the technician who maintenance-checked the Intoxilyzer on the 40-day cycle and prepared and swore to the certificates in Salt Lake City v. George, 2008 UT App 257.

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How Melendez-Diaz v. Massachusetts may affect DUI prosecutions in Utah *(cont.)*

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Nevertheless, I anticipate this will be re-litigated under Melendez-Diaz. The defense will likely cite a lot of that block-quoted language above and argue admission of the calibration certificates without the technician's presence at trial violates the right to confront, i.e., that the calibration certificates are plainly affidavits made for the purpose of establishing or proving some past fact and are functionally identical to live, in-court testimony doing precisely what a witness does on direct examination, and are made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; thus, defense counsel will argue, the alcohol technician must be available for in-court confrontation.

Our response should be to articulate the distinction between the certificates in Melendez-Diaz and our calibration certificates. The calibration certificates do not relate to a particular DUI defendant in any way, they do not name a defendant, they do not show a BAC level, and they are produced every 40 days regardless whether defendant, or any defendant, is arrested for DUI. There is not even a "past crime" to which the calibration certificates relate – at least when the first one of the two bookends is prepared. The lab result in Melendez-Diaz, on the other hand, is specific to a particular defendant: it identifies him by name, it identifies the substance connected to him, it was produced solely because defendant was being prosecuted and would not have been produced if defendant had not been arrested, and when it was produced the "past crime" had already happened. Some helpful language to pad your memoranda might be: George, 2008 UT App at ¶ 11 ("The certificates/affidavits in this case are uncharacteristic of the typical kind of testimonial evidence at which the Confrontation Clause was aimed, i.e., ex parte examination of witnesses intended to be used against a particular defendant. Nor are the affidavits similar to … statements taken by police during interrogation.") (emphasis added); State v. Norman, 125 P.3d 15 (Or. Ct. App. 2005), review denied, State v. Norman, 132 P.3d 28 (Or. 2006) ("Confrontation Clause is directed at the methodology of…prosecutorial examinations of potential witnesses…for the purpose of establishing or proving a fact in issue in [a] criminal case being prosecuted… [r]ather than being directed at evidence about the accuracy of a machine result"); Bohsancurt v. Eisenberg, 129 P.3d 471, 477 (Ariz. Ct. App. 2006) ("the type of evidence contained in the calibration records – primarily abstract data output from a machine with no relationship to a particular defendant – is not the sort of evidence with which the Framers were concerned"); Commonwealth v. Walther, 189 S.W.3d 570, 575 (Ky. 2006) ("A properly operating breathalyzer instrument could just as well prove innocence as guilt. Thus [the technician] was not bearing testimony against Respondent."); Davis v. Washington, 126 S.Ct. 2266, 2276 (2006) ("When we said in Crawford that interrogations by law enforcement officers fall squarely with the class of testimonial hearsay, we had immediately in mind…interrogations solely directed at establishing facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.") (emphasis added). That's past crime not past administrative maintenance check of the Intoxilyzer. The calibration certificates "testify" about the working condition of a machine not a past crime.

As the clinching point on this, the final sentence of footnote 1 signals the Court's approval of the current state of the law on this issue: "Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Melendez-Diaz, 557 U.S. at ___, note 1; see also note 5 and accompanying discussion. That quoted sentence is the Court's strongest possible statement of approval for the post-Crawford, pre-Melendez-Diaz state of the law wherein the unanimity of appellate courts have approved using Intoxilyzer calibration certificates/ Intoxilyzer affidavits to establish admissibility of the breath test without the presence at trial of the Intoxilyzer maintenance technician. The only way the Court could have stated it more strongly is if that were the issue presented to them for decision. Given the Court's reticence about issuing advisory rulings, that statement is the strongest possible statement of approval it could make.

Blood-draw cases

The one admissible document in DUI blood-draw cases is the report from the state crime lab showing BAC level or controlled substance level. Melendez-Diaz is almost directly on point and precludes admission without the presence at trial of the analyst for all the reasons the lab report in Melendez-Diaz distinct from the calibration certificates: the state crime lab report in a DUI is specific to a particular defendant, it identifies him or her by name, it identifies the

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LEGISLATURE CLEARLY INTENDED FOR CRIMINAL PROSECUTION 'ACTIONS' TO BE IMMUNE.

Ryan Hoyer was charged and convicted of the unlawful possession of snakes. Accordingly, Utah Division of Wildlife Resources (DWR) seized approximately sixty-five rubber boa snakes from his home and held them during the court process. While the case was pending, Hoyer tried to get permission for his father, Richard Hoyer, to care for the snakes or to have an expert brought in to care for the snakes. His offers were declined. After two and one-half years and the unsuccessful appeal of his conviction, Ryan Hoyer was finally granted the opportunity to inspect the snakes. He then learned that all but eight of them had died.

Ryan Hoyer and his father sued DWR for negligence, as well as violating their substantive and procedural due process rights. DWR filed a motion for summary judgment claiming immunity under Utah Code Ann. § 63-30d-301(5)(3)(2004). The trial court granted their motion. On January 17, 2008, Hoyers filed a motion seeking an extension of time to file a notice of appeal and on January 25, 2008, a notice of appeal was filed. The court granted the motion and extended the deadline for filing a notice of appeal to February 14, 2008. Hoyers did not refile or amend their previous notice of appeal. DWR filed a motion for the dismissal of Hoyers' appeal based on the filing of their notice of appeal occurring more than thirty days after the entry of final judgment and before the court granted the motion to extend the time to file. Hoyers argue that nothing exists in the rules to prevent an appeal being heard "when the notice of appeal was filed after the original deadline but before a properly filed application to extend the time to appeal under Utah Rule of Appellate Procedure 4(e) was granted." DWR also moved to strike portions of the fact section because it lacked support of citations to the record. Hoyers filed a motion for leave to amend their brief.

The Utah Supreme Court held that Hoyers were not required to file a second notice of appeal after the granting of their motion for extension of time. It concluded that their appeal was timely filed because to find otherwise would "amount to little more than empty paper shuffling." It further concluded that allowing the Hoyers to amend the unsupported portions of the brief would not result in prejudice to DWR or the court. And, on the predominant issue regarding immunity, the court held that the legislature clearly intended to hold actions "carried out in connection with criminal prosecutions" immune. Accordingly, it applied the test laid out in *Taylor v. Ogden City Sch. Dist.*, 927 P.2d at 163, and found that there was sufficient causal connection between the death of the snakes and the prosecution of the criminal case against Ryan Hoyer. Therefore, "the waiver of immunity for negligence applies." Affirmed. *Hoyer v. State*, 2009 UT 38.

Utah Court of Appeals

REASONABLE SUSPICION OF CRIME DISSIPATED BEFORE REACHING THE WINDOW

At approximately 9:30 p.m. on June 12, 2007, Trooper Williams pulled Mr. Morris over for not having a visible license plate and bumping the fog line on the road while driving." Upon coming to a stop, the trooper shone a light on Morris' vehicle, illuminating a piece of paper taped to the back window. At some point, as he approached the vehicle, the trooper identified the paper to be a temporary permit and confirmed that fact with Morris. He then questioned Morris on his driving pattern to which Morris explained, "there were a lot of ruts in the road and the tire pressure in his back tire was a little low." Morris provided his license, registration and insurance information to the trooper and stepped out of the vehicle, as requested. The trooper stated he could smell alcohol but Morris denied any drinking. The trooper administered field sobriety tests, which Morris failed and was then placed under arrest. During the search incident to arrest, drugs and paraphernalia were discovered. He was charged with DUI and several drug- and alcohol-related crimes. Morris tried to get the evidence suppressed based on his argument that the investigation and arrest was illegal because the trooper lacked reasonable suspicion by the time he reached Morris' window to justify the stop. The trial court denied the motion stating that the trooper was justified in approaching the window, at which point the contact generated a new suspicion of criminal activity. Morris entered a conditional plea and reserved his right to appeal.

The appellate court agreed "with the trial court and accepted the State's concession…that…Morris' driving pattern did not provide…reasonable suspicion of improper lane travel

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sufficient to justify..." the traffic stop. In addition, once the paper was identified as the temporary permit, the court held that "reasonable suspicion of crime had dissipated" before the trooper even reached Morris' window. As such, the traffic stop was an unjustified and unreasonable seizure and the trial court erred in denying the motion to suppress evidence. Reversed and remanded. *State v. Morris*, 2009 UT App 181.

ODOR OF MARIJUANA SUFFICIENT PROBABLE CAUSE FOR SEARCH OF BACKPACK

Police officers responded to a home when a neighbor reported seeing individuals, other than the owners, inside. Police found D.A.B. present with friends. When asked how they got there, another juvenile, K.S.G., said he'd driven them there and parked around the corner. An officer requested his keys so he could search the vehicle. During the search he found a closed backpack that smelled strongly of marijuana. He opened it and discovered a marijuana pipe. D.A.B. admitted to owning the backpack and the pipe. D.A.B. challenges the search of both the car and the backpack.

The appellate court held that D.A.B. lacked standing to challenge the search of the vehicle. Turning its attention to the search of the backpack, it relied on *Duran* which held "that although the odor of marijuana … gave rise to probable cause for a search, it did not create exigent circumstances that would justify the [ ] warrantless search of the trailer." *State v. Duran*, 2007 UT 23, 156 P.3d 795. The court also noted that under the automobile exception to the warrant requirement, if there is probable cause to believe a "readily mobile" vehicle contains contraband, police could search the vehicle on that basis alone. Accordingly, the court affirmed the trial courts ruling that police had probable cause to search the backpack because of the smell of marijuana. *State ex rel. D.A.B. v. State*, 2009 UT App 169.

HYPOTHETICAL CONSEQUENCES DO NOT FALL WITHIN EXCEPTION TO MOOTNESS DOCTRINE

Moore was convicted of aggravated sexual abuse of a child and dealing in material harmful to a minor. While in custody and awaiting sentencing, he received a disciplinary notification that "he had been accused of "[e]ncouraging others to engage in any prohibited sexual activities ." At the hearing his request to consult an attorney was denied, his attempt to invoke his right to remain silent was ignored, and he was not permitted to present or confront any witnesses. The hearing resulted in a finding that he violated jail policy. As a result of that finding, he was transferred to solitary confinement for nine months and had a citation placed in his file. Following sentencing on his criminal charges, and prior to the completion of his time in solitary confinement, he was transferred to the prison.

"Moore filed a Petition for Extraordinary Relief … seeking relief from the alleged wrongful restraint on his personal liberty and an expungement of the citation from his prison disciplinary record." The trial court denied his request, holding that his due process rights were not violated. Moore appealed.

On appeal, the court held that "[b]ecause Moore is no longer confined in administrative segregation and there are no adverse collateral legal consequences flowing from the disciplinary actions on his record, the case … is moot." The court reasoned that any potential impact of the citation in his file on a future parole hearing "was purely hypothetical" and the issue did not fall within the "exception to the mootness doctrine for issues capable of repetition yet evading review." *State v. Moore*, 2009 UT App 128.

NO PROHIBITION ON JUDICIAL FACT FINDING TO IMPOSE A LOWER MINIMUM TERM

Among other convictions, James Johnston was convicted of sodomy on a child and sentenced to an indeterminate term of six, ten, or fifteen years to life, without a specifically imposed minimum term. His sentence was to run consecutively to the sentences for his other convictions. He appealed his convictions and the appellate court affirmed in part and remanded in part for the "limited purpose of imposing [a] sentence" designating the minimum mandatory term to be served. The court issued the remittitur in February 2003 and Johnston was resentenced in September 2005. At the resentencing hearing Johnston neither requested the assistance of counsel nor affirmatively waived his right to counsel. The court imposed the minimum term of six years and denied most of Johnston's other motions. Johnston appeals. He argues, among other issues, that his sentence by a judge who engaged in judicial fact finding is illegal because the statute, Utah Code Ann. § 76-3-201(7) (2003) (repealed 2007), is unconstitutional in permitting judicial fact finding.

The Utah Court of Appeals noted that the Sixth Amendment prohibition on judicial fact finding to

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enhance a sentence only applies to mandatory maximum sentences, not mandatory minimum sentences. It further noted that although this statute allowed for judicial fact finding to determine whether to raise or lower the minimum term it did not permit elevating beyond the maximum term. Therefore, the court held that because "there is no constitutional prohibition on judicial fact finding to impose a lower minimum term in an indeterminate sentencing scheme, [the] Defendant's sentence is legal." Judgment affirmed. *State v. Johnston*, 2009 UT App 136.

Tenth Circuit

TARDY RESTITUTION ORDER IS NOT AN INVALID ORDER

Brian Dolan assaulted a hitchhiker by the side of the road and left him for dead. The hitchhiker was found by officers and rushed to the hospital. He survived but was left with more than $100,000 in medical bills. At sentencing, Dolan was ordered to pay restitution to the victim in the amount of $250 a month. Dolan appealed the restitution ordered, arguing that since the order was entered past the 90 day statutory deadline, the order is void. He further argues that even if the order is valid, the $250 payment exceeds his ability to pay.

The Tenth Circuit Court of Appeals acknowledged that the deadline prescribed by the Mandatory Victims Restitution Act had passed prior to the entrance of the restitution order. However, the court held that it was not jurisdictional and that "a tardy restitution order is not an invalid one." It reasoned that the intent of the statute was to motivate the government into providing swift compensation to victims, and not to create a "jurisdictional bar to untimely restitution orders." It further held that when the deadline passes, a victim may have cause to compel the court's action, however, the deadline did not afford the defendant a means to "get off the hook." The court also held that the lower court made a proper analysis of Dolan's ability to pay and did not abuse its discretion in ordering the $250 monthly payment. Affirmed. *United States v. Dolan*, 567 F.3d. 618 (10th Cir. 2009).

Other Circuits

DOCUMENTS SEIZED BY RECEIVER ARE ADMISSIBLE

Gregory and Deborah Setser, who are siblings, were convicted for their involvement in a Ponzi scheme. The Securities Exchange Commission (SEC) and the FBI began civil and criminal investigations into the Setsers and their companies, IPIC and HRN. Upon request, the district court appointed a receiver to preserve assets of the defendants. The receiver was "granted the authority to "enter and secure any premises" of the defendants "in order to take possession, custody, or control" of their assets." Upon the defendants' arrest, the receiver seized various assets and later turned some of them over to investigators. Defendants' filed a motion to suppress this evidence and argued that the receiver was acting as an agent of the investigators. The district court denied the motion and found that the receiver seized only those documents covered by the Receivership Order.

The Fifth Circuit Court "conclude[d] that after a receiver validly takes possession of records and other property, becoming their "lawful custodian," the original owner has lost any "reasonable expectation that those records would remain private." Therefore, Setsers' rights were not violated when the receiver turned some of the property over to investigators. *United States v. Setser*, 568 F.3d 482 (5th Cir. 2009).

QUESTIONING WITHOUT WARNING PROPER UNDER THE PUBLIC SAFETY EXCEPTION TO THE MIRANDA RULE

A number of officers descended on a neighborhood known for violent crime and an open drug market in Washington, D.C., to arrest Jones on a murder warrant. The officers had information that Jones had committed the murder with a gun and that he was armed. An officer spotted Jones and chased him. When the officer caught Jones, he asked Jones if he "had anything on him." Jones said that "his burner" was in his waistband. An officer retrieved a handgun from Jones's waistband. Jones was convicted of unlawful possession of a firearm and ammunition by a convicted felon. Jones claimed that the question about whether he had anything on him constituted illegal interrogation because it preceded a *Miranda* warning.

The court held that the question was proper under the "public safety" exception to the *Miranda* rule. In *New York v. Quarles*, 467 U.S. 649 (1984), the Supreme Court held that officers may ask questions without a

See **BRIEFS** *on page 11*

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Miranda warning when "reasonably prompted by a concern for the public safety," or for the safety of the arresting officers. In Jones's case, the court said there is "nothing unreasonable about an officer worrying that a person who committed a murder just six weeks before, and who had a previous conviction for a firearm offense, would be in the habit of carrying a weapon." Moreover, the court recognized that Jones had not yet been searched, his clothing could conceal a gun, there were small children nearby, and the neighborhood was well-known for its danger level and drug dealing. *United States v. Jones*, --- F.3d ----, 2009 WL 1586784 (D.C. Cir. 2009).

Other States

GPS Infringes on Reasonable Expectation of Privacy

In December 2005, a New York State police investigator concealed a global positioning system (GPS) tracking device inside the bumper of Weaver's van. It remained affixed to the bumper for 65 days, tracking every movement and location to which the vehicle traveled. The continuous monitoring of the vehicle was done without a warrant. Prosecution wanted GPS readings admitted at trial that showed the van driving slowly through the parking lot earlier in the evening of the burglary. Weaver's motion to suppress the data was denied without a hearing. The data was received into evidence and Weaver was convicted of two counts relating to the burglary.

The court noted that people reasonably expect less privacy in their vehicles than in other private places. It did not address the Fourth Amendment issue under federal constitutional law because "the United States Supreme Court has not yet ruled upon whether the use of GPS by the state for the purpose of criminal investigation constitutes a search." However, premised solely on the New York State Constitution, the court reasoned that the "massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy." Accordingly, it held that the GPS evidence should have been suppressed at trial. Order reversed. *People v. Weaver*. 12 N.Y.3d 433 (N.Y. 2009)

Questioning Without Warning Proper Under the Rescue Doctrine Exception to the Miranda Rule

On October 1, 1993, Davis kidnapped Polly Klaas from a slumber party with her friends. On November 30, officers arrested Davis. Davis invoked his right to counsel. After learning that his palm print matched a print found at the scene, an officer asked Davis whether there was any hope of finding Polly Klaas alive. Davis told him that he didn't know what he was talking about. However, 15 minutes later, Davis called the officer back to his cell and told the officer that she was dead. He gave a detailed confession and lead officers to the child's body. Davis claimed that the officer's questioning about finding the victim's body was unconstitutional interrogation because he had invoked his right to an attorney. Davis claimed that the "rescue doctrine" could not apply because the child had already been missing for 64 days when he was questioned.

A suspect may be questioned, even after invoking the right to counsel or right to remain silent, when there is: "1. Urgency of need in that no other course of action promises relief; 2. The possibility of saving human life by rescuing a person whose life is in danger; and 3. Rescue as the primary purpose and motive of the interrogators." The California Supreme Court held that the questioning was proper. The court ruled that the officer's questions were limited to the purpose of finding the victim, or her dead body, and were not intended to elicit an incriminating response. The court stated: "the length of time that a kidnap victim has been missing is not, by itself, dispositive of whether a rescue is still reasonably possible." Davis had told associates that he committed the crime for money. Thus, it was reasonable for the officers to believe that the victim might be alive 64 days after the kidnapping. The court affirmed Davis's death sentence. *People v. Davis*, 46 Cal. 4th 539 (Cal. 2009).

End of **BRIEFS**

TRIVIA

Recently Sen. Franken and Judge Sotomayor were talking about watching Perry Mason, while growing up, during her nomination hearings. Franken asked the Judge how many cases Perry Mason lost, and she answered one. Most people would probably say "none".

Technically, the correct answer is three. So that Pros-CLE members can win a lot of trivia games at happy hour, here are the three:

1. The Case of the Terrified Typist, June 21, 1958, Episode 38. Jury returns a guilty verdict against Mason's client. Later it turns out that the defendant is an imposter, but it was a guilty verdict at trial.

2. The Case of the Witless Witness, May 16, 1963, Episode 181. Mason loses an appeal.

3. The Case of the Deadly Verdict, October 17, 1963, Episode 185. Mason's client is found guilty of murder and sentenced to death. Mason later finds someone else did the murder, but a guilty verdict was returned against him.

Special thanks to Jim Dedman, Director of Academics and the National College of District Attorneys.

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How Melendez-Diaz v. Massachusetts may affect DUI prosecutions in Utah *(cont.)*

CONTINUED from page 7

substance connected to him, i.e., found in his or her blood or urine, it is only produced because defendant was being prosecuted and would not have been produced if defendant had not been arrested, and when it was produced the "past crime" had already happened. I don't think this will change anything that we have been doing in DUI cases all along, since I don't know of any prosecutors who are not calling the blood analyst at trial.

Regarding chain of custody, Justice Kennedy's dissent supplies a lot of language the defense may use to hamper what I understand to be current local practice in some prosecution offices under State v. Wynia, 754 P.2d 667 (Utah Ct. App. 1988), which is that some DUI blood-draw prosecutions are brought using the arresting officer, the person who did the blood draw, and the analyst, but nobody else in between who handled the blood vial, drove it to the lab (if it wasn't mailed), and any missing links in the chain of custody go to weight not to admissibility. Melendez-Diaz raises questions in my mind about that:

> Meeting this obligation [of the prosecution to establish chain] requires representations—that one officer retrieved the evidence from the crime scene, that a second officer checked it into an evidence locker, that a third officer verified the locker's seal was intact, and so forth. The iron logic of which the Court is so enamored would seem to require in-court testimony from each human link in the chain of custody. That, of course, has never been the law. … In any number of cases, the crucial link in the chain will not be available to testify and so the evidence will be excluded for lack of proper foundation. Melendez-Diaz, 557 U.S. at ___ (Kennedy, J., dissenting).

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How Melendez-Diaz v. Massachusetts may affect DUI prosecutions in Utah *(cont.)*

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Justice Scalia responded to this in a footnote:

> Contrary to the dissent's suggestion…, we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. … [T]his does not mean that everyone who laid hands on the evidence must be called. Melendez-Diaz, 557 U.S. at ___, note 1.

So far so good, but then the footnote continues: "[B]ut what testimony is introduced must (if the defendant objects) be introduced live." Id. (emphasis in original). That makes it sound as though the defense can insist that all the witnesses forming the entire chain of evidence must be present at trial, and that would affect the way some offices are prosecuting DUI (and other cases) under Wynia. For example, if the prosecutor asks the analyst how the lab comes into possession of the blood vial and the analyst starts to answer that 'officer so-and-so usually drives over a basketful of vials twice a week so I assume that's how we got this sample,' that could arguably be objectionable under Melendez-Diaz, whereas it only may have gone to weight under Wynia.

Justice Scalia wrote "Defense attorneys and their clients will often stipulate…. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with [forcing] the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion." Id. at ___. It's really hard to believe he wrote this, and Justice Kennedy challenges this reality disconnection head on. Since when does the defense bar go along? (I'm not saying they should in the first place.) It's also hard to believe that none of the parties or amici curiae mentioned the practice of 'chain of evidence witness show up drills' or 'jury chicken' that already goes on in some busy courts where the defense forces the prosecution to bring every witness in the chain to court.

At some point the question of how we got so far down the road that we "try" questions of evidentiary admissibility in front of the jury needs to be addressed. It seems analytically incorrect. Since the question of admissibility is a question for the court, Utah R. Evid. 104(a) ("the admissibility of evidence shall be determined by the court"), if the defense is planning on challenging chain, notice it up for a hearing and bring in all the chain witnesses, and let the court rule in limine one way or another. Then at trial defendant can confront the analyst and only the analyst on his or her qualifications and methodology and the jury can decide what to believe. That might not be doable in blood draw DUIs under Melendez-Diaz. But in breath-test DUIs, I think it still is as related to admission of the breath test. But it's come to the point where the examination predicate to admissibility of the breath test is sometimes carried out in front of the jury, including going into the maintenance procedures for the Intoxilyzer in front of the jury, and how the Intoxilyzer works in front of the jury. The breath test is either admissible evidence or it is not, and that is for the judge to rule on. At some point in breath test DUIs we need to stop subpoenaing, or letting the defense subpoena, the Intoxilyzer maintenance technician to jury trials "just in case." If defendant wants to challenge admissibility of the breath test he or she can do in at an in limine hearing before trial.

This is only a cursory analysis of Melendez-Diaz as it relates to DUI (both breath and blood cases), but we wanted to get it out ASAP. I welcome your comments, input, criticisms and identification of errors. This is a case well worth reading since it will affect a lot of what we do, at least in terms of motion practice. If any of this is worthwhile to cut-and-paste into a motion you have our permission to do so.

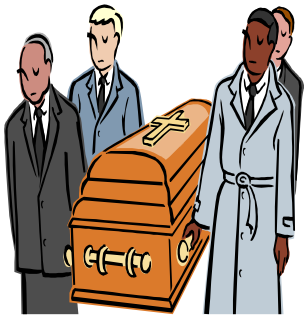
Having said that above, I think an argument can be made that neither the evidence custodian who transports the blood from the police station to the crime lab, nor the blood draw tech/phlebotomist need appear in court under Melendez-Diaz. Be advised there is some learned disagreement about that. If you would like to discuss that argument, please contact me at 801.366.0241 or eberkovich@utah.gov.

On the Lighter Side

Rich McKelvie, US Attorney and University of Utah Professor, to his summer law school class: "Did you know a bar review class is being held next door?"

Class nods in the affirmative.

Professor: "If a doctor told me I only had 24 hours to live, that is where I'd be."



Confused, the class asks why?

Professor: "Because it would drag the time out forever and I would welcome death!"

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Betty and Tim were killed in an auto accident on the eve of their wedding. When they reached the pearly gates, St. Peter met them. They asked if they could still be married in Heaven

Peter responded, "Well, let me find out if this is possible. Stay here and I will be right back."

Six months passed and finally Peter returned. "Yes, we can do this for you."

"Well," said the couple, "as we have spent so much time together waiting for your answer, we need to know that if things don't work out there's a possibility that we could be divorced?'

To which St. Peter answered "It took me six months to find a priest up here...how long do you think it will take me to find a lawyer?"

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A young businessman rented a beautiful office and furnished it with antiques. However, no business was coming in. Sitting there, worrying, he saw a man come into the outer office. Wanting to look busy, he picked up the phone and pretended he was negotiating a big deal. He spoke loudly about big figures and huge commitments. Finally, he put down the phone and asked the visitor "Can I help you?"

The man said, "I've come to install the phone."

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2009 Training Calendar

Utah Prosecution Council (UPC) And Other Utah CLE Conferences

August 6-7	UTAH MUNICIPAL PROSECUTORS ASSN ANNUAL CONFERENCE *Instruction aimed specifically at municipal prosecutors*	Ruby's Inn Bryce, UT
August 17-22	BASIC PROSECUTOR COURSE *Substantive and trial skills training for newly minted prosecutors*	University Inn Logan, UT
September 16-18	FALL PROSECUTOR TRAINING CONFERENCE *Our annual prosecutor gathering. Don't miss it.*	The RiverWoods Logan, UT
October 21-23	GOVERNMENT CIVIL PRACTICE CONFERENCE *Training for those who keep the Commission and Council happy*	Moab Valley Inn Moab, UT
November 3-5	JOINING FORCES: PREVENTION, INVESTIGATION, PROSECUTION AND TREATMENT OF CHILD ABUSE *Sponsored by Prevent Child Abuse Utah (UPC is a co-sponsor)*	Davis Co Conf Ctr Layton, UT
November 11-13	COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR *Executive discussion and training for the bosses and their chief deputies*	Dixie Center St. George, UT
November 18-20	ADVANCED TRIAL SKILLS TRAINING – CHILD SEX ABUSE CASES *The third annual advanced trial skills training for experienced prosecutors*	Courtyard by Marriott St. George, UT

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

September 21-23	PROSECUTING DRUG CASES - NCDA*	San Diego, CA
October 24-28	THE EXECUTIVE PROGRAM - NCDA* *Designed specifically for elected prosecutors and chief deputies*	Myrtle Beach, CA
Oct. 31 - Nov. 4	NATIONAL CONFERENCE ON DOMESTIC VIOLENCE - NCDA*	San Antonio, TX
November 16-18	PROSECUTING HOMICIDE CASES - NCDA*	San Francisco, CA
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.

NAC SCHEDULE—*page 16*

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.

August 24-28	BOOTCAMP: AN INTRODUCTION TO PROSECUTION *A course for newly hired prosecutors* *Application deadline: June 26, 2009*	NAC Columbia, SC
Sept. 28-Oct 2	TRIAL ADVOCACY I *A practical, hands-on training course for trial prosecutors* *Application deadlines: July 31, 2009*	NAC Columbia, SC
Sept 15-18	COURTROOM TECHNOLOGY *The electronic litigator from case analysis/prep to courtroom presentations* *Application deadline is July 17, 2009*	NAC Columbia, SC