

The

PROSECUTOR



United States Supreme Court

FEDERAL HABEAS CORPUS CLAIM NOT DEFAULTED BY PRIOR COURT PRESENTMENT

Gary Cone was convicted of murdering an elderly couple in their home. At the time of the murders, he was hiding from police who were chasing him for committing a robbery, among other crimes. Cone's sole defense at trial, and the only mitigating

factor offered during the sentencing phase, was the insanity defense. Cone claimed he lacked the requisite mental state for a conviction and did not deserve a death sentence because he committed the crimes while suffering from chronic amphetamine psychosis.

Following a lengthy appeals process, Cone discovered evidence in the prosecution's file that corroborated his insanity defense and supported his mitigation claim. He petitioned for a writ of habeas corpus but was ultimately denied. Certiorari was granted to address "whether a federal habeas claim is 'procedurally defaulted' when it is twice presented to the state courts."

After reviewing the case and postconviction proceedings, the Supreme Court held that the "Tennessee courts' rejection of petitioner's *Brady* claim does not rest on a ground that bars federal review." While the Court agreed that the evidence was not material to Cone's mental state in the commission of the

murders, it found that the lower courts had not adequately considered the same evidence as it related to his sentence. As such, the judgment denying federal habeas corpus relief was vacated and the case remanded with regard to sentencing. *Cone v. Bell*, 129 S.Ct. 1769 (2009).

TAINTED EVIDENCE IS ADMISSIBLE FOR IMPEACHMENT

After two days of drug use and no sleep, Donnie Ventris and Rhonda Theel confronted Ernest Hicks to investigate rumors that Hicks abused children. The encounter ended with Hicks being murdered and the defendants escaping in Hicks' truck with about \$300 of his money and his cell phone. While in custody, prior to trial, an informant was placed as Ventris' cell mate. The informant heard Ventris divulge that he'd shot Hicks and taken his money and phone. However, at trial Ventris blamed the entire robbery and shooting on Theel. Prosecution called on the informant to

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testify about Ventris' prior cell admission. Ventris objected; however, the court allowed the testimony with a cautionary instruction to the jury. The Kansas Supreme Court reversed the conviction, holding that Ventris' statements violated his Sixth Amendment right to counsel and were not "admissible at trial for any reason, including the impeachment of the defendant's testimony." The State's petition for certiorari was granted.

The U.S. Supreme Court concluded that the "*Massiah* right is a right to be free of uncounseled interrogation" and that the infringement of the right occurs at the time of the interrogation. *Massiah v. United States*, 377 U.S. 201 (1964). It further held that the "interests safeguarded by such exclusion are

outweighed by the need to prevent perjury and to assure the integrity of the trial process." The Court reasoned that it is one thing to prohibit government from using unlawfully obtained evidence, but it is quite another to provide a defendant with a "shield against contradiction of his untruths." In every other context the Court had held that tainted evidence was admissible for impeachment.

Accordingly, the Court held that the informant's testimony was admissible to challenge Ventris' testimony at trial.

Reversed and remanded. *Kansas v. Ventris*, 129 S.Ct. 1841 (2009).

STANDARD OF PROOF APPLIES TO ALL SUBSEQUENT ELEMENTS OF A STATUTE

Ignacio Flores-Figueroa, a citizen of Mexico, presented to his employer false

social security and alien registration cards. When the employer provided the documentation to U.S. Immigration and Customs Enforcement, it was discovered that the numbers on both cards were assigned to other people. Among other offenses, Flores was charged and convicted of aggravated identity theft



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Case Summaries





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under 8 U.S.C.S. § 1028A(a)(1). He moved for a judgment of acquittal on the charge, arguing that the government could not prove he knew the numbers on the cards were assigned to other people. The District Court ruled in favor of the government, holding that they did not have to prove that knowledge. The Court of Appeals upheld the lower court's holding. Certiorari was granted to resolve a split in the circuits.

The U.S. Supreme Court held that 8 U.S.C.S. § 1028A(a)(1) required proof that Flores knew the numbers belonged to another person. In relying upon basic principles of English, in addition to case precedent where the Court provided statutory interpretation, the Court concluded that 'knowingly' applied to each subsequent element listed in the statute. The Court further held that difficulties in proving such knowledge were not sufficiently compelling to outweigh the clarity of the text. Reversed and remanded. *Flores-Figueroa v. United States*, 129 S.Ct. 1886 (2009).

DISCHARGING A FIREARM CHARGE DOES NOT REQUIRE THE DISCHARGE BE AN INTENTIONAL ACT

Christopher Dean walked into a bank wearing a mask and waving a gun around while yelling at everyone to get down. As he removed money from each of the teller stations, his gun discharged but no one was injured. Dean cursed and ran out of the bank. He and an accomplice were later arrested and convicted of conspiracy to commit a robbery affecting interstate commerce, and aiding and abetting each other in using, carrying, possessing, and discharging a firearm during an armed robbery. Dean was sentenced to a 10-year minimum

mandatory prison term on the firearm count. On appeal, Dean argued that although the gun had discharged during the robbery, he should not be subject to the 10-year sentence because the discharge was accidental. The Appeals Court for the Eleventh Circuit affirmed the lower court's decision. Certiorari granted.

The U.S. Supreme Court held that the statutory language under 18 U.S.C.S. § 924(c)(1)(A)(iii), pertaining to the discharge of a firearm during a crime of violence, did not require that the discharge be intentional. It further clarified that the intent requirements relative to other provisions of the statute did not extend to § 924(c)(1)(A)(iii). The Court reasoned that although "it is unusual to impose criminal punishment for the consequences of purely accidental conduct...it is not unusual to punish individuals for the unintended consequences of their unlawful acts." As such, the sentencing enhancement "accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible." The Court also held that Dean's arguments of ambiguity were insufficient to invoke the rule of lenity. The Eleventh Circuit's judgment was affirmed. *Dean v. United States*, 129 S.Ct. 1849 (2009).

MODIFICATION TO THE SEARCH INCIDENT TO ARREST DOCTRINE

The United States Supreme Court has modified the search incident to arrest doctrine, rejecting a broad reading of *New York v. Belton*, 453 U.S. 454 (1981). In this case, *Arizona v. Gant*, the court overturned the search incident to arrest of Rodney Gant's car after Gant was arrested for driving with a suspended license, handcuffed and

secured in the back of a patrol car with several officers at the scene. Officers found cocaine in Gant's car during the search incident to the driver license arrest.

The Court held that a search of the passenger compartment of a vehicle following an arrest is allowed "only if (1) the arrestee is within reaching distance of the passenger compartment at the time of the search or (2) it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies."

Gant stands for the proposition that once the arrestee is secured, a search incident to arrest of the involved vehicle is lawful only when there is reason to believe that the vehicle holds evidence of the underlying crime on which the arrest is based. *Gant* does not foreclose other search doctrine that may apply to particular cases. Fourth Amendment warrant clause exceptions of consent, probation/parole search, exigent circumstances, vehicle "frisk" for weapons upon appropriate reasonable suspicion, inventory and community caretaking, continue to potentially apply. *Arizona v. Gant*, 129 S.Ct. 1710 (2009).



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PROSECUTOR PROFILE



Tim Taylor, Chief Deputy, Utah County Attorney's Office

Tim Taylor is the third child in a family of six children and was raised in Blackfoot, Idaho. His mother grew up in Finland and his father was raised in Idaho. He credits his parents with teaching him the value of hard work and honesty. However, the person he feels has most influenced his life is his wife. "She's always positive, has a smile on her face and gave me a second chance for a date..." after turning him down the first time, he explains. They have four children... and pet gerbils.

So, what potpourri of interesting details can be learned about Mr. Taylor? Music from the 80's and groups with mullets would be his choice for listening. He is a Utes fan, is just beginning to mountain bike, is a novice scuba diver, and a famous (at least to his family) WWF wrestler with his 5 year-old son on the trampoline! Crown Burger wins out as his favorite food but if looking for a cheap snack, Peanut M&Ms are what he's looking for. "Raising Arizona" is his favorite movie while "Breaking Bad" is his pick for favorite TV series and "Fat Albert" or "Tarzan" are his favorite cartoons. Tim describes himself as loving to learn, not being easily offended and someone who can't stand thieves! He speaks Finnish and recalls that his best family vacation was traveling to Finland, but if money were no object, he'd love to travel to the South Pacific (Fiji or New Zealand). On a more domestic journey, Tim was mobilized to Ft. Lewis, Washington, from June 2007 to July 2008, with the Army Reserves. He says this experience transformed him into a real homebody and gave him an even greater respect for the many soldiers who have been repeatedly deployed to Iraq or Afghanistan.

Tim's earliest memory of what he wanted to be when he grew up was to be a pediatrician or a skateboarder... because, you know, they are so similar! But life took him down a different path from those early ambitions and he graduated with a finance degree from the University of Utah. His family and friends were very supportive of his choice to pursue law, and declared, "Great! We get a free lawyer!" He attended Creighton University School of Law in Omaha, Nebraska. Currently, Tim is the Chief Deputy at the Utah County Attorney's Office where he has worked since 2001. The last stop, so far, in a series of jobs ranging from milking cows, working in the logging business with his family and living out of a school bus for the summer near Island Park, Idaho, working at WordPerfect, working as an in-house corporate attorney, and working on fraud cases at the Division of Securities. It was while he was working at the Division of Securities that Tim decided, "some people just needed a good butt-kickin' (figuratively, of course)." So, he applied for an entry-level attorney position with Utah County and has been there ever since.

A day in the life of Tim Taylor, involves reviewing proposed plea agreements, screening cases, attending meetings and eating Pub Mix ("A Savory Blend of Crunchy Snacks") for sustenance. He loves the good relationships he's developed with law enforcement and was surprised that his expectation of animosity in working with defense attorneys didn't materialize. In fact, he actually enjoys working with some defense attorneys. Although, there is that certain defense attorney who has a perpetual chip on her shoulder and he can't help but joke and wonder if "they are only nice to me because they want something?" Tim is not optimistic that crime rates will decrease and recognizes he's become jaded because people's actions surprise him less and less. But, he laughs at the memory of conducting his first preliminary hearing on a felony DUI. After sitting down and taking satisfaction in what he had just accomplished, the defense attorney stood and asked the judge to bind the case over as a class B misdemeanor because he'd forgotten to introduce the defendant's prior DUI convictions. And then there was the time that the witness on the stand was the defendant's mother and the attorney was trying to establish the "cohabitant" relationship, so he questioned her as to what method of delivery the mother used in giving birth to the child! Tim thought the Judge was going to hold him in contempt because he couldn't stop laughing!

When all is said and done, Tim is devoted to his wife, his children, his country, and doing the work that makes Utah County a great place to live!

PREFERRED NAME - Tim

BIRTHPLACE
Rexburg, Idaho

Q U I C K **FAMILY**
Third of six kids; Father of four children ages 5, 10, 12, and 19

F I R S T **FIRST JOB**
Milking cows

K **PETS**
Gerbils— and they're potty trained!

F **FAVORITE BOOK**
Atlas Shrugged by Ayn Rand

A **LAST BOOK HE READ**
Undaunted Courage by Stephen Ambrose

C **WORDS OF WISDOM**
"What then is my duty? What the day demands." - Goethe

T **ADVICE TO OTHERS**
Spend time with friends and family to remind yourself that not everyone uses dope or steals from their neighbors.



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Utah Court of Appeals

ABANDONMENT OF LEGAL NONCONFORMING USE

Alicia Vial purchased a home in Provo with the intent to rent out the basement apartment while she attended law school. Three days after closing on the home, she received a zoning verification letter from Provo City. The letter advised her that her home was a single-family dwelling and that rental of the basement apartment constituted an illegal use. Vial appealed the notification to the Board of Adjustment (Board), arguing that the basement apartment was a legal nonconforming use established prior and continuously up to the present time. The Board denied her appeal. She sought district court review, which upheld the Board's decision. Vial now appeals the district court decision arguing that the Board's decision was "arbitrary, capricious, and illegal."

The appellate court held that by a preponderance of the evidence, Vial proved the establishment of the apartment as a legal nonconforming use. However, the court held in favor of the city that the use was eventually abandoned during periods of time lacking occupancy. It further held that Vial "failed to establish the applicability of the exception allowing her to invoke estoppel against the government." Judgment affirmed. *Vial v. Provo City*, 2009 UT App 122.

EXACT AMOUNT OF RESTITUTION IS NOT REQUIRED FOR A KNOWING AND VOLUNTARY PLEA

Judy Gibson entered a guilty plea to the charge of unlawful dealing of

property by a fiduciary. The charge resulted from Gibson taking out and using credit cards in her incapacitated aunt's name, taking out a mortgage on her aunt's home and writing checks to herself on her aunt's account. Her plea was held in abeyance, she was placed on probation and a restitution hearing was scheduled. At the hearing, restitution was ordered in the amount of \$238,184.00. Some time thereafter, Gibson filed a motion to withdraw her plea, arguing that since the total restitution amount and associated monthly payment had not been set, her plea was not knowing and voluntary. The trial court denied the motion and Gibson appealed.

The appellate court held that under Utah R. Crim. P. 11(e), a knowing and voluntary guilty plea does not require a defendant be advised of the exact amount owing in restitution. The court held that because the record supported that Gibson "understood the basic consequences of her plea," the trial court properly accepted her plea as knowing and voluntary. Judgment affirmed. *State v. Gibson*, 2009 UT App 108, 628 Utah Adv. Rep. 13.

SUBSTANTIAL EVIDENCE SUFFICIENT FOR RETENTION OF JURISDICTION

Plaintiff mother and defendant father were granted a divorce with physical custody of the children being awarded to the mother. The father was convicted of attempted murder of the mother and incarcerated following two attempts to have the mother killed by two separate hired assassins. The mother filed a petition to terminate the father's parental rights, citing the

attempted murder conviction and abandonment as grounds. A trial was held and the juvenile court terminated the father's rights on the grounds of abandonment and parental unfitness. The father appealed, arguing that the court lacked subject matter jurisdiction because the mother did not list her address in the petition and the children no longer lived in Utah. He also challenged the court's order on constitutional, evidentiary, and procedural grounds.

The appellate court held that pursuant to Utah Code Ann. § 78B-13-202(1) (2008), there was "substantial evidence remaining in Utah on the relevant issues and therefore supports the juvenile court's conclusion that Utah retains subject matter jurisdiction over the

mother's petition." With regard to the Father's constitutional, evidentiary, and procedural arguments, the court held that the "Mother's fitness was not at issue, the juvenile court had discretion to enter the protective orders and quash the subpoenas, and the evidence was sufficient to

support the termination of Father's parental rights" under Utah Code Ann. § 78A-6-506(3). Judgment affirmed. *D.M. v. S.H. (In re A.M.)*, 2009 UT App 118.

ERROR BY SECOND JUDGE IN REVERSING PRIOR JUDGE'S ORDER WITHOUT ARTICULATING REASON

Ruiz, an illegal alien, was charged with sexual abuse of a child, a second degree felony. He hired counsel, accepted a plea agreement, and entered a guilty plea to attempted sexual abuse of a child, a third degree felony. A written plea agreement, signed by Ruiz and filed with the court, indicated a potential



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Confessions as Proof of Guilt: Reasons for Caution

By Anton Tolman, PH.D.

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I am not a regular watcher of *The People's Court* and other popular TV law shows. However, as I came home the other day, my son had left the channel on this show. On screen, a "reporter" was quizzing audience members how they felt about someone pleading guilty. One lady spoke up with assurance, "You wouldn't plead guilty if you weren't guilty". Likewise, I have heard people say things like "You wouldn't confess to a crime if you weren't guilty." Throughout the history of our judicial system, the use of confessions has been seen as a vital link in discovering truth and prosecuting offenders. Many persons, including potential jurors, tend to believe that no one would ever confess to a crime, particularly a serious crime, if they were not in fact guilty of committing that crime. Unfortunately, the available data clearly demonstrates that some caution is in order when evaluating confession evidence, despite the naïve confidence of television audience members. In fact, many innocent persons do end up confessing to serious crimes; the data even suggests that beliefs that their innocence will protect them actually puts them at greater risk for this outcome.

Let us be clear: the actual rate of false confessions is a matter of dispute among experts, but there is little doubt that it actually occurs, probably more often than the public believes is the case. For example, evidence indicates that 15-25% of cases of proven wrong convictions involved confession evidence. Likewise, it is clear that many guilty persons confess or plead guilty to crimes they committed. This is most likely to occur under conditions where the suspect spontaneously confesses to the crime or the suspect is aware that the evidence against them is overwhelming. The confessions that are most suspect are those given after lengthy police interrogations.

One of the most notable examples of false confessions was the Central Park Jogger case. In 1989 a female jogger in New York City was raped and brutally beaten and left for dead. She suffered skull fractures, massive loss of blood, and total amnesia for the attack. Five young men who had been in the park that night, ages 14-16 were ultimately charged with this heinous crime. Four of the youth confessed on videotape to the crime, providing extensive details of what happened (even though these details did *not* match the crime scene data). However, the confessions began the night before and continued into the next day and only the final confessions were videotaped, not the entire interrogations. Thirteen years later, a serial rapist called police to confess to being the one who assaulted the jogger. His DNA matched crime scene evidence and other evidence emerged exonerating the boys. Why would these young men confess, in detail, to a serious crime that they never committed?

Forensic psychologists, most notably Saul Kassin and his colleagues, have studied the factors that shape false confessions including police procedures. These studies have shown a pattern of psychological, not physical, coercion, that may result in a confession that is false. Kassin found that many police carry out what is referred to as a "pre-interrogation" interview. This is of the type where the person protests they have done nothing wrong and the officer says, "There is no problem, we just want to ask you a few questions." This is not yet an interrogation, but the purpose of the interview is for the officer to make a decision on the likely guilt of the suspect.

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Confessions as Proof of Guilt: Reasons for Caution

(Continued)

Based largely on published techniques such as the Reid technique (which makes inflated claims of accuracy), officers carefully observe the suspect during this initial interview. As one officer told Kassin, “I do not interrogate innocent people.” However, if the officer decides that the person is probably guilty of the crime, the interview becomes an interrogation. Interrogating officers who believe the suspect is guilty may engage in *confirmation bias*, seeing only what they expect to see (guilty behaviors) and ignoring behaviors that do not match. The conviction the suspect is guilty also shapes the officer’s behaviors and types of questions including greater use of false evidence to convince the person to confess, pushing the defendant harder to confess, use of “hypothetical situations”, and use of extended hours of interrogation (producing fatigue, hunger, social isolation and sometimes despair in suspects). Videotaping the full interrogation is an often recommended improvement to the system to help prevent false confessions, although studies indicate that if the camera is focused exclusively on the suspect (and not also on the interrogating officer), observers tend to believe the suspect is more guilty, so camera focus on all parties is important.

I am personally aware of cases resulting in false confessions. For example, I know of a defendant who had Mental Retardation; after hours of interrogation, the suspect confessed after officers implied that if he just “told the truth” he could go home. Of course, any answer given that did not match the officer’s perception of the “truth” was rejected, leaving only one option. Of course, most suspects would realize that confessing to a crime will not result in being released, but this suspect was too impaired to understand that. Likewise, I consulted on a case where a man was interrogated for hours, repeatedly protesting his innocence. The emotional pressure on the subject was intense, even watching, as an observer, from a distance via videotape. Like many suspects who believe their innocence will protect them, this suspect had waived his *Miranda* rights because he did not believe he needed them. Thus, the suspect’s own conviction of their innocence may actually result in a situation in which a person ends up in a terrible situation and confesses to a crime. To assist legal professionals in evaluating confessions, psychologists have created specific instruments to assist in the evaluation of competency to confess, and although more research is always useful, this is a significant step forward.

So, contrary to the wisdom of television audiences, innocent people may, in fact, end up confessing to crimes, even serious crimes, they did not commit. At the same time, the use of confession evidence is a critical and valuable part of the investigation and prosecution of crime. However, false confessions do not serve justice; they permit the truly guilty party to escape consequences and may result in misuse of system resources. The solution is for everyone to be aware of the factors that may shape this negative outcome and act together to *prevent* false confessions from occurring in the first place such as by recording all parties for the entire duration of an interrogation.



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prison sentence of zero to five years. Two months after entering his plea, Ruiz changed attorneys. His new attorney filed a motion to withdraw Ruiz's guilty plea on the basis that his prior attorney misadvised Ruiz about the immigration consequences for his guilty plea, rendering the plea involuntary. Judge Fuchs granted the motion and the State filed a motion to reconsider. Ruiz opposed the State's motion and Judge Fuch's set it for a hearing, but retired before it could be heard. Judge Skanchy was then assigned to the case and decided to hear the motion to reconsider and to hear new testimony from the prior attorney. Based on the new testimony, the Judge granted the motion to reconsider, rescinded the order granting the motion to withdraw the guilty plea, and denied the motion to withdraw his guilty plea.

On appeal, the issue before the court is whether "Judge Skanchy erred in hearing the State's motion to reconsider and then allowing the State to put on new evidence after Judge Fuchs had already ruled that Ruiz could withdraw his plea and that no more evidence could be presented." The appellate court held that when "a second judge announces a reversal of a prior judge's order, it is doubly important for the second judge to articulate a reason for the change." Without such an explanation, the court reasoned, there is no assurance the change wasn't made merely as a matter of personal preference. The court further stated that presentence motions should be liberally granted and that a defendant's burden on a motion to withdraw a plea remained fundamentally unchanged. Vacated and remanded. *State v. Ruiz*, 2009 UT App 121.



Tenth Circuit Court of Appeals

PROOF OF INTENT TO OBSTRUCT ESTABLISHED CORRUPT INTENT

Kathryn Erickson, a general manager for Uintah Special Services District (USSD), together with Gilman Mitchell, a firm owner, were each convicted on three counts of obstructing and impeding a federal grand jury. The charges resulted from a grand-jury subpoena, issued during an investigation, which requested records from USSD. Erickson submitted to the grand jury three contract extensions that the government alleged were backdated to cover work done by Mitchell's firm. Erickson and Mitchell argued on appeal that there was insufficient evidence to support their convictions, they raised a Brady challenge, and alleged that they were deprived of a fair trial due to the bias of the trial judge

The appellate court held that proof of intent to obstruct established corrupt intent. It further held that the

fraudulent documents compromised the grand jury's ability to make its own determination about the authorized or unauthorized nature of the work, and the government was not required to prove the alterations were relevant to the investigation. In addition, the court found the Brady challenges failed because of the lack of evidence proving that the government received or knew of the audit report. And finally, the court found that the defendants failed to show that recusal was appropriate under 28 U.S.C.S. § 455 or that the judge had conveyed to the jury any favoritism towards the prosecution. *United States v. Erickson*, 561 F.3d 1150 (10th Cir. 2009).

POSSESSION OF UNREGISTERED WEAPON IS NOT A CRIME OF VIOLENCE

The United States Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) identified Serafin as someone possibly involved in the illegal weapons trade. As part of a sting investigation, an agent met with Serafin on several occasions and gathered a significant amount of evidence confirming his involvement. An undercover agent set up a time to purchase an "Eagle Arms AR15" assault rifle from Serafin and met him at his apartment for the transaction. The agent paid the agreed upon price, took the rifle and left. Agents then lured Serafin out of his apartment and arrested him. At the time of arrest, Serafin was armed with a 45-caliber "SIG Sauer TM" pistol and after executing a search warrant, another AR15-type rifle and silencer were discovered. Serafin was convicted of possessing a weapon in furtherance of a



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crime of violence. On appeal, Serafin argued that possession of an unregistered weapon in violation of 26 U.S.C.S. §§ 5841, 5845(a), 5861(d) and 5871, was not a crime of violence under 18 U.S.C.S. § 924(c)(1).

The appellate court held that the scope of 18 U.S.C.S. § 924(c)(1) was confined to only include active, violent crimes that “involve a substantial risk that physical force will occur in the course of committing the offense.” Accordingly, the court concluded that possession of an unregistered weapon did not meet that definition. Conviction reversed and case remanded. *United States v. Serafin*, 562 F.3d 1105 (10th Cir. 2009) .

Other Circuits

WARRANTLESS SEARCH OF PROBATIONER'S HOME ALLOWED, EVEN WITHOUT PROBATION AGREEMENT PROVISION

Carter was on probation for possession of cocaine and for battery. He was subsequently arrested for trafficking in cocaine and ecstasy, but the evidence was suppressed and the charges were dismissed. The prosecutor notified Carter's probation agent of the arrest and evidence issues. Carter reported meager income from menial labor, but bought three expensive cars and a townhouse. Carter told his probation officer that he was forming a drywall company with a friend (who had a felony criminal history). The business cards had stylized printing that suggested a gang affiliation. The probation agent decided that there was reasonable suspicion to search Carter's home. Carter's probation agreement *did not* include a provision subjecting him to warrantless searches.

In *United States v. Knights*, 534 U.S. 112 (2001), the Supreme Court upheld a police officer's search of a probationer's home upon reasonable suspicion, in a case where there was a probation agreement provision providing for warrantless searches. The Court's opinion did not foreclose the possibility that probation searches might be permissible upon reasonable suspicion and *without* a probation agreement requiring warrantless searches. Lower courts have divided



on the issue of whether warrantless search clauses must be contained in probation agreements in order for such searches to be permitted upon reasonable suspicion.

The Court of Appeals for the 11th Circuit held that, “when a probationer has a condition of probation reducing his expectation of privacy, and the government has a higher interest in monitoring the probationer due to the nature of his criminal history, a search can be permissible when supported only by reasonable suspicion.” Carter's expectation of privacy in his home was reduced by a probation condition requiring him to submit to home visits. “We conclude, in this case, that Carter had a reduced

expectation of privacy in his home and the government had a sufficiently high interest in monitoring him on account of his drug and violence-related crimes that a search of Carter's home based upon reasonable suspicion was reasonable under the Fourth Amendment.” The better course is to include warrantless searches as written conditions in probation agreements. *United States v. Carter*, --- F.3d ----, 2009 WL 1108667 (11th Cir. 2009).

Other States

K9 TRACKING EVIDENCE SUBJECT TO EXPERT WITNESS FOUNDATION REQUIREMENTS

White and two confederates robbed a convenience store at gunpoint. As the bandits were leaving the store, a police officer pulled in to the parking lot. The store clerk flagged the officer over and told him about the robbery. The officer chased the bandits, caught one, and White and the other continued to run. A K9 team responded and the dog tracked directly to White who was curled up asleep on the ground, his handgun held like a pacifier. White challenged the introduction of the tracking evidence. Despite a positive identification by the store clerk and the officer who saw him run from the store, White claimed that “some other dude done it.” He did not have a rational explanation for being asleep in a field, grasping a handgun.

White claimed the trial judge failed in his gate-keeping role to vet the reliability of the dog's tracking skills, thus leaving the jury to speculate about the dog's reliability. The court overruled a South Carolina Court of

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NOTICE FROM UTAH STATE COURTS

CHANGES IN RECORD OF COURT PROCEEDINGS AND TRANSCRIPTS

Effective July 1, 2009, court reporters will no longer be employed with the Utah State Courts to make verbatim records of court proceedings. Instead, all court proceedings will be recorded electronically. In capital cases, in addition to the digital recording, the court is permitted to contract with a licensed certified court reporter to report the proceedings. If a party in any other case wants to hire a licensed certified court reporter to report a court proceeding, the party may do so provided the court gives its approval. If an attorney anticipates needing overnight or expedited transcript production, the attorney should request the court's approval to hire a court reporter to report the proceedings and to provide whatever transcripts are needed. Forms for parties to request a court reporter in capital or non-capital cases will be available on the court's web page or in the offices of the clerk of court statewide.

Beginning July 1, 2009, all transcripts for official purposes must be requested through a transcript coordinator located in the appellate clerks' office. As of July 1, transcripts may be ordered and processed on-line by going to the court's web site www.utcourts.gov and clicking on the link for transcripts. When your order is placed, you will receive an email notifying you of the transcriber assigned and how to contact that person. You will need to make adequate payment arrangements with the transcriber within five business days after receiving confirmation of the transcript order. The transcriber will not begin work on the transcript until satisfactory payment arrangements are made.

Once the transcript is prepared and paid for, the transcriber will file the printed, certified transcript and the digital text file with the trial court and send you a copy of the transcript. Transcripts that are prepared outside of the above-described process will not be considered official and may not be used for court purposes. Requests for digital records for purposes other than preparing an official transcript should be made to the court in which the proceeding was held. If you have questions about the new procedures, please contact Nicole Gray at 801-238-7975.

To insure that digital recordings of court proceedings are as clear and distinct as possible, please adhere to the following "best practices" when speaking in the courtroom:

- Do not move microphones.
- Do not block microphones.
- Do not shuffle papers near a microphone.
- Do not speak simultaneously with witnesses, counsel, or the judge.
- Speak within arm's reach of a microphone.
- Use a lapel microphone if one is available. If you approach the bench without a lapel microphone, wait until you are within an arm's reach of a microphone before speaking.
- Use mute button (if available) while consulting with your client; be sure the microphone is on before proceeding.
- Move away from the microphone before coughing or sneezing.
- Hold discussions outside the courtroom or at least away from microphones.



Continued from **BRIEFS** on page 9

Appeals decision setting different standards for admission of science-based expert testimony and experience-based expert testimony. The court held that expert testimony based on specialized skill is subject to the same test for admissibility as scientific expert testimony. The court adopted a test nearly identical to numerous other jurisdictions. “A sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated.” The court held that the trial judge had properly considered the qualifications of the handler/expert and the reliability of the evidence and it affirmed White’s conviction. *State v. White*, --- S.E.2d ---, 2009 WL 1108881 (S.C. 2009).

CURRENCY CONTAMINATION THEORY DOES NOT DEFEAT K9 SNIFF

Ronald Johnson saw a police officer and began to run. The officer chased Johnson to a house. When the officer knocked on the door, Johnson shouted at him from the second floor window. After some commotion, the officers entered the house and found Johnson in the second floor room. There were various drugs on the bed near Johnson. They arrested Johnson and took him to jail. At the jail, the officers found \$845 in Johnson’s pants pocket. A drug detector dog sniffed the pants and the cash and gave a positive final response to both. The prosecution introduced the

sniff evidence and preemptively introduced evidence to combat the widespread misunderstanding about currency contamination.

The court held that the prosecutor should not have been allowed to preemptively attack the currency contamination myths. However, the court also rejected Johnson’s claim that the court should take judicial notice that the residue of controlled substances contaminates the majority of U.S. currency. The dog’s handler testified about conducting a number of controlled sniffs in proofing exercises with currency in general circulation in the community. However, the court observed that the handler had not been presented as an expert in the currency contamination theory. Nonetheless, the results of the dog sniff were held to have probative value in determining whether Johnson possessed illegal drugs.

The currency contamination theory is just a theory. Moreover, the condition of residual, microscopic trace evidence of drugs on a single bill does not lead to the conclusion that the bill will carry the odor of illegal drugs. Defendants who have advanced the currency contamination theory have often done so relying on scientifically fallacious arguments, supported by junk science. In the cases where the prosecution has responded with the properly qualified experts, the currency contamination theory rapidly disintegrates into the residue of detritus and its value in the courtroom becomes less than microscopic. *Johnson v. State*, --- A.2d ---, 2009 WL 929347 (Md. 2009).



NO CUSTODY IN POLICE PARKING LOT CONVERSATION

Burbine fought with his girlfriend. She asked him to leave. She then called the police and asked them to come and pick up some of Burbine’s belongings, including a duffel bag of illegally possessed guns. An officer later telephoned Burbine and invited him to come to the station to retrieve his property. The officer intended to ask Burbine about the guns. Two officers met Burbine in the parking lot and casually asked him questions about the

ownership of the guns. Burbine admitted to owning all but one. The trial judge suppressed Burbine’s statements, finding that he was not free to leave at the time of the questioning, thus triggering *Miranda* warnings. The judge further found that, even if *Miranda* warnings were not required,

the statements were involuntarily given. The appellate court reversed. The statements were not involuntary. The officers “talked nice, thought mean.” There was no coercion involved. Burbine was a person of average intelligence who was fully rational and capable of freely conversing with the officers. Nor was Burbine in custody. He was not escorted into the station, placed in a patrol car, told that he couldn’t leave, or restrained in any way. The objective circumstances of the interrogation do not disclose that there was a restraint on Burbine’s freedom of movement of the degree associated with a formal arrest. The officer’s unstated intent to arrest Burbine on weapons charges was irrelevant to the custody determination. *Commonwealth v. Burbine*, 904 N.E.2d 787 (Mass.App.Ct. 2009). Sorry, link unavailable.



Third Judicial District Court

Judge Sheila K. McCleve

May 28, 2009

Mark W. Nash, Director
Utah Prosecution Council
160 East 300 South, Sixth Floor
Salt Lake City, UT 84114-0841

Dear Members of the Prosecution Council:

As I leave the bench I wanted to take the time to thank you and all prosecutors in the state for your service to the State. I know some of you better than others, but I appreciate all that you each do to serve the citizens of Utah and uphold this great system of ours. I'm grateful for everything that working in this system has taught and given me. I especially appreciate the opportunity I've had to associate with so many fine people. Best wishes to you for continued success in your careers and fulfillment in your service.

Sincerely,

A handwritten signature in black ink, appearing to read "Sheila K. McCleve", written in a cursive style.

Sheila K. McCleve
District Court Judge

SKM:jsh

The Utah
Children's Justice
Symposium/
UPC Domestic
Violence
Conference 2009





On the Lighter Side

"You seem to be in some distress," said the kindly judge to the witness. "Is anything the matter?" "Well, your Honor," said the witness, "I swore to tell the truth, the whole truth and nothing but the truth, but every time I try, some lawyer objects."

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A man walked into a Bank of America and wrote "this iz a stikkup. Put all your munny in this bag" on a deposit slip. While waiting to give his note to the teller, he began to worry that someone had seen him write the note. He left the Bank of America and crossed the street to Wells Fargo. After waiting a few minutes in line, he handed his note to the Wells Fargo teller. She read it and

inferred that the man was not too bright, so she told him that she could not accept his note because it was written on a Bank of America deposit slip. The man said "OK" and decided to leave. The Wells Fargo teller quickly called the police, who promptly arrested the man a few minutes later while he was waiting in the Bank of America line.

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A man walked into a corner store with a shotgun and demanded all the money from the cash register. After the cashier put the money in a bag, the man saw a bottle of scotch sitting on a shelf behind the counter. He told the cashier to put it in the bag as well, but the cashier refused and said that he did not believe the man

was twenty-one. The man insisted that he was of the legal age, but the clerk continued to refuse to give him the scotch. Finally, the man pulled his drivers license out of his wallet and gave it to the clerk. The clerk looked it over, and finally agreed that the man was, in fact, over twenty-one and put the scotch in the bag as the man requested. The man then ran from the store with his money and scotch. As you probably guessed, the cashier called the police as soon as the man was out of sight and gave the name and address of the man, which he got off the license. The man was arrested at his home a mere two hours later.

~~~~~



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Visit the UPC online at

[www.upc.utah.gov](http://www.upc.utah.gov)



# Calendar

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

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

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

|                    |                                                                                                                                                                                                                                                          |                  |
|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|
| July 29 - August 1 | <a href="#">30<sup>TH</sup> ANNUAL AGACL CONFERENCE</a><br><br><i>Sponsored by the Association of Government Attorneys in Capital Litigation<br/>For more information go to <a href="http://www.agacl.com">www.agacl.com</a>, or call (623) 979-4846</i> | Miami, FL        |
| September 21-23    | <a href="#">PROSECUTING DRUG CASES</a> - NCDA*                                                                                                                                                                                                           | San Diego, CA    |
| October 24-28      | <a href="#">THE EXECUTIVE PROGRAM</a> - NCDA*<br><i>Designed specifically for elected prosecutors and chief deputies</i>                                                                                                                                 | Myrtle Beach, CA |

# Calendar cont'd

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

|                  |                                                                  |                   |
|------------------|------------------------------------------------------------------|-------------------|
| Oct. 31 - Nov. 4 | <a href="#">NATIONAL CONFERENCE ON DOMESTIC VIOLENCE</a> - NCDA* | San Antonio, TX   |
| November 16-18   | <a href="#">PROSECUTING HOMICIDE CASES</a> - NCDA*               | San Francisco, CA |
| December 6-10    | <a href="#">FORENSIC EVIDENCE</a> - NCDA*                        | San Diego, CA     |
| December 6-10    | <a href="#">PROSECUTING SEXUAL ASSAULTS</a> - 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](mailto:mnash@utah.gov). To access the interactive NCDA on-line registration form, click on 2009 Courses.

## National Advocacy Center (NAC)

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

Restoration of federal funding for the 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   | <a href="#">BOOTCAMP: AN INTRODUCTION TO PROSECUTION</a><br><i>A course for newly hired prosecutors</i><br><i>Application deadline: June 26, 2009</i>                      | NAC<br>Columbia, SC |
| Sept. 28-Oct 2 | <a href="#">TRIAL ADVOCACY I</a><br><i>A practical, hands-on training course for trial prosecutors</i><br><i>Application deadlines: July 31, 2009</i>                      | NAC<br>Columbia, SC |
| Sept 15-18     | <a href="#">COURTROOM TECHNOLOGY</a><br><i>The electronic litigator from case analysis/prep to courtroom presentations</i><br><i>Application deadline is July 17, 2009</i> | NAC<br>Columbia, SC |