

The

PROSECUTOR



Utah Supreme Court

Crawford does not extend to preliminary hearings and spousal privilege only extends to involuntary in-court statements

On June 30, 2007, screams were heard by the Timmerman's neighbor and reported to the police. During the investigation, Mrs. Timmerman told police that Travis Timmerman had repeatedly hit her while trying to force

her to have anal and vaginal intercourse. She provided a written statement to that effect and exhibited bruising on her arms and face. In addition, a Sexual Assault Nurse Examination (SANE) report also documented her injuries and statements of what had occurred. Timmerman was charged with attempted rape, forcible sexual abuse, and assault. At the preliminary hearing Mrs. Timmerman invoked her spousal privilege and refused to testify against her husband. The State introduced into evidence Mrs. Timmerman's statements to the police and the SANE nurse. The judge bound the case over for trial. Timmerman filed a motion to quash the bindover, but it was denied by the district court. Timmerman appealed and argues that his confrontation rights were violated because he couldn't cross-examine Mrs. Timmerman on her out-of-court statements. He further argued that by admitting the statements, the judge

ignored her spousal privilege.

The Utah Supreme Court relied on *State v. Rhinehart* in holding that Crawford does not extend to preliminary hearings and accordingly, that Sixth Amendment confrontation rights only apply to trials. 2006 UT App 517, 153 P.3d 830. It further reasoned that the 1995 amendment to article I, section 12 of the Utah Constitution "removed the constraints of Utah's Confrontation Clause from preliminary hearings" and left the admittance of such evidence to be "governed by the reliable hearsay language in the Utah Constitution and rule 1102 of the Utah Rules of Evidence. In addition, the court held that Mrs. Timmerman's spousal privilege was not violated because the protection only extends to involuntary in-court statements. It reasoned, "in light of its purpose, we interpret the spousal testimonial privilege to apply only to compelled testimony, or in other words, involuntary, in-court

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testimony. We believe this narrow interpretation of the privilege will not serve to exclude relevant testimony or extend into privilege beyond its narrow purpose. Further, admitting an out-of-court statement into evidence does not force one spouse to testify against the other or tempt the testifying spouse to commit perjury.” Affirmed. *State v. Timmerman*, 2009 UT 58.

Charging clarification between the Imitation Act and the Counterfeit Act

Edgar Jeffries sold an undercover officer a “twist,” which is a common way of packaging crack cocaine. After paying for the twist the officer “quickly discovered that it contained small chunks of drywall instead of cocaine.”

Jeffries was charged with distribution of a counterfeit substance, a second degree felony. Following the preliminary hearing, Jeffries filed a motion to quash the bindover and argued that he should only have been charged with unlawful distribution of an imitation controlled substance, a class A misdemeanor. The court denied the motion. Jeffries entered a conditional guilty plea to an amended charge and reserved the right to appeal. The appellate court certified the case to the Utah Supreme Court.

The Utah Supreme Court compared and analyzed the Imitation Act and the Counterfeit Act. It concluded that the definition of a counterfeit substance is only applicable to substances falsely represented, by means other than false

markings, to be legitimate or lawful controlled substances. Accordingly, a substance falsely represented to be an illicit street drug would be charged under the imitation substance statute. In this case, since the drug involved was represented to be an illicit street drug it should have been charged under the Imitation Act. As such, the district court holding is reversed and remanded. *State v. Jeffries*, 2009 UT 57.

Evidence of a victim’s character must be offered and admitted to show propensity

Kenneth Leber got in a fight with his fifteen-year-old son, M.L., which resulted in M.L. suffering a bloody mouth, swollen eye and marks on his neck. Leber

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admitted to the altercation but claimed M.L. was the aggressor and Leber had only acted in self defense. Leber was charged with second degree felony child abuse. Prior to the trial the court granted Leber's motion to exclude evidence of prior bad acts. However, during the trial, the court ruled that Leber had "opened the door to his character trait for violence under rule 404(a) of the Utah Rules of Evidence." Specifically, during opening statement his attorney stated that Leber had problems with M.L. in the past and that the child had attacked Leber. Later during the testimony of M.L., Leber questioned him about a fight with his mother's boyfriend. After an objection and rewording the question, M.L. admitted "it was a disagreement to the extent that [he was] no longer comfortable living at [his] mother's house." Leber's counsel also told the trial court "he intended to show that M.L. has been obstreperous towards his dad ... and that he took actions against his dad ... and had the type of nature that he's done things against his dad in the past." The court found that Leber had opened the door regarding the victim's violent character and allowed the State to question Leber on cross-examination about his prior bad acts. As such, considerable evidence of Leber's past violent behavior was admitted. Leber was convicted and sentenced to prison. On appeal, Leber argued that the court abused its discretion by admitting the evidence of prior bad acts under rules 404(a) and 405 without complying with rule



404(b) of the Utah Rules of Evidence. The appellate court affirmed the rulings of the trial court. Certiorari was granted.

The Utah Supreme Court reasoned that while Leber argues that M.L. was the first aggressor and Leber was acting in self-defense, the issue of whether this claim opens the door to "an accused's violent character under rule 404(a) hinges on the evidence used to demonstrate that the victim was the first aggressor." If Leber offered evidence that M.L. had a propensity to be violent, then the door has been opened to explore Leber's own violent character and the prosecutor may offer rebuttal. However, the court further

stated that evidence of the victim's violent character "must be "offered by the accused *and admitted*" before a court may rule that the accused has opened the door to evidence of his own propensity for violence. Utah R. Evid. 404(a)(1)

(emphasis added)." The court went on to review the statements made during trial and found that "no evidence of M.L.'s involvement in a violent confrontation was ever offered and admitted, [and] Leber did not inject propensity evidence into the record." Accordingly, the court held that the trial court had abused its discretion in ruling that Leber had opened the door to evidence of his violent character. In addition, the Utah Supreme Court held that the trial court abused its discretion in erroneously interpreting rule 405(a). It reasoned that rule 405(a) does not "provide a justification for allowing [Leber] to be cross-examined as to his

prior bad acts to prove action in conformity therewith." Furthermore, Leber was neither a reputation nor an opinion witness. Whether the evidence was admissible under rules 404(a) and 405 must be determined before proceeding to a rule 402 and 403 analysis. "The court of appeals erroneously failed to address this threshold issue." Accordingly, the court remanded the case back to the court of appeals to determine whether Leber's conviction required reversal on direct appeal. *State v. Leber*, 2009 UT 59.

Utah Court of Appeals

Jurisdiction attaches with the filing of an information, absent statute to the contrary

In February 2002, the Salt Lake City Attorney's Office filed an information in the Third District Court charging Gregory Weiner with multiple class B misdemeanor offenses. Shortly thereafter, in July 2002, the Salt Lake City Justice Court was created. The City did not refile the information; rather it continued prosecution of Weiner in the district court. For unknown reasons, "the case was not resolved prior to the passing of the statutory period for filing an information with the justice court." In August 2008, Weiner filed a motion to dismiss claiming that the court lacked jurisdiction over him and that the creation of the justice court had divested the district court of its prior jurisdiction. The district court granted the motion in favor of Weiner and dismissed the City's case. The City appealed.

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PROSECUTOR PROFILE

JAMI BRACKIN

Deputy Summit County Attorney

As a child, Jami wanted to be an archeologist, but changed her mind when she discovered there were spiders involved. Then she wanted to be an architect until she learned there was a lot of math, so she decided to become a dancer, which she was, until she blew out her knees after a European tour with a dance company. Being an attorney was her last choice.

Jami attended the University of Southern California (Go Trojans!) and graduated with a degree in International Relations in 1988. She went to BYU for law school and graduated in 1992. During law school Jami did some public defender work but decided she “didn’t like that side nearly as much as the good guy side.” Following law school she worked for a large firm in Salt Lake, but realized she wanted more court time, so when she was offered a position with the Uinta County Attorney’s Office in Wyoming, she took it. There she handled both civil and criminal cases, but her primary function was as a felony prosecutor. After nearly ten years she took her current position working in the civil division of the Summit County Attorney’s Office, where she has been for the past eight and a half years. She says, “The civil side is very different but equally rewarding and I really love the work. It’s very diverse.”

Jami is married to a wonderful husband. He is a police officer who cooks and cleans toilets! They met in court when they both were living in Jackson, Wyoming. When she has time she loves to read, play golf, paint with watercolors and make porcelain dolls. Jami is an avid Trojan’s fan, and a self-proclaimed sports junkie with a special love of football. Her favorite music is Earth, Wind & Fire, her favorite movie is *Singing in the Rain* and her favorite TV series is *Lost*. As a kid she wanted to marry Johnny Quest, but now she’ll watch whatever cartoons her kids are watching. Her favorite foods include mashed potatoes, Pop Tarts, and Diet Coke. If grabbing a snack she reaches for a Butterfingers. Her most interesting job of the past was when she worked in Hollywood for the game show company, Mark Goodson Productions, as a celebrity coordinator. She booked the rich and famous for game shows and other events. Jami loves to travel and has been to all the states west of the Mississippi (including Alaska and Hawaii) and many east of it as well. She’s also been to Europe, Mexico, Canada, the Caribbean and one day hopes to travel to Egypt. Jami describes herself as an M&M, hard shell on the outside and sweet mushy chocolate on the inside!

Most embarrassing memory? “That would be the time I was pushing a chair down the hall having just finished a high powered meeting with lots of elected officials when the chair got caught on the carpet and stopped, but I didn’t. I went a** over end over the chair, legs flailing, and saying bad words, leaving a lovely arched black scuff mark from my high heel on the newly painted wall as a souvenir, while the people I had just met with looked on. I’d really like to forget that one.” No doubt, having it in print will help it to ‘fade.’ Jami is not alone with embarrassing moments, however. She recalls doing a murder trial in which the regular judge had recused himself and a retired judge was sitting on the bench. He was always falling asleep during the trial, and one day Jami came to a point in questioning a witness that was a natural time to take a break. She asked the judge if he’d like to take a break now or continue. He didn’t answer. Everyone was now looking at the judge sleeping on the bench. Not knowing what else to do, she cleared her throat and asked again in a louder voice. Still no answer. Feeling a little embarrassed, she looked at the jury who were somewhat amused, looked at the clerk who just shrugged her shoulders and asked one more time, nearly screaming this time. No answer! Finally the clerk took pity and went over to poke the judge awake. Jami asked again and he told her to keep going. She asked one question, and he called for a lunch recess!

In Jami’s opinion, the most important quality for any public attorney, whether civil or criminal, is a respect for who you represent and respect for the rule of law. The least satisfying aspect of being a public attorney is that you never get rich, however, the most satisfying is “feeling like you are doing something to make the world a little better place.” When asked what sets her apart from the typical prosecutor, she responded, “I don’t think that anything does. I think I’m as sick and twisted as the rest of them.” Keep up the excellent work Jami!



PREFERRED NAME - Jami

BIRTHPLACE - SLC, Utah

FAMILY

Married and mother of two ages 7 and 9, step-mother of two ages 23 and 25.

She is the eldest of five children

PETS

Mimi the Shih-Tzu and Rex the Guinea Pig

FIRST JOB

Burger flipper at Wendy’s

FAVORITE BOOK

Katherine by Anya Seton

LAST BOOK SHE READ

The Good Husband of Zebra Drive by Alexander McCall Smith

FAVORITE QUOTE/WORDS OF WISDOM

If you don’t participate in your democracy, you have no right to bitch about what happens.



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The appellate court held that the “district court’s jurisdiction attached when the information was filed against Defendant, and in the absence of a clear expression of statutory intention to the contrary, the creation of the justice court did not divest the district court of jurisdiction over Defendant.” The appellate court reversed the district court’s ruling and remanded. *Salt Lake City v. Weiner*, 2009 UT App 249.

Correction of clerical error not material, for purposes of filing a timely appeal

Kendall Swenson was convicted of theft, among other related offenses in October 2006. On March 14, 2007, the court mistakenly entered “Minutes-Sentence, Judgment, Commitment” listing one of the convictions as a third-degree felony instead of a class B misdemeanor. Accordingly, the sentence imposed corresponded with the third-degree felony prison sentence and fine, rather than the lower jail term and fine. Swenson filed an appeal on April 20, 2007, but did not refer to the conviction and sentencing error. On July 30, 2007, the court entered an “Addendum to Sentence, Judgment, Commitment” stating the court’s intent that Swenson’s sentence should run concurrent to any federal charges pending. On August 15, 2007, Swenson filed an amended appeal, appealing from the July 30th order. In November, the court dismissed the appeal for lack of jurisdiction, holding that he only had 30 days from the March order to file an appeal and that the July order did not “restart the time for appeal because it “did not constitute a material change” in the

judgment, but was merely a clarification.” Then, in February 2008, the court amended the March 2007 order and corrected its original entry of the conviction and sentence to reflect a class B misdemeanor offense, instead of the third-degree felony offense. As such, the sentence was reduced to the maximum allowable for a class B misdemeanor. On March 11, 2008, Swenson filed another appeal. The issue currently before the court is whether there was jurisdiction to review the claims on appeal.

The appellate court cites to Utah Rules of Appellate Procedure 4(a), which indicates that if an entry is modified or amended in some material manner, the time permitted to appeal runs from the date of the modification or amendment. However, if the entry does not change the substance or character of the judgment, the entry is “merely a nunc pro tunc entry which relates back to the time the original judgment was entered, and does not enlarge the time for appeal.” In this case, the court held that the amendment was a correction of a clerical error and not material; it “simply brought the sentence into conformity with the jury’s verdict.” It further stated that an illegal sentence can be corrected “at any time” under the Utah Rules of Criminal Procedure. Accordingly, the appeal was not timely filed and the case was dismissed for lack of jurisdiction. *State v. Swenson*, 2009 UT App 251.



When acquiring property via a deed that references a recorded plat, a right to use any street or common area arises

The original seven owners of a subdivision signed and approved a subdivision plat that read, “Know all men by these presents that we, all of the undersigned owners of all of the property described in the surveyor’s certificate hereon and shown on the map, have caused the same to be subdivided into lots, blocks, streets and easements.” Five of the lots abutted a private road named Oak Lane. Lot 2, which abutted Oak Lane, also had access by a public road. The city council accepted the plat and all parties correctly understood Oak Lane to remain a private roadway. Since the signing and recording of the plat in 1977, the original owners, the Van Wagoners, sold Lot 2 to the Watkinses, who understood that Oak Lane was a private road. The Watkinses then sold the property to the Griffins. The deed from that transaction included a reference to the 1977 subdivision plat and that title was “subject to easements, covenants, conditions and restrictions of record.” In 2003, the owners of lots 1,3,4, and 5 formed an “Association to manage the maintenance and landscaping of Oak Lane.” The Griffins, owners of Lot 2, refused to join but stated their intent to continue to use Oak Lane. All other owners quitclaimed their interests in Oak Lane to the Association. As the newly established owner, the Association placed boulders to block the Griffins access to the lane. The trial court granted summary judgment to the

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Griffins, holding that when the subdivision was created, an easement was also created over the private lane for any of the property owners whose property abutted the lane. Since Griffins' property abutted the lane and was sold to them with reference to the plat, the trial court found that they had an easement allowing "access, ingress and egress from Oak Lane to their property." The Association appealed the ruling.

The court of appeals agreed with the trial court. It reasoned that when a property owner acquires property via a deed that references a recorded plat, a right to use any street or common area included on the plat typically arises in favor of the landowner. Additionally, the right of use may be enforced against the original developer as well as any "neighboring landowners who attempt to interfere with the right." Since Oak Lane was used as a road when the Griffins acquired their property and their deed referenced the plat, they had an easement for the use of the roadway. Although other facts remained in dispute, the court found that none were material to the determination of whether the Griffins had a right to use the roadway. As such, the trial court's granting of summary judgment is affirmed. *Oak Lane Homeowners Ass'n v. Griffin*, 2009 UT App 248.

A finding that evidence is inadmissible does not require a hearing under rule 412

Zachariah Clark was convicted of five counts of sodomy on a child and five counts of sexual abuse involving his two younger brothers, T.C. and S.N.C., ages 12 and 10 respectively. Clark had lived with his two younger brothers and their parents until 2002, at

which time he was estranged from the family. In November 2005, Clark began making visits to the home. In May 2006, S.N.C. told his mother the boys had been sexually abused. The parents filed a police report and interviews at the Children's Justice Center were conducted. During the interviews and in addition to the alleged abuse by Clark, S.N.C. admitted to being anally sodomized by a neighbor boy, A.R., and by T.C. When T.C. was interviewed he provided details of abuse by Clark, but also admitted to sodomizing S.N.C.; however, he claimed he acted under the duress of Clark. Before trial Clark moved to admit evidence of the sexual activities between the victims, as well as S.N.C.'s allegation against A.R. and requested an evidentiary hearing on the



matter. Clark argued that the evidence was admissible under rule 412(b) of the Utah Rules of Evidence, and in the alternative, that if the allegation against A.R. was false, the evidence was admissible irrespective of rule 412. The State opposed the motion, arguing that the evidence was barred by rule 412 and no exception applied. The State further argued that Clark could not prove that S.N.C.'s allegation

against A.R. was false and was therefore, precluded by the rule. The trial court refused to admit the evidence and denied the motion for an evidentiary hearing. Clark was convicted and appealed.

On appeal, Clark contended that the evidence of other sexual behavior was necessary for effective cross-examination and suggested a motive for the allegations, which he had the right to explore under the Confrontation Clause. Alternatively, Clark argued that even if the allegations against A.R. "were false, the evidence was admissible under 412 because its exclusion violated his constitutional right to confrontation."

The appellate court held that Clark failed to establish that an inquiry into the victims' "sexual history had any particular relevance or probative value." Furthermore, the prosecutor had previously agreed to the defendant questioning the victims' general sexual knowledge as long as he did not disclose the specific sexual acts between them. Prosecution had also agreed to Clark questioning and exploring family relations to support an inference of motive to make false accusations. Accordingly, the appellate court held that the trial court properly excluded the evidence of sexual behavior, insofar as they were true. Although the appellate court agreed "that a prior false allegation of sexual assault by the accuser may be admissible under the Confrontation Clause, the defendant must establish the falsity of the allegation by a preponderance of the evidence before any constitutional rights are triggered." The court held that Clark had not met this threshold and could not show a violation of his rights. The court also found that where

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FALL
CONFERENCE
2009





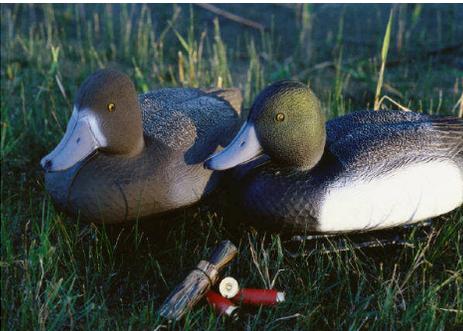
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the trial court found the evidence inadmissible, rule 412 did not require a hearing on the matter. The requirement is only triggered if “the trial court intends to admit evidence of the victim’s prior sexual conduct.” “A rule 412 hearing is not a discovery tool.” Clark failed to assert that the prior allegation was false, much less demonstrate the existence of a concrete indicator of falsity. As such, the trial court was held to be correct in its exclusion of the evidence of other sexual behavior and Clark’s right of confrontation was not triggered. Affirmed. *State v. Clark*, 2009 UT App 252.

Tenth Circuit Court of Appeals

Treaty right to possess firearms for hunting affirmed but forfeited

Dionysius Fox, a member of the Navajo Nation, was found asleep and intoxicated in a running vehicle. During the investigation and subsequent arrest for driving under the influence of alcohol, police found a shotgun and rifle hidden in the trunk of the car. Fox had previously been convicted of several felonies and was restricted from possessing any firearm. Fox claimed the guns were borrowed



so he could go hunting. He argued, although otherwise restricted from possessing a firearm, “an 1868 Treaty between the United States and the Navajo Nation guarantees him the right to hunt on his reservation. After an evidentiary hearing, the district court denied Mr. Fox’s motion to dismiss the indictment or present an affirmative defense based on his alleged treaty right. The court found that “the Treaty of 1868 concerns the Navajo Indian Tribe’s right to hunt, not individual Navajo Indians’ right to hunt.” Fox pled guilty under the terms of a plea agreement, but reserved the right to appeal.

Although other circuits have held similarly to the trial court’s ruling, the Tenth Circuit Court of Appeals disagreed. It relied on *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985), and stated that “while acknowledging the right to hunt and fish on reservation land is a long-established tribal right, ... individual Indians ... enjoy a right of user in the tribe’s hunting and fishing rights.” Accordingly, the court held that Fox could assert his individual hunting rights under the Treaty of 1868. However, the court went on to note that those who commit crimes could forfeit the treaty rights. “Article I of the Treaty stipulates that if a wrong is committed “subject to the authority of the United States” the tribe agreed to “deliver up the wrongdoer to the United States, to be tried and punished according to its laws.” Therefore, Fox was not eligible to assert his right to hunt and the trial court’s judgment was affirmed. *United States v. Fox*, 573 F.3d 1050 (10th Cir. 2009).

Drug possession does not constitute distribution, for purposes of statute

Carl Jacobs pled guilty to possessing cocaine base with intent to distribute. Pursuant to the acceptance of that plea and because the conviction was his “third or subsequent conviction for distribution of controlled substances,” the court permanently barred him from receiving federal benefits under 21 U.S.C. § 862(a).



Jacobs appeals the disbarment from benefits.

The court relied on the definition of ‘distribute’ as explained in Title 21. Based on that definition, ‘distribute’ means ‘to deliver’ a controlled substance. As such, “distribution of controlled substances” includes only those crimes that include distribution as an element. Jacobs was convicted of possession with intent to distribute, which does not require the delivery of a substance and is not the equivalent of distribution. The government conceded that Jacob’s convictions did not consist of “the distribution of controlled substances” for purposes of § 862 (a). Thus, the district court erred in banning Jacobs from federal benefits. The district court’s ruling of ineligibility is vacated. Remanded for resentencing. *United States v. Jacobs*, 579 F.3d 1198 (10th Cir. 2009).

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Other Circuits

Illegal search saved by K9 sniff and inevitable discovery doctrine

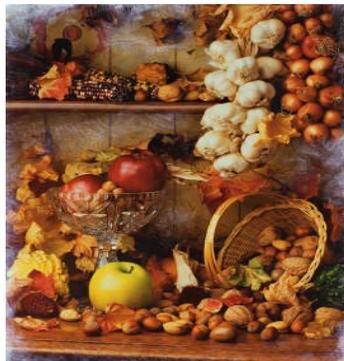
A railroad police officer became suspicious that Fallon was carrying illegal drugs. He spoke with Fallon and obtained consent to search his backpack. However, Fallon would not consent to a search of his briefcase. He told the officer that the briefcase contained \$50,000 in cash. The officer seized the briefcase, opened it and found a large amount of cash. He then closed the briefcase and called for a drug detection dog. The dog provided a positive final response, indicating that the briefcase held the odor of illegal drugs. The government asked the court to forfeit the money (totaling \$100,120.00) as illegal drug proceeds.

The court had little difficulty in deciding that the search of the briefcase was plainly illegal. It was conducted without a warrant, without consent, without probable cause and no legal justification could be found to sustain the search. However, the court allowed the evidence of the subsequent dog sniff under the doctrine of inevitable discovery. The court held that there was not reasonable suspicion to detain the briefcase at the time that the officer approached Fallon (Marracco was not present; he later claimed an interest in the money). Reasonable suspicion arose during the officer's questioning. Fallon told them that there was a large amount of cash in the briefcase when they asked if he was carrying drugs or large amounts of money. He began to sweat during this part of the encounter. He had purchased

his ticket with cash, and for one-way, just a couple of days before traveling. Thus, the officer would have been able to detain the briefcase for as long as reasonably required to obtain a drug dog. The sniff would have led to probable cause and a warrant to inspect the briefcase. Reversed. *United States v. Marrocco and \$100,120*, 578 F.3d 627 (7th Cir. 2009).

9th Circuit applies *Gant* retroactively; disagrees with 10th Circuit

The Ninth Circuit became the second court of appeals to weigh in on whether the decision in *Arizona v. Gant* will apply retroactively to cases under prosecution. The Tenth Circuit Court of Appeals recently held in *United States v. McCane* that searches now impermissible under the *Gant* decision may be subject to a good faith exception to the exclusionary rule. Such a decision seems entirely consistent with the purpose of the exclusion rule, that is, to deter police misconduct. Earlier this



year, in *Herring v. United States*, Supreme Court again emphasized that the exclusionary rule ought to be used judiciously when necessary to deter wrongful action by police. Where officers' searches

are in perfect harmony with constitutional principles in place at the time, it makes little sense to apply the exclusionary rule. Notwithstanding, the Ninth Circuit disagreed with the Tenth Circuit and held that the rule in *Gant* must apply retroactively in the Ninth Circuit. This means that searches that were lawfully conducted will still result

in exclusion of relevant evidence if a particular search would now be proscribed by *Gant*. Reversed and remanded. *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009).

Other States

Confidential informer's recorded statements to defendant held inadmissible

During a controlled buy of marijuana, a conversation was recorded between the defendant, Johnson, and the informant, Lewis, who was making the buy. The conversation did not contain any specifics regarding the drugs being purchased or payment. A question about whom "it" was for and a subsequent comment that "it" was "juiced up a little" was the extent of any incriminating evidence. The police detective testified at trial that persons involved in a drug buy rarely discuss the details of the transaction. Lewis was unavailable to testify due to his death prior to the trial. Johnson was convicted. On appeal, Johnson argued that Lewis' recorded statements were testimonial and that the admission of the statements violated his rights under the Sixth Amendment's Confrontation Clause. The State argued that even if admission of the statement was error, it was harmless error.

The South Dakota Supreme Court found that Lewis's statement was not testimonial and not subject to Crawford restrictions. It further found that "it was more probable than not that the error materially affected the verdict." Accordingly, it reversed the lower court's decision and held

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that Lewis's statement was inadmissible. *State v. Johnson*, 771 N.W.2d 360 (S.D. 2009).

Alford plea stipulations do not constitute an admission of facts

Christopher Michael Case entered an Alford plea to an amended charge of aggravated endangering of a child. In the plea agreement he "stipulated to the factual basis provided by the State." At the plea hearing four days later the facts were presented to the judge and neither Case nor his attorney objected. The court accepted his plea and found him guilty of the charge. Two months later at the sentencing hearing, the court found that "Case's crime was sexually motivated through the stipulated factual basis" provided by the plea agreement. The court imposed a substantially higher



prison term than what Case anticipated from the terms of the plea agreement. Case appealed the 'sexually motivated' basis for the higher sentence arguing that he only agreed there was a factual basis for his plea, but did not admit to anything else. However, the appellate court "emphasized his stipulation to the facts" and held that "because Case stipulated to the facts which the trial court relied upon ... there was no extrajudicial factfinding."

The Kansas Supreme Court disagreed and held that Case's stipulation to the facts in support of the Alford plea did not constitute an admission of facts. "In an Alford plea, failure or even refusal to object to the presented facts or to put on evidence

does not equate to an admission of facts and does not empower the trial court to make findings based upon those purported admissions to increase the sentence beyond the prescribed statutory maximum." By its very nature, an Alford plea does not involve an admission of guilt; rather it is merely an acknowledgement that the State has sufficient evidence to prove guilt beyond a reasonable doubt. Reversed and remanded. *State v. Case*, 213 P. 3d 429 (Kan. 2009).

Lack of current certification for K9 team is not fatal to probable cause finding

Guerra was spotted driving 3 M.P.H. over the speed limit on the freeway. A trooper stopped him. During the traffic stop, the trooper directed his drug detector canine to sniff Guerra's car. The dog gave a positive final response. The trooper searched the car on the basis of the dog's final response and found a large quantity of marijuana. At the time of the dog sniff, the dog was not certified to detect the odors of illegal drugs. Guerra asked the court to suppress the evidence, arguing that the lack of current certification rendered the dog's sniff legally insufficient to create

probable cause to search.

The South Dakota Supreme Court found that the missing certification was not fatal to a probable cause finding. The court held that the purposes of the mandatory certification statute had been fulfilled, even though the letter of the law had not been followed. The court also expressed doubt that suppression would be the appropriate remedy when the canine team failed to meet the technical certification requirements and yet had completed the necessary training and demonstrated field reliability. Though the evidence was not suppressed in this particular case, canine handlers should not place the evidence at risk and should not force prosecutors into a suppression battle by failing to recertify on a timely basis. Affirmed. *State v. Guerra*, --- N.W.2d ----, 2009 WL 2579624 (S.D. 2009).

HAPPY HALLOWEEN



End of **BRIEFS**

JUST FOR THE FUN OF IT...

YOUR AGE BY CHOCOLATE MATH



** Don't cheat by looking ahead, take it one step at a time!

1. Pick the number of times a week that you would like to have chocolate. It must be more than once but less than 10.
2. Multiply this number by 2 (just to be bold!)
3. Add 5
4. Multiply by 50 (you can use a calculator!)
5. If you have already had your birthday this year, add 1,759. But if you have not yet had your birthday only add 1,758.
6. Subtract from your total the four digit year you were born.
7. You should have a three digit number.
 - The first digit is your original number of how many times you wanted chocolate.
 - The next two numbers are your age. Oh yes it is! (Unless you have turned 29 each year for the past two or more years. In that event, just eat more chocolate!)

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On the Lighter Side



The guy is amazed. He goes back in and asks the owner what he wants for the dog.

“Ten dollars,” the guy says.

“Ten dollars? The dog is amazing. Why on earth are you selling him so cheap?”

“Because he’s a liar. He never did any of that stuff.”

Thanks to Jann Farris from Morgan County for sending this one in.

Help Wanted: Magistrate Judge, Must Be Willing to Evade Bears

Posted Aug 11, 2009, 08:47 am CDT
By [Debra Cassens Weiss](#)

Thirty candidates have applied to be a federal magistrate judge hearing mostly misdemeanor cases while serving in a small courthouse that is nothing more than a gray clapboard structure.

But those detriments pale in comparison to the benefits of what is “one of the most scenic jobs in American law”—magistrate judge in Yosemite National Park, the New York Times reports. A panel of lawyers and others is evaluating the candidates, and an appointment is expected by the end of the year.

The courthouse “sits beneath Yosemite Falls, where water cascades thousands of feet to the valley floor,” the story says. “A broad window behind the bench from where the judge presides offers a calming view of the park’s pine, cedar and oak

trees, and in the winter, falling snow.”

The judge is permitted to live on park grounds, and he or she will be paid \$160,000 a year to hear misdemeanor cases from throughout the park. Felonies are sent to a different courthouse.

Magistrate Judge William Wunderlich resigned from the job because of health concerns. One magistrate judge who filled in for him for two weeks this summer, Larry Boyle, called the setting the “Garden of Eden,” although he recalls having to stay away from a bear encountered on a walk. He told the Times he’s always willing to serve.

“I accept,” he said. “I will unpack my suitcase and stay.”

Thanks to the weekly, electronic version of the ABA Journal.



DO YOU HAVE A JOKE, HUMOROUS QUIP OR COURT EXPERIENCE? We’d like to hear it! Please forward any jokes, stories or experiences to Marlesse Whittington, Editor, at mwhittington@utah.gov.

Submission does not ensure publication as we reserve the right to select the most appropriate material available and request your compliance with copyright restrictions. Thanks!

A guy is driving down a country road and sees a sign in front of a house: “Talking Dog for Sale.” He rings the bell and the owner tells him the dog is in the backyard. The guy goes into the backyard and sees a Labrador retriever sitting there.

“You talk?” he asks.

“Yep” the Lab replies.

“So, what’s your story?” he asks.

The Lab looks up and says, “Well, I discovered that I could talk when I was pretty young. I wanted to help the government, so I told the CIA about my gift. In no time at all they had me jetting from country to country, sitting in rooms with spies and world leaders because no one figured a dog would be eavesdropping. I was one of their most valuable spies for eight years running.”

“But the jetting around really tired me out, and I knew I wasn’t getting any younger so I decided to settle down. I signed up for a job at the airport to do some undercover security, wandering near suspicious characters and listening in. I uncovered some incredible dealings and was awarded a batch of medals. I got married, had a mess of puppies, and now I’m just retired.”

Calendar

Utah Prosecution Council (UPC) And Other Utah CLE Conferences

October 21-23	<u>GOVERNMENT CIVIL PRACTICE CONFERENCE</u> <i>Training for those who keep the Commission and Council happy</i>	Moab Valley Inn Moab, UT
November 3-5	<u>JOINING FORCES: PREVENTION, INVESTIGATION, PROSECUTION AND TREATMENT OF CHILD ABUSE</u> <i>Sponsored by Prevent Child Abuse Utah (UPC is a co-sponsor)</i>	Davis Co Conf Ctr Layton, UT
November 11-13	<u>COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR</u> <i>Executive discussion and training for the bosses and their chief deputies</i>	Dixie Center St. George, UT
November 18-20	<u>ADVANCED TRIAL SKILLS TRAINING – CHILD SEX ABUSE CASES</u> <i>The third annual advanced trial skills training for experienced prosecutors</i>	Hampton Inn West Jordan, UT
April 22-23, 2010	<u>SPRING CONFERENCE</u> <i>Case law update, legislative update and more</i>	Larry Miller Campus Sandy, UT

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

October 24-28	<u>THE EXECUTIVE PROGRAM - NCDA*</u> <i>Designed specifically for elected prosecutors and chief deputies</i>	Myrtle Beach, SC
Oct. 31 - Nov. 4	<u>NATIONAL CONFERENCE ON DOMESTIC VIOLENCE - NCDA*</u>	San Antonio, TX
November 8-12	<u>PROSECUTING HOMICIDE CASES - NCDA*</u>	San Francisco, CA
December 6-10	<u>FORENSIC EVIDENCE - NCDA*</u>	San Diego, CA
December 6-10	<u>PROSECUTING SEXUAL ASSAULTS - NCDA*</u>	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.

Calendar cont'd

National Advocacy Center (NAC)

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

Restoration of federal funding for the NAC is still being sought. In the meantime, NDAA continues to offer courses at the NAC, albeit without reimbursement of expenses. Students at the NAC will be responsible for their travel, lodging and partial meal expenses.

[For specifics on NAC expenses click here.](#)

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

January 26-29, 2010	COURTROOM TECHNOLOGY <i>The electronic litigator from case analysis/prep to courtroom</i> Application deadline: November 6, 2009	NAC Columbia, SC
December 7-11 February 1-5, 2010 March 15-19, 2010	TRIAL ADVOCACY I <i>A practical, hands-on training course for trial prosecutors</i> Application deadlines: Dec. course is Sept 25th, Jan. course is Nov. 20th, March course is Jan. 8th.	NAC Columbia, SC
January 11-15, 2010 February 8-12, 2010	BOOT CAMP: AN INTRODUCTION TO PROSECUTION <i>A course for newly hired prosecutors</i> Application deadlines, Jan. course is Oct. 30th, Feb. course is Dec. 4th.	NAC Columbia, SC
February 21-26, 2010	CHILD PROOF: ADVANCED TRIAL AD FOR CHILD ABUSE PROSECUTION <i>Intensive course for experienced child abuse prosecutors</i> Application deadline: Dec. 11th.	NAC Columbia, SC
March 1-5, 2010	UNSAFE HAVENS II <i>Prosecuting on-line crimes against children</i> Application deadline: Dec. 18th.	NAC Columbia, SC
March 22-26, 2010	TRIAL ADVOCACY II <i>Practical instruction for experienced trial prosecutors</i> Application deadline: Jan. 15, 2010.	NAC Columbia, SC
March 29- April 1	CROSS EXAMINATION <i>A complete review of cross examination theory and practice</i> Application deadline: Jan. 22, 2010.	NAC Columbia, SC