

# The PROSECUTOR



## United States Supreme Court

**Choice of defense is undermined by failure to investigate mitigating evidence.**

In a case involving a defendant who was convicted of robbery and kidnapping resulting in death, Demarcus Ali Sears was sentenced to death. On post-conviction review the state court upheld the sentence despite finding that the defense attorney failed

to provide a constitutionally adequate investigation into mitigating evidence. Rather, it upheld the ruling based on the lack of a showing of prejudice to the case outcome. The Supreme Court of Georgia denied review and defendant petitioned for writ of certiorari which was granted.

The United States Supreme Court disagreed with the lower court and held that the post-conviction court failed to conduct a proper prejudice inquiry when it determined that the inadequate investigation did not prejudice the defendant. It stressed that the inquiry should include a “probing and fact-specific analysis” and would “necessarily require a court to



‘speculate’ as to the effect of the new evidence -- regardless of how much or how little mitigation evidence was presented during the initial penalty phase.” Judgment vacated and case remanded. *Sears v. Upton*, 130 S. Ct. 3259 (2010).

## Utah Supreme Court

**Accomplice must act intentionally, knowingly, or recklessly as to the results of his conduct.**

Warren Jeffs was convicted of two counts of rape as an accomplice for his role in the marriage of fourteen-year-old Elissa Wall to her nineteen-year-old first cousin, Allen Steed. Despite Wall’s repeated protests, before and after the wedding

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# LEGAL BRIEFS



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ceremony, she was subjected to sexual intercourse by Steed according to his desires and Jeffs' admonition for Wall to "give her "mind, body, and soul and obey without any question." Jeffs appealed arguing a variety of errors, one of which was that the accomplice liability and consent jury instructions were erroneous. Specifically, he argued that the instructions given focused on Jeffs' relationship with Wall rather than on Steed's relationship with Wall. He claimed that the court erred in refusing to instruct that Jeffs could not be found guilty of the offenses unless he intended for Steed to have nonconsensual sexual intercourse with Wall.

The Utah Supreme Court held that under the accomplice liability

statute, the defendant must act intentionally, knowingly, or recklessly as to the results of his conduct and that the results of the conduct must be a criminal offense. The court rejected the State's interpretation that a defendant could act in the abstract and reasoned that such a conclusion could impose accomplice liability on a person who left his house unlocked resulting in the theft of his personal property. However, the court did clarify and affirm that an accomplice does not have to act with the same intent as the principal actor, as long as the accomplice intended that the offense be committed. Convictions reversed and case remanded for new trial. *State v. Jeffs*, 2010 UT 49.

## Supreme Court mandates strict compliance with rule 11.

Douglas Anderson Lovell was convicted of the aggravated murder of Joyce Yost. On his third direct appeal, Lovell challenged the district court's denial of his motion to withdraw his guilty plea. He argued that he had good cause to withdraw his motion because the court failed to comply with Rule 11 when it failed to inform him that if he pled guilty he'd be waiving certain rights and also, when it failed to properly advise him of his right to an appeal.

The Utah Supreme Court reaffirmed that the rights provided in rule 11 are guaranteed by the constitution and case law. Moreover, a plea cannot be

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“knowing and voluntary” if the defendant is not aware of the rights. Regardless of actions taken by the lower court and the belief that Lovell was aware of all his rights pursuant to prior court appearances, it held that Lovell had not been clearly and unequivocally informed of all rights in compliance with rule 11. Accordingly, the court held that there was good cause for Lovell to withdraw his plea. Reversed and remanded. *State v. Lovell*, 2010 UT 48.

## Utah Court of Appeals

**A legal interest is void if it is illegal, offends public policy, or harms the public.**

Roger Howard Steele is a resident of California who returns to Utah to hunt and visit his wife’s family. After incurring a high number of points from prior hunt drawings where he had not won a permit, Steele decided to apply for a Utah resident drawing. He claimed to believe he qualified as a Utah resident because of his visits to the state. His large pool of points resulted in him receiving the coveted permit, which he used to participate in the hunt and subsequently shot a large trophy deer. Upon further investigation, it was discovered that he was not a Utah resident. As such, he was charged and convicted of wanton destruction of protected wildlife, which prohibits taking a trophy animal without a valid hunting permit. On



appeal, one of the challenges Steele raised was that the court erred in concluding that his hunting permit was ‘void’ from the onset of its issuance, rather than ‘voidable’ when further investigation, after the hunt, revealed his error in residency.

The appellate court relied on *Ockey v. Lehmer*, 2008 UT 37, ¶18, 189 P.3d 51, to differentiate between void and voidable. In so doing, it reaffirmed its prior statement holding that “a legal interest is void if it is illegal, offends public policy, or harms the public.” The court found that Steele’s conduct was both illegal and against public policy. Accordingly, it held that the hunting permit was ‘void’ at the time of issuance and invalid at the time of its use. Conviction affirmed. *State v. Steele*, 2010 UT App 185.

**Sufficient evidence and notice to support assault as basis for burglary conviction.**

Marcus Alexander Garcia was convicted by jury of burglary, assault and criminal mischief, and acquitted of attempted rape. He appealed the burglary conviction and argues that the assault conviction could not support the burglary conviction because the assault only occurred when he was fleeing the house and, therefore, he could

not have formed the requisite intent to commit the assault while he “entered or remained” in the house as required by the burglary statute. He also argues that because the State presented the attempted rape charge as the

underlying felony to the burglary charge, any change in that theory during trial denied him his constitutional right to confront the charges against him.

The Utah Court of Appeals disagreed and held that there was sufficient evidence to conclude that Garcia’s attempt to flee began after, and not before, the assault when Garcia heard the victim’s mother approach the bedroom and he broke through the bedroom window to escape. As such, Garcia formed the requisite intent to assault the victim while he remained unlawfully in her home. The court also held that Garcia had sufficient notice that the assault could form the basis for the burglary charge because he had been independently charged with assault; the wording of the burglary charge on the information specifically included “with the intent to commit an assault or a felony, to wit: attempted rape,” and finally, that a jury instruction informed the jury that the basis for the conviction could rely on either the assault or the attempted rape crimes. Affirmed. *State v. Garcia*, 2010 UT App 196.

**Prosecution’s modification of sentencing recommendation not prejudicial when court rejected it and imposed otherwise.**

Abraham Mario Shaffer robbed a mobile phone store with two other men. During the robbery, Shaffer used a gun to assault an employee and threatened to blow his head off. After his arrest, he agreed to enter a guilty plea to aggravated robbery as part of a plea negotiation. The State agreed to not pursue gang and gun enhancements; to not oppose a motion

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# PROSECUTOR PROFILE



## Bill McGuire, Chief Deputy Davis County Attorney

Bill McGuire's father was in the Air Force as a weather office and so their family moved around a bit. They moved from Nevada to Germany and then to Bellevue, Nebraska where he lived from about age 5 until he was 15, and finally to Utah. He attended BYU where he met his wife, Diana, and graduated with a political science degree in 1974. He went on to complete his law degree at BYU as well and graduated in 1977. They have five children, Kristina (33), Billy (30), Bobby (28), Natalie (26) and Julianne (25); as well as eleven grandchildren, including triplets and another grandchild on the way.

Bill has always wanted to be an attorney. He was enthralled with Perry Mason as he grew up and found himself to be pretty good at determining who the real murderer was! That feeling continues today and has served him well over the last 30.5 years at the Davis County Attorney's Office. The desire to become an attorney never abated; it continued through high school where debate was an important part of his life and to college where he never varied in his desire. Family and friends were all very supportive of his goal and he jokes that its because they knew he loved to talk! After being in private practice for a couple of years out of law school, the opportunity to be a part-time prosecutor came and he liked it so much that he made it his full-time career.

It is no surprise that Bill's favorite sports team is the BYU Cougars! He enjoys country music and specifically Toby Keith, but has recently been listening to Michael Buble, of whom his song Home is his current favorite. He likes to golf and read; loves beef stroganoff and is a Milky Way kind of guy when he's looking for a treat. Bill has too many favorite movies to name but for inspiration he likes Rudy, for romantic comedy he likes Sleepless in Seattle and for a little laughter he enjoys Raising Arizona. Currently his favorite TV series is Glee, but Chuck and Castle are close behind. Traveling is a passion for Bill and anyone who knows him knows that he's hooked on cruising. He has his eight and ninth cruises already booked with one to the Mexican Riviera and the other to Israel, Egypt, Greece, Turkey and Rome. Bill's next desire is to travel Europe. To describe himself, Bill hopes that as a prosecutor he was known to be one who sought justice, showed integrity, fought hard, and was skilled in the Courtroom. As a person he would hope to be known as one who put faith and family first in his life.

There were a few murder cases that Bill felt challenged his abilities but one in particular was the Paul Allen case. This was a murder-for-hire case and he had to use the person who actually murdered Paul's wife and the middle man to testify against Paul in order to get the conviction. With Ron Yengich on the other side it was a spirited and challenging case. Bill also joked that although it may not be funny, watching Ron Yengich use biblical scripture in the Allen case to show compassion for the defendant bordered on humorous! Overall, the most satisfying aspect of the job for Bill is knowing that you are really providing an essential service to the public. You are in the middle of truly providing justice for the citizens of your jurisdiction. The least satisfying is dealing with victims who are obnoxious or have unrealistic expectations. You don't want to work with them, but you have to. If he were to give advice, it would be for attorneys to not be afraid to take cases to trial. "There is no greater place to learn to be a good prosecutor than going into court and being in the heat of battle. You will learn the rules of evidence better, you will become a better advocate and will find greater confidence as you take cases to jury trial."

Most significantly, the person Bill feels has most influenced his life is his wife, Diana. He describes her as intelligent and insightful and acknowledges that without her they would not have been able to achieve the things they have. As Bill gives thanks and credit to Diana, we are happy to give thanks to him for his many decades of hard work!

PREFERRED NAME - Bill

BIRTHPLACE - Reno, Nevada

FAMILY - Father of 5 children; the youngest of three children

PETS - None

FIRST JOB - Paperboy in Bellevue, Nebraska

FAVORITE BOOK - *Pursuit of Honor* by Vince Flynn

LAST BOOK READ - *Long Lost* by Harlan Coben

FOREIGN LANGUAGE - Portuguese

FAVORITE QUOTE OR WORDS OF WISDOM: A person's integrity defines his or her worth as a prosecutor. To be effective and to promote justice, there must not be an issue of that prosecutor's integrity.



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to reduce his conviction after probation was completed and to recommend a suspended prison sentence with two years in jail and credit for time served. At the sentencing hearing, however, the State recommended an additional year in jail with no credit for time served and that Shaffer be placed on probation, with gang conditions, for three years. In addition, and in response to the defense counsel's statements about Shaffer's family support, the State provided information to show the statements were likely unreliable. The court rejected the State's recommendation and imposed a sentence of imprisonment for a term of five years to life. On appeal, Shaffer argued that the State breached the plea agreement by recommending one year with no credit for time served rather than the agreed upon two years with credit for time served. He also argued that the State failed to provide the presentence investigator with their recommendation and that statements made during the hearing impermissibly undermined the recommendation. Shaffer seeks a remedy on the basis of plain error and ineffective assistance of counsel.

The appellate court held that because the trial court rejected the State's sentencing recommendation and imposed a sentence favoring AP&P's recommendation, defense counsel's failure to object to the State's modification of their recommendation was not prejudicial, even if it was a breach. It further held that because the record was silent as to whether the prosecutor provided its recommendation to AP&P, it was unable to determine a breach, even if one existed. Should the State have actually failed to make the

recommendation, the defense counsel's failure to object would not have been prejudicial because it was unlikely that the recommendation would have changed the outcome. Finally, the court held that the prosecutor's statements were not impermissible as alleged by Shaffer, and overall the State's posture supported its sentencing recommendation. Affirmed. *State v. Shaffer*, 2010 UT App 176.

are separate remedies. And in another opinion issued the following day, the court further held that a cash judgment entered, likewise, cannot be offset by the value of forfeited property. (See *United States v. McGinty*, ---F.3d ---, 2010 WL 2573980 (10<sup>th</sup> Cir. 2010). *United States v. Martinez*, --- F.3d ---, 2010 WL 2559807 (10<sup>th</sup> Cir. 2010).

## Tenth Circuit Court of Appeals

### Restitution amount and cash judgment are not to be offset by property forfeiture.

Toby Martinez was convicted of mail fraud and conspiring to defraud the government during the construction of a county courthouse. After imposing a sentence of 67 months imprisonment, Martinez was ordered to pay \$2,710,818.66 in restitution. He appealed and, among other issues, challenged the amount of restitution imposed arguing that the court erred when it failed to offset his restitution obligation by the value of property subject to criminal forfeiture.

The Tenth Circuit held that the Mandatory Victims Restitution Act does not permit the court to offset the amount of restitution by the property value subject to criminal forfeiture. The court reasoned that forfeiture and restitution serve different purposes and



## Other Circuits

### Fourth Amendment extends protection to detainees through completion of probable-cause hearing.

After being surrendered to the jail by the arresting officer, Louis Aldini, Jr. was beaten by four jail officers. The beating occurred while he was held in the booking room pending completion of the booking process. In the civil rights lawsuit, the trial court determined that Aldini's claims and the officers' claims of qualified immunity should be analyzed under the Fourteenth Amendment's "shocks-the-conscience" standard rather than the Fourth Amendment's reasonableness standard because Aldini was not in the custody of the arresting officer when he was beaten.

On appeal, the Sixth Circuit Court of Appeals held that the trial court erred in applying the Fourteenth Amendment and that the Fourth Amendment extends protection for detainees arrested without a warrant through the completion of the probable-cause hearings. The court reasoned that

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# CHRISTINE SOLTIS, Attorney General's Office, receives UTAH WOMAN LAWYER OF THE YEAR AWARD



"The Women Lawyers of Utah have named Christine Soltis as the Christine M. Durham Woman Lawyer of the Year. This annual award is given to an exceptional woman attorney who has demonstrated professionalism, integrity, excellence and dedication to furthering opportunities for women in law. Ms. Soltis is a Utah Assistant Attorney General who has made a career of training and helping prosecutors. Her qualifications for this award are numerous.

Ms. Soltis graduated from the University of Utah S.J. Quinney College of Law in 1975, where she served as president of the Association of Women Lawyers. At that time, she was one of approximately twelve women in her class. She began her practice as a trial attorney for the Salt Lake Legal Defenders Association, where she worked from 1975-78. The Association has employed hundreds of women since its inception. Ms. Soltis was the second.

She served from 1978-1981 as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the District of Utah. She was the first woman prosecutor for the office. After that, she was in private practice from 1982-89. During this period she also served as an Adjunct Professor at the University of Utah College of Law, teaching trial advocacy.

In 1989, Ms. Soltis joined the Utah Attorney General's Office and has worked as an Assistant Utah Attorney General from 1989 to the present. During this period, she served as Director, Statewide Assistance to Narcotics Enforcement (1990), Section Chief, Criminal Appeals Division (1990-93), and Division Chief, Criminal Appeals Division (1993-99). She resigned as Division Chief in 1999 when health concerns prompted her to reduce her workload. She continues, however, to prosecute criminal appeals for the State. Due to her expertise, she represents the State in a large percentage of the most difficult and complex appeals.

Ms. Soltis has also been involved in numerous professional associations and activities. Among others, she served as president of the Utah Chapter of the Federal Bar from 1988-89. She was the second woman president of the Chapter and, at the time of her service, the first woman to serve in over a decade. She served in other capacities in the Chapter, including secretary, president-elect, and executive advisory board member. She also served as a commissioner for the Utah Governor's Commission on the Status of Women from 1981-85. In 1982, she served on the Governor's Task Force on Sex Discrimination, Utah Chapter, Fifty States Women's Project. Since 2005, Ms. Soltis has served on the Utah Supreme Court Advisory Committee on the Rules of Evidence.

Ms. Soltis has also made numerous presentations to judges and prosecutors throughout the state and was also given the award for the Appellate Attorney of the Year in 1998-1999.

During an interview, Ms. Soltis said she was very surprised and honored to be named as the award recipient. She has always loved her work, with her passion being in the area of criminal law. It was exciting to be a trial attorney earlier in her career, but later she found her efforts on criminal appeals cases and the opportunity to work with so many wonderful prosecutors throughout the state to be extremely rewarding. She enjoys being able to take a case, or a line of cases, and shape an argument to better serve and support the needs of justice, not only for the victims but for all the citizens of Utah. Ms. Soltis highly recommends working for government because there is such a great opportunity to be in court and right in the thick of things, during the earliest stages of a career. Moreover, the cases and tasks assigned to a new attorney are more sophisticated than will be assigned in the private sector. Of course, the lack of tracking billable hours clearly cinches the advantage!

The Attorney General's office issued a press release quoting Utah Attorney General Mark Shurtleff: "It is a great honor to have one of our dedicated attorneys receive this prestigious award . . . Chris Soltis has shown time and again throughout her selfless career that protecting the people of Utah is her number one priority. I join with the people of Utah in saying congratulations and thank you for your devoted service."

Congratulations to Ms. Soltis on her great achievements!"

*Special thanks to Aida Neimarlija, the author of the article (with the exception of interview comments). Additional attribution given to the Utah Bar Journal for permission to reprint.*



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by extending the protection through the probable-cause hearing, an incentive is created to hold the hearing as quickly as possible. Under that analysis, the court affirmed the court's ruling with regards to one officer but vacated the decisions as to the remaining officers and remanded. *Aldini v. Johnson*, 609 F.3d 858 (6th Cir. 2010).

### Attorney-client privilege not found under two prong analysis.

James L. Graf was convicted on charges resulting from fraudulent activity within a health care benefit program he established. Although he established the program and was a key employee, he was never listed as an employee, officer, or director of any of the companies involved in the fraudulent scheme. Graf was indicted and he then moved to exclude the testimony of the company's legal counsel arguing that he was a joint holder of the attorney-client privilege. The trial court held a hearing and determined that Graf did not have a personal attorney-client relationship to support his assertion of privilege and that his subjective believe of such a relationship was insufficient because the belief was unreasonable or was not manifested to the attorneys. Among other things, Graf argued on appeal that the attorneys' testimony provided at trial was privileged and that his communications with the attorneys should not have been disclosed without his waiver.

The Ninth Circuit analyzed Graf's claims under two theories used in other circuits: (1) whether Graf sought personal legal advice from the attorneys as determined by applying the test outlined in *Bevill*, 805 F.2d

120 (3d Cir. 1986), and (2) whether he had a reasonable subjective belief that the attorneys personally represented him in an individual capacity. The court found that Graf's claims failed on both theories and held that he did not hold a personal attorney-client privilege, with respect to his communications involving the attorneys in question. Affirmed. *United States v. Graf*, --- F.3d ---, 2010 WL 2671813 (9<sup>th</sup> Cir. 2010).

### Federal domestic violence gun ban upheld.

Steven Skoien was indicted for possessing a firearm after being convicted of a domestic violence crime. He moved to dismiss the indictment on the grounds that § 922 (g)(9), which makes it a federal crime for anyone previously convicted of a misdemeanor domestic violence crime to possess a firearm, violates the Second Amendment.



On rehearing en banc, the U.S. Court of Appeals for the Seventh Circuit held that the statute did not violate the Second Amendment. It reasoned that in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Supreme Court signaled its approval in dicta that categorical restrictions on firearms possessed by convicted criminals was proper. It further reasoned that categorical limits on the possession of firearms are not a constitutional anomaly, as evidenced by the First Amendment and its categorical limits involving obscenity, defamation, etc. Affirmed. *United States v. Skoien*, --- F.3d ---, 2010 WL 2735747 (7<sup>th</sup> Cir. 2010).

## Other States

### Lifting a shirt during justifiable frisk ruled improper.

An anonymous caller reported that a man with a gun was standing on a street corner. A veteran officer went to the location and saw Privott, who perfectly matched the description given. The officer had dealt with Privott before and knew him to be associated with a violent gang. Privott began to walk away, touching his waistband. The officer commanded him to place his hands against a fence. Then the officer lifted Privott's shirt and found a bag of crack cocaine. Privott challenged the Terry search. The New Jersey Supreme Court had no trouble finding that there was reasonable suspicion to stop Privott and frisk him. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that an officer may frisk a suspect for weapons during a valid investigative stop. The frisk is limited to a pat search of outer clothing to find weapons.

The New Jersey court was divided on whether the officer's method was proper. A frisk must be limited to the least intrusive means to look for weapons that can be used to injure the officer or others. The court stated that Privott was following the officer's orders to assume a frisk position against the fence. The court said that its task was to balance Privott's privacy rights in not having his midsection exposed to the officer's right to be safe and conduct a lawful frisk. "In this case, we strike that balance in favor of the traditional pat-down search." *State v. Privott*, --- A.2d ----, 2010 WL 2571355 (N.J. 2010).

End of BRIEFS

# Reflections of a Senior Prosecutor: The 'Tough Prosecutor'

By Creighton Horton  
Former Assistant Attorney General

Having spent over 30 years as a prosecutor, I want to share with you my perspective on what it means to be a tough prosecutor. That's a term I've often heard to describe a hard-working and tough-minded prosecutor who will take hard cases and see them through without caving in when things get rough.

Several years ago I remember becoming aware of an up-and-coming young attorney who was building a reputation as a tough prosecutor. He carried a large caseload, was a tough negotiator, and was particularly well thought of among the police officers with whom he regularly worked. It was clear they held him in high regard because he was willing to take cases others might decline, and to vigorously pursue them. I later learned that this prosecutor filed all cases the police brought to him, and had never declined a case.

I knew another prosecutor about the same time who was not so well regarded by the officers with whom he worked. I heard comments that he would sometimes decline cases that he was soft on crime, which he hid behind "prosecutorial discretion," and that he ought to be a social worker instead of a prosecutor.

Looking at these two prosecutors throughout the years, I came to regard the second one as the "tougher" prosecutor, because one of the most difficult things you must do as a prosecutor is be willing to decline a case if it's not there, despite the considerable pressure that can be brought to bear to induce you to file. The first prosecutor, the one who never declined a case and who was viewed as "tough," was in a way taking the path of least resistance, by never risking disappointing the police officers with whom he worked. While he may have been a tough prosecutor in the sense of being willing to tackle difficult cases, the other part of the equation seemed to be missing – the toughness to say no when needed.

Prosecutors stand between the police and the citizenry in performing a vital and unique function, because the prosecutor, and only the prosecutor, has the power and authority to decide who to charge, what to charge, and when to charge. The U.S. Supreme Court explained the unique role of the prosecutor this way:

"Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

Former U. S. Supreme Court Justice Robert Jackson put it this way: "The prosecutor has more control over the life, liberty and reputation than any other person in America." That's a strong statement, but if you think about it, it's true. While the police have the power to arrest, only prosecutors can authorize criminal charges.

So the short version is this – if you take your role as a prosecutor seriously, you must be willing to exercise your independent prosecutorial discretion and at times disappoint officers you work closely with and with whom you want to maintain good relationships. It's not easy to do, particularly with officers you work with on an ongoing basis, but you cannot delegate such decisions to the police without abrogating your responsibility as a prosecutor.

I've seen a number of instances, usually in high-profile cases, when prosecutors have been under tremendous pressure to file cases where emotions were running high, but the evidence was just too thin. That pressure can often come not only from the police but from the press and public, who are frustrated with the amount of time it takes to identify and charge a suspect. I've heard such prosecutors characterized as soft on crime for not bringing charges quickly enough, and have even seen elected prosecutors voted out of office because of this perceived weakness. To me, paradoxically, these were "tough prosecutors." They had the right stuff because they were willing to take the heat of criticism rather than to abrogate their responsibility to bring their best judgment to bear in the exercise of prosecutorial discretion. That takes courage, but it's rarely

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# Reflections of a Senior Prosecutor: The 'Tough Prosecutor'

By Creighton Horton, Former Assistant Attorney General

*(continued)*

lauded at the time.

So while it's important to foster good relationships with the police, and I certainly recommend that you do, being the policeman's best friend is not the proper role of the prosecutor. There are times when you have to make tough decisions, and while it may be the easier course to file cases for officers who are in your office forcefully advocating for it, there are times when you simply have to say no, not yet, or in some instances, not at all.

Lest I be misunderstood, I need to tell you that there were officers I worked with during my career who I thought the world of, and whom I counted and still count as true friends. But those friendships were never grounded on the idea that I would file a case for them based on friendship rather than upon an independent review of the strengths and weaknesses of a case. I do remember one instance in which a screening officer came in asking me for "a favor." My antenna went up, as I assumed he was going to ask me to file a case that wasn't really ready to go. And that's in fact what did happen. I declined the case, and referred it back for additional investigation.

Although there were cases I declined through the years, I think that overall I had good relationships with most officers, partly because I worked hard with them on the cases I did file, and partly because when I declined cases I tried to do so respectfully. That sometimes involved brainstorming with them what additional evidence we would need to file, or going over with them admissibility problems, if they existed. I also tried to emphasize that while we have different roles in the system, prosecutors are not superior to police officers, or smarter, for that matter. I hope that message made it through, because I truly believe if I were subject to the day-to-day stressors and pressures that officers face, I'd make my share of "mistakes" for someone to Monday morning quarterback when the danger was over. So while saying no to the police at times comes with the job, so should respect for them and what they do.

Over the course of thirty years, you see a lot of things. I have seen cases that were declined over the objection of the police get better over time, and result in solid convictions of suspects who became defendants when the cases were ready to go. I have also seen the rush to file result in acquittals where the "better evidence" anticipated at the time of screening simply never materialized. And I have seen several cases which were declined for insufficient evidence, resulting in strong public criticism against prosecutors, where it turned out later that someone other than the original suspect actually committed the crimes. In those cases, had the prosecutors caved in to the pressure to file prematurely, it would not only have resulted in the prosecution of innocent persons, but the likelihood of bringing the actual perpetrators to justice would have gone way down, since the police would have considered the cases solved and, consequently, closed.

In conclusion, I think prosecutors need to have both the toughness to prosecute difficult cases which are ripe for prosecution and the toughness to say no to cases that are not. Knowing which is which is not always easy to determine, and the stakes are often high. For those who aspire to be "tough prosecutors," I hope this perspective is helpful.

Oh, and that "social worker" prosecutor I mentioned, the one who was characterized as soft on crime – he went on to distinguish himself in his career, and a few years later received an award for "prosecutorial excellence." Sounds like a tough prosecutor to me.

Good luck in the trenches!

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NOTE: While this article focuses on charging decisions as a vital part of prosecutorial discretion, the principles apply to any decisions which are uniquely within the authority and discretion of the prosecutor to make.

*End of Article*



# On the Lighter Side

A WOMAN was flying from Seattle to San Francisco . Unexpectedly, the plane was diverted to Sacramento along the way. The flight attendant explained that there would be a delay, and if the passengers wanted to get off the aircraft the plane would re-board in 50 minutes.

Everybody got off the plane except one lady who was blind. The man had noticed her as he walked by and could tell the lady was blind because her Seeing Eye dog lay quietly on the floor in front of her throughout the entire flight.

He could also tell she had flown this very flight before because the pilot approached her, and calling her by name, said, "Kathy, we are in Sacramento for almost an hour. Would you like to get off

and stretch your legs?" The blind lady replied, "No thanks, but maybe **Buddy** would like to stretch his legs."

**Picture this:** All the people in the gate area came to a complete standstill



when they looked up and saw the pilot walk off the plane with a Seeing Eye dog! The pilot was even wearing sunglasses. People scattered. They not only tried to change planes, but they were trying to change airlines!

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The Lone Ranger and Tonto went camping in the desert. After they got their tent all set up, both men fell sound asleep. Some hours later, Tonto wakes the Lone Ranger and says, 'Kemo Sabe, look towards sky, what you see?'



'The Lone Ranger replies, 'I see millions of stars.'

'What that tell you?' asked Tonto.

The Lone Ranger ponders for a minute then says, "Astronomically speaking, it tells me there are millions of galaxies and potentially billions of planets.

Astrologically, it tells me that Saturn is in Leo. Time wise, it appears to be approximately a quarter past three in the morning. Meteorologically, it seems we will

have a beautiful day tomorrow. What's it tell you, Tonto?"

'You dumber than buffalo chips! It means someone stole the tent!'

~~~~~

During a non-jury docket in municipal court the judge heard testimony in a DUI case, then recessed it to hear a citizen witness in another case. He returned to the first case to hear testimony about the Breathalyzer and then allowed a police officer to take the stand in that case to testify about the arrest. However, during that testimony the judge declared another recess to take a smoke break.

As soon as the judge was out the door, the cop on the stand stood up and said, for all to hear, "I don't know why people would buy tickets to the circus when they can come down here for free."

### DO YOU HAVE A JOKE, HUMOROUS QUIP OR COURT EXPERIENCE?

We'd like to hear it! Please forward any jokes, stories or experiences to [mwhittington@utah.gov](mailto:mwhittington@utah.gov).

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





July 2, 2010

Dear UDVC Members and Friends,

It's the lazy, hazy, windy days of summer and the Domestic Violence LinkLine (DVLL) continues ringing through the hot months and being answered....we want to keep it ringing and answered 24 hours daily. Recently a call came in from someone who needs a plan to escape from an abuser who has financially and psychologically abused her for years. She needed someone to listen to her, assist with major medical needs, offer referrals and then locate someone who could work with her on an ongoing basis. Another caller from out of state wanted information for a family member living in Utah. The family member was frightened and did not know who to call or where to go to be safe from her abuser. An abuser called and wanted referrals for licensed domestic violence treatment. A healthcare services provider called for information about mandatory reporting requirements. The calls are varied and often involve complex problem-solving.

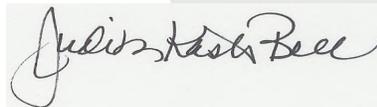
The Domestic Violence LinkLine is answered by highly trained domestic violence specialists who know the statewide resources, know how to actively listen, and possess good problem-solving skills. Calls come from victims, survivors, family and friends, neighbors, and co-workers. Calls also come from victim advocates, shelter advocates, physicians, and police officers because of this most effective service. We are able to respond to people who do not know where to go for help. The number is toll-free and is widely advertised across the state through pamphlets, word-of-mouth, billboards and at meetings. The DVLL began 24 hours of daily service in January 2004.

**Since 1993, 36,041 calls for help and information were answered serving 74,938 people**  
**The DVLL is available 8,760 hours each year**  
**The Domestic Violence Resource Manual is updated quarterly and is regarded as the most up to date resource for domestic violence services in the state (also see [www.udvc.org](http://www.udvc.org) )**  
**Two full-time staff, 3 independent contractors and 4 volunteers respond to the calls. Volunteers provide an estimated 1560 hours of service each year.**

A grant received for the last 19 years was reduced by \$10,000. UDVC is in need of funds to keep this necessary lifeline available to all and has a goal to raise \$10,000 during July to September 2010. You can help by donating \$30.00 which provides 2 hours of quality DVLL assistance. Please send your donations (UDVC is a 501 c 3 nonprofit organization) in any amount to:

Utah Domestic Violence Council  
ATTN: DVLL  
205 North 400 West  
Salt Lake City, UT 84103

Many good wishes for your peaceful summer,



Judy Kasten Bell

## UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

September 22-24	<a href="#">FALL PROSECUTOR CONFERENCE</a> <i>The annual fall professional training event for all Utah prosecutors</i>	Yarrow Hotel Park City, UT
October 20-22	<a href="#">GOVERNMENT CIVIL PRACTICE CONFERENCE</a> <i>For public attorneys who work the civil side of the office</i>	Moab Valley Inn Moab, UT
November 1-3	<a href="#">JOINING FORCES: 23<sup>rd</sup> Annual Conf. on Child Abuse &amp; Family Violence</a> <i>Sponsored by Prevent Child Abuse Utah. For more info, contact Trina Taylor 801-393-3366; e-mail: <a href="mailto:ttaylor@preventchildabuseutah.org">ttaylor@preventchildabuseutah.org</a>; website: <a href="http://www.preventchildabuseutah.org">www.preventchildabuseutah.org</a></i>	Davis Conf. Center Layton, UT
November 11-12	<a href="#">COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR</a> <i>Annual gathering of elected and appointed county &amp; district attorneys</i>	Dixie Center St. George, UT
November 17-19	<a href="#">ADVANCED TRIAL ADVOCACY SKILLS COURSE</a> <i>Advanced training for those with 5+ years and lots of trials under their belt</i>	Hampton Inn & Suites West Jordan, UT

NATIONAL COLLEGE OF DISTRICT ATTORNEYS (NCDA)\*  
AND OTHER NATIONAL CLE CONFERENCES

September 12-16	<a href="#">PROSECUTING DRUG CASES</a>	<a href="#">Register</a>	Las Vegas, NV
September 26-30	<a href="#">EXPERIENCED PROSECUTOR COURSE</a>	<a href="#">Register</a>	Marco Island, FL
Sept. 27 - Oct. 1	<a href="#">SAFETYNET</a> <i>Multi-disciplinary Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation</i>	<a href="#">Flyer</a> <a href="#">Register</a>	Easton, MA
October 3-7	<a href="#">PROSECUTING HOMICIDE CASES</a>	<a href="#">Register</a>	San Antonio, TX
October 27-31	<a href="#">20<sup>TH</sup> ANNUAL DOMESTIC VIOLENCE CONFERENCE</a>	<a href="#">Register</a>	Washington, DC
November 7-11	<a href="#">GOVERNMENT CIVIL PRACTICE CONFERENCE</a>	<a href="#">Register</a>	Scottsdale, AZ
November 14-18	<a href="#">PROSECUTING SEXUAL ASSAULTS &amp; RELATED VIOLENT CRIMES</a>	<a href="#">Register</a>	San Francisco, CA
December 5-8	<a href="#">THE EXECUTIVE PROGRAM</a>	<a href="#">Register</a>	San Francisco, CA
December 5-9	<a href="#">FORENSIC EVIDENCE</a>	<a href="#">Register</a>	San Antonio, TX

For a course description, click on the course title (if the course title is not hyperlinked, the sponsor has yet to put a course description on-line). If an agenda has been posted there will be an “[Agenda](#)” link next to the course title. Registration for all NDAA sponsored courses is now on-line. To register for a course, click either on the course name or on the “[Register](#)” link next to the course name.

A description of and application form for NAC courses can be accessed by clicking on the course title.

**Effective February 1, 2010, The National District Attorneys Association will provide the following for NAC courses: course training materials; lodging [which includes breakfast, lunch and two refreshment breaks]; and airfare up to \$550. Evening dinner and any other incidentals are NOT covered.**

September 22-24      [BEHIND THE NET](#)      [Register](#)      NAC  
Columbia, SC  
*Incorporating Technology into Multi-disciplinary Team Investigations of Sexual and Physical Abuse Cases*

October 18-22      [UNSAFE HAVENS II](#)      [Register](#)      NAC  
Columbia, SC  
*Prosecuting on-line crimes against children*

See the table      [PROSECUTOR BOOTCAMP](#)      [Register](#)      NAC  
Columbia, SC  
*Specifically designed for newly hired prosecutors*

Course Dates	Registration Deadlines
November 1-5	August 25, 2010
February 7-11, 2011	December 3, 2010
March 21-25, 2011	January 7, 2011

See the table      [TRIAL ADVOCACY I](#)      [Register](#)      NAC  
Columbia, SC  
*A practical, "hands-on" training course for trial prosecutors*

Course Dates	Registration Deadline
November 15-19	September 8, 2010
Feb. 28 - March 4, 2011	January 3, 2011

December 6-9      [CROSS EXAMINATION](#)      [Register](#)      NAC  
Columbia, SC  
*A complete review of cross examination theory and practice*  
**Registration deadline is October 8, 2010**

December 13-16      [COURTROOM TECHNOLOGY](#)      [Register](#)      NAC  
Columbia, SC  
*Upper Level PowerPoint®; Sanction II; Audio/Video Editing (Audacity, Windows Movie Maker); 2-D and 3-D Crime Scenes (SmartDraw, Sketchup®); Design Tactics. **Registration deadline is October 15, 2010.***