Newsletter of the Utah Prosecution Council

The PROSECUTOR

Director's Thoughts

All Holidayed Out?

If you were feeling a bit frazzled by the time you got to work on January 4th, little wonder. In December you had lots of celebrating to do. You made it through: Eat a Red Apple Day, Wear Brown Shoes Day, Pearl Harbor Day, Human Rights Day, National Roof Over Your Head Day, Poinsettia Day, the Boston Tea Party Anniversary, Ludwig van Beethoven's birthday, Underdog Day, Wear a Plunger on Your Head Day, Games Day, Humbug Day, Look on the Bright Side Day, National Flashlight Day, Boxing Day and Card Playing Day; not to mention Chanukah, Kwanza, Christmas and New Year's Eve and Day. Whew!

As to the groaning sound coming from your scales, you just survived: National Pie Day, National Fritters Day, National Cookie Day, National Cotton Candy Day, National Brownie Day, National Noodle Ring Day, National Cocoa Day, National Maple Syrup Day, Oatmeal Muffin Day, National Pumpkin Pie Day, National Fruitcake Day, National Chocolate Day and, because too much chocolate is never too much, National Chocolate Covered Anything Day. All that in addition to two or three traditional feasts and about 57 bowl games and several NFL playoff games, necessarily accompanied by left over turkey, ham or roast beef, pie, cake, chips, dips, cheese balls, crackers, candy, washed down with drinks of minimal nutritional but maximum caloric value.

How have you all been doing on those New Year's Resolutions? Yea, me too.

Student Loan Relief News

At least some of you are aware that, in the waning days of 2009, in between fights over health care, congress finalized the federal budget for the fiscal year which began on October 1, 2009. That budget included $10 million funding for the John R. Justice Prosecutors and Public Defenders Student Loan Relief Act. That is excellent news, as far as it goes. Don't buy that new Lexus just yet, however:

- *While $10 million is nothing to sneeze at, it is not enough to meet the nationwide need.*
- *There has to be a decision as to how the funds will be divided*

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between Prosecutors and Public Defenders. PDs are arguing for 60% on the theory that AUSAs already have a loan relief program. Prosecutors are pushing hard for a 50/50 split. Negotiations are underway with Sen. Durbin's staff and the Department of Justice.

- *Before anyone can apply for student loan relief under the act, DOJ must complete the rule and regulation writing process. Given the pace of the federal government . . .*

Do not despair, however. While you are not likely to receive relief for the March or April payments, we should know by late summer or fall how the program will be administered. Stay tuned.

National Advocacy Center

The FY09 federal budget also contained $1.75 million to fund the National Advocacy Center in Columbia, SC. This is not a full restoration of funding but it is much better than a kick in the pants. In past years, when the NAC was fully in business, a number of you took advantage of its all expense paid prosecutor training courses. With receipt of the $1.75 million, the NAC is once again paying most of the expenses of those who are accepted into its courses. Make sure you look at the training schedule on the last two pages of The Utah Prosecutor newsletter for specific information on NAC courses. Make your application soon. $1.75 million won't last long.

UPC News

There has been a change in the leadership of Utah Prosecution Council. Wasatch County Attorney Thomas Low completed two years as Chair of the Council and Assistant Logan City Attorney Lee Edwards, who has served as Chair-elect, moved up to the Chair. Lee has been a member of the

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Prosecution Council for a number of years. Both as a Council member and as an experienced prosecutor; Lee has always been totally supportive of UPC and its programs. I very much look forward to working with him.

As you may have read in the paper, Thomas Low had another big change in his life. In December, Governor Herbert nominated him to fill a vacancy on the Fourth Judicial District Court. Thomas' nomination has been confirmed by the state senate and he will soon assume his place on the bench. Congratulations to Thomas and thanks to him for the service he has rendered to UPC. We hate to see him go but the governor obviously recognized a qualified judicial nominee when he met Thomas. Our loss is the judiciary's gain.

With Thomas' move to the bench, a vacancy was created on the Prosecution Council. During the meeting of the Utah County and District Attorneys Association on January 8th, Summit County Attorney David Brickey was selected to fill that vacancy. David will represent UPC Region II – Juab, Millard, Summit, Tooele, Utah and Wasatch Counties – for a four year term, beginning on the date of his appointment.

PIMS Update

In other UPC news, I am happy to report that the Council has been awarded significant grant money with which we should be able to complete the currently planned phases of the PIMS project.

On January 8th the Council voted to accept a proposal made by State DTS for work to bring PIMS into compatibility with electronic document management system (EDMS) software, otherwise referred to as "paperless office" software. That work will begin immediately. (You know, it's really difficult for a guy who remembers using manual typewriters and carbon paper to get his mind around the concept of a paperless law office. Ain't gonna happen.)

Work is very nearly finished on a redesigned offense table. Gone will be the multiple entries to cover inchoate offenses and DV designations. In the new design, those will be accomplished by simple drop down boxes. The new design will reduce the number of entries in the offense table by about one third. State DTS will begin programming to accommodate the new offense table design once the EDMS work is complete.

Once programming and testing have been finished on EDMS and the offense table, we will be ready to finalize electronic filing capability with the courts. We thought we were almost there in the early summer of 2009, then a number of issues came up. We now anticipate that e-filing will begin in Salt Lake County in the fall of 2010. That will complete Phase II of the PIMS project.

Once Phase II is accomplished, we will be able to dedicate all our IT efforts toward Phase III, the forging of a connection with Public Safety whereby law enforcement reports will be able to be transferred directly from the law enforcement case management software into PIMS. Public Safety and CCJJ are both committed to that project and Public Safety has already begun planning work on that phase of the project.

Legislature and the Retirement System!

The 2010 session will begin on Monday, January 25th. Of major concern to all public attorneys are several bills which would change the current public employees retirement system – some of them drastically. The Association of Counties and the League of Cities and Towns are working hard on the issue, but they need all the support they can get. Because you have a personal stake, I strongly urge all public attorneys to become familiar with the retirement system bills and to communicate with your representative and senator.

Happy 2010 everyone. May it be a darned site better than was 2009. See you all at the Spring Conference, South Towne Expo Center in Sandy on April 22-23.

Mark Nash, Director
Utah Prosecution Council.

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PROSECUTOR PROFILE

Robert Cosson, St. George City Prosecutor

PREFERRED NAME - Robert
NICKNAME: Rob

BIRTHPLACE - SLC, Utah

FAMILY - Father of 2 children, The 2nd eldest of four children

FIRST JOB - Cook at McDonalds

FAVORITE BOOK
Ultramarathon Man by Dean Karnazes or *John Adams* by David McCullough

LAST BOOK READ
Owner's manual for *Call of Duty Modern Warfare 2*

FAVORITE QUOTE/WORDS OF WISDOM
"Defeat only comes when you admit it."

"Suffering is the sole origin of Consciousness." ~Dostoyevsky

"Do not follow where the path may lead. Go instead where there is no path and leave a trail." ~Ralph Waldo Emerson

Robert was born in Salt Lake City, Utah, but raised in Defuniak Springs, Florida, which is a small city of about 7,000 people located between Tallahassee and Pensacola. As a child, Robert wanted to grow up and be just like his Dad. Of his mother and father, he simply says, "I am proud to be their son." Robert met his wife while working at Matrix Marketing and going to school. They have two children: a daughter, age 7, and a son, age 3.

For his undergraduate years, Robert attended Salt Lake Community College and the University of Utah. He graduated in 2000 with a Political Science degree. When he first discussed the option of law school with his wife, she said, "Not if it means moving away from Utah," so he tucked the idea away for a few years. When he brought the idea up again she said, "Sure, why not." Robert's sarcastic humor comes shining through as he declares the reason for going to law school was, "The money of course, that's why I am a prosecutor." Robert attended St. Mary's University School of Law in San Antonio, Texas, and graduated in 2005. After graduation he was hired at the Iron County Attorney's Office. He says he had absolutely no desire to be a prosecutor while in law school but now cannot see himself doing anything else. He started out working in the justice and juvenile courts and eventually moved on to district court where he handled the Drug Taskforce cases and worked with the Drug Court Program, before moving into his current position, two years ago, with St. George. A typical day for Robert includes screening cases followed by the remainder of the day in court conducting pretrial hearings, bench trials, domestic violence hearings and hearings for those currently in custody. Understandably, the least satisfying aspect of his job is that he never has time to eat lunch.

Robert thinks the most important quality of a good prosecutor includes a strong sense of equity and justice. His expectation of being a prosecutor differed somewhat from reality, however, as he initially thought he would be dealing with bad people. He soon realized that he deals with a lot of good people who have made bad decisions. The most satisfying part of his job is that feeling that comes, every once in a while, that he has made a difference. Life was good before he was a prosecutor, he shares, and life is good now! He recalls a court experience that many can relate to, wherein he was in justice court and had ten people trying to talk to him, as well as the judge. Suddenly the judge asked Robert's position on bail for a defendant and the first thing that came out of his mouth was, "NO BAIL HOLD". The judge looked at him strangely. Robert looked back, wondering what was the problem. The judge then responded, in a slightly raised voice and said, "Mr. Cosson, I don't have the authority to do that." Robert's response, not even remembering what he'd said, was, "Why not?" The judge, now getting irritated said, "Firstly, it's an intoxication charge and secondly, this is a justice court." By that time, one of the other prosecutors leaned over and explained what he'd said. He quickly apologized and agreed to OR the defendant.

Robert loves running, road and mountain biking, golfing, climbing and canyoneering, and playing Xbox 360. His favorite food is Limon flavored Lays potato chips and Turtles (the chocolate kind). He watches House and Fringe on TV nights and remembers watching the cartoon, Dungeons and Dragons, as a kid. His favorite movie is 'The Cowboys' with John Wayne; his favorite music includes James Taylor (when he wants to relax) and Linkin Park (when he runs). When asked if he spoke a foreign language, he inquired if 'southern' counted! He would describe himself as 'experienced and sarcastic'.

Europe and Russia is where Robert would travel to if he had the money. To date his longest travel experience involved a trip from Utah to Florida in 36 hours, without stopping, other than for a restroom or refueling. He also made a journey from San Antonio, Texas, to the San Juans (in the Four Corners area), without stopping, to climb a few peaks (Silverton Group). They loaded up, and snow shoed up to about 12,000 feet before camping. The snow was horrible so they climbed back down, loaded up the next day and drove home, again, without stopping.

Robert is currently training for the 2010 St. George Ironman. He indicates that if he finishes, it will be because his wife loves and supports him enough to push him out of bed every morning to train. Good Luck Robert!

United States Supreme Court

Violence in home creates exigent circumstances for warrantless home entry

Neighbors called police to a home where Fisher was "going crazy." As the officers approached the home they saw a truck with front-end damage and blood on the hood, damaged fence posts (suggesting that the truck had recently been driven over the fence), blood on the house door and several of the home's windows broken out. The officers could see Fisher through a window. He was screaming and throwing things. The back door was bolted and the front door was barricaded with a couch. The officers saw that Fisher's hand was bleeding and asked whether he wanted medical help. Fisher cursed at the officers and told them to get a warrant to enter. One of the officers started to force the front door, but backed away when Fisher pointed a gun at him. After Fisher was charged with assaulting the officer, a Michigan court held that the officer violated the Fourth Amendment by entering without a warrant. The Michigan court was concerned that the minimal amount of blood observed by the officers could not reasonably suggest that someone had serious injuries.

The U.S. Supreme Court applied its precedent in *Brigham City v. Stuart*, 547 U.S. 398 (2004) (argued and won by Utah Assistant Attorney General Jeff Gray) to easily find that the lower court got it wrong. Reading the facts recited above, most any law enforcement officer would conclude that there were exigent circumstances to enter, secure Fisher and investigate possible, indeed probable, threats to public safety. In the Brigham City case, the Court held that "the need to assist persons who are seriously injured or threatened with such injury" created a valid reason for officers to enter a home without a warrant.

In *Michigan v. Fisher*, the Court clarified that "officers do not need ironclad proof of 'a likely serious, life-threatening injury' to invoke the emergency aid exception." The Court held that "it sufficed to invoke the emergency aid exception that it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else. The Michigan Court of Appeals required more than what the Fourth Amendment demands." Reversed. *Michigan v. Fisher*, 130 S.Ct. 546 (2009).

Ineffective assistance of counsel found for failure to present mitigating evidence

In July 1986, George Porter's relationship was ending with his girlfriend, Evelyn Williams. He threatened to kill her and then left for Florida for three months. Upon his return he tried to see Williams but was told by her mother that Williams did not want to see Porter. He drove by her home on two consecutive days and on the second of those days he tried to visit Williams. Williams called the police. Early the next morning Porter returned to the home and shot Williams. Walter Burrows, Williams' new boyfriend, struggled with Porter and forced him out of the house, where Porter then shot Burrows as well. Burrows was charged and represented himself, with standby counsel, for most of the proceedings and during his trial. Near the end of the State's case, Porter pleaded guilty.

For the penalty phase Porter decided he wanted an attorney so his standby counsel was appointed by the court to be his counsel. The state tried to prove four aggravating factors: (1) that Porter had previously been convicted of a violent felony (referring to the respective deaths of both victims), (2) the murder was committed during a burglary, (3) the murder was premeditated, and (4) the murder was especially heinous, atrocious or cruel. The only mitigating evidence offered consisted of testimony regarding Porter's behavior while intoxicated and that he had a good relationship with his son. His lawyer "told the jury that Porter "has other handicaps that weren't apparent during the trial" and Porter was not "mentally healthy." However, no other evidence relating to his mental health issues were presented. The jury recommended the death sentence for both murders. The trial court only imposed the death sentence for Williams' murder.

On appeal, the Florida Supreme Court affirmed the sentence but struck the heinous, atrocious, or cruel aggravator,

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finding that the crime was more consistent with a crime of passion that intended to be "deliberately and extraordinarily painful." Porter filed for postconviction relief claiming his attorney failed to investigate and present mitigating evidence. During the evidentiary hearing on the claim, Porter presented extensive evidence of heroic military service, extreme hardship and trauma suffered during his military deployments, long-term substance abuse, impaired mental health and mental capacity, and abuse suffered at the hand of his father as well as witnessing abuse inflicted on his mother. Porter had not been prejudiced by the failure to introduce any of that evidence. The trial court ruled that "Porter had failed to establish any statutory mitigating circumstances, and that the nonstatutory mitigating evidence would not have made a difference in the outcome of the case." The Florida Supreme Court affirmed. A writ of habeas corpus was filed and the trial court held that Porter's attorney had been ineffective. The Eleventh Circuit reversed and certiorari was granted.

The United States Supreme Court "unanimously held that counsel's failure to uncover and present any evidence of the inmate's mental health or mental impairment, his family background, or his military service clearly constituted deficient performance of counsel, and that such deficient performance was prejudicial to the inmate." Furthermore, there was a probability of a different sentencing outcome if the omitted evidence of mitigating factors was weighed against the "relatively insubstantial evidence" of aggravation that Porter shot his former girlfriend, after a night of drinking, as well as her boyfriend when he tried to intervene. Judgment reversing the grant of a writ of habeas corpus was reversed and remanded for further proceedings. *Porter v. McCollum*, 130 S. Ct. 447 (2009).

Discretionary state procedural rule may bar federal habeas review

In 1982, Joseph Kindler, Scott Shaw, and David Bernstein, were arrested for burglarizing a music store. Shortly thereafter Kindler escaped. Police later arrested him and charged him with burglary. He was released on bail. Bernstein agreed to testify against Kindler but when Kindler found this out he had other plans for Bernstein. Kindler and Shaw attacked Bernstein outside his apartment. He was beaten severely, loaded into the trunk of their car, driven to the Delaware River and dumped into the water with a cinder block tied around his neck. Bernstein died of drowning and massive head injuries. Kindler was convicted of capital murder and the jury recommended a death sentence. However, before any further proceedings could occur, Kindler escaped to Canada in September 1984. Seven months later Kindler was arrested in Canada but, once again, before he could be extradited he escaped from the jail. This time Kindler remained on the lam until being featured on America's Most Wanted and arrested in September, 1988. Kindler fought extradition for three years, but was finally extradited back to the United States in September 1991. The death sentence was imposed.

Eventually, Kindler petitioned for federal habeas corpus relief, challenging his murder conviction and death sentence. The district court held that Pennsylvania's "fugitive forfeiture rule" was not sufficiently established to serve as a state ground to bar federal review of Kindler's habeas claims. The United States Court of Appeals for the Third Circuit affirmed. Certiorari was granted.

The United States Supreme Court disagreed with the appellate court's ruling and instead, held that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review." It further explained that "nothing inherent in such a rule renders it inadequate" and that "a discretionary rule can be "firmly established" and "regularly followed" -- even if the appropriate exercise of discretion may permit consideration of a federal claim." Appellate judgment is vacated and case remanded for proceedings consistent with this opinion. *Beard v. Kindler*, 130 S. Ct. 612 (2009).

Utah Supreme Court

Victim statements inadmissible because too prejudicial

In 2002, in the middle of the night, Mark Ott cut the phone lines to his estranged wife's home. Armed with a knife, lighters, and Coleman fuel, he then burst into her home and went directly to her bedroom where he stabbed her boyfriend, Allen Lawrence, 23 times. When Ott's teenaged stepdaughter tried to intervene, he stabbed her in the stomach. He then doused his wife's bed with gasoline and lit it, a couch, and a loveseat on fire. Everyone managed to escape the burning house except for Allen Lawrence's 6-year-old daughter, Lacey,

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who died from smoke inhalation. Ott entered an Alford plea to aggravated murder in exchange for the State taking death off the table. A 5-day penalty phase hearing followed in which 27 witnesses, including the victims and Lacey's family, testified. In addition to the Alford plea to aggravated murder, Ott pled guilty, straight up, to attempted aggravated murder, aggravated assault, and aggravated arson. He is serving the statutory sentences on those felonies. The aggravated murder sentence is the only sentence at issue in this case.

On appeal, Ott challenged his sentence on several grounds, almost all based on a claim of ineffective assistance of counsel. There was a lengthy 23B hearing addressing many, but not all, of those claims. Following oral arguments, the Utah Supreme Court ordered supplemental briefing on whether Ott's plea was knowing and voluntary because the Court questioned whether there was sufficient evidence to show that he intentionally or knowingly killed Lacey, a necessary element for aggravated murder. This issue was not raised in oral argument. The State filed a brief arguing that the Court lacked jurisdiction to address the validity of Ott's plea.

The Supreme Court agreed that under long-standing precedent, they did not have jurisdiction to address the validity of Ott's plea. Nonetheless, they reversed Ott's sentence and have ordered a new sentencing hearing on the ground that Ott's attorney was ineffective for not objecting to victim impact evidence. The Court did this under the 8th Amendment and relied on SCOTUS cases, *Payne v. Tennessee* and *Booth v. Maryland*. The victim impact testimony the court relies on to reverse was primarily testimony of Ott's character, his lack of remorse, the effect this horrific crime had on the victims, and their belief that if he were released from prison in 20 years he would continue to terrorize them.

The court quoted several passages from the penalty hearing transcript, but before doing so acknowledged that while "This testimony contains many impermissible statements, we are not suggesting that every statement quoted below is constitutionally inadmissible." After quoting the passages, the court then concludes: "It is clear to us that the testimony offered at Mr. Ott's sentencing falls squarely within the categories of evidence identified as inadmissible, in capital sentencing hearing, by *Payne* and *Booth*."

The court then concluded that defense counsel performed deficiently by not objecting to this testimony and that the testimony was prejudicial, i.e., affected the sentencing outcome. Remanded for a new sentencing hearing. *State v. Ott*, 2010 UT 1.

Whether victim condition is an element of defense's claim must be determined before granting in camera review of mental health records

B.W. was placed in the Worthen home following evidence that she had been abused by biological family members. Eventually the Worthen's adopted B.W. In 2005, B.W. attempted suicide and was placed in an inpatient program at the University of Utah Neurophsychiatric Institute, where she received treatment for 19 days. Following her release, she received outpatient treatment through a clinic in her hometown. During this treatment she disclosed that Mr. Worthen had repeatedly sexually abused her. He was charged with ten counts of aggravated sexual abuse of a child. In preparation for trial Mr. Worthen filed a motion to subpoena B.W.'s medical records. He conceded that the records were subject to the doctor-patient privilege, but argued that they fell under rule 506(d)(1) of the Utah Rules of Evidence. "The exception concerns communications relevant to a physical, mental, or emotional condition when that condition is an element of any claim or defense." Worthen argued that B.W. had cognitive and misinterpretive problems, and had a motive to fabricate the allegations because of her hatred for her parents. The State also argued that Worthen's request was for the purpose of obtaining impeachment evidence and questioned whether impeachment evidence could ever qualify under the rule 506(d)(1) exception. The district court granted in camera review "to discover any statements concerning the complainant's feelings toward her parents" but denied review to discover evidence of a disorder that would affect her trustworthiness. The Utah Court of Appeals affirmed the district court's order, on interlocutory appeal. The State and guardian ad litem petitioned for certiorari review, which was granted.

The Supreme Court held that the court committed harmless error when it conducted an in camera review of the

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victim's mental health records without first conducting a preliminary inquiry into whether the victim's condition was an element of the defense's claim. The Court conducted its own inquiry and went on to hold that the victim's "frustration with and hatred toward" Worthen was an emotional condition that caused B.W. to fabricate allegations of abuse. It also held that impeachment evidence could be used to support a claim that an exception under rule 506(d)(1) applied. Affirmed. *State v. Worthen*, 2009 UT 79.

Expert testimony on fallibility of eyewitness identification allowable

Deon Lomax Clopten was convicted of first-degree murder. Clopten claimed that another man, Freddie White, was responsible for the shooting death of Tony Fuailemaa. The state had several witnesses who testified to the contrary and it leaned heavily on those eyewitness testimonies to secure a conviction. Clopten tried to introduce Dr. David Dodd's testimony as an expert on eyewitness identification. The trial court excluded the testimony, reasoning that the testimony was unnecessary and a jury instruction would suffice in addressing any potential problems with eyewitness identification. Relying on *State v. Long*, 721 P.2d 483 (1986), the court concluded that the "*Long* instruction" did "an adequate job" and that further testimony from Dr. Dodd "would only confuse the issue." Clopten appealed.

The appellate court affirmed the trial court decision and held "that trial judges are afforded significant deference to exclude expert testimony on this topic." However, the appellate court also cited numerous studies that claimed jury instructions did not adequately address the issue and invited the Supreme Court to "revisit the boundaries of trial court discretion in excluding expert testimony on the subject." Certiorari granted.

The Supreme Court held that the trial court committed prejudicial error when it excluded the expert testimony on eyewitness identification. The Court started its analysis with an overview of the evolution of Utah law as it relates to eyewitness identification. It then examined the vast research available, since the Long decision, which established the necessity of expert testimony to explain the "factors contributing to eyewitness fallibility and the resulting possibility of mistaken identifications." The Court then went on to hold that expert testimony "regarding factors that have been shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the requirements of rule 702 of the Utah Rules of Evidence." And that such testimony satisfies both tests in establishing reliability and is accordingly, sufficiently reliable under rule 702. It also held that in the event that the defense does not call an eyewitness expert, a cautionary instruction must be provided if requested and if eyewitness identification is at issue. Appellate court decision reversed and conviction vacated. Remanded for new trial. *State v. Clopten*, 2009 UT 84.

Intervener not required to exhaust administrative remedies before intervening

Taylor-West Weber Water Improvement District ("TWW") sought a water right which Roy City claims would result in the diversion of water from an underground aquifer that supplies city wells. Roy City filed a protest to become a party to the adjudication, but filed it over six months after the filing deadline had passed. Nonetheless, the state engineer considered the protest in its decision to grant the water right to TWW, but the right was granted only for a ten year period. TWW appealed the conditional approval and Roy City sought to intervene in the court's de novo review under Utah Rule of Civil Procedure 24. The district court denied the motion to intervene, holding that Roy City lacked "standing or right to participate" and hadn't pursued all administrative remedies. The Supreme Court has original jurisdiction over appeals from the district court's de novo review of an informal adjudicative proceeding.

The Supreme Court held that the district court had abused its discretion when it denied Roy City's motion to intervene because it failed to consider the civil procedure rules that govern intervention standards. Instead, the district court's decision was "based upon criteria pertaining to timing, party status and other matters outside scope of rules." It further held that an intervener was not required to exhaust administrative remedies before intervening. Reversed and remanded. *TaylorWest v. Olds*, 2009 UT 86.

Utah Court of Appeals

Detailed 911 call sufficient to create reasonable suspicion for traffic stop

Robert Van Dyke was convicted of DUI as he was leaving a sports park. While walking toward his car he came

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upon a couple and four children. He stopped and began talking with a six-year-old child in a loud manner. Both the parents could smell alcohol on Van Dyke's breath as he talked and laughed loudly. Van Dyke continued walking to his car, stopped for a few moments and stared into space. After a while he got into the car and drove out of the parking lot. The father of the child called 911 and reported the drunk driver. As Van Dyke pulled onto Main Street, Officer Matt Johnson spotted him and noting that it matched the description broadcasted by dispatch he followed the vehicle for a time. Officer Johnson saw the vehicle weave "one or two times" and cross three times onto the center divider line. Van Dyke pulled over to the side of the road, at which point Officer Johnson pulled in behind him and activated his lights.

When he approached the vehicle the officer noticed a strong odor of alcohol, that Van Dyke had slurred speech and his responses to questioning were slow. Van Dyke refused to submit to field sobriety tests and was placed under arrest. At the jail, Van Dyke refused a request for chemical testing, asserting his rights under the Fifth Amendment. At trial, the State put on several witnesses who each testified to the intoxicated state of the defendant. After prosecution rested, the defense moved for dismissal on that ground that the State failed to carry its burden. The trial court denied the motion. Van Dyke was convicted and then filed a motion to arrest judgment, which was also denied. He now appeals and argues that there wasn't "reasonable suspicion to justify the investigatory detention as required by the Fourth Amendment." He also claims that the introduction of evidence of his refusal to submit to field sobriety tests or chemical tests violated his Fifth Amendment right against self-incrimination. And finally, he argues that there was insufficient evidence to support his conviction.

The Utah Court of Appeals held that the father's 911 call alleging that Van Dyke was driving under the influence was sufficient to create reasonable suspicion to support a traffic stop because he identified himself, provided his phone number, gave a detailed description, described the strong smell of alcohol on Van Dyke, and observed his intoxicated behavior in talking with his young son.

The court identified three factors to consider in determining if an informant's tip is sufficient to create reasonable suspicion: (1) assessing the type of tip or informant involved; (2) assessing whether the informant provided enough detail of the alleged criminal activity to support a stop; and (3) whether the police officer's personal observations confirm the tip provided. The court also held that admission of evidence of Van Dyke's refusal to submit to chemical testing and field sobriety tests did not violate his privilege against self-incrimination. Nor was the officer required to advise him that the privilege against self-incrimination was not applicable under implied consent laws. The court found there was sufficient evidence to support a conviction of driving under the influence based on the testimony of numerous police officers and witnesses who came in contact with Van Dyke. Direct evidence of reckless driving or traffic law violations was not necessary. Affirmed. *State v. Van Dyke*, 2009 UT App 369.

Knowledge of possession of gun not required to support aggravated robbery charge

On August 15, 2007, Jesus A. Jimenez drove his car to a salon in Salt Lake City, Utah, with his girlfriend, Cassandra Matern, in the back seat and another friend, Miguel Mateos, in the front passenger seat. Mateos, got out of the car and entered the salon. At gunpoint he demanded money from a customer and Faviola Hernandez who was cutting the customer's hair. Hernandez went into the back of the salon and returned with a gun that she kept for protection. Mateos shot Hernandez in the chest and ran out of the salon. She was pronounced dead when police arrived. At trial, Matern testified that after hearing the gunshot she told Jimenez to leave, but he refused. Once Mateos reentered the vehicle, Jimenez drove to a nearby Wal-Mart and helped remove the stereo from the car so Mateos could hide the gun in the newly created space. Jimenez was convicted as an accomplice to aggravated robbery, and received a one-year penalty enhancement for the use of a dangerous weapon. On appeal, Jimenez argues that he did not have knowledge that Mateos had a gun and as such, his counsel was ineffective for failing to move to dismiss the aggravated charge and the penalty enhancement. He also claims the trial court erred in failing to instruct the jury that aggravated robbery requires the use of a dangerous weapon.

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The appellate court held that the jury was not required to find that Jimenez had knowledge of Mateos possessing a gun, to support the charge of aggravated robbery. By its verdict, the jury found that Jimenez knowingly helped Mateos in the robbery, helped in the flight therefrom, and that a weapon was used during the course of the robbery. It further reasoned that although evidence showed that Jimenez "undoubtedly knew about the gun when he heard the gunshot and then saw it in Mateo's possession" he could still have been convicted on the aggravated robbery, on the grounds that he facilitated Mateos' escape after serious bodily injury was caused to Hernandez. The court further held, however, that Jimenez's knowledge of the gun was material to the penalty-enhancement issue, and accordingly, counsel's performance was deficient because of the failure to object to the erroneous jury instruction on the penalty enhancement. Nonetheless, the court did not find that the deficiency was prejudicial because "a reasonable probability of a different outcome" was not demonstrated. Affirmed. *State v. Jimenez*, 2009 UT App 368.

Acquiescence to boundary is supported by lack of use by landowner or objection to use by another

A fence was constructed separating the properties of the Smiths and Security Investment Ltd. ("Security") The fence followed the recorded boundary line with the exception of a two-acre parcel of land on the Smiths' side of the fence. The Smiths used the two-acre parcel for farming while Security neither used the parcel of land nor objected to Smiths' use of it. The trial court held that the parties mutually acquiesced to the fence as the boundary between the properties. Security appealed and argued that the trial court erred in its conclusion because the court did not make a finding "that Security believed the fence was, or treated the fence as a boundary."

The Utah Court of Appeals held that the factual findings supported the trial court's conclusion that Security impliedly consented or acquiesced to the fence as the boundary between the properties. It reasoned that acquiescence is highly fact-dependent and can be shown by silence, by failure of a party to object to a line as a boundary, or by a landowner's actions with respect to the line. In this case the court noted that with the fence being in line with the rest of the fences that ran across the valley and because it followed the majority of the property's boundary, its apparent purpose was to serve as a boundary between the properties. It also noted that the land was used for farming since 1978 and that Security had never objected to its use or attempted to use it for its own purposes. Evidence of Smiths' belief that the fence was a boundary also supported the trial court's ruling. Affirmed. *Smith v. Security Investment Ltd*, 2009 UT App 355.

Other Circuits

Guns received in exchange for drugs were possessed "in furtherance of" a drug trafficking offense

On the evening of November 30, 2005, William Mahan was engaged in a conversation with Zane Isabell and Shawn Copley about purchasing firearms. In exchange, Mahan would give them 1/8 ounce of methamphetamine and $700 in cash. The three individuals met up, smoked some methamphetamine supplied by Mahan, and then drove to the location of the guns. After examining the guns, Mahan agreed to the purchase. Mahan was later arrested and charged on a three-count indictment. The final count charged him with possession of a firearm "in furtherance of" a drug trafficking offense. Mahan was convicted and timely appealed. He argues that the mere receipt of guns in exchange for drugs is not possession "in furtherance of" a drug trafficking offense. He asserts that he would have to "intend to use the firearm to promote or facilitate the drug crime" for it to be "in furtherance of" the crime.

The Ninth Circuit rejected Mahan's argument and reaffirmed that "in furtherance of" and "intended to be used" are two different standards and cannot be interpreted as identical. It further reasoned that a drug sale is not complete until payment has been made and therefore when a gun is the form of payment, it's acceptance by the defendant becomes possession "in furtherance of" a drug trafficking offense. Trial court decision affirmed. *U.S. v. Mahan*, 586 F.3d 1185 (9th Cir. 2009).

Ninth Circuit limits TASER deployment

Bryan was stopped, for the second time in an hour, while driving on a Southern California freeway. During the second stop, based on a seatbelt violation, Bryan got out of the car, wearing only boxer shorts and tennis shoes, and became highly agitated. The

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officer told Bryan to get back in the car. Bryan was striking himself and yelling unintelligibly when he took a step toward the officer (Bryan later denied advancing toward the officer). The officer deployed a TASER. It appears that Bryan was facing away from the officer when the darts struck him. One of the probes became deeply embedded in Bryan's thigh, ultimately requiring removal by a doctor. Bryan fell and broke four teeth and suffered minor contusions. The officer believed that Bryan was mentally disturbed and needed to be secured. The appellate court accepted Bryan's claim that he did not advance on the officer.

All use of force lawsuits are measured by standards established by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). In *Graham*, the Court instructed lower courts to always ask three questions to measure the constitutionality of a particular use of force. First, what was the severity of the crime that the officer believed the suspect to have committed or to be committing? Second, did the suspect present an immediate threat to the safety of officers or the public? Third, was the suspect actively resisting arrest or attempting to escape? The Supreme Court also stated that the use of force should be measured by what the officer knew at the scene.

The Ninth Circuit applied the Graham factors and upheld the trial court's determination that Bryan "did not pose an immediate threat to Officer McPherson or bystanders despite his unusual behavior." The severity of the offense under investigation tilted toward the bottom of the scale: a seatbelt violation. The court used language that suggests that the Ninth Circuit standard for deployment of a TASER requires "a strong government interest compelling the employment of such force." Lawful deployment of a TASER or similar device in the Ninth Circuit requires "objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public." The court accepted that Bryan could pose a threat to the officer. "Bryan's volatile, erratic conduct could lead an officer to be wary." However, applying the totality of the circumstances analysis dictated by Graham, the court held that the officer's use of force was not objectively reasonable. *Bryan v. McPherson*, --- F.3d ----, 2009 WL 5064477 (9th Cir. 2009).

Issuance of Mexican arrest warrant tolls limitations period for U.S. offense

Aldo Omar Crotte Sainez ("Crotte" as referenced in the opinion) was a member of the Los Tejones gang. In June 1999, he was confronted at his home by Daniel Sandoval Abundis ("Sandoval") and Julio Cesar Sevillano Gonzalez ("Sevillano") who alleged Crotte had shot at them a couple of days prior. Upon arrival, Crotte ran outside with the same gun he'd used before and started shooting at them again. Sandoval and Sevillano retreated but were shot before escaping the gunfire. Sandoval died as a result of the shooting. Sevillano suffered injuries but later recovered. A bullet was extracted but it was impossible to determine the kind of gun from which it was fired. Several witnesses gave signed, sworn statements describing what had transpired. In November 1999, a judge in Mexico issued a warrant for Crotte's arrest. Crotte was arrested at the San Ysidro, California, Port of Entry in December 2006. In March 2007, Mexico requested extradition and a hearing was held. Crotte argued that the statute of limitations on the homicide and battery charges had run and that there was insufficient probable cause that he had killed Sandoval. Extradition was certified on the homicide charge alone because the statute of limitations had run on the battery charge. The court also denied Crotte's habeas petition challenging the court's finding of extraditability. Crotte appealed. On appeal, Crotte "conceded that the statute of limitations for the homicide charge had not run under Mexican law," however, he argued that the "Lapse of Time" provision in the United States-Mexico Extradition Treaty, Article 7, barred his prosecution. Crotte argues that he was arrested more than five years after Sandoval's death and that the Mexican arrest warrant should not toll the statute of limitations on a United States offense because it is not an indictment or information under the laws of the United States.

The Ninth Circuit relied on the *Restatement (Third) of Foreign Relations Law* § 476, which provides: "For purposes of applying statutes of limitation to requests for extradition … the period is generally calculated from

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the time of the alleged commission of the offense to the time of the warrant, arrest, indictment, or similar step in the requesting state, or of the filing of the request for extradition, whichever occurs first …" It then cited to *Jhirad v. Ferrandina*, 536 F.2d 478, 480 (2d Cir. 1976), which "recognized an Indian document as the functional equivalent of a United States indictment." Accordingly, the Ninth Circuit held that "for the purpose of a civil proceeding such as an extradition, a Mexican arrest warrant is the equivalent of a United States indictment and may toll the United States statute of limitations." Affirmed. *Sainez v. Venables*, 588 F.3d 713 (9th Cir. 2009).

Other States

Warrantless search of data within a cell phone, incident to arrest, is unconstitutional

Police questioned Wendy Thomas Northern after she was transported to the hospital for a reported drug overdose. Northern agreed to call her dealer and arranged a purchase of crack cocaine at her residence. Police recorded the cell phone conversations of the arrangements. Later that evening, police arrested the dealer, Antwaun Smith, at Northern's home. During the search incident to arrest, police found a cell phone. At some point police verified through call records and phone numbers that Smith's phone had been used to speak to Northern. Testimony indicated that at least a portion of the search of the phone data occurred after police returned to the police station and were booking seized items into evidence. The police did not have a warrant or Smith's consent for the search of the phone. Smith was indicted on numerous offenses and filed a pretrial motion to suppress evidence, including the warrantless search of his cell

phone. The trial court held a suppression hearing and then informed the parties that it would issue a decision at the time the evidence was offered at trial. During the trial, the court ruled that testimony regarding the call records and phone numbers was admissible; however, it would not allow the use of any pictures discovered in the phone. Smith was convicted on all counts. On appeal, Smith argued in part that the trial court erred when it refused to suppress the evidence discovered in his cell phone. The appellate court affirmed the trial court's ruling.

The Ohio Supreme Court relied on *New York v. Belton*, 453 U.S. 454, 460 (1981) to make a finding that contrary to the State's argument, cell phones were not a "closed container" and therefore, not subject to search incident to arrest. It reasoned that in *Belton*, the definition of "container" implied that it had an actual physical object within it. In contrast, cell phones are "capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container." The court went on to hold that since a cell phone owner has a privacy interest in the contents, an officer cannot conduct a search without first obtaining a warrant unless it is necessary for officer safety or other exigent circumstances exist. Reversed and remanded. *State v. Smith*, --- N.E. 2d ---, 2009 WL 4826991 (Ohio, 2009).

Live two-way video in real-time and subject to cross examination not unconstitutional

In June 2003, an 83-year-old man was at his home preparing lunch with the defendant, a home health aide. The man suffered five head wounds and two broken fingers when the defendant allegedly hit him from behind with a hammer and demanded money. The defendant claims she only hit him after he had grabbed her breast and denies asking for or receiving any money from the victim. By the time of trial, the victim had relocated to California to be with his children and was too frail to travel. The trial court allowed the victim to testify from a courtroom in California, by two-way video. The

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victim could see the judge, jury, counsel and defendant and they could each see him, including his facial expressions. Defendant was convicted of second-degree assault. On appeal, a divided intermediate appellate court vacated the conviction on the grounds that the court lacked express legislative authorization to permit the televised testimony. The dissent concluded that the court retained discretion to allow the "new procedure without legislative authorization." Leave to appeal was granted.

The New York Court of Appeals reversed the lower appellate decision and held that the general powers of the trial court gave the court authority to allow the victim to testify by two-way, real-time television. The court based its decision on the statute that allows video testimony of children, which "otherwise leaves courts' pre-existing authority unaffected." It went on to state "that the public policy of justly resolving criminal cases while at the same time protecting the well-being of a witness can require live two-way video testimony in the rare case where a key witness cannot physically travel to court in New York and where, as here, defendant's confrontation rights have been minimally impaired." It further held that the exercise of this authority once a finding of necessity is made, does not violate the confrontation guarantees of federal or state constitutions. Dissenting opinions argued that legislation allowing children to testify was specific to that situation and not to be expanded further. The dissent also argued that the Sixth Amendment prohibited the televised testimony. Reversed and remanded. *People v. Wrotten*, --- N.E. 2d ---, 2009 WL 4782864 (N.Y. 2009).

~From all of us at Utah Prosecution Council!

End of **BRIEFS**

On the Lighter Side

~ Dedicated to anyone who ever had or ever will be a grandparent:

What is a Grandparent?

(taken from papers written by a class of 8-year-olds)

Grandparents are a lady and a man who have no little children of their own. They like other people's.

A grandfather is a man grandmother.

Grandparents don't have to do anything except be there when we come to see them. They are so old they shouldn't play hard or run. It's good if they drive us to the store and have lots of quarters for us.

When they take us for walks, they slow down past things like pretty leaves and caterpillars.

Usually grandmothers are fat, but not too fat to tie your shoes.

Everybody should try to have a grandmother, especially if you don't have TV, because they are the only grown ups who like to spend time with us.

They know we should have snack time before bedtime and they say prayers with us every time, and kiss us even when we've acted bad.

They have to answer questions like "Why isn't God married?" and "How come dogs chase cats?"

When they read to us, the don't skip. And they don't mind if we ask for the same story over again.

They don't say, "Hurry up."

They sometimes look like your mom or dad, but they have LOTS more wrinkles.

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.

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!

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2010 Training Calendar

Utah Prosecution Council

April 22-23	SPRING CONFERENCE *Case law update, legislative update and more*	South Towne Center Sandy, UT
April & May	STATEWIDE REGIONAL LEGISLATIVE UPDATES	23 locations statewide

National Advocacy Center (NAC)

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.

For specifics on NAC expenses click here. Click here to access the NAC on-line application form.
A description of and application form for NAC courses can be accessed by clicking on the course title.

March 29 - April 1	CROSS EXAMINATION *A complete review of cross examination theory and practice* ***The application deadline is January 22, 2010.***	NAC Columbia, SC
April 25 - 30	CHILDPROOF: ADVANCED TRIAL ADVOCACY FOR CHILD ABUSE PROSECUTORS An intensive course for experienced child abuse prosecutors ***The application deadline is February 26, 2010.***	NAC Columbia, SC

NATIONAL COLLEGE OF DISTRICT ATTORNEYS (NCDA)* AMERICAN PROSECUTORS RESEARCH INSTITUTE (APRI)* AND OTHER NATIONAL CLE CONFERENCES

February 1-5	INVESTIGATION AND PROSECUTION OF CHILD FATALITIES AND PHYSICAL ABUSE - APRI* *Will include specialized tracks for prosecutors, investigators, medical and mental health providers, advocates, social work professionals.*	Eldorado Hotel Santa Fe, NM
February 21-25	PROSECUTING DRUG CASES - NCDA*	Memphis, TN
March 7-11	PROSECUTING HOMICIDE CASES - NCDA*	Orlando, FL
April 25-29	EVIDENCE FOR PROSECUTORS - NCDA*	San Francisco, CA

* 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 2010 Courses.