

The PROSECUTOR



Director's Thoughts

Utah Prosecution Council at 20

On July 1, 2010, Utah Prosecution Council (UPC) celebrated its 20th birthday. Not long when compared to prosecution associations in other states, or even to SWAP, but not insignificant, either.

The primary mission for UPC, as stated by the legislature in 1990, has not changed since 1990. 67-5a-1(2) UCA provides that "The Council shall provide training and continuing legal education for state and local prosecutors" and "provide assistance to local prosecutors." Some of you graybeards will recall that organized prosecutor training in Utah did not originate with UPC. Beginning shortly after its inception in the 1970s, the

Statewide Association of Prosecutors (SWAP) had been sponsoring annual Spring and Fall Conferences. SWAP also held the first Basic Prosecutor Courses in Utah. With its primary responsibility being the prosecutorial legislative effort, and there being only one SWAP staff person and limited financial resources, the SWAP training effort was necessarily restricted. Beginning in July of 1990, UPC assumed responsibility for the statewide prosecution training effort.

As has been the case with so many significant pieces of criminal justice related legislation for the past 25 years, give or take, Paul Boyden can be said to have been the god father of UPC, with support, of course, from many others. As it has been told to me, Jim Housley, who served as Executive Director of SWAP while Paul sat on the Board of Pardons, with mandatory CLE on the way, drafted a bill in 1989 relating to a prosecutor training organization. By the fall of 1990, Paul had returned to SWAP. He recognized the need for an

organization whose primary mission was the establishment of a comprehensive prosecutor training program. Paul did some surgery on the 1989 bill then sought and obtained the support of Salt Lake County Attorney David Yocom and the rest of the SWAP Board. Law enforcement also got behind the bill. Then Public Safety Commissioner Doug Bodrero deserves special mention and appreciation for helping convince the legislature to increase the Public Safety Surcharge Fund so as to provide about \$250,000 for Utah Prosecution Council. Thanks to the hard work by Paul, the bill passed.

For those of you interested in a trip down memory lane, the original members of the Council were Attorney General Paul Van Dam, Commissioner of Public Safety Doug Bodrero, SWAP Chair and Salt Lake County Attorney David Yocom, Emery County Attorney Scott Johansen, Cache County Attorney Gary McKean, Weber County Attorney Reed Richards,



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Washington County Attorney Paul Graf, Murray City Prosecutor Randy Hart and Salt Lake City Prosecutor Cheryl Luke. Deputy Salt Lake County Attorney Jim Housley was named as the first Director of the Council, with the understanding that he would serve until a permanent director could be selected. Jim did not desire to leave his employment with Salt Lake County, especially since it would have involved a salary reduction.

I started work as Director of Utah Prosecution Council on January 2, 1991. The Attorney General's Office cleared out a supply room, fronting on a wide place in a hall, and I and Rose Jensen, the first UPC secretary, moved into the 11th floor of the Beneficial Life Tower. Rose was a tremendous asset and her ideas and expertise were invaluable as we "invented" UPC over the next couple of years.

Assistance From Lots of People

In looking back at the history of UPC, I would be entirely remiss if I failed to give first priority to the tremendous number of people, mostly prosecutors, who have volunteered of their time, talents and professional know how to help make assure the success of various UPC efforts. My first week on the job I started calling prosecutors, asking them to make presentations at training conferences, and those calls continue right through today. The help is not limited to making presentations at conferences. For each conference there has to be a conference planning committee. Hey! I ain't gonna take all that responsibility upon myself. For most conferences the committee meets twice, in addition to which they make calls to potential presenters. All they get for that is our thanks

and a sandwich or one of The Judge's fine Rancho salads.

Let's not forget the many committees where folks have given time and contributed so willingly. The UPC Training Committee reviews the UPC training effort and plans upcoming training schedules. The UPC Technology Committee and the PIMS Users Committee who without their hard work and expert input, the PIMS project would have long ago experienced an early demise. When big changes are in the office, the User's Committee, in particular, often meets up to twice a month for two or three months running. A little known but important committee is the Unusual Prosecution Expense and UPC Scholarship Committee which undertakes the often troublesome (because there is often not enough money to go around) responsibility of reviewing requests from counties for reimbursement of

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unusual prosecution expenses. The Committee also handles the happier task of reviewing and approving UPC scholarships to help prosecutors make it to specialized, out-of-state training. There have also been a number of ad hoc committees over the years, organized to help address a one time issue. Often those committee members put in dozens of hours and get little, if any public recognition.

While I'm in the thank mode, I must not forget the Attorney General's administrative staff. Over the years the people in that division who have worked on UPC stuff have been not only very professional but have been a delight to work with. And, I absolutely must recognize and thank the Attorneys General with whom I have worked, as well as their chief deputies and the division chiefs. Beginning with Paul Van Dam, continuing through Jan Graham and now Mark Shurtleff, UPC has invariably enjoyed the full support of the folks in the corner office. On a daily basis, most UPC/AG interaction is handled by the Chief Criminal Deputy and, most of the time, by the Chief of the Criminal Justice Division. Those individuals have been remarkable in their support and guidance of UPC. Absent their support, advice and good judgment, UPC could not have progressed.

I must also acknowledge the unflinching support of the county and district attorneys and the chief city prosecutors. Not one of them has ever told me to quit taking their people away from the office to present or to help UPC in other ways. Quite the contrary. I am not going to get into the trap of naming names, because I would certainly leave some out who deserve credit, but the deserving know who they are. Thank you.

As all of you know who attend UPC events or who use PIMS or who contact us for assistance of any kind, the UPC staff members are the ones who make the wheels go round. It has been my good

fortune to work with some extraordinary people over the past 20 years. Without the absolutely wonderful work of first Rose Jensen, then Carma Morris and now Marilyn Jaspersen, the training effort would have been impossible. They are the ones who have taken care of the hundreds of details that must be done in order for a conference to be a success.

Many years ago, when UPC first decided to get into the case management system, I decided we needed to look for what was then a rarest of all things, a lawyer who was also computer literate. I was lucky that Mark Burns heard of the job and accepted our offer. Mark managed the Prosecutor Dialog project, and did lots of other important stuff for UPC for a number



of years until other jobs in the AG's Office lured him away. One of the best things Mark ever did was deciding that Ron Weight was the computer tech we should hire. Ron has come to be known throughout the state as Mr. PIMS. It can and must, without exaggeration, be said that the success of Prosecutor Dialog, and now of PIMS, is largely due to Ron's professional and dedicated work.

There have, of course, been others. Jo Ann Secret, Jason Cammack and Brent Berkley each worked for a relatively short time as UPC staff attorneys. They made valuable contributions to the UPC training effort and to the case management project, respectively. Ed Berkovich currently serves as the staff attorney providing training and sharing his expertise in the areas of domestic violence and DUI prosecution. There have been two or three computer technicians who have worked with Ron and who have done excellent work. Invaluable to what most of you see about UPC, the monthly newsletter, have been a long line of really hard working law clerks. It is they who do the case summaries and put

together the newsletter. They have also done a variety of other projects for UPC, mostly thankless and less than exciting. Yet, without their efforts, UPC would not be what it has become.

Last and certainly not least among those who deserve thanks and credit for any UPC successes are the members of the Prosecution Council. It has been my privilege and pleasure to work for and with them for the past 20 years. What a tremendous group of people they have been. The Utah prosecutorial community has benefited enormously for having had them in those positions.

Training Program

As mentioned above, UPC inherited what had been a limited but successful training program from SWAP. The Fall Conference had been a tradition since the 1970s and was always well attended. One of the first decisions the Council made in regard to the Fall Conference, however, was to un-couple it from the November Utah Association of Counties Convention. The Council also soon changed the Spring Conference. For several years Prof. / Judge Ron Boyce had been giving his famous case law update as a stand alone event in the moot court room at the U of U law school. Within a couple of years, the Council combined the Boyce update with the legislative update, added another topic or two and moved it all to April.

A day or two after I began work, Jim Housley told me that the legislature had appropriated surcharge money for the training of prosecutors in domestic violence cases and that UPC was responsible for the training. Somehow I learned that the California DA's Assn. was putting on its 5th annual DV conference in March of 1991, so I went there to see what they did. The 1991 Domestic Violence Conference was the first conference I and Rose organized from scratch. We borrowed liberally from the California agenda, learned of and received generous

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PROSECUTOR PROFILE



Christine Petersen, Pleasant Grove City Attorney

Tina was born on an air force base in Belville, Illinois but was raised in southern California. As a child she wanted to be a teacher, however, as life evolved she found herself with five children to support and decided to go to law school. Tina received her undergraduate degree in History and Political Science from Arizona State University in 1992. She went on to receive her law degree from BYU in 1995. Married with five children, Tina says her favorite sports team is any team her boys are playing on. Her favorite music is listening to James Taylor or the Eagles. Although she says she's too busy for hobbies, she has always loved to read. Her favorite movie is Brave Heart, and her favorite TV series used to be ER. Tina loves steak and lobster but if looking for a quick treat she is a huge fan of Reese's Peanut Butter Cups.

If traveling anywhere were an option, Tina would go to Tahiti and anywhere in Europe. Her most memorable travel experience was when she was literally lost at sea for 30 days! She and her husband and four other people sailed from San Diego to Hawaii. The trip was supposed to only take 14 days, but after three days they had no idea where they were and ended up on the ocean for 30 days. They ran out of food and had to rely on their fishing skills, eating whatever they caught that day by roasting it on a little Hibachi grill they had brought along with them. Fortunately they had stowed a whole lot of Sparkletts water jugs so they didn't run out of good drinking water until the last day. They survived two hurricanes and two tropical storms and were actually becalmed for a few days as well. The best part of the trip for Tina was seeing a whale swimming right next to their boat one day. But that adventure comes with a strong warning to others that the Coast Guard won't come rescue you unless you are sinking or dying. If you are just young and stupid, you are on your own!!

Tina started out as a law clerk and bailiff in the Fourth District Court the year she graduated from law school and then went to POST to be certified as a Special Function Officer. That was her first introduction to prosecution work and she realized that there needed to be a solid working relationship between the officers on the street and the prosecutor in order for the system to work efficiently. She worked part-time as a prosecutor for Provo City after finishing her clerkship and found that she really enjoyed the work. When a position opened up with the firm that was doing the contract work for Pleasant Grove, she was fortunate enough to get on with them. A year later, Pleasant Grove decided to go in-house counsel and the rest is history. Tina was the first female attorney and the first in-house attorney for the City. Handling both civil and criminal work, Tina quickly realized that prosecution is the best job in the world because your only mandate is to do the right thing. The most rewarding part of her job is when she receives thank you letters from defendants who have made it through substance abuse treatment and cleaned up their act. She loves feeling like she is providing a service to the community every day.

The most embarrassing experience for Tina occurred during her second ever DUI trial. She had a defense attorney make a *Batson* challenge on her jury selection. She recalls that, "I had ABSOLUTELY NO IDEA WHAT THAT WAS!!!" In fact, she mentioned that her worst grade in law school was in Criminal Law. Fortunately, Judge Backland saw her "deer-in-the-headlights" look and rescued her by providing educational information while lecturing defense counsel about the fact that *Batson* did not protect individuals who drank alcohol or who did not go to BYU. Evidently, she had struck a few people who admitted to drinking alcohol and who went to other colleges besides BYU. Not having a clue yet about what she was doing, Tina says she didn't even think about striking them for those reasons, although, she admits, "I had other reasons which I am sure now were as ridiculous as what I was being accused of anyway!"

Tina would like to have others describe her as a hard worker and well-prepared. The evidence is in and so far she's guilty on both counts!

PREFERRED NAME - Tina

BIRTHPLACE - Belville, IL

FAMILY - Mother of 5 children; the oldest of two girls

PETS - Dog "Buddy", 2 fish "Jordan" and "Jenny"

FIRST JOB - Stuffing advertisements into newspapers

FAVORITE BOOK - Too many to choose! Recently: John Adams, 1776, His Excellency George Washington, Leadership and Self-Deception, and The Speed of Trust

LAST BOOK READ - Biography of Benjamin Franklin

FOREIGN LANGUAGE - a little Spanish



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and welcome advice and assistance from the Utah Domestic Violence Council and put a conference together. It seems to have worked. The 20th annual DV conference, now held in conjunction with the annual CJC Conference was just held in May.

The other big effort that first year was the Basic Prosecutor Course in its present iteration. I got out my Career Course agenda, invited Creighton Horton and Roger Blaylock to help and we invented an agenda and format for the course then went to Logan and put it on. Over the years we've put lots of prosecutors through our basic program, a number of whom are now in senior positions in their offices.

In the late 1980s a group of municipal prosecutors, feeling, with some justification, that the annual SWAP conferences were organized primarily with felony prosecutors in mind, had informally organized and had begun holding an annual training event aimed at the concerns of misdemeanor prosecutors. Thus was born the Utah Municipal Prosecutors Association (UMPA). I'm not sure whether it was my charm (doubtful) or the offer of UPC money, coupled with my promise that UMPA would remain in total control of the agenda, but UMPA and UPC have been working together ever since.

Rounding out UPC's current training effort is the Advanced Trial Skills Course. Our first effort at trial skills training for seasoned prosecutors was in 1992. It very well may remain the most ambitious effort to date. Over the years UPC held irregular advanced courses dealing with a wide range of topics. It wasn't until 2005, however, that the UPC Training Committee and the Council both agreed on the need for an annual advanced trial skills course. Thus was born the annual Advanced Trial Skills Course. The 2010 program is set for November of this year.

In addition to the regular training offerings, UPC has, over the years, sponsored dozens of individual training events. In many cases we have brought in

national talent for such events. Topics have included computer crime, porn prosecution, white collar crime, homicide, juvenile prosecution, DUI and DRE, crash reconstruction and many others.

Another major initiative undertaken by the Council has been the training of non-lawyer staff in prosecutors' offices. What was then called the Key Personnel Conference began about 17 years ago as a one day event. Over the years, thanks to the very hard work of many professional prosecutorial staff members and the support of the Council, the Key Personnel Conference evolved into the Utah Prosecutorial Assistants Association (UPAA). Marilyn Jaspersen, in addition to keeping the office running and making sure the training conferences come together, is the coordinating staff member to UPAA.

Case Management System

A major expansion of UPC's role began one day back in 1994 (or was it '95?) when Paul Boyden and I sat down with Jennifer Hemenway of CCJJ and Rick Schwermer of the Administrative Office of the Courts and decided it would be really neat if UPC were to develop a computerized case management system for prosecutors. The thought behind that was not only to save money for the offices, it was to assure, as nearly as possible, uniformity around the state. The first system purchased by UPC was Prosecutor Dialog®. That system served well for a number of years, but when the users began pushing for expansion of its capabilities to allow interface with law enforcement and court data bases, the vendor was unwilling and unable to support such work.

After a thorough review of commercial systems out there, UPC decided, for financial, technical and strategic reasons, to develop Utah specific case management software that UPC

would own. Work has now been completed to make PIMS compatible with electronic document management software (EDMS), sometime called paperless office systems. The Salt Lake DA's Office went live with the EDMS update late last month. Work is well underway to bring on an improved offense table and to finalize electronic exchange



between PIMS and CORIS, the state courts' information management system. That should begin early in 2011. Also underway are efforts, by UPC, State ITS and Public Safety, to enable the electronic transfer of data from law enforcement systems, directly into PIMS

All of the above described progress on case management systems would not, could not have taken place without the constant encouragement and financial support of the Commission on Criminal and Juvenile Justice (CCJJ). Since the first money for Prosecutor Dialog®, grant money from CCJJ for case management work is now approaching \$700,000. Throughout that whole effort, Jennifer Hemenway has been there for us at CCJJ. In addition to "her" money, Jennifer has encouraged, cajoled, pushed, pulled, listened to, confronted, yelled at (always kindly), thanked and even hugged the law enforcement community and prosecution communities into the computer age. Jennifer's vision, persistence and trust, coupled with vital grant support, has been invaluable.

Whence From Here

It is always hard to see into the future. As to training, one thing is becoming certain. On-line training will become more valuable and more prevalent. In the past 18 months, UPC has produced one training event for on-line only use and, working with the experts at POST, "filmed" last year's Fall and Government Civil Practice Conferences. All of those are now available for viewing for MCLE credit at the UPC

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website, www.upc.utah.gov. We plan to do likewise with the 2010 Fall and Civil Conferences. I very truly hope that we never get to the point where the state's prosecutors no longer gather personally at one place two or three times each year. Loss of that interaction and collegiality, just because it is technically possible to get training on-line, would be a tragedy.

It is vital that a whole new crop of prosecutors become trainers for UPC. I am not as familiar with those of you who have come into the prosecutorial community in the last 10-15 years, but you are now at, or beyond where I and the other baby boomers were 20 years ago. We need to take advantage of your experience and expertise. Please, contact me and let me know you are willing to present for UPC. Don't wait for me to find and call you.

The PIMS project will continue to progress and expand. I anticipate that in the next few years prosecutors will be sharing data with each other, through PIMS, on a regular basis. With a few mouse clicks, you will be able to learn whether your latest bad guy is being prosecuted elsewhere in the state. It won't be too long until the entire criminal justice system is interconnected. Data will be entered only once, by the person who generated the data, and it will be shared to populate the fields on other systems as appropriate. No more scribbling frantically as the judge pronounces judgment and sentence, then tossing your scribbled notes on a secretary's desk, hoping she can discern your hieroglyphics well enough to put what the judge ordered into PIMS. The court clerk will hit a button on her or his computer and the correct judgment information will have populated the correct fields in PIMS before you leave the courtroom, much less make it back to your office.

I hope this longer-than-I-had-intended-romp through the last 20 years has been interesting to you. It has been a privilege and a true delight to have been the Director of Utah Prosecution Council

for the past 20 years. I can't think of anything else I'd rather have done. The job has given me the opportunity to work with hundreds of professionals and that association has greatly enhanced my life. Least you wonder, no, this is not a valedictory message. I can't hang'um up for a few more years. I look forward to continuing to work with all of you as we seek to make the criminal justice system more just.

**Mark Nash, Director
Utah Prosecution Council**



RECENT CASES

United States Supreme Court

Fact that a firearm was involved in an offense must be proven beyond a reasonable doubt

Martin O'Brien and Arthur Burgess attempted to rob an armored vehicle outside of a bank. Each of the men carried a firearm. Two of the counts on their indictment charged them with using a firearm in furtherance of a crime of violence and with using a machine gun in furtherance of a crime. The government dismissed the machine gun

related charge because it lacked the ability to prove the count beyond a reasonable doubt.

However, it maintained that 18 U.S.C. § 924(c)(1)(B)(ii)'s machine gun provision was a sentencing enhancement which, if a conviction was obtained in the firearm count, the district court could determine and apply to sentencing. If the district court agreed with this argument it would result in a judge finding the enhancement applicable on a preponderance of the evidence standard, rather than the determination being made by a jury, beyond a reasonable doubt and as an element of the offense. The district court rejected the government's argument and the First Circuit affirmed that the machine gun provision constituted an element of an offense, not a sentencing factor. The government appealed. Certiorari granted.

The Supreme Court of the United States held that the fact that a firearm is a machine gun is an element of the offense to be proved to the jury beyond a reasonable doubt and not merely a sentencing factor provable to a judge at sentencing. The Court referred heavily to *Castillo v. United States*, 530 U.S. 120 (2000), which the First Circuit had likewise relied on and found to be "close to binding". It reasoned, generally, that a fact that increases a penalty is an element of a crime. Applying the *Castillo* factors, the Court upheld the ruling of the lower courts. Affirmed. *United States v. O'Brien*, 130 S. Ct. 2169 (2010).

SORNA not applicable to preenactment travel

In July 2004, upon being released on probation for a first-degree

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TROY RAWLINGS, DAVIS COUNTY ATTORNEY, RECEIVES 2010 BUD CRAMER AWARD



Troy Rawlings of the Davis County Attorney's Office received national recognition for his work on behalf of Utah's Children's Justice Centers (CJC). In Washington, D.C., the National Children's Alliance presented Troy Rawlings with its 2010 Bud Cramer Award, for his commitment to using the CJC model to help alleged victims of child abuse. "Nothing is more critical than providing the best help possible for child abuse victims," said the Utah Attorney General, Mark Shurtleff. "Troy Rawlings well deserves this honor for being such a great advocate for children and the Children's Justice Centers."

The National Children's Alliance is the accrediting body for children's advocacy/justice centers and is dedicated to promoting a joint response to allegations of child abuse. NCA provides accreditation, training and technical assistance to more than 700 centers nationally. The Bud Cramer Award is named after former Alabama Congressman Robert "Bud" Cramer, who as a district attorney founded the country's first center in 1985.

Rawlings is credited for transforming the Davis County CJC by strengthening its multidisciplinary team (MDT), but his influence goes beyond a single center. "Certainly Troy helped the Davis CJC realize its potential," says Tracey Tabet, the state's CJC Program Administrator. "But by strengthening Utah's laws, promoting the CJC model with his peers, and supporting our program generally, Troy has made a difference statewide. He is truly a champion for Utah's child abuse victims--and for the many professionals who work with them."

Since being elected county attorney in 2006, Rawlings has collaborated with state lawmakers on significant legal reforms, most notably Shelby's Law and Utah's "sexting" law. He has strengthened the partnership between the Utah Attorney General's Office, which administers the CJC program, and the counties that are contracted to operate the centers. Rawlings has also trained law enforcement officers, prosecutors and other professionals who handle child abuse cases. Attorney General Shurtleff recognized Rawlings in 2008 for his leadership by awarding him the first Attorney General's Children's Justice Award. The Attorney General's Office also nominated him for the NCA award.

"I cannot think of any professional award I would rather receive on behalf of the state of Utah than the Bud Cramer Award from the National Children's Alliance," said Troy Rawlings. "I am honored to accept this on behalf of many dedicated professionals who make the CJC model work. Particularly, I want to acknowledge Utah Attorney General Mark Shurtleff; Tracey Tabet, the Children's Justice Center Program Director for the state of Utah; my own Davis County Utah CJC Director Doug Miller; and the many professionals who staff our CJC's, who work with abused children, and who attend and support the vital MDT meetings. Children matter most. Our allocation of resources must reflect this." Troy was surprised and greatly appreciative of the award. He was unaware of even being nominated and feels that Tracy Tabet and Doug Miller, the people behind the nomination, were very deserving of the award themselves.

Troy has always wanted to be a criminal attorney and recalls watching Perry Mason episodes with his parents. As a defense attorney for five years he learned prosecutors have a more significant role and consistent opportunity to see that justice is done. He enjoys the variety of cases his office deals with, the adrenaline of conducting trials, and the ability to make decisions that impact the community and individual lives in a positive manner. The most rewarding aspect of the job for him is when victims of crime and law enforcement are appreciative of his efforts and the outcome. In addition, he appreciates it when those defense attorneys who "get it" feel he has been professional and fair while holding their client(s) accountable. Troy believes prosecutors have one of the most important roles in society and encourages others to appreciate and take their authority seriously. Prosecutors must realize that the power to prosecute or decline will impact the lives of others in the most personal way. As such, Troy believes they must make their decisions contemplatively based on a solid foundation of law, fact, common sense, and in anticipation of what a judge or jury may do. And during the course of a case, communicating with victims and with law enforcement at appropriate times and in a professional manner is critically important.

Congratulations to Troy for a job well done and for representing Utah in this prestigious recognition.



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sexual abuse offense, Thomas Carr was required to register as a sex offender in his resident state of Alabama. Some time later but prior to the enactment of the federal Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. §2250, Carr relocated from Alabama to Indiana. In July 2007, law enforcement became aware of his presence in Fort Wayne, Indiana and he was indicted with failing to register in violation of §2250. Carr moved to dismiss the charge arguing that his travel occurred prior to SORNA's effective date and that to prosecute him under §2250 would violate the Ex Post Facto Clause. The District Court denied his motion; Carr entered a conditional guilty plea and appealed. The Seventh Circuit affirmed the lower court's ruling and held that the statute is not limited to post-SORNA travel. Certiorari was granted to decide the statute's applicability to pre-SORNA travel.

The U.S. Supreme Court concluded that a person must first be subject to SORNA's registration requirements, which it reasoned could only occur after the statute's effective date. It further supported its conclusion by, among other analyses, referring to the present tense language within the statute, specifically, using the word "travels" rather than "traveled or has traveled" to show that § 2250 does not extend to pre-enactment travel. Reversed and remanded. *Carr v. United States*, 130 S. Ct. 2229 (2010).

A victim's losses may still be determined and a restitution order entered after 90-day deadline

Brian Dolan entered a guilty plea to a federal assault charge involving serious bodily injury. As

part of the plea agreement, he agreed that restitution may be ordered by the court. At the sentencing hearing, the judge left the issue of restitution open for a future ruling once additional expense information was received. Within the 90-day period, restitution information became available; however, a restitution hearing was not set until beyond the statutory period. Upon the ordering of restitution, Dolan appealed, however, the Tenth Circuit affirmed.

The U.S. Supreme Court granted certiorari to address the consequences of missing the 90-day deadline where the statute, itself, does not identify them. In looking at the statutory language and relevant context, the Court concluded that the statute was enacted to encourage a speedy resolution of restitution matters by creating a time-related directive. It further concluded that although the statute is legally enforceable, missing the statute's 90-day deadline, regardless of who is at fault for the delay, does not deprive the judge of the power to order restitution. Affirmed. *Dolan v. United States*, --- S. Ct. ---, 2010 WL 2346548 (U.S. 2010).

Second Amendment right extended to states

Two years ago when *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) issued, the U.S. Supreme Court struck down a District of Columbia law banning possession of handguns in the home and held that the Second Amendment protected the right to keep and bear arms in self-defense. Otis McDonald, et al, now files federal suit

against Chicago arguing that several related city ordinances effectively ban possession of handguns by private citizens within their own homes. They seek a declaration that the ordinances violate their Second and Fourteenth Amendment rights. *Heller* explicitly refrained from opining on whether the Second Amendment applied to the States. As such, the District Court dismissed the law suits in accordance with established Circuit precedent, and the Seventh Circuit affirmed the dismissal. Certiorari was granted.

In a comprehensive and lengthy opinion delivered by Justice Alito, the Court held that the Fourteenth Amendment does incorporate the Second Amendment right, as recognized in *Heller*, allowing private citizens to keep and bear arms for the purpose of self defense. Accordingly, the Second Amendment right to "keep and bear arms" is fully applicable, not only to the federal government but also to the individual states. Reversed and remanded. *McDonald v. Chicago*, --- S. Ct. ---, 2010 WL 2555188 (U.S. 2010).



Utah Supreme Court

An electronic signature sufficiently satisfies the signature requirement under the Utah Code

Farley Anderson filed a petition for extraordinary writ for review as to whether electronic signatures can be used to meet the Utah Code signature

See BRIEFS on page 10

KEN WALLENTINE RECIEVES THE 2010 GOVERNOR'S AWARD FOR OUTSTANDING PUBLIC SERVICE

Ken Wallentine, the Director of Law Enforcement for the Utah Attorney General's Office was honored Monday for finding new ways to stop Internet predators, child abductors and undocumented residents who commit violent crimes. Ken Wallentine received the 2010 Governor's Award for Outstanding Public Service from Governor Gary Herbert.

The award recognizes an individual for using creativity and resourcefulness to better the community they serve. "Ken is a 21st century renaissance man," said the Attorney General, Mark Shurtleff. "He's a law enforcement officer, attorney, author and nationally recognized authority on police work. He loves the people of this state and the men and women of law enforcement who serve and protect them." In addition to his duties as Director, Ken remains an itinerant prosecutor, occasionally taking a case in his local town justice court as the prosecutor for a day.



Ken Wallentine oversees the Investigations Division for the Attorney General's Office. He has many notable accomplishments that have been made under his direction, including:

- The Utah Internet Crimes Against Children (ICAC) Task Force leads the nation in per-capita arrests of child predators. The task force increased productivity by 20% last year despite a cutback in funding.
- The Utah Child Abduction Response Team (CART) is nationally recognized as one of the best teams in the nation for finding missing and abducted children.
- The Identity Theft Reporting Information System (IRIS) has won national awards for creating a "one-stop" location for citizens and law enforcement to report and obtain information about identity fraud.
- The Statewide Enforcement of Crimes Committed by Undocumented Residents Strike Force (SECURE) was started in 2009 to focus on violent and major fraud crimes committed by undocumented residents. SECURE investigated 61 cases in 7 counties during its first 5 months of operation.
- The Utah Preservation of Assets and Seizure Team (UPAST) was also created last year to preserve and seize financial resources received through fraud.
- The Utah Technical Assistance Program (UTAP) was started up again in 2009 to provide a "think tank" of prosecutors, investigators and psychiatrists to law enforcement agencies with cold-case homicides. UTAP also offers ultraviolet cameras, portable lasers and other high-tech devices to detect body fluids.

Ken Wallentine was very surprised to receive the award and says it should be shared by all of the members of his division. "If I am standing tall it is only because I stand on the shoulders of giants. They loan me hearts and brains and deserve credit for doing the real work."

Ken's path to this career began when he was working as a bouncer, part-time, in a bar and was not finding the pleasure in it like he used to. His favorite bartender complained a lot about her spouse's divorce attorney so they decided to both take the LSAT. Ken now calls himself a "cop with a law license" and says that last he heard, his friend is still a great bartender. Hands down, Ken says the greatest component of his career was the launching of a rural drug court at a time that conventional wisdom taught that drug courts needed a large social services foundation to succeed. The most rewarding moments continue to be when he sees graduates of the program that are clean and sober and happy. Ken hears from someone at least every few months and says nothing beats their success, even a favorable jury verdict at the end of a murder trial. Ken says, "Life gets restored and families are preserved in drug court. Sobriety is a gift that keeps on giving."

Ken's advice to others is to save your pennies for black leather and a Harley-Davidson bagger. Ride fast, ride far, ride frequently. Chat with gas station attendants, motel clerks, diner cashiers, and cheap-dive servers because they have great stories. Listen to them and recount them. A story teller delivers the best opening statement and closing argument. That's art! The stuff in between is more science than art.

Ken loves what he does and quotes John Wayne, "Sure I wave the American flag. Do you know a better flag to wave? Sure I love my country with all her faults. I'm not ashamed of that, never have been, never will be." Congratulations Ken for your great work! Utah is a better place to live because of your efforts and we can all feel safer knowing you are on the job!



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requirement, for someone wanting to run for statewide office but not affiliated with a registered political party. Anderson submitted his paperwork and signatures to run as a candidate in the upcoming gubernatorial election, however, some of the signatures were obtained through a website advocating his candidacy. The Lt. Governor rejected him as a candidate for failing to provide all 1,000 signatures in handwritten form.

The Utah Supreme Court acknowledged that although handwritten signatures clearly meet the signature requirement, they are not the only means to sign a document. Accordingly, it held that a signor did not have to physically sign a piece of a paper; an electronic signature was sufficient to satisfy the requirement. Writ granted. *Anderson v. Bell*, 2010 UT 47.

Execution warrant is not an appealable order

Death row inmate, Ronnie Lee Gardner challenged the Warrant of Execution issued in his case. He argued that the court erred in not considering claims related to the validity of his death sentence as “legal reasons” for not issuing the warrant.

The Utah Supreme Court held that an execution warrant is merely the directive for the already imposed sentence to be carried out. It is neither a judgment of conviction nor an order affecting the defendant’s rights and as such is not an appealable order. In light of this holding the Court states that the only legal remedy for the issuance of a warrant is a petition for extraordinary writ and as such, the Court proceeded to consider the appeal

as a petition for extraordinary writ. In doing so, it held that that the “legal reasons” referred to in Gardner’s argument and found in Utah Code section 77-19-9(2) are limited to reasons that would render the warrant or the issuance process defective and do not include claims relating to reasons the imposed sentence should be invalidated. Accordingly, the statute does not allow for Gardner’s claims that the sentence is invalid and, therefore, the request for extraordinary relief is denied. *State v. Gardner*, 2010 UT 44.

Injustice warranting the setting aside of rules governing judicial review not found

In a petition filed by Ronnie Lee Gardner for post-conviction relief, he raised constitutional challenges to his sentence that had not been raised in any prior proceedings. The State

moved for summary judgment and the district court granted it on the grounds that the



claims are barred for being untimely and because he had opportunity to raise them prior to this proceeding. Gardner appealed.

The Utah Supreme Court, agreed with the district court’s ruling and held that Gardner’s claims were barred and that he had failed to demonstrate any injustice that would warrant the setting aside of the statutory and procedural rules governing judicial review. Affirmed. *State v. Gardner*, 2010 UT 46

Although statutory based claim moot, contractual obligation may still exist

The district court granted summary judgment in favor of Salt Lake County requiring Holliday Water to fluoridate its water supply in compliance with Regulation 33 of the Salt Lake Valley Health Department. While the proceedings were pending, Senate Bill 29 passed which amended Regulation 33 to allow for corporate public water systems to be exempt from its requirements. Holliday Water filed a Notice of Suggestion of Mootness, identifying itself as a corporate public water system and arguing that the amendments moot the appeal.

The Utah Supreme Court held that the amendments moot the case and vacated the district court ruling, remanding with instructions to dismiss the complaint as moot. However, it further held that although no statutory obligation remained to compel compliance with the regulation, the amendments did not apply retroactively to any terms of the contract entered into prior to the 2009 amendments taking effect and as such, a contractual obligation may still exist. *Salt Lake County v. Holliday Water Co.*, 2010 UT 45.

Utah Court of Appeals

Voluntary consumption of alcohol and medication undermines claim that intoxication rendered threat involuntary

While under the influence of alcohol and prescribed medications Officer Travis Turner made a death threat

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against Lehi's police chief. Accordingly, he was terminated from employment as a police officer by the Lone Peak Public Safety District (LPPSD). The case is before the appellate court to determine if the board abused its discretion or exceeded its authority. Turner argues that the decision was improper for various reasons, only some of which merited comment by the court.

The appellate court found that the termination was appropriate because the death threat constituted "misconduct" or "cause" under LPPSD's policy. In regards to Turner's claim that his intoxication made the threat involuntary, the court held that his actions involving the consumption of alcohol while ingesting prescription medications was voluntary. The court further reasoned that Turner should have known what effect mixing alcohol and medication would have on him and such behavior supported the board's justification that his conduct was "unbecoming an officer." In addition, Turner claims his termination to be disproportionate sanction for his actions; however, the court held that Turner failed to demonstrate that the Board abused its discretion or to identify past inconsistent disciplinary action that would trigger a proportionality analysis. Affirmed. *Turner v. Lone Peak Public Safety Dist.*, 2010 UT App 168.

Exclusion of expert testimony not prejudicial to outcome of case

Stephen James Walker appeals from his conviction for murder, a first degree felony, resulting from the killing of his wife, Cassandra Bryan. He argues that he received ineffective

assistance of counsel because his counsel failed to introduce an expert witness after mentioning his mental illness during opening arguments and failed to move to suppress his statements to the police on the grounds that the police failed to provide sufficient Miranda warnings.

The Utah Court of Appeals rejected Walker's claim of ineffective assistance of counsel because evidence of Cassandra being shot thirteen or fourteen times and that Walker moved closer to fire a final shot into her head while she was on the ground, made it unlikely that any testimony from an expert pertaining to Walker's mental health would be sufficient to contradict the State's theory that he acted consciously and intentionally. As such, the court could not conclude that the introduction of expert testimony would result in a "reasonable probability of a more favorable outcome." Although the court found that the failure to file a motion to suppress was deficient, it held that the failure to do so did not prejudice Walker. Conviction affirmed. *State v. Walker*, 2010 UT App 157.

2006 reduction statute is not an ex post facto law

Kenneth Neal Holt was charged with ten counts of sexual exploitation of a minor, second degree felonies. He agreed to enter guilty pleas to two counts in exchange for the remaining eight counts to be dropped. The agreement also included a two-level reduction of the offenses down to a Class A misdemeanor pursuant to the 2003 reduction statute in effect at the time. Holt was a model probationer and completed his probation successfully. He then moved for a

reduction of his offenses pursuant to the plea agreement. However, because the reduction statute had been amended in 2006 to disallow reductions in sex offenses, including the crimes for which Holt was sentenced, the trial court denied his motion. Holt appealed, arguing that the 2006 reduction statute is an ex post facto law because it retroactively and effectively increased the magnitude of his punishment and deprived him of the inducement for which he agreed to enter his pleas.

The appellate court disagreed with Holt and held that the 2006 reduction statute was not an ex post facto law because the amendments did not aggravate the crime or increase the criminal penalty imposed. Additionally, it was not retroactive because the case law at the time Holt entered his pleas established that it is the reduction statute presently in effect at the time a probationer moves for a reduction that is applicable. Therefore, if Holt seeks any remedy based on the consequence he finds himself subjected to but had sought to avoid through his plea negotiation, it needs to be pursued in a post-conviction proceeding. Affirmed. *State v. Holt*, 2010 UT App 138.

Sua sponte pretrial hearing on reliability not required

K.O., a minor at the time of the offense, was convicted for burglary of a vehicle. He appeals and argues that there was insufficient evidence to support his conviction, or prove that he was the person who committed the crime. He also argues that the court erred by failing to hold a reliability hearing before admitting eyewitness testimony at trial and by overruling his hearsay objection to law enforcement testimony regarding eyewitness

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identification of K.O.

The appellate court held that evidence was sufficient to support the finding that K.O. unlawfully entered the pickup truck. It further held that the juvenile court was not required to hold a sua sponte pretrial hearing on the reliability of the neighbor's identification of K.O. and that the court properly overruled K.O.'s hearsay objection to the arresting officer's testimony regarding an eyewitness identification of K.O. Affirmed. *K.O. v. State (In re K.O.)*, 2010 UT App 155.

Subjective fear for officer safety not sufficient for objectively reasonable belief of danger

Clay C. Lowe was standing nearby when Deputy Taylor approached Timothy Lamoreaux in hopes of obtaining information pertaining to a wanted fugitive. When the deputy approached, Lamoreaux put his left hand in his pants pocket and refused to comply with the order to keep his hands visible. Deputy Taylor pulled Lamoreaux to the ground and searched for weapons; he discovered a butterfly knife with a six-inch blade. During the incident Lowe was standing to one side with his hands in the air but when another Officer Morgan approached, Lowe made a 180 degree turn toward the arriving officer. Upon seeing the knife retrieved from Lamoreaux, Officer Morgan searched Lowe for weapons and discovered a cylindrical object in his pocket. Suspecting it might be the handle of a knife he removed it, only to find it was a prescription bottle. While removing the bottle, a baggie containing crystal methamphetamine fell from Lowe's pocket. Lowe was arrested and

charged with possession of methamphetamine. He moved the court to suppress the methamphetamine but his motion was denied. Lowe entered a conditional guilty plea and appealed, challenging his conviction on the basis that the methamphetamine evidence should have been suppressed because officers were not justified in detaining him since he was merely a bystander and not suspected of any criminal activity.

The Utah Court of Appeals held that based on the totality of the circumstances, Officer Morgan lacked an objectively reasonable belief that Lowe was armed and dangerous and was not justified in conducting the search for weapons. It reasoned that although the officer had a subjective fear for his safety, he failed to assure his safety in a less intrusive way, such as through questioning Lowe. In addition, Lowe's 180 degree turn was more of "a normal reaction to a new development than a threat." Accordingly, Lowe's motion to suppress should have been granted. Reversed. *State v. Lowe*, 2010 UT App 156.



the case and in 1995 blood samples were submitted for DNA testing. In 1997 the DNA was matched to Danny Hooks. Hooks was convicted by a jury on five counts of first degree murder and sentenced to death on each count. The Oklahoma Court of Criminal Appeals ("OCCA") affirmed the convictions and death sentences, and denied post-conviction relief. Hooks then sought federal habeas corpus relief but was denied by the district court. He appealed arguing, among other issues, that he received ineffective assistance of counsel during the guilt and penalty phases of trial and that the *Allen* charge given during penalty-phase deliberations coerced the jury into returning death sentences.

The United States Court of Appeals for the Tenth Circuit affirmed the denial of habeas relief on the murder convictions on the basis that Hooks failed to demonstrate that the OCCA unreasonably applied *Strickland v. Washington* 466 U.S. 668 (1984), during its resolution of his ineffective assistance of counsel claim. However, the Tenth Circuit further held that given the totality of the circumstances pertaining to the penalty phase, deliberations, and the *Allen* charge given, the jury was coerced into returning death sentences on the convictions. It also found that the OCCA's application of *Lowenfield v. Phelps*, 484 U.S. 231 (1988), in support of their decision to the contrary was unreasonable. Accordingly, the Tenth Circuit affirmed the convictions but reversed and remanded the case back to the district court to grant habeas relief on each of the five death sentences. *Hooks v. Workman*, 606 F.3d 715 (10th Cir. 2010).

Tenth Circuit Court of Appeals

Jury coerced into voting for sentence of death

On May 16, 1992, the bodies of five women were found in a small bedroom in a crack house. A bloody trail led to the front door of the home and a bloody palm print was left on a bedroom wall. No arrest was made in

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Sex offender restricted on contact with children and disabled adults

Lehman Smith was convicted of sexually assaulting a woman after a party to which both had attended. After everyone else had left, the woman was asleep on the couch when she awoke to find Smith having sex with her. She shoved him off and ran for help. Smith was convicted by a jury and sentenced to 60 months imprisonment followed by 36 months of supervised release. As a condition of release, the district court limited Smith's ability to have contact with children and disabled adults. He appealed and, among other issues, sought reversal of the condition of release arguing that the condition is not reasonably related to deterrence, public safety or rehabilitation and was more restrictive than necessary.

The Tenth Circuit agreed with the trial court's finding that Smith, having "demonstrated a willingness and ability to prey on vulnerable individuals," posed a risk to other populations within the community. The imposition of limitations also appropriately included the trial court's order that the conditions be reevaluated and modified or suspended based on the results of Smith's post-release psychosexual examination. The only issue raised by the Tenth Circuit was the application of the limitation to Smith's own child and siblings. Other than requesting that issue be addressed by the district court for clarification, the Tenth Circuit held that the court did not err in imposing the special conditions to Smith's supervised release. Affirmed and remanded for reconsideration and clarification. *United States v. Smith*, 606 F.3d 1270 (10th Cir. 2010).

Other Circuits

Entitlement to purchase firearms not a defense to making misstatement on ATF form

Laron Frazier enlisted other people to purchase firearms on his behalf which he would then use to support his gun smuggling operation between Canada and the United States. Those individuals who assisted him would fill out Alcohol, Tobacco, Firearms, and Explosives Form 4473 in their own names and assert that they were purchasing the firearms for their own possession and use. Upon being discovered, Frazier argued that the false statements made on the forms were not material because each person was entitled to purchase the firearms.

The Eleventh Circuit disagreed and held that the fact the individuals were entitled to purchase the firearms, is not a defense to making the material misstatement on the forms when in truth they were purchasing the firearms for Frazier. Affirmed. *United States v. Frazier*, 605 F.3d 1271 (11th Cir. 2010).

Imposition of death penalty not required for first degree murder to be a capital crime

James Gallaher, Jr. was indicted for first degree murder fourteen years after he killed Edwin Pooler on the Colville Indian Reservation in Washington. Following the denial of his motion to dismiss the indictment, he entered a guilty plea. On appeal, Gallaher argues that since the death penalty has not been

reinstated to the reservation, the five year federal statute of limitations for noncapital crimes is applicable to his offense.

The Ninth Circuit held that regardless of whether the death penalty can be imposed in a case, first degree murder remains a capital offense. Accordingly, Gallaher is not entitled to the benefits of the five year statute of limitation. Denial of motion to dismiss is affirmed. *United States v. Gallaher*, --- F.3d ---, 2010 WL 2179162 (9th Cir. 2010).

Police promise to not use statements for prosecution undermined *Miranda* waiver

When police responded to investigate an armed robbery occurring at the home of Lance Lall, they discovered that one of the victims, Lall, was involved in credit card fraud. Lall was given *Miranda* warnings but reassured by the officer that his main interest was to investigate the robbery and any statements regarding the credit card fraud would not be used to prosecute him. Lall proceeded to show the officer his equipment and explained how he conducted his fraudulent efforts. After leaving the residence, the police officer alerted the Secret Service and Lall was ultimately arrested by them. Lall moved to suppress the statements he made on the grounds that his response to the interrogation was not voluntary. He further argues that evidence removed from his bedroom was improperly obtained as a result of his initial admission. However, the trial court denied the motion, the case proceeded to trial and Lall was convicted.

On appeal, the Eleventh Circuit held that the police officer's repeated assurance that Lall's statements would

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not be used to prosecute him, undermined the voluntariness of his *Miranda* waiver. Therefore, the statements and evidence gathered as a result of the interrogation were precluded from being used to federally prosecute Lall. Reversed and remanded. *United States v. Lall*, --- F.3d ---, 2010 WL 2136630 (11th Cir. 2010).

Other States

Defense has a right to a copy of the hard drive in pornography case

Neil Grenning was charged with 72 counts of child sex crimes, 20 counts of which were for possession of depictions of minors engaged in sexually explicit conduct with sexual motivation. The images were seized and the trial court granted only limited access to the defense team to prepare for trial. The access only permitted viewing copies at the government's building, on government operating systems, using government software and during limited hours. Due to the limitations, Grenning was unable to find an expert willing to examine the hard drives. Grenning was convicted. The Court of Appeals affirmed all convictions except the 20 counts of possession of child pornography. Grenning petitioned for review but was denied. The State cross-petitioned on the reversed charges and review was granted.

The Supreme Court of Washington held that Grenning was entitled to having the State provide a mirror image of his hard drives to his defense team to analyze, outside of the imposed government limitations. By

refusing to provide Grenning with the hard drive evidence in this manner, the State deprived him of his right to effective assistance of counsel. It further held that the "overwhelming untainted evidence test" would govern the harmless error analysis and found that the error was not harmless. Accordingly, the reversal by the Court of Appeals was affirmed and the case remanded for a new trial on those counts. *State v. Grenning*, --- P.3d ---, 2010 WL 2406409 (Wash. 2010).

Prosecutor's opinion work product may be discoverable in a civil lawsuit

Michael J. O'Connell and Shelley Santry petitioned the court for a writ to prevent the trial court from enforcing its order requiring Santry to turn over her litigation files in a civil action involving a claims of abuse of process, malicious prosecution, intentional infliction of emotional distress, and a violation of § 1983. The case involved a former defendant, who Santry had prosecuted. The Court of Appeals denied the petition and the petitioner's now appeal to the Supreme Court of Kentucky.

The Supreme Court held that because the circuit court failed to evaluate the request for discovery under the heightened "compelling need" standard, the denial of the writ should be reversed. It further instructed the circuit court to re-evaluate the discovery request under the heightened "compelling need" standard and conduct an in camera review before allowing discovery. Reversed and remanded. *O'Connell v. Cowan*, --- S.W. 3d ---, 2010 WL 2016889 (Ky. 2010).

Deportation of sole defense witness not a violation of constitutional rights

Armando Monter Jacinto was charged with attempted murder and assault with a deadly weapon resulting from an altercation involving several individuals in a melee where punches were thrown, shoving occurred and Victor Retana was stabbed. Jacinto located an uninvolved eyewitness who would testify that it was another person, not Jacinto who stabbed Retana. A private investigator for the defense located the witness, Nicolas Esparza, in the county jail and interviewed him on two occasions. During the latter interview a jail employee and Esparza both stated that he was likely to be deported. Prior to trial, Esparza was, in



fact, deported. The defense moved for dismissal claiming the deportation of Esparza violated Jacinto's due process and compulsory process rights. The trial court granted the dismissal.

The Court of Appeals reversed and the Supreme Court of California granted review.

The Supreme Court held that no misconduct occurred relative to the deportation of Esparza to warrant the dismissal of the case. It reasoned that the jail officials were not part of the prosecution team and that Jacinto had legal tools available to ensure the compulsion of Esparza to testify. "Absent some additional showing of affirmative prosecutorial involvement in [the witness's] removal, we cannot hold the prosecutor legally responsible merely because a sheriff's deputy working at the jail was involved." Court of Appeals ruling affirmed. *People v. Jacinto*, 231 P.3d 341 (Cal. 2010).

End of BRIEFS

Protecting Your Plea Deals Post *Padilla v. Kentucky*

By Laura Dupaix, Chief

Criminal Appeals Division, Utah Attorney General's Office

Last March, the United States Supreme Court in *Padilla v. Kentucky* placed an affirmative duty on defense counsel to accurately advise their noncitizen clients of the deportation consequences of guilty pleas. But that duty arises only when those consequences are “truly clear” under immigration law. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1483 (2010). When immigration law is not “succinct and straightforward,” the duty is “more limited.” *Id.* In unclear cases, “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.*

Before *Padilla*, Utah law—as in most jurisdictions—held that defense counsel had no affirmative duty to advise clients of the adverse immigration consequences of guilty pleas. See *State v. Rojas-Martinez*, 2005 UT 86, ¶ 20, 125 P.3d 930. The underlying rationale for this rule was that deportation was a collateral consequence of a guilty plea and counsel’s failure to advise a client of collateral consequences could not be deemed to be ineffective assistance of counsel. *Id.* But while prior law did not require defense counsel to advise their clients of adverse immigration consequences, it prohibited counsel from affirmatively misrepresenting those consequences. *Id.* at ¶¶ 20-21. In other words, defense counsel did not perform deficiently by remaining silent regarding the deportation consequences of a plea, but if he or she chose to advise the client, that advice must be correct.

Now that defense counsel have an affirmative duty to correctly advise noncitizen clients of “truly clear” adverse deportation consequences, prosecutors might well ask how to ensure that guilty pleas won’t be set aside whenever a defendant claims his attorney did not fulfill that duty. The potential problem created by *Padilla* is real given that most defense attorneys will acknowledge having little to no understanding of immigration law. Many will also acknowledge that they purposefully avoid ascertaining their clients’ immigration status in the hope that their clients will escape the notice of ICE and, consequently, deportation. Following are some steps that prosecutors can take both during and after entry of a plea to avoid the potential problems raised by *Padilla*.

1. Make sure that all criminal defendants are told on the record that their plea could have adverse immigration consequences. At first blush, this might seem futile given that *Padilla* places the affirmative duty on *defense counsel*—not on the trial court or the prosecutor—to inform clients of adverse immigration consequences. But while it is true that counsel performs deficiently by not complying with that duty, counsel is not constitutionally ineffective unless that failure actually prejudices the defendant. In the guilty plea context, prejudice is proven if the defendant shows that, but for counsel’s error, he would not have pled guilty. By building a record that a noncitizen defendant knew when he pled guilty that his plea could—and likely would—have adverse immigration consequences, the prosecution can make it nearly impossible for a defendant to later prove that he was prejudiced by either his counsel’s silence or even by his counsel’s misadvisement. After all, if the record shows that the defendant knew his plea could adversely affect his immigration status and he pled anyway, he can hardly argue later that he would have never pled guilty if that information had come from his attorney.

There are two ways to build this record. One is to ask the trial court to advise the defendant during the plea colloquy that if he is a noncitizen, his plea may—or even will—subject him to deportation or otherwise adversely affect his immigration status, including permanently barring re-entry into the United States. The trial court should also advise the defendant that if he has questions about the effect of his plea on his immigration status, he should consult with an immigration attorney.

Another way to build this record is to include an advisement like the following in the defendant’s written plea statement:

I understand that if I am not a United States citizen, my plea(s) today may, or even will, subject me to deportation under United States immigration laws and regulations, or otherwise adversely affect my immigration status, which may include permanently barring my re-entry into the United States. I understand that if I have questions about the effect of my plea on my immigration status, I should consult with an immigration attorney.

The Utah Supreme Court’s Advisory Committee on the Utah Rules of Criminal Procedure is currently considering amending the Rule 11 form for written plea statements to include such an advisement. But nothing prevents parties in the meantime from including additional warnings not currently recommended by the rules. However, if this method is

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Protecting Your Plea Deals Post *Padilla v. Kentucky*

By Laura Dupaix
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used, the prosecutor should make sure that the trial court refers to the written plea statement on the record and asks the defendant if he has read and understands everything in the plea statement.

2. Insist that defendants use proper procedures to raise a *Padilla* claim. There are two ways for a defendant to raise a *Padilla* claim. The first is through a timely motion to withdraw the plea. A motion to withdraw a plea must be filed before announcement of sentence. Utah Code Ann. § 77-13-6. If a motion to withdraw a plea is not filed before announcement of sentence, neither the trial court nor an appellate court has jurisdiction to address the validity of the plea. See *State v. Ott*, 2010 UT 1, ¶ 18, 647 Utah Adv. Rep. 19. If the defendant does not timely move to withdraw his plea, he may raise a *Padilla* claim only by filing a petition under the Post-Conviction Remedies Act. See Utah Code Ann. § 77-13-6; *State v. Nicholls*, 2006 UT 76, ¶¶ 6-7, 148 P.3d 990.

Our office has already received a number of *Padilla* post-conviction challenges. If you receive one, please contact Erin Riley of our Post-Conviction Team immediately, at (801) 366-0180. By statute, the Attorney General's Office represents the State in post-conviction challenges to felony convictions. While the prosecuting entity is ordinarily responsible for responding to post-conviction challenges to misdemeanor convictions, to ensure consistency, we would like to coordinate our positions in *Padilla* petitions.

3. Make defendant prove both deficient performance and prejudice. If defendant files a timely motion to withdraw, make defendant prove both elements of ineffective assistance of counsel: deficient performance and prejudice. Do not accept self-serving affidavits by defendants about what their attorney did or did not tell them. The burden is on the defendant to prove ineffective assistance of counsel and, unless there is no dispute as to the facts, you should insist on an evidentiary hearing at which not only the defendant, but also his plea counsel testifies. If defendant does not call his attorney to testify, you should.

The following are some substantive points to keep in mind in putting defendants to their proof. First, under *Padilla*, counsel's affirmative duty to advise arises only if immigration law is "succinct, clear, and explicit in defining the removal consequence" of the plea. If the law is not clear—which is probably true 90 % of the time—counsel's duty is limited to merely advising a noncitizen client that "pending criminal charges *may* carry a risk of adverse immigration consequences." *Padilla*, 130 S.Ct. 1473.

Second, a good argument can be made that *Padilla* applies only to *legal*, and not *illegal* immigrants. *Padilla* himself was a lawful permanent resident and had been for over 40 years. It is difficult to imagine how illegal immigrants could prove prejudice, where their deportation may be independently based on their illegal status.

This leads to the third point. *Padilla*, by its terms, applies only to advising clients as to deportation or removal, and not to other potential adverse immigration consequences. As Justice Alito points out in his concurring opinion, while the *Padilla* majority requires counsel to advise noncitizen defendants regarding deportation consequences, it does not require counsel to advise the same defendant that a plea may render him excludable should he ever leave the United States. Thus, an alien might be induced to enter a plea upon being told that he won't be deported, "without realizing that a consequence of the plea is that [he] will be unable to reenter the United States if [he] returns to his or her native country for any reason, such as to visit an elderly parent or to attend a funeral." *Padilla*, 130 S.Ct. at 1491 (J. Alito, concurring in the judgment). In other words, the affirmative duty to advise regarding adverse immigration consequences goes only to deportation or removal and not to other potential consequences.

Finally, defendants who entered their pleas before *Padilla* will, in most instances, be unable to prove deficient performance. Counsel's performance is judged at the time of the alleged error and based on his or her "perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). See also *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993) ("To establish a claim of ineffectiveness based on an oversight or misreading of law, a defendant bears the burden of demonstrating why, on the basis of the law in effect at the time of trial, his or her trial counsel's performance was deficient."). As stated, before *Padilla*, the law in Utah and elsewhere was that counsel had no duty to advise a noncitizen client of the immigration consequences of a plea; counsel's only duty in that regard was to not affirmatively misadvise. Thus, a *Padilla* challenge to a pre-*Padilla* plea should fail absent an allegation and proof that counsel affirmatively misadvised the immigration consequences of the plea.

In sum, while *Padilla* may create some potential hazards, a little diligence on the part of prosecutors can avoid them. And don't be afraid to call us if you have *Padilla* questions.

End of Article



On the Lighter Side

ALL ABOUT MOMS

Answers given by 2nd grade school children:

Why do we need mothers?

1. She's the only one who knows where the scotch tape is.
2. Mostly to clean the house.

What ingredients are mothers made of?

1. Mothers are made out of clouds and angel hair and everything nice in the world and one dab of mean.
2. They had to get their start from men's bones. Then they mostly use string,

What kind of a little girl was your mom?

1. My mom has always been my mom and none of that other stuff.
2. I don't know because I wasn't there, but my guess would be pretty bossy.
3. They say she used to be nice.

What did mom need to know about dad before she married him?

1. His last name...
2. She had to know his background. Like is he a crook? Does he get drunk on beer?

3. Does he make at least \$800 a year? Did he say NO to drugs and YES to chores?

Why did your mom marry your dad?

1. She got too old to do anything else with him.
2. My grandma says that mom didn't have her thinking cap on.

Who's the boss at your house?

1. Mom doesn't want to be boss, but she has to because dad's such a goof ball.
2. Mom. You can tell by room inspection. She sees the stuff under the bed.

What's the difference between moms and dads?

1. Moms know how to talk to teachers without scaring them.
2. Moms have magic, they make you feel better without medicine.

What does your mom do in her spare time?

1. Mothers don't do spare time.
2. To hear her tell it, she pays bills all day long.

What would it take to make your mom perfect?

1. On the inside she's already perfect. Outside, I think some kind of plastic surgery...
2. Diet. You know, her hair. I'd diet, maybe blue.

If you could change one thing about your mom, what would it be?

1. She has this weird thing about me keeping my room clean. I'd get rid of that.
2. I'd make my mom smarter. Then she would know it was my sister who did it not me.
3. I would like for her to get rid of those invisible eyes on the back of her head.

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.

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www.upc.utah.gov



UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

August 5-6	UTAH MUNICIPAL PROSECUTORS ASSOCIATION SUMMER CONFERENCE <i>For all prosecutors whose caseload consists primarily of misdemeanors</i>	Zion Park Inn Springdale, UT
August 16-20	BASIC PROSECUTOR COURSE <i>A must attend course for all new prosecutors, or those new to prosecution</i>	University Inn Logan, UT
September 22-24	FALL PROSECUTOR CONFERENCE <i>The annual fall professional training event for all Utah prosecutors</i>	Yarrow Hotel Park City, UT
October 20-22	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>For public attorneys who work the civil side of the office</i>	Moab Valley Inn Moab, UT
November 17-19	ADVANCED TRIAL ADVOCACY SKILLS COURSE <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

August 23-27	STRATEGIES FOR JUSTICE Register	National Harbor, MD
August 31– Sept. 3	ASSN OF GOVERNMENT ATTORNEYS IN CAPITAL LITIGATION <i>Indispensable training and info for any prosecutor who has a capital case</i> <i>For more info: www.agacl.com, contact Jan Dyer at (602) 938-5793 or agacl@msn.com</i>	San Diego, CA
Sept. 27– Oct. 1	SAFETYNET Agenda	Easton, MA
October 27-31	ANNUAL DOMESTIC VIOLENCE CONFERENCE	Washington, DC

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. For specifics on NAC expenses [click here](#) . To access the NAC on-line application form [click here](#)

August 9-13 [BOOTCAMP](#) [Register](#) NAC
A course for newly hired prosecutors
The registration deadline is June 11, 2010
 Columbia, SC

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

Course Number	Course Dates	Registration Deadlines
08-10-TAI	September 27 - October 1	July 23, 2010
09-10-TAI	November 15-19	September 8, 2010

August 3-6 [CROSS EXAMINATION](#) [Register](#) NAC
An in-depth examination of the theory and method of effective cross
 Columbia, SC

August 23-27 [UNSAFE HAVENS II](#) [Register](#) NAC
Advanced trial advocacy training for prosecution of technology-facilitated
Child sexual exploitation cases
 Columbia, SC

September 13-17 [COURTROOM TECHNOLOGY](#) [Register](#) NAC
Upper level PowerPoint; Sanction II; Audio/Video Editing (Audacity, Windows
Movie Maker); 2-D and 3-D Crime Scenes (SmartDraw, Sketchup); Design Tactics
 Columbia, SC