

# The PROSECUTOR



## RECENT CASES

### United States Supreme Court

#### Miranda does not require an explicit statement

On August 10, 2004, Tampa Police Department arrested Kevin Dewayne Powell. At the police station Powell was read his rights from the department's standard form. Powell waived the rights, signed the rights form and then talked with the officers. He was charged and subsequently tried to get his statements suppressed, arguing that the warning was deficient because

his right to have an attorney present during questioning was not clearly conveyed. The trial court denied the motion. Powell was convicted and appealed. The appellate court ruled that the motion to suppress should have been granted and that Powell had not been properly advised of his right. The Supreme Court of Florida affirmed. Certiorari granted.

The U.S. Supreme Court held that although different words were used than the exemplary formulation used by the F.B.I., the words used in the rights read to Powell communicated the same essential message. Reversed and remanded. *Florida v. Powell*, 175 L. Ed. 2d 1009 (2010).

#### Habeas relief revoked premised on challenge to peremptory strike

During voir dire of a Texas state



court murder trial, two judges presided at different stages. During the latter stage, the prosecutor struck an African-American juror named Owens and the opposing attorney raised a *Batson* objection. The prosecutor then gave a race-neutral explanation for his decision based on Owens'

demeanor during individual questioning. Opposing counsel did not dispute Owens' behavior but argued that her answers showed a leaning towards the State's case. The Judge denied the *Batson* objection on the basis of the prosecutor's race-neutral reason. The trial against Anthony Haynes continued, he was convicted and received the death sentence. The Fifth Circuit granted habeas relief, ruling that the *Batson* cases relevant to juror demeanor did not allow a judge to uphold a peremptory strike if the judge could not confirm the behavior.

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# LEGAL BRIEFS



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Certiorari was granted.

The U.S. Supreme Court reversed the decision of the Fifth Circuit. It held that although in a peremptory challenge based on demeanor a judge should take into account any observations the judge was able to make during voir dire, *Batson* did not require the judge to reject the explanation if the judge had not observed or recalled the juror's demeanor in question. *Thaler v. Haynes*, 175 L. Ed. 2d 1003 (2010).

## **A break in custody for *Miranda* purposes is upheld if lasting more than 14 days**

In August 2003, Detective Blankenship met with Michael Shatzer

who was incarcerated at a Maryland prison. Prior to asking questions regarding an investigation into child sex abuse allegations, Detective Blankenship gave Shatzer *Miranda* and obtained a written waiver of those rights. Once questioning began, however, Shatzer invoked his right to have counsel present during questioning. The interview ceased and the investigation was closed. Several years later another detective reopened the investigation based on new information and returned to the prison to meet with Shatzer. This time Shatzer waived his *Miranda* rights and made inculpatory statements. The trial court later denied a motion to suppress the statements because "Shatzer had experienced a break in custody for *Miranda* purposes between

the 2003 and 2006 interrogations. Shatzer was convicted. The Court of Appeals of Maryland reversed the trial court's decision, finding that a release back into the prison population did not constitute a break in custody. Certiorari granted.

The U.S. Supreme Court held that Shatzer did experience a break in *Miranda* custody because it lasted more than two weeks (14 days). As such, it reversed the judgment of the Court of Appeals of Maryland and remanded for further proceedings. *Maryland v. Shatzer*, 175 L. Ed. 2d 1045 (2010).



### **United States Supreme Court (p. 1-2)**

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*Thaler v. Haynes* - Habeas relief revoked premised on challenge to peremptory strike

*Maryland v. Shatzer* - A break in custody for *Miranda* purposes is upheld if lasting more than 14 days

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## Utah Supreme Court

### Coercion and distress undermine 'voluntary' choice

On April 23, 2004, Ms. Tripp was involved in an automobile-motorcycle accident that resulted in the death of the motorcycle driver. At the scene of the accident Ms. Tripp refused, on numerous occasions, to allow her blood to be drawn. She was then handcuffed and detained in the back of the police car for the purpose of persuading Ms. Tripp into consenting to the blood draw. A blood technician and victim advocate continued to talk to her in an effort to persuade her to give consent. Eventually blood was drawn, as Ms. Tripp was crying and pulling away. The issue before the Utah Supreme Court was whether the appellate court erred in finding that the consent was not voluntary and erred by refusing to affirm on exigent circumstances because the police lacked probable cause.

The Utah Supreme Court held that there is a "balance between security and liberty." It reasoned that when that balance is disrupted by "coercion and duress to overcome free and voluntary choice" that the court is "compelled to enforce the constitutional balance." It further held that there was insufficient probable cause for the exigent circumstances exception. Affirmed. *State v. Tripp*, 2010 UT 9.

### Police have 'duty of reasonable care' when responding to an emergency

Steven Clegg sued Wasatch County for injuries sustained when his vehicle was struck by Deputy Travis Jensen's patrol car. Deputy Jensen was responding with lights and sirens activated, to an injury accident at the time of the incident. The trial court granted summary judgment in favor of Wasatch County on the grounds that the Governmental Immunity Act barred Clegg's claim. Clegg appealed



arguing, among other issues, that the granting of summary judgment was improper due to material issues of fact remaining in dispute, specifically whether the activated lights and sirens were

adequate notice that Deputy Jensen was responding to an emergency.

The Utah Supreme Court reiterated that although law enforcement officers must respond to emergencies quickly they still have a duty of reasonable care in doing so. It held that there was no evidence on the record regarding the distance from which the emergency signals could be seen or heard. As such, there is a disputed issue of material fact remaining and the case should be remanded back to the trial court for further proceedings. The outcome of those proceedings may be relevant to Clegg's negligence claim, but not necessarily determinative. *Clegg v. Wasatch County*, 2010 UT 5.

## Utah Court of Appeals

### Evidence properly admitted for purpose of showing intent

James Eric Verde was charged and convicted of sexually abusing N.H., a thirteen-year-old boy. On appeal Verde claims the trial court erred in admitting evidence of other crimes, wrongs, or bad acts. He argues that the evidence was inadmissible under the rule 404(b) of the Utah Rules of Evidence "because it was not presented for a proper noncharacter purpose, it was not relevant, and it was more prejudicial than probative."

The Utah Court of Appeals held that the trial court did not err in its admission of the evidence because an element of the crime included specific intent. The evidence was admitted for the purpose of showing intent and accordingly was both relevant and probative. Affirmed. *State v. Verde*, 2010 UT App 30.

### Removal of passenger from vehicle not a violation of Fourth Amendment rights

On August 20, 2007, Russell E. Hurt was arrested for possession of a controlled substance. At the time, Hurt was a passenger in a car driven by Grant Black that was stopped for driving in excess of the speed limit. Black was arrested on a warrant and Hurt was asked to step out of the vehicle so law enforcement could search the vehicle incident to Black's arrest. Hurt was asked to turn out his pockets; he complied and produced an

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# PROSECUTOR PROFILE



## Janette White, Assistant Attorney General, Child Protection Division

Janette has worked for the Attorney General's Office for over six years and loves her job. She gives credit for her efforts to her wonderful parents who are hard workers and have taught her from a young age to work and serve others. As a child, Janette didn't really know what she wanted to be when she grew up. She considered nursing, teaching, raising beagles and being a musician. Music is what opened the door to her education. She attended Weber State University on a full music scholarship and plays the French Horn. She was a music major for three years before changing direction. Janette graduated in 1994 with a Bachelor of Science in Social Work and a minor in Child Development. One day, as she was working as a victim advocate in the Davis County Attorney's Office, she decided she'd go to law school. She called her mother and said, "I think I'll go to law school." Her mom said, "Okay." The rest is history. After her first semester she was ready to quit, but one of her friends forbid her to come home! Even though it was a ten hour drive, her parents and friends visited and came to her graduation in 2003. She says she couldn't have made it without them.

Janette's favorite sports team is "any team that isn't playing," although she did watch the Olympics and thought it was fabulous. She loves classical music but "not Baroque with all those whiney violins and plucky harpsichords." She also loves soundtracks and musicals. Her favorite food is cheese fries at Lonestar and diet Coke but if she's grabbing a snack she loves Red Sour Patch Kids. Her favorite TV series is Project Runway and since she saw the new Star Trek movie six times, she thinks that is probably her favorite movie...right now, anyway. She loves the Harry Potter books but isn't certain why. At first she thought it was because it had nothing to do with work but then realized "it's just a big child welfare story, isn't it! A baby abandoned on a doorstep, mistreated by relatives, etc. And who lets their child go off and play with wands while fighting evil wizards? Someone needs to call CPS!" Janette doesn't have a lot of hobbies because she is currently living with and caring for an Aunt who has Alzheimer's. But, she says she is very grateful for her friends and the time she spends laughing with them. Her favorite cartoon is The Simpsons. As for traveling, the farthest she's been is to Vancouver and Victoria, B.C. but hopes to go to Australia or New Zealand one day. When asked if she spoke a foreign language, her response was, "Is 'Bossy' a foreign language?" Anyone who knows Janette knows that she has a great sense of humor!

Humorous stories abound in the courtroom and Janette has one of her own. She recalls that one day she was in court on a case with a child whose name was "Pale." She goes on to say, "I don't know what the reasoning was behind the name. I was talking about the child and using his name, Pale. The public defender brought up the Indian Child Welfare Act and I responded by saying 'Pale Face isn't an Indian child.' I wished the floor had swallowed me up right there! None of the attorneys could quit laughing. I didn't dare look at the judge."

Another court experience ranks as her most rewarding. She filed a petition one day, on behalf of a child. DCFS was asking for custody of the child and as she was reading through the documents she was struck by the horror the family pets were subjected to. The family cat was harmed in a domestic violence incident and the perpetrator had harmed and had threatened to kill the family dog. In the petition, on behalf of the child, she asked the juvenile court judge to order the animals removed from the home due to their use in the domestic violence incidents. The court granted her motion. There were people in the case who were speaking for the children, speaking for the parents and representing the state, but she says, "these helpless animals were cowering in the shadows and I helped them out. It was a good day."

Her favorite memory occurred one day in the post office when a mother came up and hugged her. She'd graduated from drug court and had her children back with her. "I like those experiences! It's a good feeling when you see someone succeed and become a better parent to their children!" She believes that "this job takes your time and energy and the children and families involved in the cases deserve more than mediocrity. If you're not willing to go the extra mile, get another job!" The State of Utah is lucky to have you, Janette!

PREFERRED NAME - Janette

BIRTHPLACE - Ogden, Utah

FAMILY - Second eldest of four children (but she's the boss!)

PETS - Jack Russell Terrier/  
Chihuahua mix named Lucy,  
American Eskimo named Beau and a  
Chihuahua mix named Harrison  
because he was hit by a car on  
Harrison before being rescued by  
Janette.

FIRST JOB - Babysitting

FIRST REAL JOB - Vito's pizza and  
video store

FAVORITE BOOK

*Harry Potter (series)*  
by J.K. Rowling

LAST BOOK READ

*7th Heaven* by James Patterson

FAVORITE QUOTE

"Evils that befall the world are not  
nearly so often caused by bad men  
but by good men who are silent  
when an opinion must be voiced."

# Rule 15A, URCrP

~ Newly Adopted ~

The Supreme Court's decision in *Melendez-Diaz* ended the practice of simply bringing the report from the state lab to court to prove that the stuff found in the defendant's pocket really was weed, or meth, or heroin. Since then, the state has pretty much had to bring the lab guy, and all persons in the chain of custody, to testify at every trial.

The newly adopted Rule 15A, URCrP, does not, of course, override *Melendez-Diaz*. It does, however, give some relief from the need to automatically subpoena every person who ever touched the stuff from the instant of seizure until the time it is introduced at trial. Please make sure you read this rule and the order adopting it, effective immediately.

IN THE SUPREME COURT OF THE STATE OF UTAH

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In re: Proposed Amendments to Rules 15 of the Utah Rules of Criminal Procedure Case No. 20100164-SC

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ORDER

IT IS HEREBY ORDERED that the attached Rule 15(A) of the Utah Rules of Criminal Procedure is adopted and promulgated effective as of the date of this order pursuant to the expedited rulemaking provisions contained in Rule 11-105(5) of the Supreme Court Rules of Professional Practice.

FOR THE COURT:

*February 26, 2010*  
Date

*Christine M. Durham*  
Christine M. Durham,  
Chief Justice

Case No - 20100164-SC

**Rule 15A. Scientific, Lab, and Analytical Reports - When prosecution required to produce foundation and chain of custody witnesses.**

(a) In all prosecutions in which an analysis of a controlled substance or other evidentiary sample is conducted, a sworn copy of the analytical report signed by the director of the laboratory or the analyst, technician, or forensic scientist conducting the analysis, shall be admitted as prima facie evidence of the report's contents and conclusions and of the chain of custody pertaining to any sample tested.

(b) The defendant may, however, require that the prosecution produce the preparer of the report or chain-of-custody witnesses for cross-examination at trial by filing a written demand with the court and the prosecutor no less than 30 days before trial or 15 days after receiving the report, whichever is later. The court shall extend the demand time for good cause shown.

(c) If a written demand is filed, the prosecution shall be entitled to a continuance upon a showing that the prosecution, despite reasonable efforts, is unable to procure the attendance at trial of the preparer of the report or chain-of-custody witnesses. The time within which a trial is required to begin shall be extended by the length of the continuance.

(d) Failure to timely file a written demand waives the defendant's right to challenge the admissibility of the report or the sample's chain of custody on the ground that the prosecution did not call the preparer of the report or chain-of-custody witnesses.

# Heroes South of the Border

## Mexican Prosecutors Fighting for Justice Amidst Violence and Change

By Robert E. Steed, Assistant Attorney General



A recent news article reports the grisly circumstances of the latest massacre: “Five decapitated bodies were found by police authorities in front of a public school.” One might assume that this was just another ghastly act of terrorism in Iraq or somewhere in the Middle East. However, such atrocities are occurring with increasing frequency just south of the border from the United States. A spokesman for the Sinaloa State Prosecutor’s Office stated that the victims’ bodies and heads were found in front of a primary school in the town of Escuinapa in the Mexican State of Sinaloa. Sinaloa is one of 31 Mexican states located across the Baja Peninsula on the northwest side of Mexico. This terrible crime is just one of many similar atrocities being committed by drug cartels in northern Mexico. The victims’ bodies had the letter “Z” carved on their backs in an apparent reference to the Zetas drug gang.

With more than 15,000 homicides in the northern regions of Mexico in the past three years alone, the rising body count was initially dismissed according to one author as “simply reflecting narco on narco violence. Powerful drug cartels were fighting for control of lucrative territory and distribution routes.” “Few tears needed to be shed — especially north of the border — if the foot soldiers of those cartels were killing each other off.” The drug cartel wars, however, have spilled over like a tsunami of violence across the population and even across our own borders.

Mexican civilians have not only been caught in the cross fire in clashes between drug cartels and police, now they are being directly targeted for kidnapping or murder by gangs. Recently, armed gunmen killed 13 people in Ciudad Juarez. Most of the victims were high school students attending a party. Juarez is a border town; just a stone throw from El Paso, Texas. The drug cartels have grown so brazen that they do not hesitate to target law enforcement or government officials. In December of 2009, federal forces conducted a raid resulting in the death of one of Mexico's drug kingpins. Melquisedet Angulo Cordova, a marine commando, died in the line of duty during the operation. His name became public when President Felipe Calderon, and other officials, made him a national hero. Tragically, this allowed the cartel to locate his family leading to the murders of Angulo’s mother, brother, sister and aunt.

In the midst of this chaos are a law enforcement and legal system that are largely inept, overwhelmed and under sharp public criticism for their inability to cope with the problem. The Mexican legal system has a reputation of being corrupt and secretive. Terms like “presumption of innocence” or “due process” do not exist. Judges are bribed and police officers are similarly viewed as being on the take. While the public rightfully fears the criminal element, they have little confidence in the legal system for protection. A victim of a crime has a realistic fear that if they report a crime, the police will do nothing about it, and worse, the assailant will learn about the report and retaliate against them. When the law fails, all that is left is anarchy. As the philosopher Aristotle said, “At his best, man is the noblest of all animals; separated from law and justice he is the worst.”

Conditions in Mexico demand real change to restore order and public confidence in the justice system. Without it, Mexico as a nation is at risk and the problems there will continue to spill over the border into the United States. In September 2008, hundreds of thousands of Mexican civilians took to the streets demanding government intervention to end the violence and called for reform of the judicial system. Traditionally, Mexico operates under the European system or *inquisitorial* system of justice. In a nutshell, cases are presented to the court through written

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# Heroes South of the Border

## Mexican Prosecutors Fighting for Justice Amidst Violence and Change (continued)

By Robert E. Steed, Assistant Attorney General

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documents. An accused in Mexico would have his case presented to a panel of judges who would never see or hear a witness, listen to the testimony of experts or of the accused; there would be no opening or closing statement, no cross examination and, hence, no ability on the part of the judges to assess credibility from personal observation. Judges base their decisions on written pleadings, reports and exhibits. According to one Mexican prosecutor, “if police put someone's head in excrement and the person confessed, the confession was admitted if the paperwork followed procedures as far as fingerprints, the signature of the public minister, etc.” Another author commented, “Without the threat of exposure in public trials, mistaken arrests, bungled investigations and confessions extracted under threats and torture have become common in Mexico.”

As prosecutors, we might ask ourselves how would we perform our function under these seemingly hopeless circumstances? In early spring of 2009, I spent three days with approximately 40 Mexican prosecutors in a unique training program where I learned something of their lives as prosecutors (“fiscals”). In the fall of 2008, I responded to an email from Chief Deputy A.G. Kirk Torgensen asking if there were prosecutors in our office who spoke Spanish (I think the word fluent might have been mentioned). I replied that I spoke Spanish. Our offices at College Drive in Murray are located directly above the Immigration and Customs Enforcement Office. It's not uncommon that I get asked to translate for somebody seeking directions or for assistance.

After responding to the email, I was informed that I had been selected to teach trial advocacy to Mexican prosecutors as part of a unique program organized by the National Association of Attorneys General (“NAAG”) and the Conference of Western Attorneys General (“CWAG”). The first thing I discovered was that the “Spanish” I learned in Peru, South America serving an LDS mission was not only a little rusty, but it certainly did not entail legal terminology. In truth, most English speakers do not understand much of the terminology we use in a courtroom. I certainly was not prepared to speak Spanish legalese. Accordingly, I set about printing a book of legal terminology in Spanish in preparation of the course.

Before the training, I attended two preparation courses with a variety of prosecutors from around the country. I worked with prosecutors from Puerto Rico, Florida, New Mexico, Illinois, Texas, Idaho and California. Some of the prosecutors were natural Spanish speakers, though had little prosecution experience; while others had prosecution experience, but like me; Spanish was definitely a second language. We blended our language and experience in order to create a mini prosecutors training course for Mexican prosecutors.

The course took place over three days in March of 2009 in Austin, Texas. The Mexican prosecutors who attended the course were younger and almost a third of them were female. They came primarily from Chihuahua and Oaxaca (pronounced “Wahaca”), two of the northern states of Mexico. What I found most impressive about these prosecutors was their desire to help their country. After spending a lunch hour with a group of prosecutors I was informed that their entire caseloads were comprised of homicide cases (not surprising given the current climate of violence). When asked about their typical workday, I was amazed to learn that prosecutors in Mexico work day and night, Monday through Saturday. One prosecutor worked seven days a week as the legal supervisor on homicide cases. The average working day comprised of starting

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# Heroes South of the Border

## Mexican Prosecutors Fighting for Justice Amidst Violence and Change (continued)

By Robert E. Steed, Assistant Attorney General

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at the office at about 8:30 and working until about 6:00 p.m. Following a short trip home to eat dinner, the prosecutor returned to the office until about 10:00 or 11:00 p.m. This schedule was constant every day except Saturday, where they worked until 6:00 p.m. Sunday was their only day off.

I heard very little complaining about the workload. The toughest problems the prosecutors faced were poor police work and corruption. While they appreciated the training, they questioned whether the judges would allow them to do the things we taught them. As we attempted to explain our legal system, the prosecutors were bewildered by our ability to work with police and to have judges in the United States who followed the process we were outlining for them. One of the greatest challenges to reform is that the judges and prosecutors are reluctant to change the cultural framework of the court. Too often they simply revert to what they know and understand. Change is not going to be easy, nor will it take place quickly. As trainers, we realized quickly that we were merely planting seeds. Mexico's justice system will evolve slowly, but it must change in order to restore the rule of law in a relatively lawless state.

In the inquisitorial system, there is no plea bargaining. Every case is processed via the paper work they prepare and submit to the court. It was unclear to us at the time of the training if plea bargaining will be permitted in the new system and how much discretion they will exercise as prosecutors. Needless to say, the Mexican prosecutors were entranced by our depictions of prosecutors serving as ministers of justice and deciding how to resolve a case with little or no input from the judges. Without question, if open trials are going to become the new way of doing things, the process will have to evolve to resolve cases outside the trial process.

Another area where my admiration grew for these prosecutors was their lack of fear or nervousness when doing the training exercises. I have both a participant in and trainer in past trial advocacy courses. The Mexican prosecutors showed none of the typical signs of nervousness so prevalent in my past experience in teaching new prosecutors here in the States. There was no nervous voice inflections, no twitching or pacing. These "fiscals" were naturals in telling stories and showing emotion to emphasize their passion for the facts they were describing in the exercises. I was also impressed with how quickly they learned and applied new concepts, such as conducting a proper direct or cross examination. I have little doubt that these prosecutors could function very well in an American courtroom.

As we became friends with our Mexican colleagues and students, a chilling thought crossed my mind. These prosecutors have enjoyed a degree of anonymity in their work up until now. Pleading cases by paper does not expose them as directly as being in the courtroom, asking tough questions and openly defying the drug cartels and their legions of henchmen. I worry for their safety. Will they, like the police or the fallen marine commando, become the next target of reprisal? If it has not occurred already, I fear it will. These prosecutors are not only hard working, capable and brave; they are real modern heroes for trying to uphold the rule of law in a country marred with violence and chaos.



*End of Article*



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eyeglass case. When requested to open the case, Hurt again complied and revealed contraband. Hurt filed a motion to suppress the evidence, but was denied and subsequently convicted. On appeal Hurt argues that his removal from the vehicle, as well as the requests leading up to the discovery of the contraband, violated his Fourth Amendment rights against unreasonable search and seizure.

The court of appeals held that Hurt failed to demonstrate a violation of his Fourth Amendment rights. He made no effort to marshal the evidence against the district court's finding that he consented to the search. In fact, as asserted in the State's brief, he failed "to even acknowledge the district court's reliance on Hurt's consent, much less present any reasoned argument or authority against it." Accordingly, the court affirmed the district court's ruling denying Hurt's motion to suppress and affirmed his conviction. *State v. Hurt*, 2010 UT App 33.

### **Petitioner statutorily entitled to factual innocence hearing**

Harry Miller was arrested in 2003 and charged with aggravated robbery. He was convicted by a jury. On appeal his case was remanded for additional findings, at which time a stipulated motion for summary reversal of the conviction was filed based on an agreed error in the proceedings. A motion to dismiss the charges was filed and Miller was released from custody, after nearly four and one-half years of incarceration. Miller then filed a civil petition against the State of Utah to determine his factual innocence pursuant to the "Postconviction

Determination of Factual Innocence" statute. The trial court granted the State's motion to dismiss the petition. Miller appeals and argues that the court erred in granting the motion to dismiss pursuant to rule 12(b)(6) of the Utah Rules of Civil Procedure.

The Utah Court of Appeals held that the plain language of the statute, Utah Code Ann. § 78B-9-404(1)(b) (2008), entitles Miller, "who has secured reversal or vacatur of his conviction and who is facing no further prosecution for that offense to file a petition under subsection (2)(b), which petition is not constrained by the statutory requirements of subsection (2)(a)." Furthermore, the court held that Miller's petition contained a "bona fide issue as to factual innocence." Accordingly, the court reversed the trial court's granting of the motion to dismiss and remanded the case "so that Miller may receive the factual innocence hearing to which he is statutorily entitled." *Miller v. State*, 2010 UT App 25.

### **Standard for ascertaining continuous use**

The Okelberrys appeal a trial court's order and argue that it improperly applied the standard for ascertaining continuous use as a public thoroughfare under Utah Code § 72-5-104. They argue that the district court erred in its application of the recent Utah Supreme Court decision outlining the standard for determining what

qualifies as a sufficient interruption to restart the running of the required ten-year period.

The appellate court recognized that the case law prior to the court's decision was unclear. It reasoned that with it being unclear at the time of trial "the parties should have the opportunity to present supplemental evidence, regarding any intent to interrupt public use" and provide more information on "whether and when the gates were closed and locked." The

case is remanded back to the trial court to provide the parties with that opportunity. *Wasatch County v. Okelberry*, 2010 UT App 13.

### **Prior bad acts admissible for proper noncharacter purpose**

Robert H. Pedersen was convicted on two counts of aggravated sexual abuse of his daughter, T.P., for the inappropriate fondling of her on two occasions. Pedersen appealed his conviction arguing that various errors resulted in an unfair trial. He claimed that his trial counsel was ineffective, that the trial court erred in allowing evidence of prior bad acts to be admitted, that a mistrial was warranted due to prosecutorial misconduct and that his motion for a directed verdict should have been granted.

The appellate court determined that Pedersen failed to show that his counsel was ineffective or that a mistrial was warranted. In addition, the court held





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that the testimony of prior bad acts was correctly admitted because it was offered for noncharacter purpose, was relevant and its probative value did not substantially outweigh the danger of unfair prejudice. The court declined to review the final claim regarding the motion for directed verdict because Pedersen failed to preserve the argument and did not argue plain error or exceptional circumstances. Affirmed. *State v. Pedersen*, 2010 UT App 38.

## Tenth Circuit Court of Appeals

**Prosecution's failure to disclose that government witnesses shared a jail cell was not a *Brady* violation.**

Isaac Headman was convicted on murder and kidnapping charges. He appealed arguing that the government violated its duties under *Brady* when it failed to disclose that two of its witnesses had shared a cell during trial. He also argues that the court erred by failing to inform the jury of a more specific application of the intoxication instruction submitted by him.

The Tenth Circuit held that although under *Brady* and its progeny, it would have been better to disclose the cell-sharing arrangement, no *Brady* violation occurred because Headman failed to show that the undisclosed information was material. Based on affidavits provided by both witnesses and lacking any evidence of collusion on their part, the court found “no reasonable probability that the outcome would have been different” should the

information have been disclosed. The court further held that Headman failed, in his jury instruction claim, to meet the requirement that plain error be ‘plain’. It reasoned that if the instructions somehow misinformed the jury, it was not obvious or apparent to the court. *U.S. v. Headman*, 594 F.3d 1179 (10th Cir. 2010).

## Other Circuits

**Plain-view doctrine applied to computer searches**

Curtis Williams was convicted of possession of an unregistered machine gun and an unregistered silencer, as well as possession of child pornography. The items were seized from his home during the execution of a search warrant. Williams filed a motion to suppress the evidence claiming, “their seizure exceeded the scope of the warrant and was not justified by plain-view exception to the warrant requirement.” The District court denied the motion. The issues on appeal include whether the seizure of child pornography fell within the scope of the warrant’s authorization and whether the evidence was properly seized under the plain-view exception to the warrant requirement.

The Fourth Circuit Court of Appeals held that the search for and seizure of child pornography did fall within the scope of the warrant because it authorized search for

“instrumentalities of computer harassment.” It further held that the evidence seized was justifiable under the plain-view doctrine because the officer was lawfully present at the place where the evidence was plainly viewed, the officer had a lawful right of access to the evidence and the incriminating character of the evidence was immediately apparent. Affirmed. *U.S. v. Williams*, 592 F.3d 511 (4th Cir. 2010). \*\*Note: For a similar issue and holding also see, *U.S. v. Mann*, 592 F.3d 779 (7th Cir. 2010).

***Gant* leaves abundant authority to search car for evidence incident to arrest**

Samuel Vinton was convicted of narcotics and firearm offenses after evidence was found in a briefcase, in his car, during a traffic stop. His motion to suppress the evidence was denied. On appeal he argues that *Arizona v. Gant* establishes that the search of the

briefcase cannot be upheld under the search-incident-to-arrest exception.

The U.S. Court of Appeals for the District of Columbia disagreed and held that after making an arrest involving a weapons offense, the police

officer had an objectively reasonable basis to believe additional weapons may be contained in the briefcase. Accordingly, he did not violate the Fourth Amendment by opening a locked briefcase in the car while searching for other weapons. Affirmed. *U.S. v. Vinton*, 594 F.3d 14 (D.C. Cir. 2010).



See BRIEFS on page 11



Continued from page 10

## **Routine biographical information on government forms is not hearsay**

On August 7, 2007, Abimel Caraballo was involved with two other defendants in smuggling eleven aliens into Miami, Florida. He was convicted and subsequently sentenced for his role in the alien smuggling incident. On appeal Caraballo argues that the court erred and violated the Federal Rules of Evidence and the Confrontation Clause of the Sixth Amendment when it admitted evidence obtained during an unlawful search and admitted a standard INS form relative to the aliens he smuggled.

The Eleventh Circuit held that the officer had reasonable suspicion to support the initial investigative stop. Probable cause developed in support of the defendants' violation of Florida's fishing laws and therefore the search of the cabin of the boat that lead up to the discovery of the aliens did not violate the Fourth Amendment. It further held that the standard INS forms admitted into evidence fell within the hearsay exception for public records and reports and did not violate the Confrontation Clause of the Sixth Amendment. Finally, the court upheld the imposed sentence. Affirmed. *U.S. v. Caraballo*, --- F.3d ---, 2010 WL 297146 (11th Cir. 2010).

## **Jail policy requiring suspicionless strip searches upheld**

To address serious problems of contraband being smuggled into the jail system, the San Francisco Sheriff's Department, under the Sheriff's direction, instituted a policy requiring the strip search of all arrestees being introduced into San Francisco's general jail population. A class action

lawsuit was filed challenging this policy. The district court held that it violated the Fourth Amendment rights of the persons searched and denied the Sheriff qualified immunity. On interlocutory appeal, a divided panel of the appellate court affirmed the denial. An en banc rehearing was granted.

The Ninth Circuit concluded that the strip search policy did not violate the constitutional rights of arrestees being searched. Furthermore, it reversed the district court's denial of the Sheriff's motion for summary judgment based on qualified immunity. Accordingly, the district court's granting of plaintiffs' motion for partial summary judgment as to Fourth Amendment liability was reversed. *Bull v. City and County of San Francisco*, --- F.3d ---, 2010 WL 431790 (9th Cir. 2010).

## **Other States**

### **DNA profile in 'John Doe' arrest warrant satisfies the particularity requirement of the Fourth Amendment**

Four days before the statute of limitations would have expired on a sexual assault case, a felony complaint was filed against "John Doe, unknown male," describing him by his unique 13-loci deoxyribonucleic acid (DNA) profile. An arrest warrant issued, referencing the same DNA profile. Paul Eugene Robinson was later arrested based on a "cold hit" in a DNA database. A jury convicted him of five felony sexual offenses, all involving the same victim. The issue before the state court is (1) whether the issuance of a "John Doe" complaint or

arrest warrant can commence a criminal action, (2) whether a DNA profile satisfies the "particularity" requirement for an arrest warrant; and (3) what remedy, if any, exists for the unlawful collection of genetic material.

The Supreme Court of California held that the identification of a suspect by his unique DNA profile adequately identified him for purposes of commencing prosecution. Additionally, an arrest warrant containing an unknown defendants DNA profile adequately identified him and satisfied the particularity requirement of the Fourth Amendment. It further held that erroneous collection of a suspects DNA sample did not violate the Fourth Amendment and any violation of these rights in the erroneous collection of DNA samples did not trigger exclusionary rule. Affirmed in part and remanded with directions. *People v. Robinson*, No. S158528, 2010 WL 252110 (Cal., Jan. 25, 2010).

### **No warrant needed to get service provider to 'ping' cell phone**

Robert Bella Devega, III, was convicted by jury of multiple offenses, involving the murder of Saifullah Afzal. Devega argues on appeal that, among other claims, his Fourth Amendment right was violated when an investigating officer had his cell phone provider "ping" Devega's phone, without a warrant, in order to locate him.

The Georgia Supreme Court held that because the warrantless monitoring of Devega's cell phone did not "reveal any information that was not also available through visual surveillance", a violation of the Fourth Amendment did not occur. Affirmed. *Devega v. State*, No. S09A2064, 2010 WL 337333 (Ga., Feb. 1, 2010).

End of BRIEFS



# On the Lighter Side

It's not uncommon for defendants in misdemeanor court to waive counsel and proceed pro se on a plea. The other day I was prosecuting such a defendant and explaining the offer we were making him on his criminal case.

He told me he wanted to take the offer, and I told him he could choose to plead either "Guilty" or "No Contest." I started to generically explain the difference... "When you plead guilty, you're admitting you committed the crime; when you plead no contest..."

He broke in and said: "Well, that's just a sissy way of sayin' guilty, isn't it?"

He then informed me he had "no desire to plead 'sissy.'"

During a non-jury docket in municipal court the judge heard testimony in a DUI case, then recessed it to hear a citizen witness in another case. He returned to the first case to hear testimony about the

Breathalyzer and then allowed a police officer to take the stand in that case to testify about the arrest. However, during that testimony the judge declared another recess to take a smoke break.

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

Q. (By prosecutor) And you could tell that the injuries were sustained before death and not as a result of the autopsies?

A. (By medical examiner) Yes, because the body does not bruise after death.

Q. And you do not perform autopsies on living people?

A. No, that's considered bad form.

I was on a criminal jury. An elderly female witness was being questioned. She said she saw from her third story window, the defendant chasing the victim around the car. The defense attorney asked her if the two men were running around the car, how did she know it was the defendant who was chasing the other man. Moreover, could she be making an assumption about who was chasing whom?

She answered without missing a beat, "Yes, I made an assumption. I assumed the one with the gun, your client, was chasing the other one."

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

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

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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## UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 21-22	<a href="#">23RD ANNUAL CRIME VICTIMS' CONFERENCE</a> <i>Utah Council on Victims of Crime - Helping Victims Achieve New Heights</i>	Radisson Hotel SLC, UT
April 22-23	<a href="#">SPRING CONFERENCE</a> <i>Caselaw update, legislative update and more</i>	South Towne Center Sandy, UT
April & May	STATEWIDE REGIONAL LEGISLATIVE UPDATES	23 Locations statewide
June 24-25	<a href="#">UTAH PROSECUTORIAL ASSISTANTS ASSOCIATION CONFERENCE</a> <i>Outstanding training for non-attorney staff in prosecution offices</i>	University Marriott Salt Lake City, UT
August 5-6	<a href="#">UTAH MUNICIPAL PROSECUTORS ASSOCIATION SUMMER CONFERENCE</a> <i>For all prosecutors whose caseload consists primarily of misdemeanors</i>	Zion Park Inn Springdale, UT
August 16-20	<a href="#">BASIC PROSECUTOR COURSE</a> <i>A must attend course for all new prosecutors, or those new to prosecution</i>	University Inn Logan, UT
September 22-24	<a href="#">FALL PROSECUTOR CONFERENCE</a> <i>The annual fall professional training event for all Utah prosecutors</i>	Yarrow Hotel Park City, UT
October 20-22	<a href="#">GOVERNMENT CIVIL PRACTICE CONFERENCE</a> <i>For public attorneys who work the civil side of the office</i>	Moab Valley Inn Moab, UT
November 17-19	<a href="#">ADVANCED TRIAL ADVOCACY SKILLS COURSE</a> <i>Advanced training for those with 5+ years and lots of trials under their belt</i>	Hampton Inn & Suites West Jordan, UT

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

April 25-29	<a href="#">EVIDENCE FOR PROSECUTORS</a>	<a href="#">Agenda</a>	<a href="#">Register</a>	San Francisco, CA
May 16-20	<a href="#">OFFICE ADMINISTRATION</a>	<a href="#">Agenda</a>	<a href="#">Register</a>	Rancho Barnardo, CA
May 17-21	<a href="#">EQUAL JUSTICE FOR CHILDREN</a> <i>Investigation and prosecution of child abuse</i>	<a href="#">Agenda</a>	<a href="#">Register</a>	Charleston, SC
June 6-16	CAREER PROSECUTOR COURSE			Charleston, SC
July 11-14	NDAA SUMMER CONFERENCE			Napa, CA
August 23-27	STRATEGIES FOR JUSTICE		<a href="#">Register</a>	National Harbor, MD
Sept. 27– Oct. 1	SAFETYNET	<a href="#">Draft Agenda</a>		Easton, MA

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.

## NATIONAL ADVOCACY CENTER (NAC)

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](#).

See the matrix

[BOOTCAMP](#)

[Register](#)

*A course for newly hired prosecutors*

NAC  
Columbia, SC

Course Number	Course Dates
04-10-BCP	April 23-16
05-10-BCP	June 14-18
06-10-BCP	August 9-13

April 25-30

[childPROOF](#)

[Register](#)

*Advanced trial advocacy for child abuse prosecutors*

NAC  
Columbia, SC

See the matrix

[TRIAL ADVOCACY I](#)

[Register](#)

*A practical "hands-on" training course for trial prosecutors*

NAC  
Columbia, SC

Course Number	Course Dates
04-10-TAI	May 3-7
05-10-TAI	June 7-11
06-10-TAI	July 12-16
07-10-TAI	August 16-20
08-10-TAI	September 27 - October 1

August 3-6

[CROSS EXAMINATION](#)

[Register](#)

*An in-depth examination of the theory and method of effective cross*

NAC  
Columbia, SC

August 23-27

[UNSAFE HAVENS II](#)

[Register](#)

*Advanced trial advocacy training for prosecution of technology-facilitated Child sexual exploitation cases*

NAC  
Columbia, SC

September 13-17

[COURTROOM TECHNOLOGY](#)

[Register](#)

*Upper level PowerPoint; Sanction II; Audio/Video Editing (Audacity, Windows Movie Maker); 2-D and 3-D Crime Scenes (SmartDraw, Sketchup); Design Tactics*

NAC  
Columbia, SC