

The PROSECUTOR



Director's Thoughts

Student Loan Relief

During the Fall Conference I received several inquiries regarding the status of the John R. Justice Student Loan Relief Act (JRJ); specifically, when funds will become available to help those struggling to repay large student loan balances on public attorney salaries. I have been remiss in not keeping people better informed in regard to this program. See the table of contents for the page upon which current JRJ information can be found.

SCOTUS

At this early date in its term the U.S. Supreme Court has already heard arguments in two cases which bear close

attention by prosecutors. They both deal with prosecutorial liability and immunity.

On October 13th, the court heard arguments in Skinner v. Switzer. This is a civil rights case out of Texas and the 5th Circuit. Skinner was convicted of slaughtering an entire family. The state's case included lots of DNA evidence. The defense team, as a matter of strategy, declined to seek DNA testing of additional items that were collected at the crime scene.

Now, as you have probably guessed, the defense wants the additional items tested, because they will show that "that other guy" did it. Oh – and this will surprise you – "the other guy" is now dead. The defendant pursued testing of the additional item through habeas corpus proceedings in state and federal courts, all of which denied him relief.

Not to be deterred, Skinner then filed a civil rights action against the DA,

claiming that her failure to agree to additional testing amounted to a denial of his civil rights. A unique and creative legal approach, to be sure, and one that got the attention of the U.S. Supreme Court. The question before the Court is: "May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?"

A ruling for Skinner in this case could open a whole new area of post conviction litigation. If you want to read the briefs and keep up on the case, go to the ABA website: www.abanet.org/publiced/preview/briefs/oct2010.shtml#09571.

On October 12, 2010, the Supreme Court heard arguments in Connick v. Thompson, a case out of New Orleans and, like Skinner, the 5th Circuit. The case addresses the issues of prosecutor immunity and liability. It is also a §1983 civil rights action.



Continued on page 2

In This Issue:

3 Case Summaries

4 Prosecutor Profile:
Roger Blaylock,
Deputy Assistant District Attorney

6 DV LinkLine Letter

7-8 Fall Conference Pics

9 John R Justice Student Loan Relief

13 Brief Bank Update!

14 On the Lighter Side

15-16 Training Calendar



Continued from page 1

Following the trial of the civil rights case, the federal district court found that the prosecutors who handled Thompson's criminal case had hidden exculpatory evidence in violation of Brady. Despite no history of similar violations, the DA's Office in New Orleans was found liable under §1983 for failing to adequately train its deputy prosecutors. A pattern of violations is usually necessary to show culpability and causation in failure to train claims, but in rare cases one violation may suffice. According to the below website, the Court has hypothesized only one example justifying single-incident liability; that being a failure to train police officers on the use of deadly force.

Two questions are before the Court:

1. "Does imposing failure-to-train liability on a district attorney's office for a single Brady violation contravene the rigorous culpability and causation standards of Canton and Bryan County?"
 2. "Does imposing failure-to-train liability on a district attorney's office for a single Brady violation undermine prosecutors' absolute immunity recognized in Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009)?"
- This attack on prosecutorial immunity, if it stands, has serious ramifications. May long standing and well established procedures and law relating to much of what we do be tossed out if the case is packaged as a federal §1983 civil rights action?

To learn more about the case, go to: www.abanet.org/publiced/preview/briefs/oct2010.shtml#09571.

Complex Financial Crime Training

This year the Advanced Trial Skills Course will, for the first time, use a complex financial crimes scenario. Some of the very best prosecutors in the state put their heads together and came up with a really dynamite program. This is an opportunity for you to sharpen up your trial advocacy skills and, at the same time, learn that you can, indeed, take on the con man who has ruined the lives of citizens of your county. David Cole will tell you it's more fun than golf – and David is really into golf. You will already have received the brochure for the advanced program. Please look over the agenda and plan to join us in beautiful West Jordan in mid-November.

Continued on page 3

Utah Supreme Court (p. 3)

State v. Harker - An arrest lacking in statutory authority may still be constitutional if probable cause
State v. Epling - Cert on dismissed claim denied when other claims still pending on appeal

Utah Court of Appeals (p. 5, 10)

State v. Shaffer - Failure to object to modified sentencing invited error
State v. Burkenshaw - Reves family resemblance test applied to find a 'promissory note' to be a 'security'
State v. Hamblin - Disclosure of evidence under *Brady*, not prejudicial to outcome of case
State v. Bergesen - Trial court bound by agreement to consider motion to suppress

Other Circuits (p. 10-12)

U.S. v. Allen - SWAT permitted to detain 'everyone' during warrant execution
U.S. v. Dotson - WA statute prohibitory and subject to assimilation
In re Application for Order - No warrant needed to use tower data for cell phone tracking
Millender v. Cnty of Los Angeles - Use of shotgun insufficient to support warrant authorizing seizure of all firearms
U.S. v. Minnitt - Melendez-Diaz not applicable to limited due process right to confrontation in a revocation hearing
U.S. v. Mundy - Inventory proper because it fit the agency policy

Other States (p.12)

Moore v. Superior Court - Mental competence not required for commitment or recommitment trial
Barnett v. Superior Court - Discovery in post-conviction cases not applicable to out-of-state law enforcement agencies

Case Summary Index





Continued from page 2

Following Doctor's Orders?

Well, folks, summer is but a memory and by the time you read this most of the leaves will probably have fallen. Back in April, Ole Doc Nash gave his prescription for summer wellness. He prescribed lots of back yard BBQs, frequent trips to a local canyon or lake and use of your personal leave time. He also promised that he'd try to follow his own advice.

So, how did the ole doc do? Being a generous individual he gives himself a B-, maybe even a B. His back yard grill didn't get as much use as it ought to have, but he did finish off one propane bottle and have to switch to another. He and Mrs. Nash took a trip to northern California where they relaxed and did a bit of leisurely hiking among the giant Redwoods. Reverence and awe are but a couple of nouns that come to mind. There are no adjectives that do them justice. Visits from and to the grandchildren couldn't honestly be characterized as relaxing, but trying to keep up with the kids got Doc's heart pumping. Camping in the Uintas with most of the family occupied one of those three day summer weekends. Having been bitten with some kind of bug, Doc and the Mrs. kind of participated in the Tooele 4th of July 5K. (They started half an hour before the gun and walked the course – at a good, brisk pace, they'll have you know.) In short, Ole Doc Nash and his dear wife had a pretty fair summer. They hope you did likewise.

Now, get your snow tires mounted before Thanksgiving, get your flu shots now and get the snow blower serviced soon. Doc wants to be sure you're all around to receive his 2011 summer wellness prescription.

Happy Halloween.

Mark Nash, Director

RECENT CASES

Utah Supreme Court

An arrest lacking in statutory authority may still be constitutional if probable cause

Following a car accident, Jeff Brian Harker was arrested for driving without insurance and providing false evidence of insurance to the officer. During the search incident to arrest, the officer further discovered methamphetamine, Lortab pills, and a residue-tainted piece of glass pipe. Harker moved to suppress the evidence found during the search, but the court denied the motion and found that the officer had probable cause to arrest based on the officer's knowledge, hearing and other senses. Harker entered a no contest plea and appealed. He argued that the trial court should have suppressed the evidence because the offenses, for which he was arrested, were not committed in the presence of the arresting officer. The court of appeals affirmed, holding that the arrest was supported by probable cause and statutory authority.

The Utah Supreme Court first addressed the matter of statutory authority and held that since the officer did not perceive Harker driving without insurance firsthand, the arrest was not supported by statutory authority. It then moved to the greater issue of determining the admissibility of evidence seized during a search incident to a warrantless arrest that is supported by probable cause but not authorized by statute. The court relied on *Virginia v. Moore*, 553 U.S. 164 (2008), to conclude that the evidence was admissible. It reasoned that although the arrest lacked statutory authority, it was still constitutionally permissible, under the Fourth Amendment, if based on probable cause. As such, the evidence was properly admitted. Conviction affirmed. *State v. Harker*, 2010 UT 56.

Petition for Certiorari on dismissed claim denied when final decision on other claim(s) still pending before the appellate court

David E. Epling entered no contest pleas to three counts of sexual abuse of a child and was sentenced to three consecutive terms for the crimes. He appealed and initially argued that the court abused its discretion in sentencing him to consecutive terms. Thereafter, he also claimed ineffective assistance of counsel in relation to his plea and in advising him regarding a motion to withdraw his plea. The court of appeals dismissed Epling's claims of ineffective assistance of counsel but



Continued on page 5

PROSECUTOR PROFILE



Roger Blaylock, Deputy Salt Lake District Attorney

What started out as a childhood dream to be a scientist, resulted in twenty-eight years (so far) at the Salt Lake District Attorney's office. Along the way, Roger Blaylock worked as a cook, a bullcook in an oil camp at Prudhoe Bay, worked in a library, taught courses at ITT-Tech and teaching courses at SLCC. He's no stranger to hard work, and had great parents setting the example. His mother worked as a registered nurse at night so she could care for her nine children during the day. His father was an accountant after surviving polio as a child and enduring the limp that resulted from the disease. Roger's not lacking good genes for commitment either. He shares that his father came to Roger's high school graduation in a hospital bed after being knocked 40 feet by a motorcyclist. The stellar examples set by his parents served him well as Roger pursued his own career path.

Roger was born and raised in Idaho Falls, Idaho. He attended Harvard College and BYU, graduating with an English degree before attending law school and subsequently graduating in 1973. Amidst the grueling demands of law school, he met his wife. She was the librarian at the law school and sent him an overdue notice for a book he had not checked out so that she could meet him. Together they have a son, age 25.

When it comes to sports, Roger is a fan of the Utes, the Jazz, and Harvard teams. He spends a lot of time with Boy Scouts and is the Chairman for Special Needs Scouting for the Great Salt Lake Council. He has been to three Jamborees with special needs troops. Other hobbies include woodworking and playing racquetball. Roger enjoys a broad spectrum of music, including: classical, vintage rock, folk, country, and everything else from opera, *The Magic Flute*, and *Prokiev's* ballets to John Denver. 'Forever Young' by Rod Stewart and Joan Baez, however, is a favorite. He loves salmon and scallops but will grab a Snickers for a snack, although he doesn't eat a lot of candy. His favorite movie is the *Lord of the Rings* trilogy. His current favorite TV series is *Leverage*, but in the past he has enjoyed *WKRP* and *Good Neighbors*. Roger has traveled to Europe, Germany, and France, as well as to the east and west coasts. If money were no object he'd like to return and spend time in Scotland, England and Germany.

Roger attributes his choice to go to law school to a young lady who told him she couldn't respect someone who just had a business degree. His family and friends took his decision in stride and in due time he found himself prosecuting for the Salt Lake City prosecutors office and then the district attorney's office. The most challenging aspect of being a prosecutor, for Roger, is trying to provide comfort and closure to families that have lost loved ones. On the flip side, his most rewarding aspect is convicting defendants who deserve it. He also finds it rewarding to work out win-win resolutions where appropriate. As an improvement to the criminal justice system, Roger would like to see better treatment for victims and more consistent consequences for defendants. He thinks preparation and common sense are the most important qualities of a good prosecutor.

A funny court experience involved a shoplifting and possession of a controlled substance case. The defendant had gone to the store with her children and proceeded to place a couple of items in her purse. She then left her children in the check-out line and got in her truck to attempt to drive away. At the trial, the defendant had a friend testify. During cross examination she was asked, "Why are you sure the police must have set the defendant up?" She responded, "She wouldn't have had her drugs with her if she had her kids." The jury convicted in half an hour!

As parting words of wisdom, Roger says, "Be your own person and use your particular talents. What you are doing is worth the effort. Responsibility to the law is the backbone of our society." Thanks, Roger, for the wisdom and your many years of service!

PREFERRED NAME - Roger S. Blaylock

NICKNAME: Rog the Dodger

BIRTHPLACE - Idaho Falls, ID

FAMILY - Second oldest of nine children; Father of one son

PETS - Cats

FIRST JOB - Delivering newspapers

FAVORITE BOOK - After scriptures, 1776 for history and *Dune* for science fiction

LAST BOOK READ - *Desperate Engagemment* by Marc Leepson; just finished *Pride and Prejudice* by Jane Austin

FOREIGN LANGUAGE - German, some Spanish

FAVORITE QUOTE OR WORDS OF WISDOM: Family and service to others are what make life enjoyable.



Continued from page 3

retained jurisdiction over the challenge to his sentence. Epling petitioned for certiorari on the ruling to dismiss his ineffective assistance of counsel claims.

The Utah Supreme Court dismissed for lack of jurisdiction. It reasoned that a petition must be brought after the issuance of the final decision on appeal. In this case, since the sentencing issue is still pending before the appellate court, a final decision has not been entered and as such, the matter cannot be properly brought before the court at this time. *State v. Epling*, 2010 UT 53.

Utah Court of Appeals

Failure of counsel to object to prosecutions modified sentencing recommendation was an invited error and not obvious to the court

Abraham Mario Shaffer agreed to enter a guilty plea to aggravated robbery in exchange for concessions by the State on sentencing. At sentencing the prosecutor confirmed the agreement, however, she failed to recommend the prior agreement of credit for time served and made additional statements regarding the victim's feelings that Shaffer be incarcerated for as long as possible, unreliable statements by his relatives during the presentence investigation, and that in her opinion his behavior warranted at least another year in jail followed by 36-months probation. The trial court rejected the State's

recommendation for jail time and sentenced Shaffer to serve five years to life in prison. Shaffer appealed, alleging that the prosecutor's statements breached the plea agreement. However, where the alleged breach was not raised at the sentencing hearing, the court found it was not preserved on appeal. Shaffer conceded that his claim was not preserved but further challenged his sentence on the grounds of plain error and ineffective assistance of counsel.

The appellate court held that because Shaffer's counsel stated its agreement in court and failed to object to the terms of the agreement, any error was invited and not obvious to the trial court. The court further held that the prejudice analysis under the ineffective assistance of counsel claim could not be met because Shaffer could not show it affected his sentence. It also found no evidence to support an allegation that the State failed to communicate its sentencing recommendation to AP&P. Finally, the court held that none of the statements made by the prosecutor justified reversal due to plain error or ineffective assistance of counsel. Affirmed. *State v. Shaffer*, 2010 UT App 240.

Reves family resemblance test applied to find a 'promissory note' to be a 'security'

Upon conviction for a single count of securities fraud, Jennifer Robyn Burkinshaw appealed arguing that the evidence at trial was insufficient to support the conviction. Specifically, she alleges that the trial court erred

when it determined the promissory notes were a security under the Utah Code and as interpreted in *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

The Court of Appeals of Utah applied the *Reves* family resemblance test and found that the promissory note in question was a security because three factors weighed against any family resemblance to nonsecurities. In addition, when Burkinshaw received the money as an investment, there was no regulatory scheme or other risk reducing factor to protect the investment, and it



appeared to be a security to the investing public. Accordingly, the court upheld the conviction. *State v. Burkinshaw*, 2010 UT App 245.

Disclosure of evidence under Brady, not prejudicial to outcome of case

Jason Tyler Hamblin appeals his convictions for child sex abuse crimes and claims the trial court erred when it failed to grant his motion for a new trial based on an alleged *Brady* violation. He also argues that the court erred by allowing the State to amend the dates of the alleged abuse on the day before trial and by only partially granting his motion in limine.

With respect to the *Brady* violation, the appellate court found that even if the evidence had not been disclosed, Hamblin was in no way prejudiced by the lack of disclosure and, as such, the trial court did not err in denying his motion for new trial. The court also held that the prosecution's amendment of dates in the information was proper and did not prejudice Hamblin. The court further held that the trial court did not err

Continued on page 10



Domestic Violence Council

205 205 North 400 West • Salt Lake City, Utah 84103 • (801) 521-5544 • Fax (801) 521-5548
Judy Kasten Bell, Executive Director

Dear UDVC Members and Friends,

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

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

Since 1993, 36,041 calls for help and information were answered serving 74,938 people

The DVLL is available 8,760 hours each year

The Domestic Violence Resource Manual is updated quarterly and is regarded as the most up to date resource for domestic violence services in the state (also see www.udvc.org)

Two full-time staff, 3 independent contractors and 4 volunteers respond to the calls. Volunteers provide an estimated 1560 hours of service each year.

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

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

Many good wishes,

Judy Kasten Bell

FALL CONFERENCE





JOHN R. JUSTICE STUDENT LOAN RELIEF PROGRAM UPDATE

In late June, Governor Herbert designated Utah Prosecution Council (UPC) as the state agency to administer the JRJ Act here in Utah. The Utah application was filed and a couple of weeks ago UPC received notification from DOJ that the application had been approved. The required acceptance documents have now been signed and returned.

During the summer an application to be used in applying for JRJ assistance was also prepared. DOJ has, however, in very specific terms, directed that no JRJ funds may be committed until after congress passes a budget for the fiscal year that began on October 1, 2010. As you are probably aware, Congress just adjourned until after the elections – without passing a budget. Depending upon election results, it could very well be sometime after the new congress convenes in January before an FY11 federal budget is passed.



Some things about JRJ awards, however, are certain:

- Only \$100,000 will be available for Utah in FY11.
- The act mandates that JRJ funds be divided 50/50 between prosecutors and public defenders, regardless of the relative number of eligible persons in each category. Up to 15% of the state's share may be used to cover administrative expenses.
- To be eligible for JRJ assistance a person must be either:
 - a full time prosecutor who works for state government, for a local governmental entity or for a tribal government;
 - a full time public defender who is employed by the state, by a local governmental entity or by a non-profit agency which contracts to supply public defender services for the state or for a local governmental entity; or
 - a full time public defender who works for a federal defender office.
- The act mandates that funding priority be given to those applicants who are “least able to pay” their student loan obligation.
- The act requires that a procedure be used to assure relatively equal geographic distribution of JRJ assistance awards throughout the state.
- The Utah JRJ committee has determined that, at least during this first year, no individual award of JRJ funds will exceed \$4,000. Individual award amounts will be based upon a formula that takes income and number of dependants into consideration. Longevity in JRJ eligible employment may also be considered.
- In order to receive a JRJ award, an applicant must sign a written commitment to continue in eligible JRJ employment for at least three years from the date of the award. Those who receive awards the first year of the program will, if still eligible, receive priority for subsequent year awards. Any subsequent year awards are, of course, dependant upon continued congressional funding of the program.
- There will not be nearly enough money to meet the needs of eligible prosecutors and public defenders in Utah.

Once the go-ahead from DOJ is received, word will be spread that UPC is ready to accept applications. Notification to prosecutors will be through e-mails from UPC, written notification to employers and information in *The Utah Prosecutor* newsletter. Notification to public defenders will be through e-mail and written notification to eligible employers, all of whom have agreed to spread the word internally. Information will also be posted in a JRJ section of the UPC website: www.upc.utah.gov.

All applications will be reviewed and award amounts will be determined by a five member committee consisting of two experienced public defenders, two experienced prosecutors and a representative from the Utah Higher Education Assistance Authority. The Director of UPC will chair the review committee but will have a vote only in case of a tie among other members of the committee.



Continued from page 5

in only partially granting the motion in limine because his confrontation rights were not implicated by any resulting limitation of evidence included in his opening statement. *State v. Hamblin*, 2010 UT App 239.

Trial court bound by agreement to consider motion to suppress even after defendant missed four prior pretrial deadlines

Wayne Jay Bergeson appeals his conviction on sexual exploitation and weapons charges and asserts that the trial court erred in failing to consider his motion to suppress evidence for being untimely filed. This case included four deadlines set for Bergeson to file his motion to suppress on four different occasions. Each time he failed to comply and each time the court allowed relief for good cause shown and set a new deadline. When Bergeson failed to comply with the fourth deadline, he made a good cause argument as to why he should be allowed another extension, but the court set the case for trial. Bergeson requested he be able to file the motion, under rule 12 of the Utah Rules of Criminal Procedure, within five days before trial. At that point the trial court consented to considering the motion if Bergeson was convicted and stated that if his rights were violated as alleged in the motion, the court would vacate the conviction and grant the motion. As such, Bergeson filed his motion more than five days before trial, however, the court refused to consider it, as it had previously consented to do. Bergeson appealed.

The appellate court held that Bergeson timely sought relief by filing the motion more than five days before trial as allowed by rule 12, and that the

court must consider the motion as agreed. Accordingly, it reversed the trial court's refusal to consider the motion and remanded. *State v. Bergeson*, 2010 UT App 281.

Other Circuits

SWAT team permitted to detain everyone during execution of warrant

A homicide investigation lead investigators to obtain a warrant for videotapes from a bar's security cameras. Due to prior altercations at the bar involving the owner and armed patrons, investigators enlisted the SWAT team to assist. Everyone on the premises, including Thurmond Allen, were detained during the execution of the warrant. While being detained, Allen admitted to officers he had a gun and was charged with possession of a firearm by a convicted felon. He subsequently filed a motion to suppress arguing that his detention was an illegal seizure under the Fourth Amendment. The trial court denied the motion, and Allen appealed.

The U.S. Court of Appeals for the Third Circuit held that officers were permitted to detain everyone during the execution of the search warrant. As such, given that the detention was legal and that Allen voluntarily advised police that he had a firearm before being searched, the denial of Allen's motion to suppress is upheld. *United*

States v. Allen, 2010 WL 3222107 (3d Cir. 2010).

Washington statute prohibitory and subject to assimilation.

Teresita Dotson, and two other Air Force employees, worked at an on-base establishment that sold alcohol. Each was caught serving alcohol to underage servicemen. They were charged under the Assimilative Crimes Act (ACA), 18 U.S.C. §13(a), and Washington state's statute prohibiting furnishing alcohol to minors found in Wash. Rev. Code §66.44.270. The defendants filed motions to dismiss, challenging the federal courts' subject-matter jurisdiction on the ground that the Washington statute is not properly assimilated under the ACA.

The Ninth Circuit disagreed with the defendants and held that because the Washington statute was prohibitory, rather than regulatory, it was therefore subject to assimilation. It further reasoned that assimilating the statute into federal law furthered the ACA's goal of uniformity. As such, convictions affirmed. *United States v. Dotson*, 615 F.3d 1162 (9th Cir. 2010).

No warrant needed to use tower data for cell phone tracking

The United States applied for a court order to compel a cell phone provider to produce a customer's cell tower data (also known as cell site location information (CSLI)). The district court denied the application and the United States appealed.

The Third Circuit held that CSLI



defendants and held that because the Washington statute was prohibitory, rather than regulatory, it was therefore subject to assimilation. It

Continued on page 11



Continued from page 10

from cell phone calls is obtainable by court order and that such an order does not require the "traditional probable cause determination." In fact, the government had a lower burden than having to establish probable cause to obtain the order because the CSLI data requested is not information from a tracking device, rather it is a wire communication. District court order vacated, and case remanded. *In re Application of U.S. for an Order Directing a Provider of Electronic Comm'n Serv. to Disclose Records to Gov't*, 2010 WL 3465170 (3rd Cir. 2010).

Use of shotgun insufficient to support warrant authorizing seizure of all firearms

Shelly Kelly reported to police that Jerry Ray Bowen had assaulted her and fired a sawed-off shotgun at her as she escaped. Officers obtained a search warrant which included the facts of the assault and stated that Bowen was a known gang member. The warrant authorized the search of Bowen's residence and seizure of any firearm located, as well as any evidence of gang membership. After the search, the occupants of the searched residence filed suit alleging the warrant was overbroad and violated the Fourth Amendment's particularity requirement. The district court granted partial summary judgment based on qualified immunity, but denied qualified immunity with respect to the scope of the search warrant.



Defendants appealed. The appellate court vacated and remanded.

On rehearing en banc, the Ninth Circuit held that the warrant was overbroad. Furthermore, it determined there was insufficient probable cause to support the warrant authorizing search of the residence, and that defendants were not entitled to qualified immunity. "The affidavit indicated exactly what item was evidence of a crime, the black sawed-off shotgun with a pistol grip, and reasonable officers would know they could not undertake a general, exploratory search for unrelated items unless they had additional probable cause for those items." Vacated order affirmed. *Millender v. Cnty of Los Angeles*, 2010 WL 3307491 (9th Cir. 2010).

Melendez-Diaz not applicable to limited due process right to confrontation in a revocation hearing

Melvin Odell Minnitt, Jr. was convicted of being a felon in possession of a firearm. As such, he was sentenced to prison, followed by three years of supervised release. In May 2008, he completed his prison term and began his supervised release. In June 2009, Minnitt's probation officer, Greg Cruz, petitioned for revocation of his release on the grounds that Minnitt violated the terms of his release by possessing illegal controlled substances and missing counseling sessions. During the supervised release revocation hearing,

Minnitt objected to Officer Cruz's testimony as to whether the lab technician tested Minnitt's urine samples on the grounds of hearsay and a violation of his right to confrontation. The court found good cause, as required by the Fifth Circuit, and overruled his objection. Minnitt appealed and argued that a key case, *United States v. McCormick*, 54 F.3d 214 (5th Cir. 1995), which establishes that a defendant's interest in confronting laboratory technicians is minimal, was undermined by *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

The U.S. Court of Appeals for the Fifth Circuit disagreed and held that a defendant's limited due process right to confront laboratory technicians in a revocation hearing remained unchanged by the U.S. Supreme Court's ruling in *Melendez-Diaz*. It explained that "*Melendez-Diaz* interprets a defendant's right to confrontation under the Sixth Amendment in a criminal prosecution, not the limited due process right to confrontation afforded a defendant in a revocation proceeding." *United States v. Minnitt*, 617 F.3d 327 (5th Cir. 2010).

Inventory proper because it fit the agency policy

Boob Mundy (who gave him that name?) was stopped for improper window tint and failure to signal a turn. When the officers realized that the VIN and plate showed that the car was not registered, the officers impounded the car. During an inventory, the officers opened the trunk, finding a gray plastic bag. Inside the bag was a shoebox containing two bags of cocaine. A subsequent search warrant, based on the cocaine found during the inventory, lead

Continued on page 12



Continued from page 11

to the discovery of more cocaine. Boob challenged the inventory, claiming that the Philadelphia Police Department policy allowed inventories of impounded cars, but did not guide officers on how to deal with closed containers. The Philadelphia Police Department inventory policy in this case instructs officers to conduct a vehicle inventory describing any damage and/or missing equipment, personal property of value left in the vehicle by the operator/occupants, including the trunk area if accessible. The policy also stated that no locked areas, including the trunk area, should be forced open while conducting an inventory.

The court of appeals held that the inventory in this case was guided by a sufficiently detailed policy. The policy language guiding the officers to search all accessible areas of the vehicle, including the trunk, providing that the trunk and locked containers not be forced open, gave clear guidance to officers. Thus, the cocaine found during the inventory and the warrant search was admissible. The two important principles shown in this case are that an agency must have an inventory policy that provides sufficient guidance to perform an inventory and limit the discretion of the individual officer and that the officer be trained in the policy and follow it. Agencies should ensure that their policies are tailored to federal and state court decisions. *United States v. Mundy*, 2010 WL 3547435 (3rd Cir. 2010). [This case information obtained from Xiphos, a biweekly criminal procedure update offered without charge to prosecutors and public safety professionals. Go to www.kenwallentine.com/Xiphos].

Other States

Mental competence not required for commitment or recommitment trial

Ardell Moore was convicted of abducting and sexually assaulting a teenage girl. After serving three years he was paroled. Again, three years later he abducted and sexually assaulted another female victim and served a lengthy prison term. Upon his release in 2000, Moore was tried and committed as a sexually violent predator under the Sexually Violent Predator Act. Such commitment involved confinement and treatment in a secure hospital setting. Prior to the recommitment hearing, Moore moved to stay the proceedings to determine mental competence to stand trial. The court denied his motion and Moore appealed.

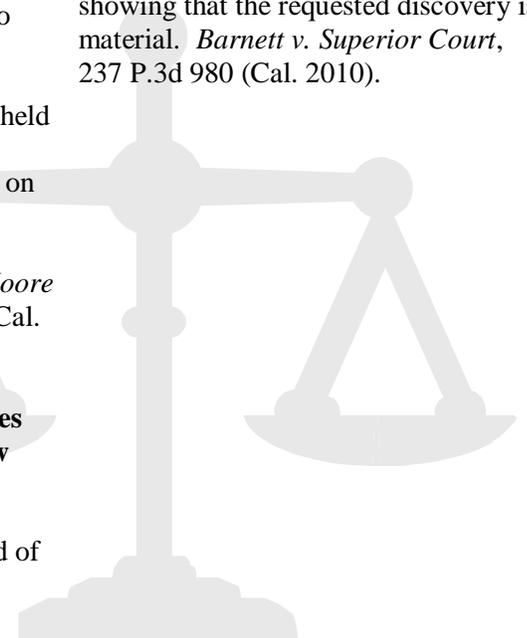
The California Supreme Court held that due process does not require mental competence be established on the part of someone being tried, committed, and treated under the Sexually Violent Predator Act. *Moore v. Superior Court*, 237 P.3d 530 (Cal. 2010).

Discovery in post-conviction cases not applicable to out-of-state law enforcement agencies

Lee Max Barnett was convicted of first degree murder, among other

offenses, and sentenced to death. Barnett filed a motion for post-conviction discovery, of which some requests were granted by the Superior Court and others denied. Barnett appealed the decision to deny some of his requests.

The California Supreme Court held that a defendant seeking post-conviction discovery must show a reasonable basis to believe the requested materials exist, and cannot compel disclosure of materials in possession of out-of-state law enforcement agencies. The court reasoned that although a law enforcement agency may have acted on behalf of the prosecution in gathering information, it is not considered part of the California prosecution team. The court further held that as grounds for a request, a defendant is not required to make a showing that the requested discovery is material. *Barnett v. Superior Court*, 237 P.3d 980 (Cal. 2010).



End of BRIEFS

THE BRIEF BANK HAS CHANGED!!!!

The NDAA Brief Bank, formerly coordinated through our office, is now the **Prosecutors' Encyclopedia (PE)**, launched and supported by the New York Prosecutors Training Institute (NYPTI). The old brief bank, although still online, is no longer being updated.

PE is "Wiki" (similar to Wikipedia) in that it is easy to access and update. It differs from other well known Wiki products in that *it is only open to prosecutors* and nothing can ever be added or edited anonymously. PE has been in development for over 2 years and will greatly enhance mutual assistance to prosecutors around the nation. The contents of the original online brief bank have already been migrated to PE.

In a nutshell, PE is a brief bank on steroids!

It contains:

- * Every published court decision federal and state (1970-today) powered by VersusLaw
- * Thousands of Expert Witness transcripts
- * Streaming Videos of experts testifying at trials (coming this fall)
- * Commentary
- * Summaries
- * Discussions

NOW IS THE TIME! Don't reinvent the wheel! This is a great opportunity to access information that will save you time and effort. It is easy to sign up; just take a few minutes to **create an account** by:

1. Going to: www.MyProsecutor.com
2. Clicking "request an account."
3. Complete the user information form - There is no charge to access this invaluable resource.
4. To gain access:
 - A. **You must create an account from your Office Computer** - or a computer where you can access your "official e-mail." No personal or transitory e-mail addresses will be permitted (i.e. Gmail, Hotmail, Yahoo, AOL, etc.).
 - B. You must be an Attorney and a Prosecutor (or attorney working for an organization supporting Prosecutors (i.e. NDAA, NYPTI, CDAA, etc.).
 - C. Follow the directions in the confirmation emails.
5. Once your account is created, please take a few minutes to read about the PE project: https://pe.nypti.org/wiki/What_is_PE. Begin collaboration and start contributing!

If you have questions or issues creating an account please e-mail: PE-Help@NYPTI.org

We hope that PE will be an invaluable resource. PE improves with additional users and contributors, so take the PE Plunge today!

If you have additional questions or need further assistance, please contact:

Sean Smith, Technical Resource Attorney, New York Prosecutors Training Institute (NYPTI)
107 Columbia Street, Albany, New York 12210
Phone: (518) 432-1100, Ext. 207, Fax: (518) 432-1180, Sean.Smith@NYPTI.org



On the Lighter Side

TRUE LOVE

A man and his wife walked into a dentist's office.

"Doc, I'm in one heck of a hurry," he said. "I have two buddies sitting out in my car waiting for us to go play golf, so forget about the anesthetic. I don't have time for the gums to get numb. We have a 10 a.m. tee time at the best golf course in town, and it's 9:30 already. I just want you to pull the tooth and be done with it."

The dentist thought to himself, "Wow, this guy is brave, asking to have his tooth pulled without anything for the pain." He asked the man, "Which tooth is it, sir?"

The man turned to his wife and said "Open your mouth, honey, and show him."

~~~~~

## OVERHEARD IN COURT

This was overheard during a domestic violence case where the defendant was claiming that she was innocent.

Prosecutor to the Victim: "And you say that she threw 8 ounce drinking glasses at you and they almost hit you in the head?"

Victim: "Yes, that is true."

Defendant blurts out: "He is lying your honor "they were 4 ounce glasses.""

One morning old Judge Thompson was conducting criminal court when it was brought to his attention that a frequent defendant, Carl Ray (last name omitted), had come to court in a state of intoxication. Judge Thompson then called Carl Ray forward to the bench and the following exchange took place:

Judge: "Carl Ray, why are you in my court half drunk" ?

Carl Ray: "Me run out of beer".

~~~~~

Jury Note from a six-person, misdemeanor jury:

"We are hung 4 to 3."

~~~~~

A well known local attorney was arguing his case in the Court of Appeals.

ATTORNEY: Ive lost my last 4 cases in this court, but this time I have the law on my side.

APPELLATE BENCH: What law is that, Counsellor?"

ATTORNEY: The law of averages!

~~~~~

QUESTION: Am I talking loud enough to

where you can hear all of my questions distinctly and clearly?

ANSWER: Yes, sir. I don't know how good I can talk, I left my teeth at home, in a glass of water.

QUESTION: Well, gum it out good and loud.

~~~~~

## TOOTH FAIRY

After losing another tooth, young-old Timmy asked his mother, "Mom, are you the tooth fairy?"

Assuming he was old enough to hear the truth, she replied, "Yes Timmy, I am."

Timmy seemed to take this news quite well.

But as he headed for the door, he slowly turned back toward his mother with a curious look on his face and said, "Wait a minute mom. How do you get into the other kids' houses?"

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

We'd like to hear it! Please forward any jokes, stories or experiences to

[mwhittington@utah.gov](mailto:mwhittington@utah.gov).

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Visit the UPC online at

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



## UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

See table

[STANDARDIZED FIELD SOBRIETY TEST WORKSHOPS FOR PROSECUTORS](#)

*Administration of SFSTs, clue observation on various BAC levels & Intoxilyzer 8000 functioning principles*

| Date & Time                                          | Location                                                                                                                 |
|------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|
| Friday, October 22 <sup>nd</sup><br>1:00 - 5:00 p.m. | POST Training Facility<br>Public Safety Education & Training Bldg. - Rm 114<br>410 W 9800 S, Sandy (Larry Miller Campus) |
| Friday, November 5 <sup>th</sup><br>1:00 - 5:00 p.m. | Orem Public Safety Department<br>Training Room<br>95 E Center St, Orem                                                   |

November 1-3 [JOINING FORCES: 23<sup>rd</sup> Annual Conf. on Child Abuse & Family Violence](#) Davis Conf. Center  
*Sponsored by Prevent Child Abuse Utah. For more info, contact Trina Taylor* Layton, UT  
 801-393-3366; e-mail: [ttaylor@preventchildabuseutah.org](mailto:ttaylor@preventchildabuseutah.org);  
 website: [www.preventchildabuseutah.org](http://www.preventchildabuseutah.org)

November 11-12 [COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR](#) Dixie Center  
*Annual gathering of elected and appointed county & district attorneys* St. George, UT

November 17-19 [ADVANCED TRIAL ADVOCACY SKILLS COURSE](#) Hampton Inn & Suites  
*Advanced training for those with 5+ years and lots of trials under their belt* West Jordan, UT

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

|                |                                                                          |                          |                   |
|----------------|--------------------------------------------------------------------------|--------------------------|-------------------|
| October 27-31  | <a href="#">20<sup>TH</sup> ANNUAL DOMESTIC VIOLENCE CONFERENCE</a>      | <a href="#">Register</a> | Washington, DC    |
| November 7-11  | <a href="#">GOVERNMENT CIVIL PRACTICE CONFERENCE</a>                     | <a href="#">Register</a> | Scottsdale, AZ    |
| November 14-18 | <a href="#">PROSECUTING SEXUAL ASSAULTS &amp; RELATED VIOLENT CRIMES</a> | <a href="#">Register</a> | San Francisco, CA |
|                | <a href="#">Agenda</a>                                                   |                          |                   |
| December 5-8   | <a href="#">THE EXECUTIVE PROGRAM</a>                                    | <a href="#">Register</a> | San Francisco, CA |
| December 5-9   | <a href="#">FORENSIC EVIDENCE</a>                                        | <a href="#">Register</a> | San Antonio, TX   |
|                | <a href="#">Agenda</a>                                                   |                          |                   |

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.*

See the table

[PROSECUTOR BOOTCAMP](#)

[Register](#)

NAC  
Columbia, SC

*Specifically designed for newly hired prosecutors*

| Course Dates        | Registration Deadlines |
|---------------------|------------------------|
| February 7-11, 2011 | December 3, 2010       |
| March 21-25, 2011   | January 21, 2011       |

Feb. 28—March 4

[TRIAL ADVOCACY I](#)

[Register](#)

NAC  
Columbia, SC

*A practical, "hands-on" training course for trial prosecutors  
The registration deadline is January 3, 2011.*