Newsletter of the Utah Prosecution Council

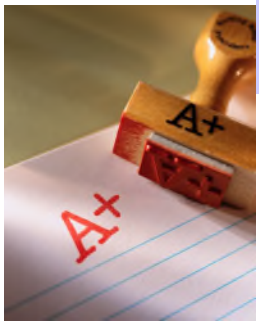
The PROSECUTOR

RECENT CASES

Utah Supreme Court

Rule 15 should be applied to procedural matters

Several Utah counties petitioned for review of the Utah State Tax commission's assessment of T-Mobile USA's taxable property in Utah for the 2003 tax year. In turn, T-Mobile sought review of the Tax Commission's assessment in the district court. The appeal was stayed pending a final decision by the district court which acted as a "tax court". The final decision issued and T-Mobile argues that this appeal is moot and should be dismissed pursuant to rule 15 of the Utah Rules of Appellate Procedure. The counties argue that rule 15 does not apply because it became effective after they initiated their appeal.



The Utah Supreme Court held that rule 15 should be applied in this case. It reasoned that although the rule may result in a different standard of review, this is a procedural matter and accordingly, retroactive application of rule 15 is appropriate. It further explained that even if rule 15 did not apply, this matter is moot and the appeal would be subject to dismissal regardless. Appeal dismissed. *Beaver County v. Utah State Tax Com'n*, 2010 UT 550.

Utah Court of Appeals

Brief struck and attorney discharged for noncompliance with rule 24

The State of Utah filed a Motion to Strike Appellant's Brief, Discharge Counsel, and Appoint Qualified Appellate Counsel. No opposition to the motion was filed. The State argued in their motion that the appointed counsel for defendant, Gary Whitener Smith, failed to comply with rule 24(a) of the Utah Rules of Appellate Procedure. Specifically, the brief did not provide a summary of proceedings in the district court, contained only a brief statement of facts which omitted

Continued on page 2

In This Issue:

1 **Case Summaries**

4 **Prosecutor Profile:** **Ryan Robinson,** Chief Prosecuting Attorney

9 **Brief Bank Update**

10-13 **Article: Changing the Paradigm: The Community Prosecution Approach to Crime Reduction** by **Brent G. Berkley,** Asst. Director of Programs, NAC, NDAA

14 **On the Lighter Side**

15-16 **Training Calendar**

Vol. 20 Issue 9 September 2010

Continued from page 1

supporting citations, lacked a sufficient statement of issues, and contained only a cursory summary of argument but did not include an argument section.

Upon review of each rule requirement contained in rule 24(a), the Utah Court of Appeals agreed that the brief "wholly fails to comply with the requirements." Furthermore, the court noted that the same attorney had filed a brief in 2008 which was also struck for failure to comply with rule 24(a). In that matter, the court directed the attorney, Milton T. Harmon, to file a brief in compliance with the rules, however, the attorney failed to file a conforming brief or make any effort at a conforming brief, despite the mandatory language of the court's order. Accordingly, and in light of the attorney's prior conduct, the court struck the brief, discharged the attorney with orders that he not be appointed to represent a party before either state appellate court for three years, and remanded the case back to the trial court to appoint new appellate counsel. *State v. Smith*, 2010 UT App 231.

Reasonable inference of involvement "in concert with two or more persons" required for enhancement

Luis Cristobal appealed the denial of his motion for a directed verdict. He argues that there was insufficient evidence to support the enhancement of his criminal mischief conviction to a second degree felony on the grounds that he "acted in concert with two or more persons." Cristobal's arrest resulted when a security guard, patrolling a Savers store, noticed a juvenile talking to two females in a car. As the officer approached, the juvenile ran behind a nearby storage unit with spray paint cans in his hands. Shortly thereafter, the officer was approached by Cristobal and the other juvenile. In the vehicle where the two females were sitting, the officer located a lid from one of the spray cans. Cristobal does not challenge his underlying conviction; therefore the issue is whether there was sufficient evidence for the jury to conclude that he acted in concert with the other juvenile.

Continued on page 3

Case Summary Index

Utah Supreme Court (p. 1)
Beaver County v. Utah State Tax Com'n - Rule 15 should be applied to procedural matters

Utah Court of Appeals (p. 1-3)
State v. Smith - Brief struck and attorney discharged for noncompliance with rule 24
State v. Cristobal - Reasonable inference of involvement "in concert with two or more persons" required for enhancement
Estate of Higley v. UDOT– No time limitation on the filing of a condemnation judgment
State v. Hildreth - Severance appropriate if crimes unconnected in their commission or not part of a common scheme or plan
State v. Little - Time to file appeal not extended even though filing required prior to order denying motion was filed

Tenth Circuit (p. 5, 7)
U.S. v. Apollo Energies Inc. - Failure to modify hazard to birds after notice given, constitutes a crime
U.S. v. Weiss - Reasonable foreseeability of circumstances resulting in the use of wire transmission sufficient
U.S. v. Mullins - Bank's increased risk of loss may 'affect' financial institution
Brooks v. Gaenzle - Deadly force not enough to constitute seizure of person
Dodds v. Richardson - Personal responsibility required for supervisor to be liable for subordinates

Other Circuits (p. 8)
Lee v. Lampert - No actual innocence exception to federal habeas statute of limitations
U.S. v. Thomas - "Literal Truth' defense to perjury must be based on more than a plausible understanding

Other States (p.8)
State v. Shadden - Officer opinion testimony on field sobriety tests not subject to Frye

Continued from page 2

The appellate court found that the unidentified juvenile's initial flight from the scene did not support a reasonable inference that he aided or encouraged Cristobal's involvement in the commission of the crime. Although the circumstances suggest that Cristobal was involved in some way, there was no evidence in the record that makes that possibility more probable than the possibility that Cristobal was merely present during the criminal activity. Therefore, the court held that there was insufficient evidence to support the jury's conclusion, beyond a reasonable doubt, that the unidentified male aided or encouraged Cristobal. Enhancement vacated and case remanded. *State v. Cristobal*, 2010 UT App 228.

No time limitation on the filing of a condemnation judgment

In 1974, the district court entered a condemnation judgment in favor of UDOT, condemning land belonging to Edwin Higley for purposes of constructing a highway. Most of the property was in Davis County but a small tract was also in Weber County. UDOT filed the judgment with the Davis County Recorder's Office but failed to file in Weber County. In 2002, UDOT became aware of construction activity on the Weber County tract of land, and upon further investigation discovered that the judgment had not been filed in Weber County. In January 2003, UDOT filed the judgment. The Estate, of the now deceased Higley, filed an action seeking to quiet title in the property and argued that because UDOT failed to file before eight years lapsed, the January recording did not transfer title to UDOT. The trial court entered a judgment dismissing the action and the Estate appealed.

The Utah Court of Appeals held that there is no time limitation on the filing of a condemnation judgment and that the failure of UDOT to do so within eight years did not preclude filing at the later date. Affirmed. *Estate of Higley v. UDOT*, 2010 UT AP 227.

Severance appropriate if crimes unconnected in their commission or not part of a common scheme or plan

Grant Hildreth, a licensed chiropractor, was charged with eight counts of forcible sexual abuse involving five female patients, several counts of which involved C.W. Prior to trial he filed a motion to sever the counts and hold a separate trial for each victim. The trial court denied the motion and concluded that he would not be prejudiced under 404(b). It briefly analyzed and commented on three factors related to prejudice but did not otherwise analyze the issue of prejudice, including whether the evidence was relevant or whether the evidence would be more probative than prejudicial. The case proceeded to trial on all counts and he was convicted. Hildreth appeals and argues that the trial court erred in denying his motion for severance.

The appellate court found that the alleged crimes were unconnected in their commission and not part of a common scheme or plan. In addition, the court concluded that all of the prior bad acts evidence would not properly come in at a trial on the charges concerning only C.W. Accordingly, it held that the trial court exceeded its permissible range of discretion in denying the motion for severance, thereby prejudicing Hildreth. Reversed and remanded for new trial. *State v. Hildreth*, 2010 UT App 209.

Time to file appeal not extended even though filing required prior to order denying motion to suppress

Todd Jeremy Little appeals his conviction and sentence. The matter came before the appellate court on the State's motion for summary disposition. Little entered a conditional plea and reserved the right to challenge the trial courts denial of his motion to suppress. As such, Little was sentenced on May 12, 2009, however, the order denying the motion to suppress was not entered until August 14, 2009.

The Utah Court of Appeals dismissed the case for lack of jurisdiction. It reasoned that the notice of appeal was required to have been filed on or before June 11, 2009, since Little did not file a motion for a new trial which would otherwise have extended the time to file. Although the court acknowledged this was an unusual situation in which Little would have been required to file his appeal to the order denying his motion to suppress before the order had actually even been entered, no exception to the rule applied. Dismissed. *State v. Little*, 2010 UT App 222.

Continued on page 5

PROSECUTOR PROFILE

PREFERRED NAME - Ryan

BIRTHPLACE - Utah

FAMILY - Father of 4 children; the eldest of six children

PETS - None

FIRST JOB - Delivery boy for Wok 'n' Roll Chinese Food

FAVORITE BOOK - *Great Expectations* by Charles Dickens

LAST BOOK READ - *Hunger Games* trilogy by Suzanne Collins

FOREIGN LANGUAGE - French

FAVORITE QUOTE OR WORDS OF WISDOM: Prior Proper Planning Prevents Poor Performance (my dad liked to recite these 6 P's. Try it, your kids will hate it!)

Ryan Robinson,

Chief Prosecuting Attorney

Ryan Robinson has worked for West Valley City Attorney's office for eleven years and currently is the Chief Prosecuting Attorney. He was raised in Cottonwood Heights, and is the oldest of six children. He has four brothers and a sister. His childhood dream included becoming a doctor when he grew up, however, a C- in Medical Physiology launched him into studying for the LSAT. Now, being an attorney is becoming a bit of a family affair. His sister is a corporate attorney in Denver who makes about three times what Ryan does, but she hates her life. He also has twin brothers, age 21, who are planning on taking the LSAT next summer. Ryan feels lucky to love what he does every day.

Ryan attended BYU for both undergrad and law school. He graduated with his psychology degree in 1996 and then his law degree in 1999. His wife loves to joke that BYU had to give him a tuition refund for being the only person to attend for seven years and not get married. He didn't meet his wife until living back in Salt Lake City where they met at the hot tub of their apartment complex. Ryan is the proud father of four children, but to his children's dismay, they have no pets. He says he used to take them to Bird World in Bountiful and tell them, "that's where we keep our pets."

Given his educational history it is no surprise that his favorite sports team is "the Cougs, of course!" His favorite music is the Dave Matthews Band. He's seen them six times and would have gone again this year but somehow his loving wife lost their tickets. Ryan's hobbies include slicing golf balls and coaching little league soccer. He loves a good steak and for a favorite treat he'll grab a Reese's. Shawshank Redemption is his favorite movie and Lost was his favorite TV series so now he's going through withdrawals. His favorite cartoon is Hall of Justice with all the superheroes fighting all the super villains. Ryan speaks French as a result of a two year stint in Brussels, Belgium where he served an LDS mission. He's dying to go on an African safari someday when he "can find two weeks of babysitters."

Ryan began working for West Valley City when a friend of his, was clerking there and recruited him. They met when the friend was a visiting student at BYU. He yelled the "f" bomb quite loudly in the BYU law library and Ryan realized he needed someone to take him under his wing if he was going to survive a year in Provo. The long term result of that friendship was that Ryan became a prosecutor for West Valley City, but his friend became a "moderately evil defense attorney." Ryan claims he lucked into the job and it is better than he ever imagined.

The most rewarding aspect of the job, for Ryan, is prosecuting domestic violence offenders. "They tend to be the toughest cases we have in our office and the offender does everything they can to wiggle out of any consequences. Often they are tampering with witnesses and attempting to manipulate the process. When we get a conviction and create real consequences for these guys, I feel like I've done a good job." He thinks the most important qualities of a good prosecutor include being tough but fair, as well as being creative and having tenacity. And, that is what he says it takes to win domestic violence cases.

On a more humorous note, Ryan was recently at the Matheson Courthouse before Judge Maughan. He had informed the court that he had just filed a new case against the defendant, and had an active warrant that needed to be served. When the defendant realized he was going to jail, he turned around, ran down the three flights of stairs, through the exit and made it to about 10th South and State before getting caught by the bailiffs. Amazingly, his attorney then requested a bail reduction, which was, to no one's surprise, denied.

Ryan loves that he gets paid to do justice. Thanks for doing such a great job Ryan, West Valley City is lucky to have you!

Continued from page 3

Tenth Circuit Court of Appeals

Failure to modify hazard to birds after notice was given, constitutes a crime

Two Kansas oil drilling operators used cylindrical "heater-treaters" equipped with exhaust pipes and movable louvers in the course of their operation. Starting in 2005, The U.S. Fish and Wildlife Service (the "Service") conducted a search of a large number of the heater-treaters. They discovered carcasses of birds in about half of them and determined that the heater-treaters posed a danger to birds protected under the Migratory Bird Treaty Act (MBTA). The Service embarked on an educational campaign, provided notice to oil companies involved in the inspections and continued to conduct random searches of the heater-treaters. Subsequently, the Kansas operators, Apollo Energies Inc. and Dale Walker of Red Cedar Oil were charged and convicted of violating the MBTA. Apollo was convicted of an April 2007 bird death and Walker was convicted of two bird deaths occurring in April 2007 and April 2008. On appeal, these cases were combined. Appellants argue MBTA does not create a strict liability crime and under the current statute lack the necessary imputed mental state to commit the MBTA violation. Among other claims, they further argue that the MBTA is unconstitutionally vague because it provides inadequate notice of what conduct is criminal.

The Tenth Circuit Court of Appeals relied on *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997), which addressed the mens rea requirement of Section 703 of the MBTA. It held that in reliance on *Corrow*, the statutory wording does not require any particular state of mind. It further explained that the holding in *Corrow* fell in line with other circuits which, likewise held that MBTA misdemeanors are strict liability crimes or noted the MBTA's lack of mens rea. On the other due process arguments the appellate court rejected the contention that the MBTA violated due process. It held that failure to modify the heater-treaters after notice of the danger to birds was given, constituted a crime. With one exception, the court affirmed the convictions. The court noted that prior to the April 2007 inspection, there was no evidence on the record of notice given to Walker that the heater-treaters posed a danger to birds. As such, the court agreed that no reasonable person would conclude, at that point in time, that the heater-treater lead to the death of migratory birds. Furthermore, the court did not find "substantial evidence of pervasive industry knowledge" until after the Service embarked on its educational campaign. Accordingly, Walker's conviction related to the bird death from April 2007, is reversed. All other convictions affirmed. *United States v. Apollo Energies Inc.*, 611 F.3d 679 (10th Cir. 2010).

Reasonable foreseeability of circumstances resulting in the use of wire transmission sufficient

Arvin Weiss was convicted of eight counts of mail fraud, five counts of wire fraud and three counts of witness tampering. The convictions resulted from a scheme that involved falsifying mortgage loan applications of otherwise ineligible buyers. Weiss argues that evidence at trial was insufficient to support his convictions.

The Tenth Circuit disagreed and held that sufficient evidence was provided at trial to justify the jury's determination of guilt. With regards to the mail fraud, it found that whether Weiss was actually the one to mail the deeds of trust at issue was immaterial if he "knew the mailings would "follow the ordinary course of business or could reasonably be foreseen." With his licensure and experience, it was reasonable to believe he could reasonably foresee the mailings would have occurred. Similarly, the court found that Weiss could have reasonably foreseen the wire transmissions between the loan processors in Colorado and the FHA . It held that proof Weiss could have reasonably foreseen the wire transmissions was not required, rather prosecution only needed to prove he could have reasonably foreseen that the fraudulent FHA applications would result in the use of wire communications. And finally, the court held that based on the testimony and evidence at trial there was sufficient evidence that Weiss asked witnesses to lie to investigators about the true source of down payments on the loans at issue. Affirmed. *United States v. Weiss*, --- F.3d ---, 2010 WL 2911718 (10th Cir. 2010).

Continued on page 7

THERE'S
NO EXCUSE FOR
ABUSE

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,

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

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

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

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

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

Many good wishes,

Judy Kasten Bell

Continued from page 5

Bank's increased risk of loss, even unrealized, may 'affect' a financial institution

Ladonna Mullins and Linda Edwards were indicted for and convicted of wire fraud, among other things. Both challenge their convictions on multiple grounds. One of Mullins' challenges is that three of the four counts on which she was convicted were time-barred because the statute of limitations had expired before she was indicted, thus she argues that her prosecution should have been prohibited.

The Tenth Circuit disagreed and held that where an offense "affects a financial institution," the federal statute allows the time period to be doubled in wire fraud prosecution cases. The doubling of the five year statute of limitation to ten years resulted in the indictment being permissible. It reasoned that the record included materially identical testimony from mortgage officers explaining how fraudulent information on the loan application causes the lender to overestimate a borrower's ability to pay off the loan. This in turn affects the financial institution when the greater risk of default, foreclosure and loss to the lender is realized. "It would be anomalous to say exposing a financial institution to a risk of loss defrauds…the institution…yet at the same time doesn't affect it." The looming potential for loss, even if not realized is enough to affect the financial institution. Accordingly, the ten year statute of limitations was appropriate. Affirmed. *United States v. Mullins*, --- F.3d ---, 2010 WL 2947873 (10th Cir. 2010).

Deadly force, by itself, is not enough to constitute seizure of that person

In a civil rights lawsuit, Keith Clayton Brooks, Jr. alleged that Deputy Steve Gaenzle violated his Fourth Amendment right to be free from unreasonable seizure by use of excessive force when he shot Brooks as he fled from the scene of an armed burglary. Prior to Gaenzle shooting Brooks, deputies responded to the scene and attempted to enter a home where the suspects were hiding. Suddenly, a shot was fired from inside the home which went through the door and barely missed the deputies. As Brooks climbed a backyard fence to escape Gaenzle shot him. Despite the injury, Brooks succeeded to escape and eluded police for several days before being arrested.

The Tenth Circuit Court of Appeals held that for purposes of the Fourth Amendment, Gaenzle did not "seize" Brooks when he shot him. It explained that the bullet did not even temporarily terminate Brooks' movement or otherwise cause the government to have physical control over him. Rather, evidence showed that Brooks continued to climb the fence, escaped and eluded the police for three days. Deadly force, by itself, is not enough to constitute a seizure. Summary judgment on the excessive force claim affirmed. *Brooks v. Gaenzle*, --- F.3d ---, 2010 WL 3122800 (10th Cir. 2010).

Some level of personal responsibility required for supervisor to be liable for subordinates actions

Thomas Carl Dodds, Jr. appeals summary judgment in favor of Deputy Randy Richardson. Dodds argues that Richardson violated his Fourteenth Amendment due process rights when, following Dodds arrest, Richardson told two parties inquiring about posting bond on his behalf that it was not possible until after he was arraigned. Dodds filed suit and Richardson responded with a motion for summary judgment claiming he was entitled to qualified immunity. Richardson based his response on a non-binding bail policy set by a court clerk. The trial court denied the motion reasoning that the deputy knew or should have known that by denying the posting of bond for a set bail, Richardson and the deputies he supervised would be denying due process rights. Richardson appealed and argued, among other issues, that Dodds failed to show Richardson was personally involved in preventing Dodds from posting bail.

The Tenth Circuit Court of Appeals held that some level of personal responsibility must be established to impose liability on a supervisor for the acts of subordinates. It reasoned, in this case, that by Richardsons' own admission, he enforced and maintained the policies established in a supervisory capacity. Thus, sufficient facts, if proven at trial, were presented to establish personal involvement by Richardson in violating Dodds' due process rights when the posting of bail was denied. Judgment affirmed. *Dodds v. Richardson*, --- F.3d ---, 2010 WL 3064002, (10th Cir. 2010).

Continued on page **8**

Continued from page 7

Other Circuits

No actual innocence exception to federal habeas statute of limitations

A jury convicted Richard Lee of two counts of sexual abuse and two counts of sodomy involving a young child. After numerous unsuccessful efforts to appeal, a petition for a write of habeas corpus was granted by the district court finding that Lee had established actual innocence and ineffective assistance of counsel. The court ordered Lee to be released or retried. The State timely appealed and argued that the petition for a writ of habeas corpus was time-barred. The district court's order was stayed. The matter now comes before the Ninth Circuit to determine whether an "actual innocence" exception to the one-year statute of limitations for his original habeas corpus petition was proper.

The U.S. Court of Appeals for the Ninth Circuit held that an "actual innocence" exception to the Antiterrorism and Effective Death Penalty Act's one-year limitations period did not exist. It reasoned that Congress explicitly enumerated three exceptions to the general rule that the limitations period begins upon the conclusion of direct review and there is no evidence that it intended to allow for any other circumstances. District court order reversed. *Lee v. Lampert*, 610 F.3d 1125 (9th Cir. 2010).

'Literal Truth' defense to perjury must be based on more than a plausible understanding

Tammy Thomas, a former professional bicyclist, was found guilty of lying to a grand jury investigating the sale and distribution of anabolic steroids to athletes. Specifically, when questioned as to whether a man 'gave' her steroids or whether she had ever taken 'anabolic steroids', she responded in the negative. During her perjury prosecution, she argued that her understanding of 'gave' included receiving something at no cost and furthermore, that her understanding of 'anabolic steroid' did not include the drugs in question. Accordingly, she claimed her answers were literally truthful and that the trial court should have granted her judgment of acquittal.

The Court of Appeals for the Ninth Circuit disagreed. It held that a defendant's explanation of a plausible understanding of a question is not sufficient to establish a literal-truth defense. It further reasoned that in this case the line of questioning was enough for a jury to reasonably conclude that Thomas' answer was accurate and responsive, when in fact; it was misleading based on her rationalized interpretation of the intended meaning. Conviction affirmed. *United States v. Thomas*, 612 F.3d 1107 (9th Cir. 2010).

Other States

Officer opinion testimony on field sobriety tests not subject to Frye

Richard Shadden was convicted of driving under the influence of alcohol. On appeal Shadden argued that the law enforcement officer's testimony regarding his field sobriety test results constituted scientific opinion evidence that is not admissible without foundation laid as required in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). He also argued that the officer should not be permitted to use terms such as tests, pass, fail or points because the words add scientific credibility to the officer's testimony.

The Supreme Court of Kansas held that the officer's testimony, where he opined on the correlation between the field sobriety test results and the specific levels of blood alcohol content, was not properly admitted into evidence and agreed that the *Frye* test must be met. However, the court also held that the terms used in the officer's testimony were terms commonly used by lay and expert witnesses to describe evidence that is not scientific in nature. In that regard, it was not necessary to meet the *Frye* test before those words are used. The court rejected other issues raised by Shadden and found the *Frye* error harmless. Conviction affirmed. *State v. Shadden*, 235 P.3d 436 (Kan. 2010).

CORRECTION

In preparing Creighton Horton's article, "Reflections of a Senior Prosecutor: The 'Tough Prosecutor'" inadvertent changes were made to one paragraph. Our most sincere apologies are extended to the author for this error and any embarrassment it might have caused.

To see the corrected text of the article, please view it on the UPC website or click on this link, http://www.upc.utah.gov/newsletter/2010AugustNewsletter.pdf

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

Changing the Paradigm: The Community Prosecution Approach to Crime Reduction

By Brent G. Berkley, Asst. Director of Programs, National Advocacy Center, NDAA

To quote an old movie, "Crime is a disease". And as prosecutors, we tend to see ourselves as "the cure". For decades, we have taken the approach of curing, or removing the disease only after the social organism has become infected. However, by using an approach similar to that of the public health profession, many prosecutors are coming to an understanding that we must look to prevention of the disease as well as to the cure. Community Prosecution is one such method.

The practice of community prosecution has experienced an exponential rise in application in the United States over the last decade. From humble beginnings as a project-based program in a few jurisdictions to a fundamental change in the structure of the prosecutorial function, community prosecution is now seen as a new paradigm in prosecution and crime prevention.

Traditional Methods of Prosecution

The historical role of prosecutors, particularly in the United States has been that of a reactive approach to crime. A crime is committed, investigated by law enforcement, and referred to the prosecutor for screening and prosecution. We often consider crime prevention to be the purview of politicians, educators, and social workers; while assuming that our role as prosecutors only comes into play *after* a crime has been committed.

Through training and experience, prosecutors have become very skilled at this traditional approach. We understand sentencing guidelines, trial strategies and skills, precedents, rules, and statutes. We apply these techniques assertively in an ongoing effort to stem the tide of criminality in our communities. However, despite decades, or centuries, of utilizing this traditional approach, crime rates continue to rise in our communities. Our citizens continue to be victimized by those who refuse to comply with the rule of law.

Many prosecutors are now realizing that, while we must still aggressively prosecute those cases that cross our desks after a crime is committed, we must also look for new and innovative ways to address crime rates in our communities. As the motivational speaker Anthony Robbins often states, "if you do what you've always done, you'll get what you've always gotten". Community Prosecution is one methodology that is improving the safety and livability of American communities.

What is Community Prosecution?

Community Prosecution involves a long-term, proactive partnership among the prosecutor's office, law enforcement, the community and public and private organizations, whereby the authority of the prosecutor's office is used to solve problems, improve public safety and enhance the quality of life of community members. Originally considered an approach for dealing with low-level, quality of life crimes, community prosecution has matured into an entirely new paradigm.

Based upon the community policing model which achieved a great deal of success in the 1980s, community prosecution is an extension of the "Broken Windows" theory. This theory argues that by addressing issues when they are small, we can prevent the inevitable escalation of criminality:

> *Consider a building with a few broken windows. If the windows are not repaired, the tendency is for vandals to break a few more windows. Eventually, they may even break into the building, and if it's unoccupied, perhaps become squatters or light fires inside.*
> *Or consider a sidewalk. Some litter accumulates. Soon, more litter accumulates. Eventually, people even start leaving bags of trash from take-out restaurants there or breaking into cars.*

When community prosecution began in jurisdictions like Multnomah County, Oregon (Portland), and Brooklyn, New York, the focus was on taking care of the "little things" that affected the way in which residents viewed their quality of life. Abandoned vehicles, vacant properties, street-level drug dealing and prostitution,

Continued on page 11

graffiti, and loitering were often the primary focus of community prosecutors. Individual prosecutors were assigned to blighted neighborhoods, either simply by focusing on the area, or often physically housed in an office in the area.

These community prosecutors invested themselves in the community, speaking to residents, attending town and neighborhood meetings, and engaging residents in the criminal justice system. This approach to dealing with small, yet nagging and important problems led to residents feeling a greater pride in their community and improved citizen involvement in public safety.

As these programs matured, and the concept of community prosecution spread throughout the United States, prosecutors saw the benefit of a geographically based, collaborative approach to prosecution and began to implement the principles learned in dealing with low-level crime to investigate and prosecute more serious offenses. In Detroit, Michigan community prosecution teams were partnered with detectives from local police precincts to form "Non-Fatal Shooting Teams" which essentially treated every non-fatal firearms case as seriously as if it had resulted in a death. By increasing the community-based approach to these cases, clearing rates for these offenses rose from 20 percent to over 68 percent in a year's time.

Los Angeles, California began using the concept of Civil Gang Injunctions to approach turf-based gang activities throughout the city. Similar to the United Kingdom's Anti-Social Behaviour Orders, Civil Gang Injunctions work to prevent illegal activities before they are committed. By filing a lawsuit against, and enjoining the activities of criminal street gang members, Los Angeles has seen a significant decrease in the publicly-visible activity of gangs.

In Highpoint, North Carolina community prosecutors, law enforcement officials, community leaders, the faith-based community, and local residents all combined to address open-air drug markets.

Throughout the United States, prosecutors have applied the community prosecution model to address other concerns, including:

- Graffiti,
- Homelessness prevention,
- Comprehensive Gang Response,
- Targeting drug houses, and
- Community education and involvement.

COMMUNITY PROSECUTION IN THE UNITED STATES TODAY

The National District Attorneys Association, the oldest and largest professional organization of prosecutors in the United States created the National Center for Community Prosecution ("NCCP") in 2001. NCCP provides training, technical assistance, research, and materials for community prosecutors nationwide. In addition to national conferences, NCCP also helps guide the development and advancement of community prosecution.

In 2008, it was determined that a new set of guiding principles were needed to help define community prosecution and distinguish it from traditional methods of prosecution. NCCP, in cooperation with the United States Department of Justice, Bureau of Justice Assistance, and the Center for Court Innovation convened a panel of community prosecution practitioners and developed an updated set of Key Principles of Community Prosecution.

1. Recognizing the Community's Role in Public Safety

Rather than dictating to the public how to handle all crime and safety issues, community prosecutors invite community stakeholders to express their safety concerns, identify neighborhood problems, brainstorm appropriate responses and help the prosecutor's office establish priorities. *Community prosecutors do this in many ways, including by assigning prosecutors to neighborhoods to focus on local crime and safety issues; creating volunteer opportunities in the justice system for community stakeholders; and opening regular channels of communication*

Continued on page 12

with community stakeholders by attending community meetings, publishing newsletters, maintaining a user-friendly web site, and creating advisory councils, special committees and task forces.

"Problem-solving prosecutors must work with and through their constituents in the community while, at the same time, seeking to achieve their primary objective of reducing crime and the perception of crime. In the words of Abraham Lincoln, 'With public sentiment, nothing can fail; without it, nothing can succeed'." - Mike Kuykendall, Former Director, National Center for Community Prosecution (2000 – 2005).

2. Engaging in Problem Solving

Community prosecutors are problem-solvers who focus not merely on individual crimes once committed, but on such acts within a context. They view individual acts as having a history, potentially a future, and as part of a problem or set of problems within a community. In addressing problems rather than dealing with only individual cases, the ultimate goal for prosecutors is to prevent the next crime. As such, they rely on a wide range of tools—both traditional and non-traditional—to address safety and crime problems. When appropriate, they look outside the criminal justice system. *For instance, they may use mediation to resolve an argument between neighbors and prevent it from escalating into a crime, or they may seek civil sanctions to remediate a poorly maintained property that has become a magnet for low-level criminal behavior. Rather than focus on crimes only "after" they occur, they look also look at "before" and "during," analyzing factors that contribute to crime. By addressing such factors, community prosecutors attempt to prevent crime before it occurs.*

"Community prosecutors take responsibility for a docket of *problems*, not *cases*."- Scott Newman, Director of Public Safety- Indianapolis, IN (Former Prosecuting Attorney of Marion County, IN)

3. Establishing and Maintaining Partnerships

The criminal justice system is an interlocking network of agencies and departments that depend on each other to operate effectively. Community prosecutors build on these natural connections, encouraging greater communication, improved coordination, and stronger partnerships. Prosecutors also understand that private citizens and private agencies are potential, and often necessary, partners as well in problem-solving efforts. Crime prevention and reduction efforts that prosecutors craft or participate in with other partners are generally more comprehensive and can have a greater impact in the community. *For example, community prosecutors convene meetings whereby the authority of the office creates a forum for information and resource sharing. By inviting different agencies and disciplines to the table to discuss a holistic approach to crime prevention, personal relationships are developed creating stronger partnerships that can be formalized with memorandums of understanding.*

> "Prosecutors across the country are redefining their role in helping solve the complex issues that result in over-reliance on the criminal justice system. Prosecutors must acknowledge and embrace the leadership role they have in problem solving, and work with others in the community to develop long term, community based solutions to public safety issues. Our partners in the medical community remind us that public safety and public health share a common model based on prevention, wise intervention and sparing suppression. Community prosecutors are at the forefront of merging the public health model and the public safety model, and the possibilities for effective, substantive change are unlimited."- John Chisholm, Milwaukee County District Attorney

4. Evaluating Outcomes of Activities

The continuous collection and analysis of data assists any prosecutor with determining the effectiveness of an initiative. For community prosecutors, evaluating effectiveness cannot be solely decided upon a conviction

Continued on page 13

rate. Community prosecutors must evaluate their activities and impact on neighborhoods, continuously adapting to the community's needs. To evaluate the activities of community prosecutors, one should look to outcomes such as the reduction of crime or calls for service in a particular area, the perception of safety in the neighborhood, or the increase in community participation through neighborhood meetings, school presentations, or other vehicles to engage the public in public safety. *Community prosecutors no longer can look at a conviction rate to determine their effectiveness; the exchange of information with the rest of their office and the public regarding crime prevention efforts truly allows one to evaluate a community prosecutor's activities.*

> "As problem-solvers, we need to show what impact we're having: Are we involving the community in our work? Are we taking into account the community's priorities? Are we addressing the problems that fuel crime? Are we capitalizing on partnerships? By quantifying our answers to these important questions, we're not only holding ourselves accountable but we're strengthening our ability to pursue justice."
> – Greg Berman, Director, Center for Court Innovation

THE NEW PARADIGM

Community and Collaborative Prosecution approaches require us as prosecutors to reevaluate our primary mission. Common responses to the question "what is the mission of prosecutors?" tend to be variations on a traditional theme:

- "My job is to fill the jails"
- "I seek justice"
- "I punish offenders"
- "I enforce the law"

While all of these responses are accurate and at times utterly appropriate, in order to make a fundamental change to our society, it is imperative to condense these missions into the true essence of the prosecutorial function. At the core, we are public servants whose job it is to serve those who have entrusted us with their safety.

Through an increased focus on community-based public safety and crime prevention, while still maintaining the core reactive aspect of our calling, the mission of all prosecutors can be summed up as follows: *The job of the prosecutor is to improve the quality of life in his or her community.*

By engaging the community and understanding their needs, we can better not only our own individual communities, but our societies as a whole.

---

[i] Originally published in the *International Association of Prosecutors' Newsletter 48, February 2010*. Located in The Hague, Netherlands, the IAP is a non-governmental and non-partisan world organization of prosecutors (visit www.iap-association.org for more information). Reprinted with Permission.
[ii] Cobra, Dir. George P. Cosmatos, Warner Bros. Pictures, 1986.
[iii] http://www.ndaa.org/apri/programs/community_pros/cp_home.html
[iv] Wilson, James Q and Kelling, George L., "Broken Windows", The Atlantic Monthly, March 1982.
[v] *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities*, 1996 by George Kelling and Catherine Coles
[vi] Ronald J. Hansen and Norman Sinclair, "Crime drop energizes Detroit neighborhood; Prosecutors, police in 10th Precinct team up to solve cases," *The Detroit News*, May 12, 2003.
[vii] *Civil Gang Injunctions: A Guide for Prosecutors*, 2008 by Max Shiner.
[viii] http://www.ndaa.org/apri/programs/community_pros/final_key_principles_updated_jan_2009.pdf

End of **Article**

On the Lighter Side

Puns for Educated Minds

1. The roundest knight at King Arthur's round table was Sir Cumference. He acquired his size from too much pi.

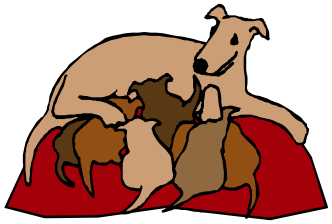
2. I thought I saw an eye doctor on an Alaskan island, but it turned out to be an optical Aleutian .

3. She was only a whiskey maker, but he loved her still.

4. A rubber band pistol was confiscated from algebra class, because it was a weapon of math disruption.

5. No matter how much you push the envelope, it'll still be stationery.

6. A dog gave birth to puppies near the road and was cited for littering.



7. A grenade thrown into a kitchen in France would result in Linoleum Blownapart.

8. Two silk worms had a race. They ended up in a tie.

9. A hole has been found in the nudist camp wall. The police are looking into it.

10. Two hats were hanging on a hat rack in the hallway. One hat said to the other: 'You stay here; I'll go on a head.'

11. I wondered why the baseball kept getting bigger. Then it hit me.

12. A sign on the lawn at a drug rehab center said: 'Keep off the Grass.'

13. In a democracy it's your vote that counts. In feudalism it's your count that votes.

14. The man who survived mustard gas and pepper spray is now a seasoned veteran.

15. A backward poet writes inverse.

16. The short fortune-teller who escaped from prison was a small medium at large.

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.

The Utah Prosecution Counsel

Mark Nash, Director, mnash@utah.gov
Ed Berkovich, Staff Attorney - DV/TSRP, eberkovich@utah.gov
Marilyn Jasperson, Training Coordinator, mjasperson@utah.gov
Ron Weight, IT Director, rweight@utah.gov
Marlesse Whittington, Law Clerk/Editor, mwhittington@utah.gov
Jeff Stott, Law Clerk, jstott@utah.gov

Visit the UPC online at

www.upc.utah.gov

2010 Training Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

October 20-22 — GOVERNMENT CIVIL PRACTICE CONFERENCE — Moab Valley Inn, Moab, UT
For public attorneys who work the civil side of the office

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 22nd !:00 - 5:00 p.m.	POST Training Facility Public Safety Education & Training Bldg. - Rm 114 410 W 9800 S, Sandy (Larry Miller Campus)
Friday, November 5th 1:00 - 5:00 p.m.	Orem Public Safety Department Training Room 95 E Center St, Orem

November 1-3 — JOINING FORCES: 23rd Annual Conf. on Child Abuse & Family Violence — Davis Conf. Center, Layton, UT
Sponsored by Prevent Child Abuse Utah. For more info, contact Trina Taylor 801-393-3366; e-mail: ttaylor@preventchildabuseutah.org; website: www.preventchildabuseutah.org

November 11-12 — COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR — Dixie Center, St. George, UT
Annual gathering of elected and appointed county & district attorneys

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

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

October 3-7	PROSECUTING HOMICIDE CASES	Agenda	Register	San Antonio, TX
October 27-31	20TH ANNUAL DOMESTIC VIOLENCE CONFERENCE		Register	Washington, DC
November 7-11	GOVERNMENT CIVIL PRACTICE CONFERENCE		Register	Scottsdale, AZ
November 14-18	PROSECUTING SEXUAL ASSAULTS & RELATED VIOLENT CRIMES	Agenda	Register	San Francisco, CA
December 5-8	THE EXECUTIVE PROGRAM		Register	San Francisco, CA
December 5-9	FORENSIC EVIDENCE	Agenda	Register	San Antonio, TX

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

Training *continued on page 16*

2010 Training Calendar

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.

December 6-9	CROSS EXAMINATION *A complete review of cross examination theory and practice* ***Registration deadline is October 8, 2010***	Register	NAC Columbia, SC
December 13-16	COURTROOM TECHNOLOGY *Upper Level PowerPoint®; Sanction II; Audio/Video Editing (Audacity, Windows Movie Maker); 2-D and 3-D Crime Scenes (SmartDraw, Sketchup®); Design Tactics.* ***Registration deadline is October 15, 2010.***	Register	NAC Columbia, SC
See the table	PROSECUTOR BOOTCAMP *Specifically designed for newly hired prosecutors*	Register	NAC Columbia, SC

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