

The

PROSECUTOR



RECENT CASES

United States Supreme Court

State Court Decision Deserved Greater Deference

The Supreme Court overturned a grant of habeas corpus relief in an unargued, fact-intensive case involving evidence of shaken-baby syndrome. After vacating and remanding the case several times to the Ninth Circuit, the Court ultimately held that the Ninth Circuit plainly erred in concluding that the jury's verdict was irrational, or that it was unreasonable for the California Court of Appeals to think otherwise.

"Judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold," the Court stressed. *Cavazos v. Smith*, U.S., No. 10-1115, 10/31/11

confession and nothing more, then the Sixth Circuit was without authority to overturn the reasoned judgment of the state court. *Bobby v. Dixon*, U.S., No. 10-1540, 11/7/11



Supreme Court Overrules Issuance of Habeas Writ

The Sixth Circuit should not have granted habeas corpus relief to a state death-row inmate whose Miranda rights were intentionally violated by police, the Supreme Court ruled. Since the remedy for the Miranda rights violation was the suppression of the statements elicited from the unwarned

AEDPA Restricts Retroactivity of Supreme Court Rulings

The term "clearly established Federal law" as used in the Antiterrorism and Effective Death Penalty Act refers to the law in place when the state court adjudicated a habeas corpus petitioner's claim-not the law at the time the petitioner's conviction became final, the Supreme Court held. *Greene v. Fisher*, U.S., No. 10-637, 11/8/11

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Utah Supreme Court

Class A Misdemeanor Defendants' Right to Prelim Is Applied Prospectively

In regards to an opinion released last April that held that Article I, section 13 of the Utah Constitution grants defendants charged with Class A misdemeanors the right to a preliminary hearing, the Utah

Supreme Court amended it so as to only have a prospective application. It accordingly applies only to those cases in which there has been no guilty plea or finding of guilt as of the date of its decision. *State v. Herndandez*, 2011 UT 70

Boundary by Acquiescence Doctrine Better Defined

While affirming the district court's entry of summary judgment quieting title to a disputed property in favor of the plaintiff, the Utah

Supreme Court held that boundary by acquiescence must be proven by clear and convincing evidence. It also held that acquiescence is determined by the parties' objective actions in relation to the boundary and not their mental state. *EBF, LC v. Kay*, 2011 UT 71

Death Sentence for Brutal Murder Upheld

In 1989, Michael Archuleta was convicted of first degree murder and sentenced to death for the

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brutal murder of Gordon Ray Church. The case has slowly worked its way through the Utah court system ever since. In the most recent review of the case, the Utah Supreme Court consolidated analysis from the fourth and fifth times that it entertained appeals by Archuleta. The court found none of Archuleta's numerous claims in either of the appeals availing, and accordingly reaffirmed his conviction and death sentence. *Archuleta v. Utah State Prison*, 2011 U T 73

State Engineer May Not Consider Non-Adjudicated Forfeiture When Reviewing a Change Application.

The Utah Supreme Court held that the state engineer lacks authority to adjudicate water rights and therefore may not consider non-adjudicated forfeiture when reviewing a change application.

Instead, the state engineer is limited to considering the factors presented in Utah Code section 73-3-8(1) when deciding whether to approve or deny a change application, but may stay change application proceedings while pursuing an adjudication of forfeiture. *Jensen v. Utah State Engineer*, 2011 UT 67

Utah Court of Appeals

Defendant Prohibited from Appealing Sentencing after He Requested the Sentence

Williams never filed a motion to withdraw his guilty plea prior to sentencing, and so the appellate court lacked jurisdiction to review the issue, which could only be challenged pursuant to the Post Conviction Remedies Act.

Williams also alleged that the district court abused its discretion in sentencing him to prison. However, the court prohibited Williams from raising the argument on appeal because he invited any error by adamantly requesting that he be sentenced to prison. *State v. Williams*, 2011 UT App 402



Right to Impartial Jury Does Not Include Guarantee of a Particular Composition

One of Coggeshell's arguments on appeal was that his counsel was ineffective for failing to file a motion to suppress evidence collected from a search of the victim's home. However, the court ruled that Coggeshell's arguments failed because he had no



standing to object to the search of the residence because he was a temporary visitor.

Coggeshell also claimed that his counsel was ineffective for failing to challenge the composition of the jury, which contained no Native Americans and two jurors with law enforcement backgrounds. The court held that while a defendant is guaranteed the right to an impartial jury, there is no guarantee of a particular composition, and Coggeshell failed to demonstrate that any juror was bias. *Coggeshell v. State*, 2011 UT App 375

Appeal Denied for Inadequacy

On appeal, the court made the following conclusions: Davie's constitutional challenge to her conviction for witness tampering and challenge to her sentence were unpreserved and inadequately briefed; and Davie's challenge to the sufficiency of the evidence for her assault conviction failed because Davie provided no reason for the court to depart from the

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PROSECUTOR PROFILE



Kathi Sjoberg

Deputy Davis County Attorney

Kathi Sjoberg has spent over twenty-two years working for the Davis County Attorney's office. Before then, if you would have told her she'd be a prosecutor for as long as she has, she would've responded, "Yeah, right."

After getting a degree in Sociology at the University of Utah, Kathi spent a year at the University of San Diego in their paralegal program. But even then, she was there mostly just to live and play in San Diego.

After that, Kathi wasn't sure what to do. Her mom, who from personal experience knew that Kathi was good at arguing, convinced Kathi to go to law school.

After law school, she became a prosecutor in 1989. She'd be the first to admit that her becoming a prosecutor was more of a fluke than a thought-out decision, for she simply needed a job, applied, and was hired.

The job ended up being surprisingly enjoyable, especially the opportunity it gave her to meet and work with some incredible people. One of the most satisfying aspects of her job is when a victim genuinely shows gratitude for her work. But not all aspects of being a prosecutor are dandy. On those particularly long days, she wonders why she didn't become a dentist, who only has to work four days a week. One experience she'd rather forget is when she was about seven months pregnant and the bailiff locked her in a holding cell with a juvenile defendant and forgot about her there for about 2 hours.

One of the most important things Kathi has learned over her years of prosecuting is that a good prosecutor needs to be open minded enough to look at both sides of an issue. A prosecutor should also never forget the huge impact he or she has on the lives of those people involved in the cases.

Kathi hopes to be the type of professional that her nineteen year old daughter can look up to. After all, Kathi herself looks up to her daughter as an example of someone who stands up for what she believes in without being afraid to be an independent thinker.

One interesting aspect of Kathi's career has been her work as a member of the Board for Law Related Education which is responsible for the Mock Trial program in Junior High and High Schools. The Board also works with the Center for Civic Education on the We The People, The Citizen and the Constitution program. Both are excellent programs. Prosecutors are encouraged to volunteer their time to help with these programs. Donations are also welcome. Visit lawrelatededucation.org for details.



BORN: Ogden, Utah

FIRST JOB - gift wrapper at ZCMI

FAVORITE MUSICIAN: Lady Gaga

FAVORITE BOOK(S) - *Millennium Trilogy* by Steig Larson

FAVORITE CARTOON AS A KID - Rocky and Bullwinkle Show

FAVORITE TREAT - Dove Dark Chocolate

FAVORITE T.V. SERIES - *Dexter*, *White Collar*, and *Psych*

HOBBIES - Reading and 'sun-worshipping'

FAVORITE FOOD - Seafood

PETS - 1 dog, a shih shu, named Ella; 2 cats, Dorian and Scully



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deference granted to the trial court to make credibility determinations. *State v. Davie*, 2011 UT App 380



Ineffective Assistance of Council Found

The appellate court remanded for a new trial after holding that defense counsel rendered ineffective assistance by eliciting testimony about the defendant's twenty-five-year-old conviction of sodomy on a child.

The court reasoned that it was defense counsel's misunderstanding about the trial court's ruling, and not any perceived tactical advantage, that resulted in defense counsel eliciting the evidence during direct examination in a misguided attempt to minimize its impact. *State v. Fowers*, 2011 UT App 383

Public Employee Fails to Follow Administrative Remedy Procedures after Being Fired

Kocherhans appealed the dismissal of his complaint for

failure to exhaust administrative remedies, arguing that he was an at-will employee exempted from the administrative review procedures outlined in Utah Code section 10-3-11. However, the appellate court affirmed, reasoning that Kocherhans did not show any error in the City's classification of his position as merit, and therefore he was not exempt from such procedures. *Kocherhans v. Orem City*, 2011 UT App 399

Fine Upheld as Fair

Loyo appealed his sentence on class A and class B misdemeanor convictions, arguing that the fine of \$740 was inherently unfair. However, the appellate court affirmed the district court, reasoning that the district court did fully consider Loyo's circumstances, as well as the need for fairness and uniformity in sentencing offenders. *State v. Loyo*, 2011 UT App 357

Defendant Has Right To Be Present During Discretionary Sentencing Judgments

Milligan appealed his convictions for murder and attempted murder. The appellate court concluded that the trial court properly denied Milligan's motion for a mistrial because the prejudice resulting from a witness's improper mentioning of Milligan's tattoo was inconsequential in light of the overwhelming evidence against Milligan.

Furthermore, because Milligan

had an opportunity to appear and defend at the sentencing hearing and the amendment of the length of his sentence did not involve any judicial reasoning or decision making, Milligan was not entitled to appear and defend against that aspect of the sentence, which was mandated by statute.

However, because the trial court's imposition of consecutive sentences did involve an exercise of discretion, the court remanded for the narrow purpose of giving Milligan an opportunity to defend against that aspect of the amended sentence. *State v. Milligan* 2011 UT App 390



Appellant's Various Arguments Denied

In response to Santonio's various arguments on appeal arising from his resisting arrest in 2003, the appellate court made the following conclusions: the trial court complied with the appropriate procedure in determining that Santonio had waived his Sixth Amendment right to counsel; the trial court properly denied Santonio's motion to amend the contempt finding against him; Rule 704(b) of the Utah Rules of Evidence is only applicable to an

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expert's trial testimony, and therefore the trial court's pretrial question to the mental health experts did not violate that rule; the trial court did not abuse its discretion in denying Santonio's discovery motion regarding some photographs; and the trial court properly declined to adopt Santonio's proposed jury instruction on attempt in the context in which it was raised. *State v. Santonio*, 2011 UT App 385

Waiver Was Voluntary Even Without Interpreter at Bench

One of the Defendant's arguments on appeal was that he did not voluntarily waive his right to a jury trial because no colloquy took place and no interpreter was present at the time his counsel requested the bench trial. However, the appellate court rejected his argument, reasoning that the



Defendant did have an interpreter while he consulted with his attorney about waiving his right to a jury trial and his attorney requested the bench trial in Defendant's presence. *State v. Singh*, 2011 UT App 396

No Ineffective Assistance if Not Prejudicial

On appeal, Strode argued that trial counsel provided ineffective assistance by failing to make a motion to dismiss the case based

upon the State's alleged failure to preserve evidence of a text message that included a threat against him by the victim. The jury did hear evidence concerning the substance of the text message and Strode merely speculated that the text message may have said something other than what was adduced at trial. Therefore, the court held that Strode was not prejudiced by trial counsel's failure to move for dismissal. *Utah v. Strode*, 2011 UT App 368

Tenth Circuit Court of Appeals

Mitigation Waiver Upheld

Prosecution and defense experts concluded that, although the petitioner was suffering from depression, he was competent to waive his right to mitigation at his death penalty proceeding.

The Utah Prosecution Council

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Afterwards, the defendant started taking anti-depressant medication and changed his mind about being executed. He then argued that the change of heart following the medication shows that he was not in fact competent when he waived his right to present mitigation evidence. However, the Tenth Circuit held that such a change in mind did not cast sufficient doubt on his competency to make the waiver when he did. *Hooper v. Workman*, 10th Cir., No. 11-6143, 11/1/11



Fourth Amendment Protected Construction Site

The plaintiffs made a Fourth Amendment claim after city employees made a warrantless entry of their premises, which were under construction. While the Tenth Circuit acknowledged a lesser expectation of privacy in commercial as contrasted with residential buildings, and that "an unfinished commercial building... affords even less of a reasonable expectation of privacy," the court nevertheless concluded that the plaintiffs had a reasonable expectation of privacy in the

unfinished building. *Klen v. City of Loveland*, 10th Cir., No. 10-1311, 11/15/11

'Withdrawal from Conspiracy' Defense in Regards to Gangs

Simply "maturing out" of a criminal gang by losing contact with other members and moving on to constructive pursuits is not legally sufficient to entitle a defendant to a jury charge on withdrawal from a conspiracy, the Tenth Circuit held.

On the contrary, withdrawal requires a member to engage in actions to affirmatively undo damage caused by the conspiracy, either by providing authorities with sufficient information to disrupt the gang's plans or communicating the withdrawal directly to co-conspirators so that they understand the defendant will have nothing to do with the gang again. *United States v. Randall*, 10th Cir., No. 10-3113, 11/1/11

Cop Not Liable for Arresting Person for Silence

An officer attempted to actuate a "pickup" order that had been issued for an elderly woman. The owner of the home where the elderly woman was staying refused to tell the officer where the elderly woman was and the officer arrested her for obstruction. She then sued, claiming false arrest.

The Tenth Circuit held that the officer was entitled to qualified immunity because a reasonable

officer could have believed that the plaintiff had information regarding the elderly woman and that she was obligated to convey such information. *Koch v. City of Del City*, 10th Cir., No. 10-6105, 11/2/11

Other Circuits/ State Courts



Police Can Search Phone in Car after Drug Arrest

Courts across the country are divided over how to apply the search-incident-to-arrest exception to cell phones. Recently, a California Appeals Court held that police officers who arrest motorists suspected of driving under the influence of controlled substances may conduct warrantless searches of the contents of the arrestees' cell phones. *People v. Nottoli*, Cal. Ct. App., No. H035902, 9/26/11

Defendant's Deportation Doesn't Eliminate Right to Initial Appeal

An appellate court may not dismiss the pending appeal of an alien defendant just because his

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involuntary deportation has rendered him unavailable, the New York Court of Appeals held. *People v. Ventura*, N.Y., No. 160, 10/25/11

Attorney-Client Privilege Doesn't Protect Child's Statements to Guardian Ad Litem

Conversations between a child and her guardian ad litem in a dependency and neglect case are not confidential communications protected by attorney-client privilege in a criminal prosecution, the Colorado Supreme Court held. *People v. Gabriesheski*, Colo., No. 08SC945, 10/24/11

State Court Interprets *Michigan v. Bryant*

The admissibility of hearsay statements to medical personnel who conduct examinations of apparent victims remains among the most significant questions left unresolved by *Crawford v. Washington* and its progeny.

The Kansas Supreme Court refined its approach to the matter, concluding that the purpose of an interview by a medical personnel can transition between testimonial and nontestimonial goals, and therefore courts should analyze which statements were made in response to questions posed for each purpose. *State v. Miller*, Kan., No. 99,232, 10/28/11, and *State v. Bennington*, Kan., No. 98,656, 10/28/11



Police Don't Need Warrant to Test DNA That Driver Leaves on DUI Breath Test Device

Police officers did not violate the Fourth Amendment when they saved the mouthpiece from a drunken-driving breath test device and conducted DNA testing on it to prove he was involved in other crimes, a California Court of Appeals held. *People v. Thomas*, Cal. Ct. App., No. B228049, 10/28/11

One Can 'Advertise' Child Porn without Producing It

On appeal of his conviction for advertising the distribution of child pornography, the defendant argued that the statute applied only to those who either advertise to produce child pornography or advertise child pornography that they produced themselves.

However, the Ninth Circuit affirmed the conviction, holding that a defendant can be convicted even if he is not a producer of the illicit material. *United States v.*

Williams, 9th Cir., No. 10-10550, 10/27/11

Police Polygrapher's 'Motherly' Approach Didn't Overbear Youthful Suspect's Free Will

Federal habeas corpus relief was not available to a petitioner who claimed he was psychologically manipulated into confessing by a polygrapher who mothered him while concealing her status as a law enforcement officer, the Ninth Circuit held. The court concluded that the polygrapher's maternal, empathetic manner and her exhortations to tell the truth did not overbear the petitioner's ability to make a voluntary choice about whether to confess. *Ortiz v. Uribe*, 9th Cir., No. 09-55264, 11/18/11

Consent-Once-Removed Doctrine Doesn't Apply after First Officers Leave Premises

Once undercover officers who had been invited into suspects' home exited the premises, the Fourth Amendment's consent-once-removed doctrine did not allow backup law enforcement officers to enter to conduct further investigation, the Sixth Circuit held. *O'Neill v. Louisville/Jefferson County Metro Government*, 6th Cir., No. 10-5699, 11/8/11



On the Lighter Side

Here is a poem about the spirit of giving during this holiday season:

A woman was waiting at an airport one night
With several long hours before her flight
She hunted for a book in the airport shop
Bought a bag of cookies and found a place to drop
She was engrossed in her book but happened to see
That the man beside her as bold as could be
Grabbed a cookie or two from the bag between
Which she tried to ignore to avoid a scene
She munched cookies and watched the clock
As this gutsy cookie thief diminished her stock
She was getting more irritated as the minutes ticked by
Thinking "If I wasn't so nice I'd blacken his eye"
With each cookie she took he took one too
And when only one was left she wondered what he'd do
With a smile on his face and a nervous laugh
He took the last cookie and broke it in half
He offered her half as he ate the other
She snatched it from him and thought "Oh brother
This guy has some nerve and he's also rude
Why he didn't even show any gratitude"
She had never known when she had been so galled
And sighed with relief when her flight was called
She gathered her belongings and headed for the gate
Refusing to look back at the thieving ingrate
She boarded the plane and sank in her seat
Then sought her book which was almost complete
As she reached in her baggage she gasped with surprise
There was her bag of cookies in front of her eyes
"If mine are here" she moaned with despair
"Then the others were his and he tried to share"
"Too late to apologize she realized with grief"
That she was the rude one, the ingrate, the thief

2011-12 Training Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 19-20	SPRING CONFERENCE <i>Case law update, legislative recap, ethics / civility, and more</i>	South Towne Center Sandy, UT
May 15-17	ANNUAL CJC / DV CONFERENCE <i>The best trainers teach about dealing with child abuse and domestic violence</i>	Zermatt Resort Midway, UT
June 21-22	UTAH PROSECUTORIAL ASSISTANTS CONFERENCE <i>Training for non-attorney staff in public attorney offices</i>	Courtyard by Marriott St George, UT
August 2-3	UTAH MUNICIPAL PROSECUTORS ASSOCIATION CONFERENCE <i>Annual training event for municipal and other misdemeanor prosecutors</i>	Zion Park Inn Springdale, UT
August 20-24	BASIC PROSECUTOR COURSE <i>Must attend course for attorneys new to prosecution</i>	University Inn Logan, UT
September 12-14	FALL PROSECUTORS TRAINING CONFERENCE <i>The annual training event for all Utah prosecutors</i>	Ruby's Inn Bryce Canyon, UT
October 17-19	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>Training for civil side government attorneys</i>	Moab Valley Inn Moab, UT
November 12-14	JOINING FORCES MULTI-DISCIPLINARY CHILD ABUSE CONF. <i>Sponsored by Prevent Child Abuse Utah</i>	Davis Conf. Center Layton, UT
November	ADVANCED TRIAL SKILLS COURSE	Location pending

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES AND OTHER NATIONAL CLE CONFERENCES

February 7-8	DIGITAL EVIDENCE	Summary	Agenda	Registration	Lincoln, NE
February 12-16	GOVERNMENT CIVIL PRACTICE CONFERENCE	Summary	Flyer	Registration	San Antonio, TX
March 5-9	UNSAFE HAVENS II	Summary		Registration	Dulles, VA
	<i>Prosecuting on-line crimes against children</i>				
March 11-15	FORENSIC EVIDENCE	Summary	Agenda		San Francisco, CA
March 24-29	PROSECUTING SEXUAL ASSAULTS				Savannah, GA
April 30 - May 2	National Cyber Crime Conference	Summary		Registration	Boston, MA