

The PROSECUTOR



RECENT CASES

United States Supreme Court

Ninth Circuit Improperly Reverses Under “No Rational Juror” Standard

A Ninth Circuit panel reversed an infant-abuse-death conviction, saying “no rational juror” could have found guilt. However, the Supreme Court reversed, reasoning that a reviewing court must defer to the jury’s resolution, and cannot overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees. *Cavazos v. Smith*, 565 U. S. ____ (2011)

Utah Supreme Court

Determining Severance Damages from Gov “Taking”

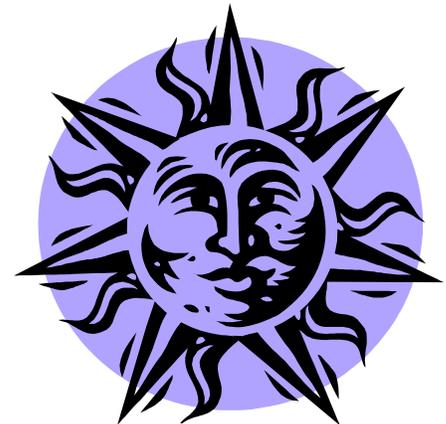
The Utah Supreme Court overruled a part of its decision in *Ivers v. Utah Department of Transportation* that prevents a landowner from recovering severance damages based on the fair market value of his property before and after it is condemned. The Court held that when a portion of a landowner’s property is taken, he is entitled to put on evidence of all factors that impact the market value of his remaining property. *UDOT v. Admiral*, 2011 Utah 62

County Council’s Rezoning Upheld

The Utah Supreme Court affirmed the lower court’s decision that Salt Lake County properly

zoned L.C. Canyon Partners’ property and that the County Council did have the authority to rescind an ordinance that would have rezoned that property. The Court reasoned that the County had a rational basis for its zoning decision, and that in light of the Council’s rescission authority, L.C. Canyon had only a unilateral hope that the rezoning ordinance ultimately would take effect, and therefore had no viable takings claim. *Partners v. Salt Lake County*, 2011 UT 63

Continued on page 2



In This Issue:

2 Case Summary Index

4 Prosecutor Profile:
Joy Natale, Summit County
Prosecuting Attorney

7

Civil Conference Pics

9

On the Lighter Side

11

Training Calendar



Utah Court of Appeals

A Sentence That Does Not Follow Sentencing Recs Is Not Illegal

Clark asserted that based on the State's recommendation that his sentences should run concurrently, the district court's decision to order Clark to serve consecutive sentences rendered his sentences illegal.

However, the appellate court held that a sentence that does not follow the sentencing recommendations in a plea agreement does not constitute an illegal sentence because a district court retains the discretion to impose a sentence that varies from the plea

agreement's recommendations. *State v. Clark*, 2011 UT App 344

Stop Was Proper Under 'Collective Knowledge' Doctrine

Two officers saw the defendant driving. The first officer knew from personal experience that the Defendant was driving with a revoked license. He told the second officer, who then stopped the defendant and arrested her after discovering that she was driving under the influence. The lower court ruled that the stop was illegal and therefore the prosecutor dismissed the case without prejudice.

On appeal, the court first held

that the State may appeal from an order suppressing evidence as a matter of right even if the prosecutor did not move to dismiss the case with prejudice, as long as "the court's suppression of evidence has substantially impaired the prosecution's case." The court then held that in line with the collective knowledge doctrine, the second officer did make a legal stop. *State v. Houston*, 2011 UT App 350

Untimely Appeal Dismissed

The appellate court held that it lacked jurisdiction to consider Smith's appeal because he untimely filed his motion to withdraw his guilty plea, and his appeal didn't

United States Supreme Court (p. 1)

Cavazos v. Smith - Ninth Circuit Improperly Reverses Under "No Rational Juror" Standard

Utah Supreme Court (p.1)

UDOT v. Admiral - Determining Severance Damages from Gov "Taking"

Partners v. Salt Lake County - County Council's Rezoning Upheld

Utah Court of Appeals (p. 2-3)

State v. Clark - A Sentence That Does Not Follow Sentencing Recs Is Not Illegal

State v. Houston - Stop Was Proper Under 'Collective Knowledge' Doctrine

State v. Smith - Untimely Appeal Dismissed

State v. Lee - No Evidence of Incompetence

Other Circuits / States (p. 3, 5-6)

United States v. Blair - Hiring Defense Attorneys Was Outside Money Laundering Statute's 'Safe Harbor'

Coronado v. State - Forensic Interview of Child Victim Can't Substitute for Cross-Examination

United States v. Dugan - Gun Ban on Drug Users Upheld

United States v. Page - Gun Count Doesn't Have to Be Severed from Others

Adams v. State - Two State Courts Disagree on the Admissibility of Pre-arrest Silence

Langley v. State - 911 Call After Suspect Fled Scene Isn't Necessarily 'Testimonial' Statement

Pena v. State - State's Erroneous Claim That Videotape Lacked Audio Violated "Brady"

Commonwealth v. Perez - Voir Dire About 'CSI Effect' Was Proper

Commonwealth v. Walker - Court Decides Not to Tighten Rules on Identifications

Derr v. State - DNA Evidence Can't Be Presented by 'Surrogate Testimony'

People v. Taylor - Test for Admitting Video Evidence

Mattos v. Agarano - Qualified Immunity For Officers Sued For Stun Gun Use

Case
Summary
Index



Continued from page 2

identify any sentencing issues. In regards to a different conviction, the court dismissed his appeal, finding that he voluntarily waived his right to appeal. *State v. Smith*, 2011 UT App 336

No Evidence of Incompetence

On appeal, Lee argued that his counsel's failure to alert the court to his incompetence was an abuse of Lee's right to "allocution" provided by rule 22(a) of the Utah Rules of Criminal Procedure and therefore rendered Lee's sentence illegal. However, the appellate court affirmed after not finding any evidence of Lee's incompetence. *State v. Lee*, 2011 UT App 356

Other Circuits/ State Courts

Hiring Defense Attorneys Was Outside Money Laundering Statute's 'Safe Harbor'

The Fourth Circuit held that there no longer is a safe harbor in a federal money laundering statute for "attorneys' fees paid for representation guaranteed by the Sixth Amendment" now that the U.S. Supreme Court has made clear that there is no constitutional right to use tainted funds to hire a criminal defense attorney. *United States v. Blair*, 4th Cir., No. 10-4478, 9/21/11



Forensic Interview of Child Victim Can't Substitute for Cross-Examination

The Texas Court of Criminal Appeals held that in regards to cross-examining child abuse victims, allowing written interrogatories posed by a "neutral" forensic interviewer to substitute for cross-examination does not provide "constitutionally adequate cross-examination" under the Sixth Amendment. *Coronado v. State*, Tex. Crim. App., No. PD-0644-10, 9/14/11

Gun Ban on Drug Users Upheld

The law that makes it a federal crime for anyone "who is an unlawful user of or addicted to any controlled substance" to ship or receive firearms in interstate commerce does not violate the Second Amendment, the Ninth Circuit held. *United States v. Dugan*, 9th Cir., No. 08-10579, 9/20/11

Gun Count Doesn't Have to Be Severed From Others

In regards to when a count of "being a felon in possession of a firearm" should be severed from drug counts, the Second Circuit held that where there is a logical connection between the felon-in-possession count and the other charges, where there is a similarity in the evidence necessary to prove the different charges, where the trial court takes steps to limit the danger of prejudice and gives a proper limiting instruction, and the defendant is not substantially or unfairly prejudiced, a district court may deny a motion to sever a felon-in-possession count from other charges for trial. *United States v. Page*, 2d Cir., No. 10-3150-cr, 9/16/11



Two State Courts Disagree on the Admissibility of Pre-arrest Silence.

Instead of addressing whether the constitution bars prosecutors from using evidence of a defendant's pre-arrest silence, the Alaska Supreme Court held that such evidence cannot be admitted

Continued on page 5

PROSECUTOR PROFILE



Joy Natale

Prosecuting Attorney for Summit County

Joy Natale grew up in New Jersey, New York, Virginia, and California. And just as you would expect from somebody who was raised on both coasts, Joy's hobbies and interests speak volumes about her well-roundedness.

Joy double-majored in Political Science and Law & Society. She's a Ute fan, a Yankee fan, and a Bon Jovi fan. With her free time, she enjoys "retail therapy" and the occasional cocktail.

Even in her career she's experienced a range of cases. Joy started out practicing complex commercial litigation with an emphasis on securities fraud and accounting malpractice. Prior to working where she is now at Summit County, Joy was a Deputy District Attorney for Salt Lake County from 1999-2007.

Half-jokingly, Joy says that the reason why she chose law school was because math is not one of her strengths and the reason behind choosing prosecution was because she wanted to be like Susan Dey's character on the TV show "L.A. Law."

One of Joy's favorite in-court memories was when she caught a defendant in a lie on the witness stand and then watched as the defense attorney mouthed several "choice words" to the defendant as he returned to his seat.

Joy believes that the most important qualities of a good prosecutor are fairness, honesty, and integrity. When Joy was in law school, she didn't appreciate how much influence prosecutors have over people's lives. Now she finds herself most satisfied about her work when everyone involved in the case feels like justice has been served.



NICKNAME - Joyful

FAVORITE CARTOON AS A KID - Peanuts

FAVORITE TREAT - Reese's Peanut Butter Cups

FAVORITE T.V. SERIES - *Lost*

FAVORITE MOVIE - *The Wedding Singer*

FAVORITE FOOD - New York style pizza

LAST BOOK READ - *A Dog's Purpose* by W. Bruce Cameron

PETS - Two dogs named Bear (age 10) & Bella (age 9)

FARTHEST SHE'S BEEN FROM HOME - Eastern Europe (Prague, Budapest, Krakow)



Continued from page 3

in light of the state's version of Fed. R. Evid. 403, which prohibits the use of evidence of silence "due to its inherently low probative value and its high risk of unfair prejudice." *Adams v. State*, Alaska, No. S-13733, 9/16/11.

However, in a similar case, the Minnesota Supreme Court ruled differently, but did so under a Fifth Amendment analysis. The court held that the Fifth Amendment does not bar the prosecution's use at trial of a defendant's pre-arrest, pre-Miranda-warning silence in response to a noncompulsory police request to submit to an interview. It was influenced by Justice Steven's concurrence in *Jenkins v. Anderson*, 447 U.S. 231 (1980), which stated that when "the government does nothing to compel a person who is not in custody to speak or to remain silent, the voluntary decision to do one or the other raises no Fifth Amendment issue." *State v. Borg*, Minn., No. A09-0243, 9/21/11



911 Call After Suspect Fled Scene Isn't Necessarily 'Testimonial' Statement

The fact that a criminal suspect has left the scene of a crime does

not mean that a 911 call describing him to police is necessarily "testimonial" for purposes of the restrictions on hearsay established in *Crawford v. Washington*, the Maryland Court of Appeals held. *Langley v. State*, Md., No. 51, 9/19/11

State's Erroneous Claim That Videotape Lacked Audio Violated "Brady"

A videotape's audio portion of an arrest that contained the defendant's denials of guilt should have been turned over to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the Texas Court of Criminal Appeals held. It did not matter that the prosecutor mistakenly believed there was no audio because members of law enforcement who made the tape are likewise subject to *Brady*. *Pena v. State*, Tex. Crim. App., No. PD-0852-10, 9/28/11

Voir Dire About 'CSI Effect' Was Proper

A trial judge did not abuse his discretion during jury voir dire by asking questions designed to ferret out juror bias favoring a high standard of scientific proof resulting from the so-called "CSI effect," the Massachusetts Supreme Court held. *Commonwealth v. Perez*, Mass., No. SJC-10208, 9/23/11

Court Decides Not to Tighten Rules on Identifications

The research on lineup identification procedures does not support a requirement that an eyewitness view the suspect and the fillers one at a time, the Massachusetts Supreme Judicial Court decided. The court also decided in a different case that an eyewitness's inadvertent observation of a defendant's image on an officer's computer screen was not irreparably suggestive. *Commonwealth v. Walker*, Mass., No. SJC-10470, 9/21/11, and *Commonwealth v. Cavitt*, Mass., No. SJC-10436, 9/21/11



DNA Evidence Can't Be Presented by 'Surrogate Testimony'

Although the trial court originally admitted the "surrogate testimony" of a laboratory supervisor as a "business records" exception, the Maryland Court of Appeals overruled, holding that the admission of DNA testing through the testimony of an expert other than the analyst who actually performed the test violates the defendant's Sixth Amendment right. *Derr v. State*, Md., No. 6, 9/29/11

Continued on page 6



Continued from page 5

Test for Admitting Video Evidence

The Illinois Supreme Court adopted a case-specific test for determining the admissibility of surveillance videos. Under the test, trial judges assess the foundation for the reliability of a video recording by examining such factors as "(1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process." *People v. Taylor*, Ill., No. 110067, 10/6/11



Brooks v. Seattle, Wash., 599 F.3d 1018, 87 CrL 45)

Qualified Immunity For Officers Sued For Stun Gun Use

The Ninth Circuit identified two situations in which law enforcement officers' use of stun guns constituted excessive force in violation of the Fourth Amendment. However, because at the time of the two incidents there were no circuit taser cases finding a Fourth Amendment violation, the court held that the officers had qualified immunity since such a right was not yet clearly established. *Mattos v. Agarano*, 9th Cir. (en banc), No. 08-15567, 10/17/11, on rehearing in



The Utah Prosecution Council

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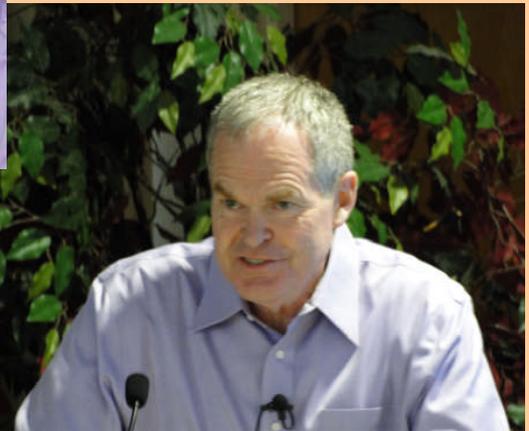
www.upc.utah.gov



Civil Conference



Civil Conference



On the Lighter Side

Here are some fun Thanksgiving facts:

Fossil evidence shows that turkeys roamed the Americas 10 million years ago.

91% of Americans eat turkey on Thanksgiving Day.

There are regional differences as to the "stuffing" (or "dressing") traditionally served with the turkey. Southerners generally make theirs from cornbread, while in other parts of the country white bread is the base. One or several of the following may be added: oysters, apples, chestnuts, raisins, celery and/or other vegetables, sausage or the turkey's giblets.

Turkeys have heart attacks. When the Air Force was conducting test runs and breaking the sound barrier, fields of turkeys would drop dead.

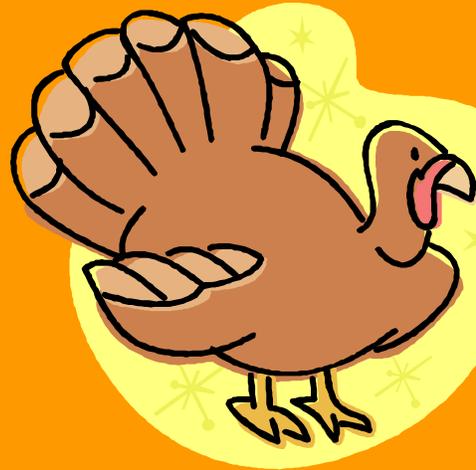
Thomas Jefferson thought the concept of Thanksgiving was "the most ridiculous idea I've ever heard."

Every President since Lincoln proclaimed Thanksgiving Day. But in 1939, 1940, and 1941 Franklin D. Roosevelt proclaimed Thanksgiving the third Thursday in November to lengthen the holiday shopping season. This upset people.

Benjamin Franklin wanted the national bird to be a turkey.

Twenty percent of cranberries eaten are eaten on Thanksgiving.

Columbus thought that the land he discovered was connected to India, where peacocks are found in considerable number. And he believed turkeys were a type of peacock (they're actually a type of pheasant). So he named them "tuka", which is "peacock" in the Tamil language of India



2011-12 Training Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

Nov. 30 - Dec. 2	ADVANCED TRIAL SKILLS TRAINING <i>Substantive and trial advocacy training for experienced prosecutors</i>	Hampton Inn West Jordan, UT
April 19-20	Spring Conference <i>Case law update, legislative recap, ethics / civility, and more</i>	Exact facility Pending Salt Lake Valley
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

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

See Table **JUSTICE IN OUR COMMUNITIES** **Summary** *Investigation and prosecution of child abuse*

December 5-7	Durango, CO	Check back to register
December 13-15	Bloomington, IN	Check back to register

December 8-9	DEFENDING THE FORENSIC INTERVIEW <i>Check back (click on the course title) for course summary and registration</i>	Durango, CO
March 5-9	UNSAFE HAVENS II Summary <i>Prosecuting on-line crimes against children</i>	Dulles, VA

* For a course description, click on the “[Summary](#)” link after the course title. If an agenda has been posted there will also be an “[Agenda](#)” link. Registration for all NDAA courses is now on-line. To register for a course, click on the “[Register](#)” link. If there are no “[Summary](#)” or “[Register](#)” links, that information has not yet been posted on the NDAA website.