

The

PROSECUTOR



RECENT CASES

Utah Supreme Court

Incriminating Letter from Allgier's Fellow Inmate Is Released To Public

While Allgier's case was pending, the district court received a letter written by an inmate stating that he heard Allgier admit to shooting an officer. On an interlocutory appeal about whether the letter should be released to the public, the Supreme Court held that the inmate's letter qualified as a court record for which there is a presumptive right of public access.

The Court further held that such a presumptive right was not overcome by the right to a fair trial because most of the significant information contained in the letter had already been introduced into the public arena through Allgier's brief. *State v. Allgier*, 2011 UT 47

Watering of Nonagricultural Lands Falls Within "Irrigating Land" Tax Exemption

The Utah Supreme Court held that a water distribution company's use of artificial watering of nonagricultural lands did fall within the "irrigating land" tax exemption.

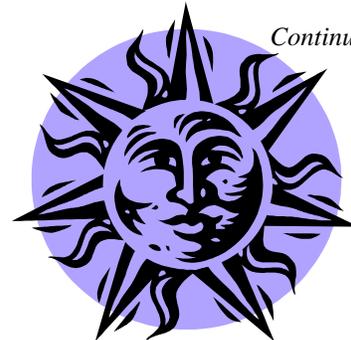
The Court also held that double taxation does not occur where the owners of real property pay higher property taxes as a result of the availability of water by a water distribution system that is separately taxed, even though the property owners may be shareholders of the company. *Summit v. State*, 2011 UT 43

Gross Inadequacy In Price And Slight Circumstances of Unfairness Justify Setting Aside a Sheriff's Sale

An attorney placed a lien on his client's house who failed to pay \$9,000 in attorney fees. The attorney eventually bought the \$125,000 house for \$329 during a Sheriff's sale. The client then attempted to redeem his property and pay his attorney fees, but the attorney continually failed to return the client's calls after leading him to believe they would negotiate.

On appeal, after a district court set aside the Sheriff's sale, the Utah Supreme Court held that the

Continued on page 3



In This Issue:

2 Case Summary Index

4 In Memory Rocky Rognile Utah Prosecution Loses a Fighter

6

A.R.I.D.E: Giving Officers the Tools They Need To Recognize Drug Impaired Drivers
By: Susan Glass

12

Prosecutor Profile: Rachele Shumway Ehlert, Deputy Washington County Attorney

15

On the Lighter Side

16

Training Calendar



Utah Supreme Court (p. 1)

State v. Allgier - Incriminating Letter from Allgier's Fellow Inmate Is Released To Public

Summit v. State - Watering of Nonagricultural Lands Falls Within "Irrigating Land" Tax Exemption

Pyper v. Bond - Gross Inadequacy In Price and Slight Circumstances of Unfairness Justify Setting Aside a Sheriff's Sale

Utah Court of Appeals (p. 3,5,9-11)

State v. Simons - Questioning Passenger OK Even Without Reasonable Suspicion

State v. Duran - Improper Comments by Testifying Officers Did Not Make Trial Unfair

State v. Hansen - Victim's Desire Not To Press Charges Is Irrelevant In Probable Cause Analysis

F.S. v. State - Foundation of Evidence Enough to Affirm Juvenile Court Order

State v. Arnold - Counsel Was Not Ineffective In Failing To Seek Release from Exclusion Order

D.V. v. State - To Be In Contempt, Written Order Must First Be Sufficiently Specific

Utah v. Light - No Jurisdiction for Untimely Appeals Even Under Ineffective Assistance Claims

State v. Marks - Difficult Balance between Rule 412 and 6th Amendment

State v. Meza - 'Aggravated' Robbery Where Defendant Acts As if He Is Carrying Gun in Pocket

Salt Lake City v. Perez - Padilla Does Not Change Jurisdictional Reqs for Untimely Appeals

State v. Prawitt - Defendant Has Burden of Ensuring Adequate Record for Appeal

Ogden City v. Rader - Parameters for When Justice Court Determination May Be Appealed

State v. Toki - Judge's Inadvertent References to the Restricted Person Language Was Not Unfairly Prejudicial

State v. Butler - Confidential Informant Reliable Enough To Justify Defendant's Seizure

State v. Charles - Murder Conviction Reversed; Court Expects Detailed Jury Instruction on Jailhouse Informant

State v. Cooper - No Mistrial Based On Improper Testimony When State Did Not Intentionally Elicit It

State v. Garcia - Explicit Findings On Record Not Necessary When Sentencing

State v. McFarland - Mitigating Factors Were Considered In Sentencing

Tenth Circuit (p. 11)

United States v. Martinez - Static 911 Call Didn't Indicate Emergency

United States v. Prince - Knowledge of Recordkeeping Not Required To Convict for Lying to Licensed Gun Dealer

Other Circuits / States (p. 11,13-14)

United States v. Mitchell - Laws Mandating Routine DNA Collection From Arrestees Upheld

Henry v. Purnell - Officer Not Entitled to Qualified Immunity For Mistakenly Firing Gun Instead of Taser

Moore v. Hartman - Two Circuits Split on Role of Probable Cause in Retaliatory-Prosecution Civil Rights Actions

United States v. Hernandez - 4th Amendment Allows Warrantless GPS Tracking

State v. Nance - Dead Witness's Past Testimony Admissible at Retrial

Bogan v. City of Chicago - Plaintiff Has Burden of Proof on Lack of Emergency

Jackler v. Byrne Garcetti - No Bar to Police Officer's Claim of Retaliation

United States v. Wright - Parlay Doesn't Push Proceeds Over Threshold

State ex rel. Watkins v. Creuzot - State Can Seek Death at Retrial Despite Loss of Evidence Spanning 30 Years

Schneyder v. Smith - Court Allows Lawsuit by Material Witness against Prosecutor Who Had Her Locked Up

United States v. Moore - Judge in Complex Case Must Limit Government's Use of 'Overview' Witness

State v. Kandutsch - Monitoring Report Doesn't Need Expert Foundation

United States v. Della Porta - Supplemental Arguments to Deadlocked Jury Did Not Result in Coercion of Guilty Verdict



Continued from page 1

district court did not err in concluding that gross inadequacy in price together with slight circumstances of unfairness may justify setting aside a sheriff's sale, and that the attorney's conduct amounted to slight circumstances of unfairness. *Pyper v. Bond*, 2011 Utah 45

Utah Court of Appeals

Questioning Passenger OK Even Without Reasonable Suspicion

On appeal, Simons argued that the evidence in his case should be suppressed because the arresting officer exceeded the permissible scope of the stop when without reasonable suspicion, he turned his attention from the driver to Simons and asked Simons if he had "anything on his person [he] need [ed] to know about."



However, the appellate court affirmed, reasoning that during a lawful stop, officers may pose questions to passengers unrelated to

the scope of the stop and without reasonable suspicion, so long as those actions do not measurably extend the length of the stop. *State v. Simons*, 2011 UT App 251

Improper Comments by Testifying Officers Did Not Make Trial Unfair

The appellate court held that the trial court did not exceed its discretion in denying Duran's motion for a new trial because 1) even presuming that Duran had a constitutional right to have a jury determine his HVO status, any error in the trial court's determination of that issue was harmless beyond a reasonable doubt; 2) an officer's comment about Duran's criminal history was not intentionally elicited by the prosecution, was made in passing, and was relatively innocuous in light of the state's strong evidence.

Furthermore, the trial court did not commit plain error in failing to declare a mistrial based on an officer's comment about Duran's invocation of his right to remain silent because Duran used the same information as part of his defense strategy. *State v. Duran*, 2011 UT App 254

Victim's Desire Not To Press Charges Is Irrelevant In Probable Cause Analysis

On appeal, Hansen argued that an officer did not have probable cause to arrest her and seize

evidence from her person.

However, the appellate court found that even though the victim did not wish to press trespass charges against Hansen, the officer still had probable cause to arrest since he witnessed Hansen trespass. The court reasoned that the victim's desire not to press charges is irrelevant to the analysis of whether the officer had probable cause. *State v. Hansen*, 2011 UT App 242



Foundation of Evidence Enough to Affirm Juvenile Court Order

Father appealed the juvenile court's order, arguing that there was insufficient evidence to support the finding that his son was sexually abused by him. However, the appellate court affirmed, reasoning that because a foundation of evidence existed to support the juvenile court's decision, it could not engage in reweighing the evidence. *F.S. v. State*, 2011 UT App 258

Continued on page 5

IN MEMORY

ROCKY ROGNILE

UTAH PROSECUTION LOSES A FIGHTER



Peter "Rocky" Rognile, Utah Assistant Attorney General, age 54, died Tuesday, August 30, 2011, near Liberty Park in Salt Lake City as the result of a traffic accident. Rocky was riding his beloved Harley when a driver turned in front of him.

Rocky was born in Fargo, North Dakota, in 1957. He graduated from Moorhead State University in 1979 and from the University of Utah College of Law in 1983.

Before joining the Attorney General's Office, Rocky was a prosecutor in both Iron and Washington Counties and spent several years in private practice. During his time with the Utah Attorney General's Office, he served as a Section Chief in the Civil Rights Division, a Prosecutor in the Children's Justice Division and an Appellate Attorney in the Criminal Appeals Division. Even before becoming an attorney, Rocky worked with and for prosecutors. When the Attorney General's Office opened its then new Children's Justice prosecution unit, headed by Rob Parrish, Rob called Professor Ron Boyce at the U of U law school and asked him to recommend two of his best and brightest to work as law clerks in the new unit. Rocky was one of Prof. Boyce's recommendations. As Rob said in his personal tribute to Rocky, "Boy did Prof. Boyce get it right."

Rocky was a donor and volunteer at the 4th Street Clinic. He also gave many hours of time at the Tuesday Night Bar Pro Bono Service, serving as the liaison to the 3rd District Court and the Supreme Court's advisory committee on professionalism. In his devotion to nature, he was a "Weeder" for the Nature Conservancy to maintain native species. Rocky was a loyal friend to many; he gave countless hours caring for and advising his friends. Rocky often treated his friends and family with a gruff and playful combativeness.

Rocky was a passionate fisherman, sportsman and a lover of gardening, good books, fine cigars and wine. He cherished his time on a good fishing lake or stream or in the mountains hunting.

The State will forever be in debt to Rocky for his life of service and dedication.



Continued from page 3

Counsel Was Not Ineffective In Failing To Seek Release From Exclusion Order

On appeal for their shoplifting conviction, the Arnolds argued that their counsel was ineffective in failing to seek release from an exclusion order after the State opened the door to the excluded evidence. However, the court disagreed because there was a sound tactical reason for counsel to not seek release from the exclusion order, and no prejudice resulted in light of the overwhelming evidence of their guilt. *State v. Arnold*, 2011 UT App 255



To Be In Contempt, Written Order First Must Be Sufficiently Specific

The appellate court found that D.V. failed to preserve his first issue because although D.V. did object to the testimony of a DCFS caseworker on hearsay grounds, he did not object based on the application of rule 1101 once the court had admitted such testimony as an 1101 exception.

The appellate court did overrule

on the second issue, holding that there was insufficient evidence for the juvenile court to find D.V. in contempt. The court reasoned that neither the written order nor verbal ruling was sufficiently specific to inform D.V. what was required of him. *D.V. v. State*, 2011 UT App 241

No Jurisdiction For Untimely Appeals Even Under Ineffective Assistance Claims

Light appealed after entering a guilty plea. The appellate court held that if a motion to withdraw a plea is not timely filed, then it does not have jurisdiction to review the plea, even on the basis of ineffective assistance of counsel. Light's remaining option would be to raise the claim under the Post Conviction Remedies Act. *Utah v. Light*, 2011 UT App 245 (also see *Utah v. Light*, 2011 UT App 265)

Difficult Balance Between Rule 412 and 6th Amendment

Marks appealed his sexual abuse conviction, arguing that the trial court erred by refusing to permit him to question the complainant about previous sexual behavior. The appellate court affirmed after a lengthy analysis about how the interplay between rule 412 and the Confrontation Clause forces trial judges to balance two important interests: the accused's right to present a complete defense and the State's interest in protecting the complainants in sex crime

prosecutions from unnecessarily intrusive invasions into private sexual matters. *State v. Marks*, 2011 UT App 262



'Aggravated' Robbery Where Defendant Acts As If He Is Carrying Gun In Pocket

The appellate court held that the trial court did not plainly err by denying Meza's motion for a directed verdict or by failing to reduce Meza's aggravated robbery conviction to simple robbery. The court reasoned that Meza's conduct of keeping his hand in his pocket while robbing the store, tilting his head toward his hand, and his verbal command, "Open the drawer, this is a stickup," constituted a representation of a dangerous weapon. *State v. Meza*, 2011 UT App 260

Padilla Does Not Change Jurisdictional Reqs For Untimely Appeals

Perez's guilty plea was entered based upon his failure to comply with

Continued on page 9

A.R.I.D.E: GIVING OFFICERS THE TOOLS THEY NEED TO RECOGNIZE DRUG IMPAIRED DRIVERS

*By Susan Glass, Traffic Safety Resource Prosecutor
Missouri Office of Prosecution Services*

A police officer on routine patrol at night passes a car that does not have its headlights on. After he turns around, intending to alert the driver to this fact, he observes the car weaving in its lane and traveling below the posted speed limit. The car then pulls up to a stop sign. Despite no other traffic being at the intersection, the car sits there for several seconds before proceeding. Based on this unusual driving behavior, the officer initiates a traffic stop. Because he is trained in DWI detection, the officer already suspects he may have a drunk driver on his hands.

The officer then approaches the car to make contact with the driver. As the driver rolls down his window, the officer immediately notices that his eyes are bloodshot and glassy. When the officer asks where he is headed, the driver stares at him blankly before finally mumbling that he can't remember. The officer notices that his speech is thick and slurred. When the officer asks to see his license and proof of insurance, the driver fumbles around to retrieve his wallet. Despite it being in plain view in the front of the wallet, the driver looks for his license for several seconds before finally telling the officer he can't find it. He seems to forget that the officer also asked to see his proof of insurance. Becoming even more convinced that he has a drunk driver on his hands, the officer asks the driver to step out of the car to perform some field sobriety tests.

As the driver walks to the back of his car, he stumbles and has to hold on to the car for balance. When the officer administers the Horizontal Gaze Nystagmus test, he observes that the driver has all six clues. When the officer administers the Walk and Turn, the driver can't maintain the starting position and almost falls. Because he is concerned for the driver's safety, the officer decides not to complete the Walk and Turn or to attempt the One Leg Stand.

Based on all of these observations, the officer suspects that he has a drunk driver on his hands. But, he's not sure. Usually, people who are this impaired smell strongly of alcohol. This driver has no odor of alcohol on his breath. Moreover, there were no empty beer cans or liquor bottles in the car. When asked if he had been drinking, the driver says no. Most confusing of all—the driver blows triple zeros on the PBT. The officer doesn't know what to do. Despite the fact that the driver seems very drunk, the PBT says he isn't.

What should the officer do in this situation? How many officers would simply let the guy go, hoping he makes it home safe? How many officers have been in this situation before and done exactly that? What's really going on here?

The most likely explanation for the driver's impairment is one that many officers may not think about. With so much focus and attention paid to drunk driving and with all the training officers receive on the detection of drunk drivers, the officer may be so focused on impairment by alcohol that he does not consider the obvious explanation for this situation. This driver is impaired, most likely by drugs.

Driving while impaired by a drug other than alcohol is an increasingly serious and prevalent problem on our nation's highways. Based on SAMHSA's 2006 National Survey on Drug Use and Health, an estimated 10.2 million persons aged 12 or older reported driving under the influence of illicit drugs at least once during the preceding year. Illicit drugs in this study included marijuana, cocaine, inhalants, hallucinogens, heroin, or prescription-type drugs used non-medically. Based on the combined data from 2004 to 2006, 4.7% of drivers aged 18 or

A.R.I.D.E: GIVING OFFICERS THE TOOLS THEY NEED TO RECOGNIZE DRUG IMPAIRED DRIVERS

(Continued)

older drove under the influence of illicit drugs. According to the Centers for Disease Control, 18% of motor vehicle driver deaths involve a drug other than alcohol. In one study of reckless drivers, over half who were not intoxicated by alcohol were found to be impaired by cocaine and/or marijuana. While drunk driving remains a very serious issue, it is clear that more attention needs to be paid to those who drive under the influence of drugs.

Driving under the influence of drugs is illegal in every state. Only a handful of states, however, have laws that make it illegal for a person to drive with any amount of certain substances in his bloodstream. In these *per se* drug law states, all that is needed to prove guilt is a toxicology test that is positive for drugs. In most other states, it is necessary to show that the driver was impaired by whatever substance he had ingested. Despite the nature of these laws, few police officers receive training on drug impairment and driving. Unless they undergo the specialized training required to become a drug recognition expert, officers may not receive any training on how to recognize and respond to a drug impaired driver. And, as described above, an officer who is not familiar with drug impairment may simply decide not to arrest an obviously impaired driver.

Recognizing the need for training on drug impairment, the National Highway Traffic Safety Administration developed **ARIDE—Advanced Roadside Impaired Driving Enforcement**. This curriculum focuses on drugged driving and is intended to bridge the gap between traditional law enforcement training that focuses on the detection and apprehension of drunk drivers and the full blown Drug Evaluation and Classification Program. It is a two day (16 hour) course that can be presented in any state.

The curriculum includes a detailed review of the standardized field sobriety tests, which remain vital to the detection of drug impaired drivers. The course also includes information on: the physiology of the human body and how driving is affected by drugs, various methods of ingestion of drugs, and medical conditions that may mimic drug or alcohol impairment. Most importantly, the ARIDE course introduces the seven drug categories from the DEC program and describes the general indicators of impairment that are associated with each category. This course, when successfully presented, will give officers the knowledge and tools they need to recognize a drug impaired driver. An officer who has attended an ARIDE class will know exactly how to proceed in a scenario like that described above and will not run the risk of simply letting an impaired driver go because he doesn't know what else to do.

It is important to note that successful completion of the ARIDE class **WILL NOT** qualify an officer as a drug recognition expert. The course does not teach the 12-step drug evaluation protocol. The course does not teach officers to conduct vital sign examinations. ARIDE is not a substitute for the DEC program. For this reason, ARIDE-trained officers should not assume that they do not need to call a DRE when they are faced with a drug impaired driver. More importantly, law enforcement administrators should not assume that they can send officers to ARIDE instead of the full Drug Evaluation and Classification Program training. The testimony of a trained drug recognition expert remains vital to successfully prosecuting a drug impaired driver, particularly in the majority of states where impairment must be tied to the substance ingested.

In DEC states, ARIDE will give law enforcement officers the information they need to determine when to call a DRE to conduct a full evaluation. ARIDE will give officers in the few states that have not yet adopted the DEC program the ability to more completely and effectively document impairment caused by drugs. In

A.R.I.D.E: GIVING OFFICERS THE TOOLS THEY NEED TO RECOGNIZE DRUG IMPAIRED DRIVERS

(Continued)

every state, officers that complete the ARIDE course will be able to recognize and respond to drivers impaired by a drug other than alcohol and will have the confidence they need to make appropriate arrest decisions in any impaired driving case.

Missouri has been active in presenting the ARIDE course to law enforcement officers and prosecutors. Several agencies, including the Missouri Office of Prosecution Services, the Missouri State Highway Patrol and various law enforcement academies have hosted classes, training a total of approximately 200 officers to date. Because the curriculum is relatively new, it is too soon to tell whether there has been any significant impact on drug impaired driving in this state. Officers who have attended the class, however, have been enthusiastic in their response and eager to put their new found knowledge and skills to the test on the road. These officers, armed with the ability to recognize and respond to drug impaired drivers, will never again release an obviously impaired driver simply because there was no alcohol on board. This will clearly result in better enforcement and safer roads. For this reason alone, the ARIDE class is worthwhile training that should be offered in every state.

*Article originally published in the National Traffic Law Center's "Between the Lines" Winter 2008 newsletter

1. See www.oas.samhsa.gov/2k8/stateDUI/stateDUI.cfm.
2. See www.cdc.gov/ncipc/factsheets/driving.htm.
3. See D. Brookoff, et. al., "Testing Reckless Drivers for Cocaine and Marijuana," New England Journal of Medicine, Vol. 331, No. 8, 8/25/94, p. 518.



LEGAL BRIEFS



Continued from page 5

his plea in abeyance. On appeal, Perez conceded that his motion to withdraw his guilty plea was untimely, but he asserted that *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) mandates that non citizens should be permitted to challenge guilty pleas under more flexible procedures.

The appellate court held that although *Padilla* imposes a duty on counsel to advise clients regarding the immigration consequences of guilty pleas, it does not require new procedures, nor does it displace state jurisdictional requirements, and therefore the court lacked jurisdiction. *Salt Lake City v. Perez*, 2011 UT App 237

Defendant Has Burden of Ensuring Adequate Record for Appeal

After Prawitt appealed his DUI,

the appellate court made the following conclusions: Prawitt failed to meet his burden of ensuring an adequate record for appeal either by making his objections on the record to begin with or by recreating them after the



fact; Prawitt failed to show harm arising from any error in a jury instruction dealing with his denying to take a BAC test; and there was probable cause to believe that Prawitt was in actual physical control of the vehicle, even without

knowing if the officer observed the keys within the vehicle. *State v. Prawitt*, 2011 UT App 261

Parameters For When Justice Court Determination May Be Appealed

A defendant may appeal the judgment from a justice court and obtain a trial de novo in the district court. The district court's decision is then final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance. Utah Code 78A-7-118(8).

In his appeal to the district court from his justice court conviction, Rader challenged a preliminary injunction on constitutional grounds, but he did not challenge the constitutionality of any statute or ordinance. Therefore, the appellate court dismissed the case for lack of jurisdiction. *Ogden City v. Rader*, 2011 UT App 247

Continued on page 10

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Continued from page 9

Judge's Inadvertent References to the Restricted Person Language Was Not Unfairly Prejudicial

Defendant was convicted of discharging a firearm from a vehicle and possession of a dangerous weapon by a restricted person. The appellate court concluded that Defendant failed to establish that the trial court's inadvertent references to the restricted person language was so prejudicial as to constitute reversible error, and that the trial court did not abuse its discretion by providing a curative instruction or declining to question the jurors regarding an altercation that happened outside the courtroom during recess.

The court also concluded that although a fair amount of the expert testimony was prejudicial and not relevant, Defendant did not demonstrate that the outcome of the trial would have been more favorable to him without the improper evidence. *State v. Toki*, 2011 UT App 293.

Confidential Informant Reliable Enough to Justify Defendant's Seizure

The appellate court found that there was an objective basis for suspecting that Defendant was committing a crime by possessing and transporting drugs due to the reliability of a confidential informant. The informant had previously provided officers with

accurate information, gave a specific address to which Defendant would be traveling in his green truck, advised the police about a hidden compartment in the driver's side door panel for meth, and accurately told the officers when Defendant was leaving his house. *State v. Butler*, 2011 UT App 281.



Murder Conviction Reversed; Court Expects Detailed Jury Instruction on Jailhouse Informant

The appellate court reversed Charles's murder conviction and remanded for a new trial after finding that his defense counsel was ineffective.

Aside from the holding, the court suggested that whenever the prosecution uses a jailhouse informant, the trial court ought to give a detailed instruction questioning the informant's credibility (see paragraphs 40-41). The AG's office will seek cert on the case; meanwhile, prosecutors should feel free to contact Ryan Tenney at rttenney@utah.gov if they have questions about such a jury instruction. *State v. Charles*, 2011 UT App 291

No Mistrial Based On Improper Testimony When State Did Not Intentionally Elicit It

Cooper challenged his conviction for filing a wrongful lien. The appellate court affirmed, concluding that Cooper's claim that the trial court violated the rules of evidence by taking judicial notice failed because he could not establish that he was prejudiced by any error.

Additionally, the trial court did not abuse its discretion in denying Cooper's motion for a mistrial because although the contested testimony was unhelpful to the defense, the State did not intentionally elicit it. *State v. Cooper*, 2011 UT App 271

Explicit Findings On Record Not Necessary When Sentencing

Garcia appealed the trial court's decision to impose consecutive sentences, arguing that the trial court failed to consider all of the statutorily required factors. However, the court affirmed, reasoning that as a general rule, the appellate court upholds the



Continued on page 11



Continued from page 10

trial court even if it failed to make findings on the record whenever it would be reasonable to assume that the court actually made such findings. *State v. Garcia*, 2011 UT App 289

Mitigating Factors Were Considered In Sentencing

McFarland argued that the district court abused its discretion in sentencing him to prison in lieu of probation because the district court failed to consider all relevant mitigating factors. However, the appellate court affirmed, reasoning that the record demonstrated that there was sufficient evidence to support the district court's sentencing decision. *State v. McFarland*, 2011 UT App 284

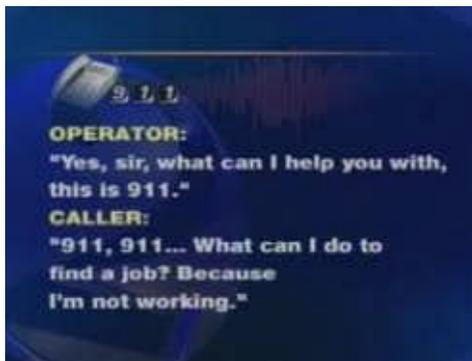
Tenth Circuit Court of Appeals

Static 911 Call Didn't Indicate Emergency

A 911 dispatcher took a call and heard nothing but static. Officers went to the house and entered through an unlocked balcony door to investigate though nothing appeared to be amiss. While inside, they spied contraband that led to federal charges against the defendant.

However, the Tenth Circuit held that the static-only 911 call by itself did not provide officers with the exigent circumstances necessary to

conduct a warrantless search of the residence. *United States v. Martinez*, 10th Cir., No. 10- 2070, 7/12/11



Knowledge of Recordkeeping Not Required To Convict for Lying to Licensed Gun Dealer

A conviction under the statute criminalizing the making of false statements to federally licensed firearms dealers does not require proof that the defendant knew his false statement would be entered in records mandated by federal law, the Tenth Circuit held. The court also held that the Constitution does not prohibit prosecutors from exercising a peremptory challenge against a prospective juror on the basis of the juror's belief that marijuana should be legalized. *United States v. Prince*, 10th Cir., No. 10-3180, 8/5/11.

Other Circuits/ State Courts

Laws Mandating Routine DNA Collection From Arrestees Upheld

An en banc Third Circuit opinion rejected 4th Amendment challenges to federal statutes that mandate the warrantless collection of DNA samples from pretrial detainees. Applying a "totality of the circumstances" test, the court reasoned that "arrestees have a diminished expectation of privacy in their identities, and DNA collection from arrestees serves important law enforcement interests." *United States v. Mitchell*, 3d Cir., No. 09-4718, 7/25/11.

Officer Not Entitled to Qualified Immunity For Mistakenly Firing Gun Instead of Taser

An officer unintentionally shot a suspect, who was fleeing arrest for a minor crime, when he meant to instead fire his taser. An en banc Fourth Circuit held that the officer, though his actions were unintentional, was not entitled to qualified immunity from liability in the suspect's civil rights lawsuit. *Henry v. Purnell*, 4th Cir. (en banc), No. 08-7433, 7/14/11.



Continued on page 13

PROSECUTOR PROFILE



Rachelle Shumway Ehlert Deputy Washington County Attorney

It's hard to tell exactly from where Rachelle got her toughness. It could have come from the time she was chased home from school by two second grade boys carrying sticks. Her mom scared them off in time, a lesson to Rachelle about having the guts to stand up for herself and always do what is right.

Rachelle may have gained her toughness simply by growing up in the gritty small town of Blanding, Utah. Raised on outdoors and sports, Rachelle learned to keep up with her three brothers wherever the Blanding wilderness took them. To this day, you can find her 4-wheeling, hiking, fishing, hunting, and jet skiing—if it's outdoors, she'll do it.

Or her toughness may have come from having to learn to speak Korean while serving an 18 month LDS mission in Pusan, Korea. Maybe it was raising two kids (age 10 and age 7) on her own that made her tough. Or it could have been a series of embarrassing moments, one of which happened when her cell phone went off, to the tune of AC/DC, during a meeting in the governor's office with Gary Herbert.

Regardless of where it comes from, Rachelle brings her toughness to the courtroom. She knew she wanted to be a lawyer ever since her 7th Grade Career Day when she observed Craig Halls at the San Juan County Attorney's office. After graduating from Oklahoma City University Law School, and after nine years of doing Bankruptcy/Creditor/Debtor work, she realized that the only happy lawyers were prosecutors. She wanted to be a happy lawyer. Now she's a happy lawyer. Though she is grateful for those first years of civil litigation because it gave her a valuable and unique outlook which she has used during her 4.5 years as a Deputy Washington County Attorney. In fact, Richelle has spent a lot of these last few years in juvenile prosecution, asset forfeiture, planning and zoning, and public lands.



In the end, it seems clear that it was a series of choices throughout her life that made Rachelle tough. "The character that takes command in moments of crucial choices has already been determined by a thousand other choices made earlier in seemingly unimportant moments...by all the 'little' choices of the past – by all those times when the voice of conscience was at war with the voice of temptation, whispering the lie that 'it really doesn't matter'..." Ronald Regan.

BORN - Monticello, Utah

FIRST JOB - Flipping burgers at the Patio Drive-In at age 16

FAVORITE SPORTS TEAM - Dallas Cowboys and Jazz

FAVORITE MUSIC - 80's Rock and Rob Thomas

FAVORITE TREAT - Dark Chocolate

FAVORITE T.V. SERIES - 24

FAVORITE MOVIE - *Star Wars*

FAVORITE FOOD - Crab

LAST BOOK READ - *How To Not Marry a Jerk*

PETS - One dog and countless frogs





Continued from page 11

Two Circuits Split on Role of Probable Cause In Retaliatory-Prosecution Civil Rights Actions

A man, who was previously on death row, brought a malicious-prosecution civil rights lawsuit against a municipal police forensic scientist for intentionally destroying potentially exculpatory evidence in the man's state murder prosecution. However, the Tenth Circuit dismissed his lawsuit because other evidence provided probable cause to believe his guilt.

The next day, the D.C. Circuit held that the existence of "arguable probable cause" to prosecute the plaintiff did not thwart a trial on his retaliatory-prosecution claim against federal officials. *McCarty v. Gilchrist*, 10th Cir., No. 09-6220, 7/14/11, and *Moore v. Hartman*, D.C. Cir., No. 10-5334, 7/15/11.



4th Amendment Allows Warrantless GPS Tracking

Courts have been divided as to whether investigators violate the 4th Amendment when they fail to get a search warrant before using a GPS device on an automobile to track a suspect's movements. In

fact, the Supreme Court has agreed to take up the question next fall. Meanwhile, the Fifth Circuit recently held that a warrant is not needed in such occasions. *United States v. Hernandez*, 5th Cir., No. 10-10695, 7/18/11.

Dead Witness's Past Testimony Admissible at Retrial

A defense attorney's decision to forgo cross-examination of a murder-witness at an initial trial does not mean that, after the defendant's conviction was reversed on the basis of ineffective assistance of counsel, the defendant's 6th Amendment right of confrontation would be offended by reading the now-unavailable witness's testimony to the jury at the retrial, the South Carolina Supreme Court held. *State v. Nance*, S.C., No. 26998, 7/11/11.

Plaintiff Has Burden of Proof on Lack of Emergency

In a civil rights action alleging that a warrantless police entry of private premises violated the 4th Amendment, the plaintiff bears the burden of proving the absence of exigent circumstances, the Seventh Circuit held. *Bogan v. City of Chicago*, 7th Cir., No. 10-2170, 7/6/11.

Garcetti No Bar to Police Officer's Claim of Retaliation

Garcetti v. Ceballos, 547 U.S. 410, 79 CrL 233 (2006) held that

the First Amendment does not apply to a public employee's speech that is based on his official duties and that has no relevant analogue to a private citizen's speech.

The Second Circuit held that when an officer refused to follow the alleged orders of his supervisors to withdraw his report confirming that another officer used excessive force, *Garcetti* did not apply and the officer was protected under the First Amendment. *Jackler v. Byrne*, 2d Cir., No. 10-0859-cv, 7/22/11.



Parlay Doesn't Push Proceeds Over Threshold

The defendant purchased property for \$8,000 using criminal proceeds, and later sold the property for \$50,000. Although the government argued that the larger transaction should be used to meet the threshold \$10,000 required under 18 U.S.C. §1957, the Seventh Circuit held that the original amount of the proceeds was what counted and was therefore insufficient to trigger liability under the statute. *United States v. Wright*, 7th Cir., No. 10-1249, 7/12/11.

Continued on page 14



Continued from page 13

State Can Seek Death at Retrial Despite Loss of Evidence Spanning 30 Years

The fact that some mitigating evidence had been lost in the 30 years since a murder defendant was first convicted does not preclude the state from seeking a new death sentence if he is convicted after a retrial, the Texas Court of Criminal Appeals held. The court reasoned that if anything, the defendant can point to his circumstances in the present as a powerful argument against his eligibility for death. *State ex rel. Watkins v. Creuzot, Tex. Crim. App., No. AP-76594, 7/28/11.*



Court Allows Lawsuit by Material Witness against Prosecutor Who Had Her Locked Up

The 4th Amendment, not the 14th Amendment's Due Process Clause, governs a civil rights lawsuit filed by a material witness who was detained for seven weeks after the case in which she was to testify was continued, the Third Circuit held. The court also decided

that a reasonable prosecutor would have known that detaining the material witness after the criminal case was continued was unconstitutional. *Schneyder v. Smith, 3d Cir., No. 10-2367, 7/29/11.*

Judge in Complex Case Must Limit Government's Use of 'Overview' Witness

Like many other courts, the D.C. Circuit condemned the government's occasional practice of opening its case-in-chief in complex cases with a lay law enforcement "overview witness" to set the scene for anticipated evidence. The court did, however, leave room for prosecutors to call contextual witnesses to give far less sweeping testimony. *United States v. Moore, D.C. Cir., No. 05-3050, 7/29/11.*

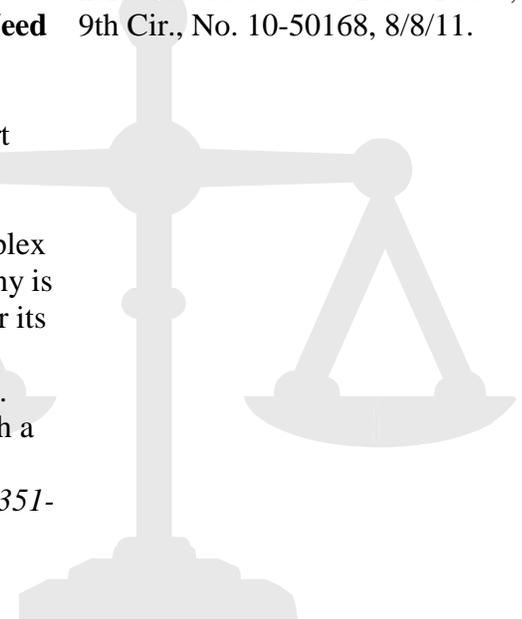
Monitoring Report Doesn't Need Expert Foundation

A computer-generated report from an electronic monitoring device affixed to a defendant's ankle is not so "unusually complex or esoteric" that expert testimony is needed to lay the foundation for its admission into evidence, the Wisconsin Supreme Court held. The court also decided that such a report is not hearsay. *State v. Kandutsch, Wis., No. 2009AP1351-CR, 7/19/11.*



Supplemental Arguments to Deadlocked Jury Did Not Result in Coercion of Guilty Verdict

A trial judge neither coerced a guilty verdict nor abused his discretion by allowing the parties in a criminal case to make 15 minute supplemental arguments to a deadlocked jury, the Ninth Circuit held. *United States v. Della Porta, 9th Cir., No. 10-50168, 8/8/11.*



On the Lighter Side

The following is a real court order out of Kentucky dated July 19th, 2011:



JUL-21-2011 09:06PM FROM-

T-897 P.001/002 --JGD

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FIRST DIVISION
CASE NO. 09-CI-00165

ENTERED
KENTON CIRCUIT/DISTRICT COURT
JUL 19 2011
JOHN C. MIDDLETON
BY: [Signature]

BARBARA KISSEL

vs.

SCHWARTZ & MAINES & RUBY CO., LPA, et al.

DEFENDANTS

ORDER

The herein matter having been scheduled for a trial by jury commencing July 13, 2011, and numerous pre-trial motions having yet to be decided and remaining under submission;

And the parties having informed the Court that the herein matter has been settled amicably¹ and that there is no need for a Court ruling on the remaining motions and also that there is no need for a trial;

And such news of an amicable settlement having made this Court happier than a tick on a fat dog because it is otherwise busier than a one legged cat in a sand box and, quite frankly, would have rather jumped naked off of a twelve foot step ladder into a five gallon bucket of porcupines than have presided over a two week trial of the herein dispute, a trial which, no doubt, would have made the jury more confused than a hungry baby in a topless bar and made the parties and their attorneys madder than mosquitoes in a mannequin factory;

IT IS THEREFORE ORDERED AND ADJUDGED by the court as follows:

I. The jury trial scheduled herein for July 13, 2011 is hereby CANCELED.

¹ The Court uses the word "amicably" loosely.

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

September 14-16	<p><u>FALL PROSECUTOR TRAINING CONFERENCE</u> <i>The annual training and interaction event for all the state's prosecutors</i></p>	Yarrow Hotel Park City, UT
October 19-21	<p><u>GOVERNMENT CIVIL PRACTICE CONFERENCE</u> <i>Training and interaction for civil side public attorneys</i></p>	Zion Park Inn Springdale, UT
November 7-9	<p><u>JOINING FORCES: CHILD ABUSE & FAMILY VIOLENCE CONF.</u> <i>Prevent Child Abuse Utah has graciously welcomed UPC as a co-sponsor of its 24th annual conference. UPC has planned a track specifically for prosecutors and investigators who handle child abuse cases.</i> <i>Prosecutors wishing to attend should register through UPC to have most of the conference fee waived</i></p>	Davis Conf Center Layton, UT
November 17-18	<p><u>COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR</u> <i>Elected and appointed county/district attorneys meet in conjunction with UAC</i></p>	Dixie Center St. George, UT
Nov. 30 - Dec. 2	<p><u>ADVANCED TRIAL SKILLS TRAINING</u> <i>Substantive and trial advocacy training for experienced prosecutors</i></p>	Hampton Inn West Jordan, UT

**NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES*
AND OTHER NATIONAL CLE CONFERENCES**

October 8-12 EXECUTIVE PROGRAM COURSE [Summary](#) [Registration](#) Hilton Head Island, SC
A program designed specifically for prosecutors in leadership positions.

October 23-27 PROSECUTING HOMICIDE CASES [Summary](#) [Registration](#) [Agenda](#) Tucson, AZ
Check back (click on the course title) for course summary and registration

See Table [JUSTICE IN OUR COMMUNITIES](#) *Investigation and prosecution of child abuse*

November 1-3	Carlinville, IL	Check back to register
November 8-10	Bismarck, ND	Check back to register
November 8-10	Portland, ME	Check back to register
November 15-17	Chillicothe, OH	Check back to register
December 5-7	Durango, CO	Check back to register
December 13-15	Bloomington, IN	Check back to register

Oct. 31 - Nov. 4 Demystifying SMART DEVICES [Summary](#) [Registration](#) [Agenda](#) Chicago, IL

November 16-17 Digital Evidence [Summary](#) Los Angeles, CA
Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation

December 8-9 [DEFENDING THE FORENSIC INTERVIEW](#) Durango, CO
Check back (click on the course title) for course summary and registration

March 5-9 UNSAFE HAVENS II [Summary](#) Dulles, VA
Prosecuting on-line crimes against children

* 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.