Newsletter of the Utah Prosecution Council

The PROSECUTOR

RECENT CASES

United States Supreme Court

Report admitted erroneously and Habeas relief reversed

Troy Brown lived in a trailer park near 9-year-old Jane Doe. Troy's brothers, Travis and Trent also lived nearby in the same trailer park. On January 29, 1994, Jane was brutally raped in her bedroom sometime between 12:15 a.m. and 1 a.m. Her bedroom was dark and she was unable to conclusively identify the rapist. She stated that he reminded her of both Troy and his brother, Trent. Several days later she saw Troy on television and said he was her attacker, but then later she said the guy who sent her flowers, Trent, was the one who raped her. She could not identify Troy in a photo lineup or at the trial. Some evidence supported her identification of Troy, while other evidence did not. Semen recovered from the victim was tested and determined that it matched Troy's. The State's crime lab expert testified that the probability of another person sharing the same DNA was only 1 in 3 million. The jury found him guilty and sentenced him to life with possibility of parole after 10 years. After unsuccessful attempts during appeal and postconviction proceedings, Troy filed a federal habeas petition claiming insufficient evidence to support his conviction and that the State's crime lab expert's testimony was inaccurate and unreliable. Absent that testimony, he argued there was insufficient evidence to convict him and supported this contention with a report prepared by Laurence Mueller, a professor in ecology and evolutionary biology. The District Court accepted the report, even though it was not presented to any state court because it was argued during postconviction, and relying upon it the court set aside the DNA testimony as unreliable. The court further held that without the DNA evidence reasonable doubt existed and subsequently, granted habeas relief. Certiorari granted.

The U.S. Supreme Court held that the Mueller report was erroneously considered in deciding if the jury had acted rationally in its guilty verdict, as the inquiry only involved evidence before the jury and not whether due process was violated by improper evidence. In addition, the Court held that the granting of habeas relief was contrary to viewing the evidence in the light most favorable to the prosecution,

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LEGAL BRIEFS

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including the DNA testimony and evidence with which the Mueller report and expert merely claimed to disagree. Reversed and remanded. *McDaniel v. Brown*, 130 S. Ct. 665 (2010).

Public can assert right to be present during voir dire

Eric Presley was on trial for a cocaine trafficking offense. Prior to jury selection the trial court requested that a lone courtroom observer, Presley's uncle, leave the courtroom and the entire 6th floor of the courthouse. The trial court invited the uncle to return after jury selection but reasoned that the jurors would be occupying the entire courtroom seating as well as roaming in the halls and the uncle should not be intermingling with them. Presley's counsel objected and requested "some accommodation" but the court did not waiver from its decision. Presley was convicted and moved for a new trial based on the exclusion of the public from the juror voir dire. At the hearing on the motion the court reasserted that it was entirely within its discretion to limit the public's access to the courtroom during jury selection. The Court of Appeals of Georgia agreed and the Supreme Court of Georgia granted certiorari and affirmed. The U.S. Supreme Court granted certiorari.

The U.S. Supreme Court held that the right to a public trial extends to voir dire and that reasonable alternatives to closing the voir dire to the public must be considered when addressing concerns. "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," the court stressed. The Court further stated that precedent established the public's right to be present during voir dire and accordingly, the uncle could not be barred. Reversed and remanded. *Presley v. Georgia*, 175 L. Ed. 2d 675 (2010).

Probability of a different outcome not shown, despite 'demonizing' closing

Frank G. Spisak was convicted of three counts of murder and two counts of attempted murder. He was sentenced to death. He filed a federal habeas petition

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arguing that constitutional errors occurred at his trial including (1) his contention that the jury instructions during the penalty phase required the jury to consider in mitigation only those factors that the jury unanimously found to be mitigating, and (2) his counsel's closing arguments were inadequate and 'demonized' him, resulting in significant harm. The Federal Court of Appeals granted habeas relief. Certiorari granted.

The Supreme Court held that the "instructions and verdict forms did not clearly bring about … a substantial possibility that reasonable jurors… thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence" of the mitigating evidence. It further held that for Spisak to succeed in his claim of an inadequate closing argument it must fall below "an objective standard of reasonableness" sufficient to violate the Sixth Amendment. In this case, the Supreme Court did not find that the assumed deficiencies in defense counsel's closing argument raised "a reasonable probability that," but for the deficient closing, the outcome of the proceeding would have been different. Reversed. *Smith v. Spisak*, 130 S. Ct. 676 (2010).

Utah Supreme Court

Employee manual created implied contract between city and employee

Kipp Cabaness was a regular employee of Bountiful Power, as defined in the city's employee manual ("Manual"), from March 1978 through January 2004. The Manual contains a disclaimer that no contract exists between the city and its employees with respect to salary or benefits. It also contains wording that prohibits any employee from intimidating or creating an abusive, harassing or hostile work environment. From 1984 to 2004, Cabaness worked under the supervision of Brent Thomas, who in turn reported to the director of the plant, Clifford Michaelis. While working under Thomas, Cabaness was subjected to Thomas verbally harassing and intimidating him, as well as being forced, under threat of firing, to work in hazardous conditions which violated safety protocol. When Cabaness and other workers complained to the director, Michaelis, they were advised that further complaints could result in their termination. In 1997, Cabaness was diagnosed with major depression, substantially resulting from the work environment and abusive boss. In 2003, after a serious safety violation occurred, Michaelis formed a committee to investigate the complaints against Thomas. Based on the recommendations, Michaelis sent Thomas a letter warning that his "intimidation needed to stop," or he'd be forced into retirement. Cabaness quit in January of 2004.

Cabaness brought intentional infliction of emotional distress claims against Thomas and Michaelis. He brought a breach of contract claim and wrongful termination claim against Bountiful Power. "The district court entered summary judgment in favor of Bountiful Power, Thomas, and Michaelis holding that as a matter of law (1) Cabaness failed to demonstrate that Thomas' and Michaelis' conduct was extreme, intolerable, and outrageous and therefore Cabaness could not prove intentional infliction of emotional distress; (2) the Employee Manual did not create a contract between Bountiful Power and Cabaness; and (3) Cabaness failed to allege any violation of a clear and substantial public policy and therefore could not succeed on his wrongful termination claim." Cabaness then filed a rule 59 and 60 (b) motion based on purported new law and newly discovered evidence, together with supporting affidavits. The district court denied the motion finding that the affidavits were untimely. Cabaness appeals the granting of the summary judgment and the denial of his motions.

The Utah Supreme Court affirmed the district court's finding that Cabaness' wrongful constructive termination claim failed as a matter of law because he "failed to allege any violations of a clear and substantial

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PROSECUTOR PROFILE

PREFERRED NAME - J.C.

BIRTHPLACE - Elko, NV

FAMILY - Father of 2 children, The eldest of five children

PETS - A 90 lb Yellow lab named 'Tug' and two Zebra Finches, un-named.

FIRST JOB - Cleaning in the bakery department of Albertsons (age 13)

FAVORITE BOOK
The Dictionary - It has all the other books in the world contained in it.

LAST BOOK READ
1776 by David McCullough

FAVORITE QUOTES
"Blame no one, expect nothing, do something."

"It's what you learn after you know everything that really matters."

FAVORITE FOOD OR SNACK
I don't play favorites. It's all good!

FOREIGN LANGUAGES
Basque and Italian

WORDS OF WISDOM
"Savor the throne but don't mind the stool." Sometimes in this job you're up and sometimes your down and it's not always in your control.

J.C. Ynchausti

Assistant Bountiful City Attorney/ Prosecutor

J.C. has worked for Bountiful City for over 13 years and loves the work, the people and the stable paycheck. Like so many others, he has worked hard to get where he is today. He's laid steel, been a pharmaceutical delivery driver, racked asphalt and clerked in the Fifth District (in Idaho) for Judge James J. May. J.C. loves to work! He was born in Elko, Nevada and lived there for the first six years of his life. His family moved to Bountiful where he's lived ever since, other than serving an LDS mission in Italy and attending law school in Idaho. As a child, being a lawyer was actually his second choice for a career, the first being that he wanted to be a cowboy and if the lawyer thing didn't turn out then being a baseball player and hockey player were next on the list. J.C. came from humble beginnings, his father was a mailman and his mother worked for a credit union. They are wonderful examples of good people who work hard to build good lives. J.C. is married and claims that, to his good fortune, his wife lost a bet but being a woman of honor she agreed to abide by her word and marry him. They have two children, Logan, age19 and Hannah, age 13.

J.C. started out as a history major at the University of Utah and graduated in 1987. He minored in Italian. He says he decided to attend law school because he was a history major and what else was he going to do! In addition, his maternal grandfather had an avid interest in Perry Mason and J.C. thought that anything that could hold his grandfather's attention was worth paying attention to himself. He also attributes his desire to pursue a law degree to a great mentor, Ken Brown (yes, Ken Brown the defense attorney), who lived in J.C.'s neighborhood and taught him in a church class. When he decided to go to law school, his family and friends' response was, "Huh?" He attended the University of Idaho and graduated with his law degree in 1990. Returning to Utah he opened up his own practice until the City called and asked if he was interested in working for them. He recalls that being a business man wasn't his forte and he didn't like private practice much so he decided to take the job and has enjoyed it ever since.

On a more personal note, J.C. is a devoted fan of the Detroit Red Wings hockey team and the Detroit Tigers baseball team. Understandably, his hobbies include playing hockey but also includes hanging out with his family, watching movies and reading. His favorite movie is Jeremiah Johnson and his favorite TV series included Millenium and Jockeys. So, since both have been discontinued, J.C. says, "In the words of Captain Jack Sparrow, "I'm in the market."" His favorite music includes rock and REO Speedwagon. His favorite cartoon is Garfield. If J.C. could travel anywhere and money was no object he would travel to Italy, Spain and the Caribbean. So far the farthest away he's traveled, aside from his mission in Italy, was traveling to TonaWanda, New York as a teenager to play in the Junior C National Hockey finals.

When asked what individual has most influenced his life, J.C. acknowledged his parents, family, Judge May and other attorneys. Having said that, he attributes much to Mark Fydrich who was a baseball pitcher for the Detroit Tigers. They called him the "Bird" and he used to go out to the mound and smooth out the grooves that the opposing pitcher had left during the prior inning. He would talk to himself and the baseball while he pitched. He won 20 games as a rookie and was named Rookie of the Year. By observing him, J.C. learned to just do your job, your way, and not to really worry about what others say or think.

The most satisfying aspect of his job is knowing that he can help his community, which is a lot of people. The least satisfying aspect is having people try to pull the wool over your eyes (lie to you, *if* you can believe it!), again and again. The funniest court experience he recalls involved him stipulating with Bruce Oliver to the admission of a package of Tums that was in his client's pocket, as evidence that his client had some gastrointestinal condition that affected his breath alcohol test! It was admitted for the limited purpose to prove that he had Tums in his pocket at the time of, and on the date of the trial. To J.C. nothing is more rewarding that when a defendant or his/her family member comes back and says something like, "You really got his/her attention and changed their behavior," or, "You really earned my respect for the way you treated me and/or handled my case." Thanks J.C. for a job well done!

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public policy." The court further affirmed the dismissal of Cabaness' intentional infliction of emotional distress claim against Michaelis. However, the court held that the district court erred in dismissing the intentional infliction of emotional distress claim against Thomas because Cabaness offered sufficient evidence of Thomas' conduct to create a jury question regarding whether it was "sufficiently intolerable and outrageous." Finally, the court held that the relevant provisions of the Manual "created an implied contract between Cabaness and Bountiful Power." In addition, it held that the contract claim is not barred by Utah's Governmental Immunity Act, and assuming Cabaness could prove a breach of the implied contract, he may seek damages for emotional distress and mental anguish. Affirmed in part, reversed in part and remanded. *Cabaness v. Thomas*, 2010 UT 2.

Establishing paternity not a prerequisite to assert right to consent and notice of adoption

On January 3, 2007, A.R. ("Mother") gave birth to D.A. Daniel Dean Austin ("Austin") claims he was originally listed as the father on the birth certificate but it was later removed when he failed to confirm paternity due to being incarcerated at the time of the birth. Mother never disputed that Austin was the biological father. Austin proffered a birth announcement listing himself as the father and stated that he wrote numerous letters to his parents acknowledging that Mother was pregnant with his child and that he wanted to raise the child. In July 2007, when D.A. was approximately seven months old, he was placed in protective custody. During the shelter hearing, Mother informed the court that Austin was D.A.'s biological father. On August 9, 2007, Austin appeared before the juvenile court for the first time. The State and Austin agreed that Austin would arrange and submit to DNA testing for the purpose of establishing paternity. Austin failed to obtain the testing by the next hearing date of October 2, 2007. At that time the court informed him that a trial was set for October 18 on the petition to terminate Mother's parental rights. Austin advised that it was fine if the termination of Mother's parental rights proceeded without him. On October 17, Austin filed a motion to intervene as a party and for paternity testing. "The juvenile court accepted Mother's voluntary relinquishment of her parental rights during the October 18 hearing without considering Mr. Austin's motion." On October 25, a hearing was held to consider Austin's motion. Austin argued that his due process rights were violated by not being permitted to establish paternity within the proceedings to terminate Mother's parental rights. The State argued that Austin failed to timely establish paternity and was therefore never a party to the action. It further argued that since Mother had now relinquished her parental rights there was no pending action in which he could intervene. On December 3, Austin filed a motion arguing that he satisfied the requirements of Utah Code section 78-30-4.14 (Supp. 2007), that an unmarried biological father must meet when a child is placed with adoptive parents after six months of age and was entitled to notice of and consent to any adoption of D.A. The juvenile court denied the motion. Austin appealed and the court of appeals certified the matter to the Supreme Court.

The Utah Supreme Court held that the juvenile court erred when it failed to hold an evidentiary hearing to determine whether Austin had complied with the requirements of section 78-30-4.14. It reasoned that the October 26, 2007 order was a procedural finding that Austin had not established paternity and was not a final substantive determination of Austin's paternity. As such the doctrine of res judicata did not prevent Austin from asserting his right to notice and consent to the adoption of D.A.. The court further held that Austin "did not waive his right to notice and consent by failing to establish paternity prior to Mother's relinquishment of her parental rights" and that "establishment of paternity is not a prerequisite to asserting the right to notice of and consent to an adoption in cases where the child is older than six months of age when placed with adoptive parents." Remanded. *In re: D.A.; D.D.A. v. State*, 2009 UT 83.

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An Overview of Tax Fraud Prosecutions and the Spillover Effects

By Mark Baer and Alex Goble, Utah Attorney General's Office

In a letter to Jean Baptiste Le Roy in 1789, Benjamin Franklin is credited for saying that "in this world nothing can be said to be certain, except death and taxes." For this, Mr. Franklin is well known and credited. But another aphorism accredited to this great man is as follows:

> There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government.

Why this is so, is anyone's guess. Theories include the relative anonymity of taxes, the collection, receipt and accounting thereof and the actual or perceived complexity of the tax system. As well, there's always an undercurrent of disobedience, justified on one level or another, often on the basis of not liking one or another government policy, program or process. Quite likely, however, it is the simple and fundamental truth that people just don't like to pay to anyone or any entity real, actual money when they may get away with not doing so or for which there is not an immediate, observable return on the investment. It seems clear that in any event, greed and selfishness play a large, perhaps overwhelming, role in motivating individuals to be non-compliant with their obligations when it comes to taxes.

The federal government is the most widely known entity for the creation and enforcement of tax laws and the pursuit of those not in compliance with those laws. Most efforts at compelling compliance take the form of audits or at least the thought or threat of an audit. In more egregious cases, criminal prosecutions are instigated at the federal level. The basis for federal tax related prosecutions are found in Title 26 of the Federal Code and include such allegations as tax evasion, failure to file, the filing of false or fraudulent returns, or aiding or providing assistance relating to the filing of fraudulent returns. A closely related, often overlapping area of criminal enforcement at the federal level involves allegations of money laundering and other currency violations.

State governments likewise pursue and prosecute individuals and, occasionally, businesses, for violations of the criminal code as it relates to taxation. Utah's primary tax fraud statute can be found at Utah Code Title 76, Section 1101, which reads in pertinent part as follows:

> Criminal offenses and penalties relating to revenue and taxation -- Rulemaking authority -- Statute of limitations
>
> (1) (a) As provided in Section 59-1-401, criminal offenses and penalties are as provided in Subsections (1)(b) through (e).
> ...
> (c) (i) Any person who, with intent to evade any tax, fee, or charge as defined in Section 59-1-4-1or requirement of Title 59, Revenue and Taxation, or any lawful requirement of the State Tax Commission, fails to make, render, sign, or verify any return or to supply any information within the time required by law, or who makes, renders, signs, or verifies any false or fraudulent return or statement, or who supplies any false or fraudulent information, is guilty of a third degree felony.
> ...(d) (i) Any person who intentionally or willfully attempts to evade or defeat any tax, fee, or charge as defined in Section 59-1-401or the payment of a tax, fee, or charge as defined in Section 59-1-

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An Overview of Tax Fraud Prosecutions and the Spillover Effects—*continued*

By Mark Baer and Alex Goble, Utah Attorney General's Office

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> 4-1is, in addition to other penalties provided by law, guilty of a second degree felony.
> ...
> (e) (i) A person is guilty of a second degree felony if that person commits an act:
> (A) described in Subsection (1)(e)(ii) with respect to one or more of the following documents:
> (I) a return;
> (II) an affidavit;
> (III) a claim; or
> (IV) a document similar to Subsections (1)(e)(i)(A)(I) through (III); and
> (B) subject to Subsection (1)(e)(iii), with knowledge that the document described in Subsection (1)(e)(i)(A):
> (I) is false or fraudulent as to any material matter; and
> (II) could be used in connection with any material matter administered by the State Tax Commission.

Related charges can and often include allegations of Theft by Deception, Fraud by a Fiduciary, Communications Fraud and a Pattern of Unlawful Activity, among others.

Cases arise from referrals from a number of sources, including aggrieved private parties, inconsistent financial filings and protestor activities. Protestor activities can range from simple non-filing to claims of unconstitutionality. Often a protesting taxpayer will claim that they are not subject to taxation on the basis of status, nationality, obscurity, Uniform Commercial Code offsets and many other claims or theories that have long been discounted by the courts.

In the state system, cases generally find their way to the Utah State Tax Commission and once there it is assigned to that agency's Criminal Investigation Division (CID). That division reviews the case, gathers evidence and drafts a report, all of which are then generally sent over to the Utah State Attorney Generals Office, or occasionally to various County Attorney offices where they are screened for potential filing in the district courts located around the state.

The underlying motivation and purposes for criminal prosecutions vary widely. Ultimately, prosecutions arise from a need for everyone to comply with the tax laws of the federal or state authority. After all, without being able to source its revenue, governments could not and would not be able to provide any services. And despite a common-man theme that government is either a bad provider of services or wasteful or not properly orientated, it remains without question that absent the funding of government, society would simply cease to function in a civilized manner. Citizens, after all, cannot long sustain a lifestyle - or in some cases even their life - without funding for infrastructure such as roads, schools and utilities, services such as fire, police and emergency assistance, and a system of laws and justice which, at least at its best, oversees and maintains a civil society.

The flip side of compliance is deterrence. General deterrence effects from audits are fairly well known and documented, however, there's some question as to what 'spillover' benefits arise from the investigation, filing, prosecution and resolution of criminal cases and the publicity that often accompanies such matters.

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An Overview of Tax Fraud Prosecutions and the Spillover Effects—*continued*

By Mark Baer and Alex Goble, Utah Attorney General's Office

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Another way to phrase 'spillover' would be to consider the 'multiplier effect' that successful prosecutions of tax fraud engender. The quantitative question that arises is how much money comes into the coffers of the state from individuals, other than the defendant, who are in a similarly situation - or at least similarly situated in their own minds - as compared to each dollar collected in criminal matters. The issue then is one of trying to determine how much revenue is presented to the state by those who voluntarily resolve their outstanding obligations on account of successful criminal prosecutions.[1]

No one know this number with great certainty, but a reasonable determination can be made if a some quantitative measure might be given to the spillover/multiplier number. Some studies have shown that multiplier to be as high as 66-to-1.[2] Thus, for every $1,000 in recovered restitution/tax fraud, $66,000 would be the net gain to the taxing entity. Clearly this is a huge amount. In the case of the efforts of the state of Utah to pursue tax fraud in the criminal context, this would mean a net revenue sourcing approaching $100-150 million dollars annually, or perhaps more while costing the state relatively little. [3]

At the end of the day, whether Ben Franklin was correct or not, taxes are mostly a voluntary compliance realm - most individuals who are so inclined will comply with their obligations which will ensure that essential governmental and societal functions have the ability to be provided and function. To the others who would and do avoid their obligations and don't comply with the law as it relates to taxation, there is always the possibility of criminal sanctions being brought by either federal or state authorities. Criminal prosecutions have the benefit of not only addressing those individuals who would and do flaunt the law, but effective pursuance also creates a spillover effect which gets many other individuals involved, or re-involved, in the process of fulfilling their legal obligations with respect to the tax laws. And while no one likes taxes and the oversight and obligation that comes with the tax structure, certainly no one who does voluntarily pay his or her fair share and complies with the law in this area likes to be thought of as gullible, naive or someone who can easily be taken advantage of by those unwilling to financially support the civil society of which we are all a part.

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[1] Of course, when considering this issue, it quickly becomes clear that it is difficult to definitively determine the net-benefit of criminal prosecutions in the area of tax fraud. After all, there are no two jurisdictions, populations, states or cross sections of the population that are exactly the same - say, two states of Utah - where one could be used as a control study with no prosecutions with the other, non-control Utah, being the place where active investigations and prosecutions take place.

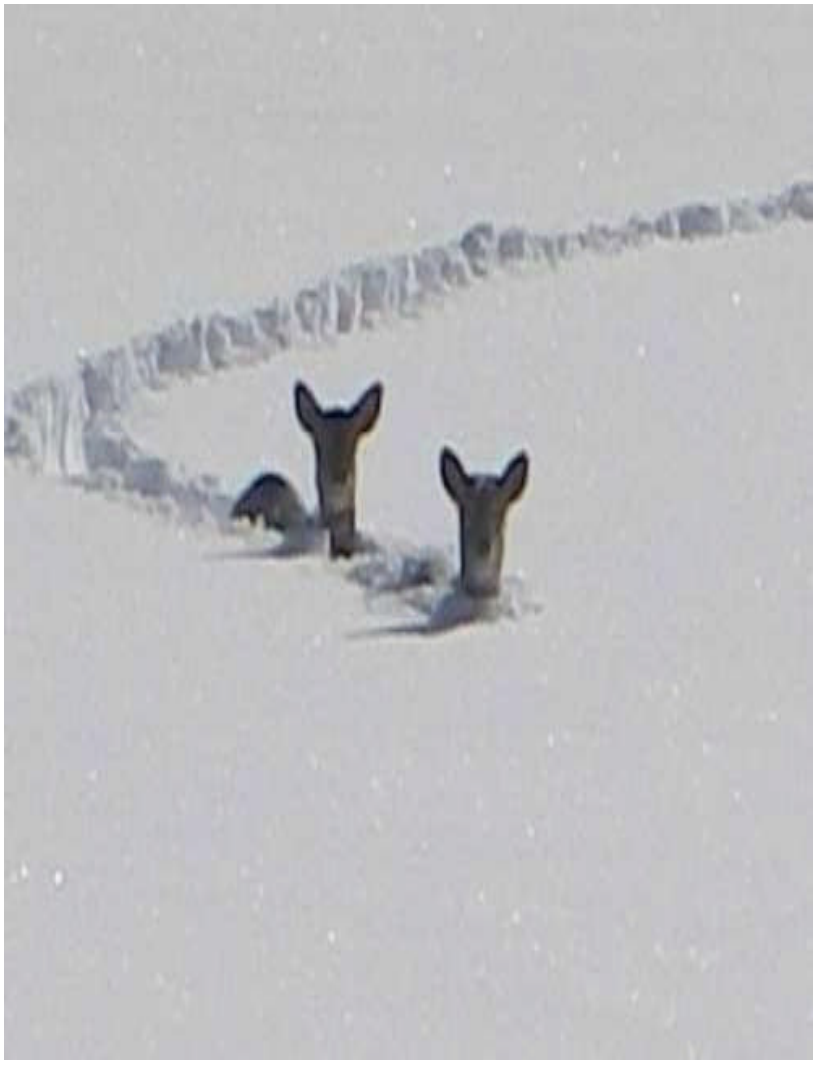
[2] Source: Criminal Investigation Enforcement Activities and Taxpayer Noncompliance, by Jeffrey A. Dubin, California Institute of Technology.

[3] The actual cost to the State of pursuing these matters: a mere thousands of dollars on an annual basis.

Where are they now?

News from Cheryl Luke in Marysvale

Many of you will remember former Salt Lake City Prosecutor and Assistant Attorney General Cheryl Luke. After she and Jim retired a few years ago they moved to their dream home at the mouth of a canyon east of Marysvale. That's in Piute County, for you geographically challenged persons. Cheryl serves three days a week in Parowan as an ALJ for the Labor Commission. They had just a little snow over a recent weekend and she sent this photo of a couple of deer in her back yard. Cheryl says she "loves living in the mountains." I thought the whole idea of retirement was to move where that doesn't happen, and I'm not referring to the deer.



We'd love to hear from some of the rest of you who have retired or have moved from active prosecution to something else. Send a photo and a short update and we'll put it in the newsletter.

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Utah Court of Appeals

Search of hidden bags deemed lawful based on objectively reasonable belief that they belonged to the vehicle driver

Tina Harding was a passenger in a vehicle when Officer Westerman initiated a traffic stop for an inoperable plate lamp. Officer Westerman ran the driver's information and learned that she did not have a valid driver license. He then ran the names and birthdates of the three passengers, including Harding, and discovered that none of them had a valid driver license either. He issued the driver a citation for the equipment violation and driving without a valid license. She was advised she could leave but had to contact someone with a license to drive the vehicle. The driver started to return to her vehicle but then turned around and approached Officer Westerman to ask a question. At this point, Officer Westerman asked for consent to search the vehicle. The driver gave consent and the Officer then requested that all the passengers get out of the vehicle. During the search of the vehicle, two bags were located behind the back seat of the vehicle. The Officer did not ask to whom the bags belonged, none of the passengers claimed ownership, and there were no markings to indicate that they belonged to anyone other than the driver. Upon searching the bags, the Officer discovered drugs, drug paraphernalia and other items indicating they belonged to Harding. Harding was then searched by Officer Westerman, arrested and given *Miranda* warnings. Harding moved to suppress the evidence but the motion was denied by the trial court. She entered guilty pleas, conditioned on the ability to appeal the denial of the motion. She now appeals.

The Utah Court of Appeals held that under the circumstances of this case, the search of Harding's bags was lawful. It reasoned that because there was a small storage area in the rear of the car where the bags were stowed, nothing on the bags indicated they belonged to anyone other than the driver, neither the driver nor any of the passengers claimed the bags belonged to them and no one objected to the search after the driver gave consent, it was objectively reasonable for the officer to believe the bags belonged to the driver. Affirmed. *State v. Harding*, 2010 UT App 8.

Tenth Circuit Court of Appeals

Introduction of a common supplier is not sufficient to create a group conspiracy

The DEA was investigating a drug ring headed by the Rosales family of El Paso, Texas, beginning in 1995. The family's main contact distributed marijuana to intermediary suppliers who in turn sold it to street dealers. Samuel Herrera was identified as one such intermediary supplier. Herrera sold marijuana to a street dealer named Michael Caldwell. Caldwell was friends with David Anderson and arranged a meeting between Anderson and Herrera, at Anderson's request, because his supplier had come up short. Caldwell received no financial benefit from the introduction and from that point on Herrera supplied marijuana to each of them, separately. In October 2007, Caldwell was indicted for conspiracy to distribute marijuana with Herrera and Anderson listed as members of the same conspiracy. At trial evidence of prior convictions from more than fifteen years prior was admitted with a limiting instruction that it should only be used to determine motive, opportunity and what Caldwell's intent was. Caldwell was convicted and sentenced according to the sentencing guidelines involving a tripartite conspiracy. On appeal, Caldwell argued that he was not part of a tripartite conspiracy; rather he had dealings with Herrera separate from Anderson. He also argued that evidence of prior convictions was inadmissible.

The Tenth Circuit held that "Herrera's role as a common supplier, Caldwell's earlier purchase of marijuana from Anderson, and Caldwell's introduction of Anderson to Herrera do not constitute sufficient evidence of a single conspiracy among the three drug dealers." The court relied on the test to prove a conspiracy laid out in *United States v. Sells*, 477 F.3d 1226 (10th Cir. 2007). It requires the government to demonstrate "(1) that two or more persons agreed to violate the law, (2) that the defendant knew at least the essential objectives of the conspiracy, (3) that the defendant knowingly and voluntarily became a part of it, and (4) that the alleged coconspirators were interdependent." In this case the evidence was sufficient to show that both Caldwell and Anderson each conspired to distribute marijuana with Herrera, however, there was

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insufficient evidence that a group conspiracy involving the three of them existed. It also held that "assuming without deciding that the district court abused its discretion" by admitting evidence of prior convictions, any such error was harmless. Conviction affirmed, remanded for resentencing. *U.S. v. Caldwell*, 589 F.3d 1323 (10th Cir. 2010).

Heck is only applicable to an actual conviction

Martin Vasquez Arroyo filed two 42 U.S.C. §1983 actions claiming that on two separate occasions, Kansas state authorities falsely arrested him and filed falsified pretrial diversion agreements containing his forged signatures. The district court dismissed both claims and held that they were barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, §1983 claims are barred if a ruling in the defendant's favor would necessarily imply the invalidity of his conviction or sentence. The court concluded that the diversion agreement was sufficiently analogous to a finding in a criminal action and did not constitute a favorable termination of the criminal charges filed against him.

On appeal, the Tenth Circuit disagreed with the trial court and held that *Heck* did not apply because under Kansas law, diversion is "a means to avoid a judgment of criminal guilt, the opposite of a conviction in a criminal action." Furthermore, the Supreme Court in *Wallace v. Kato*, 549 U.S 384 (2007), made it clear that *Heck* is only applicable when there is an actual conviction, not an anticipated one. The court further explained that in this case there was no related underlying conviction tied to the conduct alleged in the §1983 actions. And, since Arroyo had not been prosecuted, there were no outstanding judgments, convictions or sentences for the charges on which his §1983 claims were based. The court also held that a district court "may not sua sponte dismiss a prisoner's §1983 action on the basis of the statute of limitations unless it is clear from the face of the complaint that there are no meritorious tolling issues, or the court has provided the plaintiff notice and an opportunity to be heard on the issue." Accordingly, the district court's dismissal of the complaints is reversed and remanded. *Arroyo v. Starks*, 589 F.3d 1091 (10th Cir. 2009).

Other Circuits

Exigent circumstances justified mass seizure of male patrons after stabbing at nightclub

On April 27, 1997, a group of Hispanic men attempted to steal a BMW from Edin Kolenovic and his brother-in-law Sanin Djukanovic. After stabbing the victims and failing in their attempt, the suspects ran toward the 30-30 Club in Queens. Officers were posted outside the club at the time of the crime, conducting surveillance based on information that there might be problems between rival Mexican gangs. Officers witnessed several men run up to the club and jump in front of people waiting in line. Shortly after witnessing this, the victims drove up to the club and Kolenovic jumped out of the car yelling. When the officers approached Kolenovic, they saw that his shirt was bloody and that his passenger, Djokanovic had been beaten and stabbed. Djokanovic was unable to speak and died at the hospital. Officers coordinated with club security to admit the remaining people outside the club so officers could conduct the investigation. One man stepped out of line and tried to leave but police stopped him and walked him in front of the ambulance where the victims were being treated so a 'show up' could be conducted. Kolenovic identified the man, William Mero, as one of the guys. Mero denied his involvement but said he saw the attack and could identify the men. Then officers entered the club, separated out the men from the women and walked the men, one by one, out of the club and past the ambulance. The show up of approximately 170 men took about 40 minutes to complete. During the show up, Kolenovic and Mero separately identified the same six men, including David Palacios. Palacios later waived his *Miranda* rights, orally confessed and signed a written transcription of his confession. He was convicted of both assault and murder.

Palacios appealed, arguing ineffective assistance of counsel because his counsel unreasonably failed to challenge the lawfulness of his show-up and detention, and failed to move to suppress his confession as the fruit of the unlawful detention under the Fourth Amendment. The appellate court affirmed his conviction and an application for leave to appeal to the New York Court of Appeals was denied. Palacios then filed a petition for habeas relief, again claiming ineffective assistance of counsel. The district court denied the petition but issued a certificate of appealability.

The Second Circuit Court of Appeals held that the show up conducted at the nightclub following the stabbing death of Djokanovic was justified by exigent circumstances and did not violate the Fourth Amendment. The court

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reasoned that the police had two stabbing victims and reliable information that the suspects were among those either inside or outside the nightclub. It was a reasonable belief that delaying the investigation to procure a warrant would "thwart the possibility of ever finding the perpetrators." In addition, the perpetrators posed an immediate danger to others and the show up procedure conducted was not invasive. Affirmed. *Palacios v. Burge*, 589 F.3d 556 (2d Cir. 2009).

Eighteen month delay in obtaining warrant did not render evidence stale

Aaron Jay Montgomery Lemon became the focus of an investigation in June 2007, when officers executed a search warrant on the workplace of George Halldin. An examination of his computer showed that he'd traded pornographic images with Lemon. In June 2008, Officer Haider sought a search warrant for Lemon's apartment. He included in the warrant the time frame of the information provided but opined that "a search of Lemon's residence would likely result in discovery of child pornography." He provided information and asserted his belief that Lemon was a preferential collector and that such individuals rarely destroy their collections. The search warrant was issued and the subsequent search yielded evidence that Lemon was involved in production and distribution of child pornography. Lemon was arrested and filed a motion to suppress the evidence because the warrant was based on stale information and not supported by probable cause. The motion was denied. Lemon entered a conditional guilty plea to production of child pornography and appealed.

The Second Circuit held that the information in the affidavit supporting the request for the search warrant raised "a fair probability that a search of Lemon's apartment would result in the discovery of child pornography." The court reasoned that there is no bright-line test to determine when information is stale so it must look to the circumstances of each case. It also stated that the lapse of time becomes less important when the nature of the crime is continuous and the evidence is not likely to be destroyed. The information pertaining to Lemon's behavior being indicative of a preferential collector and the fact that the screen name was still in use was sufficient to lessen the importance of the eighteen month delay and support the issuance of the warrant. Affirmed. *U.S. v. Lemon*, 590 F.3d 612 (8th Cir. 2010).

Other States

'Emergency' interview with child witness interpreted broadly

Ricky Lee Allshouse was father to 7-month-old twin boys, J.A. and M.A., and a 4-year-old girl, A.A.. While Allshouse was in the living with the children he was engaged in a verbal argument with the mother ("Mother") in the kitchen. At one point Mother heard Allshouse get up from the recliner and then heard one of the twins, J.A. crying. Mother went into the livingroom as Allshouse was leaving and found A.A. in the playpen holding J.A.'s head on her lap. When Mother picked up J.A., his arm flopped backward. At the hospital J.A. was diagnosed with a spiral fracture to his right arm caused by sharp and sever twisting. Hospital staff contacted Jefferson County Children and Youth Services ("CYS") and CYS caseworker John Geist responded. The children were removed from the home and placed with their grandparents for the duration of the investigation. Geist responded to the grandparents' home to talk with A.A. about what had occurred. An evaluation with a child psychologist, Dr. Ryen was also arranged. During both interviews A.A. said Allshouse had caused the injury. In June 2004, Allshouse was arrested and charged. In September 2005, a hearing was conducted pursuant to Pennsylvania's Tender Years Hearsay Act ("TYHA") and statements of A.A. were testified to by both Geist and Dr. Ryen. The court determined that the statements qualified under TYHA and they were used to convict Allshouse of child abuse without A.A. testifying at trial. Allshouse filed several motions and appeals arguing, among other things, that the testimony of A.A.'s statements was hearsay and should not have been admissible. He claims that the admission of the statements, when A.A. had not testified and was not cross-examined, was a violation of his Confrontation Clause rights.

The Supreme Court of Pennsylvania held that A.A.'s statements to Geist were nontestimonial under *Davis v. Washington*, 547 U.S. 813, because the statements were given during an ongoing emergency. The court reasoned that although A.A. had been removed from the home of Allshouse, the allegation was made that A.A. had inflicted the injury which meant that since A.A. was still in the same home as J.A., additional injury could still occur. As such, the emergency continued through the subsequent investigation and questioning of A.A. conducted on the same day, to determine if any validity to the allegation existed. The court also held that the statements to Dr. Ryen were testimonial but that "any possible error in admitting A.A.'s statement to Dr. Ryen was harmless because the statement was merely cumulative of A.A.'s statement to Geist, which we have concluded was properly admitted." Affirmed. *Commonwealth v. Allshouse*, 942 A.2d 847 (Pa. 2009)

End of **BRIEFS**

On the Lighter Side

Who says Troopers have no sense of humor?!

In most northern tier states there is a police policy of checking on any stalled vehicle when temperatures are in the single digits or below. About 3:00 a.m. one very cold morning, a Montana State Trooper responded to a call that there was a car off the shoulder of the road outside Great Falls. He located the car, stuck in deep snow and with the engine running. Pulling in behind the car with his emergency lights flashing, the trooper walked to the driver's door, to find an older man passed out behind the wheel with a nearly empty vodka bottle on the seat beside him. The driver came awake when the trooper tapped on the window. Seeing the rotating lights in his rearview mirror, and the trooper standing next to his car, the man panicked. He jerked the gearshift into 'drive' and hit the gas.

The car's speedometer was showing 20-30-40 and then 50 MPH, but the car was still stuck in the snow, wheels spinning. Trooper Nixon, having a sense of humor, began running in place next to the speeding (but stationary) car. The driver was totally freaked, thinking the trooper was actually keeping up with him. This went on for about 30 seconds, then the trooper yelled, "PULLOVER!"

The man nodded, turned his wheel and stopped the engine. The man from North Dakota was arrested and is probably still shaking his head over the state trooper in Montana who could run 50 miles per hour.

The power of a badge...

DEA officer stops at a ranch in Texas , and talks with an old rancher. He tells the rancher, "I need to inspect your ranch for illegally grown drugs." The rancher says, "Okay, but do not go in that field over there," as he points out the location.

The DEA officer verbally explodes saying, "Mister, I have the authority of the Federal Government with me." Reaching into his rear pants pocket, he removes his badge and proudly displays it to the rancher. "See this badge? This badge means I am allowed to go wherever I wish. On any land. No questions asked or answers given. Have I made myself clear? Do you understand? "

The rancher nods politely, apologizes, and goes about his chores.

A short time later, the old rancher hears loud screams and sees the DEA officer running for his life chased by the rancher's big Santa Gertrudis bull. With every step the bull is gaining ground on the officer, and it seems likely that he'll get gored before he reaches safety. The officer is clearly terrified.

The rancher throws down his tools, runs to the fence and yells at the top of his lungs.....

"Your badge.. Show him your BADGE! "

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.

Submission does not ensure publication as we reserve the right to select the most appropriate material available and request your compliance with copyright restrictions. Thanks!

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2010 Training Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 21-22	23RD ANNUAL CRIME VICTIMS' CONFERENCE *Utah Council on Victims of Crime - Helping Victims Achieve New Heights*	Radisson Hotel SLC, UT
April 22-23	SPRING CONFERENCE *Caselaw update, legislative update and more*	South Towne Center Sandy, UT
April & May	STATEWIDE REGIONAL LEGISLATIVE UPDATES	23 Locations statewide
June 24-25	UTAH PROSECUTORIAL ASSISTANTS ASSOCIATION CONFERENCE *Outstanding training for non-attorney staff in prosecution offices*	University Marriott Salt Lake City, UT
August 5-6	UTAH MUNICIPAL PROSECUTORS ASSOCIATION SUMMER CONFERENCE *For all prosecutors whose caseload consists primarily of misdemeanors*	Zion Park Inn Springdale, UT
August 16-20	BASIC PROSECUTOR COURSE *A must attend course for all new prosecutors, or those new to prosecution*	University Inn Logan, UT
September 22-24	FALL PROSECUTOR CONFERENCE *The annual fall professional training event for all Utah prosecutors*	Yarrow Hotel Park City, UT
October 20-22	GOVERNMENT CIVIL PRACTICE CONFERENCE *For public attorneys who work the civil side of the office*	Moab Valley Inn Moab, UT
November 17-19	ADVANCED TRIAL ADVOCACY SKILLS COURSE *Advanced training for those with 5+ years and lots of trials under their belt*	Hampton Inn & Suites West Jordan, UT

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

March 7-11	PROSECUTING HOMICIDE CASES			Orlando, FL
April 25-29	EVIDENCE FOR PROSECUTORS	Agenda	Register	San Francisco, CA
May 16-20	OFFICE ADMINISTRATION	Agenda	Register	Rancho Barnardo, CA
May 17-21	EQUAL JUSTICE FOR CHILDREN *Investigation and prosecution of child abuse*	Agenda	Register	Charleston, SC
June 6-16	CAREER PROSECUTOR COURSE			Charleston, SC
July 11-14	NDAA SUMMER CONFERENCE			Napa, CA
August 23-27	STRATEGIES FOR JUSTICE		Register	National Harbor, MD
Sept. 27– Oct. 1	SAFETYNET	Draft Agenda		Easton, MA

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.

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. For specifics on NAC expenses click here. To access the NAC on-line application form click here.

See the matrix — BOOTCAMP — Register — NAC, Columbia, SC
A course for newly hired prosecutors

Course Number	Course Dates
04-10-BCP	April 23-16
05-10-BCP	June 14-18
06-10-BCP	August 9-13

April 25-30 — childPROOF — Register — NAC, Columbia, SC
Advanced trial advocacy for child abuse prosecutors

See the matrix — TRIAL ADVOCACY I — Register — NAC, Columbia, SC
A practical "hands-on" training course for trial prosecutors

Course Number	Course Dates
04-10-TAI	May 3-7
05-10-TAI	June 7-11
06-10-TAI	July 12-16
07-10-TAI	August 16-20
08-10-TAI	September 27 - October 1

August 3-6 — CROSS EXAMINATION — Register — NAC, Columbia, SC
An in-depth examination of the theory and method of effective cross

August 23-27 — UNSAFE HAVENS II — Register — NAC, Columbia, SC
Advanced trial advocacy training for prosecution of technology-facilitated Child sexual exploitation cases

September 13-17 — COURTROOM TECHNOLOGY — Register — NAC, Columbia, SC
Upper level PowerPoint; Sanction II; Audio/Video Editing (Audacity, Windows Movie Maker); 2-D and 3-D Crime Scenes (SmartDraw, Sketchup); Design Tactics