



# THE PUBLIC LAWYER

October 2003

## NEVADA CASES

*Preferred Equities Corp. v. State Eng'r*, 119 Nev. Adv. Op. 44 (August 29, 2003). "We conclude that the district court properly refused to hear PEC's petition for judicial review of Ruling No. 4499 because the basis of that petition was rendered moot by virtue of the prior final forfeiture ruling in No. 4481. Additionally, we reject PEC's tolling claim under NRS 533.040(2). Finally, we decline to grant PEC equitable relief because (1) we have restricted such relief in such matters to parties who have made beneficial use of their water rights; and (2) we have consistently held that statutes concerning Nevada water rights will be strictly construed. Accordingly, we affirm the district court's order denying PEC's petition for judicial review."

*Barry v. Lindner*, 119 Nev. Adv. Op. 45 (August 29, 2003). In this divorce case, "[w]e hold that telephonic testimony is not permissible except under special circumstances. Because Barry failed to show any special circumstances, we conclude that the district court did not abuse its discretion when it refused to allow Bauman to testify at trial by telephone. We conclude that the district court did not abuse its discretion when it denied Barry's motion to set aside the default order. We also conclude that substantial evidence supports the district court's findings of fact. Accordingly, we affirm the district court's judgment."

*Maki v. Chong*, 119 Nev. Adv. Op. 46 (August 29, 2003). "Although public policy favors homestead exemptions in all but a few situations, we cannot allow a debtor to be shielded by the homestead exemption to further a fraud or similar tortious conduct. We therefore conclude that the homestead exemption does not apply to transactions involving fraud or similar tortious conduct. Under the doctrine of equitable liens, Chong's homestead exemption does not extend to process of the court regarding enforcement of Maki's default judgment."

*Camacho v. State*, 119 Nev. Adv. Op. 47 (August 29, 2003). "This is an appeal from a district court's judgment of conviction and sentence following appellant Ruben Camacho's guilty plea. Camacho argues on appeal that the district court erred by denying his motion to suppress evidence seized from his vehicle following his arrest. Specifically, he asserts that neither the search incident to arrest nor the inevitable discovery exceptions excuses the police's warrantless search of his vehicle. We disagree and affirm Camacho's conviction. The district court correctly denied Camacho's motion to suppress since police would have discovered the evidence in a later inventory search of Camacho's vehicle, and thus, the inevitable discovery exception applied."

*Dayside, Inc. v. First Judicial Dist. Court*, 119 Nev. Adv. Op. 48 (August 29, 2003). "We conclude that contractual lien waiver provisions do not violate public policy, that the waiver present in this case was supported



by the contract's terms, and that the voluntariness of petitioner's waiver is beyond our review. Therefore, we deny the petition, as the district court did not abuse its discretion in entering partial summary judgment and dismissing the lien."

*West v. State*, 119 Nev. Adv. Op. 49 (September 8, 2003). "Brooke West was charged with and convicted of murdering her mother, Christine Smith. West was sentenced to life in prison without the possibility of parole. West contends that (1) there was insufficient evidence of criminal agency, (2) the charging information was vague, (3) the district court erroneously admitted gruesome photographic evidence, and (4) the prosecutor committed misconduct during closing argument. We conclude that West's contentions lack merit and therefore affirm."

*Mack v. State*, 119 Nev. Adv. Op. 50 (September 8, 2003). "Appellant Daryl Linnie Mack does not challenge his conviction of first-degree murder but claims that his death sentence was determined by a three-judge panel in violation of his constitutional right to a jury trial. We conclude that Mack's claim lacks merit because he requested a bench trial and waived his right to a jury trial."

*City of Las Vegas Downtown Redev. Agency v. Pappas*, 119 Nev. Adv. Op. 51 (September 8, 2003). "Substantial evidence supports the Agency's findings that the construction of the Fremont Street Experience, including the parking garage, furthers the public purpose of eliminating blight in downtown Las Vegas. Therefore, the Agency's use of eminent domain proceedings to acquire the Pappases' property for that purpose does not violate the Nevada or Federal Constitutions. The

district court erred in dismissing the eminent domain action. With the exception of the claims involving pre-condemnation interference with tenants or rental opportunities, the district court did not err in dismissing the Pappases' counterclaims. Accordingly, we reverse the judgment of the district court dismissing the complaint in eminent domain and that portion of the district court's subsequent order pertaining to the lost rent claims and remand the matter to the district court for further proceedings in accordance with this opinion. The remaining portion of the district court's order dismissing the counterclaims is affirmed."

*Guinn v. Legislature*, 119 Nev. Adv. Op. 52 (September 17, 2003). "In addition, we were necessarily concerned with the interest of preserving the democratic process."

Maupin, J., dissenting. "Accordingly, it is not for us, the supreme court of this state, to criticize the wisdom of a valid initiative embraced by an overwhelming majority of Nevadans."



## Racial Profiling in Anti-Terrorism Strategies

Editorial by David Lapin, President of  
Strategic Business Ethics, Inc.  
IG Newsletter (September 2003).

[www.ig.org](http://www.ig.org)

There is some confusion surrounding the Ethical Principles that govern Racial Profiling. To specifically target members of an ethnic group for suspicion of certain crimes is not ethically acceptable. The reason is because one individual's conduct (or a group's conduct) is not necessarily indicative of the expected conduct of other members of that same group. However, while race should not be used as grounds for prediction of a person's conduct nor for suspicion, it may be used as a description of a specific individual or group of people sought by Law Enforcement for criminal activity.

Imagine standing in line at a security check at one of the nation's busiest airports. Ahead of you is a group of men who could be from the Middle East. The group reaches the security officers who subject the men to a search far more intense and harsh than anyone else in the line. Do you feel sympathy, relief, or both? If you feel relief, are you supporting racial profiling? I will argue that you are not. Even a person who strongly opposes racial profiling (correctly defined), could support certain terrorism-prevention tactics that focus on specific segments of the population.

### *Racial Profiling and Probable Cause*

There is some confusion surrounding the Ethical Principles that govern Racial Profiling. Part of the reason for this confusion lies in two different meanings given to the term "probable cause": a crime although they cannot yet prove this. Colloquially, the term "probable cause" is often used to describe a minor violation serving as grounds to stop a person whom the officer suspects of a more serious violation, but has no grounds for that suspicion. For example, an

officer uses a broken taillight violation as "probable cause" to stop an individual to investigate a possible DUI or narcotics violation, when nothing about that individual's conduct has given the officer reason to suspect the DUI or narcotics.

Let us examine different scenarios around the second use of the term "probable cause."

1. It is clearly ethical for officers primarily concerned with narcotics or DUI, to stop all drivers with broken taillights.

2. The ethical problem arises when an officer targets a specific ethnic or socioeconomic group, age, or sex for broken taillights.

On the one hand, the person violated a regulation by driving with a broken taillight. The officer is thus free to stop the person and, while doing so, to conduct a cursory investigation for other possible violations. On the other hand, the ethical question arises because by stopping only those taillight violators of a specific ethnic group, the officer is acting on an assumption that a member of this specific group is more likely to violate laws governing DUI and narcotics than members of other groups. This assumption could be based on personal bias, in which case it is clearly unethical.





## When does excessive Internet use become a disorder?

HR NEWS

By Karyn-Siobhan Robinson

Increasingly, HR professionals are finding themselves faced with a dilemma: Is employee misuse of the Internet simply a minor productivity problem or is it a signal that something deeper, an addiction perhaps, is at play?

Some experts have estimated that employee Internet misuse and abuse cost more than \$4 billion annually in lost work productivity, said [Kimberly Young, founder of the Center for Online Addiction](#), on her web site. She noted that while at work, employees often visit sports sites, bid on auctions, trade stocks, shop and send tasteless jokes to coworkers.

The effect of heavy Internet use on humans is not widely understood, said Nathan Andrew Shapira, M.D., Ph.D., assistant professor of psychiatry at the University of Florida College of Medicine in Gainesville. Identifying the point at which Internet use becomes a problem is a challenge, he said. “The problem with the Internet is that it is glorified in society. It is easy for someone to rationalize excessive use by saying they are looking for business opportunities or doing research.”

The [Illinois Institute for Addiction Recovery](#) in Peoria, Ill., treats patients for excessive Internet use. The institute lists the following signs of the problem:

- Noticeable decline in work performance.
- An increased number of errors and mistakes.
- Preoccupation with the Internet.
- Staying late at work to use the Internet.
- Sudden withdrawal from co-workers.

Shapira said he developed the acronym “MOUSE” to help identify problematic Internet use:

- More than intended time spent online.
- Other responsibilities neglected.
- Unsuccessful attempts to cut down on use.
- Significant discord in relationships because of Internet use.
- Excessive thoughts or anxiety when not online.

Addiction treatment professionals disagree about whether excessive Internet use should be classified as a disorder.

“I don’t get caught up in semantics,” said Paul J. Gallant, an addiction specialist with a psychotherapy and consulting practice in Fairfield County, Conn. “We can argue all day about whether this is an [impulse control disorder](#) or [OCD \(Obsessive Compulsive Disorder\)](#); I don’t want to get caught up in what to call it. I just want to note that it’s happening and that it is happening a lot.”

Gallant compared excessive Internet use with excessive gambling and noted that proponents of recognizing Internet abuse as a disorder have adopted many of the criteria used to classify pathological gambling.

HR professionals are often comfortable referring an employee with an alcohol or [substance abuse problem to an employee assistance program \(EAP\)](#). An employee who has been spending too much time on the Internet probably will not be referred to an EAP; rather, an HR professional likely will deal with excessive Internet use as a time management problem, experts said.

Gallant suggested that HR professionals work with their EAP to determine if there are underlying issues behind an employee’s excessive Internet use. Just as an EAP can help an employee with a substance abuse problem, it can help an employee manage Internet use, said Gallant.



Employers are “traditionally uncomfortable” approaching employees with concerns about addiction, said Phil Scherer, assistant clinical coordinator at the Illinois addiction institute.

If someone comes to work smelling of alcohol, the employer may send the employee home with instructions to get an assessment from an EAP regarding alcohol abuse, said Scherer. An employee who spends too much time on the Internet would most likely be reprimanded, he said.

In treatment for Internet overuse, the employee works with a treatment counselor to determine a relapse prevention plan, said Scherer, noting that the model is similar to the one used to transition substance abusers into the workplace.

“We work together with the employee and employer to define boundaries for Internet use,” said Gallant. “We can modify excessive use with timers or anything that brings reality and accountability into the equation.”

Shapira said he believes that Internet addiction is undergoing the same transformation in the medical community as obsessive compulsive disorder. Obsessive compulsive disorder used to be considered a fairly rare condition, he said. During the 1980s, it was thought that only 0.3 percent of the population had it. As the condition became more widely studied and understood, the medical community realized that 3 percent of the population had it, Shapira stated.

As Internet addiction becomes more understood, treatment options will become more prevalent and HR professionals will have more—and better—tools to cope with the problem of excessive Internet use, he said.

**U**.S. health system costs twice those of CanadaAs politicians and health care experts continue to crowd the universal health bandwagon, a study showing that U.S. health care administration costs are twice those of Canada's may make the concept even more attractive.

Published in the latest New England Journal of Medicine, the research shows that, in 1999, health administration costs in the United States were \$1,059 per person, compared to \$307 north of the border. Study authors estimate the United States could save \$300 billion a year by switching to a universal system - enough to “cover all of the uninsured with money left over for prescription drugs for seniors,” according to David Himmelstein, a Harvard doctor who co-wrote the article. In fact, he adds, “if you had their level of efficiency combined with our level of spending, you'd have the best health care system, by far.”

So sure is Himmelstein, in fact, that he recently founded an organization dedicated to bringing universal health to the United States ([Physicians for a National Health Program](#)). He has called on the nation's doctors to endorse a single-payer system, currently supported by some 8,000 physicians.  
[www.benefitnews.com](http://www.benefitnews.com)

## NINTH CIRCUIT CASES

*Vance v. Barrett*, No. 01-15819 (9<sup>th</sup> Cir. September 30, 2003). “Vance alleges that the prison administrators twice violated his constitutional rights: once, by placing an unconstitutional condition on his property rights in his inmate trust accounts (requiring him to sign a waiver to forgo accrued



interest and consent to unauthorized deductions), and then again, by unconstitutionally retaliating against him when he sought to exercise such rights (firing him when he refused to sign the waiver). As a prerequisite to discerning a constitutional violation for an unconstitutional condition or unconstitutional retaliation, however, we must first examine the validity of the underlying alleged constitutional rights.”

“Normally, we would now turn to the merits of Vance’s unconstitutional condition claim. The prison administrators, however, failed to brief this issue and do not dispute the possibility that such a claim could be made out if the underlying constitutional rights were valid. Because we conclude that the qualified immunity issue is dispositive, we decline to speculate needlessly on the underlying merits of Vance’s claim and turn directly to qualified immunity.”

*Schneider v. California Dep’t of Corrections*, No. 00-15795 (9<sup>th</sup> Cir. September 29, 2003). “We must decide whether a State committed an unconstitutional taking by failing to pay interest on funds deposited in prison inmate trust accounts.” “Because we conclude that further factual development is needed to determine whether California’s failure to pay interest to *individual* inmates on their ITA funds violates the Takings Clause, the district court’s grant of summary judgment and denial of injunctive relief is VACATED and REMANDED for further proceedings consistent with this opinion.”

*United States v. Ibarra*, No. 02-30389 (9<sup>th</sup> Cir. September 26, 2003). “The government does not contest that the stop of Ibarra’s automobile, although made on the pretext of attempting to enforce traffic laws, was actually made for the purpose of investigating whether Ibarra had contraband in his vehicle. We are therefore presented

with the question of whether an otherwise reasonable traffic stop is rendered unreasonable because it was made as a pretext to investigate suspected drug activity. The issue, of course, is not novel. It was addressed and resolved by a unanimous Supreme Court in *Whren v. United States*.”

“Ibarra implies that *Whren* leaves the door open for courts to invalidate otherwise reasonable searches or seizures when there is extraordinary evidence of pretext. We reject this. If nothing else, *Whren* foreclosed the possibility that a search or seizure may be invalidated solely because of the subjective intentions of a state officer.”

*United States v. Bridges*, No. 01-30316 (9<sup>th</sup> Cir. September 24, 2003). “Search warrants, including this one, are fundamentally offensive to the underlying principles of the Fourth Amendment when they are so bountiful and expansive in their language that they constitute a virtual, all-encompassing dragnet of personal papers and property to be seized at the discretion of the State.”

*Southwester Voter Registration Educ. Project v. Shelley*, No. 03-56498 (9<sup>th</sup> Cir. September 23, 2003). “Potential voters have given their attention to the candidates’ messages and prepared themselves to vote. Hundreds of thousands of absentee voters have already cast their votes in similar reliance upon the election going forward on the timetable announced by the state. These investments of time, money, and the exercise of citizenship rights cannot be returned. If the election is postponed, citizens who have already cast a vote will effectively be told that the vote does not count and that they must vote again. In short, the status quo that existed at the time the election was set cannot be restored because



this election has already begun.”

*Young v. Weston*, No. 01-36026 (9th Cir. September 18, 2003). “Petitioner Andre Young filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging Washington State’s Community Protection Act of 1990. The Act authorizes the civil commitment of ‘sexually violent predators,’ persons who suffer from a mental abnormality or personality disorder that makes them likely to engage in predatory acts of sexual violence. Young has been confined as a sexually violent predator at the Special Commitment Center since 1991. In this appeal Young contends that the district court erred in denying his double jeopardy and *ex post facto* claims without considering, in the ‘first instance’ the actual manner in which the Act has been implemented at the SCC, and further erred in denying his substantive due process claim without considering in the first instance, the actual manner in which the Act is implemented. We have jurisdiction pursuant to 28 U.S.C. § 2253 and we AFFIRM the district court’s denial of Young’s double jeopardy, *ex post facto* and substantive due process claims.”

*United States v. Cruz-Garcia*, No. 02-10275 (9th Cir. September 18, 2003). “Did the district court abuse its discretion by excluding details of the prosecution’s star witness’s prior crimes?” “Because the evidence excluded was carefully detailed and highly probative of Meza-Castro’s ability to act on his own, it could well have cast a reasonable doubt on the theory that defendant must have been involved. We therefore cannot say with fair assurance that its exclusion was harmless. *Bauer*, 132 F.3d at 510. Accordingly, we must reverse defendant’s conviction and remand for a new trial.”

*Hotel and Motel Ass'n of Oakland v. City of Oakland*, No. 02-15220 (9th Cir. September 17, 2003). “This case arises from a constitutional challenge to a pair of city ordinances that place

maintenance and habitability restrictions on hotels, motels, and rooming houses located in Oakland, California. One ordinance requires all hotels to comply with certain maintenance, habitability, security and record-keeping standards. The other ordinance reclassifies those hotels with so-called ‘non-conforming use’ status to ‘Deemed Approved’ status, and requires Deemed Approved hotels to comply with the new standards in order to retain that status. Appellants, the owners and operators of various Oakland hotels as well as their trade association, challenge the ordinances as an unconstitutional taking under the Fifth Amendment. They also claim that the ordinances violate their Fourteenth Amendment rights to procedural due process and equal protection and are unconstitutionally vague. We conclude that the ordinances pass constitutional muster and thus affirm the district court’s dismissal of the action.”

*United States v. Bonas*, No. 02-50631 (9th Cir. September 17, 2003). “It was not defendant’s burden to insist that the district court make a better record supporting its grant of a mistrial. Defendant had a constitutional right to proceed to verdict with the jury empaneled in his case. If the district court thought it necessary to deprive him of that right, it had the responsibility to establish a factual basis supporting that action. And, if the government wished to retain the right to retry defendant before another jury, it had both the duty and the incentive to ensure that the court’s finding of manifest necessity was supported by evidence on the record. The court, in fact, announced its inclination to declare a mistrial, then took a recess to allow the parties to consider the matter. After the recess, the Assistant United States Attorney advised the district court that it could



dismiss simply by ‘utter[ing] the magic words, that the court finds that manifest necessity exists.’ But this is not a Harry Potter novel; there is no charm for making a defendant's constitutional rights disappear. By bypassing the opportunity to urge the district court to make a record supporting its finding of manifest necessity, the government forfeited the right to try the defendant again. The government will be precluded from retrying the defendant after an improper mistrial even if it has no opportunity to suggest the court make a better record, and even where the mistrial is granted over the government’s vigorous objection.”

*In re Mantz*, No. 02-16113 (9th Cir. September 16, 2003). “Roger and Sandra Mantz filed for Chapter 11 bankruptcy on May 23, 2000. The California State Board of Equalization filed a proof of claim for over \$1 million in taxes, interest, and penalties. The Mantzs objected to the SBE’s proof of claim. The bankruptcy court found that it lacked subject matter jurisdiction under 11U.S.C. § 505(a)(2)(A) to consider the Mantzs’ objection because the amount of state tax liability had already been adjudicated. Alternatively, it found that res judicata barred relitigation of the state tax liability. The district court affirmed the bankruptcy court’s jurisdictional holding. We hold that because there was no final administrative determination of the Mantzs’ tax liability prior to the commencement of the bankruptcy proceedings, the bankruptcy court had jurisdiction. We further hold that res judicata does not prevent the bankruptcy court from redetermining the Mantzs’ tax liability. We reverse and remand for further proceedings.

*Southwester Voter Registration Educ. Project v. Shelley*, No. 03-56498 (9<sup>th</sup> Cir. September 15, 2003). “Plaintiffs allege that the use of the obsolete voting systems in some counties rather than others will deny voters equal protection of the laws in violation of the United States

Constitution. They seek to postpone the vote until the next regularly scheduled statewide election six months from now, when the Secretary of State has assured that all counties will be using acceptable voting equipment, and all the polls will be open. We agree that the issuance of a preliminary injunction is warranted and reverse the order of the district court.”

<http://caselaw.lp.findlaw.com/data2/circs/9th/0356498p.pdf>

*Democratic Party of Washington State v. Reed*, No. 02-35422 (9<sup>th</sup> Cir. September 15, 2003). “The State of Washington conducts a ‘blanket’ primary, in which voters choose candidates without being restricted to candidates of any particular party. The Democratic, Republican and Libertarian Parties all challenged the law, claiming that it unconstitutionally restrains their supporters’ freedom of association. They are correct. We recognize that Washington voters are long accustomed to a blanket primary and acknowledge that this form of primary has gained a certain popularity among many of the voters. Nonetheless, these reasons cannot withstand the constitutional challenge presented here. The legal landscape has changed, and our decision is compelled by the Supreme Court’s landmark decision in *California Democratic Party v. Jones*.”

<http://caselaw.lp.findlaw.com/data2/circs/9th/0235422p.pdf>

*Idaho Coalition United for Bears v. Cenarussa*, No. 02-35030 (9<sup>th</sup> Cir. 2003). “Idaho permits direct legislation through ballot initiatives. In order to appear on the ballot, an initiative must meet several conditions; one is that signatures in support of the initiative must be collected from six percent of the qualified voters in each of at least half of the state’s



counties. Because Idaho's counties vary widely in population, this geographic distribution requirement favors residents of sparsely populated areas over residents of more densely populated areas in their respective efforts to participate in the process of qualifying initiatives for the ballot. The district court held that this unequal treatment violates the Equal Protection Clause of the Fourteenth Amendment. We affirm."

<http://caselaw.lp.findlaw.com/data2/circs/9th/0235030p.pdf>

*United States v. Si*, No. 01-10112 (9th Cir. September 12, 2003). "Tony Si was convicted and sentenced for (1) conspiracy to commit a robbery that affects interstate commerce in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and (2) use of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). Si alleges that he was denied a fair trial because (1) a Chinese translator was not appointed for him; (2) there was a *Brady* violation that resulted from the district court's reversal of the magistrate judge's discovery order requiring the government to produce information on an informant's activities; (3) the evidence was insufficient to sustain his convictions; (4) he was entrapped as a matter of law; (5) the supplemental jury instructions omitted an essential element of the offense; and (6) the district court erred in imposing upward adjustments to his sentence. We have jurisdiction and we affirm the district court's judgment and sentence."

*Montana Right to Life Ass'n v. Edelman*, No. 00-35924 (9th Cir. September 11, 2003). "In 1994, Montana voters passed various campaign finance reform measures contained in a ballot proposition known as Initiative 118. At issue in this case are two of the provisions contained in that initiative. The first lowers the maximum dollar amount both political action committees and individuals may contribute to a political

candidate; the second limits the aggregate dollar amount a candidate may receive from all PACs combined. Plaintiffs-appellants brought suit to invalidate some of the measures in Initiative 118, claiming they unduly burdened protected speech and associational rights. After a four-day bench trial, the district court made numerous factual findings and struck down portions of Initiative 118 not at issue here. As to the two provisions challenged on appeal, the district judge upheld them as sufficiently tailored to achieving Montana's important interest in preventing corruption and the appearance of corruption in Montana politics. We affirm."

*Savage v. Glendale Union High School*, No. 02-15743 (9th Cir. September 10, 2003). "This appeal presents the question of whether an Arizona high school district is an arm of the state entitled to Eleventh Amendment immunity from suit in federal court for alleged violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 & 12203 *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 794 *et seq.* We hold that it is not, and affirm the district court."

*Talk of the Town v. Dep't of Business and Finance Servs.*, No. 01-16303 (9<sup>th</sup> Cir. September 10, 2003). "Because *Arcara* compels the conclusion that the City's sanctioning of TOT for repeated violations of the liquor license requirement does not implicate the First Amendment, the district court erred in concluding that the procedural requirements identified by our *Convoy* decision are applicable here. Accordingly, we must reverse that portion of the district court's order according TOT *Convoy's* procedural safeguards and remand to that court for further proceedings not inconsistent with this opinion. In light of our resolution of the First Amendment issue, TOT's appeal of the remedy is moot."



<http://caselaw.lp.findlaw.com/data2/circs/9th/0116303p.pdf>

*Drummond v. City of Anaheim*, No. 02-55320 99th Cir. September 10, 2003). “We again confront the interplay of excessive force and qualified immunity in a case in which a mentally disturbed individual suffers serious injuries as a result of an encounter with police officers. Once again, we reverse the grant of summary judgment in favor of the officers and remand for a trial on the merits. Three Anaheim police officers determined that Brian Drummond, who was unarmed and mentally ill, should be taken to a medical facility for his own safety, but the manner in which they attempted to subdue and restrain him resulted in his falling into a coma from which he has never recovered. Drummond brought suit under 42 U.S.C. § 1983, alleging that the officers used excessive force, in violation of the Fourth Amendment. We hold that, under the circumstances, it would have been clear to a reasonable officer at the time of the encounter that the force alleged was constitutionally excessive. We therefore reverse the district court’s grant of summary judgment in favor of the defendants and remand for further proceedings.”

*Summerlin v. Stewart*, No. 98-99002 (9<sup>th</sup> Cir. September 2, 2003) (en banc). “It is the raw material from which legal fiction is forged: A vicious murder, an anonymous psychic tip, a romantic encounter that jeopardized a plea agreement, an allegedly incompetent defense, and a death sentence imposed by a purportedly drug-addled judge. But, as Mark Twain observed, ‘truth is often stranger than fiction because fiction has to make sense.’”

“In this appeal we consider whether the district court erred in denying a writ of habeas corpus sought as to petitioner’s conviction and death sentence. We affirm the district court’s judgment as to the conviction. However, we

conclude that the Supreme Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002), applies retroactively so as to require that the penalty of death in this case be vacated.”

Dissent, Rawlinson, Circuit Judge. “I must respectfully dissent from that portion of the majority opinion discussing the retroactive application of *Ring v. Arizona*. The majority opinion negates the presumption against retroactive application of a new rule articulated in *Teague v. Lane*, 489 U.S. 288, 304, 310 (1989). The underpinning of the majority opinion is an assumption that the Supreme Court’s ruling in *Ring v. Arizona*, 536 U.S. 584 (2002), represents a new substantive rule or, alternatively, a new procedural rule that seriously enhances accuracy of capital sentencing proceedings, and alters our understanding of ‘bedrock procedural elements essential to the fairness of the proceeding.’”

*United States v. Alpine Land & Reservoir Co.*, No. 01-16694 (9<sup>th</sup> Cir. September 4, 2003). “Churchill County and the City of Fallon appeal the district court’s judgment that affirmed the Nevada State Engineer’s Ruling 4979. In that ruling, the State Engineer approved eight applications of the United States Fish and Wildlife Service to transfer the place of use of certain water rights to supply needed water to the wetlands in the Stillwater National Wildlife Refuge in western Nevada. The State Engineer, rejecting the protests filed by the City and the County, determined that the changes in places of use would not conflict with existing water rights or threaten the public interest.”

“We have jurisdiction under 28 U.S.C. § 1291, and we affirm. Although we need not recount the extensive historical background of the present dispute, we briefly highlight



the major events leading up to the dispute, including the enactment of the federal Reclamation Act in 1902, the development of the Lahontan Valley Wetlands in Churchill County, and the enactment of the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act, to provide context for the parties' arguments. Next, we address each of the arguments advanced by the County and the City and explain why the district court properly affirmed the State Engineer's ruling."

"Although Congress enacted the Settlement Act in an effort to resolve many of the conflicts over water rights in the Newlands Reclamation Project, the extensive and ongoing litigation over these rights clearly indicates that many individual competing concerns have yet to be satisfied. Ultimately, although we cannot provide any final resolution to the continuing controversies over the allocation of water rights in the Newlands Reclamation Project, we hold that the State Engineer has broad discretion under Nevada law to determine whether a change in place of use of existing water rights will have a detrimental impact on the public interest or whether a hydrological or other study is necessary before approving such a transfer."

## PROSPECTIVE CLIENTS: California Committee Offers Lawyers

### Cocktail-Party Advice

A man walks into a cocktail party...and, as soon as he hears you're a lawyer, he assaults you with the excruciatingly complicated facts of his legal problems. What do you do? Helpfully, the California bar has issued an interesting opinion that points up the pitfalls of responding in a meaningful fashion -including possible confidentiality obligations, potential creation of an attorney-client relationship, and possible

conflicts of interest--by exploring three fairly real-world scenarios. The opinion doesn't give you a script for politely disengaging, but it surely gives you the reasons to do so.

<http://www.ethicsandlawyering.com/Issues/files/CalOp2003161.pdf>

**A** U.S. tax court in North Carolina has ruled that ongoing depression qualifies as a disability exemption under the IRS rules governing early distribution from qualified retirement plans.

IRS levies a 10% penalty against individuals who take retirement distributions before age 59-1/2 unless a statutory exemption applies, such as a disability that renders the employee "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment [of] indefinite duration."

In the case of *Coleman-Stephens v. Commissioner of Internal Revenue*, plaintiff Mary Coleman-Stephens stated that she suffered from continuing depression, including being hospitalized twice due to the condition. During that time, she failed to repay a retirement plan loan, and the plan reported the unpaid balance and interest as a taxable distribution. Although she included the distribution on her income taxes, she did not pay the 10% early distribution penalty, asserting her disability.

As she was unable to work during the year the distribution occurred, and had not yet returned to work by the time of trial, the court determined Coleman-Stephens disabled and therefore exempt from the penalty fine.

The decision goes beyond IRS's intended

definition of a disability and marks a shift in legal and public opinion of depression as a true and sometimes disabling disease. Although research is scant on how depression affects employers' disability costs, a recent study published in the Journal of the American Medical Association finds depression is a leading cause in lost productivity costs for employers, up to \$44 billion annually. [www.benefitnews.com](http://www.benefitnews.com)

## Want to pay taxes on your health insurance and collect your social security at a later

age? A GAO report entitled *Opportunities for Oversight and Improved Use of Taxpayer Funds: Examples from Selected GAO Work* (August 2003) includes sections on "Revise the Mining Law of 1872," Reexamine Federal Policies for Subsidizing Water for Agricultural and Rural Uses," "Reduce Federal Funding Participation Rate for Automated Child Support Enforcement Systems," "Replace the 1-Dollar Note with a 1-Dollar Coin." "Tax Interest Earned on Life Insurance Policies and Deferred Annuities," "Further Limit the Deductibility of Home Equity Loan Interest," "Limit the Tax Exemption for Employer-Paid Health Insurance Raise the Retirement Age." <http://www.gao.gov/new.items/d031006.pdf>

## IRS Revenue Ruling 2003-102

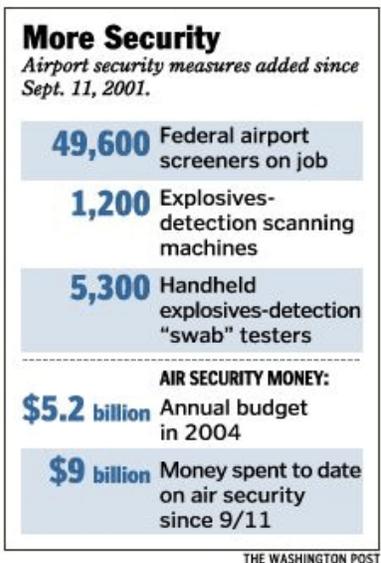
"Employee A purchases an antacid, an allergy medicine, a pain reliever, and a cold medicine from a pharmacy, none of which are purchased with a physician's prescription. Employee A purchases these items for personal use, or for the use of Employee A's spouse or dependents, to alleviate or treat personal injuries or sickness. Employee A also purchases dietary supplements (e.g., vitamins) without a physician's prescription to maintain the general health of

Employee A, or Employee A's spouse or dependents. Employee A submits substantiated claims for all of these expenses, which have been incurred during the current plan year, to Employer N's health Flexible Spending Account for reimbursement. Employee A is not compensated for these expenses by insurance or otherwise.

Held: The employee may be reimbursed for the nonprescription drugs which are used to treat ailments, but not for the dietary supplements which are used to maintain general health.

<http://www.irs.gov/pub/irs-drop/rr-03-102.pdf>





## OTHER CASES

*Contents of Account Number 03001288 v. United States*, No. 02-1839 (3d Cir. September 25, 2003) In an action seeking forfeiture of plaintiff funds because they are the proceeds of illegal heroin trafficking, the five-year statute of limitations was tolled during the time the funds were absent from the United States.  
<http://caselaw.lp.findlaw.com/data2/circs/3rd/021839p.pdf>

*United States v. Mchan*, No. 01-2060(4th Cir. September 29, 2003). An order forfeiting "substitute property" of defendant, convicted of drug trafficking, and his family is affirmed over claims of Due Process and Seventh Amendment violations, and assertions that the relation back principle of 21 U.S.C. section 853(c) prohibits the inclusion of certain property.  
<http://laws.lp.findlaw.com/4th/012060p.html>

*United States v. Holston*, No. 02-1292 (2<sup>nd</sup> Cir. September 4, 2003). "Eric Holston appeals from a judgment of conviction entered in the United States District Court for the Western District of New York, following his conditional plea of guilty to one count of producing visual depictions of sexually explicit

conduct involving a minor, in violation of 18 U.S.C. § 2251(a). Holston's plea preserved his right to appeal the denial of his motion to dismiss the indictment on the ground that § 2251(a), which prohibits the production of pornographic depictions involving a minor 'using materials that have been mailed, shipped, or transported in interstate or foreign commerce,' was an unconstitutional exercise of Congress's authority under the Commerce Clause. Because we find § 2251(a) to be constitutional, we affirm."  
<http://caselaw.lp.findlaw.com/data2/circs/2nd/021292p.pdf>

*Eckles v. City of Corydon*, No. 02-2947(8<sup>th</sup> Cir. September 3, 2003). David Eckles sued the City of Corydon, Iowa, Wayne County, Iowa, and various City and County officials alleging constitutional claims under the First Amendment and the Equal Protection Clause, and a state law claim of intentional infliction of emotional distress. These charges relate to property value assessments of Eckles's residence and efforts by the City and County to force Eckles to remove signs mixing political and religious statements he painted and posted on his property. The district court granted summary judgment in favor of the defendants on all counts, and Eckles appeals. We reverse with regard to the First Amendment claim against the City defendants and affirm the district court in all other respects.  
<http://caselaw.lp.findlaw.com/data2/circs/8th/022947p.pdf>

*Ross v. Town of Austin, Indiana*, No. 02-3830 (7<sup>th</sup> Cir. September 16, 2003). Plaintiff-Appellant Tamra Ross appeals the district court's entry of summary judgment in favor of the Town of Austin, Indiana, the Austin Police Department ("APD"), and APD Chief Marvin Richey on Tamra's substantive due process claims alleging that

APD Officer Lonnie Noble's inadequate training resulted in the murder by Gregory Miller of her husband, Kenneth Ross. For the reasons set forth herein, we affirm the decision of the district court.

<http://caselaw.lp.findlaw.com/data2/circs/7th/023830p.pdf>

## More pregnant employees suing over discrimination

As record numbers of women are in the U.S. workforce, the number of lawsuits alleging pregnancy discrimination has grown as well, according to the Equal Employment Opportunity Commission.

Pregnancy bias suits have increased 39% over the last decade, EEOC finds, generally charging [violations of FMLA or the Pregnancy Discrimination Act of 1978](#). The latter law gives entitlements to expecting employees, yet several courts have cited it when ruling for employers who terminated pregnant employees who were consistently late for work due to morning sickness, miss deadlines or otherwise are below average in their job performance. Aggrieved pregnant workers have generally had more success claiming infringement upon FMLA rights, experts say.

And while the Americans with Disabilities Act does not protect pregnant workers, EEOC states: "If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee; for example, by providing modified tasks, alternative assignments, disability leave or leave without pay."

Experts say pregnancy bias lawsuits can be avoided with clear maternity policies that are well-communicated to all employees and managers.

[www.benefitnews.com](http://www.benefitnews.com)

### Today's Word:

## Misandry (Noun)

**Pronunciation:** [mis-'æn-dri]

**Definition 1:** The hatred of men, of the male sex, man-hating.

### Today's Word:

## Andragogy (Noun)

**Pronunciation:** ['æn-drê-gah-jee or go-jee]

**Definition 1:** The education of men, i.e. adult males.

### Today's Word:

## Solecism (Noun)

**Pronunciation:** ['so-lê-si-zêm]

**Definition 1:** A grammatical error hence a social transgression and, finally, an error or impropriety of any kind.

[www.dictionary.com](http://www.dictionary.com)

## LATE CASES

*Sorrano v. Clark County*, No. 02-16199 (9th Cir. October 3, 2003). "Thus, under the amended ordinance, the County expressly no longer requires permits for newsracks on sidewalks owned or maintained by private entities. Soranno's claim against the County to issue him permits is therefore moot."

"Because the County's amendment to the ordinance in November 2001 mooted Soranno's claim for relief, we vacate the judgment below and order the district court to dismiss Soranno's complaint. We express no opinion on the merits of any claims Soranno may have against the County or private landowners in the event that a landowner or the County bars Soranno from placing newsracks on, or removes such



newsracks from, privately owned sidewalks.”

*Gasuvik v. Perez*, No. 02-35902 (9th Cir. October 3, 2003). “Ralph Gausvik brought suit against Detective Robert Perez, alleging Perez violated his civil rights during a sex abuse investigation. The district court denied Perez’s motion for summary judgment based on qualified immunity. Perez appeals, and we reverse.”

*Cunningham v. Perez*, No. 02-35792 (9th Cir. October 2, 2003). “Henry Cunningham brought suit in federal district court alleging Robert Perez, a police officer with the City of Wenatchee, Washington, and other government officials, violated his civil rights during a sex abuse investigation. The district court denied Perez’s motion for summary judgment based on qualified immunity. This appeal followed, and we reverse.”

*Sptisyn v. Moore*, No. 02-35543 (9th Cir. October 3, 2003). “Sergey Spitsyn appeals from the district court’s dismissal of his petition for habeas corpus relief under 28 U.S.C. § 2254 as untimely. He argues that the deadline for filing his petition should be subject to equitable tolling because the delay in filing resulted from an ‘extraordinary circumstance’ beyond his control, specifically his attorney’s misconduct. Based upon the unique facts of this case, where an attorney was retained to prepare and file a petition, failed to do so, and disregarded requests to return the files pertaining to petitioner’s case until well after the date the petition was due, we agree that equitable tolling of the deadline is appropriate. We vacate the dismissal and remand the matter to the district court for further proceedings.”

*Russell v. North Broward Hosp.*, No. 02-13343 (11th Cir. October 2, 2003). “To summarize our conclusions, we hold that 29 C.F.R.

§ 825.114, the Department of Labor’s regulation requiring that an employee be incapacitated for more than three consecutive calendar days in order to have a qualifying ‘serious health condition,’ is valid. And it is properly understood to require more than three consecutive full days of incapacity; consecutive partial days are not enough. Accordingly, the district court correctly entered judgment for the Hospital, in accordance with the jury’s verdict, and correctly denied Russell’s motion for judgment as a matter of law or, in the alternative, for a new trial.”

## **USA TODAY MAJOR CASES UP FOR REVIEW**

A look at significant cases the Supreme Court will consider during its 2003-04 term, and the legal questions the cases raise. The term begins Tuesday:

\* *U.S. vs. Patane* -- If a police officer fails to give a suspect his Miranda warnings regarding the suspect's right to remain silent, may any evidence derived from the suspect's statements be used against him in court?

\* *Missouri vs. Seibert* -- When a police officer intentionally questions a suspect without giving the Miranda warnings and then -- with an admission in hand -- gives the Miranda warnings and asks more pointed questions, may the suspect's statements from the second round of questioning be used as evidence?

\* *U.S. vs. Banks* -- How long must police officers who have a warrant to search for drugs wait after knocking on someone's door and announcing their presence? (The case involves a police entry into an apartment after 15-20 seconds, which was ruled unconstitutional by a lower court.)

<http://www.usatoday.com/usatoday/2003/006/5562491s.htm>