

# THE PUBLIC LAWYER

## JANUARY 5, 2005



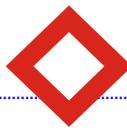
### NEVADA CASES

<http://www.leg.state.nv.us/scd/OpinionListPage.cfm>

*McConnell v. State*, 120 Nev. Adv. Op. No. 105 (December 29, 2004). “McConnell challenges the propriety of his penalty hearing and death sentence on various grounds. The most significant question raised is: in a prosecution seeking death for a felony murder, does an aggravator based on the underlying felony constitutionally narrow death eligibility? We conclude that it does not, but because McConnell admitted to deliberate, premeditated murder, the State's alternative theory of felony murder was of no consequence and provides no ground for relief.”

*Zhang v. Eighth Judicial Dist. Court*, 120 Nev. Adv. Op. No. 104 (December 29, 2004). “The primary issue we decide is whether a real property purchase agreement is enforceable when it is executed by the buyer only because the seller would not perform under an earlier purchase agreement for a lesser price. We conclude that such a modified agreement is not supported by consideration and is therefore unenforceable

*State v. Catanio*, 120 Nev. Adv. Op. No. 103 (December 29, 2004). “We conclude that the language describing a lewd act committed ‘upon or with the body’ of a child under 14 is unambiguous. Because ‘upon’ means ‘on,’ that language requires that the lewd action be done on the body of the minor, that is, some kind of touching or physical contact is required. However, the statute states ‘upon or with.’ By using the disjunctive ‘or,’ the statute clearly indicates that ‘upon’ and ‘with’ have different meanings. An act committed ‘with’ the minor’s body indicates that the minor’s body is the object of attention, and that language does not require a physical touching by the accused. Rather, the perpetrator need only cause the child to perform a lewd act upon him or herself to satisfy the elements set forth in the statute. Common sense also dictates this conclusion. When a person invites another person to do an act by saying, ‘come to the movies *with me*’ or ‘come outside to play *with me*’ or ‘watch T.V. *with me*’ or ‘I’d like to play ball *with you*,’ no physical contact is necessarily intimated or required.”



*Borger v. Eighth Judicial Dist. Court*, 120 Nev. Adv. Op. No. 102 (December 29, 2004). “This original petition for a writ of mandamus challenges district court orders dismissing petitioner’s medical malpractice action and denying his motion to amend his malpractice complaint. Because the petition involves important issues of law concerning the expert witness certification requirements of recently enacted NRS 41A.071, issues that merit clarification to further judicial economy in this case and in general, we grant this petition for writ relief.”

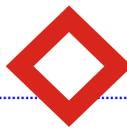
*Means v. State*, 120 Nev. Adv. Op. No. 101 (December 29, 2004). “In this appeal, we consider whether a post-conviction habeas petitioner should have been permitted to inspect and introduce his former attorney’s notes from the case file into evidence after former counsel used the notes to refresh his recollection while testifying at the post-conviction evidentiary hearing. We also consider the proper burden of proof that a petitioner carries on disputed factual questions in the context of a post-conviction hearing. Finally, we consider whether granting a default judgment pursuant to the Nevada Rules of Civil Procedure is appropriate when the State is tardy in responding to a petition for post-conviction relief.

We conclude that the district court improperly denied petitioner access to his former attorneys’ notes. We further conclude that petitioner’s burden of proof on disputed factual issues underlying a claim of ineffective assistance of counsel is by a preponderance of the evidence and that it was error to require petitioner to prove by clear and convincing evidence that he had instructed his attorneys to appeal his conviction. Finally, we conclude that the district court properly denied petitioner’s motion for default judgment.”

*In re Bowlds*, 120 Nev. Adv. Op. No. 100 (December 29, 2004). “In this appeal, we consider a long-standing local practice in Clark County, Nevada, under which district judges routinely award attorney fees in probate matters based upon the gross value of the decedent’s estate.

We hold that an agreement between an estate and its counsel, providing for payment to counsel of 5 percent of the estate’s gross value, is not per se reasonable. Thus, district courts exercising judicial oversight in probate matters must independently review challenged fee agreements for reasonableness under NRS 150.060(1) and Supreme Court Rule 155(1). *University & Community College Sys. v. Sutton*, 120 Nev. Adv. Op. No. 99 (December 28, 2004). “The University of Nevada, Las Vegas (UNLV) terminated the employment of Richard L. Sutton, a tenured professor. Sutton sued UNLV, asserting claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of substantive and procedural due process. In the alternative, Sutton sought judicial review of UNLV’s administrative decision to terminate his employment. UNLV moved for summary judgment, claiming statutory immunity from civil liability under its discretionary employment power. Alternatively, UNLV moved to limit the district court to judicial review. The district court denied summary judgment and rejected the claim that this case should be treated as a judicial review of an administrative decision.

Following a jury trial, the district court, based upon the jury verdict, entered judgment for Sutton on the claims of breach of contract and breach of the implied covenant of good faith and fair dealing. UNLV now appeals the final judgment, contending that the district court erred in denying its motion for summary judgment and made multiple errors at trial.”



*Young v. State*, 120 Nev. Adv. Op. No. 98 (December 23, 2004). “We conclude that the district court abused its discretion when it denied Young’s motion to dismiss and appoint new counsel. We hold that three factors are relevant in reviewing a district court’s denial of a motion for substitution of counsel: (1) the extent of the conflict between the defendant and counsel, (2) the adequacy of the court’s inquiry into the defendant’s complaint, and (3) the timeliness of the motion and the extent of any inconvenience or delay. Following an analysis of these three factors, we conclude that the district court abused its discretion in denying Young’s motion. We therefore reverse Young’s conviction and remand for appointment of new counsel and a new trial.”

*Nevada Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. Adv. Op. No. 97 (December 23, 2004). “This original writ petition challenges the district court’s jurisdiction over a class action complaint against petitioner Nevada Power Company that alleges causes of action for deceptive and unfair trade practices, breach of the covenant of good faith and fair dealing, and breach of contract. We address two principal issues. First, does the district court have subject-matter jurisdiction to entertain a complaint against a public utility that alleges causes of action for unfair and deceptive trade practices, breach of the covenant of good faith and fair dealing, and breach of contract? Second, if the district court does have jurisdiction over those claims, does the Public Utilities Commission of Nevada (PUC) have primary jurisdiction over them so that the district court should defer to the PUC? We conclude that the district court has subject-matter jurisdiction over the claims against Nevada Power and properly chose to exercise that jurisdiction. Accordingly, we

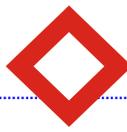
deny the petition.”

*Smith v. State*, 120 Nev. Adv. Op. No. 96 (December 23, 2004). “This is an appeal from a judgment of conviction, upon a jury verdict, of one count of burglary. Appellant Charles Rene Smith's primary contention is that the district court erred in refusing his proffered jury instruction on the lesser crime of trespass. We hold that, under the elements test set forth in *Blockburger v. United States*, the crime of trespass is not a lesser-included offense of burglary. Therefore, we conclude that the district court did not err in refusing Smith's requested instruction.”

*Seres v. Lerner*, 120 Nev. Adv. Op. No. 95 (December 21, 2004). “In this appeal, we consider the constitutionality of NRS 217.007, Nevada’s ‘Son of Sam’ law. In general terms, NRS 217.007 allows a felony victim to recover from the felon any monetary proceeds the felon might generate from published materials based upon or substantially related to the offense. Damage awards derived from actions brought after expiration of applicable statutes of limitation for tort damages are limited to publication proceeds. We hold that NRS 217.007 violates the First Amendment of the United States Constitution.”

*Matter of Mosley*, 120 Nev. Adv. Op. No. 94 (December 21, 2004). “We affirm the Commission’s determination that Judge Mosley violated NCJC Canons 1, 2, 2A, 2B, and 3B(7) in Counts I, II, VI, VII and VIII and the imposition of the discipline requiring Judge Mosley to attend the next general ethics course at the National Judicial College, to pay a \$5,000 fine to the Clark County library or a related library foundation, and to receive censures for unethical conduct. We reverse the determination of violations in Counts III and IV.”

*Butler v. State*, 120 Nev. Adv. Op. No. 93



(December 20, 2004). “Appellant John Butler was convicted by a jury of two counts of first-degree murder with the use of a deadly weapon and was thereafter sentenced by the jury to death. On appeal, we affirm Butler's convictions, but we vacate his death sentences and remand for a new penalty hearing.”

*Bergna v. State*, 120 Nev. Adv. Op. No. 92 (December 20, 2004). “ This is an appeal from a judgment of conviction, upon a jury verdict, of first-degree murder. Appellant Peter Matthew Bergna has filed a motion for bail pending appeal in this court pursuant to NRS 178.488. The State opposes the motion. In resolving this motion, we address a matter of first impression the State’s contention that a defendant convicted of first-degree murder is statutorily precluded from receiving bail pending appeal under any circumstances. We have also revisited this court’s decisional law defining standards and procedures applicable to motion for bail pending appeal. Although we reject the State’s contention, we nonetheless conclude that bail pending appeal is not warranted under the revised standards we adopt today.”

*Nevada Comm’n on Ethics v. Ballard*, 120 Nev. Adv. Op. No. 91 (December 17, 2004). “In this appeal, we must decide whether the Nevada Commission on Ethics had the authority to (1) determine whether respondents’ ‘Notice[s] in lieu of Statement of Financial Disclosure’ and related filings satisfied NRS 281.561’s requirement that a political candidate file a financial disclosure statement; and (2) seek civil penalties against respondents for violating NRS 281.561. Because we conclude that the Commission acted within its authority, we reverse.”

*State, Dep’t of Transp. v. Cowan*, 120 Nev. Adv. Op. No. 90 (December 17, 2004).

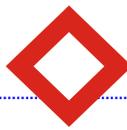
“This is an appeal and cross-appeal from a judgment awarding damages to the lessee of property that was condemned by the Nevada Department of Transportation (NDOT). The lessees, Stuart A. and Barbara L. Cowan, appeal numerous rulings by the district court, claiming that they received an inadequate damages and attorney fees award. NDOT appeals on the ground that the district court erred in awarding damages for the goodwill value of the Cowans’ business and in calculating the costs and attorney fees award.

Here, the State exercised the formal power of eminent domain by filing its complaint for title to the parcel and naming the Cowans as parties. Thus, an inverse condemnation counterclaim by the Cowans was inappropriate in this case, and the arguments based on the finding of inverse condemnation are without merit.

However, this court has recognized that under certain exceptional circumstances, the business owner may be compensated over and above the value of the real property. In *National Advertising Co. v. State, Department of Transportation*, this court recognized that when the condemnation of the real property results in the business being destroyed, the business owner should be compensated.”

*Banks v. Sunrise Hospital*, 120 Nev. Adv. Op. No. 89 (December 17, 2004). “We conclude that Sunrise has failed to demonstrate error that would entitle it to a reversal or a new trial. We also conclude that the district court properly reduced the jury award by the sums paid in settlement by the surgeon and the anesthesiologist. Accordingly, we affirm the district court’s judgment and order.”

*Walker v. Eighth Judicial Dist. Court*, 120 Nev. Adv. Op. No. 88 (December 9, 2004). “This original petition for a writ of mandamus or



prohibition challenges a district court order granting the State's motion to unseal Sam Walker's criminal records for the purpose of inspection pursuant to NRS 179.295. Because Walker's petition involves an important issue of law that we should clarify, the interpretation of NRS 179.295, and because Walker has demonstrated that the district court manifestly abused its discretion in granting the State's motion, we grant Walker's petition for writ relief."

*Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. Adv. Op. No. 87 (December 9, 2004). "This petition presents a question of first impression: Whether an indigent defendant in family court is entitled to appointed counsel in a contempt hearing when the hearing may result in the imposition of a jail sentence for the nonpayment of child support.

We conclude that while a defendant in a contempt proceeding before the family court does indeed have an important liberty interest at stake, that interest is not so compelling as to require the appointment of counsel, nor is it on par with the personal liberty interests at issue in a criminal prosecution or criminal contempt hearing to warrant the right to appointed counsel in every case. We adopt a discretionary rule involving the nonpayment of support cases whereby the district court may appoint counsel to assist an indigent defendant when the circumstances so warrant. Consequently, we grant the petition in part. Rodriguez shall remain free from confinement until the district court makes the required findings and determinations of indigency and contempt in accord with this decision."

*Metz v. Metz*, 120 Nev. Adv. Op. No. 86 (December 9, 2004). "In this proper person appeal, the primary issue is whether a

Nevada district court has authority to order a noncustodial parent to pay child support from his or her supplemental security income and/or social security disability benefits. We conclude that under 42 U.S.C. § 407(a), Congress has expressly exempted supplemental security income from child support payments. Thus, a district court is prohibited from utilizing a noncustodial parent's supplemental security income in setting a child support obligation. Congress, however, has waived the exemption with respect to social security disability benefits. Consequently, a district court may consider these benefits in its child support determination."

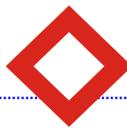
*Goodrich & Pennington Mortgage Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. Adv. Op. No. 85 (December 9, 2004). "Goodrich & Pennington Mortgage Fund, Inc., appeals from a district court judgment awarding it damages in connection with a negligent appraisal performed by J.R. Woolard, Inc. Goodrich contends that the district court's award failed to include the entirety of the damages proximately caused by Woolard's negligence. We affirm."

### **Americans cut savings to pay medical bills** By Jill Elswick

*Employee Benefit News* • December 2004

Many Americans slashed contributions to savings and retirement accounts to pay for rising health care costs in the past year, according to new reports.

Skyrocketing medical costs are taking a toll on a majority of the population, finds the 2004 Health Confidence Survey, released in October by the nonpartisan Employee Benefit Research Institute and Mathew Greenwald & Associates. Nearly two-thirds (64%) of Americans say their health insurance premium went up in the past year. In addition, about half report increases for prescription drugs (54%) and doctor visits



(49%). Forty-three percent witnessed an increase in their health insurance deductible.

Researchers surveyed some 1,400 people ages 21 and older in late June and early July, yielding results within a margin of error of plus or minus 3%. The survey has been conducted annually since 1998.

One-quarter of those affected by rising medical costs say they've reduced retirement savings to cope with the situation, while nearly one-half (48%) report cutting other savings. Eighteen percent say medical bills are making it more difficult to pay for food and clothing, and 30% are having difficulty paying other bills. Health costs gobbled up most or all of savings for 25% of survey respondents. Meanwhile, 15% borrowed money to pay health bills.

Those with annual incomes of less than \$35,000 were especially likely to have shifted resources to pay for health care cost increases, survey results show.

"Americans are coping with the rising cost of health care in a variety of ways, but it is clear that rising health costs are causing financial pain among many and are leading to a reduction of savings in general - and retirement savings in particular," says EBRI CEO Dallas Salisbury.

Most respondents (67%) are satisfied with their employment-based health coverage, however, and 20% say they'd be willing to take a pay cut for more comprehensive coverage. Health insurance remains far and away the most popular employee benefit, survey findings show.

The reason for this popularity is clear: Just 17% of respondents believe they could afford coverage on their own, even if their employer gave them the money now spent on health insurance. Those who say they or a family

member has a serious illness or chronic condition are less likely to express confidence in their ability to afford coverage.

Meanwhile, Americans are becoming increasingly skeptical about the future of the country's health care system. Just 14% rate the health system as excellent or good, while 60% rate it as fair or poor. Since 1998, the percentage of survey respondents who rate the system as poor has doubled to 30%.

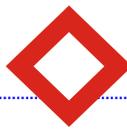
### Changing habits

A large portion of respondents report changing the way they use health care in order to save costs. Eighty-one percent use generic drugs when available, and 74% are trying to take better care of themselves. Many have begun to explore treatment options and costs more carefully with their doctors (58%) and to visit the doctor only for serious conditions or symptoms (57%), while 45% percent have delayed going to the doctor.

Less popular ways of combating rising health care costs include switching to over-the-counter drugs (40%), looking for less expensive health care providers (28%), looking for cheaper health insurance (26%) and saving money in a flexible spending account (25% of working respondents).

Nevertheless, respondents express limited faith in the ability of "consumer-driven health care" to make a difference in the quality of their health care. About half (49%) say paying more health costs directly, instead of through an insurance company, would make no difference in the quality of health care, while 27% say it would worsen quality.

What's more, many respondents appear not to want the extra decision-making burden that comes with consumer-driven plans. Two-thirds (67%) say they simply follow the doctor's advice instead of researching alternatives.



"American satisfaction with the quality of health care provided today remains high," concludes Paul Fronstin, senior health analyst at EBRI. "But there is clearly growing dissatisfaction with the health care system as a whole, and Americans are increasingly worried about their ability to afford and receive quality care in the future."

### Retirement cutbacks

A separate survey from American Express Retirement Services supports EBRI's

findings that Americans are cutting back on retirement savings to pay for today's health care expenses.

The nationally representative survey of 972 households discovered that 40% of workers plan to decrease their overall savings and investing in response to rising health costs. That figure is up slightly from 38% in 2003. Thirty-one percent, up from 29% in 2003, said they'd consider reducing their regular retirement plan contributions if they experienced significant jumps in health care costs. One in four of these respondents said they'd definitely trim contributions.

Among those who would cut retirement contributions, 53% said they would make a modest reduction of 1% to 2%, while 14% would cut back 3% to 4%. The proportion willing to make a cutback of 5% or more reached 34%, up sharply from 25% in 2003.

"We're seeing employees weighing their long-term retirement security against the near-term cost increases for current health care coverage," says Kellie Richter, vice president of financial education and planning services for American Express. "As the survey results show, this becomes a bit more difficult each year, with no relief in sight for American workers."

## Decisions, decisions

Average amount of time employees spend making benefit enrollment decisions:

0-30 minutes 37%

31-60 minutes 26%

1-2 hours 19%

2-3 hours 8%

3+ hours 10%



Source: 2003 MetLife Employee Benefits Trend Study

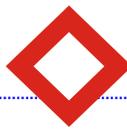


Bennett THE CHRISTIAN SCIENCE MONITOR

## NINTH CIRCUIT CASES

(Ninth Circuit cases can be found at <http://www.ca9.uscourts.gov/ca9/neopinions.nsf>)

*United States v. Gordon*, No. 03-10322 (December 30, 2004). "This case presents the disappointing story of a promising federal appellate law clerk gone bad. Robert Gordon, a graduate of Stanford Law School and a former law clerk for one of our colleagues, a judge on the U.S. Court of Appeals for the Seventh Circuit, embezzled millions of dollars in cash and stock from his employer, Cisco Systems.



Following his guilty plea conviction for wire fraud, 18 U.S.C. § 1343, and insider trading, 15 U.S.C. § 78j(b), Gordon appeals the district court's final order of restitution. The district court imposed restitution in a total amount of \$27,397,206.84 under the Mandatory Victims Restitution Act of 1996 ("MVRA"), Title II, Subtitle A of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, codified in relevant part at 18 U.S.C. §§ 3663A, 3664 (1996). Gordon does not dispute the entire amount of the restitution order but contends that certain portions should not be included. At issue on appeal are the restitution order's award of \$12,593,902.23 for embezzled shares from one company; prejudgment interest of \$2,424,913.32; and reimbursable investigation costs totaling \$1,038,477.00."

*United States v. Bad Marriage*, No. 03-30404 (December 30, 2004). "This case is a powerful indictment of the criminal justice system. Our social and penal policies are failing to alleviate alcohol abuse on Indian reservations and the crime to which it gives rise. These problems cry out for treatment, not simply more prison time. Vernon Lee Bad Marriage, Jr. ("Bad Marriage") is a member of the Blackfeet Indian Tribe with an extensive history of alcohol abuse and a lengthy criminal record. He was convicted of assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 113(a)(6) and 1153(a), and sentenced under the U.S. Sentencing Guidelines. The District Court departed upward from the applicable sentencing range on the grounds that Bad Marriage's criminal history score did not adequately reflect the seriousness of his past criminal history and the likelihood that he would commit other crimes. Because we hold that the upward departure was not justified under the facts of this case, we

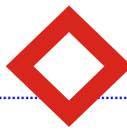
reverse and remand for resentencing. "

*Boyd v. Newland*, No. 03-17098 (December 29, 2004). "In this case, the California courts denied Petitioner's Batson motion; denied his request for a free transcript of the entire voir dire for use on appeal; and enhanced his sentence because of a nonjury juvenile adjudication. We must ask whether any of those rulings was contrary to, or unreasonably applied, clearly established federal law as determined by the Supreme Court. Because we answer 'no,' we affirm the district court's denial of habeas corpus relief.

*Docken v. Chase*, No. 03-35187 (December 29, 2004). "Montana state prisoner Leland F. Docken brings this federal habeas petition challenging, as here pertinent, the Montana parole board's refusal to provide him with annual review of his suitability for parole. The district court dismissed this claim as not properly cognizable under the federal habeas statute, 28 U.S.C. § 2254. Because such parole-based claims — which may, but will not necessarily, affect the duration of a prisoner's confinement if meritorious — are cognizable via habeas, we reverse the district court's dismissal of Docken's petition and remand for further proceedings not inconsistent with this opinion."

*Jespersen v. Harrahs Operating Co. Inc.*, No. 03-15045 (December 28, 2004). "Plaintiff Darlene Jespersen, a bartender at Harrah's Casino in Reno, Nevada, brought this Title VII action alleging that her employer's policy requiring that certain female employees wear makeup discriminates against her on the basis of sex.

The district court granted summary judgment for Harrah's, holding that its policy did not constitute sex discrimination because it imposed equal burdens on both sexes. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm."



*Lambert v. Blodgett*, No. 03-35081 (December 28, 2004). This case requires us to interpret and apply the standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and to determine the meaning of the phrase ‘adjudicated on the merits,’ which acts as a prerequisite to AEDPA review.

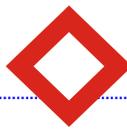
Because we conclude that the district court erroneously disregarded the Washington state courts’ factual findings and conclusions of law, we reverse the district court’s decision granting habeas relief on the ground that Lambert was denied the effective assistance of counsel and his plea was not knowing, voluntary and intelligent. We otherwise affirm.”

*United States v. Blanco*, No. 03-10390 (December 27, 2004). “After a jury trial, Rene Blanco was convicted of various drug crimes. Blanco appeals his conviction on two primary grounds. He contends that the government failed to disclose material impeachment evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). He further contends that a flight instruction should not have been given to the jury. We hold that the government wrongly suppressed impeachment information about a confidential informant in violation of *Brady* and *Giglio*. We do not know whether there is additional *Brady* and *Giglio* material that the government has still not turned over to the defendant. We remand with instructions to the district court to order the government to reveal all information in its possession concerning the confidential informant. To the degree necessary and appropriate, the district court may inspect this material in camera.”

*United States v. Luong*, No. 03-10091 (December 23, 2004). This appeal requires us to decide whether conviction (or acquittal) on RICO conspiracy and substantive charges bars subsequent prosecution for a predicate act when the predicate act is itself a conspiracy. In *United States v. Saccoccia*, 18 F.3d 795, 798 (9th Cir. 1994), we held that a defendant may be prosecuted for a RICO conspiracy and later for the predicate offenses that constituted a pattern of racketeering activity. We now conclude that the same rule applies when the predicate offense is a conspiracy. As we have jurisdiction over this interlocutory appeal, 28 U.S.C. § 1291; *Abney v. United States*, 431 U.S. 651, 659 (1977), we affirm.”

*United States v. Wilson*, No. 03-30089 (December 23, 2004). “Jay Wilson appeals his conviction and sentence in the federal district court for drug charges related to a conspiracy to import, distribute, and possess MDMA (ecstasy). The district court rejected, prior to trial, Wilson’s claim that the government had promised him complete immunity in return for his cooperation in dismantling the international conspiracy in which he was involved; and at his sentencing, the court denied him credit for acceptance of responsibility. Because the district court’s rulings were free of error, we affirm both Wilson’s conviction and his sentence.”

*United States v. Souza*, No. 04-10228 (December 16, 2004). Appellant Robert K. Souza was caught forcefully entering, and removing articles from, a parked vehicle within the boundaries of the Hawaii Volcanoes National Park. Souza pled guilty to Unauthorized Entry into a Motor Vehicle (“UEMV”), in violation of Haw. Rev. Stat. § 708-836.5 (2003), as assimilated into federal law by the Assimilative Crimes Act (“ACA” or “the Act”), 18 U.S.C. § 13. Souza asserts that his conviction was improper because applicable



federal statutes govern, thereby precluding the Hawaii statute from being assimilated into federal law. We have jurisdiction, and we affirm.”

*United States v. Afshari*, No. 02-50355 (December 20, 2004). “We review the constitutionality of a statute prohibiting financial support to organizations designated as ‘terrorist.’ Leaving the determination to the Executive Branch, coupled with the procedural protections and judicial review afforded by the statute, is both a reasonable and a constitutional way to make a determination of whether a group is a ‘foreign terrorist organization.’ The Constitution does not forbid Congress from requiring individuals, whether they agree with the Executive Branch determination or not, to refrain from furnishing material assistance to designated organizations during the two year period of designation.”

*Kesser v. Cambra*, No. 02-15475 (December 20, 2004). “In this appeal, we address a Batson-related question in the context of habeas corpus review: Whether the state appellate court erred in undertaking a ‘mixed motive’ analysis to uphold the constitutionality of three peremptory challenges, when the state prosecutor offered ethnic-neutral reasons for exercising those challenges against three Native American veniremembers, together with an ethnic-based reason for challenging one of those veniremembers. Applying AEDPA’s deferential standard of review, we hold the state court’s ‘mixed motive’ analysis was not contrary to or a clear misapplication of Batson.”

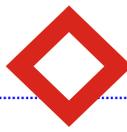
*Grotemeyer v. Hickman*, No. 02-17150 (December 15, 2004). “The facts in this case are peculiar, at least to our eyes, to the point of being seriously bizarre. That the

facts are bizarre is significant to our analysis. The victim of the crimes was a young woman who had just moved into an apartment in San Francisco. By the end of the afternoon, the movers had put all her goods into the apartment, including her baby grand piano. Relaxing from the stress of moving, she began playing a classical piece on her piano.

The tenant downstairs from her apartment came upstairs to see her, but not to welcome her. Instead, he complained about the noise. As they were discussing her piano playing, not amicably, the petitioner stepped out of his apartment down the hall from the victim’s and said he would be nailing his apartment door shut. The music-hater (actually he was not a music-hater—he testified that the music ‘sounded nice, but it was very loud’) testified that the petitioner said, ‘Do you mind if I pound this nail in my door?’ The victim looked kind of puzzled and said, ‘No.’ The music-hater and the victim exchanged looks and then continued talking about the piano.

After the music-hater’s complaint about the noise, the victim felt deflated about playing the piano, so she went out and got some dinner to bring back to her apartment. As she walked down the hall, the petitioner ‘was actually nailing his door shut.’ He told the victim her piano playing was pretty. She thanked him and invited him to stop by sometime to have tea or coffee. She then ate alone in front of the television, having locked her door with the deadbolt, and went to sleep.

As the victim subsequently discovered, the deadbolt did not work. She had noticed earlier that the doorknob lock did not work, but had no inkling that the deadbolt did not work either. Around two in the morning, she was awakened by the petitioner (the door-nailer) in her apartment. She asked him what he was doing there. He said, as he was ‘strolling across



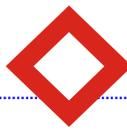
the living room' toward her bedroom, 'he was going to fuck' her. She strongly voiced her refusal, but he said she had 'invited' him. She told him 'not for this.' He threw her onto her bed. She tried to fight him off, all the while screaming every expletive she could think of. She had no phone yet in her new apartment, so she was hoping her loud voice would rouse a neighbor. He kept telling her that she had invited him, so he had 'the right to be there.' He scratched and bruised her face and breasts, ripped the crotch open on her sweatpants, and ripped her shirt, pants, and bra. Then he climbed on top of her and stuck his finger in her anus. She bit him and squeezed his testicles as hard as she could.

Fortunately, the victim's screaming roused the music-hater. When putting tissue paper in his ears did not suffice to eliminate the noise, the music-hater pounded on the ceiling with a broomstick to tell them to quiet down. At that point, the petitioner got up and walked out. The victim immediately barred her door with a piece of wood and piled-up boxes as well as the ineffectual locks. Meanwhile, the music-hater had put on his overcoat and gone up the fire escape. He did not know she had barred her door, but he explained that going up the fire escape was a shorter distance than going all the way down the hall, up, and all the way back down the other hallway above him. When he got to the victim's window, he tapped on it to express his desire for quiet. The victim heard a frightening tapping on her window (not expecting visitors by that route). The music-hater said she turned from where she was piling boxes against her door, and looked at him, 'her eyes . . . big like flying saucers.' It then occurred to him that she would think he was trying to break in. At first the victim couldn't tell who it was, and she was 'afraid it was going to be more of the

same.' She ran over to the window yelling that somebody had tried to rape her, and she found the music-hater, wrapped in an overcoat (he had no pants on), standing on her fire escape. She could tell he was trying to speak to her through the closed window, so she went to another partially opened window to hear what he was saying. He asked what was going on, and she told him the doornailer had broken into her apartment and tried to rape her. He went around to her door, which she could only open a little, but then he went back to the fire escape out of fear that the door-nailer might see him at the door. Then, deciding that staying on the fire escape was probably 'not the gentlemanly thing to do,' he went back to the door and invited her down to his apartment to call the police. They crossed through her apartment and went down the fire escape to use the music-hater's phone to call the police. A policeman came to the apartment building in answer to the victim's call. As he was waiting to be buzzed in, the petitioner walked in with two male transvestite prostitutes, one of whom the police officer had dealt with in the past (the male transvestite prostitutes, he testified, gather a half block away).

Rather than arrest the prostitutes, he left them to respond to the more urgent rape call, and found the victim upset, crying hysterically, and very frightened. After talking to the victim, the policeman went to the petitioner's apartment and arrested him. The rape victim turned down the police officer's suggestion that she go to the hospital because she did not think she could afford the cost of medical treatment. Later, the victim found the petitioner's belt in her front entryway.

The petitioner told a very different story at trial. He testified that he was severely injured in a car accident, which put him in a coma, required that a shunt be placed in his brain, and left him with a speech impediment. He met



the victim when she and the music-hater were arguing in her doorway. He had broken into his own apartment, wrecking the lock, a week before. After he told the victim he would be nailing his door shut and that he hoped it would not bother her, he told her that the music was wonderful. Later that night, just before midnight, he saw her again when she came into his apartment. She pushed open his broken door, and stared at him lying in his bed, masturbating. Then she invited him back to her apartment to smoke some crack cocaine.

According to the petitioner, he and the victim smoked two or three pieces of crack. Afterward, she asked him to rip her clothes off. He testified that he was bisexual, preferring men, but obliged her (for her pleasure, not his), and obliged her again when she later asked him to insert a finger in her anus. Although she did not explain why she wanted him to do these things, he said his experience had been that people who smoke crack usually like that kind of thing. Then ‘she started freaking’ and bit him, so he left. He testified, ‘I was still kind of high. I wanted to get somebody I could relate to, and be comfortable with. . . . [And that’s] a man.’ So he left the building to pick up the male transvestite prostitutes.

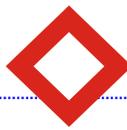
When recalled to the stand, the victim denied that she had furnished any drugs to the petitioner or taken any herself that day or anytime that week, though she admitted to using speed during previous months. The defense then put on a toxicologist to testify about methamphetamine use and its effects. The prosecutor put on a police officer who testified that the petitioner had told him, ‘I don’t want to go to prison. I’m sick. I just got out of the St. Mary’s Hospital substance abuse program.’ The jury convicted the petitioner, Grottemeyer, of first degree

burglary, assault with intent to commit sodomy, sodomy, and false imprisonment.”

*United States v. Orr Ditch Water Co.*, No. 03-16941 (December 14, 2004). “In this case, we consider whether a Nevada statute providing for an automatic stay of the State Engineer’s decisions applies to federal proceedings under the Orr Ditch Decree. Because we find that Nev. Rev. Stat. § 533.450 is an integral part of Nevada water law rather than a generally applicable rule of civil procedure, we conclude that it does.”

*United States v. Pearson*, No. 03-30441 (December 14, 2004). “His appeal is limited to the denial of his motion for a judgment of acquittal regarding the crimes set forth in Count Four and Count Five of the indictment. He alleges that the evidence is insufficient to demonstrate that he possessed methamphetamine with the intent to distribute it to the woman with whom he cohabited because they attempted to acquire it to consume it jointly and simultaneously. He also maintains that his conviction of using a firearm in relation to a drug offense may not stand because of the insufficiency of the evidence that he attempted to possess methamphetamine with the intention to distribute it. We affirm because we conclude that the evidence is sufficient to demonstrate that he attempted to possess methamphetamine to distribute it to his live-in companion.”

*United States v. Hamilton*, No. 03-50179 (December 13, 2004). “Defendant-Appellant Ronald Hamilton, who conditionally pled guilty to a federal drug trafficking offense, appeals his conviction. He argues that the district court’s denial of his motion to suppress evidence obtained from a search of his car was in violation of his Sixth Amendment right to counsel, because at the suppression hearing the district court permitted the government to conduct redirect examination of the searching



officer concerning Hamilton with neither Hamilton nor his counsel present. We agree and therefore reverse.”

*Shelby v. Bartlett*, No. 03-35847 (December 13, 2004). “This appeal raises the issue of whether the one-year limitation period set forth in 28 U.S.C. § 2244(d)(1) applies to a 28 U.S.C. § 2254 habeas corpus petition challenging a state prison administrative disciplinary decision. Eric Shelby admits that § 2244’s limitation period applies to habeas petitions challenging state court judgments, but he argues that the limitation period does not apply to petitions challenging prison administrative disciplinary decisions. We disagree. We hold that § 2244’s one-year limitation period applies to all habeas petitions filed by persons in ‘custody pursuant to the judgment of a State court,’ 28 U.S.C. § 2244(d)(1), even if the petition challenges an administrative decision rather than a state court judgment.”

*United States v. Lopez-Patino*, No. 03-10684 (December 10, 2004). “This case principally presents the question whether a conviction under Arizona’s child abuse statute circa 1990 qualifies as a categorical crime of violence for purposes of the federal Sentencing Guidelines. We hold that it does not. However, applying this circuit’s modified categorical approach, we hold that the government adequately proved that the appellant’s Arizona conviction in fact qualified as a crime of violence.”

*United States v. Fredman*, No. 03-35808 (December 10, 2004). “Frank Fredman appeals the district court’s denial of his habeas corpus petition. Fredman argues that he was denied effective assistance of counsel because of his counsel’s decision to admit in opening statement to some of Fredman’s criminal wrongdoing. We conclude that the

‘confession and avoidance’ tactic used by counsel does not constitute ineffective assistance of counsel. Because Fredman does not show that his counsel was constitutionally ineffective, we affirm the district court’s denial of his habeas petition.”

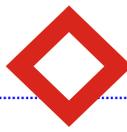
*Mitleider v. Hall*, No. 03-56097 (December 10, 2004). “Floyd A. Mitleider appeals the district court’s denial of his habeas corpus petition. Mitleider claims that race motivated the prosecutor’s peremptory strike of four African-Americans from his jury in violation of the equal protection principles articulated in *Batson v. Kentucky*, 476 U.S. 79 (1986). We have jurisdiction pursuant to 28 U.S.C. § 2253. The trial court followed the three steps set forth in *Batson* and determined that the prosecutor’s reasons for the challenges were race neutral. The trial court’s determination was affirmed on appeal by the California Court of Appeal. As the state courts did not unreasonably apply clearly established federal law or unreasonably determine the facts in denying Mitleider’s *Batson* challenge, we affirm.”

**WORKPLACE PERKS**

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## Internet Frontiers: How I Came to (Love) Blogging By Bruce MacEwen

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

Here is the story of one lawyer's introduction to blogging and his subsequent addiction.

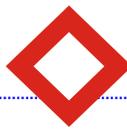
The only essential characteristic that all blogs share is that entries appear chronologically — and that they are the anarchic antithesis of mainstream media. Blogs are the platform of choice for people moved to share their interests (or obsessions) with the world. You can find blogs on virtually any topic: The Hobart-Sydney yacht race, anyone? Estimates vary wildly, but experts say about 3 million blogs have been launched.

The most popular early blog was Slashdot (<http://slashdot.org>), started in 1997, with its "news for nerds" slogan. Blogs exploded last year, with the rise of political commentators on sites like DailyKos ([www.dailykos.com](http://www.dailykos.com)) and Instapundit ([www.instapundit.com](http://www.instapundit.com)).

My first exposure to the legal "blogosphere" came about a year ago when I ran across "excited utterances," covering knowledge management ([www.excitedutterances.blogspot.com](http://www.excitedutterances.blogspot.com)), from Joy London, head of "know-how" at Allen & Overy in New York. She lists an extensive roster of other law-related blogs, and my immersion began. There are blawgs on everything from jurisprudence, to IT, to the Supreme Court ([www.goldsteinhowe.com](http://www.goldsteinhowe.com)) to the improbable: "The [Rule] 10b-5 Daily" at [www.the10b-5daily.com](http://www.the10b-5daily.com), from Lyle Roberts, a partner at Wilson Sonsini Goodrich & Rosati.

The first lesson I learned is that quality is all: Insightful content and fresh thinking, plus a felicitous turn of phrase, keep readers.

More than a bit intrigued, and with my



competitive juices aroused, I confronted the second hurdle: The toughest question about launching a blog is, "What specifically is it that you plan to write about?" The challenge was to find a subject area that: a) was not so broad that I could never make a dent (the evolution of the profession), b) was not so narrow that I would attract only obsessives (the etiquette of voicemail), and, above all, c) made me passionate to express my views.

If I had any hope of attracting readers, it would help to avoid territory already thoroughly occupied by capable incumbents.

To answer this question, I did what any highly motivated professional faced with a serious obstacle does: procrastinate. I spent time exploring the logistics of setting up and running a blog. Just as there's a wide choice of html editors, there are competing blog software platforms. Familiar tradeoffs arise: Free or paid-for; turn-key hosting or install-it-yourself; fast and easy now, versus robust and flexible later.

Ultimately the choice is a matter of taste, but I went with Movable Type ([www.movabletype.org](http://www.movabletype.org)), a sophisticated and almost infinitely customizable platform. By the time I'd wrestled my Movable Type installation to the ground, I had my topic: The economics of law firms. I was an econ major undergrad and have always been passionate about the business side of firms, so it came naturally, and as luck would have it, no one else yet had "owned" the space.

Now I faced the existential question: Would I be any good? Would I have anything original to say? Where would I find the time? To safeguard my self-esteem, I decided the prudent way to begin would be in private (think theatrical try-outs on the road). I started my blog in stealth mode, telling no one but my wife, posting entries tentatively.

As I became comfortable and found my "voice," blogging became a welcome part of the week's flow of activities, and I began enjoying the expressive outlet. Something else happened: I became more knowledgeable about the business of law firms, discovered I had strong opinions, and took pleasure in the discipline of reading widely, thinking critically, and attempting to state my view in an engaging fashion. Last spring I went public with "Adam Smith, Esq." [www.AdamSmithEsq.com/blog](http://www.AdamSmithEsq.com/blog), named in honor of the 18th-century Scottish economist who is the godfather of capitalism. I cover leadership, compensation, strategy, finance, globalization, marketing, IT, etc.

I e-mailed other legal bloggers inviting them to take a look, and in no time they provided cross-links. My site traffic started to climb, to nearly 20,000 visits a month.

What, then, have I gotten out of it? Isn't it all just an intellectual stretching exercise, one in which I will never know or hear from 99 percent of my readers? I think not. I have made valuable connections in the real world.

For example, I heard from associate professor William Henderson, of the Indiana University School of Law at Bloomington, and we are now collaborating on an ambitious research project into the characteristics and evolution of the business of large law firms. I will guest lecture in his course on "Law Firms as Business Organizations" this year.

The site was featured in The Wall Street Journal and I'm going to this year's "Knowledge Counsel Forum" in New York as blogger-in-residence. I get a steady flow of e-mail from managing partners, executive directors, lawyers, heads of IT and finance, professors, students, consultants and others, kicking off intriguing conversations.

Back when the internet was young, a commonplace observation was that it would

