

# THE PUBLIC LAWYER

## MARCH, 2005

Mark your calendars for the 2005 Nevada Civil Government Attorneys Conference:

\*To increase awareness of and renew interest in the State Bar Public Lawyers Section, any Section member may attend the 2005 conference for FREE, while non-members will be charged a \$135 registration fee. REMEMBER TO JOIN OR RENEW YOUR MEMBERSHIP in the Public Lawyers Section when paying your bar dues this month.

\*The conference will be an annual forum for networking and education on the critical issues facing counsel representing federal, state, municipal, county or other public entities.



NEVADA ADVISORY COUNCIL  
FOR PROSECUTING  
ATTORNEYS  
&  
STATE BAR OF NEVADA  
PUBLIC LAWYERS SECTION

May 4 – 6, 2005

Casa Blanca Hotel Resort – Mesquite, NV  
10 credits - including 2.0 ethics

**Wednesday, May 4, 2005**

1:00 – 1:25 p.m. – Registration

1:25 – 1:30 p.m.

**Welcome and Introductions**

Brett Kandt, Executive Director

Nevada Advisory Council for Prosecuting Attorneys  
and Chair, Public Lawyers

1:30 – 2:45 p.m.

**Nevada's Open Meeting Law Roundtable**

Neil Rombardo, Sr. Deputy Attorney General

2:45 – 3:00 p.m. – **Break**

3:00 – 4:00 p.m.

**Nevada's Open Meeting Law (continued)**

**Ethical Considerations**

**Thursday, May 5, 2005**

8:30 – 9:00 a.m. – Continental Breakfast

9:00 – 10:00 a.m.

**Amendments to the Nevada Rules of Civil  
Procedure**

Robert Gower, Deputy District Attorney

Mike Foley, Deputy District Attorney

10:00 – 10:15 a.m. – **Break**

10:15 – 11:45 a.m.

**Employment Law & Litigation**

Carie Torrence, Deputy City Attorney

11:45 a.m. – 1:30 p.m.

**Public Lawyers Section Luncheon**

1:30 – 2:30 p.m.

**Construction Contracts & Litigation**

Lee Thomson, Deputy D.A.,

Clark County

2:30 – 2:45 p.m. – **Break**

2:45 – 4:00 p.m.

**Ethics & Legislative Update**

Brett Kandt, Executive Director,

Nevada Advisory Council for Prosecuting  
Attorneys

**Friday, May 6, 2005**

8:30 – 9:00 a.m. – Continental Breakfast

9:00 a.m. – 1:00 p.m.

(Includes 15 minute break & lunch)

**Bioterrorism Legal Preparedness Exercise**

Glade Myler, Senior Deputy Attorney General

Nevada Department of Justice



-----REGISTRATION FORM-----

TUITION 2005 Gov't Civil Attorneys

Early-bird (paid 4/29/05 or before) \_\_\_\_\_ \$135 Public Lawyer Section Members \_\_\_\_\_ Free
Standard (paid after 4/29/05) \_\_\_\_\_ \$160 I would like to join Public Lawyers Section \_\_\_\_\_ \$15
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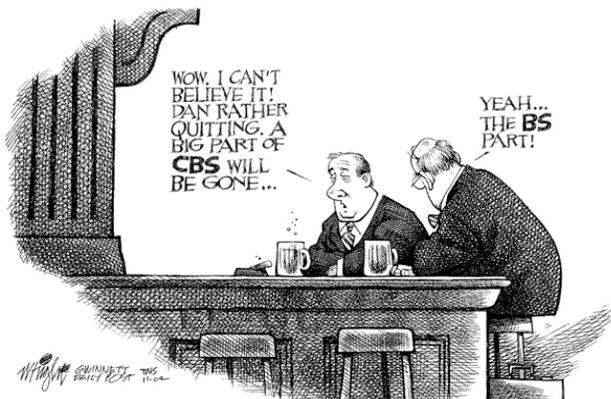
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## NEVADA CASES

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

*Reno Hilton Resort Corp. v. Verderber*, 121 Nev. Adv. Op. No. 1 (February 24, 2005).

“This is an appeal from a district court order denying a new trial as to Phase I of a bifurcated class action. Respondent has moved to dismiss the appeal for lack of jurisdiction, contending that an order denying a new trial is not appealable when, as in this case, it is interlocutory and does not follow the final judgment. Appellants oppose the motion and argue that the language in the rule permitting an appeal from an order granting or denying a new trial is unqualified, and so jurisdiction is proper. We conclude that the rule permits an independent appeal only from a post-judgment order granting or denying a new trial, and so we dismiss this appeal.”

### Current Members of the Standing Committee on Judicial Ethics and Election Practices, as well as the Judicial Discipline Commission

Standing Committee Chairman: Gordon DePaoli (Woodburn and Wedge, Reno)

Standing Committee Vice-Chairman: Kathleen Paustian (Allf, Paustian and Szostek, Las Vegas)

Other attorney members: Sally Armstrong (Downey Brand, Reno), Valerie Cooney (VARN, Carson City), George Foley (Pearson, Patton, Shea, Foley and Kurtz, Las Vegas), R. Gardner Jolley (Jolley, Urga, Wirth Woodbury & Standish, Reno), Christine Munro (Reno), Thomas Patton (Carson City), Thomas Perkins (Minden), Dan Reaser (Lionel, Sawyer & Collins, Reno), Bruce Shapiro (Las Vegas), Thomas Sheets (Las Vegas).

Judicial Discipline Chairman: Steve Chappell (Lay member from Minden)

Judicial Discipline Vice-Chairman: Daveen Nave (Lay member from Las Vegas)

Attorney members: Karl Armstrong (Las Vegas) and James Beasley (Reno)

Alternate attorney members: William Hoffman (Las Vegas) and Wayne Chimarusti (Carson City)

### Supreme Court Hears Eminent Domain Case

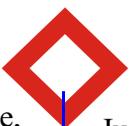
<http://www.nlc.org/Newsroom>

In cases where the power of eminent domain is used to take private property for economic development, should cities and towns adhere to some type of minimum standard to determine public benefit? That issue seemed to be at the heart of questions posed by Justices of the Supreme Court of the United States last week when they heard arguments in case of *Kelo v. City of New London*.

While generally voicing support for the use of eminent domain to bolster depressed economic neighborhoods, several of the Justices probed the standards that are used. “Virtually every taking has a public benefit,” said Justice David H. Souter. “Why must there be a limit?”

The *Kelo* case was brought by several property owners who are challenging the use of eminent domain by the city of New London, Conn., to take their property as part of a proposed 90-acre redevelopment area.

For more than 15 years, New London has suffered the loss of more than 1,500 jobs as major industries closed. After years of planning, public hearings and outreach, city officials approved the construction of a waterfront development project near historic Fort Trumbull. The four-phase plan will



include retail, residential and commercial space, a waterfront hotel and conference center, marinas and other public amenities. The project is expected to bring up to 2,300 jobs to unemployed New London residents and as much as \$1.2 million in tax revenue for improved city services.

The National League of Cities filed a “friend of the court” brief in support of New London, recognizing that any change to the current use of eminent domain could have serious implications for cities, towns and states working to improve economic development and revitalize aging neighborhoods.

Justice Sandra Day O’Connor, acting as presiding judge due to the illness of Chief Justice William H. Rehnquist, asked, “In a city that is suffering from an enormous lack of jobs ... is there not a public use benefit?” When O’Connor asked Scott G. Bullock, lead counsel for the plaintiffs, Susette Kelo and other homeowners, what test he would apply in eminent domain cases, Bullock said, “The test should be that the government shouldn’t take private property to give over to another private landowner.”

Wesley W. Horton, counsel for the City of New London, refuted this suggestion. “Purely taking from one person to give to another person is not a public use,” he said, citing a New Jersey court decision that rejected an effort by developer Donald Trump to use the power to build a parking lot. “But this development is a part of a long-range plan by the city,” Horton said, “to be developed in phases with due public processes.”

Horton argued that there shouldn’t be a higher standard for cities that use eminent domain for economic development than for utilities or for transportation projects.

Justice O’Connor appeared to concur, questioning whether the courts should second-guess the duly elected legislature in these instances.

Justice Anthony M. Kennedy noted that any economic development test “would have been easily met” in the Kelo case, given the “distressed community status” of New London. He suggested that a test might only be relevant when one person’s private property is given to another.

Justices Kennedy and Stephen G. Breyer also asked Horton if owners should somehow receive a premium price for their property as compensation for condemnation in economic development proceedings, signaling that the issue of ensuring “just compensation” — not ending the use of eminent domain for economic development — might be an area for judicial comment.

In the Kelo case, however, homeowners were not contesting the prices offered for their homes by the city.

At a news conference on the steps of the Supreme Court immediately following the argument, NLC President Anthony A. Williams, mayor of Washington, D.C., urged continued support for retaining the current flexibility in using eminent domain.

“The prudent use of this power to enable cities and towns across America to revitalize communities, create jobs and improve housing must be retained,” said Williams. “Clearly it is not a power to be used lightly, but when part of a legislative process involving citizen input and discussion, it is one of the most important tools city officials have to rejuvenate their neighborhoods.”

Williams said that the redevelopment of the Skyland Shopping Center in southeast Washington, could be in jeopardy if the Court alters the power of eminent domain. “This could bring 300 jobs and \$3.3 million in new tax revenues annually.

“Where would Baltimore be without the Inner Harbor, Kansas City without the Kansas Speedway, Canton, Mississippi, without its new Nissan plant? The people of

New London should have their chance to grow, to get good-paying jobs, as well,” he said.

Williams also noted that if the power is overturned or limited in some way, it would seriously harm a city’s ability to attract private developers to aging neighborhoods. “Projects could get held up in the courts for years; developers will simply go to undeveloped areas where it is cheaper to build, creating more sprawl. It is critically important that the Court continue to allow us to use this important power.”

The Justices are expected to rule in the case by summer.

## NINTH CIRCUIT CASES

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

*Skokomish Indian Tribe v. United States*, No. 01-35028 (March 9, 2005). “Can an Indian tribe bring claims against the United States under the Federal Tort Claims Act for violation of a treaty, or against a city and a public utility under a treaty and 42 U.S.C. § 1983?”

Equitable relief, however, merely ensures compliance with a treaty; that is, it forces state governmental entities and their officers to conform their conduct to federal law. The Tribe here would have us go further and hold that it may recover monetary damages against the City and TPU for alleged treaty violations. We find no basis for doing so.

Recognizing that ‘[s]ection 1983 was designed to secure private rights against government encroachment,’ as well as the ‘longstanding interpretive presumption that “person” does not include the sovereign,’ *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000), we conclude that the Tribe may not assert its treaty-based fishing rights under section 1983.”

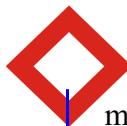
*Hayes v. Brown*, No. 99-99030 (March 7, 2005). “In this case, we consider whether a

prosecutor’s knowing presentation of false evidence and failure to correct the record violate a criminal defendant’s due process rights. We conclude that such actions violate due process, and we therefore reverse the district court’s denial of the petition for a writ of habeas corpus.”

*Moreno v. Baca*, No. 02-55627 (March 7, 2005). “Appellants challenge the district court’s order on two fronts. Their primary contention is that Moreno had no Fourth Amendment rights that could have been violated by virtue of the parole condition allowing warrantless searches of his person, residence, and property. They further assert that the arrest and search were justified by the parole search condition and the outstanding arrest warrant, despite the fact that the deputies did not know of either fact at the time. We reject both these contentions.”

*Riggs v. Fairman*, No. 02-55185 (March 7, 2005). “Following a jury trial, California state prisoner Michael Wayne Riggs filed a habeas petition seeking to set aside his conviction on the basis that he was denied effective assistance of counsel during the plea bargaining stage of his criminal prosecution. The district court ruled that Riggs’ attorney’s failure to inform him that California’s ‘three strikes’ law might apply to his case constituted ineffective assistance of counsel. The district court vacated Riggs’ conviction and sentence and ordered the parties to return to the pre-error negotiating stage. The court declined Riggs’ request that the court order the government to resurrect its original plea offer. Because the remedy fashioned by the district court was within its discretionary bounds, we AFFIRM.”

*MetroPCS, Inc. v. City and County of San Francisco*, Nos. 03-16759 (March 7, 2005). “MetroPCS brought the instant action in the District Court for the Northern District of California, alleging that a decision by the San Francisco Board of Supervisors denying



MetroPCS permission to construct a wireless telecommunications antenna atop a city parking garage violated several provisions of the Telecommunications Act of 1996 (TCA). Specifically, MetroPCS alleged that the Board's decision (1) was not 'in writing' as required by the TCA, (2) was not supported by substantial evidence, (3) constituted unreasonable discrimination among providers of functionally equivalent wireless services, (4) prohibited or had the effect of prohibiting the provision of wireless services and (5) was improperly based on environmental concerns about radio frequency (RF) emissions. Both parties moved for summary judgment, and the district court granted the City's motion for summary judgment as to all claims except the prohibition claim, ruling that material questions of fact remained as to whether the Board's decision had the effect of prohibiting the provision of personal wireless services. Both parties now appeal the ruling below, and we affirm in part and reverse in part the district court's decision."

*Obrey v. Johnson*, No. 03-16849 (March 4, 2005). "This appeal requires us to clarify and apply the harmless error test applicable to civil trials in our circuit.

Thus, when reviewing the effect of erroneous evidentiary rulings, we will begin with a presumption of prejudice. That presumption can be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict even if the evidence had been admitted."

*Leonel v. American Airlines, Inc.*, No. 03-15897 (March 4, 2005). "Here, it is undisputed that American's offers were subject to both medical and nonmedical conditions when they were made to the appellants and the appellants were required to undergo immediate medical examinations. Thus the offers were not real, the medical examination process was premature and American cannot penalize the appellants for failing to disclose their HIV-positive status — unless the company can establish that it could not reasonably have completed the background checks before subjecting the appellants to

medical examinations and questioning. It has not done so."

*United States v. Woods*, No. 03-10313 (March 4, 2005). "Defendant-Appellant Brian Keith Woods appeals the district court's denial of his motion for a new trial based on newly discovered evidence as untimely under an amended version of Fed. R. Crim. P. 33. Woods contends that: (1) retroactively applying the filing requirements of the amended Rule 33 violates the *Ex Post Facto* Clause; and (2) the district court erred by applying amended Rule 33, instead of the version of the Rule that was in effect when he was convicted, to determine whether his motion was untimely. We have jurisdiction under 28 U.S.C. § 1291, and we reverse."

*United States v. Rodriguez-Preciado*, No. 03-30285 (March 4, 2005). "Rodriguez-Preciado appeals from his conviction for various narcotics-related offenses. He argues that the district court improperly denied his pre-trial motion to suppress evidence obtained from his person, his motel room, and his vehicle, as well as statements that he made in the motel room and during a subsequent two-day interrogation. In support of these claims, he contends that the officers did not obtain a valid consent to enter and search the motel room, and that they began a custodial interrogation of him in the motel room without giving the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966). Furthermore, he argues he did not validly waive his right to remain silent after he was eventually given *Miranda* warnings, the warnings became 'stale' and should have been re-administered at the outset of the second day of interrogation, and the officers' failure to advise him of his right under Article 36 of the Vienna Convention requires suppression. He also contends the officers did not obtain a valid consent to search his person and vehicle, and these searches exceeded the scope of any consent. In addition to these suppression arguments, he asserts that the district court violated the



Speedy Trial Act, 18 U.S.C. § 3161(c)(1), and that the prosecutor improperly commented on his failure to testify, in violation of *Griffin v. California*, 380 U.S. 609 (1965). The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and we have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.”

*Reyes v. Brown*, No. 00-57130 (March 4, 2005). “California state prisoner Santos L. Reyes brought this 28 U.S.C. § 2254 habeas action challenging his sentence under California’s ‘Three Strikes’ law. Reyes was convicted of perjury for making misrepresentations on a California Department of Motor Vehicles driver’s license application. The perjury conviction was Reyes’ third strike. He was sentenced to twenty-six years to life. Reyes contends that his punishment violates the Eighth Amendment’s prohibition on cruel and unusual punishment. The district court denied Reyes’ habeas petition. Because we conclude that the facts necessary to evaluate Reyes’ petition were not sufficiently developed before the district court — and, therefore, are not sufficiently developed in the record before us — we vacate the district court’s denial of Reyes’ petition and remand to the district court for further proceedings.”

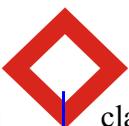
*Lasar v. Ford Motor Co.*, Nos. 03-35093 (March 3, 2005). “We address four questions relating to the court’s imposition of sanctions. First, did the district court provide adequate due process? Second, did the court comply with the procedural requirements of its local rules? Third, did Sutter violate the pretrial evidentiary rulings and fail to disclose a prior disciplinary matter in his *pro hac vice* application? Finally, were the sanctions, and rulings relating to Sutter’s *pro hac vice* status, an appropriate response to Sutter’s misconduct? With one limited exception, we answer each question in the affirmative. We affirm the district court’s ruling as to all sanctions except the permanent ban on Sutter’s *pro hac vice* appearance before that court, which we reverse.”

*United States v. Younger*, No. 04-10206 (March 1, 2005). “Clydell Younger appeals his jury conviction for possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), and for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Defendant asserts that (1) the district court erred in denying his motion to suppress statements; (2) the district court erred in permitting certain expert opinion testimony; (3) the prosecutors engaged in prejudicial misconduct during closing argument; (4) the Second Amendment bars prosecution for felon in possession; and (5) the evidence failed to satisfy the ‘interstate commerce’ element of the felon-in-possession charge. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.”

*United States v. Jeronimo*, No. 03-30394 (February 23, 2005). “We consider whether a plea agreement is enforceable and effectively waives the right of appeal. We conclude that we are without jurisdiction to assess the merits of this direct appeal.

We lack jurisdiction to entertain appeals where there was a valid and enforceable waiver of the right to appeal. *United States v. Vences*, 169 F.3d 611, 613 (9th Cir. 1999) (“It would overreach our jurisdiction to entertain an appeal when the plea agreement effectively deprived us of jurisdiction.”). We review de novo whether a defendant has waived his right to appeal by entering into a plea agreement and the validity of such a waiver. *United States v. Ventre*, 338 F.3d 1047, 1051 (9th Cir. 2003). A defendant’s waiver of his appellate rights is enforceable if (1) the language of the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made. *United States v. Joyce*, 357 F.3d 921, 922 (9th Cir. 2004); *United States v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir. 1998).”

*Morrison v. Mahoney*, No. 03-35161 (February 23, 2005). “James Morrison



appeals the denial of his habeas petition by the district court pursuant to 28 U.S.C. § 2254. Morrison contends that the district court erred in finding that various of his habeas claims were barred by procedural default. He asserts that the appellee, Michael Mahoney, the warden of the Montana State Prison, waived this defense by failing to raise it in a timely manner. In addition, Morrison has filed a motion to this court to broaden the Certificate of Appealability to include the issue of whether the state trial court violated his Sixth Amendment right to counsel by failing to properly investigate his complaints about his trial counsel. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We affirm the district court's denial of the habeas petition, and deny Morrison's motion to broaden the COA."

*Bockting v. Bayer*, No. 02-15866 (February 22, 2005). "Marvin Bockting's conviction for sexual abuse and life sentences stem from a trial in which the only witness to the conduct, his six-year old stepdaughter, Autumn Bockting, did not testify at trial, but whose interview with a detective was admitted as key evidence. Autumn's statements at the interview contradicted her testimony at a preliminary hearing where she claimed not to remember what happened with her father. Admission of the interview evidence without crossexamination violated Bockting's constitutional right 'to be confronted with the witnesses against him.' U.S. Const. amend. VI.

Although this case has been before the Nevada Supreme Court twice and before the United States Supreme Court on one occasion, resolution now rests on interpretation of an intervening Supreme Court case: *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). In *Crawford*, the Court definitively held that '[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine.' 124 S. Ct. at 1369. Because the little girl's testimony, which was not subject to crossexamination, was central to the conviction, its admission can hardly be

classified as harmless error. *Crawford* dictates reversal.

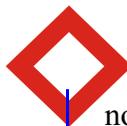
The thorny issue is whether *Crawford* applies retroactively to this state habeas appeal. Because the *Crawford* rule is both a 'watershed rule' and one 'without which the likelihood of an accurate conviction is seriously diminished,' *Summerlin*, 124 S. Ct. at 2523, the rule is retroactive."

*United States v. Osife*, No. 04-10172 (February 22, 2005). "We must decide whether the Fourth Amendment permits police to search an automobile after arresting its recent occupant, even when evidence related to the crime is unlikely to be found.

When the police arrest the occupant or recent occupant of an automobile, they may search the passenger compartment of the car, whether or not the specific circumstances give reason to think that the car is likely to contain weapons or evidence."

*Cooper-Smith v. Palmateer*, No. 03-35794 (February 16, 2005). "Michael Cooper-Smith appeals the district court's denial of his writ of habeas corpus for alleged ineffective assistance of counsel. The district court denied Petitioner's habeas petition after declining to expand the record under Rule 7 of the Rules Governing 28 U.S.C. § 2254 cases. Petitioner objects to this decision. Petitioner also presents the uncertified issue that his sentence violated *Apprendi v. New Jersey*. We have jurisdiction pursuant to 28 U.S.C. § 2253. We affirm the district court's denial of Petitioner's habeas petition and its decision not to expand the record under Rule 7. We decline to expand the Certificate of Appealability in order to reach Petitioner's *Apprendi* issue."

*United States v. Martinez-Garcia*, No. 03-30532 (February 11, 2005). "Salvador Martinez-Garcia appeals his conviction for possessing a firearm as an illegal alien, in violation of 18 U.S.C. § 922(g)(5) (2000). Martinez-Garcia argues that the firearm,



seized pursuant to a search warrant for his home, should have been suppressed due to alleged violations of the Fourth Amendment and Federal Rule of Criminal Procedure 41. Both arguments turn on the fact that state police officers began their search while waiting for a Spanish-speaking federal officer to arrive before serving Martinez-Garcia, who does not speak English, with the search warrant. Martinez-Garcia further contends that the district court erred in providing him with only a limited hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and that, in light of allegedly misleading statements and omissions in the affidavit submitted to obtain the search warrant, the warrant was not supported by probable cause. We have jurisdiction pursuant to 28 U.S.C. § 1291 (2000), and we affirm the district court.”

*Andrews v. King*, No. 02-17440 (February 11, 2005). “Appellant Antolin Andrews, an inmate in California State Prison-Solano, filed a pro se complaint under 42 U.S.C. § 1983 challenging the way in which the prison officials administered the process for resolving prisoner grievances. After the district court granted Andrews’ motion to proceed in forma pauperis, the defendants filed a motion for summary judgment, arguing that Andrews was not entitled to proceed *IFP* under the ‘three strikes’ provision of 28 U.S.C. § 1915(g). The district court granted the defendants’ motion and ultimately dismissed Andrews’ complaint without prejudice, ruling that Andrews had failed to demonstrate that he did not have three strikes under § 1915(g).

Whether the burden of establishing the sufficient evidence to establish that existence or nonexistence of three strikes rests with the defendant or with the prisoner-plaintiff is an issue of first impression in this circuit. We hold that when the defendant challenges a prisoner’s right to proceed *IFP*, the defendant bears the burden of producing § 1915(g) bars the plaintiff’s *IFP* status. Once the defendant has made out a prima facie case, the burden shifts to the plaintiff to persuade the court that § 1915(g) does not apply. Because here the defendants did

not meet their initial burden, we reverse the district court’s dismissal of Andrews’ complaint and remand for further proceedings.”

*United States v. Ameline*, No. 02-30326 (February 9, 2005). “In light of the Supreme Court’s recent decision in *United States v. Booker*, 125 S. Ct. 738 (2005), we granted appellant Alfred Ameline’s petition for rehearing to reconsider our decision in *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). In our original opinion, we held that, because Ameline’s sentence under the United States Sentencing Guidelines was based on facts found by the district judge by a preponderance of the evidence, his sentence violated the Sixth Amendment as construed by the Supreme Court in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). We vacated Ameline’s sentence and remanded for resentencing with directions that, if necessary, a jury determine the amount of drugs attributable to Ameline and whether he possessed a weapon in connection with his conviction, two factors that could enhance his sentence under the Sentencing Guidelines.”

*Galvan v. Alaska Dep’t of Corrections*, No. 03-35083 (February 9, 2005). “Briefing a case is not like writing a poem, where the message may be conveyed entirely through allusions and connotations. Poets may use ambiguity, but lawyers use clarity. If a party wants a state court to decide whether she was deprived of a federal constitutional right, she has to say so. It has to be clear from the petition filed at each level in the state court system that the petitioner is claiming the violation of the federal constitution that the petitioner subsequently claims in the federal habeas petition. That is, ‘the prisoner must “fairly present” his claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim.’ If she does not say so, then she does not ‘fairly present’ the federal claim to the state court. It may not take much, and as we held in *Peterson*, the inquiry is not

mechanical, but requires examination of what the petitioner said and the context in which she said it. To exhaust a federal constitutional claim in state court, a petitioner has to have, at the least, explicitly alerted the court that she was making a federal constitutional claim. Galvan did not.”

### Top 10 Tips for Effective Electronic Data Management

1. Make electronic data management a business initiative, supported by corporate leadership.
2. Keep records of all types and locations of hardware and software in use.
3. When creating a policy, consider backup and archival procedures, privacy concerns, any online storage repositories, record custodians, and a destroyed documents "log book."
4. Create an employee technology use program, including procedures for written security, employee electronic data storage, and employee terminations and transfers.
5. Clearly document all company data retention policies.
6. Document all ways in which data can be transferred to and from the company.
7. Regularly train employees on the organization's data retention policies.
8. Implement a litigation response team — comprised of outside counsel, corporate counsel, human resources, business line managers, and information technology staff — that can alter any document destruction policy quickly.
9. Be aware of electronic "footprints"; "delete" does not always mean "delete," and metadata is a fertile source of information and evidence.
10. Cease document destruction policies at first notice or anticipation of a lawsuit.

— *Courtesy of Kroll Ontrack Inc.*

## City officials ring up large cell phone fees

### Governments try to reduce the costs of talkative employees

*February 28, 2005*

**BY NIRAJ WARIKOO**  
FREE PRESS STAFF WRITER

For \$130 a month, you can get a cell phone plan that lets you talk more than four hours every workday with unlimited use on nights and weekends. Add 70 bucks, and you get a plan that gives you unlimited use all the time.

But the cell phone bill of one Downriver elected official was \$493 last month. In other months, the bill for Lincoln Park Councilwoman Valerie Brady's city-issued phone -- funded by taxpayers -- was \$408 and \$313.

The costly bills reveal how a new technology has led to wasteful spending by some municipal employees with government-issued cell phones.

Some cities and townships are moving to rein in the costs of a tool that has become a necessary part of the job for many employees, but has led to some abuse. The moves come at a time when local governments are struggling to break even.

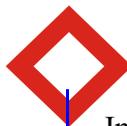
Starting this month, Lincoln Park no longer pays for the cell phones and bills of its mayor and six council members.

In Chesterfield Township, trustees voted Tuesday for a new cell policy drafted by acting Police Chief Lt. Dave Marker that requires officers to reimburse the township if they go over their monthly allotment of minutes. The revised policy comes after a couple of officers were exceeding their minutes with personal calls.

In Taylor, the city has moved to crack down on cell overspending, dropping its average monthly phone bill from \$70 to \$39.

But in other cities across metro Detroit, taxpayers continue to pay for hundreds of cell phones for elected officials and government employees. Dearborn, Southfield, Wayne County and the Macomb County Sheriff's Office are just some that pay for the cell phones.

"If I had to be tied to my desk all the time, it would be nearly impossible for me to get anything done," explained Macomb County Sheriff Mark Hackel, who uses two county-funded cell phones. One is with him all the time, another is in his car.



He has two additional cell phones for private use that he pays for. "We live in a service-driven society that is very demanding of our time," he said.

True. But problems arise when elected officials and local governments don't keep tabs on what plans they have. Brady acknowledges that her bills were high but she said she wasn't aware of the type of plan she was given after being elected in November 2003. With Nextel offering unlimited use for \$199 a month, "there's no reason for my bill to be in excess," Brady said. "My phone was just turned on. I had no idea what plan they put me on."

Some taxpayers agree with the city's move.

"They can buy their own," said Jean Richards, a Lincoln Park resident and retired insurance agent. "They aren't that expensive. Not any more they aren't."

Moreover, last year, the city hired a full-time city manager to run Lincoln Park.

"So what on earth do they need them for," wondered Richard Kudrak, a 59-year-old Lincoln Park resident, referring to the council's cell phones.

Abuse happened because there was no mechanism to monitor it, Kudrak said.

The problem isn't limited to Michigan.

In Lancaster, Pa., for example, a school superintendent was slammed by the state auditor general in a December report that said she failed to keep track of cell phone abuse by some employees.

And the U.S. Navy is often clueless about how much it is spending on cell phone plans, according to a 39-page report released in June by the U.S. General Accounting Office. At three sites examined by the GAO, cell phone usage "was not monitored to determine whether plan minutes met users' needs," read the report. "Consequently, these sites overpaid for cell phone services."

In Lincoln Park, the high cost of cell phone bills was discovered after Councilman Mike Higgins established a committee in March to find ways to save the city money. Like other municipalities, the Downriver community is hacking away at its budget to stay solvent. And stopping cell phone waste is one way to do that.

But one councilman won't have to turn in his city-issued cell phone. He never took one.

"I'm not here to feed off the public trough," said Councilman Frank Vaslo. "I just pick up my own phone. That's how I've always been."

In Warren and Detroit, there's no chance for abuse by council members. The cities don't give them cell phones, though Detroit's mayor gets one.

In Taylor, city officials had to crack down after cell phone bills began averaging \$70 per month in 2000. The city had 79 cell phones at the time. The mayor decided to closely monitor cell phone use to make sure employees didn't go over their minutes. And he had high-minute users and low-minute users share the same plan in a pool.

As a result, the city brought the average bill in 2004 down to \$39 a month for 121 cell phones.

Taylor Councilman Christopher Kemp applauds the city for reducing the cost average, but he questions why a city of only 66,000 residents needs 121 cell phones for its government employees.

"That's a huge amount," Kemp said. "Just because you have the money doesn't mean you have to spend it."

Taylor Mayor Gregory Pitoniak said that, over the past three years, not a single user of his city's cell phones has gone over his or her monthly maximum of minutes. And he said the city is now considering the elimination of

some land lines. We need to "get out of the mind-set that cell phones are a luxury."

Last month, Ford Motor Co. started eliminating about 8,000 land lines for employees, to be replaced by cell phones. The move is in its product development division, where workers engineer and design vehicles.

"They really need to be more mobile than ever before," said Valerie Rosnik, a Ford spokeswoman. "Their primary mode of communication is right at their fingertips."

Martin Manna, a business owner who lives in Bloomfield Township, is constantly on his cell phone and is familiar with the costs of phone plans. He understands that some governments may be confused about all the plans available and the sometimes "unique charges added to bills."

But there's no reason for high cell phones costs, he said.

"No one is really watching them," Manna said. "They need to do a better job of controlling costs. At the end of the day, it's our money."



## PRISON Tattoos BY MARTHA STEWART

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### Today's Words:

#### **Cupidity** (Noun)

**Pronunciation:** [kyu-'pi-dê-tee or -ti]

**Definition 1:** Excessive avarice or strong greed for something, especially for wealth.

**Usage 1:** The adjective is "cupidinous."

#### **Aestivate (or estivate)** (Verb)

**Pronunciation:** ['es-tê-veyt]

>**Definition 1:** Spend the summer, especially in a dormant state (antonym of "hibernate").

**Usage 1:** The adjective is "aestival" and the noun, "aestivation." Bears hibernate through the winter; desert amphibians aestivate during the hot, dry season.