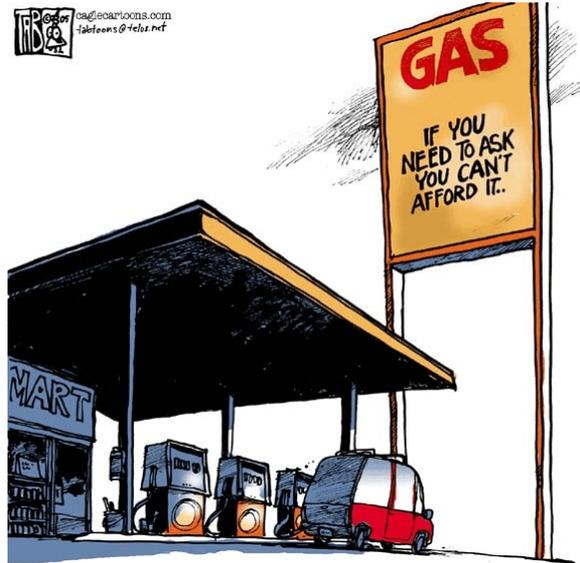


# THE PUBLIC LAWYER

PUBLIC LAWYERS SECTION

August 29, 2005



## NEVADACASES

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

***Anderson v. State***, 121 Nev. Adv. Op. No. 52 (August 25, 2005). “In this case we consider whether a trial jury may properly convict a defendant charged with driving under the influence of intoxicants based upon alternate theories of criminality. We also consider whether prosecutorial misconduct requires reversal of a conviction based upon conflicting evidence.

We conclude that the jury verdict is valid because the jury was unanimous as to two theories of culpability that are supported by substantial evidence. However, the prosecutorial misconduct committed in this case warrants plain error review because it affected Anderson’s substantial rights. Accordingly, we reverse the judgment of conviction and remand this matter to the district court for a new trial.

***Gordon v. State***, 121 Nev. Adv. Op. No. 51 (August 11, 2005). “In this appeal, we consider whether a jury may return a general guilty verdict based upon several legally sufficient theories of driving under the influence if at least one theory had sufficient evidentiary support. We conclude that it may. We

also consider whether the appellant was prejudiced by the State's failure to gather evidence during its investigation. We conclude that he was not prejudiced."

***Weaver v. State, Dep't of Motor Vehicles***, 121 Nev. Adv. Op. No. 50 (August 11, 2005). "NRS 484.384 provides that if a test reveals a blood or breath alcohol concentration of 0.08 or more, then the person tested loses his or her driver's license. In this appeal, we consider whether NRS 484.384 violates the constitutional right to due process by not allowing the person tested to present evidence that his or her alcohol level is based on alcohol consumed after driving. We conclude that, when an intervening time period exists between the driver's operation of a vehicle and his or her arrest, the driver must be permitted under NRS 484.384 to introduce evidence that he or she only drank alcohol after driving. In this case, as the administrative law judge permitted such evidence, we affirm."

***Sheehan & Sheehan v. Nelson Malley & Co.***, 121 Nev. Adv. Op. No. 49 (August 11, 2005). "In these consolidated appeals, we primarily consider whether the district court properly construed a contractual covenant not to compete and a corresponding liquidated damages clause. We conclude that the district court erred as a matter of law in awarding liquidated damages, and we therefore reverse that part of the judgment. We affirm the remainder of the judgment and the order awarding attorney fees and costs."

***Kahn v. Morse & Mowbray***, 121 Nev. Adv. Op. No. 48 (August 11, 2005). "Appellants, William (now deceased) and Christine Kahn and the Kahn Family Trust (the Kahns), sued their prior attorney, Christopher Byrd and his firm, Morse & Mowbray, for legal malpractice. Byrd and Morse & Mowbray filed a motion for summary judgment, alleging that the factual and legal issues in the case had already been litigated and resolved in another action. The district court granted the motion for summary judgment and later issued an order granting attorney fees to Byrd and Morse & Mowbray under NRS 18.010(2)(b), finding that the malpractice action was brought without reasonable grounds. The Kahns also appeal that order. We consolidated the appeals.

On appeal the Kahns allege that the district court erred in granting the motion for summary judgment because they were not collaterally estopped from raising the issues involved in the legal malpractice suit and because material issues of fact remain unresolved. In addition, the Kahns contend that the district court abused its discretion in awarding attorney fees because there was a sound basis for the complaint. We agree with both of these contentions. As the district court did not actually and necessarily litigate all of the issues supporting the Kahns' claims for legal malpractice, the district court improperly granted summary judgment on those claims. As a result, we conclude the district court abused its discretion in awarding attorney fees. However, we conclude that because the Kahns did not establish a prima facie case in regard to their claim for intentional infliction of emotional distress, the district court properly granted summary judgment on that particular claim. Moreover, we also conclude that a claim for negligent infliction of emotional distress is improper when based upon a legal malpractice claim."

***Szydel v. Markman***, 121 Nev. Adv. Op. No. 47 (August 11, 2005). "In this appeal, we consider whether a medical malpractice action filed under Nevada's res ipsa loquitur statute, NRS 41A.100, which does not require expert testimony at trial, must include a medical expert affidavit, as mandated by NRS 41A.071. We conclude that the expert affidavit requirement does not apply when the malpractice action is based solely on the res ipsa loquitur doctrine."

***Southern Nev. Homebuilders Ass'n v. Clark County***, 121 Nev. Adv. Op. No. 46 (August 11, 2005). “The Clark County Board of Commissioners approved a debated zoning ordinance that required supermajority (two-thirds) board approval of nonconforming zone change applications. The ordinance’s enabling statute, NRS 278.260, is silent as to whether supermajority approval is authorized. The district court concluded that the construction of other relevant statutes, together with silence on the matter in NRS 278.260, amounted to a broad grant of authority to the County Commissioners and declared the supermajority voting provision valid.

We conclude that there is no support for the district court’s construction. Silence on voting requirements in a statute indicates the Legislature’s desire that only a simple majority approval be met. And there are no other statutes upon which the supermajority approval requirement can be properly grounded. Further, the County Commissioners have not demonstrated any contrary legislative intent, and public policy considerations do not support their position. Therefore, declaratory relief validating the supermajority voting requirement was improper.”

***Bellon v. State***, 121 Nev. Adv. Op. No. 45 (August 11, 2005). “Robert Linzy Bellon appeals from his judgment of conviction. Bellon was sentenced to a term of life imprisonment without the possibility of parole, with an equal and consecutive term for the use of a deadly weapon.

Bellon argues on appeal that the district court erred by admitting the testimony of Louisiana police officers regarding threats that Bellon made against them after his arrest.[1] Bellon argues that the statements do not properly fall within the *res gestae* exception permitting the admission of such evidence. We agree and conclude that the district court abused its discretion by admitting the arresting officers’ testimony. In addition, we conclude that the error was not harmless and therefore reverse Bellon’s conviction and remand for a new trial.”

***Bass-Davis v. Davis***, 121 Nev. Adv. Op. No. 44 (August 11, 2005). “In this appeal, we primarily consider whether evidence that is lost after being forwarded from franchisees to their franchisor is subject to an inference that the evidence would have been adverse if produced. We conclude that the inference should apply and therefore reverse.”

***State v. Second Judicial Dist. Court***, 121 Nev. Adv. Op. No. 42 (August 11, 2005). “This is an original petition by the State for a writ of certiorari or mandamus. The State contends that the district court exceeded its jurisdiction or abused its discretion by awarding Anna Marie Jackson, the real party in interest, credit against her prison sentence for the time she served on house arrest as a condition of bail. NRS 176.055 allows the district court to award credit against the duration of a sentence for time “actually spent in confinement before conviction.” For the reasons discussed below, we hold that house arrest is not confinement within the meaning of the statute. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus.”

***Hosier v. State***, 121 Nev. Adv. Op. No. 41 (August 11, 2005). “This is an original proper person petition for extraordinary relief. Citing to Article 6, Section 4 of the Nevada Constitution, petitioner David Hosier challenges the validity of his 1990 judgment of conviction and requests this court to

exercise its original jurisdiction to consider the merits of his claims. For the reasons discussed below, we conclude that the exercise of our original jurisdiction is not warranted in this matter.”

*Weiner v. Beatty*, 121 Nev. Adv. Op. No. 26 (August 8, 2005). “In this appeal, we consider whether a public-employee union member has an independent claim for legal malpractice against an attorney provided by his union. We conclude that state labor law should be interpreted consistently with federal labor law, which bars legal malpractice claims against lawyers supplied by unions. A union member’s remedy lies in an action against the union for breach of the duty of fair representation.”

## **EDD Showcase: Rules & Procedures: Extreme Makeover**

**By Helen Bergman Moure**

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

On June 16, 2005, discovery practice took a huge step forward when the Standing Committee on Rules of Practice and Procedure approved a set of proposed amendments relating to electronic discovery. The proposed rules and their accompanying "Notes" now face three remaining hurdles: Judicial Conference of Senior Circuit Judges approval; Supreme Court approval; and Congressional review.

Assuming they are not delayed, amended, voided, or deferred during these remaining steps, the amendments will become effective on December 1, 2006.

Despite the pending status of the amended rules, members of the legal community would be wise to become familiar with their content now as there is a strong chance that the rules will succeed. Additionally, these proposals do not contradict the current rules — but rather, fill a gaping void in them. The incredible amount of research, scholarly discourse and professional compromise that birthed these proposals makes them a compelling resource for courts and litigants seeking guidance and practical information relating to electronic discovery.

Here is a brief overview of the pending rules:

**New Terminology:** A basic change contained in the pending rules is the introduction of appropriate new terminology. The phrase "electronically stored information" has been added to Rules 26(a), 33, and 34 — remedying the perceived shortcoming that the wording of the current versions failed to neatly and obviously include all the various forms of electronic information that are rightfully subject to disclosure and discovery.

The added language both clarifies that these particular rules apply to electronically stored information and establishes the terminology necessary to effect the other proposed amendments addressing issues specific to electronic discovery.

**Discovery process:** Several of the pending changes direct attention to electronic discovery issues early in the discovery process. Particularly in the context of electronic discovery, early discussion and resolution of key issues may greatly reduce the time and money spent on discovery, as well as the number and severity of discovery disputes.

✓ Rule 16(b)(5) has been amended to include provisions for disclosure or discovery of electronically stored information as an appropriate inclusion in the court's scheduling order.

√ Electronically stored information has also been added to the Rule 26(a)(1)(B) list of items to be included in a party's initial disclosures.

√ Amendments to Rule 26(f) expand the list of items that must be accomplished during the meet and confer process to include some issues of particular importance in the context of electronic discovery. These include discussing preservation of discoverable information and developing a proposed discovery plan that addresses issues relating to claims of privilege or work product protection and issues relating to the discovery of electronically stored information—including the form or forms in which it will be produced.

**Format:** The format in which information will be produced is of particular interest in the context of electronic discovery. Rule 34(b) allows the requesting party to designate the form or forms in which it wants electronically stored information produced. The rule also provides a framework for resolving disputes about the form of production in the event that the responding party objects to the requested form(s). Finally, the rule provides that if a request does not specify the form of production or the responding party objects to the requested form, the responding party must notify the requesting party of the form in which it intends to produce the electronically stored material — with the option of producing either in a form in which the information is ordinarily maintained or in a reasonably usable form.

**Privilege/Work Product:** The pending rules amendments also seek to address the growing concern over the increased risk of inadvertently producing privileged or work product information when producing electronically stored information. Rule 26(b)(5) would establish a procedure through which a party may assert privilege and work product claims after production.

**Production:** Another key amendment introduces a two-tiered approach to the production of electronically stored information, making a distinction between information that is reasonably accessible, and that which is not. Under the pending Rule 26(b)(2)(B), a responding party does not need to produce electronically stored information from sources that it identifies as not reasonably accessible because of undue burden or cost.

If the requesting party seeks discovery of the information, the responding party has the burden of showing that the information is not reasonably accessible, at which point the court may only order discovery for good cause, after considering the limitations of the current Rule 26(b)(2).

This two-tier distinction seeks to provide a balanced, equitable approach to resolve the unique problem presented by electronically stored information which is often found in a variety of locations of varying accessibility. The responding party receives protection from being forced to tap hard-to-access sources, where retrieving information or determining the presence of responsive content cannot be achieved without incurring substantial burden or cost. The requesting party benefits from being apprised at the onset of the sources from which the responding party does not plan to produce information, and is given a means of obtaining this information if truly warranted.

**Safe Harbor:** The pending rules include a "safe harbor" provision — an amendment to Rule 37 which provides that "absent exceptional circumstances, a court may not impose sanctions ... under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

This limited protection is a recognition of the unique nature of electronically stored information — which resides on dynamic systems, the normal operation of which includes routine copying, modification, relocation, overwriting, and deletion of information.

The pending rule is accompanied by an Advisory Committee Note identifying various types of routine operations common to present systems that may result in the loss of data. The "Note" also discusses the various factors that may need to be considered in determining whether the "good faith" obligation is met — specifically stating that the rule does not allow a party to exploit the routine operation of an information system to sidestep their discovery obligation by failing to prevent destruction of electronically stored information that the party is required to preserve.

Subpoenas: In keeping with the changes described above, the pending rules changes include analogous modifications to Rule 45 provisions for subpoenas.

More detailed information on these modifications, the rulemaking process, the text of the pending rules and accompanying Advisory Committee Notes, as well as the comments received regarding the proposals can be found on the federal rulemaking website ([www.uscourts.gov/rules/index.html](http://www.uscourts.gov/rules/index.html)).

## NINTH CIRCUIT CASES

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

***United States v. Rodriguez-Lara***, No. 04-10113 (August 26, 2005). “Defendant-appellant Luis Manuel Rodriguez-Lara, an alien convicted of reentry after deportation, appeals the district court’s denial of his motion to appoint an expert to assist him in pursuing his equal protection and fair cross-section challenges to the composition of the jury pool in the Fresno Division of the Eastern District of California. Rodriguez also claims that the district court erred in its application of the U.S. Sentencing Guidelines and that the court violated his Sixth Amendment rights by enhancing his sentence in violation of *Apprendi v. New Jersey* and its progeny.

Given the extent of the fair cross-section showing Rodriguez was able to develop even without the help of an expert, we hold that under the circumstances reasonably competent counsel would have required the services of an expert for a paying client, and the lack of an expert prejudiced Rodriguez. The district court therefore abused its discretion in denying Rodriguez’s motion for the appointment of an expert.”

***United States v. Carter***, No. 03-10377 (August 25, 2005). “Kennard Carter appeals the imposition of a sentence enhancement pursuant to United States Sentencing Guideline § 2K2.1(b)(4), which mandates a two-point offense-level enhancement for certain firearms offenses when any firearm involved has an altered or obliterated serial number. This case requires us, as a matter of first impression, to construe the meaning of the phrase ‘altered or obliterated’ as used in Guideline § 2K2.1(b)(4). We hold that, for the purposes of Guideline § 2K2.1(b)(4), a firearm’s serial number is ‘altered or obliterated’ when it is materially changed in a way that makes accurate information less accessible. We further hold that, under that standard, a serial number which is not discernable to the unaided eye, but which remains detectable via microscopy, is altered or obliterated.

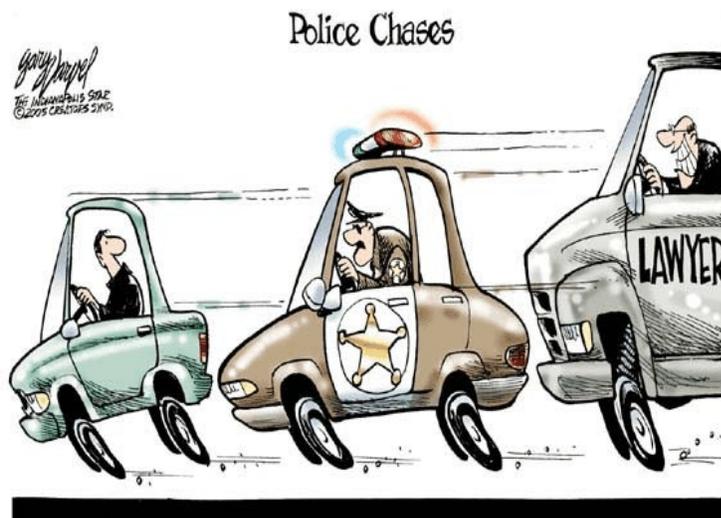
Here, Carter concedes that the serial number on the firearm he possessed is ‘not decipherable by the naked eye.’ Accordingly, we affirm the district court’s imposition of the sentence enhancement.”

***Preminger v. Principi***, No. 04-16981 (August 25, 2005). “The Santa Clara County Democratic Central Committee and its chair, Steven Preminger, are Plaintiffs in this action. They challenge the Department of Veterans’ Affairs’ exclusion of Preminger and others from VA premises when they tried to register resident veterans to vote. Plaintiffs claim that the VA regulation used to justify their expulsion, which prohibits partisan activities on VA premises, violates the First Amendment. The district court denied Plaintiffs’ request for a preliminary injunction against Defendants, the Department of Veterans’ Affairs and several of its employees. We hold that the district court did not abuse its discretion in concluding that Plaintiffs failed to demonstrate probable success on the merits of their claim and, therefore, affirm the denial of a preliminary injunction.”

***United States v. Stewart***, No. 03-10662 (August 23, 2005). “We are asked to determine whether certain words, spoken under certain circumstances, constitute criminal threats of harm against a federal judge and are not protected by the First Amendment. We are also asked to determine what quantum of evidence the Government must present to establish that a defendant, who solicited another person to murder a federal judge, had the required criminal intent for the other person to commit the murder.”

***Means v. Navajo Nation***, No. 01-17489 (August 23, 2005). “This case concerns whether an Indian tribe can exercise criminal jurisdiction over a person who is not a member of the tribe, but who is an enrolled member of another Indian tribe.

The Navajo Nation is empowered, under the 1990 Amendments, to prosecute and punish Indians for misdemeanors, despite their status as nonmembers of the tribe. The denial of Means’s petition for a writ of habeas corpus is **AFFIRMED.**”



***Inthavong v. Lamarque***, No. 03-57075 (August 23, 2005). “In this appeal from the denial of a petition for writ of habeas corpus, we must decide whether the admission of an allegedly coerced confession in the state court trial was prejudicial error.

Even without the September 16 confession, Inthavong’s own statements and an abundance of evidence attest to his participation in Dobson’s murder. The California Court of Appeal was objectively reasonable to rule that any error in

admitting Inthavong’s September 16 confession was harmless beyond a reasonable doubt.”

***Manufactured Home Communities, Inc. v. City of San Jose***, No. 03-16766 (August 23, 2005). “Manufactured Home Communities, Inc. and MHC Operating Limited Partnership (collectively MHC) sued the City of San Jose challenging the City’s Mobilehome Rent Ordinance as unconstitutional.

MHC also sued four individual tenants of the MHC mobilehome park: Enis Rice, Gary DeWet, Martin Vancil, and Marsha Skratt (collectively Individual Defendants). MHC argued that the Individual Defendants are not eligible for rent control under California state law and are, thus, in violation of the City's Ordinance and California state law for refusing to pay increased rent. MHC appeals the district court's dismissal of MHC's complaint for various jurisdictional and res judicata problems. We affirm the district court's decision on the basis of res judicata, untimeliness, failure to state a federal question, lack of supplemental jurisdiction, and California's statute of limitations.

Although it does not affect the outcome of this case, we reverse the district court's holding on the *Rooker-Feldman* doctrine. 4 We reverse and remand the matter of attorneys' fees."

***Hirschfield v. Payne***, No. 04-35437 (August 22, 2005). "In this habeas corpus appeal, we must decide whether a criminal defendant's motions to represent himself at trial in state court were improperly denied.

Because Judge Ishikawa's decision as to the April 24 motion was contrary to clearly established federal law, as established by the Supreme Court's opinion in *Faretta*, the district court's ruling is **REVERSED** and the case is **REMANDED**. On remand, the district court shall issue a conditional writ of habeas corpus directing that Hirschfield be released from custody unless the State of Washington begins trial proceedings against him within a reasonable period of time to be determined by the district court."

***Ashley Creek Phosphate Co. v. Norton***, No. 04-35640 (August 22, 2005). "The issue we address is whether Ashley Creek Phosphate Company has standing to bring this action under the National Environmental Policy Act ("NEPA"). Ashley Creek has no environmental stake in the phosphate mining project at issue, which is some 250 miles from the phosphate Ashley Creek controls. Indeed, its only interest is an economic one: if the project does not go forward, Ashley Creek speculates that it might become an alternate supplier of phosphate. Because it has shown neither an injury in fact nor an interest within the zone of interests protected by section 102(2)(C) of NEPA, Ashley Creek lacks standing to bring this NEPA challenge."

***Dang v. Cross***, No. 03-55403 (August 22, 2005). "In this civil rights action, under 42 U.S.C. § 1983, Plaintiff H.N. Dang prevailed in a jury trial on his excessive force claim against Officer Gilbert Cross of the City of Compton Police Department and was awarded compensatory damages, but not punitive damages. We consider Dang's consolidated appeals. Dang first challenges the district court's refusal to instruct the jury that oppressive conduct can serve as a predicate for punitive damages under § 1983. Second, Dang contends that the district court erred in its calculation of reasonable attorney's fees and costs under 42 U.S.C. § 1988.

We hold that the district court erred in failing to instruct the jury that it could award punitive damages if it found that Cross acted in an oppressive manner and we conclude that this error was not harmless. Second, we hold that the district court did not abuse its discretion in determining the reasonable hourly rate it applied in calculating the fee award. We vacate the fee award and remand, however, for further consideration of the reasonable hours expended in light of the proper legal standard and for reimbursement of the cost of recording an abstract of judgment."

***Cleveland v. City of Los Angeles***, No. 03-55505 (August 22, 2005). “This case involves the application of the Fair Labor Standards Act’s (“FLSA”) overtime exemption for an ‘employee engaged in fire protection activities.’ 29 U.S.C. § 207(k). Unless an exemption applies, the FLSA requires that employees be compensated at a rate of one-and-one-half times their regular hourly rate for all hours worked in excess of forty in one week. We must determine whether the fire protection exemption should be applied to dual function paramedics, individuals trained in both fire suppression and advanced life saving. This issue is of first impression in the Ninth Circuit. We have jurisdiction under 28 U.S.C. § 1291. For the reasons set forth below, we affirm the district court, finding that no exemption applies.”

***Defenders of Wildlife v. United States Environmental Protection Agency***, No. 03-71439 (August 22, 2005). “Under federal law, a state may take over the Clean Water Act pollution permitting program in its state from the federal Environmental Protection Agency (EPA) if it applies to do so and meets the applicable standards. This case concerns Arizona’s application to run the Clean Water Act pollution permitting program in Arizona. When deciding whether to transfer permitting authority, the Fish and Wildlife Service (FWS) issued, and the EPA relied on, a Biological Opinion premised on the proposition that the EPA lacked the authority to take into account the impact of that decision on endangered species and their habitat. The plaintiffs in this case challenge the EPA’s transfer decision, particularly its reliance on the Biological Opinion’s proposition regarding the EPA’s limited authority. This case thus largely boils down to consideration of one fundamental issue: Does the Endangered Species Act authorize — deed, require — the EPA to consider the impact on endangered and threatened species and their habitat when it decides whether to transfer water pollution permitting authority to state governments? For the reasons explained below, we hold that the EPA did have the authority to consider jeopardy to listed species in making the transfer decision, and erred in determining otherwise. For that reason among others, the EPA’s decision was arbitrary and capricious. Accordingly, we grant the petition and remand to the EPA.”

***United States v. Chong***, No. 03-10222 (August 18, 2005). “Peter Chong appeals his conviction on murder-for-hire and extortion counts stemming from his involvement with the Wo Hop To gang in Northern California. Chong’s main contention is that the jury had insufficient evidence to convict him for his role in the attempted murder of a leader of a rival gang in Boston. He argues that the government failed to link him to the attempted murder or demonstrate that he offered anything of pecuniary value to the hitmen in change for commission of the murder — a required element of the offense. We conclude that the jury had insufficient evidence to convict Chong on the murder-for-hire offense because the government failed to prove that Chong — or one of his coconspirators — promised anything of pecuniary value to the hitmen as a quid pro quo for murdering a gang rival.”

***Empress LLC v. City and County of San Francisco***, “The owners of the Empress Hotel brought this action against the Executive Director of the Tenderloin Housing Clinic, claiming that the City of San Francisco unlawfully delegated zoning decisions to him by taking official actions consistent with his requests on all zoning petitions affecting San Francisco’s Tenderloin area. We conclude that the action is precluded by the Noerr-Pennington doctrine and affirm the judgment of the district court.”

***Gospel Missions v. City of Los Angeles***, No. 04-55888 (August 17, 2005). “Gospel Missions of America (GMA) appeals from the district court’s summary judgment for the City of Los Angeles (City). GMA contends that the definitions of the terms ‘heritable’ and ‘olicitation’ in section 44.00(b) and (g) of the Los Angeles Municipal Code (LAMC) are unconstitutionally vague and overbroad, and

that their application violates the Equal Protection Clause. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.”

***M & A Gaebee v. Community Redevelopment Agency***, Nos. 04-56134 (August 17, 2005).

“The parties’ dispute centers on whether the CRA’s use of the eminent domain power was aimed at a valid ‘public use,’ U.S. Const., amend. V; *see Kelo v. City of New London*, 125 S. Ct. 2655, 2662 (June 23, 2005), but this question is not before us. Rather, we must decide whether the doctrine of *Younger* abstention required the district court to dismiss M&A’s two federal lawsuits because of the eminent domain proceedings taking place in California state court.

Because a state action was initiated with regard to the 1010 E. Slauson property before any proceedings of substance had occurred in the corresponding federal action, the district court was correct to dismiss Case No. 04-56740.”

***Jefferson v. Budge***, No. 03-16932 (August 16, 2005). “Willie Lee Jefferson, a Nevada state prisoner, appeals pro se the district court’s order dismissing as untimely his 28 U.S.C. § 2254 habeas petition filed in 2002 challenging his 1992 conviction for burglary, robbery with use of a weapon, battery, and attempted sexual assault. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we reverse and remand.”



***United States v. Fidler***, No. 05-50444 (August 16, 2005). “Appellant Sheldon Fidler (“Fidler”) appeals, pursuant to 18 U.S.C. § 3145(c), a district court order denying his motion to modify the bail condition in his release order pending trial in this criminal case. Although the district court earlier granted Fidler bail pending trial, he remains in custody because he is unable to meet the financial condition that he post a \$300,000 bond secured by deed of real property. Fidler contends that the

district court’s order and his continued custody violate various provisions of the bail statute, 18 U.S.C. § 3142. We write to clarify the procedural and substantive requirements that obtain when a defendant is detained pending trial based on his inability to meet a financial condition of release imposed by the district court.”

***United States v. Williams***, No. 04-10213 (August 15, 2005). “Jamal Williams appeals the district court’s order denying his motion to suppress as evidence a gun recovered when the car in which he was a passenger was stopped for a traffic infraction, and Williams, after being ordered to get back inside the car, threw the weapon out of the passenger window. While it is well established that an officer effecting a lawful traffic stop may order the driver and the passengers out of a vehicle, *Maryland v. Wilson*, 519 U.S. 408, 410 (1997), we consider for the first time in this circuit whether an officer may order a passenger who voluntarily gets out of a lawfully stopped vehicle *back into* the automobile without violating the passenger’s Fourth Amendment rights. In upholding the officer’s

discretion to control the situation as he or she deems necessary to ensure the safety of the officer and the vehicle occupants, we answer in the affirmative the question explicitly left open by the *Wilson* Court. *Id.* at 415 n.3 (finding it unnecessary to consider whether “an officer may forcibly detain a passenger for the entire duration of the stop”). We now hold that a passenger’s compliance with an officer’s command to get back into the car in which the passenger had just exited is not an unreasonable seizure under the Fourth Amendment.”

***United States v. Hall***, No. 04-50193 (August 15, 2005). “We must decide whether the Sixth Amendment right to confront testimonial witnesses established in *Crawford v. Washington*, 541 U.S. 36 (2004), applies to the admission of hearsay evidence during revocation of supervised release proceedings.

*Crawford* does not create a Sixth Amendment right of confrontation applicable to supervised release revocation or similar proceedings. Hall had a due process right to confront a testimonial witness which is not absolute. Balancing the *Comito* factors, we conclude that Hall had little interest in confrontation with respect to the domestic violence allegation because the hearsay evidence was insignificant to the ultimate finding. This minimal interest was outweighed by the government’s substantial showing of good cause for not producing Hawkins at the hearing. Although Hall had a relatively strong interest in confronting Hawkins with respect to the false imprisonment allegation, his interest in confrontation on that allegation is outweighed by the government’s good cause for failing to produce Hawkins at the hearing—both because the government made every effort to do so and because the hearsay evidence was substantially corroborated. For these reasons, Hall’s due process rights were not violated and the final order of revocation is affirmed.”

***United States v. Saechao***, No. 04-30156 (August 12, 2005). “The issue on this appeal is whether a probationer who provides incriminating information to his probation officer in response to questions from that officer, and does so pursuant to a probation condition that requires him to ‘promptly and truthfully answer all reasonable inquiries’ from the officer or face revocation of his probation, is ‘compelled’ to give incriminating evidence within the meaning of the Fifth Amendment. Because we conclude that the state took the ‘impermissible step’ of requiring the probationer ‘to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent,’ *Minnesota v. Murphy*, 465 U.S. 420, 436 (1984), we hold that his admission of criminal conduct was compelled by a ‘classic penalty situation’ and the evidence obtained by the probation officer may not be used against him in a criminal proceeding. We therefore affirm the district court’s order suppressing the fruits of the state’s unlawful conduct.”

***United States v. Beck***, No. 03-30470 (August 10, 2005). “Michael Beck appeals several rulings of the district court made during his trial for bank robbery pursuant to 18 U.S.C. § 2113(a). The district court denied Beck’s pre-trial motions to exclude evidence of photograph identification and in-court eyewitness identification of Beck, and also to prevent Beck’s probation officer from giving lay opinion testimony identifying Beck as the person in the bank’s surveillance photograph. Beck also appeals the district court’s denial of his trial motion to exclude the government from presenting rebuttal testimony of an FBI agent. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 742(a)(1), and we affirm.”

***United States v. Dorsey***, “Following a conditional guilty plea, Nikos Delano Dorsey

was convicted of possession of cocaine base with intent to distribute, possession of a firearm during and in relation to a drug trafficking offense, and possession of a firearm in a school zone. He challenges his conviction and sentence. We affirm his conviction and remand his sentence for consideration in light of *United States v. Booker*, 125 S. Ct. 728 (2005), and *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005).”

***United States v. Dowd***, No. 04-30062 (August 8, 2005). “A jury convicted Matthew Evans Dowd of violating the federal interstate domestic violence law. He argues that the jury did not have sufficient evidence that he forced or coerced his companion, Danna Johnson, to cross state lines, as the statute requires, because she had reasonable opportunities to escape. Dowd also challenges the district court’s decision to impose a sentence for the domestic violence crime that is consecutive to his sentence for previous drug-related crimes. He further argues that the district court improperly enhanced his sentence as a sexual crime in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). We affirm Dowd’s conviction. The evidence demonstrated that Dowd subjected Johnson to numerous instances of physical and psychological abuse as they traveled through Montana, Colorado and Utah. Viewed from the perspective of a reasonable woman in Johnson’s circumstances, the jury could readily have found that Dowd, through a combination of actual force and dire threats, compelled Johnson to stay with him and made her fearful of attempting to flee. We further affirm Dowd’s sentence because the district court properly exercised its discretionary authority in imposing a consecutive sentence, and the jury found that Dowd had committed a sexual assault, making him eligible for the statutory enhancement.”

***United States v. Stafford***, No. 04-30134 (August 3, 2005). “On the afternoon of January 22, 2003, Snohomish County, Washington, Sheriff’s officers responded to a report of a possible dead body inside what witnesses described as a bloodspattered apartment in a state of disarray. In the course of looking for a possibly injured or deceased person, the deputies saw two assault rifles, a suspected grenade launcher, ammunition, and photographs of a man apparently injecting drugs intravenously while sitting in the bathroom of what appeared to be the same apartment. As a result of this entry, observation, and subsequent seizure of the weapons, Matthew Stafford was charged with and convicted of two counts of unlawful possession of a firearm. He was sentenced to 72 months of imprisonment. On appeal, he challenges the district court’s denial of his motion to suppress evidence obtained during the warrantless search. He also argues that, in light of *United States v. Booker*, 125 S. Ct. 738 (2005), his sentence constitutes plain error. We hold that the warrantless entry was reasonably justified by the emergency doctrine, and that the rifles and ammunition seized were properly admitted into evidence under the plain view exception to the Fourth Amendment’s warrant requirement. We remand the case to permit the district court to consider whether it would have sentenced Stafford differently under the advisory, rather than the mandatory, United States Sentencing Guidelines. See *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). Accordingly, we affirm the district court’s denial of Stafford’s motion to suppress and remand pursuant to *Ameline*.”

***United States v. Dupas***, No. 04-50055 (August 3, 2005). “Defendant Matthew Eugene Dupas appeals the sentence imposed after his conviction for possessing stolen mail in violation of 18 U.S.C. § 1708. The government concedes that Defendant’s sentence of imprisonment may be remanded to the district court pursuant to our decision in *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc), because that sentence rested on the district court’s finding of fact as to the amount of loss and was imposed according to the then-mandatory United States Sentencing Guidelines. Here, we address two other challenges to Defendant’s sentence, both of which present issues of first impression in this circuit. Both issues are raised for the first time on appeal, so we review only for plain error. See *id.* at

1078 (reviewing the defendant's Sixth Amendment challenge for plain error); *United States v. Rearden*, 349 F.3d 608, 618 (9th Cir. 2003) (reviewing a challenge to conditions of supervised release for plain error), *cert. denied*, 125 S. Ct. 32 (2004).

First, Defendant argues that the retroactivity principles of the Fifth Amendment's Due Process Clause preclude the retroactive application of the *remedial* holding of *United States v. Booker*, 125 S. Ct. 738, 756-57 (2005), which excised portions of Title 18 of the United States Code in order to make the Sentencing Guidelines effectively advisory. As we explain below, we reject Defendant's argument and hold that he may be resentenced according to the principles set forth in *Booker* and *Ameline*.

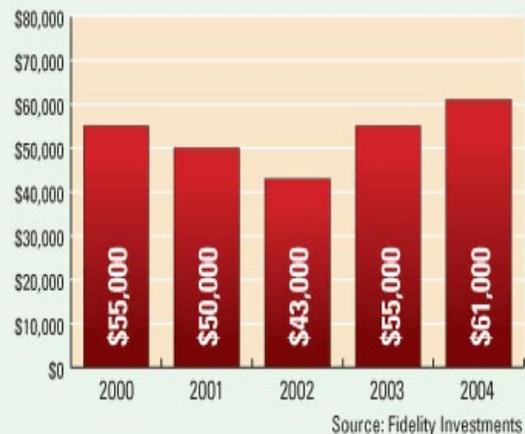
Second, Defendant challenges two conditions of supervised release pertaining to searches and to payments for substance abuse treatment. We affirm the former and, although we are uncertain whether the latter was an improper delegation of the district court's authority under 18 U.S.C. § 3672, our very uncertainty persuades us that the district did not plainly err."

***United States v. Thomas***, No. 03-56750 (August 3, 2005). "Calvin Thomas appeals the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his federal criminal convictions for bank robbery, Hobbs Act robbery, assault on a federal officer, and gun charges in connection with these offenses. The issue is whether prejudice should be presumed under *United States v. Cronin*, 466 U.S. 648 (1984), on account of trial counsel's concession of Thomas's guilt on the Hobbs Act robbery charge without consulting Thomas or obtaining his consent, or instead must be proved under *Strickland v. Washington*, 466 U.S. 668 (1984). The district court found that counsel's statements were part of a trial strategy to make his challenge to other charges more credible, and did not constitute abandonment. It held that *Strickland*, rather than *Cronin*, applies, and included that Thomas had made no showing of a reasonable probability that the outcome of the trial would have been different absent counsel's statements to the jury. We agree, and affirm."

***Gaston v. Palmer***, No. 01-56367 (August 2, 2005). "Anthony Gaston, a California prisoner, seeks review of the district court's dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court held that Gaston's petition was time-barred under the one-year statute of limitations of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2244(d)(1). Gaston concedes that he filed his petition more than one year after the statutory period began to run, but he makes three arguments why the statute should be tolled. We agree with his third argument, and hold, on the facts of this case, that Gaston is entitled to tolling during the time his state court habeas applications were pending. 'Pending,' in this context, includes the intervals between the dismissal of one state application and the filing of the next one. Because Gaston is allowed tolling for the time his state court applications were pending, his federal habeas petition is timely. We therefore reverse the district court's dismissal of his petition and remand for further proceedings."

### Average defined contribution balances

After a few years of declines, the average defined contribution balance is at its highest level since 1999, according to an analysis by Fidelity Investments, the largest plan provider.



## Retirement planning: a reality check

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

Retirement planning has been likened to a three-legged stool. One leg is Social Security, another is made up of retirement benefits from work, and the third leg comes from accumulated assets.

In this analogy, missing any one of the legs causes the stool to fall — the plan to fail. And if the legs aren't balanced right, the stool wobbles. These days, there's a lot of talk in the news about shaky retirement plans at major corporations and municipalities, threatening employee benefits and wreaking havoc with some retirees' retirement stools. Rather than panic perhaps it's time to sit back and do a reality check to get a better understanding of retirement and how best to plan for it.

Let's start by understanding employer-sponsored retirement plans. In the beginning, there was nothing. Then the annuity was created. An annuity is an age-old benefit plan that can provide a guaranteed income to a beneficiary for as long as the beneficiary lives. Social Security retirement benefits and employer "defined benefit pension plans" are based on this concept. A company-defined benefit pension plan, for example, might promise to pay new employees 75% of their average final three years' income for life when retiring at age 65 with 25 years of service.

This is a good deal. The problem is that this type of benefit plan has to have enough cash available at all times to pay the guaranteed benefits. In order to accumulate sufficient cash, the plan needs to make assumptions about the amount of cash coming into the plan, the investment growth rate, and the actual amount of benefits to be paid over time. The problem is compounded as guaranteed benefits for future retirees and current retirees' life expectancies increase. Consequently, such plans are very expensive to administer, and wrong assumptions can leave the plan with a shortfall that could bankrupt the company.

Alternatively, many employers offer employees "defined contribution" plans, which are less costly to administer and have fewer assumptions since there are no guaranteed benefits to pay. A defined contribution plan may stipulate that it will deposit 10% of earnings into the plan each year until retirement, at which time the retiree can withdraw his or her share of the deposits plus investment earnings—whatever they may be.

In a defined contribution plan, a definite amount of cash is invested, and in the future, retirees get a retirement benefit based upon the amount of cash attributed to their share of the plan. 401(k), 403(b), 457, SEP, and SIMPLE IRAs are some examples of plans that use this principle, but there are many more. In some defined contribution plans, only the employer makes contributions. In some plans, both the employer and employee contribute "deferred earnings," while in others, only the employee contributes to his or her plan. When employees retire, they often have the option of taking a lump sum of cash, using their cash to buy an insurance annuity that will give them guaranteed periodic payments, or some other payout option. Defined contribution plans are very flexible, but future benefits cannot be guaranteed.

As an employee, you may not have the choice of whether a plan is a defined benefit or a defined contribution plan, but you usually have a choice of payout options at retirement. With defined

contribution plans, employees often have investment choices that reduce the employer's liability for poor investment acumen and lay that burden on the employees' shoulders.

## Getting a grip

With more and more responsibility falling on future retirees to make decisions about how much and how to invest their retirement funds, it's more difficult to make rational planning choices.

Purveyors of investment products encourage you to save all you can in a tax-advantaged retirement plan for your "golden years." Computer illustrations show how inflation and taxes will erode your purchasing power during the years when you are planning to kick back and relax on your yacht purchased with accumulated savings and supported by your retirement plan benefits for the 15, 20, 30 or more years of retirement. This fear is backed up by the uncertainty of future Social Security benefits. Fear of failing companies and pension plans also fuel the fire. Do I feed my family today or put more money into my retirement savings so I can die rich? Difficult choices.

Okay, sit down; take a deep breath, and get a grip on reality. The retirement stool of this era actually has four legs. And even if you do live 15, 20, 30 or more years into retirement you're not likely to be spending wildly in the throes of inflation and taxes. Despite some "advisors'" claims to the contrary, according to studies done by the U.S. Department of Labor and the U.S. Census Bureau, the trend in spending as one ages in retirement seems to go downward. If you think about it, it makes sense. How many 90-year-olds do you know who party hearty each week? For that matter, how many 90-year-olds do you know? The point is that as one ages, a time is reached where you slow down and spend less. You're more likely to need money for medical and long-term care (which are tax-deductible expenses or may be covered by insurance).

After 25 years of work, most folks who retire...don't. Not necessarily because they financially can't, but because they need to be actively involved in productive endeavors. So, the fourth leg of the "retirement stool" is the ability to continue to generate income from some other work or business.

Now do a reality check. When planning financially for retirement, consider several scenarios. Think about the three phases of retirement: *active retirement*, the time when you first retire but may want to continue earning part time while enjoying increased leisure; *full-retirement*, no more work, just puttering around in the garden, traveling, and spending time with the family; and *final-retirement*—that inevitable time in the cycle of life (old age) when your family will have to come visit you. Consider at what age each is likely to occur and how long it will last. Consider your spending needs for each. Consider the role of Social Security, Medicare, and long-term care insurance in working out your budget for each phase. Now go back and review your employer retirement plan and other investments to see how much more you need to cover—you'll be glad you did. Now go feed the family.

### Today's Word:

**Concatenate** (*Verb*)

**Pronunciation:** [kên-'kæ-tê-neyt or kên-'kæt-ê-neyt]

**Definition 1:** To link together, as in a chain.