



The Public Lawyer

Public Lawyers Section

Nevada Cases

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Rose vs. State, 123 Nev. Adv. Op. No. 24 (July 26, 2007) “Appellant Jeff Rose was convicted of twenty counts of sexual assault on a minor under the age of fourteen based on conduct involving one of his minor daughter’s friends. Rose argues that his conviction was not supported by sufficient evidence and that the district court abused its discretion by refusing his proposed jury instruction that the victim must testify with “some particularity” regarding each charge. We conclude that Rose’s arguments are without merit and that the child-victim’s testimony that the charged incidents occurred every weekend or nearly every weekend during a particular extended time period, along with her de-

scription of the conduct, provided sufficient particularity to support the twenty charges of which Rose was convicted.

Rose also argues that (1) his due process rights were violated by the exclusion of evidence, (2) the district court abused its discretion by denying his motion for a continuance, (3) his due process rights were violated by the use of allegedly false evidence, (4) the State improperly introduced polygraph evidence, (5) his right to be present at all critical stages was violated, (6) the State committed prejudicial prosecutorial misconduct, and (7) cumulative error requires reversal. We conclude that Rose’s arguments are without merit, and we therefore affirm the judgment of conviction. Rose argues that his conviction



must be reversed because of cumulative error. “The cumulative effect of errors may violate a defendant’s constitutional right to a fair trial even though errors are harmless individually.” If the defendant’s fair trial rights are violated because of the cumulative effect of errors, this court will reverse the conviction. The relevant factors to consider when deciding whether cumulative

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If a man watches three football games in a row, he should be declared legally dead. Erma Bombeck

Cogito cogito ergo cogito sum (I think I think therefore I think I am). Ambrose Bierce, The Devil’s Dictionary

If the laws could speak for themselves, they would complain of the lawyers in the first place. Lord Halifax

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Career Stoppers

By Mary Swanton

Few women in corporate America reach the levels that Lorene Schaefer and Theresa Metty attained. Schaefer was general counsel of General Electric’s \$4.2 billion transportation business. Metty was senior vice president and chief procurement officer at Mo-

torola, with annual compensation near \$2 million.

But both women claim they hit the glass ceiling—an invisible barrier blamed for blocking women from realizing their career potential. Faced with demotion, Schaefer filed

a class action lawsuit May 31, accusing GE of “systemic, company-wide discriminatory treatment” of female attorneys and managers. Passed over for promotion, demoted and subsequently terminated, Metty claimed Motorola made

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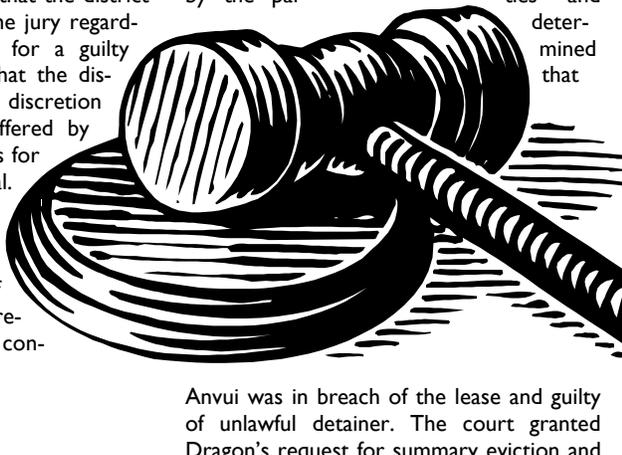


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error requires reversal are “(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.” Although the crimes charged are serious, the State presented compelling evidence of Rose’s guilt and the few errors that we have discussed are minor. We hold that there is no cumulative error warranting reversal. We hold that there was sufficient evidence to support Rose’s conviction and that the district court properly instructed the jury regarding the evidence required for a guilty verdict. We further hold that the district court did not abuse its discretion by excluding evidence proffered by Rose or denying his motions for a continuance and a mistrial. Finally, although there were some instances of prosecutorial misconduct, none of them warrant reversal of Rose’s conviction. We therefore affirm the judgment of conviction. **AFFIRMED**”

Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. Adv. Op. No. 25 (July 26, 2007) “In this appeal, we consider whether, in an NRS 40.253(6) summary eviction proceeding, appellant raised any legal defense to allegations of its unlawful detainer [sic] of the premises at issue, precluding its summary eviction. In order to reach that issue, and since this is a matter of first impression, we must first conclude that the standard for our review of a district court’s order granting summary eviction is the same as our review of a district court’s order granting summary judgment. Appellant Anvui, LLC, leased a commercial building from respondent G.L. Dragon, LLC. The lease states that Dragon is entitled to receive basic rent ‘free and clear of any and all expenses, costs, impositions, taxes, assessments, liens or charges of any nature whatsoever.’ The lease also requires Anvui to pay all operating costs, which are defined as ‘all expenses and disbursements . . . that [Dragon] incurs in connection with the ownership, operation, and maintenance of the Premises.’ Finally, Section 14 of the lease agreement states that ‘[s]hould [Anvui] fail to cure any monetary default within ninety (90) days after written notice has been provided, [Anvui] and [Dragon] agree to cooperate in immediate sale of [Anvui’s] operations at the

highest and best price possible.’ At the hearing, Anvui argued, among other things, that Section 14 of the lease precluded Dragon from seeking summary eviction and restitution of the premises because that section specifies that Dragon’s only remedy in the event of Anvui’s breach is to cooperate in the immediate sale of the business at the highest and best possible price. The district court considered the affidavits filed by the par-



ties and determined that Anvui was in breach of the lease and guilty of unlawful detainer. The court granted Dragon’s request for summary eviction and accordingly entered an order for summary eviction and a writ of restitution and ejectment. This appeal followed, and we granted Anvui’s request for a stay of the district court’s order pending appeal. We conclude that we review a district court order granting summary eviction based on the standard for review of an order granting summary judgment. We further conclude that summary eviction was not appropriate in this case because there is a legal defense based upon unresolved issues of material fact. Dragon must attempt to pursue restitution of the premises, if at all, under NRS 40.290 to 40.420. We have carefully analyzed the parties’ other arguments and conclude that they lack merit. Accordingly, we reverse the order of the district court.”

Nelson vs. Heer, 123 Nev. Adv. Op. No. 26 (July 26, 2007) “In this appeal, we interpret the statutory provisions that require a seller of residential property to disclose any defects to a buyer of that property. Respondent Scott Heer contended that appellant Judy Nelson sold him a cabin without complying with NRS 113.130 because she failed to disclose prior water damage that may have caused elevated amounts of mold

within the cabin. Under NRS 113.140, however, a seller of residential property is required to disclose to potential buyers only those defects of which the seller is aware. NRS 113.100(1) defines “defect” as “a condition that materially affects the value or use of residential property in an adverse manner.” Because Nelson had the prior water damage repaired and she was not aware of the presence of any elevated amounts of mold, we conclude that Nelson did not have a duty under NRS Chapter 113 to disclose the prior water damage or the possible presence of mold. Under NRS 113.140(1), a seller of residential property has a duty to disclose only those conditions that materially and adversely affect the value or use of the property, and of which the seller is aware, realized, perceived, or knew. Because repaired water damage does not constitute a defect under NRS Chapter 113 and Nelson did not know of the presence of elevated amounts of mold in the cabin, she did not violate the disclosure requirements contained in NRS 113.130 when she completed the SRPD. Therefore, as the district court should have granted Nelson judgment as a matter of law, we reverse that portion of the district court’s amended judgment awarding Heer \$245,549.40 under NRS Chapter 113.

Additionally, during trial, Heer failed to establish that the prior water damage proximately caused the presence of the elevated amounts of mold within the cabin. Heer also failed to establish that Nelson breached the implied covenant of good faith and fair dealing, because Nelson did not arbitrarily or unfairly act to Heer’s disadvantage. Accordingly, as judgment as a matter of law was also appropriate on these claims, we reverse the district court’s amended judgment awarding Heer \$24,000 for intentional misrepresentation and \$10,000 for breach of the implied covenant of good faith and fair dealing. We dismiss, as moot, that portion of the appeal taken from the district court’s order denying Nelson’s motion for a new trial.”

Herup vs. First Boston Financial, 123 Nev. Adv. Op. No. 27 (July 26, 2007) “In this case, we consider whether the Uniform

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Fraudulent Transfer Act (UFTA), NRS Chapter 112, was properly applied to a secured creditors' transfer of assets to a third party following the secured creditors' improper repossession of their business. We also take this opportunity to examine the standard to be used in determining whether a transferee has a good faith defense to a fraudulent transfer action under the UFTA. We adopt an objective, rather than a subjective, inquiry into whether the transferee knew or should have known of the debtor's fraudulent purpose in transferring the assets. But here, because we conclude that the district court failed to determine whether a fraudulent transfer under the UFTA occurred in the first instance, we reverse the district court's judgment as to the third party and remand this case for a new trial. We conclude that the district court failed to make specific findings of fact with respect to whether the Grants' transfer of the business to Herup was fraudulent, and whether Herup was a good faith purchaser within the meaning of the UFTA. Accordingly, we reverse the district court judgment as to Herup and remand this matter for a new trial consistent with this opinion."

Manwill vs. Clark County, 123 Nev. Adv. Op. No. 28 (July 26, 2007) "This appeal involves, in part, determining the scope of NRS 617.457(1), which sets forth a conclusive presumption that entitles firefighters with heart disease to occupational disease benefits from the date of disablement, so long as the date of disablement occurs at least five years after full-time, uninterrupted work as a firefighter. During the administrative proceedings below, an appeals officer upheld the denial of a firefighter's occupational disease claim under NRS 617.457(1), concluding that the firefighter was not entitled to that statute's conclusive presumption because his heart disease predated the completion of five years' qualifying employment, and his preexisting heart condition had merely progressed over many years, irrespective of his work as a firefighter. The district court later denied judicial review.

We conclude, however, that the statutory conclusive presumption applies to a claimant who contracts heart disease before completing the five-year vesting period, but whose date of disablement from the heart disease takes place after the five-year pe-

riod has concluded. Accordingly, we reverse the district court's order denying judicial review of the appeals officer's decision. Since, however, the appeals officer did not determine whether the firefighter is actually disabled and therefore entitled to benefits, we remand this matter for further administrative proceedings. NRS 617.457(1)'s conclusive presumption applies to heart diseases of qualifying firefighters, entitling them to occupational disease compensation from the date they are deemed disabled, so long as this date occurs after at least five years of full-time, continuous work as a firefighter. Any onset of the heart disease before the five-year vesting period is completed does not affect the statutory presumption. Because the appeals officer plainly erred in concluding that the conclusive presumption statute did not apply to Manwill's claim because Manwill had developed heart disease before he completed five qualifying years as a firefighter, we reverse the district court's order denying judicial review, and we remand this matter to the district court. On remand, the district court is instructed to grant judicial review and remand this matter for additional administrative proceedings to determine whether Manwill is entitled to occupational disease compensation in light of this opinion and NRS 617.457."

Halverson vs. Hardcastle, 123 Nev. Adv. Op. No. 29 (July 27, 2007) "This original petition for a writ of quo warranto raises important and novel issues regarding a chief district judge's authority over the actions of another district judge.

Due to reported events in the spring of 2007, the chief judge of the Eighth Judicial District in Clark County appointed a three-judge committee to work with a newly elected district judge in improving her judicial performance. Based on the three-judge committee's recommendation, the chief judge then reassigned the judge's criminal caseload to a different judge. Thereafter, citing security concerns that had arisen, in part, when the judge brought private bodyguards into the courthouse, the chief judge ordered the judge barred from the courthouse until she agreed to meet with the three-judge committee to address the security concerns.

The judge then filed the instant petition for a writ of quo warranto, challenging the chief judge's authority to carry out the above acts. The petitioning judge asserts that those acts constitute improperly imposed "punishment" for her judicial and nonjudicial conduct and that the effective removal from her courtroom compromised her ability to perform the duties of the constitutional office to which she was elected. On a broader level, her petition raises concerns regarding the scope of a chief district judge's authority over court security and other court administration matters and the chief judge's power to personally address another elected judge's potentially discordant actions.

We conclude that, pursuant to properly adopted district court rules, a chief judge has broad administrative authority to ensure that the district court system functions as it should. Accordingly, the chief judge may, when appropriate under the rules, exercise that authority to appoint a three-judge committee to work with a judge and to reassign that judge's criminal caseload, even if those remedial actions impart an aspect of "punishment." A chief judge's authority, while broad, is not unlimited, however; it extends only so far as the express language of the rules or as is reasonably necessary in an emergency situation to ensure the district court system's proper functioning.

Consequently, the chief judge in this matter appropriately appointed a committee of judges to review the judge's judicial performance and reassigned the judge's caseload. In barring the judge from the courthouse when other less drastic measures could have been implemented, however, the chief judge intruded into the judge's judicial functions, warranting the issuance of a writ of quo warranto. Instead, unless faced with an emergency situation requiring immediate action, the chief judge's remedy is with the Nevada Commission on Judicial Discipline, which has authority over formally disciplining judges, or under certain circumstances, with this court, which has the ultimate administrative authority over the functioning of Nevada's court system.

In coming to this conclusion, we recognize that this is the first time that we have had the opportunity to examine these interrelat-

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tionships in the context of the strong chief judge system, enacted by this court in the late 1990s. Accordingly, the parties to this matter and this court have, until the issuance of this opinion, been required to operate within the confines of an experiment in modern statewide and local judicial management. Thus, the judges involved in this interaction have had to act under their best judgment and discretion in attempting to

ently exercise her judicial decision-making functions, the Nevada Commission on Judicial Discipline's authority over disciplinary matters, or this court's authority, through its chief justice, as administrative head of the court system.

Because Chief Judge Hardcastle's actions in appointing a three-judge committee and in removing Judge Halverson's criminal cases



comply with the constitutional, statutory, and court-imposed mandates discussed in this opinion.

Judge Halverson not only challenges Chief Judge Hardcastle's authority to take the actions discussed in this opinion, she also complains that the motives behind those acts were punitive. Chief Judge Hardcastle's motives, however, need not be examined as long as she acts in accordance with the rules and within the scope of her inherent authority and does not improperly interfere with Judge Halverson's duties to independ-

constituted a proper exercise of her administrative authority, a writ of quo warranto is not warranted to address those issues. With respect to the May 10 order banning Judge Halverson from the justice center until she cooperates, however, Chief Judge Hardcastle overstepped her authority. Accordingly, we grant the petition, in part, and we direct the clerk of this court to issue a writ of quo warranto "ousting" Chief Judge Hardcastle from intruding upon Judge Halverson's exercise of her judicial functions in this manner."

Marcuse vs. Del Webb Communities, 123 Nev. Adv. Op. No. 30 (August 2, 2007) "In these consolidated appeals, we consider whether the appellants, who were unnamed class members in a constructional defect action, had standing to object to a proposed settlement and whether they now have standing to appeal the district court's final order approving the settlement and dismissing the class action. We also consider whether the district court should have allowed the appellants to pursue a second action independent from the class action (second action), based on the doctrine of judicial estoppel. Because unnamed class members in a constructional defect class action case are parties to the class action, we conclude that they have standing to object to a proposed settlement. Further, since unnamed class members who are unable to opt out of the settlement must be permitted an opportunity to preserve their own interests against a settlement that will ultimately bind them, they also have standing to challenge the district court's approval of the settlement, in an appeal from the final judgment. Nonetheless, the district court did not abuse its discretion in approving the settlement in this case, and we therefore affirm the dismissal of the class action based on the settlement.

We also conclude, however, that the district court erred when it dismissed the appellants' second action under the doctrines of res judicata and collateral estoppel, because the respondent represented that the appellants could file a second action for their claims that exceeded the constructional defect class action's scope, and therefore respondent is judicially estopped from arguing that the action should be dismissed on res judicata grounds. We therefore reverse the district court's order granting the respondent's motion to dismiss the second action and remand the appeal in Docket No. 44508 to the district court for further proceedings.

We conclude that the Marcuses had standing to object to the proposed settlement and to appeal the district court's dismissal of the class action based on the settlement. However, we further conclude that the district court did not err in approving the settlement. Additionally, because Del Webb represented to the district court that the

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Marcuses could file a second action outside of the class action, we determine that the district court did not abuse its discretion in denying the Marcuses' motion to consolidate and motion for a separate trial within the class action. Nevertheless, given Del Webb's conduct, the district court erred by granting Del Webb's motion to dismiss the second action based upon the doctrines of res judicata and collateral estoppel, because it should have denied the motion based upon the doctrine of judicial estoppel. Accordingly, we affirm the district court's dismissal of the class action based on the settlement (Docket No. 44753), but we reverse the district court's order granting Del Webb's motion to dismiss the second action (Docket No. 44508) and remand that matter for further proceedings consistent with this opinion."

Gallegos vs. State, 123 Nev. Adv. Op. No. 31 (August 2, 2007) "In 2004, the State charged Gallegos with one count of unlawful possession of a firearm after police arrested him at his home in Clark County and found a firearm inside that home. The State based that charge on a 1998 felony warrant issued by a California superior court. The California court issued the warrant when Gallegos failed to appear for sentencing after pleading nolo contendere to seven felony charges, which California had agreed to reduce to gross misdemeanor charges in exchange for Gallegos' plea and good behavior. At his Nevada trial, Gallegos testified that he did not appear for his sentencing hearing because the California superior court told him when he entered his plea that "he'd recommend me not stepping a foot back in California ever again." He further testified that he did not know he needed to return for sentencing because when he reported to the probation office shortly after he entered his plea, as directed by the California superior court, that office had no record of Gallegos' charges in its system. Believing that his case had been resolved and that he had satisfied his obligations, Gallegos asked the probation office to contact him if anything changed. He then left California and returned to Las Vegas.

Prior to his Nevada trial, Gallegos filed a motion to dismiss the unlawful possession charge. In that motion, he argued that NRS 202.360(1)(b) is unconstitutionally vague

and fails to provide sufficient notice that he cannot possess a firearm because it does not define the term "fugitive from justice." The district court denied the motion. The district court later conducted a two-day trial during which the district court instructed the jury that "[a] fugitive from justice is any person who has fled from any state to avoid prosecution for a crime." The district court, at the urging of the prosecutor, derived that instruction from the federal definition of "fugitive from justice" found in 18 U.S.C. § 921(a)(15). At the end of the evidentiary portion of his trial, Gallegos renewed his motion to dismiss the charge on constitutional grounds. The district court again denied the motion. Relying on the instruction it had been given, the jury found that Gallegos was a "fugitive from justice" and was guilty of unlawfully possessing a firearm in violation of NRS 202.360(1)(b). The district court sentenced Gallegos to a prison term of 1 to 6 years, suspended execution of the sentence, and placed him on probation with conditions for an indeterminate period of time not to exceed 3 years. This appeal followed.

We conclude that NRS 202.360(1)(b) is unconstitutionally vague and violates the Due Process Clause of the Fourteenth Amendment. Accordingly, we reverse the district court's judgment of conviction."

State vs. Ruscetta, 123 Nev. Adv. Op. No. 32 (August 2, 2007) "In this appeal, we clarify the test for determining the scope of consensual vehicular searches. In doing so, we revisit our decision in *State v. Johnson*, where a majority of the court concluded that dismantling a vehicle glove box exceeds the scope of general consent to search a vehicle and is therefore unreasonable. We now clarify that the proper test in cases involving consensual vehicular searches is one that examines the totality of the circumstances for objective reasonableness.

While on patrol, two Las Vegas Metropolitan Police Officers stopped respondent David John Ruscetta's car after observing him make an illegal right turn. A records check revealed that Ruscetta was driving on a suspended license and had two outstanding warrants. One of the officers asked Ruscetta to exit the vehicle. Once outside,

Ruscetta consented to a search of his person, which revealed no evidence.

Ruscetta later freely consented to a search of his vehicle. Upon entering the driver side of the car, the inspecting officer noticed that someone had previously removed the air conditioning vents, ashtray, and center console. Additionally, the officer detected an odor that, through his experience and training, he knew to be marijuana. After moving to the passenger side of the vehicle, the officer placed his right hand on the center console, which shifted towards the driver's seat. Underneath the console, the officer found three plastic baggies containing marijuana and a handgun.

The officers arrested Ruscetta. At that time, a third officer arrived and read Ruscetta his *Miranda* rights. Ruscetta waived his right to remain silent and explained that he had bought the marijuana at a local convenience store a few hours before the stop and that an acquaintance had given him the handgun for personal protection a few months earlier. After the officers finished interviewing Ruscetta, they transported him to the Clark County Detention Center for booking. The officers then impounded Ruscetta's car and performed an inventory search.

Several months later, the State filed an information charging Ruscetta with three crimes: possession of a controlled substance with intent to sell, unlawful possession of a firearm, and possession of a firearm by an ex-felon. After waiving his right to a preliminary hearing, Ruscetta filed a motion to suppress the evidence found during the search of his vehicle. The district court held a brief hearing on Ruscetta's motion at which the parties did not present any witness testimony. The only evidence submitted to the district court was the official police report documenting the search. After listening to the arguments of counsel, the district court granted Ruscetta's motion. Based on the totality of the circumstances, the district court determined that the movement of the center console went beyond the scope of Ruscetta's consent. In making this determination, the district court relied in part upon this court's prior decision in *Johnson*. The district court then granted Ruscetta's oral motion to dismiss for lack of evidence.

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We take this opportunity to clarify our decision in *Johnson* and conclude that the proper analysis in cases involving consensual vehicular searches is a traditional objective reasonableness approach, which requires an examination of the totality of the circumstances.

In this case, the district court based its conclusion on the totality of the circumstances but it failed to hold an evidentiary hearing or make written factual findings with respect to the inspecting officer's conduct during the search of Ruscetta's vehicle. Consequently, we vacate the order of the district court and remand this matter for additional proceedings consistent with this opinion."



(Continued from page 1)

only "minimal effort to hire or promote women to executive positions." She settled a sex discrimination suit for an undisclosed sum on March 8 as a jury trial was underway.

Other recent glass ceiling cases include Morgan Stanley's \$46 million settlement with 2,700 female financial advisers in April. At Costco, assistant managers who claim they were blocked from promotions won certification of a class action in January.

More than two decades after a *Wall Street Journal* article popularized the phrase "glass ceiling" and more than 40 years after Congress outlawed sex discrimination, litigation claiming gender disparities in promotional opportunities is on the rise.

While most women aren't willing to risk the stigma attached to executives who sue their employers, some are stepping forward. And plaintiffs' attorneys are stimulating interest

with highly publicized mega-class actions.

"We've seen several cases recently of professional women taking on their employers over discrimination where a few years ago we didn't see that," says Sandra Jezierski, shareholder in Hallelund Lewis Nilan & Johnson. "It seems women feel more empowered to bring lawsuits against their employers. When women read articles about other women doing it, it adds fuel to the fire."

Unconscious Bias

In many cases the fire is set by plaintiffs' attorneys who know the numbers are on their side. In 2006 the women's advocacy group Catalyst found that while 46.3 percent of U.S. employees are women, only 15.6 percent of corporate officers are women.

"Enough women have made it to the first rung of the ladder that it's obvious to ask the question, why haven't more gone higher?" says Brad Seligman, executive director of the Impact Fund, a legal foundation specializing in class actions, and lead attorney for the *Costco* plaintiffs.

The answers to that question vary, and some of them can undermine a plaintiff's case. Some disparities can be explained by the fact that women may choose less demanding career paths or take extended leaves of absence in order to spend more time at home. At the highest levels, decision makers often base promotions on subjective factors such as "enthusiasm" and "leadership ability" that can't be quantified, so it's hard to show that they passed over a woman due to bias. And the discrimination is usually subtle.

"Most CEOs are male," says Jane McFetridge, partner in Fisher & Phillips. "And people are more likely to foster and develop someone like themselves. But it's very difficult to prove discrimination."

Now plaintiffs' attorneys are taking a new tact, tapping sociologists to present theories that tie such unconscious bias to discriminatory decisions.

"What we rely on now is a developing body of sociological knowledge that looks at how people make decisions," Seligman says.

O.J. SIMPSON ARRESTED IN LAS VEGAS ROBBERY



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"Research tells us that we are most comfortable with people like ourselves, so if you don't have a carefully designed personnel system with accountability and oversight, the odds are you are not going to consider people [for promotion] who are different from you."

While the 11th Circuit upheld class certification in the massive *Dukes v. Wal-Mart* sex discrimination class action in January based in part on testimony from sociologists about unconscious bias, few courts have ruled on the theory.

"Plaintiffs' attorneys are relying on unconscious bias theory at the class-certification stage to show a common thread that ties together hundreds of employment decisions," says Jeremy Sosna, partner in Ford & Harrison. "The proverbial jury is still out on whether that is a viable way to prove discrimination."

Gender Stereotypes

Litigating on the defense side of glass ceiling cases isn't easy either. In companies where women are underrepresented in management and plaintiffs show a pattern of apparently qualified women losing out on promotions to men, "I have to explain how that statistical anomaly transpired," McFetridge says.

The defense case is hampered if the company can't produce annual reviews or other documentation that differentiates the candidates, she adds.

Companies also are sometimes tripped up by gender stereotypes.

"There aren't a lot of companies that intentionally exclude women from executive jobs, but there could be stereotypes of what an executive should look like," Jezierski says. "They expect the CEO to be a bulldog, and they just can't see a woman in that role."

Beyond that, while most companies have corporatewide anti-bias policies, many promotion and pay decisions are made in far-flung divisions or work groups that may not get the message.

"At the corporate level, you have very sophisticated human resources people whose focus is to eliminate bias," Sosna says. "But because

of the decentralized nature of many companies, it's very difficult to impose that corporate culture."

While Seligman agrees that many companies are working to address glass-ceiling issues, he predicts an increase in sex discrimination class actions, especially if *Dukes* survives the next round of appeals. The case will become a prototype that plaintiffs' attorneys can follow.

"It won't be an avalanche because class litigation is complex and difficult, but you will see an increase in targeted cases," he says.

Role Models

To avoid being the next target, employers must back up fair policies with sound personnel practices at all levels. That includes posting promotion opportunities, writing detailed job descriptions and requiring candid reviews. Putting promotion decisions in the hands of a diverse team also minimizes claims.

"Companies need to look at promotion practices—not just the policies but how the policies are implemented," Jezierski says. She also recommends examining pay rates for men and women at all levels and detailing job duties that impact pay in job descriptions, even though the Supreme Court recently made it more difficult to claim pay discrimination.

Cathy Fleming, partner at Nixon Peabody and president of the National Association of Women Lawyers, suggests that in-house lawyers serve as role models for the rest of the corporation. Legal departments at Wal-Mart, Sara Lee and Pepsi are doing just that by embracing diversity in hiring and promotion and supporting women lawyers with training opportunities, she says.

"Embracing the concept of diversity has to come from management down," Fleming says. "Management has to say it is an important goal."

Common sense often makes good law.
William O. Douglas

Tact is the ability to describe others as they see themselves.

Abraham Lincoln

Nevada State Comm'n on Ethics v. Goodman, Order of Affirmance (September 11, 2007) (footnotes omitted).

This is an appeal from a district court order granting judicial review of an ethics commission decision. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Following an administrative hearing, appellant Nevada Commission on Ethics determined that respondent Las Vegas Mayor Oscar Goodman violated NRS 281.481(2) by hosting a cocktail party sponsored by his son's company, iPolitix, at a national mayors' conference. Goodman then filed a petition for judicial review with the district court, arguing that the administrative record did not support the Commission's findings. The district court agreed and this appeal followed.

On appeal, the Commission contends that the district court failed to provide sufficient deference to its findings and that the record supports its determination that Goodman violated NRS 281.481(2). The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition. For the following reasons, we affirm.

Standard of review

When a decision of an administrative body is challenged, our function is identical to that of the district court—we review the evidence presented to the administrative body and ascertain whether that body acted arbitrarily or capriciously, thus abusing its discretion. Accordingly, we may set aside an agency's final decision if substantial rights of the

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petitioner have been prejudiced because the decision was, *inter alia*, affected by error of law or clearly erroneous in view of the reliable, probative and substantial evidence. In performing our review, we are limited to the record below, and may not substitute our judgment for that of the agency as to the weight of evidence on questions of fact.

With respect to NRS 281.481, we have recognized that although we "may conduct a *de novo* review of the Commission's construction . . . the district court was obligated to give deference to the construction afforded by the Commission." This is because an agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." In addition, "[a]lthough the district court may decide pure legal questions without deference to an agency determination, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence." "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion."

Substantial evidence does not support the Commission's determination that Mayor Goodman violated NRS 281.481(2)

NRS 281.481(2) prohibits a "public officer" from using "his position in government to secure or

grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person." Several elements of this statute are not in question and require no further discussion here: (1) Oscar Goodman, as mayor of Las Vegas, is a public officer, and (2) Mayor Goodman has a commitment in a private capacity to the interests of his son. However, because the parties dispute the remaining elements of NRS 281.481(2), we will discuss them in detail below.



Mayor Goodman did not "use his position in government"

Although this court has never addressed the meaning of the term "use" in NRS 281.481(2), Webster's dictionary defines it as "the act or practice of employing something."¹¹ In granting Goodman's petition, the district court applied a similar definition—it defined the verb "to use" as "R]o put into service or apply for a purpose; employ."

On appeal, the Commission argues that Goodman "used" his position in government by bringing his son's attention to the national mayors' conference. In addition, the Commission contends that Goodman used his position to garner favor for iPolitix by (1) agreeing to host the cocktail party in question, (2) handing out four or five invitations (which included his name and title), and (3) suggesting that attendees pick up an iPolitix informational folder before leaving the party. We disagree. After examining the record, we conclude that the evidence does not sustain a finding that Mayor Goodman "used" his position in government.

Initially, we note that the Commission simply ignores significant evidence in the record. For example, the Commission does not address the fact that the mayors' conference was actively soliciting new campaign-related technology for presentation at the conference. In addition, Goodman's son went through all of the proper procedures to have the conference place an iPolitix event on the conference agenda. There is no evidence that Mayor Goodman aided iPolitix in any way besides telling his son that the conference was seeking technology presentations. Moreover, the record demonstrates that when a scheduling conflict forced the conference organizers to cancel iPolitix's original event, a conference representative, *not Goodman*, suggested that iPolitix sponsor a cocktail party. In fact, the conference had pre-scheduled Goodman to host a cocktail party at the conference even before he knew about iPolitix's need for a host. Thus, Goodman was not actively involved in the decision

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to have him host; rather, he merely agreed to host iPolitix's party since he was already going to host one anyway.

Moreover, we conclude that Mayor Goodman did not "use" his position to foster goodwill for iPolitix products before or during the cocktail party. Before the party, iPolitix circulated invitations, which included Mayor Goodman's name. Mayor Goodman personally distributed four or five of the invitations. At the party, Mayor Goodman spoke briefly and encouraged attendees to take a folder providing information on iPolitix's products. In addition, Mayor Goodman mentioned that he loved his son. This type of minimal conduct is not of the same significance that the Commission has generally found to violate NRS 281.481. In addition, other states have generally found ethical violations by public officials where the official bribes or threatens parties, or where the official expends public funds. This case does not involve such serious conduct.

After reviewing the record, we conclude that substantial evidence does not support the Commission's determination that Mayor Goodman "used" his position as mayor as that term has been interpreted by the Commission. Accordingly, the district court properly found that Mayor Goodman did not violate NRS 281.481(2).

Mayor Goodman did not "secure or grant unwarranted privileges, preferences, exemptions, or advantages" for his son

Separately, the Commission contends that Mayor Goodman secured or granted unwarranted privileges, preferences, exemptions, or advantages for his son." As the record makes clear, however, this is not a case in which a public official "pulled strings" in favor of himself or a relative. Rather, Mayor Goodman became aware that the mayors' conference was soliciting new technology companies to serve as presenters. He relayed this information to his son, who then went through all of the proper procedures to place an iPolitix event on the agenda. After event coordinators cancelled iPolitix's event and the company decided to hold a cocktail party instead, Mayor Goodman agreed to host the party. Under the circumstances of this case, Mayor Goodman's conduct does not rise to the level of being "unwarranted." In fact, the record wholly supports the district court's conclusion that "the solicitation by [the conference] of 'cutting edge technology to present at the conference' (Finding No. 7) was sufficient justification for [Mayor Goodman] to inform his

son about the Conference." Moreover, as noted by the district court, the Commission made "no finding that, beyond providing the desired information, [Mayor Goodman's] son or iPolitix derived any concrete benefit . . . or expected to do so." Thus, we conclude that Goodman did not "secure or grant" a benefit in favor of iPolitix or his son. Although the Commission found that "Mayor Goodman created an appearance of impropriety and unwarranted privilege" by encouraging attendees to review iPolitix's products and material, the district court correctly noted that "the appearance of impropriety . . . is not sufficient to constitute an infraction [NRS 281.481(2)]." We therefore conclude that Mayor Goodman's conduct did not constitute a violation of that statute.

Conclusion

We conclude that substantial evidence does not support the Commission's determination that Mayor Goodman violated NRS 281.481(2). Accordingly, we ORDER the judgment of the district court AFFIRMED.



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Farmer vs. Baldwin, No. 06-35635

(August 15, 2007) “George Edward Farmer (“Farmer”) appeals the district court’s dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254, arising from his conviction in Oregon state court on one count of murder. The district court did not reach the merits of Farmer’s claims, ruling instead that he failed to exhaust available state remedies, and that his claims are now procedurally defaulted.

Farmer contends on appeal that the district court erred in so concluding, arguing that because he complied with Oregon procedural rules to present his claims to the state courts, those claims are now exhausted and warrant federal habeas review. Because this contention raises an important and unresolved issue of Oregon law, we respectfully CERTIFY A QUESTION for review by the Supreme Court of Oregon. We offer the following statement of relevant facts and explanation of the “nature of the controversy in which the question arose.” OR. REV. STAT. § 28.210(2) (2005). We certify the following question to the Supreme Court of Oregon:

Whether, under its rules or practice, the Oregon Supreme Court would deem a federal question not properly raised before it, when that question has been presented by means of an attachment to a *Balfour* brief filed in the Court of Appeals, and the attachment served as (but was not labeled as) Section B of said brief, and the petitioner specifically states in his petition to the Supreme Court that his reasons for seeking review are set forth in the *Balfour* brief. We respectfully request the Oregon Supreme Court to exercise its discretionary authority under Oregon’s Uniform Certification of Questions of Law Act, OR. REV. STAT. §§ 28.200 to .255 (2005), to accept and decide this question. If the Oregon Supreme Court decides that the question presented in this case is inappropriate for certification, or if it declines the certification for any other reason, it should so state and we will resolve the question according to our understanding of Oregon law. The Clerk will file a certified copy of our Order with the

Oregon Supreme Court under OR. REV. STAT. § 28.215 (2005). This appeal is withdrawn from submission and will be submitted following receipt of the Oregon Supreme Court’s Opinion on the question certified. This panel retains jurisdiction over further proceedings in this court. The parties will notify the Clerk within one week after the Oregon Supreme Court accepts or rejects certification, and again within one week after the court renders its opinion.”

Womack vs. Del Papa, No. 06-15069

(August 13, 2007) “Womack shared an apartment with Kathryn

Reeder, her seven and thirteen year-old sons, and her twelve year-old daughter.

On October 4, 1999, while Reeder was at work, Womack stabbed the thirteen year-old boy in the neck, chest and shoulder, cut the

seven year-old across his and chest, all three children in the bathroom.

After stealing several items, Womack fled the apartment. Reeder’s daughter escaped from the bathroom, ran to Reeder’s workplace, and informed her mother what Womack had done.

Reeder and her daughter returned to her apartment and Reeder called 911 when she saw the extent of her sons’ injuries. Womack was arrested the following day when he attempted to cash a forged check. Jaramie D. Womack, a Nevada prisoner, appeals the denial of his federal habeas petition. He asserts that he entered an

Alford guilty plea to several crimes that was not knowing, voluntary and intelligent because he was deprived of effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. He alleges that even though his trial attorney advised him that a guilty plea was his “best chance” the trial judge would impose the minimum sentence for each count in his indictment, thereby making him eligible for parole in thirty to forty years, the trial judge instead determined that Womack is a habitual criminal and sentenced him to eight life terms without the possibility of parole. We hold that Womack did not receive ineffective assistance of counsel, and we affirm the district court’s denial of his petition for habeas corpus. We hold that the Nevada Supreme Court’s conclusion that Womack did not receive ineffective assistance of counsel is not contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). We therefore affirm the district court’s decision denying Womack’s petition for a writ of habeas corpus.

AFFIRMED”

Porter vs. Jones, No. 06-55517 (August 6, 2007) “The 2000 presidential election was one of the closest in our nation’s history. Polls in the weeks before Election Day showed a statistical dead heat see Election 2000, [http://](http://www.pollingreport.com/2000.htm#TRIAL)

www.pollingreport.com/2000.htm#TRIAL, and George W. Bush eventually prevailed even though Al Gore received a plurality of the national popular vote. The 2000 election also featured third-party candidates on both the left and right ends

of the political spectrum: respectively, Green Party nominee Ralph Nader and Reform Party nominee Pat Buchanan. Although Nader and Buchanan ultimately combined to receive only 3.1 percent of the national popular vote, their importance was magnified by the closeness of the election.

Bush and Gore supporters worried that so-called “swing states” might be tipped one way or another by votes for thirdparty candidates. See, e.g., James Dao, *Democrats Hear Thunder on Left, and Try To Steal Some of Nader’s*, N.Y. Times, Oct. 25, 2000, at A1.



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The public's attention also became particularly focused on the peculiarities of the American electoral system, under which small numbers of thirdparty votes can prove decisive in closely contested states because of their winner-take-all rules for the allocation of presidential electors, and a candidate can win the presidency despite losing the national popular vote. See, e.g., Michael Kranish, *Electoral College Count Looming Larger This Year*, Boston Globe, Oct. 26, 2000, at A30. Winner-take-all systems allocate all of a state's electoral votes to the candidate who receives the most popular votes in that state, even if his share of the vote is less than an outright majority. Almost all states employ this system; only two, Maine and Nebraska, allocate electoral votes on a district-by-district basis. It was in this highly charged political atmosphere that Appellants created two websites, *votewap2000.com* and *votexchange2000.com*, that encouraged people to "swap" their votes and provided email-based mechanisms for doing so. The vote-swap mechanisms enabled third-party supporters in a swing state such as Florida or Ohio to agree to be paired with major-party supporters in a "safe state" such as Massachusetts or Texas, whereby the swing-state users would promise to vote for the major-party candidate and, in exchange, the safe-state users would promise to vote for the third-party candidate. The point of the swaps, at least when agreed to by Nader and Gore supporters, was to improve Gore's odds of winning the Democratic-pledged electors in the swing state without reducing Nader's share of the national popular vote (which needed to exceed five percent in order to qualify his party for federal funding in future elections). Four days after their website began operation, the owners of *votewap2000.com* were threatened with criminal prosecution by then-California Secretary of State, Bill Jones, for alleged violations of various state election and penal code provisions. They immediately disabled the website's vote-swapping mechanism, as did the owners of *votexchange2000.com* upon learning about that threatened prosecution. Shortly thereafter, Appellants filed this action, alleging that Jones' threatened prosecution violated the First Amendment and the dormant Commerce Clause and exceeded the scope of his authority under California's election code; they sought damages as well as injunctive and declarative relief. The district court twice found this case to be moot —

most recently because of an informal letter from former Secretary of State Kevin Shelley to the California legislature asking for clarification of the state election code provisions. Because the letter does not assure that California will not threaten to prosecute vote-swapping websites in the future, we conclude that this appeal is not moot. On the merits, we hold that Jones violated Appellants' First Amendment rights. The websites' vote-swapping mechanisms as well as the communication and vote swaps they enabled were constitutionally protected.

Although California certainly has valid interests in preventing election fraud and corruption, and perhaps in avoiding the subversion of the Electoral College, these interests did not justify the complete disabling of the vote-swapping mechanisms.

Because we conclude that Jones' actions were not sufficiently tailored to advance the State's legitimate interests, we do not reach Appellants' further claims that those actions were an unconstitutional prior restraint, violated the dormant

Commerce Clause and were ultra vires under state law. Finally, we hold that Jones is entitled to qualified immunity from damages because the constitutionality of halting vote swapping was not clearly established in 2000. The district court's decision is therefore affirmed in part and reversed in part. We hold that this case is not moot. The Shelley letter did not make it absolutely clear that California would not threaten to prosecute the owners of vote-swapping websites in the future. We further hold that Jones violated the First Amendment when he threatened to prosecute the owners of *votewap2000.com* and *votexchange2000.com*. Both the websites' vote-swapping mechanisms and the communication and vote swaps that the mechanisms enabled were constitutionally protected. The heavy burden Jones imposed on this protected activity did not further the State's interests in preventing corruption and preventing the subversion of the Electoral College, and the Secretary failed to establish that the State's antifraud interest could not have been advanced as effectively through less severe measures. Nonetheless, we hold that Jones is entitled to qualified immunity because the constitutionality of halting vote swapping was not clearly established in 2000. The parties shall bear their own costs on appeal.

AFFIRMED IN PART AND REVERSED IN PART."



USA vs. Larson, No. 05-30076 (August 1, 2007) "In 2003, the Great Falls Police Department began investigating a number of drug dealers in the Great Falls, Montana area. In April 2003, the Department paid informant Connie Riggs to make a controlled purchase of 1.8 grams of methamphetamine from Larson. The police unsuccessfully attempted a second controlled buy from Larson through Riggs. In October 2003, informant Jason Gilstrap made two controlled purchases of methamphetamine from Laverdure, one in the amount of 1.46 grams and the other in the amount of 1.79 grams. In December 2003, a third informant purchased 3.2 grams of methamphetamine from Joy Lynn Poitra and her cousin, Rick Lee Lamere. Two weeks later, the same informant purchased another twenty-one grams of methamphetamine from Poitra.

On July 23, 2004, a federal grand jury indicted Larson, Laverdure, Poitra, and Lamere in a single indictment, charging each with one count of conspiracy to possess methamphetamine with intent to distribute.² The Government informed Lamere that because he had at least two prior felony drug convictions, he faced a statutory mandatory minimum sentence of life imprisonment without the possibility of release. See 21 U.S.C. § 841(b)(1)(A).

These appeals present the question whether the Sixth Amendment Confrontation Clause rights of Defendants Patricia Ann Larson and Leon Nels Laverdure were violated when they were barred from cross-examining two witnesses about the mandatory minimum prison sentences that they would have faced but for their coop-

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eration with the Government. A three-judge panel of our court held that there was no constitutional violation and affirmed Defendants' convictions. *United States v. Larson*, 460 F.3d 1200 (9th Cir. 2006). We subsequently granted rehearing en banc. Before addressing the merits of Defendants' constitutional arguments, we clarify the standard of review that we apply to Confrontation Clause challenges. Under the circumstances here, we review for abuse of discretion, and we hold that Defendants' Confrontation Clause rights were violated. The error was harmless, however, and we therefore affirm their convictions."

Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, No. 05-55406 (September 17, 2007).

"We must determine whether a municipal rent control ordinance survives a due process and equal protection challenge or requires payment of compensation as a government taking."

"In sum, we conclude that MHC has standing based on its financial interest in the Park. However, we affirm the district court's order dismissing its complaint. The complaint contained no claim upon which relief could be granted, because its as-applied takings claim was unripe, its facial claims failed to satisfy the applicable statute of limitations, and its due process and equal protection claims lacked merit under the United States Constitution. Moreover, the principles of abstention justify the district court's dismissal of the petition for a writ of administrative mandamus, and we decline to disturb the state trial court's subsequent decision denying the writ.

The district court's order dismissing MHC's First Amended

Complaint is **AFFIRMED**."

Nilsson v. City of Mesa, No. 05-15627

(September 13, 2007). "Nilsson applied for a police officer position with the City of Mesa. In conjunction with her employment application, Nilsson agreed to "waive all [her] legal rights and causes of action to the extent that the Mesa, Arizona, Police Department investigation (for purposes of evaluating [her] suitability or application for employment) . . . violate[d] or infringe [d] upon . . . [her] legal rights and causes of action . . ." In addition, Nilsson: [A]gree[d] to hold harmless and release from liability under any and all possible causes of legal action the City of Mesa, Arizona Police Department, their officers, agents, and employees for any statements, acts, or omissions in the course of the investigation into [her] background, employment history, health, family, personal habits and reputation.

Officer Dwayne Yunker (Yunker) was assigned to investigate Nilsson's background. After an initial review, Yunker "gave . . . Nilsson the thumbs up," and her employment application was sent to the Mesa Police Department's (Mesa PD) Hiring Board. Yunker continued discussions with Nilsson, however, because he was unable to answer the hiring Sergeant's questions regarding the conditions under which Nilsson left the Tempe Police Department (Tempe PD), as well as the various legal proceedings in which Nilsson had been involved while employed by the Tempe PD. Nilsson disclosed that she had been involved in an EEOC dispute with the Tempe PD, and that she left the Tempe PD as part of a settlement agreement. In a subsequent discussion, Nilsson explained that she had been involved in civil proceedings in 1983, 1988, 1991, and 1992. Nilsson also revealed that in or around 1990 or 1991 she filed a worker's compensation claim, and that in 1993 she was involved in a labor board proceeding.

The Hiring Board denied Nilsson's application, but did not inform her of its decision. Nilsson learned that her application had been denied from Detective John Newberry (Newberry), a friend of hers at the

Mesa PD. Newberry also informed Nilsson that "there could be a possibility [the hiring officials] . . . could change their mind." The Mesa PD subsequently extended a conditional offer of employment to Nilsson, subject to her successfully completing a physical aptitude test, a medical examination, and a psychological evaluation. Nilsson passed the physical aptitude test, as well as the medical examination, but failed the psychological evaluation. Dr. Robin Ford, a clinical psychologist, recommended that Nilsson not be hired, citing among other reasons "[Nilsson's] stubborn, [sic] edginess and impulsivity." Nilsson was ultimately not hired by the Mesa PD.

Nilsson filed a charge of discrimination with the EEOC asserting violations of her rights under the ADA and Title VII. She subsequently sued Mesa asserting various state and federal claims. After the district court granted summary judgment in favor of Mesa, Nilsson filed this timely appeal."

"Nilsson voluntarily, deliberately, and knowingly waived her right to assert her ADA and § 1983 claims against the Mesa PD because they were predicated on actions taken during the background investigation. As Nilsson failed to file a charge with either the EEOC or the Arizona Civil Rights Division with respect to her sex and disability discrimination claims under the AEDA, those claims were not exhausted. Although Nilsson's Title VII and AEDA retaliation claims were not barred, she failed to raise a genuine issue of material fact with respect to pretext. Accordingly, summary judgment in favor of Mesa was warranted as to all of Nilsson's causes of action."

Polk v. Sandoval, No. 06-15735 (September 11, 2007). "Levenal Demarilo Polk, a Nevada state prisoner, appeals the denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his conviction for first-degree murder with a deadly weapon and discharge of a firearm from a motor vehicle. We have jurisdic-



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tion pursuant to 28 U.S.C. § 2253. We hold that Polk's federal constitutional right to due process was violated because the instructions given at his trial permitted the jury to convict him of first-degree murder without a finding of the essential element of deliberation. The error was not harmless. We reverse and remand to the district court to grant the writ unless the State elects to retry Polk within a reasonable time."

Van Duyn v. Baker School Dist. 5j, No. 05-3518 (September 6, 2007). "This case arises from the difficult transition of Christopher J. Van Duyn ("Van Duyn"), a severely autistic child, from elementary to middle school. Van Duyn alleges that Baker School District 5j ("District") failed to implement key portions of his individualized educational program ("IEP") during the 2001-02 school year, his first year at Baker Middle School, thereby depriving him of the free appropriate public education guaranteed by the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* An administrative law judge ("ALJ") ruled that the District failed to provide Van Duyn sufficient math instruction, but otherwise found that the District had adequately implemented the IEP. The district court affirmed the ALJ's decision in all respects and declined to award any attorney's fees to Van Duyn.

Van Duyn brings to us a detailed list of complaints about the District's variances from his IEP, arguing that the ALJ and district court were much too forgiving of the District's failures to provide him the special instructional and support services agreed to in the IEP. Accordingly, we must decide how much leeway a school district has in implementing an IEP as it translates the plan's provisions into action at school and in the classroom. We hold that when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP."

"Applying this standard to the various implementation failures Van Duyn alleges, we conclude that none of them was material (with the exception of the math instruction shortfall, which was later remedied in response to the ALJ's order), and that the District therefore did not violate the IDEA. Because Van Duyn did partially prevail, however, we hold that Van Duyn is to that extent entitled to reasonable attorney's fees for the relevant work done at the administrative hearing level — though not for Van Duyn's mother, who has acted as one of his attorneys in these proceedings. Accordingly, we affirm in part and reverse in part the district court's judgment and remand for further proceedings consistent with this opinion."

United States v. Braswell, No. 05-35009 (September 4, 2007). "We must decide whether a habeas petitioner's argument that his indictment was constitutionally defective is procedurally barred because of his failure to raise it on direct appeal."

"Here, Braswell cannot claim novelty or interference for his failure to raise the adequacy of his indictment on direct appeal; indeed, during its pendency he attempted to raise the claim in a post-trial motion that his trial court rejected as untimely, which decision we affirmed. *Braswell*, 51 F. App'x at 784. Nor has Braswell shown any other cause for his failure to raise the issue on appeal.

Furthermore, even if Braswell could somehow demonstrate cause, he has at no point argued, let alone demonstrated, that any defect in his indictment worked to his actual disadvantage at trial in any way, such as by making it difficult to prepare a defense for the charges against him. *Cf. Hamling v. United States*, 418 U.S. 87, 117 (1974). Thus, nothing in Braswell's arguments before the district court or this court approaches the necessary showing of prejudice to overcome the procedural bar.

Finally, we note that Braswell has not argued "actual innocence," and that both the district court in habeas review, and our court on direct appeal, have concluded that the evidence of his guilt at trial was "overwhelming." *Braswell*, 51 F. App'x at 784. Therefore, the actual innocence exception to the procedural bar cannot apply to Braswell's claim.

For the foregoing reasons, we conclude that Braswell's claim that his indictment was constitutionally deficient is procedurally barred."

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