

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Halverson v. Secretary of State 124 Nev. Adv. Op. No. 47 (July 3, 2008) “On May 5, 2008, petitioner Elizabeth Halverson filed in this court an original petition seeking an extraordinary writ and declaratory relief that would prevent the Secretary of State and the Clark County Registrar of Voters from holding an election in 2008 for four judicial positions created by the 2005 Nevada Legislature in Senate Bill (S.B.) 195. According to Halverson, S.B. 195 unconstitutionally created positions for judges with initial terms of two years, when the state constitution requires six-year terms for all district court judges. The judicial posi-

tions created by S.B. 195 were filled by election in 2006 and pursuant to the two-year term created by the bill are now open for election in 2008. Halverson asks this court to declare the bill’s two-year term provision unconstitutional and substitute it with a six-year term.

We conclude that the senate bill does not violate the constitution because the constitution provides the Legislature with the ability to create new judicial positions for less than six-year initial terms in order to place judicial positions on the same election cycle. Long-standing precedent from this court has

Judge Laporte’s Helpful Formulas

Law.com

Law.com technology editor Sean Doherty reports from Friday morning's keynote address by Judge Elizabeth Laporte, down in LA for the

morning before flying back up to her seat in the Northern District of California. Working in a region that encompasses San Francisco and Silicon Valley, Judge

Public Lawyers Section

July 2008



Compiled & Edited by
Justin.tully@lvwd.com

Balancing Dollars and Health Sense 2

Ninth Circuit Cases 7

Krollon-track.com eDiscovery Cases 29

Blog Review #167 31

Laporte has had the chance to learn a thing or two about e-discovery while presiding over disputes between some of the largest tech companies in the world.

Sean notes that "[s]he had a lot to say about how counsel and their clients need to understand and learn about their electronically stored information prior to attending 'meet and confers' and other pretrial discovery conferences."

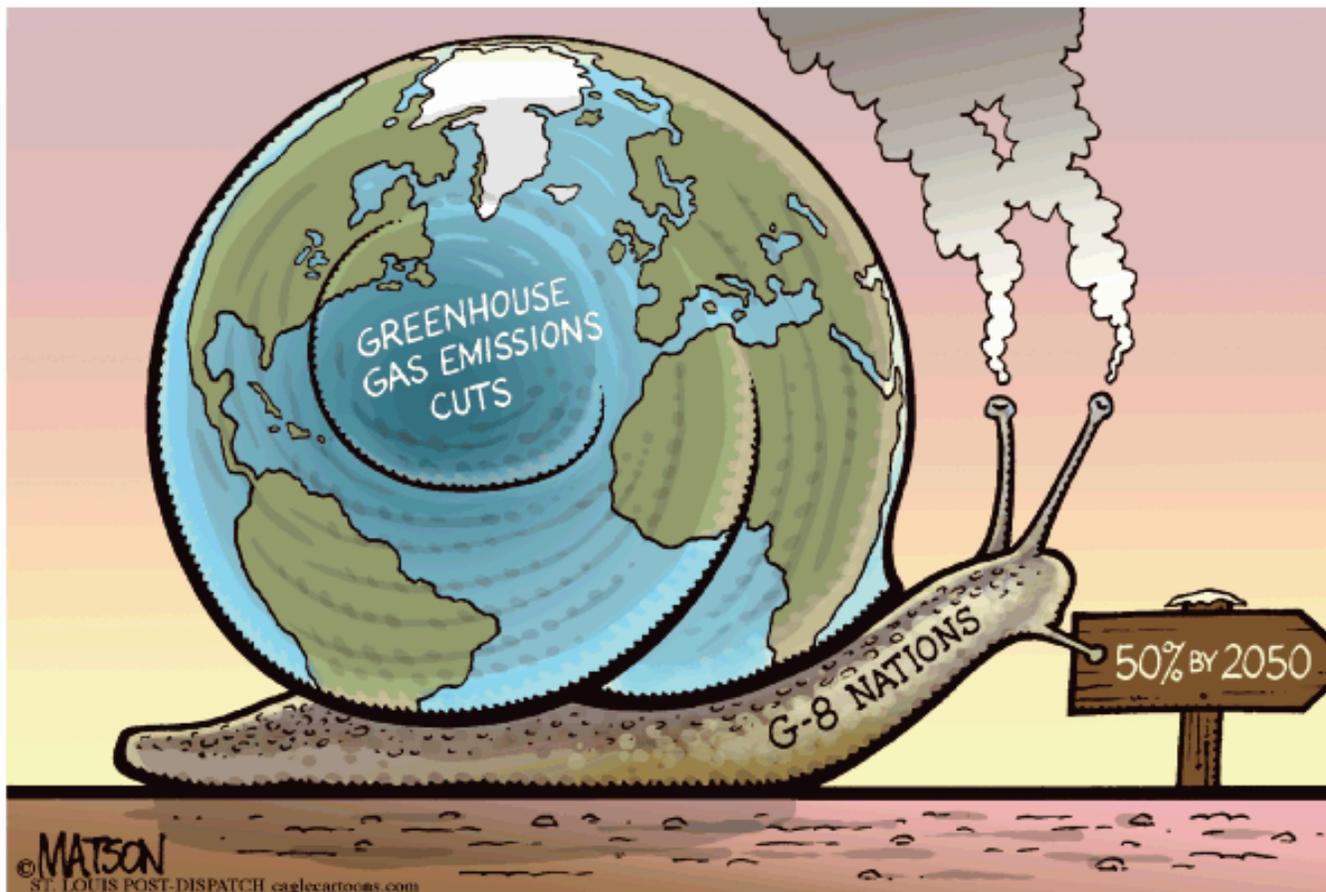
The lessons to take away are not to treat the early meetings as "drive-by conferences" and prepare for them: Do your homework. And when you know the extent of your ESI, be prepared to discuss it openly and with candor to your opponent and to the court. You also need to go beyond the extent of ESI and know how it was created and how it is maintained -- all in a way that can inform the parties and the court of its nature

and accessibility, or inaccessibility. And most of all, remember that the "cover-up is worse than the crime."

While she was at it, Judge Laporte managed to pepper her technical speech with a few literary allusions, including a formula from a Salman Rushdie story that lawyers should never let their litigation support staffs use on them, "P2C2E": Process too complicated to explain.

Balancing Dollars and Health Sense Center for State and Local Government Excellence

Written by the Institute for Public Policy and Social Research (IPPSR) at Michigan State University, a [new issue report](#) from the Center offers a framework for decision-making on funding state retiree health care benefits.



Nevada Supreme Court Cases

settled the constitutionality of statutes creating judicial positions with shortened initial terms to preserve a uniform general election cycle. Further, that precedent rejects any right by the judge selected for the shortened initial term to later claim entitlement to a full six-year term. As the two-year term in this senate bill was part of an ongoing effort by the Legislature to place judicial positions on identical election cycles, it is constitutional. We therefore deny the petition.”

Nunnery v. State 124 Nev. Adv. Op. No. 46 (July 3, 2008) “In this opinion, we consider whether conspiracy to commit robbery is a felony involving the use or threat of violence to the person of another within the meaning of the death penalty aggravating circumstance defined in NRS 200.033(2)(b). We conclude that it is not.”

“Even if we were to conclude that conspiracy to commit robbery meets the definition of threat under *Redeker*, this court must consider whether NRS 200.033(2)(b) requires the victim to perceive the threat. In *Weber*, we upheld two prior-violent-felony aggravators based on sexual assaults—crimes that this court noted did not require proof of the use or threat of violence. Although there was no evidence of overt violence or overt threats of violence by Weber against the underage female victim during the two assaults, this court reasoned that the totality of the evidence showed that the assaults included at least implicit threats of violence, allowing their use as valid aggravators.[18] The salient facts we considered in reaching this conclusion concerned the victim herself—the implicit threats were directed at the victim and her family. However, the critical distinction between this case and *Weber* is that the State

does not allege—in the context of committing the conspiracy offense, *i.e.*, the making of the unlawful agreement to rob—that Nunnery made any implicit or explicit threats of violence that were perceived by any of his intended victims. Similarly, in *Hidalgo*, we stated that the threat provision of NRS 200.033(2)(b) was meant to apply in cases like *Weber* and observed that the State did not allege that Hidalgo made any implicit or explicit threats of violence that were perceived as such by the intended victims.

Based on the foregoing discussion, we conclude that the elements of conspiracy to commit robbery do not include the use or threat of violence to the person of another. Nor is there any allegation that Nunnery made any implicit or explicit threats of violence perceived by the victims. Therefore, although conspiracy to commit robbery involves conspiring to commit a violent act, it is not itself a felony involving the use or threat of violence as contemplated by NRS 200.033(2)(b). We therefore conclude that the aggravating circumstance alleging conspiracy to commit robbery as a prior violent felony must be stricken.”

Bianchi v. Bank of America 124 Nev. Adv. Op. No. 45 (July 3, 2008) “In this case, a judgment creditor domesticated a foreign judgment in Nevada but failed to enforce the domesticated judgment within Nevada’s six-year limitation period for the enforcement of judgments. Then, after successfully renewing the judgment in the issuing jurisdiction, the judgment creditor domesticated the renewed foreign judgment in Nevada.

Thus, in this appeal, we consider whether a judgment creditor’s valid renewal of a foreign judgment allows the creditor to domesticate the renewed foreign judgment, when the creditor failed to enforce the original domesticated foreign judg-

Nevada Supreme Court Cases

ment within Nevada's limitation period for the enforcement of judgments. We conclude that upon showing that the foreign judgment is valid and enforceable in the issuing state, a judgment creditor may domesticate a new foreign judgment in Nevada, even after Nevada's limitation period for the enforcement of judgments has expired on the original domesticated foreign judgment."

Dickinson v. American Medical Response 124 Nev. Adv. Op. No. 44 (July 3, 2008) "In this appeal, we address the use of equitable estoppel and waiver principles in administrative workers' compensation proceedings, as well as the appeals officer's duty to make factual findings in rendering a determination. We conclude that equitable estoppel and waiver principles may be applied in workers' compensation proceedings, and therefore, since those principles generally require a factual determination, the appeals officer has authority to and must consider them in the first instance. Further, we reiterate that, in resolving aspects of a contested case, including equitable estoppel or waiver, the appeals officer must support the determination with factual findings.

Fundamentally, this appeal challenges an appeals officer's decision that denied a workers' compensation claimant permanent partial disability (PPD) benefits for a cervical spine condition. The appeals officer's decision was based on two conclusions: first, that the claimant's failure to administratively challenge the exclusion of her neck condition from her accepted workers' compensation claim precluded payment for that condition, and second, that the claimant failed to demonstrate that her neck condition was caused by her industrial injury.

In considering the claimant's argument that her

failure to administratively appeal should not preclude PPD benefits for her cervical spine condition because she continued to receive medical benefits for that condition, we conclude that the doctrines of equitable estoppel or waiver apply in workers' compensation proceedings, and thus, the appeals officer must determine whether those doctrines apply here. Further, with respect to the claimant's contention that substantial evidence does not support the appeals officer's refusal to recognize her cervical spine condition as industrial, we are unable to adequately review that issue because the appeals officer failed to provide the requisite factual findings supporting the determination.

Therefore, we reverse the district court's order denying judicial review of the appeals officer's decision and remand this matter so that the appeals officer may address and revisit these issues. Finally, we point out that the appeals officer's award of any PPD benefits on remand must accord with NRS 616C.490(2)'s rating physician selection requirements."

Estate of Maxey v. Darden 124 Nev. Adv. Op. No. 43 (July 3, 2008) "In this appeal, we consider, for the first time, multiple sections of Nevada's Uniform Act on Rights of the Terminally Ill (the Act), codified in NRS 449.535 through 449.690. The Act authorizes the use of three procedures by which terminally ill patients or their families can legally implement their wishes with regard to withholding or withdrawing life-sustaining treatment. First, an individual may execute a declaration directing an attending physician to withhold or withdraw life-sustaining treatment under certain circumstances. Second, an individual may execute a declaration designating another person to make decisions on the

Nevada Supreme Court Cases

individual's behalf regarding withholding or withdrawing life-sustaining treatment. Third, in the absence of either an express declaration or a declaration designating another person to make life-sustaining treatment decisions, a terminally ill patient's attending physician may withhold or withdraw life-sustaining treatment from the patient upon receiving surrogate consent from certain members of the patient's family.

Here, after their mother died, appellants Richard Kaminski and Steven Kaminski, M.D., brought an action for medical malpractice wrongful death, among other claims, against respondent Jon Darden, M.D., an emergency care physician; multiple corporate entities; and other defendants not parties to this appeal. The Kaminskis maintained below, as they do on appeal, that Dr. Darden improperly withheld treatment from their mother, Avis Maxey, in reliance on an invalid surrogate consent. The Kaminskis appeal from the district court's partial summary judgment in favor of Dr. Darden and appellants EmCare of Nevada, Inc.; EmCare Physician Services, Inc.; EmCare, Inc.; SEC/EmCare Emergency Care, Inc.; and EmCare Silver (collectively, corporate entities) on three grounds. First, they argue that Dr. Darden was not Avis's attending physician for purposes of the Act and that he therefore lacked authority to withhold or withdraw life-sustaining treatment. Second, they argue that the surrogate consent form signed by Avis's ex-husband was attested improperly and was thus invalid to authorize Dr. Darden to withhold life-sustaining treatment under the Act. Third, they argue that Dr. Darden did not exercise reasonable medical care when he classified Avis as terminally ill.

With regard to appellants' first two appellate arguments, although we conclude that Dr. Dar-

den was Avis's attending physician under the Act and that he therefore had the authority to make decisions concerning withholding life-sustaining treatment from Avis, summary judgment nevertheless was not appropriate here because genuine issues of material fact exist with respect to the validity of the surrogate consent to withhold treatment. In particular, the record does not reveal whether the surrogate consent was attested by two witnesses with personal knowledge, gained in the purported surrogate's presence, of his signature on the consent form and his intent to consent to withholding life-sustaining treatment from Avis.

As for appellants' third argument on appeal, the Act immunizes physicians from civil and criminal liability for decisions made in accord with reasonable medical standards. In this case, genuine issues of material fact remain concerning whether the attending physician's decisions were made in compliance with that standard. Accordingly, we reverse the district court's grant of summary judgment and remand this matter to the district court for proceedings consistent with this opinion."

Somee v. State 124 Nev. Adv. Op. No. 42 (July 3, 2008) "Chanon Somee was convicted of four counts of attempted murder with the use of a deadly weapon with the intent to promote, further, or assist a criminal gang and two counts of carrying a concealed weapon. He now appeals those convictions arguing that the district court erred in admitting evidence obtained through: (1) a pat-down search of Somee and (2) field interviews with Somee conducted prior to the crime.

Regarding the pat-down search, we apply the standard of review set forth in *State v. Lisenbee*. We hold that in determining whether an officer has reasonable articulable suspicion under the totality of the circumstances to justify a pat-down

Nevada Supreme Court Cases

search, one factor a court may consider is whether the officer had reasonable articulable suspicion that the suspect was involved in narcotics activity. The record in this case, however, is insufficient for us to review the district court's decision to admit the challenged evidence.

Regarding the field interviews, while we recognize that such interviews are an important tool in community policing and often garner information that is admissible at trial, we hold that such interviews may also, in certain circumstances, violate a defendant's constitutional rights, necessitating the exclusion of the evidence obtained from the interview. The record before this court, however, is insufficient for us to determine whether the field interviews conducted in this case violated Somee's constitutional rights. Lastly, we hold that the evi-

dence obtained during the field interviews concerning Somee's gang affiliation did not constitute inadmissible character evidence.

Because the record is inadequate for this court to consider the constitutional challenges to the pat-down search and the field interviews, we reverse the judgment of conviction and remand this matter to the district court for a new trial."

Term Limit Briefs

<http://www.nvsupremecourt.us/highProfile/index.php?caseID=28>



NINTH CIRCUIT CASES

Nader v. Brewer No. 06-16251 (July 9, 2008)
“Ralph Nader and one of his supporters in Arizona, Donald Daien (collectively, ‘plaintiffs’), appeal from the district court’s grant of summary judgment to Janice Brewer, the Secretary of State of Arizona. Plaintiffs alleged that two provisions of Arizona’s statutory election scheme—the requirement that circulators of nomination petitions be residents of Arizona and the requirement that nomination petitions be filed at least 90 days before the primary election—violated their rights to political speech and association under the First and Fourteenth Amendments. The case arose from Nader’s efforts to appear on the 2004 Arizona general election ballot as a presidential candidate. The district court upheld both petition requirements, holding that the burdens imposed on the exercise of plaintiffs’ rights were not significant and were sufficiently justified by the state’s interests. The district court measured the burdens in terms of the effect the requirements had on Nader’s ability to get on the Arizona ballot. The court held that these requirements were not a material cause of Nader’s failure to get on the ballot in 2004 and the burdens were therefore minimal.

In this appeal Nader stresses that the burdens of the residency requirement should be measured in terms of the effect the requirement has on the rights of persons like himself who live outside Arizona and wish to circulate petitions in that state. Controlling Supreme Court authority and a persuasive opinion of the Seventh Circuit support Nader’s position. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). Controlling Supreme Court authority also requires us to hold that the burdens imposed by Arizona’s early filing requirement are severe and must be supported by compelling interests.

Anderson v. Celebrezze, 460 U.S. 780 (1983). Neither the district court nor this court has had the benefit of much documentation of the state’s needs for the requirements. We conclude, on the basis of this record, when examined after the passage of the considerable amount of time expended completing the appellate process, that the burdens are significant and that the state has not shown the requirements are sufficiently narrowly tailored to further compelling interests.”

“Election cases are difficult. The historical background for such litigation changes rapidly. The district court was faced with a serious challenge to ballot-access requirements that have proved difficult for courts to evaluate, given both the state’s compelling interests in preventing fraud and providing orderly election administration, and the Constitution’s mandate for free political expression and participation that require such ballot-access restrictions to survive strict judicial scrutiny. Although the district court did not agree with plaintiffs that the requirements constituted serious impediments to the exercise of their constitutional rights, we conclude that the burdens are serious and the restrictions are not sufficiently narrowly tailored to serve the state’s compelling interests. The state was given every opportunity to meet the heavy burden that the district court or a higher court might eventually determine that it must shoulder under strict scrutiny. On the basis of the record before us, the state did not do so. The judgment of the district court is Reversed and Remanded with instructions to enter summary judgment in favor of plaintiffs.”



NINTH CIRCUIT CASES

United States v. Fuller No. 07-30114 (July 8, 2008) “Defendant-appellant Leonard Fuller was convicted of possession of an identification document that appears to be made by or under the authority of the United States which is stolen or produced without lawful authority, in violation of 18 U.S.C. § 1028(a)(6). On this appeal, we must decide whether, in a prosecution under § 1028(a)(6), the government must prove that the identification document in question appeared to be issued by a real agency of the United States. We hold that the government does not; consequently, we affirm Fuller’s conviction.”

“Fuller argues that the indictment and jury instruction were defective because they did not include the element that the identification document purport to be from a real agency, and he argues that there was insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that the document appeared to be issued by a real agency. Fuller’s challenges to the indictment, the jury instruction, and the sufficiency of the evidence, therefore, all turn on his legal theory of § 1028(a)(6), presenting a statutory construction issue of first impression. *See United States v. Cannan*, 48 F.3d 954, 962 (6th Cir. 1995) (noting the defendant’s argument that there was insufficient evidence to convict him under § 1028(a)(6) because the document he possessed was from a defunct law enforcement agency but not deciding whether § 1028(a)(6) requires the document to purport to be issued by a real agency).”

“First, Fuller argues that a document cannot appear to be ‘issued’ from a federal agency unless the document purports to be from a real federal agency. We are not persuaded. All sorts of documents can appear to be made by or under the authority of the United States even though they purport to be documents produced by an agency that

turns out to be nonexistent. An identification badge or card which states that the holder is a judge on the United States Court of Appeals for the Twelfth Circuit could appear to be made by or issued under the authority of the United States even though the Twelfth Circuit does not exist. Likewise, an identification badge which states that the holder is the Director of the United States Federal Service could also appear to be made by or issued under the authority of the United States even though the Federal Service is not a real agency. The statute requires that the document *appear* to be made by or issued under the authority of the United States; it does not require that the document actually be made by or under the authority of the United States. Fuller’s identification document states that he was a Commander in the United States Special Response Department. Admittedly, Fuller’s identification document is suspect on its face, but whether the document appears to be made by or under the authority of the United States is a question of fact for the jury to determine.”

“Based on its text and purpose, we conclude that 18 U.S.C. § 1028(a)(6) has only two elements: (1) the defendant knowingly possessed a document of a type intended or commonly accepted for the purposes of identification of individuals and that document be or appear to be made by or under the authority of the United States; and (2) the defendant had knowledge that the document was stolen or produced without the authority of the United States. Because the indictment charged these elements, the jury instruction properly described these elements, and a rational trier of fact could find that the government proved these elements beyond a reasonable doubt, the district court did not err in any of its challenged rulings. The judgment of

NINTH CIRCUIT CASES

the district court is AFFIRMED.”

United States v. Salman No. 05-10093 (July 7, 2008) “Albert R. Salman appeals his convictions for two counts of passing a fictitious financial instrument, in violation of 18 U.S.C. § 514(a)(2), and two counts of attempting corruptly to interfere with the administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a). On two separate occasions, Salman sent a document he titled ‘Sight Draft’ and a tax payment voucher for the amount of the sight draft to the Internal Revenue Service (‘IRS’). Relying on our decision in *United States v. Howick*, 263 F.3d 1056 (9th Cir. 2001), Salman argues that the sight drafts he submitted to the IRS are not unlawful fictitious financial instruments under 18 U.S.C. § 514(a)(2), and therefore the government presented insufficient evidence to support his convictions on those counts. Salman also challenges the sufficiency of the evidence to support his convictions for corruptly interfering with the administration of the internal revenue laws, arguing that because his convictions under 26 U.S.C. § 7212(a) are directly dependent on his passing of unlawful fictitious instruments, they can only stand if his convictions under 18 U.S.C. § 514(a)(2) stand. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm Salman’s convictions, concluding that the documents he presented to the IRS are unlawful fictitious financial instruments under 18 U.S.C. § 514(a)(2).

Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriffs Department (July 2, 2008)

“Plaintiffs drove a truck that displayed enlarged, graphic photographs of early-term aborted fetuses around the perimeter of a public middle school in Rancho Palos Verdes, California. Deputy Sheriffs were dispatched to the school. Plaintiffs contend that the officers violated their First Amendment

rights by ordering Plaintiffs to remove their truck from an area adjacent to the school. Plaintiffs also contend that the officers violated their Fourth Amendment rights by detaining Plaintiffs for an unreasonable time and by searching their vehicle without consent.

Plaintiffs brought this action under 42 U.S.C. § 1983 seeking damages and injunctive and declaratory relief for violation of their First and Fourth Amendment rights. The district court held that the Deputy Sheriffs and Dodson Middle School Assistant Principal Art Roberts were entitled to qualified immunity and dismissed the damages claims against them. In addition, the court dismissed the lawsuit against Los Angeles County Sheriff Leroy D. Baca, a redundant defendant. After considering cross-motions for summary judgment, the district court granted summary judgment in favor of Defendants on the remaining First and Fourth Amendment claims. Plaintiffs timely appealed these orders.

We have jurisdiction under 28 U.S.C. § 1291. For the reasons set forth below, we reverse the district court’s orders (1) granting Defendants’ summary judgment motion on all the issues in the case, and (2) denying Plaintiffs’ summary judgment motion with respect to Plaintiffs’ First Amendment claim and Fourth Amendment Claim for unreasonable detention. We affirm the district court’s order (1) dismissing Sheriff Leroy D. Baca and (2) granting qualified immunity to the individual defendants on the First Amendment claim. We remand for the district court to resolve Plaintiffs’ conspiracy claim and request for injunctive relief.”

United States v. Evans-Martinez No. 05-10280 (July 2, 2008) “Defendant Jesus Evans-Martinez was sentenced to 15 years imprison-

NINTH CIRCUIT CASES

ment after pleading guilty to sexual abuse of a minor, sexual exploitation of minors and witness tampering. Evans-Martinez timely appeals his sentence on the ground that the district court failed to provide adequate notice of its intent to sentence him above the term suggested by the Sentencing Guidelines. Fed. R. Crim. P. 32(h) requires that a district court provide notice of the potential it will depart from the Sentencing Guidelines range. We have not yet had occasion to decide whether this requirement survives *United States v. Booker*, 543 U.S. 220 (2005). We hold that it does. We vacate the sentence and remand for resentencing.”

“After the parties entered into the plea agreement and the initial presentence report was prepared, the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory in order to comply with the Sixth Amendment. The presentence report was amended to acknowledge that, post-*Booker*, the district court was required to consider, but no longer bound by, the Guidelines. Evans-Martinez did not object to the amended presentence report.

At sentencing, the Government moved for a downward departure on the basis of Evans-Martinez’s cooperation. The Government noted that Evans-Martinez supplied law enforcement agents with his e-mail password and, as a result, seven other sexual predators in seven cities were identified, tried and convicted. The district court accepted the plea agreement, adopted the conclusions of the presentence report as amended and ‘granted’ the Government’s motion for a downward departure. The court determined, however, that the motion only ‘released’ it from its obligation to impose a sentence at or above the mandatory minimum sentence of 10

years and that it was still able to sentence Evans-Martinez up to the statutory maximum of 20 years. The district court commented on the disturbing nature of the case and summarized the facts as they were related in the presentence report. Taking into account Evans-Martinez’s cooperation, the court then sentenced him to a term of 15 years and a period of supervised release.”

“In *Burns v. United States*, 501 U.S. 129, 138 (1991), the Supreme Court holds that ‘before the district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling.’ The Supreme Court further holds that ‘[t]his notice must specifically identify the ground on which the district court is contemplating an upward departure.’”

“Although we have not previously held that the notice requirement of Rule 32(h) survives *Booker*, the Government conceded at oral argument that the district court’s failure to provide notice constitutes plain error. We hold Rule 32(h) requires that a district court provide notice of its intent to depart from the applicable sentencing range suggested by the Guidelines post- *Booker*, as it did pre-*Booker*. *Accord United States v. Dozier*, 444 F.3d 1215 (10th Cir. 2006).”

“This conclusion is consistent with the Supreme Court’s recent decision in *Irizarry v. United States*, No. 06-7517 (2008). *Irizarry* holds that Rule 32(h) does not require a sentencing judge to provide notice before imposing a sentence at ‘variance’ with the Federal Sentencing Guidelines. Slip op. at 8. In reaching that conclusion, the Supreme Court emphasizes the distinction be-

NINTH CIRCUIT CASES

tween a variance and a departure. Because Rule 32(h) requires notice when the district court is contemplating a ‘departure,’ ‘the rule does not apply to § 3553 variances by its terms.’ *Id.* at 6. Rather, ‘[d]eparture’ is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.’ *Id.* *Irizarry* does not control the result in this case because the district court here did not sentence at variance from the recommended Guidelines range based on Section 3553(a) factors, but departed as the term was used when Rule 32(h) was promulgated. By its own terms, the *Irizarry* holding does not extend to sentencing departures under the Guidelines.

In light of *Irizarry*, it is arguable that the due process concerns that led to the promulgation of Rule 32(h) are now equally inapplicable to sentencing departures. We decline to reach that conclusion. We understand the Supreme Court’s distinction between a variance and a departure to be a meaningful one. Further, the *Irizarry* Court implies that Rule 32(h) continues to apply with respect to departures. *See id.* at 8 (‘The fact that Rule 32(h) remains in effect today does not justify extending its protections to variances . . .’). The Supreme Court gives no indication that it disapproves of the continued application of Rule 32(h) to departures in the post-*Booker* era.

The district court failed to provide notice of its intent to depart from the sentencing range suggested by the Sentencing Guidelines as required by Rule 32(h). We VACATE the sentence and REMAND for resentencing consistent with this opinion.”

Donell v. Kowell No. 06-55544 (July 1, 2008)
‘Robert Kowell found an investment opportunity that sounded too good to be true. In Kowell’s

case, it wasn’t. J.T. Wallenbrock & Associates (‘Wallenbrock’) promised Kowell a 20 percent return on his investment every ninety days, risk free, and that is nearly what he got. Because he received regular interest payments from Wallenbrock, Kowell was quite surprised to learn later that an SEC investigation had revealed the business to be a Ponzi scheme in which thousands of investors had been defrauded. Several years after Kowell first invested, and long after he had spent his returns, he was informed by the receiver for Wallenbrock that California law requires him to pay back all of his gains. Kowell challenges a judgment requiring him, as an innocent investor, to disgorge his profits as fraudulent transfers under the Uniform Fraudulent Transfer Act. He also asks this court to permit him to offset any liability by amounts paid in federal income taxes on his earnings. The district court found that Kowell was liable to repay \$26,396.10, plus pre-judgment interest of \$5,159.22. We affirm.”

“Ponzi schemes leave no true winners once the scheme collapses—even the winners were defrauded, because their returns were illusory. Those who receive gains from innocent participation in the scheme may be required to disgorge those amounts, long after the money has been spent. Addressing the victims of the original Ponzi scheme, the Supreme Court commented that ‘[i]t is a case the circumstances of which call strongly for the principle that equality is equity.’ *Cunningham v. Brown*, 265 U.S. 1, 13 (1924). In this case, then, equity compels that Kowell share some of the hardship equally with those who lost their initial investment.

California’s Uniform Fraudulent Transfer Act has treated Kowell fairly. Indeed, Kowell actually benefitted from the equitable concerns embodied in UFTA. Kowell ‘invested’ \$22,858.92

NINTH CIRCUIT CASES

into the scheme; Wallenbrock made payments to Kowell (including the return of his initial ‘investment’) totaling \$73,290.70. The Receiver’s original demand letter inaccurately informed Kowell that he owed \$69,546.70, and tried to pressure him to mail a check for 90 percent of that amount, or \$62,592.03, within 20 days or face consequences. Because Kowell did not succumb to these tactics and instead sought protection in federal court, the Receiver was forced to concede that Kowell netted only \$50,431.78. Further, the applicable statute of limitations limited Kowell’s actual liability to \$26,396.10, plus pre-judgment interest of \$5,159.22, for a total liability of \$31,555.32.

Thus, comparing the total he received, \$73,290.70, with the amount he must return, \$31,555.32, shows that Kowell will be permitted to retain \$41,735.38 of the monies Wallenbrock paid him—for a net gain of \$18,876.46 on his initial investment of \$22,858.92 (calculated as \$41,735.38 – \$22,858.92). This represents a total return of approximately 83 percent on his investment, or, an annualized return, over the period of investment from 1997 to 2001, of approximately 16 percent. Most of the scheme’s 5,200 net losers are likely to recover only pennies on the dollar of their initial investment. The judgment is AFFIRMED.

Mangano v. United States No. 05-17334 (July 1, 2008) ‘Dr. Dennis Mangano brought suit under the Federal Tort Claims Act (‘FTCA’), 28 U.S.C. §§ 1346(b), 2671-80, for emotional distress and other injuries allegedly suffered in connection with his termination from the San Francisco Veterans Administration Medical Center. The district court found that his claims are preempted by the Civil Service Reform Act

(‘CSRA’) and dismissed the suit. Dr. Mangano contends that the district court erred because he was hired under a provision that allows the Veterans’ Administration (‘VA’) to employ part-time physicians ‘without regard to civil service or classification laws, rules, or regulations.’ 38 U.S.C. § 7405(a). He relies on *Orloff v. Cleland*, in which we held that the ‘civil service laws [do] not apply to part-time physicians employed by the VA.’ 708 F.2d 372, 376 (9th Cir. 1983). As we discuss in greater detail below, after *Orloff* was decided, Congress amended the CSRA to apply selectively to part-time physicians. 5 U.S.C. § 2105(f). We hold that Dr. Mangano’s tort claims are subject to CSRA preemption and affirm the judgment.

Hearns v. City of San Bernardino Police Department No. 05-56214 (July 1, 2008) ‘It is the right and duty of a plaintiff initiating a case to file a ‘short and plain statement of the claim.’ Fed. R. Civ. P. Rule 8(a)(2). The district court dismissed Plaintiff Kimberlyn Hearns’ 81-page complaint under Rule 8 without prejudice with leave to file an amended complaint. When Hearns filed an amended complaint that was substantially unaltered, the district court dismissed the case with prejudice. Neither complaint warranted dismissal under Rule 8: although each set forth excessively detailed factual allegations, they were coherent, well-organized, and stated legally viable claims. We therefore reverse in appeal No. 05-56214 and remand for further proceedings. Pursuant to Defendant’s non-opposition, we also reverse in appeal No. 05-56306. Finally, we dismiss appeals Nos. 05-56272 and 05-56324 as moot.’

United States v. Davis No. 07-30219 (June 30, 2008) ‘On October 22, 2004, law enforcement agents executed a search warrant and raided a large marijuana growing operation on private property in rural Oregon belonging to Jeffrey and

NINTH CIRCUIT CASES

Cynthia Davis. While officers were executing the search warrant on the Davis's property, Jeffrey Davis's brother Richard Davis, drove onto the property through a locked gate and, when asked, told officers in a moment of omniscient honesty that he knew 'everything' about the marijuana growing operation.

We hold that the observations, upon which law enforcement officers relied to obtain the warrant to search the Davis's property, were not made within the curtilage of the Davis's home. As a result, the warrant did not violate the Davis's Fourth Amendment rights. We must also determine whether the law enforcement officers violated Richard Davis's constitutional rights by questioning him, searching his person, searching his vehicle, and subsequently searching his property. With the exception of the search of a tin container found on Richard Davis's person, our answer is no. But because any error arising from its discovery was harmless, the motions to suppress all evidence seized were properly denied.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm."

Brown v. Lambert No. 04-35998 (June 27, 2008) "On remand from the Supreme Court, *Uttecht v. Brown*, 127 S. Ct. 2218 (2007), we consider whether defense counsel's performance was deficient."

"Brown's counsel weren't objectively deficient, as they made reasonable strategic decisions by not calling a psychiatrist, not calling Sally Schick and not cross-examining Dr. Brinkley. The district court therefore correctly rejected Brown's ineffective assistance of counsel claim. Nor did the district court abuse its discretion in

excluding the death penalty trial reports. AFFIRMED."

Farrell v. Tri-County Metro No. 06-35484 (June 27, 2008) "Appellant Tri-County Metropolitan Transportation District of Oregon ('TriMet') appeals a trial verdict in favor of Appellee Frank Farrell ('Farrell') awarding him \$1,110.00 in lost wages under the Family Medical Leave Act (the 'FMLA'). TriMet presents a single issue on appeal: Whether the FMLA allows a plaintiff to recover damages for absences from work that were caused by an emotional condition that itself resulted from the employer's wrongful denial of FMLA leave. We affirm."

"The jury's verdict in this case is consistent with Tri-Met's position that 'Congress decided that aggrieved employees must bear the cost of their own psychological damages when it comes to harm caused by employers violating FMLA' because the verdict does not require TriMet to compensate Farrell for 'psychological damages.' Rather, the verdict requires TriMet to compensate Farrell for the wages he lost 'by reason of [its] violation.' 29 U.S.C. § 2617(a)(1)(A)(i)(I). The jury's verdict was limited to wages actually lost as a result of TriMet's FMLA violation, and thus, the award was not 'a back-door means of recovery for psychic injuries.'"

The actual issue presented on appeal is straightforward and requires no reworking of established precedent. TriMet violated the FMLA and Farrell was awarded \$1,110 in lost wages for days of work that he missed as a result of TriMet's violation. AFFIRMED."

United States v. FMC Corporation No. 06-35429 (June 27, 2008) "In the late 1990s, Plaintiff United States and Intervenor Shoshone-Bannock Tribes

NINTH CIRCUIT CASES

(‘the Tribes’) approached Defendant FMC Corporation, a mining company operating in Idaho, about potential violations of federal and tribal environmental laws. FMC reached an agreement with each party. FMC agreed to pay the Tribes \$1.5 million per year in lieu of applying for certain tribal permits. Concerning federal law, FMC and the United States entered into a detailed agreement (‘Consent Decree’), which they presented to the federal district court for approval.

The district court approved the Consent Decree, and we affirmed. *United States v. Shoshone-Bannock Tribes (FMC Corp.)*, 229 F.3d 1161 (9th Cir. 2000) (unpublished disposition).

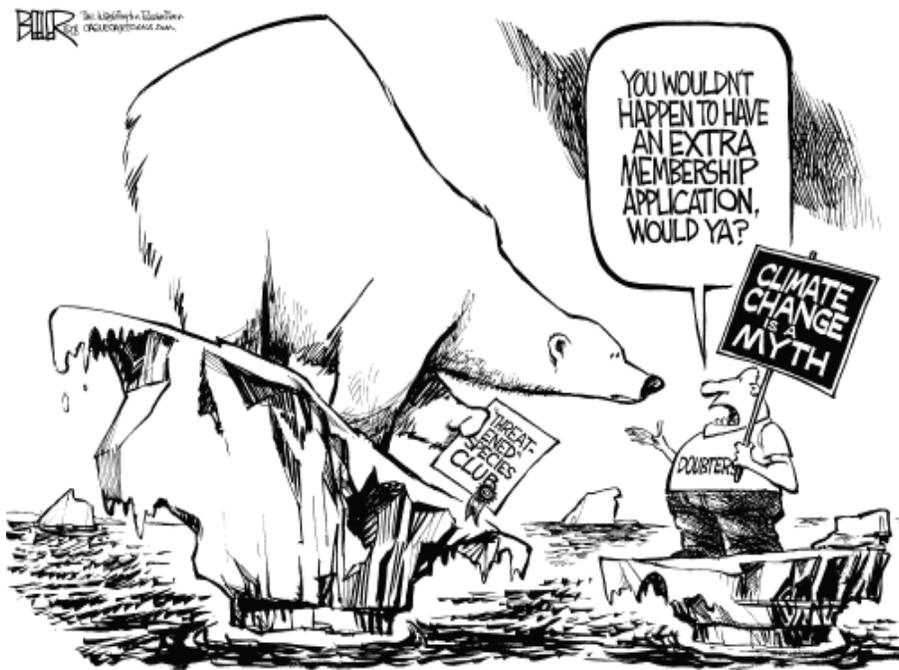
In 2001, FMC ceased some of its mining operations, stopped making its annual payments to the Tribes, and refused to apply for certain tribal permits. After negotiations between the Tribes and FMC failed, the Tribes sought enforcement of the Consent Decree in district court. The district court held that the Tribes could enforce the Consent Decree as third-party beneficiaries and that the Consent Decree required FMC to apply for tribal permits. FMC appealed. We hold that the Tribes lack standing to enforce the Consent Decree and, therefore, vacate the district court’s orders and remand with instructions to dismiss

the action.”

“By definition, all third-party beneficiaries receive a benefit from a consent decree; otherwise they would not be beneficiaries. But, as explained by the D.C. Circuit, ‘[w]hen a consent decree or contract explicitly provides that a third party is not to have enforcement rights, that third party is considered an incidental beneficiary even if the parties to the decree or contract intended to confer

a direct benefit upon that party.’ *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 159 (D.C. Cir. 1998); see also *Consol. Edison*, 426 F.3d at 528 (rejecting the right of a third party to enforce a contract because ‘the parties to the Agreement clearly created a third-party right, but just as clearly they took

pains to assure that the right was limited . . . [and] not a right to sue’); *McKesson HBOC*, 339 F.3d at 1091-92 (‘The . . . Agreement’s express rejection of any intent to create a class of third-party beneficiaries in the shareholders . . . [means that,] [a]t most, the . . . shareholders might be considered incidental third-party beneficiaries, a status that provides no legal benefit.’); *Pure Country*, 312 F.3d at 958 (‘In order for a third party to be able to enforce a consent decree, the third party must, at a minimum, show that the parties to the consent decree not only intended to confer a benefit upon that third party, but also intended to give that



NINTH CIRCUIT CASES

third party a legally binding and enforceable right to that benefit.’); 9 *Corbin on Contracts* § 44.6, p. 68 (Rev. ed. 2007) (stating that it is ‘obvious’ that, ‘where the terms of the contract expressly state the intention of the promisee and promisor concerning the enforceable rights of third parties, the critical question of whether the parties intended the third party to have such a right is easily answered’).

In closing, we note that, during the pendency of this appeal, FMC began the process of applying for tribal permits, which is the main relief that the Tribes have sought in this action. At oral argument, the Tribes expressed their concern that, if we were to hold that the Tribes lack standing to enforce the Consent Decree, FMC would withdraw its permit applications and undo the progress made to date on the proper resolution of this dispute. In response to questioning from the panel, FMC’s lawyer represented to the court that FMC understands that it has the obligation to continue, and will continue, with the current tribal proceedings to their conclusion. We accept that statement from counsel as binding on FMC.”

Fogel v. Collins No. 06-15395 (June 27, 2008) “Police officers of the City of Grass Valley, California, arrested plaintiff-appellant Matthew Fogel and impounded his van because of messages painted on the back of the vehicle. Fogel brought suit against Grass Valley and six police officers under 42 U.S.C. § 1983, alleging a violation of his First Amendment rights. The district court assumed without deciding that Fogel’s First Amendment rights had been violated. On that assumption, it granted summary judgment for defendants, holding that the City of Grass Valley had not implemented an unconstitutional policy or custom, and that the police officers were entitled to qualified immunity. We hold

rather than assume that Fogel’s First Amendment rights were violated. We nevertheless affirm, for the reasons given by the district court.”

“It is well-established that the First Amendment protects speech that others might find offensive or even frightening. Speech ‘may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with the conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.’ *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Courts have long recognized that speech may need to be abrasive or upsetting in order to draw attention to the speaker’s cause. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (‘Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases.’). We have ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’ *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

“We examine the totality of the message on Fogel’s van in light of the full context available to someone observing the van. *See Planned Parenthood*, 290 F.3d at 1067; *see also Orozco-Santillan*, 903 F.2d at 1265. Applying the objective standard, we hold that ‘a reasonable person would [not] foresee that the statement [on the van] would be interpreted by those to whom [Fogel] communicates the statement as a serious expression of intent to harm or assault.’ *Id.* A reasonable person would expect that an observer of Fogel’s van would see an old Volkswagen van covered with artwork, an American flag, and an obviously satiric or hyperbolic political message.

NINTH CIRCUIT CASES

The First Amendment and USA PATRIOT Act references are overtly political speech, and reasonable observers would be hard-pressed to believe that an actual suicide bomber would so boldly announce his presence and intentions. The remainder of the van displayed innocuous images and phrases, including some with spiritual meaning, created through the artistic endeavors of Fogel and his friends.”

“We hold that the individual defendants in this case violated Fogel’s First Amendment rights by arresting him, impounding his van, and making him paint over his message. We affirm the district court’s decision that qualified immunity protects these defendants from a claim for damages. We also affirm the district court’s decision that the City of Grass Valley did not violate Fogel’s First Amendment rights.”

Hubbard v. Sobreck LLC. No. 06-56870 (June 27, 2008) “Plaintiffs-appellants Lynn and Barbara Hubbard filed parallel claims for violations of both the Americans with Disabilities Act (‘ADA’) and the California Disabled Persons Act (‘CDPA’). Their complaint alleged barriers that deprived them of full and equal access to the restaurant operated by defendants-appellees Sobreck, LLC, dba Johnny Carino’s. We consider whether the district court properly awarded attorney’s fees to defendants under the California Act, in circumstances where fees were not authorized under the federal ADA. We hold that the award of fees under state law was preempted by federal law.”

“A violation of the federal ADA constitutes a violation of the CDPA. *See, e.g.*, Cal. Civ. Code §§ 54(c), 54.1(d), 54.2(b). Therefore, to the extent that California’s Section 55 mandates the imposition of fees on a losing plaintiff who brought both a nonfrivolous ADA action and a

parallel action under Section 55, an award of attorney’s fees under Section 55 would be inconsistent with the ADA, which would bar imposition of fees on the plaintiff. In such a case, the proof required to show a violation of the CDPA and of the ADA is identical. In that circumstance, it is impossible to distinguish the fees necessary to defend against the CDPA claim from those expended in defense against the ADA claim, so that a grant of fees on the California cause of action is necessarily a grant of fees as to the ADA claim. As federal law does not allow the grant of fees to defendants for non-frivolous ADA actions, we must conclude that preemption principles preclude the imposition of fees on a plaintiff for bringing nonfrivolous claims under state law that parallel claims also filed pursuant to the federal law. *See Cal. Fed. Sav.*, 479 U.S. at 280-81.”

“For purposes of our decision, we leave it to California courts to interpret Section 55 in a definitive way, and to decide authoritatively whether it would mandate fees to all prevailing defendants. We hold only that to the extent that Section 55 does authorize the award of fees to a prevailing defendant on nonfrivolous CDPA state claims that parallel nonfrivolous ADA claims, the ADA preempts Section 55 of the CDPA.”

Cuevas v. State of California No. 06-15403 (June 26, 2008) “Plaintiffs Armando Cuevas and Heather Burlette appeal the district court’s grant of summary judgment against them on their civil rights action brought pursuant to 42 U.S.C. § 1983. Although Plaintiffs alleged a variety of constitutional violations in the district court, they press on appeal only their claim that a warrantless entry into their residence on February 25, 2004, was unlawful under the Fourth

NINTH CIRCUIT CASES

Amendment to the Constitution.

Viewing the facts in the light most favorable to Plaintiffs, as we must, we conclude that Deputy Sheriff Christopher Starr violated Plaintiffs' Fourth Amendment rights and is not entitled to qualified immunity. We therefore reverse the district court's grant of summary judgment to Starr. However, we conclude that Deputy Sheriffs Richard Horn and Michael Cook did not violate Plaintiffs' Fourth Amendment rights, and we therefore affirm as to them. Plaintiffs do not argue on appeal that their Fourth Amendment rights were violated by Sheriff Jeff Neves, Sergeant Brian Golmitz, or the County of El Dorado. Accordingly, we affirm as to those Defendants as well."

Guidivillie Band v. NGV Gaming Ltd. No. 05-17066 (June 26, 2008) "This appeal presents the single, seemingly straightforward question whether the word 'is' really means 'is,' at least as that word is employed in 25 U.S.C. § 81. At the core of the present dispute, that statute requires the Secretary of the Department of the Interior ('Secretary') to approve any 'contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years' before such a contract can be considered valid. Section 81(a) defines the term 'Indian lands' in part as 'lands the title to which *is* held by the United States in trust for an Indian tribe.'" (emphasis added).

Appellant NGV Gaming Ltd. ('NGV') asks us to read Section 81 literally— as pertaining solely to contracts that implicate lands already held in trust by the federal government. Appellees Harrah's Operating Company ('Harrah's') and Guidiville Band of Pomo Indians ('the Tribe'), on the other hand, urge a nonliteral reading of the statute—one that would treat

Section 81 as also covering contracts in which the parties reach agreement, not with respect to already-held lands, but to acquire lands in the future that might eventually be held in trust. Under the latter interpretation the contract at issue in this appeal would be invalid, lacking as it does the Secretary's approval, and the district court's decision to dismiss NGV's suit against Harrah's for tortious interference with that contract would have to be affirmed. But under the first—and literal—reading, the district court's decision would be in error, and the state law action could proceed.

Motivated largely by the plain meaning of Section 81—but after also taking into account related statutes, relevant legislative history and the language of the contract itself—we conclude that the word 'is' means just that (in the most basic, present-tense sense of the word) and that Section 81 therefore applies only to contracts that affect lands already held in trust by the United States. We therefore reverse the district court and remand for further proceedings."

Coos County Board v. Norton No. 06-35634 (June 26, 2008) "We are asked to decide whether the Fish and Wildlife Service ('FWS') has an enforceable duty promptly to withdraw a threatened species from the protections of the Endangered Species Act (the 'ESA' or the 'Act'), 16 U.S.C. §§ 1531- 1544, after a five-year agency review mandated by the Act found that the species does not fit into one of the several types of population categories protected under the ESA. We answer that FWS does not have such a duty.

We hold that the dismissal of Coos County's complaint was entirely proper.

Coos County, however, is not without recourse.

NINTH CIRCUIT CASES

It may file a delisting petition. As the District Court for the District of Columbia put it while granting summary judgment to the government in *American Forest Research Council v. Hall*, 533 F. Supp. 2d 84, 93 (D.D.C. 2008), an action brought by other parties challenging the tri-state murrelet Five-Year Review on grounds very similar to those in this case: ‘[I]f [Coos County] believes that the threatened listing of the tri-state population causes [the County] unwarranted injury, [it] has the right and the ability to petition FWS to delist the tri-state population of the marbled murrelet. . . . But [Coos County] has failed to pursue this course of action.’ 533 F. Supp. 2d at 93. Coos County maintains that FWS has already drawn conclusions in a five-year review, so that it would be futile now to file a petition. That argument relies on Coos County’s erroneous belief that the five-year review and petition processes substitute for each other. They do not.

The Five-Year Review here functioned as it was supposed to: It provided useful information that prompted FWS to consider broadening protections for the murrelets, and to consider revising aspects of its current listing. It also provided information to Coos County and other interested members of the public, including parties who may decide, based on the information provided in the Five-Year Review, to file a delisting petition. To separate this process from the petition process makes perfect sense.

Nor would such a petition be futile. FWS’s conclusions in five-year reviews are not set in stone. Rather, five-year reviews provide useful guidance on the rationales and data presently supporting an ESA listing, point up remaining uncertainties, and allow petitioners to marshal arguments and information that the agency may find germane in light of the review. The exten-

sive public process triggered by the filing of a petition may well change the agency’s mind. For instance, in this case FWS indicated that it would find more information on the range-wide health of the murrelets helpful in deciding on a future course of action. True, a petition still may not succeed, but the fact that some petitions will lack merit does not mean that five-year reviews render petitions futile as a general matter, or in this case.

In sum, our view of Coos County’s suit resembles that of the court in *Wyoming v. U.S. Dep’t of the Interior*, which also considered an attempt to avoid the petition process through an effort to establish a ‘mandatory duty to delist’ by other means. *See* 360 F. Supp. 2d at 1231-33, 1244-45. We are ‘at a loss to explain the actions of [Coos County].’ *Id.* at 1245. It could easily have filed a delisting petition — years ago. ‘This action, if it had been taken, would have forced the Federal Defendants to make choices under hard deadlines set by Congress . . . and much of the Federal Defendants’ arguments presented here would have melted away, allowing this Court to reach the merits of many of [Coos County’s] claims.’ *Id.*

If Coos County wishes to force FWS to act swiftly on delisting the tri-state murrelets, the petition process is open to it.

The Lands Council v. Martin No. 07-35804 (June 25, 2008) “A forest fire burned thousands of acres of national forest in southeastern Washington, the United States Forest Service initiated a salvage logging operation, and we are called upon to determine whether the Forest Service took the requisite ‘hard look’ under the National Environmental Policy Act of 1969 (‘NEPA’), 42 U.S.C. §§ 4321-4370, and whether it complied with the National Forest Management Act of 1976 (‘NFMA’), 16

NINTH CIRCUIT CASES

U.S.C. §§ 1600-1614.

Plaintiffs The Lands Council, Oregon Wild, Hells Canyon Preservation Council, and Sierra Club, which are environmental organizations, appeal the district court's grant of summary judgment to Defendants United States Forest Service and the Forest Supervisor of the Umatilla National Forest. American Forest Resource Council, Boise Building Solutions Manufacturing, L.L.C., and Dodge Logging, Inc., which are a forestry advocacy organization and logging companies, join Defendants as intervenors. We hold that the Forest Service failed to include an adequate discussion of the effects of proposed logging on two significant roadless areas. We otherwise affirm."

"In summary, the Forest Service was required to discuss the effects of the proposed logging on the roadless character of both roadless areas. *Smith* held that the size of an uninventoried roadless area must be considered in combination with the size of any contiguous inventoried roadless area. The size of Upper Cummins Creek combined with the size of contiguous Willow Springs is more than 5,000 acres. We make clear today that the rule in *Smith* applies to roadless areas that are *either* greater than 5,000 acres *or* of a 'sufficient size' within the meaning of 16 U.S.C. § 1131(c). The West Tucannon roadless area falls within the scope of that rule.

Defendants next argue that, even if the Forest Service was required to include a discussion of the roadless areas, the EIS in fact includes such a discussion. The EIS does contain a three-page analysis on 'roadless character,' but the cursory nature of the discussion and legal errors in it render it insufficient to meet the requirements of NEPA.

In three separate passages, the EIS erroneously declares that 5,000 acres is an absolute minimum size criterion for potential designation as a wilderness area. *See* EIS at 3-270 ('There are no other areas within the School Fire Salvage Recovery Project area that meet or exceed the 5,000 acre size criteri[on] for roadless.');

id. ('There are no large blocks of land where the undeveloped character of the area meets the minimum criteri[on] of 5,000 acres or greater that might make them potentially designated as an [inventoried roadless area] or wilderness area.');

id. at 3-271 ('There would be no direct, indirect, or cumulative effects to alter the undeveloped character of any land because there are no large blocks that meet the minimum criteri[on] of 5,000 acres or greater.'). The EIS erroneously adds that '[n]or are there areas of undeveloped character adjacent to an existing [inventoried roadless area] or wilderness area suitable for consideration.' *Id.*; *see also id.* at 3-270 (nearly identical statement).

Wholly apart from those errors, we conclude that the EIS's discussion fails to meet even the bare minimum requirement discussed in *Smith* and analyzed above: 'the possibility of future wilderness classification triggers, *at the very least*, an obligation on the part of the agency to disclose the fact that development will affect a 5,000 acre roadless area.' *Smith*, 33 F.3d at 1078 (emphasis added). Upper Cummins Creek, combined with the contiguous inventoried roadless area, comprises one roadless area much larger than 5,000 acres. That fact is nowhere revealed in the EIS. As in *Smith*, 'nowhere has the agency disclosed that the inventoried and uninventoried lands together comprise one 5,000 acre roadless area.' *Id.* at 1079. Similarly, the West Tucannon roadless area contains nearly 5,000 acres (i.e., is 'of sufficient size')

NINTH CIRCUIT CASES

but the EIS never discloses that fact.

“In conclusion, we reverse the district court’s holding that the EIS’s discussion of the effects of the proposed logging in the roadless areas complied with the requirements of NEPA. We affirm the district court in all other respects.”

United States v. Locklin No. 07-50187 (June 25, 2008) “Deandre Lamont Locklin appeals (a) his conviction for failure to appear, in violation of 18 U.S.C. § 3146(a)(1), and (b) his sentence. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We affirm the conviction, vacate the sentence, and remand for resentencing.

In September 2004, Locklin was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He was released from custody on bond and, as a condition of release, was required to appear at all court proceedings held in connection with the indictment. Locklin attended court on the morning of June 21, 2005, for the beginning of jury selection for his trial, but fled at the lunch break. He was apprehended months later and, in a superseding indictment, charged, as before, with being a felon in possession of a firearm, in violation of § 922(g)(1) (count one), and, additionally, with failure to appear, in violation of 18 U.S.C. § 3146(a)(1) (count two). Testifying on his own behalf at trial, Locklin admitted that he failed to appear in court on June 21, 2005. The jury acquitted Locklin of being a felon in possession of a firearm, but convicted him of failure to appear. Locklin was sentenced to a prison term of 30 months. He timely appealed his conviction and sentence.”

Contrary to the interpretation of § 3146(b)

urged by Locklin, this penalty scheme authorizes a range of punishments for failure to appear that are valid regardless of the underlying offense. Under § 3146(b)(1)(A), any sentence that is permitted when the charged underlying offense is a misdemeanor is likewise permitted if the underlying offense carries more serious penalties. Hence, regardless of whether the government has proved the underlying offense to the jury, the district court may, without running afoul of any of the provisions of § 3146(b)(1)(A), impose a term of imprisonment that does not exceed one year. Therefore, the underlying offense need not be proved to the jury to authorize some valid punishment under § 3146, and thus is not a ‘fact necessary to constitute the crime’ of failure to appear. *Winship*, 397 U.S. at 364. Accordingly, *Weaver* continues to be an accurate statement of the essential elements of failure to appear, in violation of § 3146. We therefore affirm Locklin’s conviction.”

“Under the § 3146 penalty framework, described above, a violation of § 3146(a) may be punished by a term of imprisonment exceeding one year only if the underlying offense is a felony. ‘Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ *Apprendi*, 530 U.S. at 490. Accordingly, if the government seeks a sentence for failure to appear that exceeds one year’s imprisonment, the underlying offense ‘must be submitted to a jury, and proved beyond a reasonable doubt.’ *See id.*

“Locklin was sentenced to 30 months’ imprisonment for his failure to appear in court. However, neither the penalty for Locklin’s charged underlying offense nor any findings necessary to determine the underlying offense were submitted to the

NINTH CIRCUIT CASES

jury. Thus, the sentence contravened *Apprendi*.”

“We therefore vacate Locklin’s sentence and remand for resentencing consistent with the facts proved to the jury beyond a reasonable doubt.”

United States v. Campion No. 06-15410 (June 24, 2008) “In this case, we review a district judge’s discretion to exclude expert testimony regarding electromagnetic fields (‘EMFs’) in a condemnation action. The United States condemned an easement on land belonging to Donn Campion for the construction of power transmission lines. At trial, both sides offered expert testimony regarding diminution of value of the remaining land resulting from the power lines within the easement. While some of this testimony was allowed, the judge refused to let Campion’s expert, an environmental planner, testify about specific EMF levels on the land and the types of questions developers typically ask her about EMFs. A jury found that Campion was entitled to just compensation in the amount of \$2,023,715. The district court entered judgment, and Campion appeals the exclusion of expert testimony. We affirm.”

“At the time that the easement was taken, Campion’s land was undeveloped and used for agricultural purposes. The land had been zoned for agricultural use, with a minimum parcel size of 160 acres. The government’s expert appraiser, Correia, testified that, at the time of the taking, the highest and best use of the property was for agricultural purposes. On that basis, he valued Campion’s entire property at \$3.075 million. He further testified that the taking caused no diminution of the value of the land outside the easement. Accordingly, he testified that the government should pay \$76,518 as just compensation for the taking of the easement, and only the ease-

ment.

Before the taking occurred, however, Campion had begun creating plans to develop part of the land for residential use, a golf course, a community village center, and public facilities. His expert appraiser, Gimmy, testified that the highest and best use of the land at the time of the taking was for such a residential development. On this assumption, Gimmy put the pre-taking value of the land at \$19.320 million. Gimmy also concluded that the power transmission lines diminished the value of the land outside of the easement. Barred from testifying that the mere existence of EMFs on Campion’s land reduced the land’s value, Gimmy cited public perceptions of power lines, environmental issues limiting development in other areas of the property, aesthetic issues, and the practicalities of developing around power lines. He concluded that, after the taking, the property would have no residential potential. Rather, cattle grazing would be the highest and best use of the entire property after the taking. He concluded that the value of the property after the taking was \$3.22 million, warranting a \$16.1 million compensation award. Of this amount, only \$1.415 million was attributable to the easement itself as opposed to severance damages.

Gimmy’s opinion was influenced by the report of another of Campion’s experts, Cindy Sage, an environmental planner with extensive experience advising developers regarding the impact of EMFs from power transmission lines on the use and development of property. Sage proposed to testify to the following: (1) public perceptions of the effects of EMFs among residential homeowners and home buyers, (2) the extent and level of EMFs from the Path 15 line that reach beyond the easement into the rest of

NINTH CIRCUIT CASES

Campion's property, and (3) the types of studies concerning EMFs for which developers routinely engage her. Of these subjects, the trial judge permitted Sage to testify only to public perceptions. In this appeal, Campion challenges the exclusion of the latter two subjects."

"The trial judge acted within his discretion in excluding Sage's measurements, as depicted in a map of the 'impaired zone,' on the ground that they could plausibly mislead the jury into thinking that EMFs posed a proven health risk to humans. The countervailing probative value of such measurements is minimal because Campion presented no evidence linking specific EMF levels with specific public perceptions or market effects. With respect to the models Sage constructed for developers, these specific examples offer little probative value in light of the general testimony regarding Sage's work that was admitted. If there was any error in excluding the latter evidence, the error was harmless. The judgment of the district court is AFFIRMED."

United States v. Sawyer No. 05-17347 (June 24, 2008) "Pursuant to a 2001 order of the Secretary of Energy, the Western Area Power Administration ('WAPA') selected certain land estates in the western portion of the San Joaquin Valley in California, where it planned to construct a highvoltage transmission line. The United States began condemnation proceedings in the district court on behalf of WAPA, seeking transmission easements on the lands selected by WAPA. Sawyer and a few other individual owners of condemned property (collectively 'Sawyer') challenged the government's exercise of its power of eminent domain, claiming that the taking lacked proper congressional authorization, was not for a 'public use'

as required by the Takings Clause, and violated California law. The district court dismissed Sawyer's objections and, when the parties reached an agreement on the compensation amount, entered summary judgment *sua sponte*. Sawyer filed this appeal. We affirm."

The district court did not err in granting summary judgment *sua sponte*. '*Sua sponte* grants of summary judgment are only appropriate if the losing party has 'reasonable notice that the sufficiency of his or her claim will be in issue.'" *Greene v. Solano County Jail*, 513 F.3d 982, 990 (9th Cir. 2008) (quoting *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993)). 'Notice need not be explicit. . . . A party is 'fairly apprised' that the court will in fact be deciding a summary judgement [sic] motion if that party submits matters outside the pleadings to the judge and invites consideration of them.' *In re Rothery*, 143 F.3d 546, 549 (9th Cir. 1998) (internal citations omitted). Sawyer met this condition by submitting two declarations outside the pleadings in support of his opposition to the government's motion, and he had a fair opportunity to contest the issues decided in the motion. *See id.* More fundamentally, with the exception of just compensation, Sawyer never raised any issue that required resolution of any question of fact. *See supra*. As a consequence, when Sawyer eventually entered into a stipulation with the government with respect to compensation, he effectively removed the only factual issue before the court. The district court did not err in granting summary judgment *sua sponte*."

"The district court did not err in granting summary judgment in favor of the United States or apportioning the compensation among the defendants. The judgment of the district court is AFFIRMED."

NINTH CIRCUIT CASES

Espinosa v. United Student Aid Funds Inc., No. 06-16421 (June 24, 2008) “Espinosa obtained \$13,250.00 in student loans from United Student Aid Funds, Inc. (Funds). He later filed a Chapter 13 bankruptcy petition and plan. The plan provided that he repay the \$13,250.00 principal, and that accrued capitalized interest, penalties, and fees be discharged. The clerk of the bankruptcy court mailed a notice of commencement and a copy of the proposed plan to Funds, which gave Funds the usual notice of the date and time of the plan confirmation hearing and the deadline for filing objections to the plan. Funds then filed a proof of claim for \$17,832.15, which presumably included unpaid accrued capitalized interest, penalties, and fees. But Funds filed no objections to the plan, and as there were no other creditors, the bankruptcy court confirmed the plan as proposed. Espinosa subsequently paid Funds \$13,250.00 over the course of four years, at which point the plan was completed and the bankruptcy court issued a discharge order, filed May 30, 1997. Curiously, the discharge order provided that Espinosa was ‘discharged from all debts provided for by the plan . . . except any debt . . . for a student loan,’ which contradicted the terms of the plan and pretty much rendered the whole exercise pointless from Espinosa’s point of view. Curiouser still, Espinosa did not seek reconsideration of the discharge order, nor did he appeal.”

“We have therefore taken a look at the cases from the other circuits and do not immediately find them persuasive; the rationale of *Pardee* and *Andersen*, relying as it does on straightforward notions of notice and waiver, seem far more consistent with accepted principles concerning the finality of judgments that transcend this particular corner of the law. But we have no occasion to

resolve this matter because, as previously noted, the discharge order in this case simply did not discharge Espinosa’s student loan debt. Indeed, it specifically excluded the student loan debt from the discharge. *See* p.7295 *supra*. This order was, to be sure, inconsistent with Espinosa’s Chapter 13 plan’s terms; in effect, the bankruptcy court did not make good on its promise to the debtor that, if he satisfied the terms of the plan, it would discharge all of his listed debts.”

“Much the same seems to have happened in *Mersmann*, 505 F.3d at 1039-40 & n.5, where the court found that ‘the clerk of the bankruptcy court automatically generates the discharge orders and simply failed to tailor it [sic] to the facts of Mersmann’s case.’ In *Mersmann*, the bankruptcy court corrected the discharge orders pursuant to Federal Rule of Civil Procedure 60(a). 505 F.3d at 1040. Here, Espinosa did not seek a correction of the order, and the bankruptcy court did not correct the order *sua sponte*, as it is permitted to do by Rule 60(a). It is possible that the bankruptcy court was unaware of the precise language of its discharge order, and was under the mis-impression that the order did cover the student loan debt; that seems to be the most plausible inference from its order enforcing the discharge injunction against Funds. And it is possible that neither party brought the precise language of the discharge order to the bankruptcy court’s attention, as the parties said barely anything about it in their briefs before us.

We therefore remand the case to the district court, with instructions for it to remand to the bankruptcy court. On remand, the bankruptcy court has our express leave to consider whether its discharge order in this case was entered as a result of a clerical error and, if so, whether to

NINTH CIRCUIT CASES

correct it so as to conform to Espinosa's Chapter 13 plan. *See Travelers Cas. and Surety Co. v. Pac. Gas and Elec. Co.*, No. 04-15605, 2008 WL 1970961, at *1 (9th Cir. May 8, 2008). The remand shall be for this limited purpose and no other, and shall last the earlier of 60 days or until such time as the bankruptcy court enters an order addressing this issue."

Duncan v. Ornaski No. 05-99010 (June 24, 2008) "Once again, we consider whether a capital defendant's appointed lawyer's performance was so deficient and prejudicial that it violated his Sixth Amendment right to counsel. Appellant Henry Earl Duncan was convicted of robbery and first-degree murder on March 3, 1986. The jury found the special circumstance allegation to be true and, after a brief penalty phase hearing, sentenced Duncan to death. The California Supreme Court affirmed the judgment on direct appeal and subsequently denied Duncan's petition for writ of habeas corpus on the merits. Duncan filed a federal habeas petition in the Central District of California. The district court denied most of his claims and then held a four-day evidentiary hearing, after which it rejected the rest. Duncan appeals.

We conclude that Duncan's lawyer's performance was deficient during the guilt phase of his trial because he failed to investigate and present evidence that the blood samples from the crime scene that did not belong to the victim also did not belong to Duncan. This evidence would have tended to establish that Duncan had an accomplice who was in the murder room on the night of the murder, shed blood, and used the first aid kit on the wall to treat his wounds. Indeed, the evidence would have been sufficient to support an inference that it was the accomplice, not Duncan, who killed the victim. Never-

theless, evidence with respect to Duncan's presence at the crime scene on the night of the murder, including his shoe prints, fingerprint, and palm prints in the money room, is sufficient to show that Duncan participated in the robbery and thus to sustain Duncan's conviction for felony murder. Accordingly, we hold that Duncan's lawyer's deficient performance did not prejudice him with respect to his conviction. However, counsel's failure to investigate and present the potentially exculpatory serological evidence did prejudice Duncan with respect to the jury's special circumstance finding, which, under California law at the time of his trial, required proof beyond a reasonable doubt that he intentionally killed the victim or, if not, that he intended that she be killed. Because the serological evidence raises doubts as to whether Duncan was the actual killer, and the evidence in the record does not establish beyond a reasonable doubt that Duncan intended that the victim be killed, we conclude that counsel's ineffective performance was prejudicial and thus constituted a Sixth Amendment violation. Accordingly, we reverse the judgment in part and remand with instructions to grant the petition as to the jury's special circumstance finding and to vacate the sentence."

United States v. Chapman No. 07-50000 (June 23, 2008) "Lee Chapman appeals his misdemeanor conviction under 18 U.S.C. § 111(a) for forcibly resisting, opposing, impeding, and interfering with a federal officer engaged in official duties. Because § 111(a) allows misdemeanor convictions only where the acts constitute simple assault, and because Chapman's nonviolent civil disobedience did not constitute a simple assault, we reverse and vacate the judgment of conviction."

"18 U.S.C. § 111(a) allows misdemeanor conviction."

NINTH CIRCUIT CASES

tions only in cases ‘where the acts in violation of [§ 111(a)] constitute . . . simple assault.’ By ‘tensing up’ in anticipation of Officer Buchanan’s arrest and disobeying his orders to move and lie down, Chapman may have made the officers’ job more difficult, but his actions did not amount to a simple assault. Because Chapman’s conduct did not amount to a ‘simple assault,’ his misdemeanor judgment of conviction under § 111(a) is REVERSED AND VACATED.”

Richlin v. Metro-Goldwyn-Mayer No. 06-55307 (June 19, 2008)

“Inspector Jacques Clouseau, famously unable to crack the simplest of murder cases, would most certainly be confounded by the case we face. While Inspector Clouseau searched for the answer to the question, ‘Who did it?’, we must search for the answer to the question, ‘Who owns it?’ In 1962, Maurice Richlin coauthored a story treatment (the ‘Treatment’) involving the bumbling inspector. Later that year, before publication, Richlin assigned all rights in the Treatment—including copyright and the right to renew that copyright—to a corporation that used it to create the smash-hit film, *The Pink Panther* (the ‘Motion Picture’). The Richlin heirs now claim federal statutory renewal rights in the Treatment and derivative works, including the Motion Picture. They assert that Richlin’s coauthorship of the Treatment makes him a coauthor of the Motion Picture. Alternatively, they contend that, because the Motion Picture secured statutory protection for the portions of the Treatment incorporated into the Motion Picture, and because the copyright in the Motion Picture was renewed for a second term, they are co-owners of the Motion Picture’s renewal copyright and all derivative

“Inspector Jacques Clouseau, famously unable to crack the simplest of murder cases, would most certainly be confounded by the case we face.”

works thereof. Although the Richlin heirs have developed several theories that could supply the answer to the question, ‘Who owns it?’, unlike Inspector Clouseau, they have not quite stumbled upon a theory that favors them. We therefore affirm the district court’s conclusion that the Richlin heirs have no interest in the copyright to the Motion Picture.

United States v. Gonzalez No. 07-10326 (June

19, 2008) “Michael Gonzalez, a Border Patrol agent, appeals his jury conviction for possession with intent to distribute less than 50 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D), and for use of a firearm in furtherance of that drug trafficking offense in violation of 18

U.S.C. § 924(c)(1)(A)(I). Gonzalez, in uniform and carrying his service-issued sidearm, was caught on videotape stealing a distribution quantity of marijuana, while purporting to assist an Arizona Department of Public Safety (‘DPS’) officer with a traffic stop. A jury found that the weight of the stolen marijuana was 10 kilograms. Gonzalez challenges the district court’s denial of judgment of acquittal on both counts and its denial of a motion to dismiss the firearm charge for lack of jurisdiction and failure to state an offense. He further challenges the district court’s adoption of the jury’s finding regarding the weight of the stolen marijuana. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.”

Barona Band of Mission Indians v. Yee No. 06-55918 (June 18, 2008) “We must decide whether a non-Indian contractor who purchases construction materials from non-Indian vendors, which are later delivered to a construction site

NINTH CIRCUIT CASES

on Indian land, is exempt from state sales taxes. The California State Board of Equalization (the ‘Board’) appeals the grant of summary judgment in favor of the Barona Band of Mission Indians (the ‘Tribe’) in which the district court determined that the balancing test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), preempted a state sales tax levied against a non-Indian subcontractor performing electrical work on the Tribe’s multi-million dollar casino expansion. Because the Tribe, as part of its highly lucrative gambling enterprise, merely marketed a sales tax exemption to non-Indians as part of a calculated business strategy, we conclude that its strategic effort to receive construction services from non-Indians at a competitive discount by circumventing the state sales tax does not outweigh California’s interest in raising general funds for its treasury. The district court had jurisdiction under 28 U.S.C. § 1362, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand to the district court for further proceedings consistent with this opinion.”

Ryan v. Commissioner of Social Security No. 06-15291 (June 18, 2008) “Plaintiff-Appellant Karen L. Ryan appeals the district court’s order granting summary judgment in favor of the Defendant-Appellee, upholding the Commissioner of Social Security’s decision denying her application for Title II disability benefits. The Administrative Law Judge (‘ALJ’) did not give full weight to the opinions of two examining psychologists, characterizing their opinions as too heavily based on Ryan’s ‘subjective complaints,’ and as being inconsistent with the records of Ryan’s treating physician, a family practitioner. There was no inconsistency. The records of Ryan’s treating physician, if anything, supported the examining psychologist’s

assessment that Ryan was incapable of maintaining a regular work schedule. Because substantial evidence does not support the ALJ’s denial of disability benefits, we reverse.”

Quon v. Arch Wireless Inc. No. 07-55282 (June 18, 2008) “This case arises from the Ontario Police Department’s review of text messages sent and received by Jeff Quon, a Sergeant and member of the City of Ontario’s SWAT team. We must decide whether (1) Arch Wireless Operating Company Inc., the company with whom the City contracted for text messaging services, violated the Stored Communications Act, 18 U.S.C. §§ 2701-2711 (1986); and (2) whether the City, the Police Department, and Ontario Police Chief Lloyd Scharf violated Quon’s rights and the rights of those with whom he ‘texted’—Sergeant Steve Trujillo, Dispatcher April Florio, and his wife Jerilyn Quon—under the Fourth Amendment to the United States Constitution and Article I, Section 1 of the California Constitution.

“Appellants assert that they are entitled to summary judgment on their Fourth Amendment claim against the City, the Department, and Scharf, and on their California constitutional privacy claim against the City, the Department, Scharf, and Glenn. Specifically, Appellants agree with the district court’s conclusion that they had a reasonable expectation of privacy in the text messages. However, they argue that the issue regarding Chief Scharf’s intent in authorizing the search never should have gone to trial because the search was unreasonable as a matter of law. We agree.”

“As a matter of law, Arch Wireless is an ‘electronic communication service’ that provided text messaging service via pagers to the Ontario Police Department. The search of Appellants’ text messages violated their Fourth Amendment and

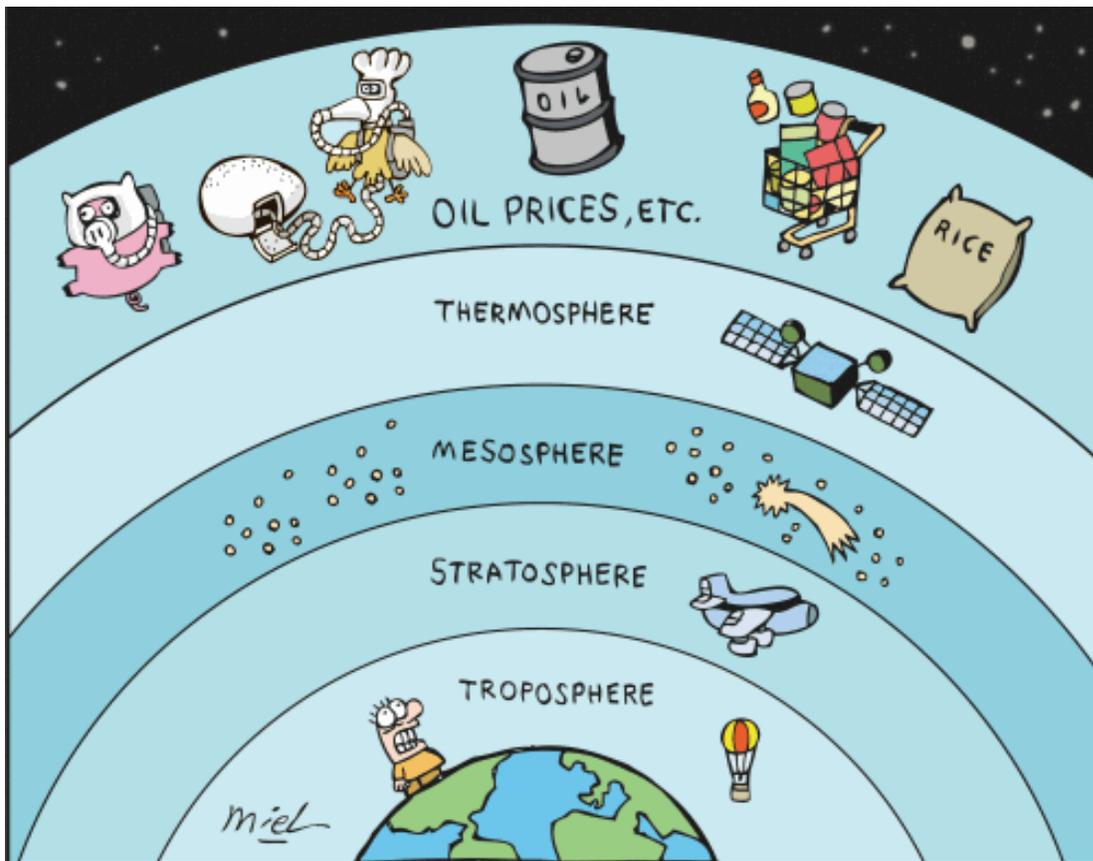
NINTH CIRCUIT CASES

California constitutional privacy rights because they had a reasonable expectation of privacy in the content of the text messages, and the search was unreasonable in scope. While Chief Scharf is shielded by qualified immunity, the City and the Department are not shielded by statutory immunity. In light of our conclusions of law, we affirm in part, reverse in part, and remand to the district court for further proceedings on Appellants’ Stored Communications Act claim against Arch Wireless, and their claims against the City, the Department, and Glenn under the Fourth Amendment and California Constitution.

FIRMED in part, REVERSED in part, and REMANDED for Further Proceedings.”

“Because we hold that Appellants prevail as a matter of law on their claims against Arch Wireless, the City, the Department, and Glenn, we need not reach their appeal from the denial of their motions to alter or amend the judgment and

for a new trial under Federal Rule of Civil Procedure 59. The parties shall bear their own costs of appeal. AF-



Krollontrack.com eDiscovery Cases

Court Rejects Argument that a Missing E-Mail is Proof of Non-Receipt Krollontrack.com

Am. Boat Co., Inc. v. Unknown Sunken Barge, 2008 WL 1821599 (E.D.Mo. April 22, 2008). In this negligence action, the plaintiffs moved to reopen the time to file an appeal claiming the plaintiffs' attorney did not receive the electronic notice of the court order. The defendants' computer forensic expert imaged the computer hard drive belonging to the plaintiffs' counsel and found no evidence the notice had ever been on the computer system. Based on his investigation, the expert opined the notice was successfully sent, but was removed from the server after the attorney's secretary accessed the e-mail from a remote computer using the internet Post Office Protocol. The court found that proof an e-mail is not in a recipient's possession is insufficient to rebut the presumption that a generally reliable, properly dispatched e-mail reached its intended recipient.

Court Issues Forensics Protocol for Hard Drive Examination

Ferron v. Search Cactus, L.L.C., 2008 WL 1902499 (S.D.Ohio April 28, 2008). In this case involving an alleged violation under the Ohio Consumer Sales Practices Act, the court ordered a protocol for viewing the information contained on the plaintiff's home and office computers. In considering the protocol, the court identified three categories of information contained on the plaintiff's hard drives: confidential personal information, attorney-

client privileged information, and information relating to e-mail and website advertisements. The court ordered the plaintiff's computer forensic expert to mirror image the hard drives, removing information deemed personal and confidential that could not lead to the discovery of relevant information. Additionally, the court ordered the defendant's computer forensic expert to meet with the plaintiff to identify for deletion information that is irrelevant and create a privilege log of any relevant information which is privileged. Finally, the court ordered both parties to share the costs associated with their chosen computer forensic expert.

Computer Forensic Evidence Insufficient to Grant Preliminary Injunction

Maxpower Corp. v. Abraham, 2008 WL 1925138 (W.D.Wis. April 29, 2008). In this litigation against former employees, the plaintiffs sought a preliminary injunction requiring the defendants to return information allegedly deleted from the plaintiffs' servers, in addition to spoliation sanctions. The plaintiffs' computer forensic expert examined the defendants' laptops, finding evidence of hard drive wiping software and of "text strings" referring to information about outdated products. The defendants argued the deletions of information from their laptops were done for maintenance purposes and complied with company policy. Finding the plaintiffs' computer forensic evidence insufficient and ambiguous, the court denied the motion for preliminary injunctive relief. Additionally, the court denied the plaintiffs' motion for sanctions finding insufficient evidence to

Krollontrack.com eDiscovery Cases

support the argument that wiping the hard drive constituted deliberate spoliation.

The Brill Files: Just Because You Install the Software Does Not Mean You Are Secure

On a recent computer forensics engagement, we ran into an interesting question that reminded me of an important technology truism. The security of systems is not simply a matter of having the right technology – it requires the active cooperation of the user as well.

The question involved the security of a laptop computer that had been stolen. The company had installed a “full-disk encryption package” and assumed that everything on the machine – stolen while the employee was traveling -- was secure. We determined that the employee had not shut down the computer before beginning travel. Instead, he simply shut the lid of the machine, which put it into “sleep mode.” We looked at the documentation of the security software, and the particular package only invoked absolute protection when the computer was turned off completely. Fortu-

nately, we also determined that the laptop was set to force the user to log-on after it awoke from sleep mode, so the thief could not simply open the machine and use it. The user also informed us that the password was not easy to guess and included upper and lower-case letters, numbers and symbols.

How often do users assume that because their machine has encryption software installed they do not have to do anything specific to protect it? All too often, I am afraid. It is absolutely vital that users be told exactly what they need to do to make sure their machine is secure. The level of machine security is different if a user shuts it down (as opposed to just closing the cover), and a user needs to know that.

Incorrectly assuming that a laptop’s security is in place and operating can lead to

