

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Posas v. Horton, 126 Nev. Adv. Op. No. 12 (April 15, 2010) In this appeal, we consider whether the district court erred in giving a sudden-emergency jury instruction in a rear-end automobile collision case. We conclude that the district court erred in giving the sudden-emergency jury instruction in this case. We further clarify that the sudden-emergency doctrine applies when an emergency affects the actor requesting the instruction and the actor shows that he or she was otherwise exercising due care.

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Court Denies Defendant's Suppression Argument Regarding Text and Picture Messages

State v. Rivera, 2010 WL 339811 (Ohio App. 12 Dist. Feb. 1, 2010). In this action involving the Stored Communications Act (SCA), the defendant appealed his conviction, arguing text and picture

messages obtained from his cell phone provider should have been suppressed. The defendant also argued the trial court erred in not denying the SCA as unconstitutional. Denying the defendant's argument regarding the constitutionality of the SCA, the court found the detective violated the SCA by not providing notice to the defendant as required. However, the SCA does not include exclusion as a remedy, and thus the exclusionary rule was inapplicable. Addressing the suppression argument, the court deferred to the trial court's determination of probable cause and found that based on the facts and circumstances, there was a substantial probability that evidence of criminal activity would have been found through other locations and media. Thus, the court denied the defendant's appeal and affirmed the trial court's ruling.

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Court Holds Burdens Cannot Be Met With “Bald Generalizations”

Cartel Asset Mgmt. v. Ocwen Fin. Corp., 2010 WL 502721 (D.Colo. Feb. 8, 2010). In this misappropriation of trade secrets litigation, the court addressed several motions, notably the defendants’ motion for a protective order. The defendants argued the production requests exceeded the discovery permitted by a previous court order, imposed an unreasonable expense and burden, and sought information that was duplicative or not likely to lead to the discovery of admissible evidence. Noting the burden required for a protective order cannot be met with “bald generalizations,” the court found the defendants’ undue burden and expense arguments regarding the discovery of ESI unpersuasive. The defendants did not provide specific information regarding ESI storage, the number of backup or archiving systems in place, or the capability to retrieve information. Rather the defense counsel argued that producing this information would affect profitability and client service. Determining this statement to be the “e-discovery equivalent of an unsubstantiated claim that the ‘sky is falling,’” the court denied the defendants’ motion in part and ordered the defendants to supplement their discovery responses. The court also noted that e-discovery “has simply become too expensive and too protracted to permit superficial compliance with the ‘meet and confer’ requirement” under the Fed.R.Civ.P. and endorsed the Sedona Conference Cooperation Proclamation.

Court Finds Attorneys’ Careless Conduct Insufficient to Impose Monetary Sanctions

Lawson v. Sun Microsystems, Inc., 2010 WL

503054 (S.D.Ind. Feb. 8, 2010). In this discovery dispute, the plaintiff’s former counsel (two attorneys from a law firm) objected to the magistrate judge’s recommendation that they be sanctioned \$13,625 for failure to read e-mails from the plaintiff that divulged discovery misconduct, claiming no bad faith or willful misconduct occurred. During review, the plaintiff accessed password-protected files produced by the defendant and sent e-mails to counsel referencing these actions. Recognizing the attorneys’ failure to read or react to the plaintiff’s e-mails and adequately supervise the plaintiff’s behavior during the discovery phase amounted to carelessness, the court nonetheless concluded “careless conduct does not equate to ‘wanton’ conduct” and found the recommendation for sanctions against the plaintiff’s counsel unsupported. The court further concluded the defendant was not harmed as a result of the plaintiff’s actions, since the password-protected documents contained information that could have been obtained through other discovery means.

Court Orders Production of Electronically Stored Photographs and Associated Metadata

Irwin v. Onondaga County Res. Recovery Agency, A.T., 2010 WL 462948 (N.Y.A.D. 4 Dept. Feb. 11, 2010). In this litigation, the plaintiff sought disclosure of all electronically stored photographs and associated metadata. The defendant previously provided digital copies of 1,423 already-published photographs, with two photographs of the plaintiff, but denied production of the remaining photographs, claiming the request was overbroad and constituted

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an invasion of personal privacy. Pursuant to the Freedom of Information Law statute, the court held that electronically stored photographs and associated metadata must be disclosed by a public agency if properly requested by members of the public. However, unpublished photographs relating to active or ongoing law enforcement investigations, or personal photographs depicting the agency's employees or staff, may be excluded from disclosure. Based on these determinations, the court ordered production of the unpublished photographs and associated metadata that depict the individual but do not depict active or ongoing law enforcement investigations. The court also ordered production of metadata associated with the previously produced photographs.

Citing Fed.R.Evid. 502, Court Denies Parties' Subject Matter Waiver Argument

Trustees of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc., 2010 WL 558719 (D.D.C. Feb. 12, 2010). In this litigation, the defendants filed a renewed motion to compel documents withheld by the plaintiffs under the claim of privilege. First, the court addressed whether privilege existed in the first place by examining the parties involved and determined privilege existed despite the presence of two consultants at the meetings, since they became integral members of the team assigned to deal with litigation and legal strategies. Next, the court determined whether privilege was waived or "forfeited," noting that Fed.R.Evid. 502 abolished the "dreaded

subject-matter waiver." Thus, the defendants' argument that the disclosure of non-privileged information should constitute a waiver of privileged information of the same subject matter was "flat out wrong," since the question is whether the information, both disclosed and undisclosed, shares the same subject matter and ought in fairness to be considered together. Based on this analysis, the court denied the defendants' arguments that privilege was waived and ordered the plaintiffs to provide documents marked as privilege for an in camera review.

Court Denies Untimely Motion to Compel, Finds Non-Native Production Acceptable Absent Initial Format Request

Secure Energy, Inc. v. Coal Synthetics, 2010 WL 597388 (E.D.Mo. Feb. 17, 2010). In this business dispute, the plaintiffs sought production of electronic engineering drawings in native format with metadata. The plaintiffs argued that the definition of "documents" in previous discovery requests included ESI, that they were under the impression the defendants agreed to produce the files and that the terms of a proposed joint scheduling plan entitled them to native production. Citing Fed.R.Civ.P. 34, the court determined the defendants were not obligated to produce the drawings in native format since the plaintiffs failed to identify a specific format in their requests. The court also found the plaintiffs' motion untimely, since they waited until two months after the discovery and motion to compel deadlines had passed. Finally, the court recognized that expert testimony may be required regarding retrieval and interpretation of the metadata from the drawings and determined the defendants would be preju-

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diced if the plaintiffs' equest was granted. Thus, the court denied the plaintiffs' motion and held the defendants fulfilled discovery obligations by producing the drawings in PDF format.

Court Imposes Permissive Adverse Inference Instruction for Intentional Deletion of E-Mails, Draws Distinctions Between Pension Committee

Rimkus Consulting Group, Inc. v. Cammarata, 2010 WL 645253 (S.D.Tex. Feb. 19, 2010). In this employment agreement dispute, the plaintiff sought sanctions, costs and attorneys' fees, and a finding of contempt, alleging the defendants intentionally spoliated evidence and failed to produce requested discovery. Before addressing the parties' specific arguments, the court noted that "spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns" and "distract[s] from the merits of a case, add[s] costs to discovery, and delay[s] resolution." Moving to the case specifics, the court found the defendants intentionally lost, altered and deleted e-mails, and sent the case back to the jury with a permissive adverse inference instruction. The court also awarded the plaintiff attorneys' fees and costs incurred in the spoliation investigation. Notably, the court distinguished the recent Pension Committee ruling from the Southern District of New York, finding the differences between circuits in relation to culpability of parties limited the applicability of the approach taken in *Pension Committee*. The court identified an additional distinction in regard to the burden of proof in relation to relevance and preju-

dice of spoliated evidence.

Court Issues Default Judgment Sanction for Defendant's "Shocking" Discovery Misconduct, Finds Over \$83 Million in Judgment Not Dischargeable

In re Hecker, 2010 WL 654151 (Bkrtcy.D.Minn. Feb. 23, 2010). In this ancillary bankruptcy proceeding, the plaintiff requested default judgment sanctions, alleging the defendant repeatedly failed to produce privilege logs and responsive ESI, and engaged in offensive discovery despite court orders prohibiting those actions. The defendant argued he was unable to produce large amounts of the requested ESI since the documents were located on his computers and servers that were in government custody. First, the court noted that the majority of information requested remained in the defendant's possession, since the government made forensic images of the data. Next, the court detailed the "shocking" behavior of the defendant and his counsel throughout the discovery process, which included belated and incomplete productions, violation of court orders, and delivery of an external hard drive containing 1.1 million scrambled files and folders. Based on this behavior, the court determined the defendant acted in bad faith and willfully abused the discovery process. Due to the court's certainty that no court order would secure the defendant's cooperation, the plaintiff's motion for a default judgment sanction was granted and \$83,070,987 of the plaintiff's judgment against the defendant was not dischargeable.

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Important Developments in Recent E-Discovery Case Law – March 2010

In the years since the 2006 amendments to the Federal Rules of Civil Procedure, keeping abreast of e-discovery developments has been no small feat, especially given the rapidly expanding body of case law. Each e-discovery dispute and corresponding opinion provides one small piece of a seemingly impossible puzzle, and litigants have struggled to find concrete definitions of duties and court expectations. However, as electronic discovery becomes the dominant form of discovery, definitions of related duties are beginning to take shape.

The Preservation Problem

One challenging aspect of the e-discovery process that parties continue to struggle with is the duty to preserve. On January 15, 2010, District Judge Shira Scheindlin of the Southern District of New York issued an opinion, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), that provides further guidance on a party's preservation obligation. This case, which is sure to be one of the most cited cases of 2010 and beyond, reiterates the concept that the duty to preserve arises upon reasonable anticipation of litigation and provides definite "criteria a court should review in evaluating discovery conduct." Specifically, Judge Scheindlin discussed the four factors necessary for consideration in determining whether a litigant's conduct throughout the discovery process warrants the imposition of sanctions, including the party's culpability, the interplay between the duty to preserve evidence and the spoliation of evidence, which party bears the bur-

den of proving that evidence has been lost or destroyed and resulting consequences, and the appropriate remedy for the harm caused by the spoliation.

Perhaps one of the most important lessons from this opinion concerned Judge Scheindlin's holding that the failure to issue a written litigation hold constitutes gross negligence. In this case, six of the thirteen plaintiffs subject to sanctions never issued a written hold at any time. Based on this conduct, Judge Scheindlin determined a permissive adverse inference sanction was warranted. Judge Scheindlin also found all thirteen plaintiffs worthy of monetary sanctions since they "conducted discovery in an ignorant and indifferent fashion," and awarded the defendants reasonable attorneys' fees and costs associated with the motion.

Judge Scheindlin noted that "[b]y now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence." Following this landmark decision, the bar of acceptable behavior in the context of e-discovery has been raised, and it is clear that a party's ignorance of its preservation obligations is no longer a viable defense to discovery violations.

Importance of Information Management

In the plaintiffs requested the production of e-mails from certain key players relating to a specified time period. Objecting to the production requests, the defendant relied on Fed.R.Civ.P. 26(b)(2)(B) and claimed that the

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location of the e-mails on the company's "cumbersome" old archiving system made them not reasonably accessible. The defendant presented testimony from an information technology manager who testified that retrieval would be disruptive to business operations, would take nearly four years to restore and would cost \$834,285. After noting that the defendant's cost estimate had increased from \$88,000 just six months earlier, the court found that the e-mails were readily accessible, and even if they weren't, good cause existed to order production. The court held that the plaintiff should not be disadvantaged because the defendant, a "sophisticated" company, chose not to migrate the e-mails to the now-functional archival system.

Proper information management from the outset could have entirely avoided the issue the defendant faced in the Starbucks case, since there would have been no need to access the antiquated archiving system. As demonstrated by this case, poor or outdated IT infrastructure does not serve as an excuse to ESI request response. Thus, parties must use sound data management practices and take advantage of services, such as an archiving system, that can help reduce litigation expenses and strengthen defensibility.

Taxation of Costs

In 2009 WL 5159761 (N.D.Ga. Dec. 30, 2009), the defendants enlisted an e-discovery vendor to aid compliance with the production of 1.4 million electronic documents and six versions of source code. Due to the excessive cost and time connected with the collection of the documents, the defendants filed a motion to tax the costs associated with the use of the

vendor. Overruling the plaintiff's objections and ordering recovery of taxable costs, the court sent a strong message to e-discovery litigants. According to the court, the highly technical nature of e-discovery in the electronic age, more often than not, requires the use of outside vendors. Therefore the "[t]axation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery."

There is no doubt that the law of electronic discovery will continue to develop at a fast pace. Part of this progression will inevitably involve the reconfiguration of existing e-discovery duties as technology continues to advance. However, analysis of the existing case law provides a wealth of information that aids in determining current duties of litigants in e-discovery disputes. Education is essential, and parties must continue tracking the evolution of electronic discovery.





2010: A SPACE ODYSSEY



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United States v. Bell, No. 05-16154 (April 20, 2010) The long, divisive history of this and related litigation over the waters of the Truckee and Carson Rivers, and the decline of Pyramid Lake, is best reflected in *Nevada v. United States*, 463 U.S. 110 (1983), and in several landmark opinions of this and other courts. See, e.g., *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364 (9th Cir. 1989); *Truckee-Carson Irrigation Dist. v. Sec’y of Dep’t of Interior*, 742 F.2d 527 (9th Cir. 1984); *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973). Congress had passed the Reclamation Act in 1902, creating projects to reclaim otherwise arid western lands for farming. See Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388. One of the projects created by the Reclamation Act, the Newlands Project, controls diversions from the Truckee and Carson Rivers. The Truckee-Carson Irrigation District has managed the Project under a contract with the federal government for decades. This particular case concerns the United States’ effort to recoup excess diversions TCID permitted over many years.

For the foregoing reasons, the judgment of the district court with respect to prejudgment and postjudgment interest is vacated and remanded for further consideration. The judgment with respect to amounts of recoupment for excess diversions in 1974, 1975, 1978, 1979, and spills in 1979 and 1980 is vacated and remanded for recalculation of the effect of gauge error. The judgment with respect to spills from 1981-84 is vacated and remanded for a determination of the amount of water

spilled during those years. The judgment of the district court is otherwise affirmed.

Black Star Farms LLC v. Oliver, No. 08-15738 (April 13, 2010) This case involves a Michigan winery’s claim that certain provisions of Arizona’s statutory scheme regulating the direct shipment of wine from wineries — whether located in-state or out-of-state — to Arizona consumers violate the dormant Commerce Clause. The Plaintiffs-Appellants claim that those provisions, in practical effect, unlawfully discriminate against out-of-state wineries. Arizona generally requires all alcoholic beverages sold to consumers in the state to pass through a three-tier distribution system comprised of producers, wholesalers, and retailers. However, Arizona has carved out two exceptions to its system that allow wineries under specified circumstances to bypass the three-tier distribution system. First, all wineries that produce less than 20,000 gallons of wine per year — whether located in-state or out-of-state — are allowed to ship an unlimited amount of wine directly to consumers, regardless of how the order is placed, and to sell directly to retailers. Second, all wineries — whether located in-state or out-of-state — are allowed to ship two cases of wine per year directly to consumers who purchase wine while they are physically present at the winery. Relying on *Granholm v. Heald*, 544 U.S. 460 (2005), which held that States may mandate a three-tier distribution scheme regulating the sale of wine so long as the scheme does not unlawfully discriminate against out-of-state wineries, Black Star Farms contends that

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these challenged exceptions to the three-tier system violate the dormant Commerce Clause.

We conclude that Arizona's statutory exceptions to its three-tier distribution system, which treat similarly situated in-state and out-of-state wineries the same and impose no new impermissible burdens on out-of-state wineries, do not have the practical effect of "favor[ing] in-state economic interests over out-of-state interests." *Id.* at 487. Therefore, we affirm the district court's order granting summary judgment in favor of the State.

Serra v. Lappin, No. 08-15969 (April 9, 2010) Current and former federal prisoners allege that the low wages they were paid for work performed in prison violated their rights under the Fifth Amendment and various sources of international law. Plaintiffs sued officials of the Bureau of Prisons for damages and injunctive and declaratory relief. We conclude that prisoners have no enforceable right to be paid for their work under the Constitution or international law, and we affirm the district court's dismissal of the action.

United States v. Orr Water Ditch Co., No. 07-17001 (April 7, 2010) This case concerns the extent of the federal courts' subject matter jurisdiction over the administration of water rights adjudicated in the Orr Ditch Decree. The Decree allocates rights to water in the Truckee River. *See United States v. Orr Water Ditch Co.*, Equity No. A3 (D. Nev. 1944). The river begins at Lake Tahoe and runs most of its course in Nevada, ultimately flowing into Pyramid Lake, northeast of Reno. The Pyramid Lake Paiute Tribe of Indians alleges that Nevada State Engineer Ruling

5747, allocating groundwater in the Tracy Segment Hydrographic Basin, adversely affects its water rights under the Decree. The Tribe appealed the decision by the Nevada State Engineer to the federal district court for the District of Nevada. Appellees contended that, whatever the effect of the Engineer's allocations of groundwater on the Tribe's decreed water rights, the district court did not have jurisdiction over the appeal because the Decree adjudicated only rights to surface water in the river. The district court agreed and dismissed the appeal for lack of subject matter jurisdiction.

We reverse and remand. If the Tribe's allegations are true, the groundwater taken from the Basin pursuant to the Engineer's groundwater allocations will adversely affect the Tribe's decreed water rights. We hold, first, that the Orr Ditch Decree forbids groundwater allocations that adversely affect the Tribe's decreed rights to water flows in the river. We hold, second, that the federal district court has jurisdiction over an appeal from groundwater allocations by the Engineer that are alleged to have such an adverse effect.

Holley v. California Dep't of Corrections, No. 07-15552 (April 5, 2010) State prisoner Patrick Ronald Holley, Sr., appeals from the district court's summary judgment in favor of defendant prison officials. Holley alleges in his 42 U.S.C. § 1983 action that California Department of Corrections grooming regulations requiring short hair imposed a substantial burden on his exercise of religion in violation of section 3 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1. He seeks

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damages from defendants in their official capacities. We must decide whether the acceptance of federal prison funding by the state of California effected a waiver of the state's sovereign immunity that would allow the RLUIPA claim for damages against state officials in their official capacities to proceed in federal court. We conclude that California did not waive its Eleventh Amendment immunity under either RLUIPA or the Rehabilitation Act Amendments of 1986, and we therefore affirm the judgment of the district court.

Brooks v. City of Seattle, No. 08-35526 (March 26, 2010) Sergeant Steven Daman, Officer Juan Ornelas, and Officer Donald Jones appeal the district court's denial of the Officers' motion for summary judgment on Malaika Brooks's § 1983 and state law claims. Brooks had sued the City of Seattle, the Seattle Police Department and its chief, as well as the Officers, based on the Officers' alleged excessive force when they tased her three times to effect her arrest. The district court denied the Officers' motion for summary judgment, finding that they were not entitled to qualified immunity for their actions. The Officers challenge that denial. This court has jurisdiction pursuant to 28 U.S.C. § 1291. We reverse.

On November 23, 2004, SPD Officer Juan Ornelas stopped Brooks for speeding in a school zone. The situation deteriorated rather quickly. Brooks claimed she had not been speeding, took her driver's license out of Officer Ornelas's ticket book and only reluctantly gave it back, and then repeatedly refused to sign a Notice of Infraction regarding her speeding violation. When SPD Officer Jones arrived at the scene, Officer Ornelas told him

that Brooks had refused to sign the Notice and was being uncooperative. Officer Jones tried to obtain her signature himself, but Brooks also refused his entreaties, despite assurances that signing was not tantamount to admitting the violation. She accused Officer Jones of lying to her about the import of signing, suggested he was being racist, and became upset, repeating "I'm not signing, I'm not signing" over and over. Throughout, she remained in the car with the ignition running.

Officer Ornelas then called his supervisor, SPD Sergeant Daman. When Sergeant Daman arrived, Brooks continued to refuse to sign the Notice. Sergeant Daman then asked her "if [she] was going to sign the ticket." When she refused, he told Officers Ornelas and Jones to "[b]ook her." They attempted to follow those orders.

Brooks refused to leave her car, remaining in it with the ignition running and her door shut. Officer Jones then showed Brooks his Taser, explaining that it would hurt "extremely bad" if applied. Brooks told them she was pregnant and that she needed to use the restroom. The officers discussed where to tase her, deciding on her thigh. Officer Jones demonstrated the Taser for her. Brooks still remained in the car, so Officer Ornelas opened the door and reached over to take the key out of the ignition, dropping the keys on the floorboard. Officer Ornelas then employed a pain compliance technique, bringing Brooks's left arm up behind her back, whereon Brooks stiffened her body and clutched the steering wheel in order to frustrate her removal from the car. Officer

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Jones discharged the Taser against Brooks's thigh, through her sweat pants, which caused Brooks "tremendous pain." She began to yell and honk the car's horn. Within the next minute, Officer Jones tased her two more times, against her shoulder and neck, the latter being the only area of exposed skin. Brooks was unable to get out of the car herself during this time because her arm was still behind her back. The third tasing moved Brooks to the right, at which point Officers Ornelas and Jones were able to extract her from the car through a combination of pushing and pulling. She was immediately seen by medical professionals, and two months later delivered a healthy baby.

Bamonte v. City of Mesa, No. 08-16206 (March 25, 2010) Appellants, police officers employed by Appellee City of Mesa (City), challenge the district court's entry of summary judgment in favor of the City. The officers contended that the City violated the Fair Labor Standards Act by failing to compensate police officers for the donning and doffing of their uniforms and accompanying gear. Because officers had the option of donning and doffing their uniforms and gear at home, the district court determined that these activities were not compensable pursuant to the FLSA and the Portal-to-Portal Act. We agree that these activities were not compensable pursuant to the FLSA, and affirm the district court's judgment.

Bailey v. Hill, No. 09-35450 (March 25, 2010) Steven Ray Bailey, an Oregon state prisoner, appeals the district court's denial of his habeas corpus petition, brought pursuant to 28 U.S.C. § 2254, challenging the state court's restitution order entered after Bailey's

guilty plea to kidnapping and attempted assault. The district court denied Bailey's habeas petition and dismissed his case concluding that Bailey did not meet the "in custody" requirement of § 2254 because he challenged only the restitution order and, alternatively, because Bailey did not exhaust his state court remedies. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

United States v. Maggi, Nos. 08-30223 (March 16, 2010) The Major Crimes Act, 18 U.S.C. § 1153, provides federal criminal jurisdiction for certain crimes committed by Indians in Indian country. As the Supreme Court explained in *United States v. Antelope*, "we are dealing [] not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests." 430 U.S. 641, 646 (1977). Determination of who is an Indian under the statute is not as easy as it might seem. Indeed, the statute contains no definition, leaving to the courts the task of defining "Indian." See FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 3.03[4] (LexisNexis 2005). We have developed a framework for evaluating Indian status under § 1153: 1) the presence of some Indian blood indicating tribal ancestry; and 2) tribal or government recognition as an Indian. *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). Both prongs must be satisfied to establish Indian status.

Gordon Mann and Shane Maggi appeal from unrelated convictions on the same basis, namely that they are not "Indians" for purposes of prosecution under the Major Crimes Act. Because there is no evidence

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that Mann has any blood from a federally recognized Indian tribe, his conviction must be vacated. Maggi's documented blood from a federally recognized tribe is scant—1/64. However, we do not decide the novel question whether Maggi's Indian blood degree is adequate; rather, because Maggi lacks sufficient government or tribal recognition as an Indian, his conviction must also be vacated. In light of this disposition, we need not consider Maggi's additional challenges to the sufficiency of the indictment and the reasonableness of the sentence.

Supreme Court Still Apparently Unfamiliar With Texting and Call Waiting

Yesterday, the Supreme Court [heard argument in *City of Ontario v. Quon*](#). The case is about whether a SWAT team sergeant in Ontario, Calif., had a reasonable expectation of privacy in text messages sent via a department-issued pager, despite a department policy stating pretty clearly that messages could be audited at any time.

Not just any text messages, mind you, but some dirty, dirty text messages between said sergeant and 1) his wife, 2) his mistress and 3) a fellow officer. "To Protect and Sext" would look great on the side panels of a black and white.

The [9th Circuit held](#) (PDF) that the cop did have such an expectation of privacy, and that the search of his messages conducted by the city (with the aid of the wireless company) after Sgt. Quon repeatedly went over his mes-

sage allowance was unreasonable as a matter of law. But, then again, this is the 9th Circuit we're talking about. Marcia Coyle [had some pregame predictions](#) of the argument in Friday's *National Law Journal*.

According to [Lyle Denniston's recap](#) at SCOTUSBlog, the Justices seemed to be leaning pretty heavily toward reversing, and finding there was no reasonable expectation of privacy. But Adam Liptak, in *The New York Times*, [revealed an interesting](#), and sort of scary exchange between the Justices and Sgt. Quon's counsel:

"What happens, just out of curiosity," Chief Justice Roberts asked, "if he is on the pager and sending a message and they are trying to reach him for, you know, a SWAT team crisis? Does the one kind of trump the other, or do they get a busy signal?"

Dieter Dammeier, a lawyer for Sergeant Quon, said he was not sure.

Justice Kennedy suggested that the caller might get a recorded message.

"He's talking to the girlfriend," Justice Kennedy said, and the caller "gets a voice message that says: 'Your call is very important to us. We will get back to you.' "

We'll give Kennedy a pass for not quite

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grasping text messages -- he's almost 74. But OMG, Roberts, C.J.? A busy signal? Isn't your 10-year-old daughter [addicted to texting yet](#)? Here we are, speculating about whether the next potential justice [likes girls](#), and the current ones don't even know how to [abbreviate](#) "Just Freaking Google It?" [YYSSW](#).

The WSJ Law Blog has a few more frightening excerpts from the argument [here](#).

Tennessee Court and Police Share Motorists' Bizarre Excuses for Speeding

What does it take to get yourself out of a speeding ticket in Murfreesboro, Tenn.? Unlike in San Antonio, where all it apparently takes is a credit card and access to the Web site [texasticketfix.com](#) (via Bob Ambrogio's [LawSites](#)), you're going to need a darn good excuse.

General Sessions Court Judge David Loughry told the *Murfreesboro Post* that the one reason he'll accept in court is a "medical emergency when the driver or a close family member is critically ill," but that doesn't stop people from offering all kinds of bizarre excuses. From [a recent article](#) in the *Post* (via [Legal Juice](#)), here are some of the more bizarre excuses collected by Judge Loughry and local law enforcement officers, and their outcomes:

From a woman stopped for speeding:

"My colon has fallen in my vaginal canal."

The officer wrote her a ticket anyway, assuming she could bring medical proof from her OB/GYN to court if she wanted to contest the ticket. The woman paid the ticket without a hearing.

From a man stopped for speeding:

"I was going so fast is because I couldn't see the speedometer. Sir, I had my head so far up my butt there's no way I could possibly see how fast I was going."

The officer rewarded the "most original excuse I've heard in my 10 years as a traffic officer" with a warning and no ticket.

Discussion with a man stopped for driving more than 100 mph on the highway:

Man: "I was trying to get my window to defog because I couldn't see."

Officer: "You're going 100 mph because you couldn't see?"

Man: "Right."

Result? Ticket.

Discussion with a man stopped for speeding:

Man: "My colonoscopy bag is leaking."

Officer: "Prove it."

Man: [Proves it].

Officer: "Have a nice night."

Read the full Top 10 [here](#).