The Public Lawyer

STATE BAR OF NEVADA

Nevada Supreme Court Cases

Wheble v. Dist. Ct., 128 Nev. Adv. Op. No. 11 (March 1, 2012) – The Court grants a writ petition challenging district court orders denying petitioners' motions to dismiss and for summary judgment in a medical malpractice matter, ruling that NRS 11.500 does not save otherwise time-barred medical malpractice claims dismissed for failure to comply with the affidavit requirements of NRS 41A.071 because these claims are void, and NRS 11.500 applies only to actions that have been "commenced."

Bigpond v. State, 128 Nev. Adv. Op. No. 10 (March 1, 2012) – The Court affirms a jury conviction of battery constituting domestic violence, third offense within seven years, ruling that that 1) evidence of "other crimes, wrongs or acts" may be admitted for a nonpropensity purpose other than those listed in NRS 48.045(2); 2) to the extent prior opinions indicate that NRS 48.045(2) codifies the broad rule of exclusion adopted in State v. McFarlin, 41 Nev. 486, 494, 172 P. 371, 373 (1918), those opinions are overruled; and 3) the first factor of the test set forth in Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), for determining the admissibility of prior bad act evidence is clarified to reflect the narrow limits of the general rule of exclusion, and the prosecution must demonstrate that the evidence is relevant for a nonpropensity purpose. Applying these principles to the case, the Court holds the district court did not abuse its discretion in admitting evidence of prior acts of domestic violence involving the victim and defendant; the fact that the victim recanted her pretrial accusations against the defendant was relevant because the evidence placed their relationship in context and provided a possible ex-

Public Lawyers Section

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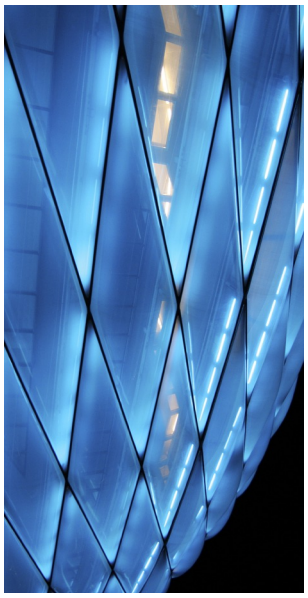
Brett Kandt, Chair



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planation for the recantation, which assisted the jury in evaluating the victim's credibility. Furthermore, the prior acts were proven by clear and convincing evidence, and the district court properly weighed the probative value against the danger of unfair prejudice, giving an appropriate limiting instruction.

Weddell v. H2O, Inc., 128 Nev. Adv. Op. No. 9 (March 1, 2012) – The Court affirms in part and reverses in part a district court judgment following a bench trial in a breach of contract, tort, and declaratory relief action, ruling that 1) pursuant to NRS 86.401, a judgment creditor may obtain the rights of an assignee of the member's interest, receiving only a share of the economic interests in a limited-liability company, including profits, losses, and distributions of assets; 2) due to the district court's misinterpretation of NRS 86.401, that portion of the district court's judgment is reversed and remanded; 3) parties should only file a notice of pendency under NRS 14.010 when the action directly involves real property—more specifically, concerning actions for the foreclosure of a mortgage upon real property or actions affecting the title of possession of real property; 4) the notice of pendency filed by appellant Weddell in this matter is unenforceable, as the action on which it is based concerned an alleged expectancy in the purchase of a membership interest in respondent Empire Geothermal Power, LLC, and, thus, did not involve a direct legal interest in real property; 5) and substantial evidence supports the district court's findings that Weddell was merely an agent on behalf of respondent Michael B. Stewart and has never acquired an ownership interest in respondent H2O.

Webb v. Shull, 128 Nev. Adv. Op. No. 8 (March 1, 2012) – The Court, in an appeal and cross-appeal from a district court judgment awarding appellant homebuyer treble damages against respondent seller, a limited liability company, but refusing to find the individual respondent, a former manager of the limited liability company, liable for the judgment as the company's alter ego, affirms in part and reverses in part. The Court first considers the seller's cross-appeal on whether the district court's award of treble damages under NRS 113.150(4) [allowing treble damages for a seller's delayed disclosure or nondisclosure of property defects] requires a predicate finding of willfulness, or mental culpability, ruling that no such mental state is required. The Court also rules that it is unable to review the alter ego issue because the district court failed to explain its reasoning for denying alter ego status. The Court therefore affirms the district court's judgment, except for the portion of the judgment concerning the alter ego issue, which is vacate and remanded.

Café Moda v. Palma, 128 Nev. Adv. Op . No. 7 (March 1, 2012) – The Court affirms in part and reverses in part a district court judgment on a jury verdict in a tort action, ruling that NRS 41.141, Nevada's comparative-negligence statute, permits liability to be apportioned between a negligent tortfeasor and an intentional tortfeasor, and determining that the negligent tortfeasor, appellant Café Moda, is severally liable for 20% of respondent Donny Palma's damages and that the intentional tortfeasor, respondent Matt Richards, is jointly and sever-

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ally liable for 100% of Palma's damages [reversing the part of the district court's judgment imposing joint and several liability against Café Moda and remanding for entry of a modified judgment].

Finkel v. Cashman Professional, Inc., 128 Nev. Adv. Op. No. 6 (March 1, 2012) – The Court reviews two district court orders on consolidated appeals: one granting a preliminary injunction to enforce restrictive provisions in a consulting agreement (the Agreement) and to prevent likely violations of Nevada's Uniform Trade Secrets Act, and the other refusing to dissolve that preliminary injunction after the Agreement had been terminated. Because substantial evidence exists to support the district court's decision to issue the preliminary injunction, the Court affirms the district court's first order. However, upon termination of the Agreement, the district court should have granted appellant's motion to dissolve the injunctive provisions that were grounded on findings that appellant likely breached the Agreement. With regard to the alleged trade secret violations, NRS 600A.040(1) requires the district court to make findings as to the continued existence of a trade secret and to what constitutes a "reasonable period of time" for maintaining an injunction under Nevada's Uniform Trade Secrets Act. Because the district court failed to make these findings, the Court reverses the district court's second order and remands for further proceedings regarding the extent that the injunctive provision related to likely violations of the Trade Secrets Act should remain in effect.

Carstarphen v. Milsner, 128 Nev. Adv. Op. No. 5 (March 1, 2012) - The Court reverses a district court order dismissing a corporations action, ruling that in resolving a motion for a preferential trial date brought to avoid dismissal under NRCP 41 (e)'s five-year rule, district courts must evaluate (1) the time remaining in the five-year period when the motion is filed, and (2) the diligence of the moving party and his or her counsel in prosecuting the case [citing Monroe, Ltd. v. Central Telephone Co., 91 Nev. 450, 456, 538 P.2d 152, 156 (1975)]. The Court concludes that the district court abused its discretion in denying appellant's motion for a preferential trial date in the present case, because appellant filed his preferential trial motion with more than three months remaining in the five-year period and the record reflects that appellant diligently moved his case forward. The Court therefore reverses the district court's denial of that motion and the resulting dismissal of the underlying case pursuant to NRCP 41(e), and remands to the district court with instructions to grant appellant a preferential trial date. Finally, the Court reaffirms the holding in McGinnis v. Consolidated Casinos Corp., 97 Nev. 31, 623 P.2d 974 (1981), that on remand from an erroneous judgment or dismissal entered before trial has commenced that is reversed on appeal, the parties have three years from the date that the remittitur is filed in district court to bring the case to trial [overruling Rickard v. Montgomery Ward & Co., 120 Nev. 493, 498-99, 96 P.3d 743, 747 (2004)].

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In re Estate of Melton, 128 Nev. Adv. Op. No. 4 (February 16, 2012) – The Court reverses a district court order in a probate action, ruling that 1) NRS 132.370 abolishes the common law rules that would otherwise render a testator's disinheritance clause unenforceable when the testator is unsuccessful at affirmatively devising his or her estate; 2) the doctrine of dependent relative revocation (a revocation made in connection with a failed dispositive objective or false assumption of law or fact should be considered ineffective when doing so is necessary to ensure that an estate is distributed in a manner that most closely matches the testator's probable intent) is adopted in Nevada; 3) while the district court erred in determining that NRS 133.130 precludes the doctrine of dependent relative revocation, it did not err in alternatively determining that if the doctrine exists in Nevada, it is inapplicable under the particular facts of this case; 4) escheat under NRS 134.120 is triggered when, as here, a testator disinherits all of his or her heirs, and 5) as the testator disinherited all of his heirs, his estate must escheat.

Vaile v. Porsboll, 128 Nev. Adv. Op. No. 3 (January 26, 2012) – On consolidated appeals from a district court post-divorce decree order imposing statutory penalties on child support arrearages under NRS 125B.095, the Court reverses and remands, reviewing the district court's authority to enforce or modify a child support order that a Nevada district court initially entered, when neither the parties nor the children reside in Nevada and ruling that 1) under the Uniform Interstate Family Support Act, because no other jurisdiction has entered an order concerning child support, the Nevada order controls and the district court retains subject matter jurisdiction to enforce the Nevada order; 2) since the parties and children do not reside in Nevada and the parties have not consented to the district court's exercise of jurisdiction, the district court lacks subject matter jurisdiction to modify the support order; 3) in the family law context a modification occurs when the district court's order alters the parties' substantive rights, while a clarification involves the district court defining the rights that have already been awarded to the parties; and 4) because the district court in the present case impermissibly modified the child support obligation set forth in the divorce decree, the district court's order is reversed and the case remanded for further proceedings.

In re Parental Rights as to S.M.M.D., 128 Nev. Adv. Op. No. 2 (January 26, 2012) – The Court affirms a district court order denying, based on lack of subject matter jurisdiction, appellant's petition to vacate its earlier certification of her relinquishment of parental rights, ruling that under section 1919 of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963 (2006), a tribal-state agreement respecting child custody proceedings may vest a Nevada district court with subject matter jurisdiction to take a relinquishment of parental rights under circumstances where section 1911(a) of the ICWA, 25 U.S.C. § 1911(a), would otherwise lay exclusive jurisdiction with the tribal court.

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Pohlabel v. State, 128 Nev. Adv. Op. No. 1 (January 26, 2012) – The Court affirms a conviction pursuant to a guilty plea of felon in possession of a firearm, ruling that a conviction under NRS 202.360 does not violates the right to keep and bear arms secured by the Second Amendment to the United States Constitution and by Article 1, Section 11 (1) of the Nevada Constitution, since the right is accorded to law-abiding responsible citizens and does not extend to felons (citing District of Columbia v. Heller, 554 U.S. 570 (2008).

Rogers v. State, 127 Nev. Adv. Op. No. 88 (December 29, 2011) –The Court affirms in part and reverses in part a district court order denying a post-conviction petition for a writ of habeas corpus in a case involving a conviction, pursuant to a guilty plea, of three counts of sexual assault and three counts of sexual assault with the use of a deadly weapon causing substantial bodily harm, offenses committed when appellant was a juvenile. The Court in pertinent part ruled that the district court abused its discretion in failing to appoint counsel to assist appellant in the post-conviction proceeding, given the severity of the consequences, appellants' indigency, and the difficulty of the issues presented related to the applicability and scope of the holding in Graham v. Florida, 560 U.S. _, 130 S. Ct. 2011 (2010).

Toston v. State, 127 Nev. Adv. Op. No. 87 (December 29, 2011) – The Court affirms in part and reverses in part a district court order denying a post-conviction petition for a writ of habeas corpus alleging ineffective assistance of counsel, ruling that 1) although trial counsel is not constitutionally required to inform a defendant of the right to appeal when the conviction stems from a guilty plea absent the defendant's inquiry about the right to appeal or the existence of a direct appeal claim that has a reasonable likelihood of success, trial counsel has a duty not to provide misinformation about the availability of a direct appeal; 2) counsel's affirmative misinformation about the right to appeal from a judgment of conviction based on a guilty plea may fall below an objective standard of reasonableness and therefore be deficient; 3) trial counsel has a duty to file an appeal when, based on the totality of the circumstances, the defendant reasonably demonstrated to counsel that he was interested in challenging his conviction or sentence; and 4) because Toston's petition alleged that trial counsel misinformed him regarding his right to appeal and that he had expressed dissatisfaction with the conviction and sentence such that counsel reasonably should have filed an appeal, and those allegations are not belied by the record and would entitle Toston to relief if true, the Court reverses the district court's order as to this claim of ineffective assistance of counsel and remands for an evidentiary hearing (affirming the district court's order in all other respects).

Fourth St. Place v. Travelers Indem. Co., 127 Nev. Adv. Op. No. 86 (December 29, 2011) – The Court affirms a district court summary judgment in an insurance coverage action, ruling that the policy at issue does not provide coverage because the

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damage sustained did not result from a covered cause of loss. The Court adopts the doctrine of efficient proximate cause, but concludes that it does not apply in this case: where covered and noncovered perils contribute to a loss, the peril that set in motion the chain of events leading to the loss or the 'predominating cause' is deemed the efficient proximate cause or legal cause of loss (citing Pioneer Chlor Alkali v. National Union Fire Ins. Co., 863 F.Supp. 1226, 1230 -32 (D. Nev. 1994)).

In re Fontainebleau Las Vegas Holdings, 127 Nev. Adv. Op. No. 85 (December 29, 2011) – The Court grants a motion to strike respondents' appendix in a matter arising from a question certified from a federal court pursuant to NRAP 5 in the Fontainebleau casino resort project bankruptcy litigation, ruling that 1) respondents' appendix contains information beyond the facts certified to the Court by the bankruptcy court; 2) the Court's review is limited to the facts provided by the certifying court, and the Court must answer the questions of law posed based on those facts; and 3) while an appendix may be filed to assist the Court in understanding the matter, it may not be used to controvert the facts as stated in the certification order.

State v. Dist. Ct. (Armstrong), 127 Nev. Adv. Op. No. 84 (December 29, 2011) – The Court denies a writ petition challenging an order of the district court granting in part the real party in interest's motion to preclude the introduction of his blood alcohol test results in a DUI prosecution, ruling that 1) although retrograde extrapolation evidence is relevant in a DUI prosecution, under certain circumstances such evidence may be unfairly prejudicial and therefore inadmissible; and 2) because the prosecution in this case had to rely on the results from a single blood sample and a number of the factors that affect the mathematical calculation necessary to a retrograde extrapolation were unknown, the district court did not manifestly abuse or arbitrarily or capriciously exercise its discretion in concluding that the evidence would be unfairly prejudicial.

Munda v. Summerlin Life & Health Ins. Co., 127 Nev. Adv. Op. No. 83 (December 29, 2011) – The Court reverses a district court order granting a motion to dismiss a tort action, ruling that, under the set of facts alleged, state law claims of negligence and negligence per se are not preempted by the Employee Retirement Income Security Act (ERISA) because respondent's alleged actions were independent of the administration of the ERISA plan (distinguishing Cervantes v. Health Plan of Nevada, 127 Nev. _, _ P.3d _ (Adv. Op. No. 70, October 27, 2011).

Ninth Circuit Court of Appeals Cases

Angle v. Miller, _ F.3d _, No. 10-16707 (9th Cir. 2012) –The 9th Circuit assesses the constitutionality of Nevada's provision for the enactment of direct legislation through ballot initiatives under Nev. Const. art. 19, § 2. To qualify an initiative for the ballot, proponents must obtain signatures from a number of registered voters equal to 10 percent of the votes cast in the previous general election in each of the state's congressional districts. The Court affirmed the district court's ruling that this geographic distribution requirement violates neither the Equal Protection Clause nor the First Amendment.

Conner v. Heiman, _ F.3d _, No. 10-17545 (9th Cir. 2012) – In a case involving agents for the Nevada Gaming Control Board that addresses both qualified immunity and probable cause to arrest, the 9th Circuit holds that the district court erred when it declined to determine whether probable cause existed to arrest a casino gambler who refused to return an overpayment. At summary judgment, where the only disputes involve what inferences properly may be drawn from uncontroverted facts, a qualified immunity claim turns on a legal question that a court must resolve.

State of Nevada v. Bank of America, _ F.3d_, No. 12-15005 (9th Cir. 2012) – In the Nevada Attorney General's *parens patriae* lawsuit against Bank of America for violation of the Nevada Deceptive Trade Practices Act and violation of the existing consent judgment in BOA's mortgage loan operations, the 9th Circuit reversed the district court's decision denying remand after removal of the action from State court. The Court noted that Nevada's action is not a class action nor a mass action, nor does it involve the necessary determination of a federal question of law, and then recognized the State's sovereign interests in keeping the action in State court.

Haskell v. Harris, _ F.3d_, No. 10-15152 (9th Cir. 2012) – The 9th Circuit assesses the constitutionality of the 2004 Amendment to California's DNA and Forensic Identification Data Base and Data Bank Act of 1998 (DNA Act), Cal. Penal Code § 296(a)(2)(C), which requires law enforcement officers to collect DNA samples from all adults arrested for felonies. Applying the "totality of the circumstances" test and balancing the arrestees' privacy interests against the Government's need for the DNA samples, the Court notes on the first hand that 1) a buccal swab of the arrestee's mouth is a *de minimis* intrusion that occurs only after a law enforcement determination of probable cause; 2) the DNA profile is limited to only the information necessary to identify the individual, substantially similar to fingerprinting, and 3) state and federal statutes impose significant criminal and civil penalties on persons who misuse DNA information. Noting on the other hand that DNA analysis is an extraordinarily effective tool for law enforcement officials to identify arrestees, solve past crimes, and exonerate innocent suspects, the Court concludes that the Government's compelling interests far outweigh arrestees' privacy concerns, and that the 2004 Amendment does not violate the Fourth Amendment.

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Watison v. Carter, _ F.3d _, No. No. 10-16778 (9th Cir. 2012) - The Ninth Circuit, in a case involving inmate claims against prison officials under 42 U.S.C. § 1983 alleging first amendment retaliation and eighth amendment cruel and unusual punishment, rules that 1) the "humiliation" plaintiff allegedly suffered does not rise to the level of severe psychological pain required to state an Eighth Amendment claim; and 2) plaintiff alleged facts sufficient to state a First Amendment retaliation claim.

ACLU v. Masto, _ F.3d _, No. 09-16008 (9th Cir. 2012) - The Ninth Circuit upholds as constitutional the retroaction application of Assembly Bill 579 to bring Nevada into compliance with the Sex Offender Registration and Notification Act (SORNA) contained in the federal Adam Walsh Act.

Metabolic Research Inc, v. Ferrell, _ F.3d _, No. 10-16209 (9th Cir. 2012) - The Ninth Circuit rules that an order denying a pretrial special motion to dismiss under Nevada's anti-SLAPP ("strategic lawsuit against public participation") statute, Nev. Rev. Stat. §§ 41.635-670, is not immediately appealable under the collateral order doctrine.

Farmer v. McDaniel, _ F.3d _, No. 10-99017 (9th Cir. 2012) - The Ninth Circuit rules in a habeas death case, in which the petitioner's death sentence was vacated in 2007 after the Nevada Supreme Court held that it was unconstitutional to use as an aggravating circumstance the fact that a murder was committed in the course of committing another felony or felonies, holding that petitioner's double jeopardy rights would not be violated by the state again seeking a death sentence based on aggravating circumstances different from those that formed the basis for imposing the first death penalty sentence.

2012 Nevada Government Civil Attorneys Conference
May 16-18
Harveys Resort—South Lake Tahoe

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For further information, please contact Brett Kandt, Public Lawyers Section Chair, at (775)688-1966 or e-mail bkandt@ag.nv.gov.

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Lafler v. Cooper, 566 U. S. _, No. 10-209 (March 21, 2012) - By a 5-4 vote, the Court held that a defendant's Sixth Amendment right to effective counsel is violated when his counsel provides deficient advice not to accept a plea offer and he is then convicted after a fair trial and sentenced to a longer term than he would have received under the plea offer. The Court ruled that such a defendant can establish *Strickland* prejudice by showing "that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than the judgment and sentence that in fact were imposed." The Court held that the proper remedy will generally be to require the prosecution to reoffer the plea proposal and for the trial court then to exercise its discretion as to which convictions, if any, to vacate and to resentence the defendant accordingly.

Missouri v. Frye, 566 U. S. _, No. 10-444 (March 21, 2012) - By a 5-4 vote, the Court held that a defendant's Sixth Amendment right to effective counsel is violated when his counsel's deficient performance results in loss of a plea offer and he later pleads guilty and is sentenced to a longer term than he would have received under the lost plea offer. The Court stated that the central importance of plea bargains to our criminal justice system means that the Sixth Amendment requires counsel to provide adequate assistance during that plea bargain process ─ including, at the very least, communicating to the defendant any formal plea offers from the prosecution. Defendants may show prejudice by demonstrating "a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel" and "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law."

Coleman v. Court of Appeals of Maryland, 566 U. S. _, No. 10-1016 (March 20, 2012) - The Court analyzes when and how Congress can abrogate State immunity under the 14th Amendment, and by a 5-4 vote holds that Congress did not properly do so under one portion of the Family and Medical Leave Act.

Martinez v. Ryan, 566 U. S. _, No. 10-1001(March 20, 2012) - By a 7-2 vote, the Court held that, in those states in which a defendant may not assert ineffective assistance of trial counsel on direct review but rather may first assert that claim is in a state post-conviction proceeding, ineffective assistance of state post-conviction counsel, or the lack of any counsel, can constitute "cause" that can excuse a procedural default of a claim of ineffective assistance of trial counsel.

Messerschmidt v. Millender, 565 U. S. _, No. 10-704 (February 22, 2012) - The

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Court reversed a Ninth Circuit decision that had denied qualified immunity to police officers who obtained a facially valid, but possibly overbroad, warrant to search respondents' home. The officers obtained the search warrant in connection with the investigation of a known gang member for shooting at his ex-girlfriend with a sawed-off shotgun. Respondents filed a §1983 suit, alleging that the search violated their Fourth Amendment rights because there was not sufficient probable cause to believe certain items listed (such as "all guns" and gang-related material) were evidence of the crime under investigation. The Court held that the officers were entitled to qualified immunity because (1) when a neutral magistrate has issued a warrant, the officers necessarily acted in an objectively reasonable manner unless "it is obvious that no reasonably competent officer would have concluded that a warrant should issue"; and (2) this case does not fall within that narrow exception.

Howes v. Fields, 565 U. S. _, No. 10-680. (February 21, 2012) - The Court unanimously held that the Sixth Circuit erred when it held that the Court's precedents established a categorical rule that a prisoner is always "in custody" for purposes of *Miranda* any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison. By a 7-2 vote, the Court held that respondent was not in custody when he was taken to a conference room by prison guards and questioned by law enforcement officers about a crime because he was told at the outset of the interrogation that he was free to go back to his cell at any time, and he was neither physically restrained nor threatened.

Wetzel v. Lambert, 565 U. S. _, No. 11-38 (February 21, 2012) - By a 6-3 vote, the Court summarily reversed a Third Circuit decision that had granted habeas relief to respondent on the ground that the state, by failing to turn over a "police activity sheet" prior to trial, violated *Brady v. Maryland*. The document noted that an individual named Mr. Woodlock "is named as a co-defendant" by one of the state's primary witnesses at trial. Finding the document "entirely ambiguous," the Pennsylvania Supreme Court rejected Lambert's claim that the document was exculpatory because it suggested that someone other than or in addition to him and his accomplices committed the crime. The Third Circuit granted habeas relief. The Supreme Court criticized that ruling for failing even to address the state court's holding that the notations were ambiguous and that any connection to this crime was speculative. A federal court may not grant habeas relief "unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA."

Marmet Health Care Center, Inc. v. Brown, 565 U. S. _, No. 11-391 (February 21, 2012) - Through a unanimous *per curiam* opinion, the Court summarily reversed a West Virginia Supreme Court decision which held that arbitration agreements are not enforceable as applied to claims alleging personal injury or wrongful death against nursing homes. The Court held that its prece-

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dents make clear that the Federal Arbitration Act preempts a state law or policy that prohibits arbitration of a particular type of claim.

Ryburn v. Huff, 565 U.S. _, No. 11-208 (January 23, 2012) - Through a unanimous *per curiam* opinion, the Court summarily reversed a Ninth Circuit opinion that had denied qualified immunity to two police officer defendant in a §1983 action, based upon their entering a house without a warrant because they were concerned about an imminent threat of violence. The Court criticized the Ninth Circuit majority for "tak[ing] the view that conduct cannot be regarded as a matter of concern so long as it is lawful"; for "look[ing] at each separate event in isolation," rather than the "combination of events"; and for failing to be cautious before "second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation."

Reynolds v. United States, 565 U.S. _, No. 10-6549 (January 23, 2012) - The Sex Offender Registration and Notification Act (SORNA) requires convicted sex offenders to register, and keep the registration current, in all states and makes it a crime to fail to do so. By a 7-2 vote, the Court held that SORNA does not require persons who committed their sex offenses before SORNA's enactment to register unless and until the Attorney General specifies that the registration provisions apply to such offenders. However, the Attorney General has adopted an Interim Rule specifying that SORNA applies to pre-Act offenders and a valid final rule to that effect, the validity of which the Court did not address.

United States v. Jones, 565 U.S. _, No. 10-1259 (January 23, 2012) - The Court without dissent held that federal agents conducted a search, within the meaning of the Fourth Amendment, when they installed a global positioning system (GPS) tracking device on the undercarriage of respondent's car and then monitored the car's movements for 30 days: "[t]he Government physically occupied private property for the purpose of obtaining information" and "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." While the Court held that the installation of the GPS was a Fourth Amendment "search" it declined to address the issue of when the installation of the device is reasonable or unreasonable.

Maples v. Thomas, 565 U.S. _, No. 10-63 (January 18, 2012) - By a 7-2 vote, the Court held that petitioner's counsel abandoned him while his state post-conviction application was pending, which was cause to excuse the procedural default that occurred when petitioner failed to appeal the denial of that application. Petitioner's out-of-state pro bono counsel had left the firm by the time the trial court issued its order, while local counsel received the order, but apparently assumed lead counsel would handle the matter. The Court held that petitioner's counsel had abandoned him and therefore were not his agents when the default occurred. As a consequence, the default re-

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sulted from "something *external* to petitioner" and could be cause to excuse the default.

Perry v. New Hampshire, 565 U.S. _, No. 10-8974 (January 11, 2012) – The Court reiterated the constitutional standards for the admissibility of identification testimony in holding by an 8-1 vote that the Due Process Clause does not require a trial judge to screen eyewitness evidence for reliability pretrial when the identification was not procured under unnecessarily suggestive circumstances by law enforcement.

Gonzalez v. Thaler, 565 U.S. _, No. 10-895 (January 10, 2012) - The Court construed two provisions of AEDPA, holding that 1) AEDPA's requirement that a certificate of appealability (COA) "shall indicate [the] specific issue" on which the petitioner has made a "substantial showing of the denial of a constitutional right" is a mandatory but non-jurisdictional rule; and 2) in construing AEDPA's one-year statute of limitations, for a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' on the date that the time for seeking such review expires.

Smith v. Cain, 565 U.S. _, No. 10-8145 (January 10, 2012) - By an 8-1 vote, the Court held that prosecutors violated *Brady v. Maryland* by failing to provide defense counsel with statements by the single eyewitness who linked petitioner to the crime that called into question the reliability of that identification. The Court found that the lead detective's notes, made the night of the murder and five days later, contain statements by the eyewitness stating that he could not identify the perpetrators and did not see any faces, were plainly material.

Minneci v. Pollard, 565 U.S. _, No. 10-1104 (January 10, 2012) - By an 8-1 vote, the Court held that it would not imply a *Bivens* action against employees of a privately operated federal prison because state tort law authorizes adequate alternative damages actions, reversing a Ninth Circuit decision that had allowed a prisoner's Eighth Amendment-based damages claim, based on a deprivation of adequate medical care, to proceed.

WILLIAM RAGGIO

Oct. 30, 1926 - Feb. 24, 2012

William J. Raggio Jr., former Washoe County District Attorney, the longest serving state senator in Nevada history, successful gaming attorney, and one of Nevada's most admired citizens, died of respiratory illness while on vacation in Sydney, Australia, Feb. 24. He was 85.

Raggio served as Washoe County District Attorney from 1958 to 1970 and was named "Outstanding Prosecutor in the United States" in 1965. He was elected president of the National District Attorneys Association in 1967.

Raggio was first elected to the Nevada State Senate in 1972, representing Washoe County, where he served until 2010. During his record five decades in the Senate, ten sessions where he served as Majority Leader, Raggio worked beside and with seven Nevada Governors.