

# The Public Lawyer



STATE BAR OF NEVADA

## Nevada Supreme Court Cases

*In re Assad*, 124 Nev. Adv. Op. No. 38 (June 12, 2008) “In this appeal, we consider whether the Nevada Commission on Judicial Discipline properly issued a decision to publicly censure Las Vegas Municipal Judge George Assad based on its finding that Judge Assad had violated Nevada Code of Judicial Conduct Canon 2A, as he failed to comply with the law and did not promote public confidence in the judiciary’s integrity. Judge Assad asserts several procedural objections to the Commission’s decision, as well as arguing that the charges were not sufficiently supported and that a censure is too harsh.

Although Judge Assad’s procedural objections do not require a reversal of the Commission’s decision, we note that the Commission has apparently misread our opinion in *Matter of Mosley*, concerning when judicial ethics expert testimony is appropriate, in that the Commission views *Mosley* as discouraging such testimony. Such was not our intent, since judicial ethics expert testimony can provide assistance to the Commission and should be admitted if it is helpful. Having considered the proposed testimony in this case, however, we are not persuaded that the Commission abused its discretion in refus-

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## Ties Becoming Obsolete

law.com

First, it was [typewriters](#), then [law libraries](#) and [bike couriers](#). Now, it seems that neckties are destined for this growing heap of law firm and business accou-

trements rendered obsolete by 21st century trends.

As the [Denver Post](#) reports, sales of neckties are declining, down from a \$1.3 billion peak

in 1995, to less than \$678 million during the 12 months ending March 31. And according to a Gallup Poll in 2007, only six percent of men wore ties to work daily.

In contrast to the typewriter or bike courier, which have been edged out of existence by computers and electronic communication, technology isn't directly responsible for the demise of the neck tie, which is attributable to casual Fridays and a general decline in men's dress standards. Still, in my view, it's no coincidence that tie-wearing has declined at the same time that technology has taken off. Significantly, with the Internet, most business people and lawyers can do much of their work remotely -- and dress doesn't matter as much when our clients can't see us.

But perhaps we'll see the pendulum swing back again. As we move towards technologies like Skype or other applications that enable teleconferences, we can no longer hide our appearance from the outside world. Perhaps a resurgence of visual, Web-based technologies will make appearance -- and relatedly, ties and dress suits -- relevant once again. What do you think?

## 10 Essential Sites for Litigators

Genie Tyburski, law librarian at Ballard Spahr Andrews & Ingersoll and publisher of the legal-research resource [The Virtual Chase](#), has compiled her list of [10 Essential Web Sites for Litigators](#). What stands out about her list is that she leaves off the usual suspects, explaining:

You might wonder why Lexis and Westlaw aren't on the list. Or, why well known legal information sites, such as FindLaw and Law.com, are missing. Or, for that matter, why Google doesn't appear on the list.

Mostly, I excluded them because they do not comprise the type of resources lawyers have in mind when they ask for suggestions. They mean, *What do I not already know about that's highly relevant to my work and free?*"

I won't steal thunder and repeat her 10 picks here. Instead, I'll recommend you click on through and get it straight from the researcher's mouth, so to speak.



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ing to admit it.

The violations found by the Commission are supported by clear and convincing evidence, but a censure is not warranted, as the Commission's decision precludes any finding of willfulness and the record is replete with mitigating evidence. Accordingly, a censure, one of the most serious penalties available for nonwillful conduct, is too extreme in this instance. Instead, we conclude that Judge Assad must issue a formal apology and, at his own expense, take the next available judicial ethics class at the National Judicial College."

***Haney v. State***, 124 Nev. Adv. Op. No. 40 (June 12, 2008) "This appeal concerns whether the district court erred when it denied Randy Gene Haney's motion to correct an illegal sentence following a guilty plea to attempted third-degree arson. Haney contended that his sentence of 12 months flat time was illegal because a flat time sentence violated the separation of powers doctrine and contravened legislative intent. We conclude that the district court should have granted Haney's motion because flat time sentencing frustrates clear legislative intent to allow the sheriff to award good time credit."

***Diomampo v. State***, 124 Nev. Adv. Op. No. 41 (June 12, 2008) "In this case, we primarily consider whether the State's peremptory challenge of a prospective juror on the ground that he did not understand the English language violates the rule set forth in the United States Supreme Court decision in *Batson v. Kentucky*.

A jury convicted appellant Jose Diomampo of mid-level trafficking in a controlled sub-

stance in violation of Nevada's Uniform Controlled Substances Act.[2] On appeal, he argues that the State used its peremptory challenges in a discriminatory manner in violation of *Batson*. He also argues that the State commented on his post-*Miranda* silence at trial in violation of the Fifth Amendment, that the district court improperly admitted evidence of prior bad acts in violation of NRS 48.045(2), that police conducted an unreasonable vehicle inventory search in violation of his Fourth Amendment rights, and that the State presented insufficient evidence to sustain his conviction on appeal.

We conclude that the State violated *Batson* in exercising two of its peremptory challenges, that the State's witnesses improperly commented on Diomampo's post-*Miranda* silence at trial, and that the State improperly introduced evidence prejudicially suggesting that methamphetamine users generally resort to burglary to support their addictive behavior. Further, although the State also introduced prior bad act evidence without a requisite hearing under *Petrocelli v. State*, and failed to provide a contemporaneous explanatory instruction of that evidence in compliance with our decision in *Tavares v. State*, those procedural errors were not preserved for argument on appeal and do not ascend to plain error. We further conclude that the police conducted a proper vehicle inventory and that the State provided sufficient evidence upon which to convict. Nonetheless, the errors identified above compel reversal of Diomampo's conviction and a remand of this matter for a new trial."

***Brooks v. Bonnet***, 124 Nev. Adv. Op. No. 36 (June 5, 2008) "Appellant Robert L. Brooks instituted a district court action seeking declaratory and injunctive relief with respect to a strip of land owned by respondents Robert and An-

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gela Bonnet, on which he had built a driveway. At issue in this case is whether Brooks possessed an express easement, easement by necessity, or residual easement over that strip of land. We conclude that Brooks did not possess an easement and therefore was not entitled to the declaratory or injunctive relief that he sought.”

***Douglas v. State of Nevada***, 124 Nev. Adv. Op. No. 37 (June 5, 2008) “In this proper person appeal we decide whether NRS 213.1214 provides the State Board of Parole Commissioners (Parole Board) with the authority to require Psychological Panel (Psych Panel) certification prior to a prisoner’s release on parole from a sentence involving a nonsexual offense if that prisoner has ever been convicted of a sexual offense. Appellant Eric Douglas claimed that the Parole Board violated a statutory duty regarding his parole when it required him to obtain Psych Panel certification, pursuant to NRS 213.1214, on an offense not enumerated in NRS 213.1214(5). The State, however, contends that it was proper for the Parole Board to require Psych Panel certification because Douglas was previously convicted of a sex offense.

We disagree with the State and conclude that the district court abused its discretion when it denied Douglas’s petition. NRS 213.1214(1) requires a Psych Panel to certify ‘that the prisoner was under observation while confined in an institution of the Department of Corrections and does not represent a high risk to reoffend based upon a currently accepted standard of assessment.’ This requirement applies to the enumerated offenses set forth in NRS 213.1214(5). Significantly, the crime of attempted burglary is not one of the offenses set forth in NRS 213.1214(5). Moreover, neither NRS 205.060 (burglary) nor NRS 193.330

(punishment for attempts) require appellant to receive Psych Panel certification before he is eligible for parole on his sentence for attempted burglary.

We further reject the State’s contention that NRS 213.1214 provides the Parole Board with the broad authority to require Psych Panel certification so long as a prisoner has ever been convicted of a sex offense. To the extent this court’s opinion in *Stockmeier v. Psychological Review Panel* implied that Psych Panel certification is required on the last offense prior to being released into society for anyone ever convicted of a sex offense, regardless of whether the last offense is a sex offense, we now take the opportunity to clarify that Psych Panel certification is required on an offender’s last sex offense sentence, whether this will involve a release to the street or an institutional parole to serve a sentence on a nonsexual offense.”

***Federal Ins. v. Am. Hardware Mut. Ins.***, 124 Nev. Adv. Op. No. 31 (May 29, 2008) “The United States District Court for the District of Nevada has certified, under NRAP 5, the following question to this court: ‘[w]hether, under Nevada law, an additional insured endorsement provides coverage for an injury caused by the sole independent negligence of the additional insured?’ We answer the question in the affirmative and conclude that, unless the contrary intent is demonstrated by specific language excluding or limiting coverage for injuries caused by the additional insured’s independent negligent acts, there is coverage.”

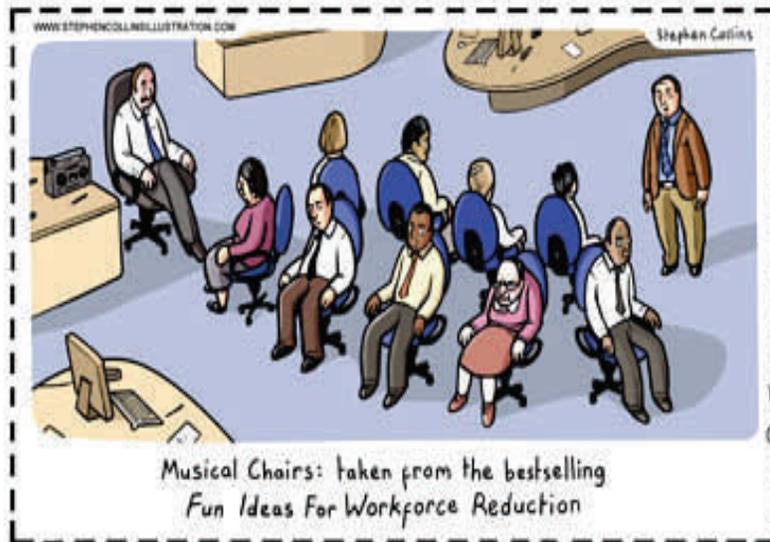
***Dutchess Bus. Servs. v. State, Bd. of Pharm.***, 124 Nev. Adv. Op. No. 32 (May 29, 2008) “In this case, two pharmaceutical wholesalers appeal from the district court’s

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denial of a petition for judicial review of an order by respondent Nevada State Board of Pharmacy revoking the wholesalers' licenses for violations of Nevada's statutes and regulations governing the secondary prescription drug market. After a disciplinary hearing, the Board found that appellants Dutchess Business Services, Inc., and its successor company, Legend Pharmaceuticals, Inc., violated numerous sections of the Nevada Revised Statutes and the Nevada Administrative Code; therefore, the Board revoked Dutchess's and Legend's wholesaler's licenses and imposed fines on the entities. Dutchess and Legend appeal on multiple grounds, three of which raise issues of first impression.

Specifically, after addressing the Board's jurisdiction to discipline Dutchess and Legend for conduct that occurred outside of Nevada, we consider (1) an administrative agency's discretion concerning joinder in an administrative proceeding; (2) an administrative agency's discretion with respect to discovery in an administrative proceeding; and (3) whether intent must be proven to render an entity liable for violating NRS 585.520(1), which prohibits '[t]he manufacture, sale or delivery, holding or offering for sale of any food, drug, device or cosmetic that is adulterated or misbranded.' Concerning an administrative agency's discretion to decide joinder and dis-

covery issues during an administrative proceeding, we conclude that in the absence of a rule, statute, or regulation governing the type of proceeding before the agency, issues such as joinder and discovery are generally left to the agency's discretion. With regard to determining liability under NRS 585.520(1), because the plain language of that statute does not require intent for its violation, we conclude that the Board may find that a licensee violated NRS 585.520(1) without proving a licensee's intent to cause harm or violate the statute. After addressing those issues, we resolve Dutchess's and Legend's remaining contentions."



***Hidalgo v. Dist. Ct.***, 124 Nev. Adv. Op. No. 33 (May 29, 2008) "On December 27, 2007, this court issued an opinion in this case granting a petition for a writ of mandamus. Subsequently, the real party in interest filed a rehearing petition. On February 21, 2008, this court withdrew

the prior opinion pending resolution of the petition for rehearing. After reviewing the rehearing petition and answer, as well as the briefs and appendix, we conclude that rehearing is warranted under NRAP 40(c)(2), and we grant the petition for rehearing. We now issue this opinion in place of our prior opinion.

In this opinion, we consider whether solicitation to commit murder is a felony involving the use or threat of violence to the person of another within the meaning of the death penalty aggravator defined in NRS 200.033(2)(b). We

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conclude that it is not. We also consider whether the State's notice of intent to seek the death penalty against petitioner satisfies the requirements of SCR 250(4)(c). We conclude that it does not. However, we conclude that the State should be allowed to amend the notice of intent to cure the deficiency. Accordingly, we grant the writ petition in part and instruct the district court to strike the two aggravating circumstances alleging solicitation to commit murder as prior violent felonies pursuant to NRS 200.033(2) and to allow the State to amend its notice of intent to seek the death penalty with respect to the factual allegations supporting the pecuniary gain aggravator."

*Mayfield v. Koroghli*, 124 Nev. Adv. Op. No. 34 (May 29, 2008) "This case concerns a contract for the sale of Henderson, Nevada, real property. Under the contract, the close of escrow was conditioned on the buyer obtaining commercial subdivision approval with respect to the land. After the parties worked unsuccessfully for approximately three years to obtain the commercial subdivision approval, the sellers, without any warning to the buyer, repudiated the contract and refused to consummate the sale. In the ensuing action instituted by the buyer against the sellers and his real estate agent, who ultimately settled with the buyer, the district court granted specific performance to the buyer and awarded him costs.

In this appeal, we consider whether a party's performance under a contract must be completed within a certain time when the contract's terms do not make the time for the party's performance of the essence. We conclude that when a contract does not make the time for a party's performance of the essence, either party can make it so by setting a reasonable time for performance and notifying the other party of an intention to abandon the contract if it is not per-

formed within that time. Further, absent such a demand for performance, or a term making time of the essence, a contract must be performed within a reasonable time. What constitutes a reasonable time for a contract's performance is a question of fact to be determined based on the nature of the contract and the circumstances surrounding its making.

We also consider in this appeal the circumstances under which a party to a contract may waive a condition precedent to his performance so that he can complete his performance under the contract. We conclude that when a contract contains a condition precedent to a party's performance, that party may waive the condition and tender performance so long as the parties included the condition in the contract for the sole benefit of the party seeking to waive the condition and complete performing his contractual obligations. Whether a condition included in a contract is for the benefit of one or both parties is a question of fact.

Finally, we consider whether costs should be apportioned when one party sues multiple defendants on similar claims based on the same set of facts. We conclude that in such a situation, it is within the district court's discretion to determine whether the claims are so intertwined as to render apportionment impracticable, but before declaring apportionment impracticable, the district court must make a good faith effort to apportion costs. In light of those considerations, we affirm the district court's judgment granting specific performance to the buyer. In particular, the sellers did not provide the buyer a reasonable time to complete his performance under the contract, and although the buyer failed to obtain the commercial subdivi-

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vision approval—a condition precedent to the buyer’s performance—that condition was included in the contract solely for the buyer’s benefit so he was free to waive it and complete performance by tendering the down payment. Nevertheless, because the record in this case does not reveal that the district court made an effort to apportion costs, we reverse its award of costs and remand for further proceedings consistent with this opinion.”

*Law Offices of Barry Levinson v. Milko*, 124 Nev. Adv. Op. No. 35 (May 29, 2008) “Under the Nevada Industrial Insurance Act (NIIA), a workers’ compensation claimant is entitled to benefits for an industrial injury only upon proving that he or she suffered an injury by accident that arose out of and in the course of employment. A workers’ compensation claimant generally must notify his or her employer of a work-related injury, in writing, promptly after an alleged accident. When the claimant files a notice of injury after his or her employment is terminated, a rebuttable presumption is established that the injury did not arise out of or in the course of employment.

Thus, in these consolidated workers’ compensation matters, we first consider whether to reexamine our long-standing jurisprudence concerning the interpretations of ‘accident’ and ‘injury,’ in light of the neutrality now required when construing the NIIA.[1] We also consider what evidence is required to rebut the statutory presumption that arises when a claimant files a notice of injury after the claimant’s employment is terminated.

We conclude that the neutrality rule does not require us to overturn 25 years of precedent regarding the construction of ‘accident’ and ‘injury.’ We further conclude, after examining the legislative history, that to rebut the pre-

sumption that arises when a claimant files a notice of injury after termination, the claimant must prove that the injury did not arise from an event that occurred after termination. Given our enunciation of this standard for rebutting the statutory presumption, we ultimately reverse a district court order denying a petition for judicial review and remand that matter so that the appeals officer may revisit the issue of whether the claimant rebutted the presumption and demonstrated that she is entitled to workers’ compensation under the standard articulated in this opinion.

As a secondary matter regarding the same workers’ compensation claim, we examine a district court order upholding an award of permanent partial disability. Although we discern no error in the amount of disability benefits awarded, whether the claimant is entitled to this award inevitably turns on whether she is entitled to workers’ compensation in the first instance. Accordingly, we remand this matter so that it may be considered with the factual findings to be made on the claimant’s eligibility for workers’ compensation. If it is ultimately determined that the claimant is not entitled to workers’ compensation, then the disability benefits award must be vacated. But if it is determined that the claimant is entitled to workers’ compensation, then the claimant should receive the amount of permanent partial disability benefits previously awarded because the award is supported by substantial evidence.”



## HOW TO GET SUED

You're a lawyer -- of course you know how to sue someone. But do you know how to *get sued*? If not, there is now an instructional guide, written by lawyer and blogger J. Craig Williams, whose blog, [May It Please the Court](#), is part of the [Law.com blog network](#). The 272-page book, [How to Get Sued: An Instructional Guide](#), published by [Kaplan Publishing](#), is described as "a witty look at the American court system."

"Aimed at the attorney or intelligent casual reader seeking some light diversion, this satirical how-to is sophisticated enough to appeal to the average reader who enjoys sharp wit and some of the more bizarre twists the legal system takes without covering the humor with a thick layer of obscure jargon."

So how does one get sued? Based on some of the book's chapters, it appears to be quite easy. Go to work, own a pet, enjoy yourself -- even just step out your front door in the morning, and you could be sued. Consider the woman Williams writes about who bought her roommate a cat,

only to find herself later embroiled in a cat-custody battle that resulted in a five-figure settlement.

The book features a forward by [9th U.S. Circuit Court of Appeals](#) Chief Judge Alex Kozinski. "Just as it's hard to avert your eyes from a train wreck," Kozinski writes, "it's very difficult to put down a book that repeatedly illustrates not only how easily one can be swept into the sausage factory, but how hilariously difficult and Byzantine things can become once there." As for the author, he is just back from the release of his book at [Book Expo America](#). He [writes on his blog](#) that he is happy to autograph the book for anyone who buys a copy and sends it to him. And he points to a page on his publisher's site where you can get free [chapter bonus materials](#).



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***Gribben v. UPS***, No. 06-15964 (June 16, 2008) “Charles W. Gribben appeals the district court’s judgment in favor of his employer United Parcel Service (‘UPS’) in his action alleging disability discrimination and retaliation in violation of the Americans with Disabilities Act (‘ADA’). Gribben, who suffers from congestive heart failure and cardiomyopathy, requested and was denied accommodations for certain limitations imposed by his cardiologist. The district court granted summary judgment in favor of UPS on the discrimination claim and a jury returned a verdict in favor of UPS on the retaliation claim. We have jurisdiction under 28 U.S.C. § 1291. We affirm the jury verdict in favor of UPS on the retaliation claim, reverse the district court’s summary judgment in favor of UPS on the disability claim, and remand that claim to the district court for further proceedings.”

“Finally, we conclude that the district court did not err in refusing to give the jury a punitive damages instruction. The jury determined that the evidence was insufficient to establish a claim for retaliation. This determination supports the district court’s decision that the same evidence was insufficient to warrant an instruction on punitive damages. *See Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1087 (9<sup>th</sup> Cir. 2005) (error in instructing the jury does not require reversal if harmless). A punitive damages instruction may, however, be warranted in connection with Gribben’s disability discrimination claim which we remand to the district court. We express no

opinion on that. The parties shall bear their own costs on appeal. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**”

***Aramark Facility Services v. Service Employees International Union***, No. 06-56662 (June 16, 2008) “This case arose from the response by Aramark Facility Services (‘Aramark’) to a ‘no-match letter’ from the Social Security Administration (‘SSA’), which indicated that Aramark had reported information for 48 of its employees at the Staples Center in downtown Los Angeles that did not match the SSA’s database. Suspecting immigration violations, Aramark told the listed employees they had three days to correct the mismatches by proving they had begun the process of applying for a new social security card. Seven to ten days later, Aramark fired the 33 employees who did not timely comply.

Local 1877 of the Service Employees International Union (‘SEIU’) filed a grievance on behalf of the fired workers, contending the terminations were without just cause and thus in breach of the collective bargaining agreement (‘CBA’) between Aramark and SEIU. An arbitrator ruled for SEIU and awarded the fired workers back-pay and reinstatement, finding there was no convincing information that any of the fired workers were undocumented. The district court vacated the award on the ground that it violated public policy. SEIU timely appealed.

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This case boils down to a single issue: whether the SSA's no-match letter — and the fired employees' responses — put Aramark on constructive notice that it was employing undocumented workers. If so, the arbitrator's award would force Aramark to violate federal immigration law, and therefore was properly vacated as against public policy. If not, the award must stand.

As we explain below, Aramark has not established constructive knowledge of any immigration violations. Constructive knowledge is to be narrowly construed in the immigration context and requires positive information of a worker's undocumented status. Moreover, we are required to defer to the arbitrator's factual findings even when evaluating an award for violation of public policy. Accordingly, given the extremely short time that Aramark gave its employees to return with further documents and the arbitrator's finding that Aramark had no 'convincing information' of immigration violations, the employees' failure to meet the deadline simply is not probative enough of their immigration status to indicate that public policy would be violated if they were reinstated and given backpay. Therefore, the district court erred and the award must be confirmed."

***United States v. Marks***, No. 05-30218 (June 13, 2008) "Defendant Richard Marks ('Marks') was convicted of numerous offenses arising from his involvement in Anderson's Ark and Associates ('AAA'), an organization that created, promoted, and implemented schemes to assist U.S. taxpay-

ers in the evasion of their income tax liabilities and that also defrauded its own clients. Marks was sentenced to serve a prison term and to pay restitution.

Marks appeals his conviction and sentence on several grounds: that the district court denied him a fair trial because it was biased against him and the other *pro se* defendants; that the court erred in failing to address Marks' jurisdictional challenges; that the court's restitution order is invalid because it was not entered until after the ninety-day statutory period set forth in 18 U.S.C. § 3664(d)(5); that the court's *ex parte* entry of the restitution order violated Marks' right to be present at a critical stage of the proceeding and his right to allocute; that the court erred in failing to *sua sponte* examine Marks' competence to stand trial; and that the court erred in allowing Marks to proceed to trial *pro se*.

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

***Belmontes v. Brown*** No. 01-99018 (June 13, 2008) "Once again we are presented with a case in which an individual sentenced to death received inadequate representation by his counsel at the penalty phase of his trial. Here, the question is only whether counsel's deficient performance was prejudicial. There can be little doubt that it was."

"Belmontes's remaining claims are as follows: (1) that he received ineffective as-

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sistance of counsel during the penalty phase of his trial; (2) that he was deprived of due process when the district court denied his request for an evidentiary hearing on his first claim; and (3) that he was deprived of due process and a fair penalty phase trial, and subjected to cruel and unusual punishment, by (a) the admission of evidence of his prior acts of misconduct, (b) the trial court's response to questions from the jury about the consequences of their failure to agree on a unanimous verdict with respect to the penalty, and (c) the trial court's prejudgment of Belmontes's motion to reduce his sentence. Because we conclude that Belmontes's counsel not only provided deficient representation at the penalty phase of his trial but that Belmontes *was* prejudiced by that deficient performance, we reverse and remand for issuance of a writ of habeas corpus and, if the State so elects, a new death penalty proceeding."

"We affirm the district court's ruling that Belmontes received deficient representation at the penalty phase of his trial, but set aside its ruling that he suffered no prejudice as a result. We hold that counsel's failure to introduce adequate lay witness testimony regarding Belmontes's childhood experiences and his failure to explain to the jury the consequences of the minimal mitigating evidence he did introduce was prejudicial, especially in light of the scant aggravating evidence and the uncertainty the jury indicated about the sentence it should impose. We also hold that counsel's failure to intro-

duce expert witnesses to testify to the relationship of the type of childhood traumas suffered by Belmontes to future criminal conduct, and thus to offer important mitigating expert testimony was prejudicial and thus provides a separate and independent basis for reversal, again especially in light of the circumstances referred to above. Accordingly, we remand to the district court with instructions to grant the petition for writ of habeas corpus and to return the case to the San Joaquin County Superior Court to reduce Belmontes's sentence to life without parole, unless the State pursues a new sentencing proceeding within a reasonable amount of time, as determined by the district court."

*United States v. Becerril-Lopez*, No. 05-50979 (June 12, 2008) "Raul Becerril-Lopez ('Becerril') appeals his jury conviction and sentence for being a deported alien found in the United States in violation of 8 U.S.C. § 1326. Among other claims, he argues that his prior conviction under California Penal Code § 211 does not qualify as a 'crime of violence' under the sentence enhancement provision for illegal re-entry crimes. We hold that it does, and we affirm."

"As defined in the commentary to U.S.S.G. § 2L1.2, 'crime of violence' means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use,

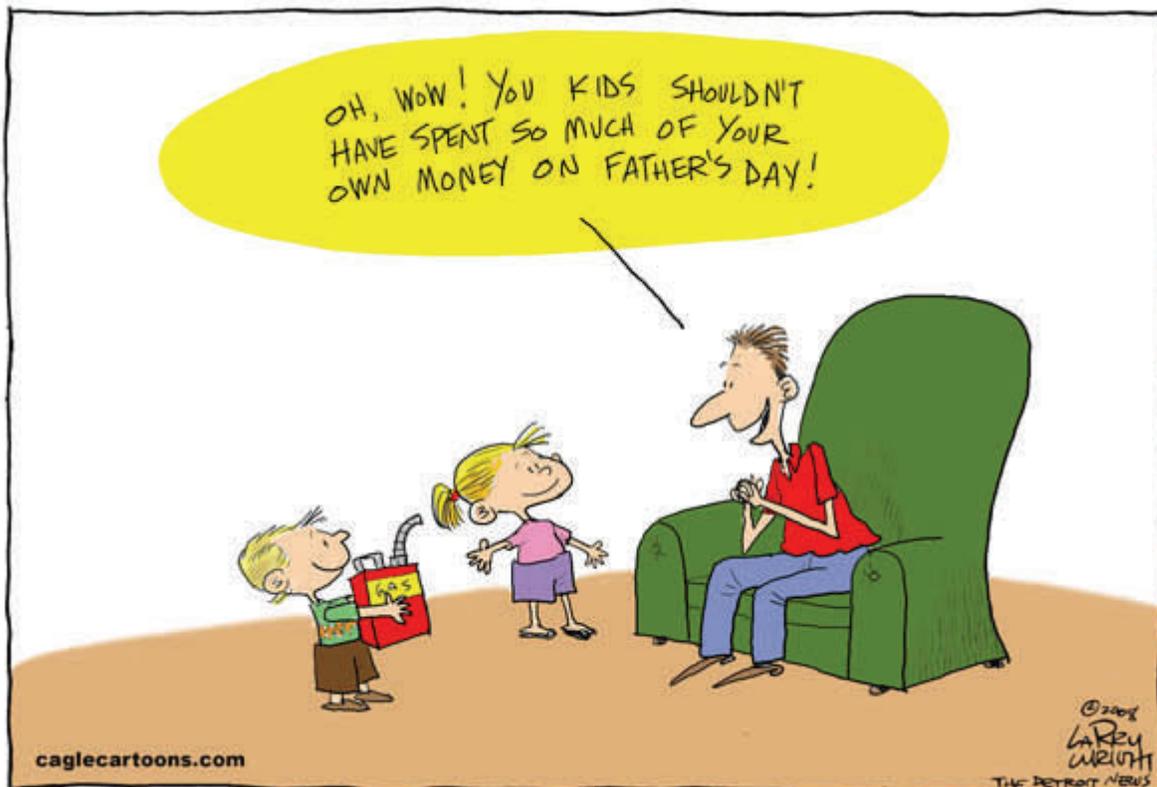
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attempted use, or threatened use of physical force against the person of another. To determine whether a conviction under Cal. Penal Code § 211 meets this definition, we use the *Taylor* categorical approach. We ‘look only to the fact of conviction and the statutory definition of the prior offense, not to the underlying facts,’ to determine whether the prior conviction is a qualifying offense. *United States v. Lopez-Montanez*, 421 F.3d 926, 929 (9th Cir. 2005) (internal quotation marks and citation omitted). To demonstrate that § 211 is not per se an offense within the Guideline, Becerril must show that there is ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the ge-

neric definition of [the] crime[s]’ listed in the enhancement and also outside the enhancement’s ‘catch-all’ language. *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007); see also *James v. United States*, 127 S.Ct. 1586, 1591 (2007) (examining each listed crime and catch-all in 18 U.S.C. § 924(e)). Under the law of our circuit, Becerril may carry this burden by showing that the text of the state statute expressly includes a broader range of conduct than the Guideline. See *United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc) (citing *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc)).

“We simply conclude that if a conviction

under



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Cal. Penal Code § 211 involved a threat not encompassed by generic robbery, it would necessarily constitute generic extortion and therefore be a ‘crime of violence’ under U.S.S.G. § 2L1.2. *See* 3 LaFave § 20.4(b) (‘Statutory extortion (or blackmail) is, of course, closely related to the crime of robbery, having in fact been created in order to plug a loophole in the robbery law by covering sundry threats which will not do for robbery.’.)”

“Because we reject each of Becerril’s challenges, his conviction and sentence are AFFIRMED.”

***Golden v. CH2M Hill Hanford Group, Inc.***, No. 05-35832 (June 11, 2008) “Daniel Golden worked at a facility on the Hanford Nuclear Reservation, operated by the CH2M Hill Hanford Group, Inc. (CH2M). CH2M stored liquid waste in large storage tanks; the liquid contained radioactive materials and non-radioactive heavy metals. On May 20, 2002, Golden was working on one of these tanks when up to four gallons of this toxic liquid splashed on him.

Golden sued CH2M in state court under Washington law, claiming that the accident caused him physical injuries ranging from colitis to sinusitis, as well as emotional distress. Golden’s wife sued for loss of consortium. CH2M removed. The district court had jurisdiction under the Price-Anderson Act, which preempts all state-law claims for injury resulting from nuclear incidents. *See Phillips v.*

*E.I. DuPont De Nemours & Co. (In re Hanford Nuclear Reservation Litig.)*, 521 F.3d 1028, 1054 (9th Cir. 2008). The district court granted summary judgment to CH2M, and the Golden’s appeal.”

“To survive summary judgment on a toxic tort claim for physical injuries, Golden had to show that he was exposed to chemicals that could have caused the physical injuries he complains about (general causation), and that his exposure did in fact result in those injuries (specific causation). *Jaros v. E.I. DuPont (In re Hanford Nuclear Reservation Litig.)*, 292 F.3d 1124, 1133 (9th Cir. 2002). To show specific causation, Golden offered the testimony of his physician, Dr. Wilkinson. At Dr. Wilkinson’s first deposition, he was asked if he could state with a reasonable degree of medical certainty that Golden’s symptoms resulted from his 2002 exposure. Dr. Wilkinson responded, I can’t prove it. Any time you have people with chronic illness, there’s little that you can prove. But we have to work on assumptions . . . . I deal with things from the standpoint of what I can do to get my patient well. An assumption made for purposes of treatment doesn’t establish causation.”

“As Golden’s expert was unable to support his claim that this accident caused his physical injuries, Golden is unable to prove specific causation. Because Golden must show both specific and general causation, we need not consider whether Golden presented sufficient evidence of general causation. We affirm the district court’s grant of summary judgment to CH2M on Golden’s

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claim for physical injuries.”

***Simpson v. Thomas***, No. 07-16228 (June 11, 2008) “Gary Simpson filed suit under 42 U.S.C. § 1983 alleging that Sergeant Jeffrey Thomas, a corrections officer at the California Medical Facility (CMF) state prison in Vacaville, California, used excessive force after Simpson did not comply with Thomas’s orders. For impeachment purposes, the district court admitted evidence of Simpson’s three prior convictions more than ten years old pursuant to Federal Rule of Evidence 609(b), explaining that because his prior convictions were utilized pursuant to California’s Three Strikes Law to enhance his current sentence, those prior strikes were not and do not wash out under state law. Additionally, pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994), the district court excluded any evidence or testimony that Simpson acted in self-defense after Thomas allegedly punched him, explaining that such evidence would invalidate the finding of guilt in Simpson’s prison disciplinary proceeding.

After a jury trial resulted in a verdict in Thomas’s favor, Simpson filed a motion for a new trial, which the district court denied. *Simpson v. Thomas*, No. 2:03-CV-00591, 2007 WL 1687092 (E.D.C.A. June 8, 2007).

We have jurisdiction pursuant to 18

U.S.C. § 1291, and we reverse and remand for a new trial. We hold that the use of prior convictions older than ten years to enhance a sentence for a separate conviction pursuant to California’s Three Strikes Law does not bring those prior convictions within the ten year time limit of Federal Rule of Evidence 609. Additionally, we hold that *Heck* does not create a rule of evidence exclusion and therefore may not be used to bar relevant evidence.”

***Barnes-Wallace v. Boy Scouts of America***, No. 04-55732 (June 11, 2008) “The Desert Pacific Council, a nonprofit corporation chartered by the Boy Scouts of America, leases land from the City of San Diego in Balboa Park and Mission Bay Park. The Council pays no rent for the Mission Bay property and one dollar per year in rent for the Balboa Park property. In return, the Council operates Balboa Park’s campground and Mission Bay Park’s Youth Aquatic Center. The campground and the Aquatic Center are public facilities, but the Council maintains its headquarters on the campground, and its members extensively use both facilities. The Boy Scouts of America — and in turn the Council — prohibit atheists, agnostics, and homosexuals from being members or volunteers and require members to affirm a belief in God. “*The Boy Scouts of America — and in turn the Council — prohibit atheists, agnostics, and homosexuals from being members or volunteers and require members to affirm a belief in God.*” The plaintiffs are users of the two Parks who are, respectively, lesbians and agnostics. They would use the land or facilities leased by the Desert Pacific Council but for the Council’s and Boy Scouts’ discriminatory

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policies. We certify to the California Supreme Court the following questions:

1. Do the leases interfere with the free exercise and enjoyment of religion by granting preference for a religious organization in violation of the No Preference Clause in article I, section 4 of the California Constitution?
2. Are the leases ‘aid’ for purposes of the No Aid Clause of article XVI, section 5 of the California Constitution?
3. If the leases are aid, are they benefiting a ‘creed’ or ‘sectarian purpose’ in violation of the No Aid Clause?

‘The plaintiffs Barnes-Wallaces are a lesbian couple and the plaintiffs Breens are agnostics. Because of their sexual and religious orientations, they cannot be Boy Scout volunteers. Both couples have sons old enough to join the Boy Scouts, and they would like their sons to use the leased facilities, but the parents refuse to give the approval required for membership. As part of the membership application, a parent must promise to assist his or her son ‘in observing the policies of the Boy Scouts of America . . . [to] serve as his adult partner and participate in all meetings and approve his advancement.’ [*Id.* 1533.] The application also includes the Scout Law and the Declaration of Religious Principle. The Barnes-Wallaces and the Breens believe that the Boy Scouts’ policies are discriminatory, and they refuse to condone such practices by allowing

their children to join the Boy Scouts.”

“The plaintiffs never applied to use the Youth Aquatic Center or Camp Balboa; there is no evidence that the Council actively excluded them. Rather, they testified that the Council’s occupation and control of the land deterred them from using the land at all. The plaintiffs desired to make use of the recreational facilities at Camp Balboa and the Youth Aquatic Center, but not under the Council’s authority. As a result, they actively avoided the land. They refused to condone the Boy Scouts’ exclusionary policies by seeking permission from the Boy Scouts to use the leased facilities or by using the leased facilities subject to the Boy Scouts’ ownership and control. They had an aversion to the facilities and felt unwelcome there because of the Boy Scouts’ policies that discriminated against people like them. The plaintiff families brought this action against the City of San Diego, the Boy Scouts, and the Desert Pacific Council, alleging that leasing public land to an organization that excludes persons because of their religious and sexual orientations violates the federal Establishment Clause, the California Constitution’s No Preference and No Aid Clauses, the federal and state Equal Protection Clauses, the San Diego Human Dignity Ordinance, and state contract law. The district court found the plaintiffs had standing as municipal taxpayers and then allowed them to file an amended complaint. Both parties sought summary judgment. The court found that the leases violated the federal Establishment Clause and

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the California No Aid and No Preference Clauses and granted summary judgment in the plaintiffs' favor. *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1276-80 (S.D. Cal. 2003). In the amended final judgment, the court enjoined the Balboa Park and Fiesta Island leases. The City then notified the Council that under the terms of the 2002 Balboa Park lease, the term tenancy was terminated and converted to a month-to-month tenancy. The plaintiffs have since settled with the City. The Scout defendants appealed the district court's ruling."

"We are aware of the California Supreme Court's demanding caseload and recognize that our request adds to that load. But we feel compelled to request certification because this case raises difficult questions of state constitutional law with potentially broad implications for California citizens' civil and religious liberties. Considerations of comity and federalism favor the resolution of such questions by the State's highest court rather than this court."

***Butler v. Curry***, No. 07-56204 (June 9, 2008) "Frank Butler alleged in his petition for writ of habeas corpus that his Sixth Amendment rights were violated when the California state trial court imposed an 'upper term' sentence based on two aggravating factors not proved to a jury beyond a reasonable doubt. The district court, relying on *Cunningham v. California*, 127 S. Ct. 856 (2007), agreed, and granted the writ. The State contends that *Cunningham*, which struck down California's de-

terminate sentencing law ('DSL'), announced a 'new rule' that cannot be applied on collateral review. In the alternative, the State maintains that the requirements for habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA') have not been met, and that, even if they were, there was no constitutional violation.

We conclude that the result in *Cunningham* was clearly dictated by the Supreme Court's Sixth Amendment case law, in particular by *Blakely v. Washington*, 542 U.S. 296 (2004), decided before Butler's conviction became final. The state court decision in Butler's case was contrary to this clearly established law. Further, Butler's constitutional rights were violated when the statutory maximum for his crime was increased on the basis of facts found by a judge by a preponderance of the evidence, rather than admitted or found by a jury beyond a reasonable doubt. We cannot, however, determine whether this violation was harmless in the absence of further factfinding about what evidence was presented to the state trial court judge in support of the allegation that Butler was on probation at the time of his crime. For that reason, we remand to the district court for an evidentiary hearing."

***Carver v. Lehman***, No. 06-35176 (June 9, 2008) "This case presents the question whether Washington state law creates a liberty interest in an inmate's early release into community custody that is pro-

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tected under the Due Process Clause of the Fourteenth Amendment. We hold that it does. We conclude, however, that this right was not clearly established at the time of the facts giving rise to this case. We therefore affirm the district court’s grant of qualified immunity.”

“Washington state law creates a liberty interest in an inmate’s early release into community custody that is protected under the Due Process Clause of the Fourteenth Amendment. Carver was denied his due process right by the state officials’ refusal to approve his release plan without reviewing it on its merits. At the time, however, the due process right arising from the existence of his liberty interest was not sufficiently clearly established to meet the *Saucier* standard. We therefore affirm the district court’s determination that Lehman is entitled to qualified immunity.”

***International Society for Krishna Consciousness So. v. City of Los Angeles***, No. 01-56579 (June 9, 2008) “We certify the question set forth in Part II of this order to the California Supreme Court. The answer to the certified question depends upon California law. The California Supreme Court’s answer will be determinative of the appeal presently before us. We find no clear controlling precedent in the decisions of the California Supreme Court. We therefore

respectfully request that the California Supreme Court answer 6475 the question presented below. If the court declines certification, we will ‘predict as best we can what the California Supreme Court would do in these circumstances.’ See *Pacheco v. United States*, 220 F.3d 1126, 1131 (9th Cir.2000).”

“The dispositive question of state law to be answered is: Is Los Angeles International Airport a public forum under the Liberty of Speech Clause of the California Constitution? Our phrasing of the question should not restrict the California Supreme Court’s consideration of the issues involved. ‘We will accept the decision of the California Supreme Court, which is the highest authority on the interpretation of California law.’ *Grisham v. Philip Morris U.S.A.*, 403 F.3d 631, 634 (9th Cir. 2005) (per curiam) (noting that the Ninth Circuit is bound to follow the holdings of the California Supreme Court when applying California law).”

*“Is Los Angeles International Airport a public forum under the Liberty of Speech Clause of the California Constitution? “*

“We conclude that the potential conflict between the application of the First Amendment and the California Constitution regarding freedom of speech at California’s airports is one that the California Supreme Court should have the opportunity to address and resolve. As the original panel noted, ‘[t]his case involves California plaintiffs and California defendants who disagree primarily over whether a California municipal ordinance

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violates the California Constitution.’ Given the complexity of California’s public forum doctrine, the Supreme Court’s 1992 decision in *Lee*, and the changes made at LAX and other state airports following the events of 9/11, we agree with the original panel that this case is appropriate for certification. We further note that the parties operated on the assumption that this case would be certified when they engaged in extensive supplemental discovery from 2003 to 2006. Moreover, Judge Marshall operated on that assumption when she declined to exercise supplemental jurisdiction over the California claim in case No. CV 03-00293 (No. 06-56660 on appeal).”

“For these reasons, we submit this request for certification.”

***Ferguson v. Coregis Insurance Co.***, No. 06-35867 (June 3, 2008) “What happens when an insurance company includes a policy endorsement meant to reduce the dollar limits to which it will respond for its policyholder’s liability, but does so by reference to a non-existent standard? What should happen: the endorsement is ineffective to reduce those limits. Plaintiff-Appellant, John M. Ferguson, filed this action on behalf of his son, Richard F. McLeod, in Idaho state court seeking a declaratory judgment as to the ‘general liability limit’ of the insurance policy (‘the Policy’) sold to the Coeur d’Alene School District by the Defendant-Appellee, Coregis Insurance Company. Coregis removed the action to federal dis-

trict court, invoking that court’s diversity jurisdiction pursuant to 28 U.S.C. § 1332. Coregis then filed a motion for summary judgment; Ferguson responded and filed a crossmotion for summary judgment. The district court denied Ferguson’s motion, but granted Coregis’s.

We review the district court’s rulings on summary judgment *de novo*. *Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997). We reverse both the district court’s grant of summary judgment in favor of Coregis, and its denial of Ferguson’s cross-motion for summary judgment because the judgment determined the ‘general liability limit’ by means of a non-existent standard. A judgment cannot be entered to enforce a contract’s term when that term does not exist.”

***Delgadillo v. Woodford*** No. 07-55089 (June 3, 2008) “This appeal requires us to consider whether for purposes of our review under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1), a state habeas court’s decision to apply *Crawford v. Washington*, 541 U.S. 36 (2004), retroactively to uphold a defendant’s sentence is an unreasonable application of Supreme Court precedent. Although *Whorton v. Bockting*, 127 S. Ct. 1173, 1177 (2007), held that *Crawford* is not retroactively applicable in federal habeas proceedings, *Danforth v. Minnesota*, 128 S. Ct. 1029, 1040-41 (2008), clarified that the rule of nonretroactivity for fed-

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eral habeas proceedings is not binding on state habeas courts. In light of *Danforth*, we hold that the state habeas court's decision to apply *Crawford* was reasonable. We also hold that we must defer to the state habeas court's application of *Crawford* to the facts of this case. Therefore, we affirm the district court's denial of Delgado's petition for a writ of habeas corpus."

***United States v. Rivera***, No. 06-30474 (June 2, 2008) "Defendants Gilberto Baez Rivera, Rigoberto Baez Rivera, Leonel Mendoza and Alice Espinoza appeal their convictions for conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846. Espinoza also appeals her conviction for intentional use of a communication facility in causing and facilitating conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 843(b). Defendants argue that the government failed to show necessity for a wiretap on two telephones and failed to properly minimize the various wiretaps it used in its investigation of the conspiracy.

Rigoberto also appeals his sentence of 168 months imprisonment on the ground

that the district court, in calculating the applicable sentencing range under the United States Sentencing Guidelines, improperly applied a four-level enhancement to his offense level for his role as an 'organizer or leader' pursuant to U.S.S.G. § 3B1.1. Rigoberto further argues that his sentence is unreasonable. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm."

***United States v. Hinkson***, No. 05-30303 (May 30, 2008) "Following a two-week trial in federal district court in Boise, Idaho, a jury convicted David Roland Hinkson of soliciting the murder of three federal officials. The govern-



ment's star witness supporting the conviction was Elven Joe Swisher. Wearing a Purple Heart lapel pin on the witness stand, Swisher testified that he had told Hinkson that he was a Korean War combat veteran and that Hinkson, im-

pressed by Swisher's military exploits, solicited him to kill the officials.

The government maintained in its opening statement to the jury that Swisher was a Korean War combat veteran, and it maintained throughout the trial that Hinkson's understanding of Swisher's military exploits showed that he was serious in his

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solicitations of Swisher. The government now concedes that Swisher neither served in combat nor earned any personal military commendations, and that Swisher presented a forged military document in court and repeatedly lied under oath at trial about his military record.

On appeal, Hinkson makes three arguments. First, he argues that the district court wrongly precluded him from introducing evidence showing that Swisher presented a forged document and lied on the stand. Second, he argues that the prosecutor engaged in misconduct when he invoked Swisher's military service in his closing argument despite having substantial reason to suspect that Swisher had not been truthful. Third, he argues that he is entitled to a new trial based upon his discovery after trial of evidence that conclusively establishes Swisher's fabrications.

We agree with Hinkson's third argument. Because Hinkson's conviction substantially rests upon the testimony of a witness who had been conclusively shown, by the time Hinkson moved for a new trial, to be a forger and a liar, we hold that the district court abused its discretion in denying Hinkson's motion for a new trial. We do not reach Hinkson's first and second arguments."

***United States v. Giberson*** No. 07-10100 (May 30, 2008) "Giberson appeals from the district court's denial of his motion to suppress evidence of child pornography found

on his personal computer, which led to his conviction for receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2) and possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). He also appeals from his sentence, arguing the district court erred in sentencing him for both possession and receipt of child pornography. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(1). We affirm his conviction, vacate his sentence, and remand.

Giberson contends that the district court erred when it sentenced him for both receipt and possession of child pornography, arguing that the sentencing is multiplicitous. He failed to object in the district court, and we review for plain error. *See United States v. Smith*, 424 F.3d 992, 999-1000 (9th Cir. 2005).

By a divided panel, and subsequent to Giberson's sentencing, we recently held, on plain error review, that entering judgment against a defendant who had pled guilty to both the receipt and possession of child pornography was multiplicitous and violated the Fifth Amendment's prohibition against double jeopardy. *United States v. Davenport*, \_\_\_ F.3d \_\_\_, 2008 WL 732491 (9th Cir. 2008). In *Davenport*, we accepted the argument, similar to the one Giberson makes, that 'the offense of possessing child pornography is a lesser included offense of the receipt of child pornography,' and that conviction and punishment for both is therefore constitutionally impermissible. *Id.* at \*6. We held

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that, though the defendant's sentences (like Giberson's) were to run concurrently, '[t]he district court's error was plain, and it affected [the defendant's] substantial rights by imposing on him the potential collateral consequences of an additional conviction.' concluded that 'because the prohibition against double jeopardy is a cornerstone of our system of constitutional criminal procedure, this error threatens the fairness, integrity, and public reputation of our judicial proceedings,' and vacated the defendant's sentence. *Id.* *Davenport* is materially indistinguishable from this case, and we therefore vacate Giberson's sentence and remand to the district court for resentencing."

*"an escalating series of disputes arising from Beck's protests against a city contract granted to one of his competitors."*

***United States v. Marler***, No. 07-30181 (May 29, 2008) "Coby James Marler appeals the sentence imposed following his guilty plea to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). We must decide whether the fact that a defendant is on escape status at the time he commits another offense means that the escape and the subsequent offense are 'related' for purposes of calculating the defendant's criminal history score under United States Sentencing Guidelines Manual ('USSG') § 4A1.2(a)(2), even though the two offenses are not related in any other way. The district court rejected Marler's argument that his escape offense was re-

lated to his subsequent robbery conspiracy offense and sentenced Marler to 57 months' imprisonment. We have jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. We agree with the district court and therefore affirm the sentence."

***Beck v. City of Upland***, No. 05-56901 (May 28, 2008) "Kenneth Beck and the City of Upland, California, engaged for months in an escalating series of disputes arising from Beck's protests against a city contract granted to one of his competitors. In the incident that gave rise to this case, Beck was arrested six days after he confronted two city police officers over what he felt to be unfair treatment by the city. Beck's arrest was pursuant to a warrant for two felony violations of a California statute prohibiting threats of violence made to deter police officers from performing their duties. The warrant, we conclude — as did the state courts considering the criminal charges — was entirely without probable cause. All charges against Beck were dismissed.

Beck maintains that his 'First and Fourth Amendment rights . . . were violated when he was arrested and imprisoned [without probable cause] for his protected speech and then forced to incur the cost of defending himself against the criminal charges.' The question we consider is whether Beck's subsequent suit under 42 U.S.C. § 1983 for these constitutional violations and for various state law causes of action against the City of Upland, its police department, and

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the officers who engineered his arrest, Police Chief Martin Thouvenell and Sergeant Jeff Mendenhall, may go forward to trial. The district court held that it may not, because (1) a San Bernardino County prosecutor authorized the filing of a criminal complaint before the police officers obtained an arrest warrant, thereby acting as an intervening cause of Beck's injuries and cutting off post-complaint liability under § 1983; and (2) California state law immunized the officers. *See Smiddy v. Varney*, 665 F.2d 261, 266-68 ('*Smiddy I*') (9th Cir. 1981) (discussing the post-complaint liability of the arresting officers in such circumstances); CAL. CIV. CODE § 43.55(a) (state law immunity).

After the district court decision, the United States Supreme Court decided *Hartman v. Moore*, 547 U.S. 250 (2006), clarifying the elements of a constitutional tort under § 1983 for retaliatory arrest or prosecution. We hold, relying in part on *Hartman*, that causation issues arising from the criminal complaint do not preclude Beck's case, and that California immunity law does not either. We therefore reverse the district court's grant of summary judgment against Beck."

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### Court Sanctions Defendant for E-Mail Preservation Failure

*Connor v. Sun Trust Bank*, 2008 WL 623027 (N.D.Ga. Mar. 5, 2008). In this litigation alleging interference and retaliation claims under FMLA, the plaintiff filed a motion for sanctions based on the defendant's failure to pro-

duce a highly relevant e-mail during discovery. The plaintiff located, through other means, a relevant e-mail that explained her dismissal to other employees. The defendant moved for summary judgment relying on their 30-day e-mail destruction policy which automatically deleted e-mails that were thirty days old, unless they were first archived by the user. The court, unpersuaded by the defendant's reasoning, granted the plaintiff's motion for sanctions and issued an adverse jury instruction.

### Court Declines to Issue Default Judgment Sanction Due to Lack of Prior Warning

*ClearOne Communications, Inc. v. Chiang*, 2008 WL 704228 (D.Utah Mar. 10, 2008). In this litigation involving trade secret misappropriation, the plaintiff filed a motion for sanctions alleging the defendants misrepresented material facts during discovery and withheld a "smoking gun" e-mail. The defendants claimed the misrepresentation was merely a misunderstanding by their Fed.R.Civ.P. 30(b)(6) witness, who spoke English only as his third language. Further, the defendants argued they were not in possession of the email in question as their computer system was not programmed to save sent e-mails. Suspicious of the defendants' computer system but unable to locate the e-mail in question, the court found the defendant's actions sanctionable. The court was unwilling to enter default judgment as it had not previously issued a warning and instead issued an adverse jury instruction relating to the misrepresentation of the 30(b)(6) witness, allowing the jury to consider the misrepresentation when determining the witness' credibility.

### Court Grants Motion to Amend Com-

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### **plaint to Include a Spoliation Claim**

*Ed Schmidt Pontiac-GMC Truck, Inc. v. DaimlerChrysler Motors Co.*, 2008 WL 668267 (N.D. Ohio Mar. 11, 2008). In this suit alleging breach of a settlement agreement, the plaintiff sought to amend the complaint to include a claim for spoliation following two years of discovery. The plaintiff alleged the defendant knowingly destroyed relevant evidence – specifically the defendant replaced employees’ hard drives days before the plaintiff could make forensic images of those drives. The defendant argued that a spoliation claim would be futile and cause undue prejudice. Applying state law for spoliation and appropriate sanctions, the court granted the plaintiff’s motion and allowed the plaintiff to add a claim of spoliation.

### **Court Declines to Order Party to Comply with Rule 45 Subpoena**

*Thomas v. IEM*, 2008 WL 695230 (M.D. La. Mar. 12, 2008). In this discrimination suit, the plaintiff served a Fed.R.Civ.P. 45 subpoena on the defendant (her former employer), seeking production of a complete electronic copy of the e-mail boxes of nine named individuals as they appeared on a specified date. Rather than responding to the subpoena, the defendant served formal objections to the plaintiff who then filed this motion to compel a response to the subpoena. The defendant objected to the use of a Rule 45 subpoena on a party as well as the limited response time and argued that the information sought was irrelevant, confidential, duplicative and unduly burdensome. Agreeing with the defendant, the court denied the plaintiff’s motion as the information sought constituted discovery within the meaning of Fed.R.Civ.P. 26 and 34 and the request was not limited in time or subject matter.

### **Court Affirms Default Judgment Based on Discovery Misconduct**

*Grange Mut. Cas. Co. v. Mack*, 2008 WL 744723 (6th Cir. Mar. 17, 2008). In this suit alleging fraud, the defendant appealed a default judgment and liability award of damages plus attorney’s costs and fees, arguing abuse of judicial discretion. The defendant purposely delayed discovery, ignored court discovery deadlines and orders to compel, instructed employees to ignore court orders and ignored a serious warning from the district judge relating to his continued discovery misconduct. Based on the defendant’s willful bad faith and the resulting prejudice suffered by the plaintiffs, the court affirmed the default judgment, “[B]oth to punish the defendant for his egregious conduct and to deter other litigants who might be tempted to make a mockery of the discovery process.”

### **Court Limits Production Requirements by Scope and Privilege Considerations**

*Bro-Tech Corp. v. Thermax, Inc.*, 2008 WL 724627 (E.D. Pa. Mar. 17, 2008). In this trade secret misappropriation suit, the defendants objected to a magistrate judge’s order requiring disclosure of forensically sound images of data storage devices without any scope or privilege filtering. The plaintiffs sought production without limitation, claiming review of the entire record was necessary to determine defendant’s compliance with an earlier order. Additionally, the plaintiffs asserted the defendants waived privilege upon disclosure of the servers’ contents to a third party. Finding the defendants satisfied an exception to the privilege waiver rule since the content disclosed to a third party was necessary for informed legal advice, the court overruled a portion of the magistrate’s order, and limited the production in scope and privilege.

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### **Court Issues Protocol for Text Message Review and Production**

*Flagg v. City of Detroit*, 2008 WL 787061 (E.D.Mich. Mar. 20, 2008). In this suit, the plaintiff sought production of text messages to support his claim that the defendants' lax investigation prevented the filing of a wrongful death lawsuit. After determining that certain text messages were discoverable, the court set forth a detailed set of parameters for the review and production of the text messages. The defendant was ordered to provide the third party service provider with names and related PIN numbers for the relevant individuals, thereby allowing the service provider to willingly produce the text messages to the court under seal for privilege review. Due to the time consuming nature of this task, the court appointed two magistrate judges to collect and review the text messages and make the initial determination as to discoverability.

### **Court Appoints Third Party to Build, Maintain and Operate a Database of Discovery Documents**

*In re World Trade Center Disaster Site Litig.*, 2008 WL 793578 (S.D.N.Y. Mar. 24, 2008). In this ongoing multi-district litigation, the plaintiffs objected to the court-appointed special master's recommendation that a third party be hired to build, maintain and operate a database of "Core Discovery." The plaintiffs' objection focused on the great expense and claimed lack of necessity associated with creating such a large database. The court, sensitive to the costs of the litigation, approved the recommendation due to the necessity of a common core of reliable information in this important litigation.

### **Court Declines to Issue Sanctions Where Production Complies with Search as Re-**

### **quested by Opposing Party**

*Autotech Technologies, Ltd. v. Automationdirect.com, Inc.*, 2008 WL 783301 (N.D.Ill. Mar. 25, 2008). In this trademark infringement litigation, the defendant moved for sanctions claiming inadequate discovery production due to missing information. Finding the plaintiff complied with the defendant's discovery request, the court declined to issue sanctions. The court further ordered the parties to meet to resolve how the specific information sought by the defendant may be obtained, with the defendant bearing the costs unless able to demonstrate the information should have been produced by the original search.

### **Court Declined to Consider Cost Shifting Analysis Due to Inadequately Detailed Search Record**

*Barker v. Gerould*, 2008 WL 850236 (W.D.N.Y. Mar. 27, 2008). In this employment litigation, the plaintiff initially filed a motion to compel production of e-mail among and between the parties. In response, the defendants produced some e-mail; however, the plaintiff claimed the production was inadequate and renewed its motion to compel. In an effort to ascertain the adequacy of the defendants' search, the court ordered the parties to submit an affidavit describing the procedures undertaken, but the submitted affidavit merely described the additional work required to restore the deleted data from backup tapes. Finding the record pertaining to the defendants' search of the requested e-mail from accessible sources incomplete, the court declined to compel production and instead ordered the defendants to identify individuals with knowledge of the steps taken during collection and allowed time for the plaintiff to depose those individuals.

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### Court Declines to Issue E-Discovery Advisory Opinion

*Texas v. City of Frisco*, 2008 WL 828055 (E.D.Tex. Mar. 27, 2008). In this case, the State of Texas sought a declaratory judgment and protection from a litigation hold request previously sent by the City of Frisco seeking preservation of all electronic data related to a potential environmental litigation. The defendant filed a motion to dismiss, arguing that the plaintiff was seeking an advisory opinion concerning the proper method of preservation without pleading all necessary elements of a viable claim. Agreeing with the defendant and dismissing the case, the court determined the issues were not yet ripe and encouraged both parties to make a good faith effort in preservation and production of documents in the absence of court intervention.

### Court Refuses to Issue Sanctions Where

### Party Fails to Establish Relevance of Destroyed Evidence, but Orders Restoration and Search of Additional Backup Tapes

*Treppel v. Biovail Corp.*, 2008 WL 866594 (S.D.N.Y. April 2, 2008). In this defamation suit involving numerous ongoing discovery conflicts, the plaintiff moved the court to compel production of additional electronic information and for sanctions for failure to preserve evidence. The plaintiff sought restoration and search of all backup tapes from two servers and one employee's laptop, arguing that the defendant's search was insufficient and possibly overlooked relevant data. The defendant argued its recovery and search of the December 2003 and March 2005 backups was sufficient as the events giving rise to the litigation occurred in the spring of 2002 and the complaint was filed in May 2003. For the most part, the court agreed with the defendant that the likelihood of finding additional relevant documents

was exceedingly remote and therefore held that the burden outweighed the likely benefit. However, the court ordered restoration and search of one e-mail server for three specific days as well as two separate backups of another file server and email server.

Thanks to Justin Tully, summer intern, for his help in preparing this issue. You can send him material and suggestions at [Justin.Tully@lvvwd.com](mailto:Justin.Tully@lvvwd.com).

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