

ANNUAL SURVEY OF NEVADA LAW 2000

Compiled and Edited by
The *Nevada Law Journal* Staff
Nevada Law Editor
Gary Ashman

ADMINISTRATIVE LAW

Langon v. Washoe County **993 P.2d 718 (Nev. Feb. 2, 2000)**

Counties may set or adjust the maximum compensation for constables.

In 1996, the Washoe Board of County Commissioners (Washoe) issued an order that set the base salary for constables at \$10,000 and established a fee sharing formula that required constables, once their base salary and net revenues for services reached \$55,000, to forward fifty percent of the net fees collected to the county. The plaintiff constables refused to abide by the new fee-splitting standards. Washoe brought suit to enforce the rules and the constables counterclaimed, arguing that Nev. Rev. Stat. Chapter 258 authorizes the legislature, but not counties, to cap constable compensation or to require constables to share fees.

The Nevada Supreme Court held that a plain language reading of the statute allows county boards to change constable salaries only by increasing the minimum. The court held that this would be an absurd result that the legislature would have specified had that been its intent. The court interpreted Nev. Rev. Stat. 258.040 to allow counties to adjust or fix a constable's maximum compensation, and found that Nev. Rev. Stat. 258.125 permits constables to collect stated fees but does not allow them an absolute right to keep all fees collected.

Karadanis v. Bond **993 P.2d 721 (Nev. Feb. 3, 2000)**

Legislature may act to cure a defective city ordinance without violating the judiciary's interest in the separation of powers if both the act and ordinance are constitutional.

Business owners (Owners) moved for a preliminary injunction to challenge the county's enactment of a sales tax increase to finance a railroad grade separation project. The plaintiffs alleged the Washoe Board of County Commissioners (Washoe) violated Nevada law, which required Washoe to secure written financial commitments covering at least half the cost of the project prior to enacting the tax. The district court granted the city and county's motion for summary judgment, and the Owners appealed.

Washoe had five written funding commitments of money or property sufficient to fulfill the statutory requirements, but the Owners challenged the City of Reno's loan commitment, which was to be repaid from the creation of a

special assessment district. The Owners alleged that the commitment was invalid because the district was created illegally.

The Nevada Supreme Court affirmed the district court, holding that a subsequent act of the Nevada Legislature cured the defect in the creation of the special assessment district. The Owners argued that the curative statute was an unconstitutional violation of the separation of powers because it retrospectively abrogated judicial pronouncements. The court held that the legislature was within its rights to amend a statute to cure a defective ordinance, so long as both the ordinance and statute were constitutional.

Salem v. Rio Casino & Hotel Suites, Inc.
2000 U.S. LEXIS 3288 (9th Cir. Mar. 1, 2000)

Nevada Gaming Control Board rulings are accorded the same preclusive effect in federal court as they are given in state court.

Salem filed a disputed jackpot claim against the Rio Hotel and Casino with the Nevada Gaming Control Board (GCB), which ruled against him. The plaintiff did not pursue an appeal in Nevada state court. Instead, he filed a Racketeer Influenced and Corrupt Organizations (RICO) claim in federal district court, which was dismissed.

The United States Ninth Circuit Court of Appeals held that Salem was precluded from re-litigating the issue in federal court because it was the same issue decided on the merits by the GCB between the same parties. Since the GCB's ruling has the same preclusive effect in federal court as a state court judgment would have, the Ninth Circuit affirmed the district court's dismissal of the plaintiff's claim.

Kindred v. Second Judicial Dist. Court
996 P.2d 903 (Nev. Apr. 5, 2000)

Title VII and FMLA claims are not exempt from arbitration clauses contained in an employment agreement, as Congress has never expressly precluded either from arbitration proceedings.

Upon being hired as an investment banker, Kindred was required to sign two separate employment agreements, each containing an arbitration clause. Three years later, she filed a complaint in Washoe County District Court alleging Title VII sexual harassment and/or discrimination and breach of the Family Medical Leave Act (FMLA). When she refused to arbitrate her claims, the district court ruled that all claims were subject to arbitration. Kindred subsequently filed a writ of mandamus or prohibition challenging the court's mandatory arbitration order.

The Nevada Supreme Court denied Kindred's request, holding that Title VII expressly approves utilizing alternative dispute resolutions, including arbitration, to resolve claims. Further, of the eleven federal courts of appeal that have addressed the issue, ten have affirmed that Title VII claims are subject to arbitration. The eleventh – the Ninth Circuit – held that legislative history showed congressional intent to preclude compulsory arbitration of such claims in *Duffield v. Robertson Stephens Co.*, 144 F.3d 1182 (9th Cir. 1998). The court followed the majority of federal circuits, holding that Congress did not expressly preclude the arbitration of Title VII claims. The court also held that

FMLA contains no specific reference or suggestion that claims may not be arbitrated. Since Congress could have precluded arbitration of FMLA claims but chose not to, FMLA claims are also proper for arbitration proceedings.

Lee v. Nevada

997 P.2d 138 (Nev. Apr. 6, 2000)

A road dedicated to the "public authority" is one over which state or local authority has jurisdiction to enact traffic ordinances or regulations.

Lee killed a man and injured two others while driving his tractor-trailer along a mining access road and was charged with reckless driving. Lee moved to dismiss on the grounds that the road along which he was driving – a non-exclusive right of way granted to a mining company by the Bureau of Land Management – is not a public highway. The district court denied the motion and he appealed.

The Nevada Supreme Court determined that the case turned on the meaning of the language in Nev. Rev. Stat. 484.065, which defines public highways as roads open to public use where they are "dedicated to the public authority." The court held that a road dedicated to the public authority is one over which the state or local authority has the jurisdiction to enact traffic ordinances or regulations, which was not the case here. The court further stated that broadening the definition of a public highway is the domain of the legislature and not the courts.

Hooks v. Clark County School Dist.

228 F.3d 1036 (9th Cir. Apr. 12, 2000)

Rules allowing local school districts to set the definition of "qualifying private school" does not violate the Individuals with Disabilities in Education Act.

Appellants, the Hooks, requested and received an exemption from the compulsory school attendance requirement and were allowed to educate their child at home. In 1996, Clark County School District (CCSD) denied their son speech therapy services because the CCSD's policy did not provide access to ancillary services for non-enrolled students. The CCSD suggested the Hooks request an exemption from the Board of Trustees or enroll their son in the school district in order to gain access to the services.

The Hooks instead filed a complaint with the Nevada Department of Education (NDOE). The NDOE rejected the complaint based on a policy letter issued by the United States Office of Special Education Programs (OSEP), which stated that each state has the discretion to determine if home education qualified as a private school or facility. Under Nev. Rev. Stat. 394.103, home schooling does not qualify.

In 1998, the Nevada legislature amended state law to require each school district to provide special education and ancillary services to children exempted from compulsory attendance by reason of home education. Nev. Rev. Stat. 392.070(2). As a result, the CCSD conceded it was now required to provide these services prospectively, but the issue of payment for the previously denied service remained.

The Individuals with Disabilities in Education Act (IDEA) requires that special services be offered to three categories of students: (1) students in public schools; (2) children placed in private schools by a public agency; and (3) children placed unilaterally in private schools by their parents. The Hooks argued that their child fell into the third category. The CCSD argued that home schooling did not qualify as a private facility. Nothing in the IDEA, however, provides for services to children not enrolled in a school. Because this definition was left to the state to define, the court reviewed various state statutes.

The Nevada Supreme Court held that the Nev. Rev. Stat. 394.103 definition of private school does not include a home school. Based on this statute, the court held that the Hooks' son did not qualify as a private school attendee and was not eligible for ancillary services from the CCSD.

In the second prong of its holding, the court noted that the United States Supreme Court has previously taken guidance from the OSEP's policy letters in interpreting the IDEA. As such, the Ninth Circuit deferred to the policy letter, leaving the definition of a private school to the discretion of the individual state.

The third prong of the Ninth Circuit's analysis focused on Congress' ratification of OSEP's view that the state must define "private schools" based on the plain language in the amended statute. When Congress re-enacts a statute adopting the administrative agency's interpretation, Congress is adopting that interpretation. The court held there was nothing in the IDEA mandating schools to provide services to children not enrolled in a school, as defined by that state.

The court also held that the CCSD's actions did not violate 42 U.S.C. § 1983. Home-educated children are not a suspect class; therefore, the analysis turns on whether or not the regulation infringes on a fundamental right or lacks a rational basis. The court held that, since the Hooks had not been prohibited from educating their son at home, the CCSD's policy did not violate the Due Process Clause. The court further held that the CCSD's policy requiring enrollment and attendance in a qualified school in order to receive ancillary services constituted a reasonable government regulation that does not contravene the requirements of the Constitution.

The Ninth Circuit noted that education is a traditional area of state sovereignty, and that IDEA's delegation to the state of the power to define "school" was in keeping with that tradition. The court also held that CCSD's policy against providing ancillary services to home schooled children was rationally based.

Estate of Thomas v. Costello
998 P.2d 560 (Nev. May 4, 2000)

Administrative claims on an estate have higher priority than debts and charges listed in former Nev. Rev. Stat. 150.220, because such interpretation is consistent with other Nevada statutes and recent legislative amendments.

A judgment lien encumbered the estate of the deceased George Evan Thomas. The home was the principal asset of the estate and the decedent died testate. The executrix of the estate, with the approval of the district court, gave payment of fees to the estate's attorney and the executrix priority over payment

of the deceased's debts. The question before this court was whether or not Nev. Rev. Stat. 147.220, which was later amended, allowed such distribution of estate assets.

Nev. Rev. Stat. 147.220 allowed for the following priority in payment of debts and charges of the estate: (1) funeral expenses; (2) expenses of the last sickness; (3) family allowance; (4) debts having preference by laws of the United States; (5) money owed to the Nevada Department of Human Resources for medical assistance benefits; (6) wages due; (7) judgments rendered against the deceased in his lifetime and mortgages; and (8) all other demands against the estate. The appellants contended that, because the statute was silent as to the issue of payment of administrative claims, these claims fell under the category of "all other demands against the estate" and, therefore, were lower in priority than judgments rendered against the deceased in his lifetime.

The Nevada Supreme Court held that, in Nevada, words in a statute should be given their plain meaning unless doing so would violate the spirit of the act. The court also stated that recent amendments to statutes should be treated as persuasive evidence of the legislative intent behind the original statute. It concluded that, although statutory change does not allow for retrospective application, reading former Nev. Rev. Stat. 150.220 to give higher priority to estate administrative expenses was consistent with other Nevada statutes. The court went on to hold that if the appellant's interpretation of the statute were adopted, it would render other Nevada statutes nugatory, since those statutes specifically provided for an estate's payment of the administrative expenses at issue in this case.

The court affirmed the district court's holding that because administrative expenses and attorney fees were expressly required by statute to be paid from the estate's assets, administrative claims have a higher priority than the debts and charges of the estate listed in former Nev. Rev. Stat. 150.220.

Nunez v. City of North Las Vegas
1 P.3d 959 (Nev. June 9, 2000)

Municipal courts are separate from state courts in determining §1983 complaints and are, similar to a municipality, susceptible to §1983 suits.

North Las Vegas Municipal Judge Gary Davis terminated Georgia Nunez from her position as administrator of the City of North Las Vegas Municipal Court. Nunez brought suit in federal court against both Judge Davis and the City of North Las Vegas, claiming retaliatory discharge in violation of the First Amendment and 42 U.S.C. § 1983 and gender and racial discrimination under Title VII (42 U.S.C. § 2000 *et seq.*). Nunez also filed pendent state claims for wrongful discharge in violation of state public policy, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and negligent infliction of emotional distress.

These claims arose out of allegations by Nunez that, for a considerable period of time, Judge Davis harassed and made illegal demands of her, and of other female and minority employees. Ultimately, Judge Davis terminated Nunez's position in what Nunez claims was retaliation for her refusal to block female employees who had not assisted Judge Davis in his re-election campaign from attending a seminar. Nunez also claimed that the termination was

retaliation for her failure to obtain a raise for Judge Davis, her failure to replace ceiling tiles in Judge Davis' chambers, and her refusal to require clerks in the Marshall's office to work overtime.

The United States District Court dismissed all claims against the City of North Las Vegas and several federal claims against Judge Davis. The court also dismissed Nunez's civil rights claims against Judge Davis because, as a member of the Judge's personal staff, she fell within the personal staff exception to Title VII claims against an elected public official.

Following the conclusion of this federal action, Nunez filed suit in state district court, with claims that nearly mirrored her federal claims. Here again, the court dismissed Nunez's claims. On appeal, Nunez argued that the state abused its discretion in dismissing her complaint.

The Nevada Supreme Court found for Nunez and remanded for reinstatement of the complaint. The court held that the municipal courts of Nevada are separate branches of their respective municipal governments and not an extension of the state courts for purposes of §1983 suits. Consequently, they are susceptible to §1983 suits in the same way that municipalities themselves are. The decision overrules the court's previous holding in *Pittman v. Lower Court Counseling*, 871 P.2d 953 (Nev. 1994).

Roger Falcke & Herbig Properties Ltd. v. County of Douglas
3 P.3d 661 (Nev. July 14, 2000)

Where a local municipal ordinance requiring a super-majority vote is in conflict with state statute, the requirement is invalid and a simple-majority vote suffices.

A property owner applied for approval of a master plan amendment and a zoning change to real property. The Douglas County Planning Commission (Commission) recommended approval with a majority vote of five-to-two. The Douglas County Board of Commissioners (Board) voted three-to-two to approve the amendment. However, the Douglas County Development Code (DCDC) section 20.608.070 required a four-to-one vote to pass. Therefore, while it received a simple majority, the petition was denied. After a new hearing resulted in the same three-to-two split, the property owner filed a petition for writ of mandamus to the Nevada Supreme Court challenging the Board's decision.

Various portions of the Nevada Revised Statutes specify the required majority in certain governmental proceedings. Both Nev. Rev. Stat. 278.210(2) and the municipal code provide a two-thirds vote requirement for the Commission. DCDC section 20.608.070, however, required a super-majority of four-to-one. The decision and vote were governed by Nev. Rev. Stat. 278.070, which provides no specific majority requirement. Therefore, the Board erred in requiring a super-majority where, as the court determined, by the very absence of a majority requirement, the legislature intended a simple majority to approve the master plan amendment. The court issued a writ requiring the Board to approve the master plan amendment in accordance with Chapter 278 of the Nevada Revised Statutes as a simple majority was reached during both hearings.

DR Partners v. Board of County Commissioners of Clark County
6 P.3d 465 (Nev. Aug. 18, 2000)

Purely factual material that is severable from the opinion or advice in a document of public record is generally not protected by a deliberative privilege, including the private phone numbers of individuals called by or calling public officials on the officials' publicly-owned cellular phones.

The Las Vegas Review Journal (LVRJ) requested cellular phone records from the defendant for a study on governmental waste. The defendant produced edited records, excluding the last four digits of each phone number listed. Plaintiff sued for a writ of mandamus in state court to compel full disclosure under the Nevada Public Records Act, Nev. Rev. Stat. 239.010, and defendant argued a violation of privileges and privacy rights. The district court denied plaintiff's motion, and plaintiff appealed.

The Nevada Supreme Court held that a public official or agency bears the burden of establishing the existence of privilege based upon confidentiality, and that privileges should be interpreted and applied narrowly, balancing the citizen's fundamental right to access the public record with the incidental right of the agency to be free from unreasonable interference. To ascertain whether documents are protected because they relate to a pre-decisional matter, the agency must pinpoint a decision or policy to which the documents contributed. The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process. Following a showing that the documents play a role in an agency decision-making process, the documents must be shown to be "deliberative" in order to be protected under Exemption 5 of the Freedom of Information Act (FOIA). Purely factual material that is severable from the opinion or advice in a document is generally not protected and must be disclosed in a FOIA suit.

The court repudiated the "California" approach, holding that a particularized evidentiary showing is necessary to establish application of the deliberative process and that the names of persons with whom government officials have consulted are not protected from disclosure. Identification of persons, retained or otherwise, who participate in policy formation does not implicate the disclosure of factual information intertwined with the decision or policy-making processes of government. Records kept with regard to the use of cellular phones by county officials do not reveal anything that would interfere with the deliberative process of government. In addition, a deliberative process privilege is conditional and qualified; once the court determines that a document is privileged, it must still determine whether the document should be withheld. Once the agency demonstrates that documents fit within the privilege, the burden shifts to the party seeking disclosure. It must demonstrate that its need for the information outweighs the regulatory interest in preventing disclosure.

As for the privacy rights of those whose numbers would be released in a full record, the Nevada Supreme Court held that generally, there is no expectation of privacy in cellular phone billings. First, public officials who make calls to unlisted numbers or provide their cellular numbers to members of the public know that the billings are public record; thus, the act of placing cellular phone

calls to private citizens places the number called within the public domain. Second, members of the public who knowingly place calls to government-issued cellular phones knowingly place their numbers in the public domain. Third, where exigent circumstances are shown to justify non-disclosure, the trial court must apply the Bradshaw test, weighing the public's need to know with the concerns of the telephone number's owner.

LFC Marketing Group, Inc. v. Loomis
8 P.3d 841 (Nev. Sept. 19, 2000)

Courts may secure a corporation's property to satisfy a corporate officer's debt where the officer is the ultimate authority for the corporation's dealings.

Loomis sought to recover a three-year old judgment from William, LFC Marketing's (LFC) vice president, with a writ of attachment on commissions payable to the LFC. LFC filed a third-party claim, asserting sole ownership of the attached monies. The district court held that LFC was William's alter ego, granted the writ of attachment, and ordered that the funds be paid to Loomis. LFC appealed.

LFC argued that the district court erred by allowing the respondents to utilize the alter ego doctrine and pierce the corporate veil in reverse, in an attempt to satisfy their judgment against the corporation's vice president. LFC claimed that the alter ego doctrine could not apply because the vice president did not own any shares in the company. In addition, LFC argued that the writ of attachment post-judgment was procedurally improper.

The Nevada Supreme Court rejected these arguments and held that the vice president was the ultimate authority for all of LFC's dealings, thereby constituting a "unity of interest and ownership." The court further held that the district court properly applied the alter ego doctrine in reverse in order to reach LFC's assets and satisfy the vice president's debt. The court also held that the plain language of Nev. Rev. Stat. 31.010 allows attachment procedures post-judgment.

United States v. Nevada
123 F. Supp. 2d 1209 (D. Nev. Sept. 20, 2000)

Federal government's appeal of the State Engineer's order denying applications for water appropriation should be heard in state court.

In 1997, the Department of Energy (DOE) applied to the state of Nevada for appropriations of water to be used in connection with the development of a high-level nuclear waste storage facility at Yucca Mountain. The permits were designed to replace permits that were due to expire at the end of 2002. The State Engineer of Nevada held hearings and turned down the permits on the grounds that they were not in Nevada's best economic interest and that Nev. Rev. Stat. 533.370(3) prohibited him from approving such permits.

DOE argued that the state statute on which the State Engineer relied is unconstitutional and that jurisdiction should lie with a federal court. The state moved to dismiss arguing that the action was an appeal of a state administrative order regarding water law, an action involving state law that should be decided by a state court.

The court held that, although the federal court could exercise jurisdiction in an action commenced by the federal government, historically, federal courts deferred jurisdiction to state courts in matters of water law. Further, by applying for water appropriations through the state agency and participating in hearings before the State Engineer, plaintiff acknowledged this deference. Thus, the federal district court abstained, granting the motions to dismiss so that the matters could be adjudicated in the state courts.

Reed v. United States Dep't of the Interior
231 F.3d 501 (9th Cir. Nov. 2, 2000)

BLM is afforded broad operational discretion under the Federal Tort Claim Act's discretionary function exemption as a protection in negligence suits brought against BLM under the act.

Appellant Daniel Reed was severely injured when a car ran over his tent while he was attending the "Burning Man Festival," an event held on Bureau of Land Management (BLM) land in Nevada. Reed sued the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2679-2680 (FTCA), but the district court ruled that the government was shielded by the discretionary function exception, which limits the government's tort liability.

Reed appealed. He argued that BLM's failure to warn event goers and to monitor the event was not discretionary and could not render the BLM immune.

The Ninth Circuit held that BLM's actions were discretionary and that none of these actions were negligent. The court noted that Reed's arguments demonstrate the need for BLM discretion, and that Reed simply disagreed with how BLM exercised that discretion. The court determined that the discretionary exception to the FTCA therefore applied, and affirmed the district court's grant of summary judgment in favor of the United States.

BUSINESS LAW

Phillips v. Colonial Penn Ins. Co.
2000 U.S. App. LEXIS 3212 (9th Cir. Feb. 17, 2000)

An unreasonable delay in forwarding paperwork or failure to provide notice of pending suit with another driver results in the forfeiture of an underinsured motorist claim.

Appellant, Phillips, filed an underinsured motorist claim with Colonial Penn, but failed to provide paperwork, including notice of his suit against the other driver until nineteen months after the appellant filed the claim. The district court granted summary judgment to Colonial Penn.

The Ninth Circuit affirmed because the appellant breached the notice provision in his motor vehicle insurance policy. In addition, the court rejected Phillips' arguments that the policy required "condition precedent" language for forfeiture, that the insurance company acted in bad faith, and that the forfeiture of an underinsured motorist claim under these circumstances offended Nevada's public policy. The court held that all of these claims were undermined by Phillips' failure to comply with the express timely filing requirements of his policy.

Chen v. Nevada State Gaming Control Bd.**994 P.2d 1151 (Nev. Mar. 9, 2000)**

A card counter did not commit fraud because the casino did not detrimentally rely on his misrepresentation and the misrepresentation was not the proximate cause for the casino's damages.

Chen exchanged a total of \$44,000 in cash for casino chips at the Monte Carlo Resort & Casino. Chen gave a fictitious Burma passport. After amassing \$84,400, a pit boss recognized Chen as a "card counter" (a player who achieves an advantage over the house by tracking previously played cards) and discovered that Chen's passport was bogus. The casino notified the Gaming Control Board (GCB) and successfully petitioned GCB to deny Chen his winnings. The casino returned only the \$44,000 Chen had exchanged for chips.

Chen appealed, arguing that his actions did not constitute a fraud on the casino, as the casino did not allow him to play based on his presentation of the false passport.

The Nevada Supreme Court held for Chen on two grounds. First, the casino did not detrimentally rely on Chen's misrepresentation to allow him to play blackjack, since the misrepresentation was not made until after Chen played. Second, Chen's skill in playing blackjack, rather than his misrepresentation, was the proximate cause of his winnings. The court awarded Chen his \$40,400 in blackjack winnings.

In dissent, Justice Maupin argued the misrepresentation was fraudulent, because it allowed Chen access to high stakes play despite legitimate attempts by the casino to prevent this from occurring.

Comm'r of Ins. v. State Farm Mut.**995 P.2d 482 (Nev. Mar. 9, 2000)**

Nevada Administrative Code section that defines chargeable accident as one in which the insured is fifty percent or more at fault is void because it conflicts with Nev. Rev. Stat. 687B.385.

State Farm Mutual Insurance Company (State Farm) had company policies that defined a chargeable accident as one where the insured was fifty-percent or more at fault. Subsequent to State Farm's enactment of this policy, the Division of Insurance (Division) promulgated Nev. Admin. Code ch. 690B, § 230(2) that defines a chargeable accident as one where the insured is more than fifty-percent at fault. An insurance company can cancel, refuse to renew, or increase the rates of an insured that is involved in a "chargeable accident." The Division enacted this regulation to enforce Nev. Rev. Stat. 687B.385, which states that an insurance company cannot cancel, refuse to renew, or increase the rates of an insured for claims where the insured was "not at fault." The legislature did not define the phrase "not at fault" in the statute.

State Farm filed an action for declaratory relief contending that the definition of a chargeable accident in the regulation was in conflict with Nev. Rev. Stat. 687B.385. The district court held the regulation and the statute were in conflict, entered a permanent injunction against enforcement of the regulation, and the Division appealed.

The Nevada Supreme Court upheld the injunction, citing its holding in *State Farm Mut. v. Comm'r of Ins.*, 958 P.2d 733 (Nev. 1998), in which the

court determined that Nev. Rev. Stat. 687B.385 should be read “in pari material” with Nev. Rev. Stat. 41.141, the comparative negligence statute. Under Nev. Rev. Stat. 41.141 an insurer is required to pay a judgment when the insured is fifty-percent or more at fault. Therefore, “not at fault” is interpreted by the court to be when the insured is determined to be less than fifty-percent at fault, and “at fault” is when the insured is fifty-percent or more at fault.

Moreland v. Morsani

2000 U.S. App. LEXIS 7226 (9th Cir. Apr. 17, 2000)

An option agreement with the right to first refusal to purchase a car dealership was held unambiguous and assignable.

Plaintiff was assigned a right of first refusal on an option agreement to purchase a car dealership from the owner. The term of the right included no premature expiration upon termination or any requirement to maintain an equity interest in the dealership. Assignor ceased to be an employee and shareholder in the dealership and later executed a redemption agreement to purchase and assign the right to Moreland. Morisani refused to allow Moreland to match another party’s price to purchase.

The district court found the option agreement to be ambiguous, and then relied on parol evidence to determine that the right of first refusal expired when assignor’s employment was terminated. Moreland could not enforce the right of first refusal because the assignment was invalid, and assignor waived his rights under the option agreement when he entered into the redemption agreement, accepted the termination of his employment, and sold back his share of stock pursuant to the terms of the sale agreement and his employment agreement.

The Ninth Circuit held that the option agreement was not ambiguous and assignor’s right was not prohibited in the contract. The court also held that assignor did not waive his rights since the redemption agreement was consistent with the option agreement and his execution of the redemption agreement did not manifest any intent to lead defendant in believing that the right of first refusal had been relinquished, thus assignor was not equitably estopped from asserting the right of first refusal.

Sengel v. IGT

2 P.3d 258 (Nev. June 14, 2000)

Nevada Gaming Control Board decisions will be examined under the “any” evidence standard and if not arbitrary, capricious, or otherwise contrary to law, will be treated with great deference by Nevada courts.

Appellant, Sengel, was playing a slot machine and a malfunction stopped the reels in an uneven line across the pay line. A Nevada Gaming Control Board (GCB) agent sent to the scene concluded the win was not valid. The GCB affirmed the agent’s decision. Appellant petitioned the district court and the district court also upheld the GCB’s decision.

Appellant argued the decision was not supported by adequate evidence and that the decision was arbitrary, capricious, and contrary to law. Appellant claimed the slot machine did not malfunction. However, the Nevada Supreme Court found evidence supporting the malfunction occurrence. Moreover, the

court clarified that in cases with less than substantial evidence, the “any” evidence standard is to be applied.

The court further held the decision was not arbitrary, capricious, or contrary to law. It ruled the public has constructive knowledge of the state law requiring all gaming devices to use a random selection process to determine each game outcome. Further, the court found the GCB’s decision, that the even alignment of the game’s symbols did not constitute a jackpot, was not an arbitrary decision. Finally, the “Malfunction voids all pays and plays” disclosure on the face of the machine was adequate to include the type of malfunction that occurred in this case.

The court refused to consider public policy arguments made by both parties, noting that the Nevada Legislature empowered the GCB to make policy decision based upon Nev. Rev. Stat. 463.3666

Vitale v. Jefferson Ins.

5 P.3d 1054 (Nev. Aug. 18, 2000)

The designation of a named insured in a general liability policy is not ambiguous if the named insured can be determined by implication through other provisions in the policy.

In 1992, while conducting business for a day care center he owned with his wife, Mr. Moor caused an automobile accident, in which the motorist and two passengers were injured. The Moors reached a settlement agreement in the amount of \$717,500, and their automobile insurer paid the policy limit of \$100,000 to the injured parties. The Moors also agreed to assign all of their causes of action against Jefferson, the day care business insurer, to the injured appellants in exchange for their promise not to execute the judgment against the Moors and their business, thereby shielding themselves from direct liability and creating a right to sue for the plaintiffs.

Jefferson insured Mrs. Moor and the business under a general liability policy in the amount of \$300,000 but denied coverage for the accident, due to an automobile exclusion provision, in a letter sent to the Moors in 1993. The appellants filed a complaint against Jefferson and later sought partial summary judgment, alleging the exclusion was inapplicable because Mr. Moor was not insured under the policy, due to Jefferson’s failure to designate the business as a sole proprietorship or to list Mrs. Moor on the declaration sheet. They argued that this failure rendered Mr. Moor a non-insured, because he was not the spouse of an insured specifically designated as an individual or sole proprietorship.

Jefferson filed a counterclaim for summary judgment, arguing that Mrs. Moor was a declared “person insured” under the policy, and she owned the automobile driven by Mr. Moor. Furthermore, Jefferson argued that Mr. Moor, as a spouse, was also insured, despite the fact that neither Mrs. Moor, nor the business, were designated as an individual or sole proprietorship respectively. The district court entered a judgment for Jefferson, and the Moors appealed, arguing that Mr. Moor was not a “person insured,” or alternatively, that Jefferson waived its right to assert exclusion.

The Nevada Supreme Court construed the policy in plain language and construed any ambiguity in favor of the insured. Thus, the court concluded that

the exclusion clearly limited the policy. Since the plain language in another section of the policy clearly encompassed Mr. Moor as an insured, Jefferson's failure to check the designation box on the declaration sheet was not determinative of coverage. The court noted the absurdity of the appellants' reasoning which would result in no one being covered under the policy.

The court also held waiver would apply only if the insurer engaged in misconduct or behaved in such a way as to induce the insured to rely on an insurer's misrepresentation. Because Jefferson promptly notified the Moors that it was denying coverage based upon a standard, unambiguous exclusion common to general liability policies, and because the application of the exclusion could be readily determined from a layman's reading of the policy, the Moors were clearly on notice that Jefferson was relying on the exclusion and did not waive its right to do so.

In re Estate of Friedman
6 P.3d 473 (Nev. Aug. 21, 2000)

The signature of a notary public may constitute the signature of an attesting witness to a will, if the notary signed the self-proving affidavit in the presence of the testator.

Margaret Friedman executed her last will and testament in the presence of a witness and a notary public. The notary was present when Friedman signed the will and declared it to be her last will and testament. Thereafter, the notary signed a sworn affidavit during probate stating that the testator appeared to be of full age and sound mind at the time she executed the will.

The district court denied admission of the will to probate for failure to have the will attested to by at least two competent witnesses. The court held that the notary's signature was made as a notary and, as such, the notary did not qualify as a witness. The executor appealed.

The Nevada Supreme Court held that an affidavit signed by a notary in the presence of the testator constitutes a signature of a witness attesting the will. The court remanded the case so the district court could determine whether the notary signed the affidavit in the testator's presence.

Rubin v. State Farm Mut.
222 F.3d 750 (9th Cir. Aug. 21, 2000)

Question of whether insurance policy that excludes coverage for expenses payable by workman's compensation applies to expenses recovered from a third-party tortfeasor certified to the Nevada Supreme Court.

Rubin was injured in an automobile accident, in the course of her employment. Nevada's State Industrial Insurance System (SIIS) paid her medical expenses, lost wages, and other costs, but Rubin was instructed to reimburse SIIS if she recovered from the individual tortfeasors. She settled the matter and submitted a claim with State Farm under her automobile insurance. State Farm denied the claim because the company excludes coverage when worker's compensation is available. The district court entered summary judgment in favor of State Farm.

On appeal, Rubin argued that even if the exclusion existed in her policy, such exclusion violated Nevada public policy; when a third-party is involved,

worker's compensation payments are only advancements of expenses to be repaid. She also claimed that enforcing such provisions would deny full compensation.

Rubin's appeal questioned whether State Farm could exclude coverage in auto accidents for medical expenses to avoid double recovery when worker's compensation paid for the expenses, but a third-party re-paid the costs. Rubin also claimed that allowing such an exclusionary clause to apply to those expenses would violate Nevada public policy. The Ninth Circuit declared these issues to be matters of first impression in Nevada and certified the questions to the Nevada Supreme Court for consideration.

Nguyen v. Nevada

14 P.3d 515 (Nev. Dec. 15, 2000)

Gaming markers are the equivalent of checks for purposes of the Nevada "bad check" statute.

Nguyen obtained "markers" (written instruments that allow for credit play in a casino) from three Las Vegas casinos based on an existing bank account with a Texas bank. Each of the markers was converted to casino chips and/or cash. Nguyen left the markers outstanding and the casino submitted the markers to the bank for collection. The bank returned all the markers with the notation "Account Closed."

Nguyen contended that the markers were lines of credit, which the casinos agreed to hold for future disposition, not "checks or drafts" (the language used in Nevada's bad check statute, Nev. Rev. Stat. 205.130(1)), payable upon presentation.

The Nevada Supreme Court disagreed, holding that there was no evidence that the parties mutually understood the markers to be lines of credit since the face of the document demonstrated that they were payable on demand. In addition, the court held that the statute applies to markers since the instruments are drawn upon a bank, payable on demand, and signed by the payor (Nguyen), regardless of the agreed disposition date.

Nguyen also contended that his conduct lacked the criminal intent required by the statute. The court disagreed, citing Nguyen's closed bank account and failure to pay the full amount of the markers within the statutory period.

Salas v. Allstate Rent-A-Car

14 P.3d 511 (Nev. Dec. 15, 2000)

Short-term vehicle lessors may be required to pay damages to persons injured by lessees of its motor vehicles when a lessee's personal insurance has already paid the Nevada minimum.

Appellants, a husband and wife, along with another couple, were injured when a rental car owned by Allstate and leased by Stephen Romeo rear-ended their vehicle. Romeo, who was covered by his own vehicle insurance, declined to purchase additional insurance from Allstate. Following the accident, Romeo's insurance paid out the policy limit of \$30,000, the Nevada minimum, divided among the four injured persons. Pedro Salas received \$6,000 for his injuries, while Mrs. Salas received \$11,000 for her injuries. After settling with

Romeo's insurance company, the Salases filed suit against Allstate alleging that the injuries they sustained were greater than \$30,000.

The district court granted summary judgment for Allstate, stating that the legislature did not intend for lessors to have to pay in accidents where the damages allegedly exceed the limits provided by the driver's insurance company.

The Nevada Supreme Court reversed, holding that the legislature enacted a scheme that contemplates dual coverage. Nev. Rev. Stat. 485.185 and 485.186 require that every vehicle owner provide insurance in the minimum amounts set forth therein, and that a lessee may provide an "operators policy" which insures the driver while operating the motor vehicle in the same minimum amounts. The court concluded that these two statutes, in light of Nev. Rev. Stat. 482.305 (1), which creates a limited safe harbor protecting short-term lessors from being held jointly and severally liable for damages caused by a negligent lessee, show that the legislature intended both policies be required to pay up to the statutory minimums. The court also held that there is a general question of material fact regarding the actual damages sustained by the Salases.

CIVIL PROCEDURE

Baby Tam & Co., Inc. v. City of Las Vegas **199 F.3d 1111 (9th Cir. Jan. 14, 2000)**

Licensing ordinance for adult bookstores overturned for failure to provide for timely city action.

Baby Tam applied for a business license to operate an adult bookstore. When the city denied the application, the plaintiff sought a permanent injunction to prevent the city from enforcing the licensing ordinance as an unconstitutional prior restraint on speech. In a previous case, *Baby Tam v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998), the Ninth Circuit agreed with Baby Tam on narrow grounds and remanded to the district court with instructions to enter the injunction. Though the city cured the problems identified by the Ninth Circuit, the court held for Baby Tam again, concluding that their previous ruling had identified only some of the problems with the ordinance, and that others existed.

The court cited *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), in which the U.S. Supreme Court invalidated a Dallas ordinance allowing the city to withhold licensing until after the completion of health and safety inspections, including those with no set time limits. The court followed *FW/PBS* in holding that an ordinance that sets no limited time period in which the licensor must make a decision risked an indefinite suppression of permissible speech.

Judge Thompson dissented, arguing that, unlike the Dallas ordinance, the Las Vegas ordinance mandated a thirty day period in which the city had to act upon completion of all safety and health inspections.

Morrison v. Beach City L.L.C. **991 P.2d 982 (Nev. Jan. 26, 2000)**

The legal certainty test is the proper test for determining the jurisdictional amount in controversy for subject matter jurisdiction, and an offer in compro-

mise cannot be used as evidence of a failure to satisfy the jurisdictional amount.

Morrison filed a complaint in district court, alleging that he received injuries while a patron of the nightclub, The Beach. Morrison alleged general and specific damages in excess of \$10,000.00. After a pre-arbitration conference, Morrison's attorney sent a letter to The Beach's attorney seeking to settle the case for \$2,000. In the letter, Morrison's attorney expressed his belief that \$2,000 reflected the amount that his client would recover were the matter to proceed to arbitration.

Subsequently, The Beach filed a motion to dismiss for lack of subject matter jurisdiction, alleging that based upon the offer to settle, the case did not meet the jurisdictional damage requirement for the district court. The court dismissed the complaint, without prejudice, for lack of subject matter jurisdiction. Morrison appealed, asserting that the court erred in granting the motion to dismiss based upon the offer to compromise.

To resolve this issue, the Nevada Supreme Court adopted the federal court "legal certainty test" for determining the jurisdictional amount in controversy in Nevada district courts. Under the test, it must appear to a legal certainty that the claim is worth less than the jurisdictional amount in order to be dismissed based on lack of subject matter jurisdiction. Applying the test, the court declared the letter from Morrison's attorney as nothing more than an offer in compromise. An offer in compromise cannot be used as evidence of a failure to satisfy the jurisdictional amount. Accordingly, the court remanded the case to allow the district court to determine if the potential damages fell below the jurisdictional threshold, disregarding any information relating to settlement negotiations.

Diaz v. Eighth Judicial Dist. Court
993 P.2d 50 (Nev. Jan. 27, 2000)

Nevada's liberal news shield statute provides journalists an absolute privilege from disclosure of sources or information in any proceeding.

Prior to being involved in a fatal motor vehicle incident, the driver of one of the vehicles had earlier that day been escorted home by police when he was found on the interstate, outside of his vehicle. Discovery regarding officers transporting the driver to his home revealed they believed him to be intoxicated, but were unable to charge him with drunk driving, as he did not have the keys to the vehicle and there were no witnesses to place him behind the wheel. Petitioners, relatives of victims of the collision, deposed a news reporter that had covered the story. The reporter refused to answer pertinent questions under the Nevada news shield statute, Nev. Rev. Stat. 49.275. Consequently, a motion to compel was filed by the petitioners.

A discovery commissioner denied the motion to compel under Nevada's news shield statute and the First Amendment. The district court also denied the petitioners motion to compel and a petition for a writ of mandamus or prohibition followed.

Previously, the Nevada Supreme Court held the news shield statute was only applicable to confidential information and could be waived by voluntary disclosure. The *Diaz* court, however, held that Nevada's waiver statute does

not apply with respect to the news shield statute. Moreover, the statute is not limited to confidential sources, but rather is all-inclusive, covering any source. Additionally, it applies to both published and unpublished information and includes the information obtained itself, as well as the source of the information.

Campbell v. Maestro
996 P.2d 412 (Nev. Mar. 24, 2000)

An insurance company's perpetuation of litigation and refusal to pay plaintiff's damages constitutes bad faith in arbitration proceedings when the insured has previously admitted liability for the accident.

Robert Campbell was sued for negligence as a result of a motor vehicle accident. Campbell was represented by counsel retained by his insurance company, Nevada General Insurance (NGI). At Campbell's deposition, he admitted liability for the accident, yet his insurance company denied liability for a year and a half after the accident and refused to pay for the plaintiff's property damage. The arbitrator awarded medical expenses and other damages to the plaintiffs and found that NGI arbitrated in bad faith. Campbell filed a request for trial de novo and a demand for a jury trial. The district court determined that Campbell, through his insurer, failed to arbitrate in good faith and granted plaintiff's motion to strike. Campbell appealed.

The Nevada Supreme Court held that the district court appropriately considered NGI's litigation conduct for purposes of determining good faith participation in the arbitration process. The court also held that the district court did not abuse its discretion in finding that Campbell's request for trial de novo on all issues, including liability, was evidence of bad faith. However, the court concluded that because Campbell had a valid request for a re-determination of damages, the district court's severe sanction of striking his request for trial de novo was unwarranted. The record below did not justify the complete elimination of the right to proceed to trial.

Gittings v. Hartz
996 P.2d 898 (Nev. Mar. 24, 2000)

Failure to appear at an arbitration hearing does not in and of itself amount to bad faith under Nevada Arbitration Rule 22.

Amy Hartz filed a complaint against Angela Gittings resulting from an automobile accident. An arbitrator ruled in favor of Hartz, and Gittings filed a request for a trial de novo. The Eighth Judicial District Court, Clark County, granted Hartz's motion to strike the request on the grounds that Gittings' bad faith in the arbitration process constituted a waiver of her right to trial de novo pursuant to Nevada Arbitration Rule 22. Gittings appealed.

The district court cited six reasons for its determination that Gittings acted in bad faith during the arbitration process: (1) Gittings did not attend the arbitration hearing; (2) no witnesses were called to testify for Gittings; (3) the arbitration meeting lasted less than one hour; (4) Gittings did not contest liability; (5) Gittings did not request an independent medical examination; and (6) Gittings' insurer, Allstate, had a high percentage of prior trial de novo requests.

The Nevada Supreme Court held the evidence did not prove bad faith in arbitration sufficient to constitute a waiver of the right to trial de novo. The court held that failure of a party to attend or call witnesses in an arbitration hearing does not in itself amount to bad faith or a lack of meaningful participation. The court also held that since the arbitration proceeding was not recorded, the district court did not have a record by which to examine what actually occurred. The court further held it is the substance of the proceeding that must be considered rather than the length of the arbitration hearing when judging good faith. Finally, the court held that regardless of the number of trial de novo filings by Allstate, the actions of an insurance company cannot be imputed to its insured when reviewing an arbitration proceeding.

Lee v. GNLV Corp.

996 P.2d 416 (Nev. Apr. 5, 2000)

A final judgment does not include post-judgment issues such as attorney's fees.

Plaintiff, Lee, filed a wrongful death action against Golden Nugget Las Vegas (GNLV). GNLV moved for summary judgment, which was granted. Lee filed an appeal prior to the rendering of a formal judgment in which fees and costs were awarded to GNLV. GNLV moved to have the appeal dismissed on the grounds that the appeal was initiated prior to the issuance of a formal judgment in the case and, therefore, was premature.

The Nevada Supreme Court noted that the standard definition of a final judgment as one that disposes of all matters in a case, including the awarding of costs, was inconsistent with the rules of civil procedure. The rules specify that the entry of a judgment shall not be delayed for the taxing of costs. The court clarified that a final judgment is one that disposes of all the issues presented in the case, but does not include post-judgment issues such as attorney's fees and costs.

The court held that the finality of a court's order is not based on whether it is called a judgment or an order, but rather by what the action accomplishes. The court then held that the summary judgment order was appealable, because its effect was to dispose of all the issues presented in the case.

Laforge v. Nevada

997 P.2d 130 (Nev. Apr. 5, 2000)

Issue preclusion is proper regardless of the way one titles a claim, as long as it arises out of the same facts as the issue already adjudicated on the merits.

Plaintiff, LaForge, filed suit in both federal and state court based on his termination from the University of Nevada, Reno (UNR). The federal court dismissed the federal action, because UNR was under no obligation to provide anything more than notice of termination to LaForge. The state court then granted summary judgment based on issue preclusion, because the federal and state claims were based on the same set of facts.

LaForge argued that issue preclusion was inapplicable to his state claims, because the issues were not identical to those in the federal claim. The court found that the issue in both cases was whether UNR was required to do any more than what it did; the claims were different, but the issues were the same.

The court held that because that issue had already been litigated in federal court, the district court was correct to dismiss the state action for issue preclusion.

Simon v. Hatcher

2000 U.S. App. LEXIS 7243 (9th Cir. Apr. 18, 2000)

Ninth Circuit reverses and remands two habeas corpus claims that were raised in district court but denied in error.

Appellant raised twenty-one claims from the lower court's dismissal of his petition for writ of habeas corpus.

The Ninth Circuit affirmed the district court's bar of ten of the claims on procedural grounds, for failure to make a timely appeal, and for failure to show good cause for late filing. The court also affirmed the district court's rejection of nine other claims. The court held that Simon's failure to raise them in any prior state proceeding meant that the claims had not been exhausted at the state level and could not be pursued in a federal court until state remedies were exhausted.

The court reversed on two claims, holding that the evidence at trial did not support a finding of malice and that Simon had received ineffective assistance of counsel. The court held that both claims were properly raised at district court and were improperly denied. The court remanded to district court for consideration of those issues.

Menken v. Emm

2000 U.S. App. LEXIS 8872 (9th Cir. May 1, 2000)

Attorney's fees may be awarded to a defendant when the plaintiff dismisses a case with prejudice.

The plaintiff filed suit in federal district court on a variety of state-law claims against several defendants for a real estate transaction gone wrong. The plaintiff moved for voluntary dismissal with prejudice because he lacked the necessary funds to continue the litigation. The district court granted plaintiff's motion and awarded attorney's fees to the defendant. Nev. Rev. Stat. 18.010 allows the trial court to award reasonable attorney's fees in a lawsuit when the parties have entered a written agreement with a fee-shifting provision. The parties entered such an agreement, but the plaintiff argued that no prevailing party exists when a claim is dismissed with prejudice.

The Ninth Circuit held that a dismissal with prejudice is a judgment and, therefore, a prevailing party exists. The court held that, since attorney's fees could be awarded for a dismissal with prejudice, the district court properly awarded attorney's fees to the defendants.

Scrimmer v. Eighth Judicial Dist. Court

998 P.2d 1190 (Nev. May 8, 2000)

A flexible multi-factor approach should be used in assessing what constitutes good cause for failure of timely service prior to dismissal under Nev. R. Civ. P. 4(i), and such an analysis includes good-faith settlement discussions.

Plaintiff served an initial complaint on defendant after the 120-day statutory limit. On motion by the plaintiff, the court granted additional time to effec-

tuate service. Nev. R. Civ. P. 4(i) requires plaintiff to serve summons and complaint within 120 days of filing the complaint unless plaintiff can show good cause why the complaint was not timely served. The defendant challenged plaintiff's showing of good cause for untimely service in a motion to dismiss, and the trial court ordered the original service quashed. The Nevada Supreme Court reversed, holding that a balanced and multi-faceted analysis is warranted in the trial court's determination whether or not to dismiss a complaint pursuant to Nev. R. Civ. P. 4(i).

The court clarified the seeming contradictions in the case law by declaring that a number of considerations may govern a district court's analysis of good cause under the statute, no one of which is controlling. The trial court should consider: (1) difficulties in locating the defendant; (2) the defendant's efforts at evading service or concealment of improper service until after the 120-day period has lapsed; (3) the plaintiff's diligence in attempting to serve the defendant; (4) difficulties encountered by counsel; (5) the running of the applicable statute of limitations (for example, if dismissal after the statute of limitations has run results in constructive dismissal with prejudice); (6) the parties' good faith attempts to settle the litigation during the 120-day period and the actual service of process on the defendant; (7) the prejudice to the defendant caused by the plaintiff's delay in serving process; (8) the defendant's knowledge of the existence of the lawsuit; and (9) any extensions of time for service granted by the district court.

The court held that a flexible approach should be used in assessing motions to dismiss, and that settlement negotiations undertaken in good faith in a serious effort to settle the litigation may constitute good cause for untimely service under Nev. R. Civ. P. 4(i). This explicitly overrules the holding in *Lacey v. Wen-Neva, Inc.*, 849 P.2d 260 (Nev. 1993), and rejects dicta from *Dougan v. Gustavson*, 835 P.2d 795 (Nev. 1992).

Baker v. Eighth Judicial Dist. Court
999 P.2d 1020 (Nev. June 5, 2000)

An individual's status as a non-practicing member of the state bar is not a systematic and continuous contact with the state sufficient to satisfy the requirements of general jurisdiction; however, a single-night's hotel stay is sufficient to meet the requirements of specific personal jurisdiction.

The dispute in this case arose from petitioner Robert Baker's one-night stay at the Rio Suite Hotel Casino (Rio). Baker challenged the designation of his room as a suite and threatened legal action if the Rio did not cease their allegedly false and deceptive advertising. The Rio filed for declaratory relief in federal court, but later voluntarily dismissed this action and brought a declaratory relief action in Nevada District Court. Baker filed a writ of prohibition on the grounds that the district court should have quashed service due to a lack of personal jurisdiction. Baker was a California resident and contended the district court did not have personal jurisdiction over him since he was not a resident of Nevada and did not have substantial, systematic, and continuing contacts with the state. Baker further argued that his injury did not occur as a result of his one-night stay at the Rio, but from the Rio's false and deceptive advertising in California. Baker was also a non-practicing member of the Nevada bar.

The court held Baker's bar membership status did not, in and of itself, meet the systematic and continuous requirement since he had not, at the time, or in the past, practiced law within the state. The court rejected Baker's argument that his injury occurred in California because of the Rio's advertising. It stated Baker's real injury occurred in Nevada when he checked into the Rio and discovered his room was not a two-room suite. The court also rejected Baker's argument that Nevada had no forum interest in the matter. The court held Nevada has an interest in resolving matters arising from injuries that occur while nonresidents are staying in its hotels. The court also found that hearing the matter in Nevada would promote judicial efficiency because the hotel "suite," the alleged false marketing information, and many of the witnesses, with the exception of Baker, were located in Nevada. For these reasons, the court held that Nevada courts had specific jurisdiction over Baker.

Freeman v. Second Judicial Dist. Court
1 P.3d 963 (Nev. June 9, 2000)

Appointment of an agent to receive service of process does not subject a non-resident corporation to personal jurisdiction in Nevada.

Mark Freeman filed an action against West American Insurance Company (West American) and Ohio Casualty Insurance Company (Ohio Casualty) for malicious prosecution. At the time of his malicious prosecution action, Freeman was a Nevada resident. West American, a subsidiary of Ohio Casualty, is an Indiana corporation licensed to do business in Nevada. Ohio Casualty is an Ohio corporation licensed to do business in Nevada. Freeman's claim stemmed from previous litigation against West American in California. The underlying dispute did not involve Nevada in any way.

After Freeman filed an action in Nevada, West American and Ohio Casualty moved to quash service of process, claiming that Nevada lacked personal jurisdiction over them. The Nevada Supreme Court held that West American and Ohio Casualty did not have sufficient contacts with Nevada to subject them to personal jurisdiction, and that the appointment of an agent to receive service of process as required by Nev. Rev. Stat. 680A.250 did not in itself subject a non-resident insurance company to personal jurisdiction in Nevada.

Evans v. Dean Witter Reynolds, Inc.
5 P.3d 1043 (Nev. Aug. 18, 2000)

District court erred in admitting evidence of the restitution of property in a conversion suit because the restitution did nothing to mitigate consequential damages; such restitution may not reduce compensatory damages against tortfeasor, and may not prevent punitive damages; Bader v. Cerri overruled.

The estate of Elfreda Gardner won a jury verdict against Dean Witter Reynolds, Inc., (Dean Witter) and Warren House, a stockbroker and senior vice-president of Dean Witter, for conspiracy to commit conversion of securities. The jury returned compensatory damages of \$2,600,000 against the defendants, and separate punitive damages of \$6,000,000 against Dean Witter, and \$50,000 against House. At trial, defendants were able to admit evidence relating to restitution by third parties, and the court applied post-verdict equitable offsets based on the increased property value. The district court reduced the

compensatory damages to zero, based on the offsets, but let the punitive damages stand. Plaintiff appealed claiming improper limitation of the conversion claim, and improper use of equitable offsets. Dean Witter cross-appealed arguing there was no evidence of malice to justify punitive damages.

Evidence of restitution is admissible for the purpose of showing mitigation of damages when a defendant, charged with a civil conversion, restored the property to the alleged victim. Such evidence is not admissible when the restitution is made by a third party. Similarly, it is admissible when such restitution would mitigate consequential damages attendant to the loss of the use of the converted property, but is not admissible when no claim for consequential damages is made. Evidence of the returned property's value may not be considered as an offset to the value of the property taken. Consequently, the Nevada Supreme Court held that the district court erred in admitting the restitution evidence.

The court held that intentional tortfeasors, including persons found liable in conversion and persons in conspiracy with them, may not apply credit from settlements by their joint tortfeasors in reduction of judgments against them arising from the intentional misconduct. One may not as a matter of policy seek equity with unclean hands, and Nev. Rev. Stat. 17.225 provides that no right of contribution exists in favor of any tortfeasor who has intentionally caused or contributed to the injury sustained. The court held the district court erred in its admission of mitigation evidence and in the imposition of post-verdict equitable setoffs. Insofar as the precedent of *Bader v. Cerri*, 609 P.2d 314 (Nev. 1980), implies that a non-settling defendant in a conversion case may seek credit for third-party settlements post-verdict, it is expressly overruled.

Restitution made by a third party is also irrelevant to whether a defendant's conduct merits punishment. Thus, such restitution should not be considered in determining whether the compensatory damages, which are a necessary precondition to punitive damages, were awarded.

**Washoe County Dist. Attorney v. Second Judicial Dist. Court
5 P.3d 562 (Nev. Aug. 18, 2000)**

Rule 11 sanctions against district attorney vacated because the district court abused its discretion and misinterpreted statutes.

The state of Washington sent a child support transmittal to the district attorney for enforcement after the obligor moved to Nevada. In a hearing to determine payments, it was recommended that Washington determine the issue of arrearage amounts because of its continuing exclusive jurisdiction to adjudicate. The obligor objected to initiating an action in Washington, and the recommendation was rejected.

Obligor was then allowed to file a written motion for sanctions against the district attorney. The court imposed sanctions under Nev. R. Civ. P. 11 for failing to discontinue the enforcement of a Washington child support arrears case.

The Nevada Supreme Court vacated the sanctions because the district court misconstrued the out-of-state child support law, Nev. Rev. Stat. 125B.140(1)(a), which provides that a child support order from any state is considered a judgment that can be enforced.

Hansen v. Eighth Judicial Dist. Court
6 P.3d 982 (Nev. Aug. 21, 2000)

Distinction between special and general appearance abolished for purposes of establishing personal jurisdiction.

Petitioner sought to answer a complaint to avoid a default judgment, but feared that doing so would constitute a general appearance under Nevada law and that he would thereby waive the right to challenge personal jurisdiction. In federal court, the special/general appearance doctrine was abolished with the 1938 adoption of Fed. R. Civ. P. 12, which allows every defense to be made either in the responsive pleading or by motion, and states that no defense or objection is waived by being joined with any other defense or objection in a responsive pleading or motion. Though Nevada has recently recognized the special/general appearance distinction, Nev. R. Civ. P. 12 was revised in 1998 to mirror the federal rule.

The Nevada Supreme Court held that this revision renders the special/general appearance distinction obsolete. Objections to personal jurisdiction, process, or service of process may now be raised by motion or responsive pleading, and are not waived when joined with one or more other defenses. They may be waived, however, if not filed in a timely manner or included in a responsive pleading.

DeJesus v. Flick
7 P.2d 459 (Nev. Aug. 24, 2000)

When an attorney's closing arguments are so inflammatory and improper that they might reasonably prejudice a jury, a mistrial may be declared even when opposing counsel raises no objections during the proceedings.

The defendant, in a fit of road rage, forced the plaintiff's vehicle off the road, causing lasting neurological damage to the plaintiff. At trial, the plaintiff's attorney made a provocative closing argument, in which he personally attacked the defendant's medical expert and accused him of perjury, told the jury how much he disliked the defendant, asked the jury to "send a message" to local law firms that might defend similar cases in the future, and asked the jury to place themselves in the position of the plaintiff. The jury returned a verdict in excess of what the plaintiff sought.

Although the defendant's attorney raised no objections during trial, the Nevada Supreme Court held that a court has the power to consider an attorney's actions on its own. Further, that court may find that a closing argument is so improper that its effect permeates the entire proceeding, and a new trial can be ordered. Impropriety includes an attorney injecting his personal opinions, and asking the jury members to place themselves in the position of the victim (making a "golden rule" argument that interferes with jury objectivity).

Justice Rose, joined by Justices Shearing and Leavitt, dissented stating that it was entirely possible that the jury was influenced by the defendant's egregious conduct, and that the award was a natural response to the growing number of instances of road rage in this country. The dissent also argued that it was up to the defendant's counsel to raise any objections at trial.

Med. Device Alliance, Inc. v. Ahr
8 P.3d 135 (Nev. Aug. 25, 2000)

Nevada shareholders met the statutory requirement to apply for a receiver after the district court granted them leave to amend their complaint twice to include more shareholders.

Medical Device Alliance (MDA) entered into an agreement with Misonix, Inc. to sell and market its liposuction device worldwide. Two hundred and seventy investors, including Nevada shareholders, invested \$41,313,750.00 in MDA. After allegations of fraud and mismanagement and a failed attempt to pursue appointment of a receiver in California, the Nevada shareholders sought appointment of a receiver in the Nevada district court. Nev. Rev. Stat. 78.650(1) mandates that any holder or holders of one-tenth of the issued and outstanding stock may apply to the district court for an order appointing a receiver.

In order to meet the requirement, the shareholders moved to amend their complaint to include more shareholder names. On June 28, 1999, the district court granted the shareholder motions to amend and to appoint a temporary receiver. On August 27, 1999, the receiver's first report confirmed most, if not all, of the shareholders' original allegations of fraud and waste. Due to a clerical error, which was discovered on October 1, 1999, the shareholders filed for leave to amend their complaint a second time. The district court, once again, granted the plaintiffs leave to amend.

As a result of the plaintiffs' ability to add additional shareholders to the second amended complaint, the shareholders met the requisite ten percent. The Nevada Supreme Court upheld the district court's decision to grant the shareholders leave to amend their complaint and to appoint a receiver for MDA because the court found that the Nevada shareholders had complied with Nev. Rev. Stat. 78.650(1).

Pengilly v. Rancho Santa Fe
5 P.3d 569 (Nev. Aug. 28, 2000)

Nevada Supreme Court rules it has no jurisdiction over an appeal from a contempt order unless a rule or a statute authorizes it or if it is brought by a writ petition.

After a district court found an insurance company and its counsel in contempt for not honoring a settlement agreement in a construction defect case, the counsel appealed the contempt order to the Nevada Supreme Court. The court noted there was no rule for the proper way to appeal contempt orders and that, in the past, the court had reviewed both direct appeals and writ petitions.

The court found that, while the common law assumed there was no right of review, most states had modified this by statute or constitutional provision. Other states varied on the proper form of review, and Nevada had reviewed contempt orders by appeal and by writ petition explicitly finding which was correct. The court held that, given its practice of confining its jurisdiction to appeals authorized by rule or statute, the court could only review contempt orders by writ petition. Since Pengilly's direct appeal was peripheral to the case, not authorized by rule or statute, and not brought by a writ petition, the court refused to review it.

Nevada v. Second Judicial Dist. Court
11 P.3d 1209 (Nev. Nov. 2, 2000)

The Nevada Supreme Court has the authority to promulgate rules of procedure that the state must abide by unless the state can show good cause for its failure to do so.

The state did not file notice to seek the death penalty within the thirty day window required by Nev. Sup. Ct. R. 250(4)(c) for two defendants charged with robbery and murder. The district court denied leave to file notice late and the state appealed. The state argued that Sup. Ct. R. 250 conflicted with Nev. Rev. Stat. 175.552(3), and that only the legislature could promulgate rules of criminal procedure. In the alternative, the state argued that it had good cause for filing late.

The Nevada Supreme Court held that simply because the Nevada Revised Statutes are silent on any time frame in which the state must give notice to seek the death penalty, this does not preclude the court from imposing a time limit that ensures due process. Further, if there were a conflict with the statutes, the court's rule would prevail. The court stated that Article 4 of the Nevada Constitution makes it clear that as a coequal branch of government, the court has the power to make rules necessary to carry out its duties. This is true even if such rulemaking overlaps powers granted to the other branches of government, such as the Legislature's ability to create laws governing criminal procedure. Finally, the court held that even if the defendant's due process rights would not be substantially violated by late filing, the state still must show good cause for missing the deadline. Prosecutors cannot use an excessive workload as an excuse to miss the filing deadline.

Williams v. Lakeview Co.
13 P.3d 280 (Ariz. Nov. 9, 2000)

Arizona courts could not exercise general or specific jurisdiction over a Nevada casino in a case involving a motor vehicle accident that occurred in Arizona because the plaintiffs failed to establish a nexus between their cause of action and the casino's activities in Arizona.

Plaintiffs, Michelyn Williams and Kelly Williams, traveled to Boulder City, Nevada, from Arizona, with a friend, Patrick Kelsey. They visited the Gold Strike Inn & Casino, which was owned by Lakeview Co. (Lakeview). At the casino, Kelsey consumed a large amount of alcohol. On the return trip to Arizona, Kelsey drove the vehicle with the Williams as passengers. In Arizona, Kelsey lost control of the car and the plaintiffs were injured. The plaintiffs filed suit in Arizona against Lakeview and its partners. The trial court dismissed the case for lack of personal jurisdiction over Lakeview.

The Gold Strike Inn & Casino is located a few miles from the Nevada/Arizona border. Lakeview is a Nevada company, which does not conduct business in Arizona and does not own property in Arizona. The casino does advertise in Arizona newspapers. Additionally, the casino sent a one-time offer to Arizona bus companies, offering them an incentive to stop at the casino on their way into Nevada. The casino employed some Arizona residents and a large part of the casino's overnight guests were from Arizona. Plaintiffs conceded that their visit was not related to any of the casino's contacts with Arizona.

Nevertheless, plaintiffs appealed, claiming that Arizona courts have personal jurisdiction over Lakeview.

The Supreme Court of Arizona held that its courts could not exercise specific jurisdiction over Lakeview since the plaintiffs failed to establish a nexus between their cause of action and Lakeview's activities in Arizona. Additionally, Lakeview's activities in Arizona were not sufficient to establish general jurisdiction. The Supreme Court of Arizona stated that a causal relationship must exist between the defendant's forum activities and the plaintiffs' claim. In this case, the relationship between Lakeview's activities in the forum state and the plaintiffs' claim was not sufficient to meet the proximate cause test or the "but for" test to establish causation.

In dissent, Justice Zlaket argued that the majority approach was too strict and invited absurd and unjust results. He argued that the focus of jurisdictional questions should be on the defendant's conduct, and not on the plaintiff. Additionally, he opined that section 37 of the *Restatement (Second) of Conflict of Laws* justified the exercise of jurisdiction over Lakeview, since Lakeview caused "effects" to occur in Arizona.

Kay v. Summers

2000 U.S. Dist. LEXIS 18023 (D. Nev. Nov. 13, 2000)

A claim of improper withholding of federal income taxes must comply with civil procedures, administrative procedures, and jurisdictional requirements.

Plaintiffs claimed exemption from income taxation, but the IRS instructed plaintiffs' employer, the City of Las Vegas, to withhold part of their income. Plaintiffs sought a return of past income withholdings, an injunction against future withholdings, and monetary damages.

The federal district court dismissed the plaintiffs' claims as frivolous. It held that its jurisdiction derived from the United States Constitution and statutory enactments, rather than, as plaintiffs claimed, from gold fringe on the courtroom flag. In addition, the court held that plaintiffs were really suing the federal government. The court noted that the federal government has sovereign immunity, and that plaintiffs could not avoid that immunity simply by naming IRS employees as individuals, rather than in their official capacities.

Am. Bonding Co. v. Barnard, Vogler & Co.

13 P.3d 758 (Ariz. Ct. App. Nov. 16, 2000)

Where accounting firm performed audit in Nevada and directed no activity towards Arizona, personal jurisdiction cannot be exercised by Arizona courts.

Defendant accounting firm, Barnard Vogler (Barnard), performed an audit in Nevada for a Nevada client. All work was performed in Nevada and all reports were delivered to the client in Nevada. During the audit, however, the firm uncovered information regarding possible wrongs committed by the Nevada client against an Arizona corporation, American Bonding Company (ABC). ABC claimed Barnard's report aided in the Nevada client's wrongdoing and attempted to sue Barnard in Arizona for fraud and negligent misrepresentation.

Under traditional personal jurisdiction analysis, the Arizona Court of Appeals determined that ABC failed to prove the constitutional requirements of

minimal contacts. The court rejected ABC's argument that Barnard had established a basis for personal jurisdiction by directing its allegedly tortious activity to Arizona. The court held that Barnard's conduct was not specifically targeted at ABC and that, as such, Arizona was not the "focal point" of Barnard's actions.

The court also cited Barnard's engagement letter to its Nevada client, which did not mention ABC, as further evidence of Barnard's lack of directed activity towards Arizona. Finally, the court rejected ABC's attempted use of Arizona and Nevada insurance regulations as a means to establish personal jurisdiction. The court held that Nevada insurance regulations pertained to Nevada insurers and did not support finding jurisdiction in Arizona.

Turnipseed v. Truckee-Carson Irrigation Dist.
13 P.3d 395 (Nev. Nov. 30, 2000)

A litigant is entitled to a peremptory challenge of a judge if the litigation involves an administrative agency's decision, even if the judge has ruled on closely related, yet separate and distinct actions.

In 1994, the state engineer undertook the appropriation of water from a river that had been previously unappropriated. Two parties desiring the water rights sought judicial review of the engineer's decisions in the district court presided over by Judge Blake. Subsequent to the engineer announcing his final decision, the previous litigants again sought judicial review. At this time, the Pyramid Lake Paiute Tribe entered the litigation for the first time as a real party in interest. The tribe filed a peremptory challenge to Judge Blake.

Nev. Sup. Ct. R. 48.1 permits each side to issue one peremptory challenge to a judge if the action has not been appealed from a district court, and if the judge had not made any ruling on a contested issue, or commenced hearing a contested matter in the action. The previous litigants argued the peremptory challenge was not permitted as this review was an appeal, and Judge Blake had already made rulings in the case.

The Nevada Supreme Court held that administrative agency decisions, such as those from the engineer's office, are distinct from lower court decisions. The court ruled that only the decisions of lower courts trigger the type of appeal where peremptory challenges are disallowed. Judicial review of an agency's decision is the initiation of the case into the formal court system as statutorily defined.

Further, the court held that a judge's previous rulings on closely related issues brought by other parties to the action does not prevent the new party from utilizing their peremptory challenge. The court found the prior decisions for review of related instances form separate and distinct actions from the review sought when the tribe intervened.

Thus, the court held the tribe's peremptory challenge to Judge Blake was valid, vacated the order striking the peremptory challenge, and ordered the district court to assign a new judge.

Blackjack Bonding v. City of Las Vegas
14 P.3d 1275 (Nev. Dec. 29, 2000)

Municipal courts have the inherent judicial power to charge and collect reasonable fees without statutory authorization.

Appellant, Blackjack Bonding (Blackjack), sought to recoup \$185,960 in bail bond filing fees paid between 1991 and May 12, 1997. Blackjack contended that the \$40 filing fee for bail bonds imposed by the municipal courts was not authorized by statute and constituted unjust enrichment. The district court granted the city's motion to dismiss because the municipal courts had specific statutory authority to charge the fee.

Blackjack appealed, arguing that the statutory authority was granted in 1997, making all fees collected between 1991 and the enactment of the statute unjust enrichment. Blackjack based its argument on an Attorney General opinion.

The Nevada Supreme Court reviewed the district court action as a motion to dismiss, rather than as a grant of summary judgment. The court held that municipal courts are statutorily created, but, once established become part of the constitutional judicial system of Nevada. Moreover, the court held that the municipal courts enjoy inherent judicial powers under the separation of powers doctrine and when the state legislature granted the power over bail and property bonds, the legislature also granted, by implication, the power necessary to exercise that authority. In reaching this decision, the court relied on a different premise than the district court in that the district court relied on specific statutory sanction rather than inherent powers.

CONSTITUTIONAL LAW

Nicholas v. Nevada
992 P.2d 262 (Nev. Jan. 27, 2000)

Reduction in absolute vested benefit amounts for eligible public employees is unconstitutional under both the United States and Nevada Constitutions because it impairs the obligation of contracts.

Assembly Bill 820 (AB 820) quadrupled retirement benefits for eligible members under the Legislator's Retirement Law, Nev. Rev. Stat. ch. 218. AB 820 passed on June 23, 1989 by legislative override of the governor's veto and was repealed by special session on November 21, 1989. Two former legislators sued as a result of the reduction in their retirement benefits claiming they had a vested right to the increase. The plaintiffs, David O. Nicholas and Robert Craddock, left office in November 1988 and received retirement benefits effective November 1, 1989.

Vested pension benefits can be limited or absolute. A limited vested right occurs when the benefit is part of the total compensation package for the public employee. An absolute vested right occurs when the employee retires. The vested amount as authorized by law cannot be changed, even if the law is later repealed.

The Nevada Supreme Court held that the repeal of AB 820 impaired the obligation of Nevada to pay the increased benefits in violation of the United

States Constitution, Article 1, Section 10 and the Nevada Constitution, Article 1, Section 15. The court reasoned that any other holding would allow the legislature to negatively affect the absolute vested pension benefits and undermine the validity of the contractual benefits of all public employees.

In dissent, Justice Young stated that public employees' retirement benefits are deferred compensation for services rendered. To be eligible for the increase, the appellants had to perform services after AB 820 became law and retire prior to the repeal of AB 820. Further, he argued that an employee does not have a vested right to additional benefits conferred after his or her service ends. Since neither appellant was a public employee on June 23, 1989 when AB 820 passed, they are not entitled to the increase.

Justice Maupin, in a separate dissent, argued that, as a matter of law, the appellants cannot establish a reliance on the increased benefits as a condition of their public service, especially since the bill was not law until after they left public employment.

Nevada v. Connors

994 P.2d 44 (Nev. Feb. 4, 2000)

Police must terminate Terry stop search immediately upon determining that no weapon is present.

A Nye County Deputy Sheriff stopped Connors for running a stop sign and conducted a *Terry* stop pat-down search. During the search, the officer felt an unidentifiable object, and subsequently changed his grip in order to determine what the object was. The officer then retrieved the item and discovered a vial containing methamphetamines. The state charged Connors with possession of a controlled substance. Connors challenged the seizure of the drugs. The district court suppressed the evidence.

The Nevada Supreme Court affirmed the district court's order. The court cited *Minnesota v. Dickerson*, 508 U.S. 366 (1993), which held a *Terry* stop is unconstitutional if it goes beyond what is necessary to secure the officer's safety. The court held that, when the officer felt the hard object in Connors' pocket, he knew immediately that it was not a weapon, yet continued to manipulate the object until he could identify the object as a vial of the size and shape commonly used to contain contraband. The court reasoned that by continuing the search on Connors' pocket, which the officer knew did not contain a weapon, the officer exceeded the scope of *Terry v. Ohio*, 392 U.S. 1 (1968), as interpreted in *Dickerson*. Therefore, the subsequent seizure was the result of an unconstitutional search because the officer lacked probable cause to retrieve the object from Connors' pocket.

United States v. Osborn

203 F.3d 1176 (9th Cir. Feb. 9, 2000)

It is not a violation of the Fourth Amendment for a police officer to briefly detain an individual if he has reasonable suspicion, which is determined based upon the totality of the circumstances.

Defendant Osborn, a convicted felon, went to visit his friend Joey Pagtulingan at his home, but instead was confronted by two officers who were investigating the death threat that Pagtulingan had made to his mother a short time

earlier (in which he threatened that he or his friends could kill her). Because of Osborn's nervous demeanor, the officers questioned and then arrested him for failure to notify the Las Vegas Metropolitan Police Department of his change of address within forty-eight hours, as convicted felons are required to do.

Osborn moved to suppress evidence seized from his person following the arrest, maintaining that this was a violation of his Fourth Amendment rights because the officers lacked reasonable suspicion to search him. He argued that his mere friendship with Pagtulingan was insufficient for reasonable suspicion to search him.

The Ninth Circuit found that the police searched Osborn because he showed up at Pagtulingan's mother's house while the police were in the process of investigating Pagtulingan's threat that he or his friends could kill her. The combination of his friendship with Pagtulingan and the death threat were sufficient for reasonable suspicion.

Furbay v. Nevada

998 P.2d 553 (Nev. May 4, 2000)

Delay of more than five years between defendant's arrest and trial does not implicate right to speedy trial where the majority of the delays are the result of continuances sought by the defendant and negotiations between the parties.

Defendant, Harold Furbay, was convicted of first-degree murder and robbery and was sentenced to life without possibility of parole for murder and a consecutive term of fifteen years for robbery. Furbay appealed on numerous grounds, among them that his right to a speedy trial was violated, his motion for self-representation was improperly denied, and his right to a fair penalty hearing was denied.

The Nevada Supreme Court held that Furbay waived his right to a speedy trial at his arraignment. During the five and one-half years between Furbay's arrest and his jury trial, his trial was continued nine times. Five of the continuances were instigated by defense counsel, two were the result of the parties entering plea negotiations, and one was for good cause by the prosecution. The final continuance was the result of the prosecutor's attendance at a seminar. The court held that except for the two-month delay for the prosecutor's seminar, all of the other continuances were for good cause and Furbay's constitutional right to a speedy trial was not violated.

The court also held the defendant's right to self-representation was waived. The district court's decision to deny Furbay's motion to represent himself was based on the court's determination that Furbay was not aware that the state was seeking the death penalty. In March 1997, the district court gave Furbay an opportunity to reconsider the previous decision by the court regarding his motion for self-representation. At that time he waived his right to self-representation.

Finally, the Nevada Supreme Court held the prosecutor's office was not required to provide the defendant with inculpatory evidence prior to the penalty hearing. At his penalty hearing, Furbay contended that the prosecution failed to reveal evidence prior to the hearing regarding a murder charge against him in Alabama, and an altercation Furbay had with his previous employer. The court

held that, while a prosecutor who promises to provide all inculpatory evidence in his control may not withhold the evidence for later use, the prosecution is under no general duty to provide inculpatory evidence to the defense. The court found that the prosecutor did not promise to provide all inculpatory evidence in his possession to Furbay and upheld Furbay's conviction and sentence.

United States v. Morales

2000 U.S. App. LEXIS 12593 (9th Cir. June 5, 2000)

After a routine traffic stop, an officer may detain the suspect and conduct a search of the vehicle if the totality of circumstances surrounding the detainment creates a reasonable suspicion and the search is supported by probable cause.

A police officer performed a routine traffic stop, after observing the defendant's car swerve across the lane markers three times. The officer detained the defendant for an extended period of time due to the presence of certain indicia of illegal narcotics involvement: a large supply of gasoline, strong smell of air freshener, nervous behavior in response to narcotics questioning, and large amounts of cash in the vehicle.

Morales contended that the evidence from the stop should have been suppressed because none of the indicia were sufficient to form the probable cause necessary to search the vehicle, thus making the stop pretextual.

The court held that, while any of these circumstances viewed separately may not sufficiently create reasonable suspicion, it is the totality of the circumstances that must be considered, not individual contributing factors. The numerous indicia of illegal narcotic activity, when considered in the aggregate, created sufficient suspicion to permit the detainment and the search of the vehicle.

Herrera v. Russo

106 F. Supp. 2d 1057 (D. Nev. Aug. 3, 2000)

Clark County School District is not an arm of the state for purposes of Eleventh Amendment sovereign immunity.

Plaintiff, Herrera, sued a school police officer and his supervisor for injuries suffered during a shooting on school grounds. Although the complaint alleged the defendants were acting within the scope of their employment and under the color of law, it named them in their individual rather than their official capacities.

At issue was whether the defendants were acting in their official or individual capacity and whether Clark County School District was an arm of the State of Nevada.

The court found that because the defendants were named individually, the Eleventh Amendment did not apply, making defendants subject to personal liability. The court applied the *Mitchell* factors, derived from *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198 (9th Cir. 1988), to determine whether the school district was an arm of the state. The court held that for the following reasons Clark County was not an arm of the state: (1) any funds used to satisfy a judgment would not be paid out of state funds; (2) public schools were under local control and did not perform statewide governmental functions; (3) each

school district had the ability to sue or be sued; (4) school districts had the power to take property as well as own property and school property was held as a corporation.

**S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians v.
Sixth Judicial Dist. Court
7 P.3d 455 (Nev. Aug. 24, 2000)**

An Indian tribe may waive sovereign immunity by its actions, without express congressional authority.

In 1913, the state engineer initiated water rights adjudication procedures for the Humboldt River. As part of the adjudication, the Sixth Judicial District Court decreed water rights to five ranches, and by 1935, all water rights had been adjudicated. Between 1937 and 1942, the United States purchased the five ranches to form the reservation for the tribe.

For approximately forty-five years, the tribe cooperated with the state engineer and water commissioners by allowing them access to the reservation. The United States paid the water assessment fees in the 1970s and early 1980s, but the tribe paid the fees from the mid-1980s until the early 1990s. Subsequently, the tribe adopted two resolutions on March 8, 1988, decreeing that water commissioners would not be allowed to enter the reservation, and the tribe would not pay assessment fees for water rights.

On September 13, 1999, three water commissioners entered the reservation to reach diversions on an adjacent private ranch for the purpose of regulating the river pursuant to the decree. The commissioners were followed by a tribal peace officer, escorted back to the tribal office on the reservation, and the supervisor was handcuffed and charged with trespass and then escorted off the reservation. The state engineer and water commissioners of the Sixth Judicial District Court petitioned the district court for an order to show cause why the tribe should not be held in contempt for interfering with the commissioners' authority to regulate. The tribe filed a motion to dismiss, which was denied, and a subsequent petition for a writ of prohibition to prevent the court from proceeding with a contempt hearing, on the basis that the court lacked jurisdiction over the tribe, and that the United States was an indispensable party to the proceedings.

While the Nevada Supreme Court acknowledged that Indian tribes possess sovereign immunity from suit, the immunity can be waived. The court noted: (1) the tribe was the successor in interest to owners of the decreed water rights; (2) the tribe enjoyed the benefits of the decree; and (3) for fifty-five years, the tribe allowed commissioners to travel onto the reservation, while voluntarily paying assessment fees for a period of years. This, coupled with deeds to the property mentioning the appurtenant water rights, constituted an express waiver of sovereign immunity, ratified by decades of abiding by the decree.

Furthermore, while the United States was the legal owner of both the property and accompanying water rights, the actions giving rise to the contempt proceedings were those of the tribe and not the United States. Because the United States would not be affected by the contempt proceedings, it was not an indispensable party whose failure to be joined would result in unjust adjudication. Thus, the tribe's motion for a writ of prohibition was denied.

Citizens for Honest & Responsible Gov't v. Heller
11 P.3d 121 (Nev. Oct. 26, 2000)

Various provisions of Nevada's recall petition statutes held constitutional under both the federal and the state constitutions.

Citizens for Honest & Responsible Government (Citizens) initiated two recall petition drives against Clark County Commissioner Yvonne Atkinson Gates in 1998. Under Nev. Rev. Stat. ch. 306, petition drives are deemed successful, resulting in a special election, when at least twenty-five percent of voters from the election in which the official had been elected sign the petition. The statutes require such drives to be completed within sixty days and allow petition signers to remove their names from the petition prior to the sixty-day deadline. The statutes also require the Secretary of State to conduct a random sampling of five hundred names on the petition to determine their validity.

After each of the two drives, the Secretary determined the petitions had failed because the random samplings had invalidated too many signatures. Consequently, Citizens appealed to the Eighth Judicial District Court, challenging the constitutionality of the recall petition statutes. The court, using the Nevada Administrative Procedure Act (APA), determined that the statutes were indeed constitutional and upheld the Secretary's invalidation of the petition drives. On appeal, Citizens challenged the district court's constitutional holdings as well as its use of the APA.

First, Citizens challenged the statute's sixty-day limitation on First Amendment freedom of speech grounds. Citizens argued that the limitation unreasonably restricted their ability to conduct the petition drive, thus depriving them of their constitutional rights. They also argued that the court must utilize a strict scrutiny analysis to determine constitutionality, which in turn would require the state to prove a compelling state interest. The Nevada Supreme Court, however, disagreed and rejected the necessity of strict scrutiny. Citing *Burdick v. Takushi*, 504 U.S. 428 (1992), the court instead adopted a more flexible test, which balances the constitutional rights of the petitioner with the interests of the state. The court determined that the free speech implications were relatively minor and were certainly outweighed by the state's need to effectuate an efficient and effective recall petition process.

Next, Citizens challenged the statute's sixty-day limitation, the provision allowing signatories to remove their names from the petition, and the provision requiring the Secretary's statistical sampling. The court relied on Nevada's Constitution art. II, § 9, however, which allows the legislature to provide "such additional legislation as may aid the operation" of its political recall laws, to overcome Citizens' constitutional objections. The court then determined that each of the challenged provisions aids the state in safeguarding the efficiency, accuracy, and effectiveness of the recall process, thus affirming the district court's determination of constitutionality.

Finally, the court ruled that the district court's use of the APA in determining that certain evidence proffered by Citizens was inadmissible at trial was erroneous, but harmless error.

Hughes v. Nevada**12 P.3d 948 (Nev. Nov. 22, 2000)**

Warrantless search of a vehicle in which the defendant was a passenger was not in error because it was supported by probable cause and exigent circumstances.

Defendant, Brian Hughes, was one of four passengers in a car that was stopped on State Route 160 for suspicion of involvement in a shots fired incident at the Saddle West Hotel & Casino in Pahrump, Nevada. A security guard flagged down a Nevada state trooper, Cobel, and gave him a license plate number and description of the vehicle. Cobel caught up with the vehicle and pulled it over, conducting a felony traffic stop. After patting down and handcuffing all the vehicle occupants, he searched the vehicle for weapons. He found a semiautomatic handgun, marijuana, methamphetamines, and a second handgun. A third handgun, that was thrown from the car, was discovered as well. Hughes was charged with three counts of being an ex-felon in possession of a firearm and two counts of possession of a controlled substance.

The district court denied the defense motion to suppress the evidence of the warrantless search. Hughes appealed, arguing that the search was improper. The state argued that the search was admissible under the "automobile exception rule." Under the exception, there must be probable cause to believe that there is criminal evidence in the automobile, and exigent circumstances must exist that are sufficient to dispense with the need for a warrant.

The Nevada Supreme Court affirmed. The court held that the first prong of probable cause was met because it was reasonable to assume, based on the description by the security guard and the type of crime committed, that criminal evidence would be found in the car. The court also held that the roadside stop following the pursuit made waiting for a warrant impracticable, thus creating the necessary exigent circumstances.

Nevada v. Combs**14 P.3d 520 (Nev. Dec. 15, 2000)**

Although the district court made an obvious error in granting defendant's motion to dismiss, it would violate the Double Jeopardy Clause to permit a second trial after the mistaken acquittal.

The state charged Combs with four counts of sexual assault. After the prosecution presented its case, Combs moved for dismissal of all counts. The state and Combs stipulated to the dismissal of Count IV; however, the state opposed dismissal of the remaining counts. The district court found there was insufficient evidence to support Count III and dismissed that count in addition to the stipulated dismissal of Count IV. The state appealed, planning to retry Combs on Count III, if successful on appeal. Combs argued that the appeal was moot because the Double Jeopardy Clause barred retrial.

The Nevada Supreme Court held that the district court erred in granting Combs' motion to dismiss, ruling that the proper course of action would have been for the court to direct a verdict, or, alternatively, to set aside the verdict if the jury had convicted Combs on Count III.

Nonetheless, the court agreed with Combs that a judgment of acquittal, whether based on a not guilty verdict or a court ruling of insufficient evidence,

may not be appealed. The court held that no matter how mistaken an acquittal may be, to permit a second trial would be double jeopardy. Consequently, the court dismissed the state's appeal.

CRIMINAL LAW

United States v. Blair

2000 U.S. App. LEXIS 1549 (9th Cir. Feb. 2, 2000)

Public authority defense and assertions of estoppel relating to violation of federal child pornography laws available only when reasonably relying on authorized federal agent's representation.

Appellant, Blair, pled guilty in district court to eleven counts of transporting and one count of possessing child pornography, both in violation of federal law. On appeal, Blair argued that the district court erred in excluding appellant's affirmative defenses of public authority and equitable estoppel. He argued that he relied on an officer's stated belief that child pornography "popping up" on appellant's computer was not illegal. He also argued that he was sentenced incorrectly. He asserted that the court erred in finding that an image of sodomy between an adult man and a minor female deserved a four-level sentence enhancement and that distribution of pornography, when there was no showing of pecuniary gain, deserved a five-level sentence enhancement.

The Ninth Circuit recognized the availability of the public authority defense when a defendant reasonably relies upon a representation of a government agent acting with authority to allow the commission of the illegal act. The court, however, held that the officer's statement did not constitute an authorization to carry or distribute child pornography because there was no evidence that the appellant relied on the officer's statement, and because the officer had no authority to authorize violating child pornography laws. The court also held that equitable estoppel only applies when a defendant relies on advice or authority of authorized federal agents. Because the officer making the statement allegedly relied on was not a federal agent, the court held that the district court did not err in excluding appellant's defense of entrapment by estoppel.

The court reviewed appellant's second argument on a "clear error" standard. Federal law provides for a four-level sentence enhancement where pornographic material reveals sadistic or masochistic conduct, or other acts of violence. The court held that the image – depicting an adult male anally penetrating a minor female – was an act of violence, thus warranting the four-level enhancement.

Finally, the court recognized that federal law requires a showing of pecuniary gain in distributing child pornography in order to enhance a sentence by five levels. Accordingly, the court reversed on this issue and remanded to district court to determine whether appellant received pecuniary gain in relation to his distribution of child pornography.

Doyle v. Nevada**995 P.2d 465 (Nev. Feb. 3, 2000)**

The "could" test renders a stop/arrest valid and may be applied retroactively to cases not yet taken to final judgment.

Appellant, Doyle, was sentenced to death for first-degree murder, conspiracy to commit murder, first-degree kidnapping, and sexual assault. On appeal, the Nevada Supreme Court reversed the conviction for sexual assault but affirmed the other convictions and the death sentence. Consequently, appellant petitioned the district court for post-conviction relief on numerous grounds of ineffective counsel. The petition was denied and an appeal followed.

Doyle contended trial counsel was ineffective based upon numerous grounds. He argued that counsel failed to challenge the admissibility of a statement he made to police, as it was based upon a pre-textual arrest. Doyle argued that the district court should have utilized the "would" standard (would a reasonable officer have made the stop/arrest) in the determination of whether his trial counsel was indeed ineffective in the failure to seek suppression of his statement. Doyle argued that the "could test" (could the officer have legally made the stop) was adopted prospectively. Consequently, he claimed that the court's use of the "could" standard was error.

The court, citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), held that new standards of conduct for criminal prosecutions are adopted retroactively to any cases not yet final at the time the rule is changed. For this reason, the "could" test adopted in *Gama v. Nevada*, 920 P.2d 1010 (Nev. 1996), applied and the district court acted properly in allowing it.

The court held that the standard Doyle wished to apply was not the law at the time of his trial. As such, appellant's counsel could not be deemed ineffective for his failure to predict a change in the law.

Knight v. Nevada**993 P.2d 67 (Nev. Feb. 3, 2000)**

Determination of whether a steak knife may be considered a "dangerous or deadly weapon" is a question of fact for the jury.

In a dispute over his car, defendant, Knight, pursued and eventually injured his victim with a common steak knife. At trial, the jury was given an instruction regarding the illegality of "carrying a dirk, dagger, or dangerous knife." Knight was convicted of carrying a concealed weapon, a gross misdemeanor.

On appeal, the Nevada Supreme Court first explored the implications of the term "dangerous knife." The court had already determined that the term was too vague to withstand constitutional scrutiny, and, thus, found the instruction improper. The court, nonetheless, found use of the term in the jury instruction to be harmless error, because the steak knife in question could be found by a reasonable jury to be a "dangerous or deadly weapon." In so doing, the court adopted several factors for determining whether an otherwise benign implement may be regarded as a dangerous or deadly weapon in certain circumstances including: the nature of the instrument itself; the circumstances under which it is carried; the manner in which it is carried; the particular person carrying it; and other factors such as possible peaceful uses.

As a preliminary matter, the court rejected the state's motion to dismiss the appeal as moot, because Knight had already completed his sentence for the crime. The court held that, due to the collateral consequences of a criminal conviction, the completion of the sentence would not render the appeal moot. The court's decision overruled its earlier decisions in *Bryan v. State*, 368 P.2d 672 (Nev. 1962), *State v. Cohen*, 201 P. 1027 (Nev. 1921), and *State v. Pray*, 94 P. 218 (Nev. 1908).

Desimone v. Nevada

996 P.2d 405 (Nev. Feb. 23, 2000)

Civil tax conviction on drug charge is a penalty, making subsequent criminal prosecution exposure to double jeopardy.

Desimone was charged with possession and sale of methamphetamines. The district court entered civil judgment against him, in the amount of \$166,000, for failure to pay taxes on the drugs pursuant to Nevada's Tax on Controlled Substances Act (CSA). The district court convicted Desimone of one count of possession of a trafficking quantity of a controlled substance, and sentenced him to a term of fifteen years with a \$100,000 fine. Desimone appealed on the grounds that this was impermissible exposure to double jeopardy. The Nevada Supreme Court threw out the conviction on those grounds, but the United States Supreme Court vacated the court's decision and remanded.

The Nevada Supreme Court reconsidered the case using a two-part test outlined in two U.S. Supreme Court decisions: *United States v. Ursery*, 518 U.S. 267 (1996), and *Hudson v. United States*, 522 U.S. 93 (1997). The test determines whether a civil penalty is really a disguised criminal penalty by examining whether the law in question is civil or criminal in nature and whether the statutory scheme is so punitive as to transform a civil remedy into a criminal penalty.

Based on this analysis, the court again vacated Desimone's criminal conviction. The court concluded that, even though the Nevada legislature intended the CSA to be essentially civil in nature, the tax was the functional equivalent of a criminal prosecution. Therefore, since the tax judgment occurred prior to Desimone's criminal conviction for engaging in the same unlawful conduct, the conviction violated the Double Jeopardy Clause.

Breault v. Nevada

996 P.2d 888 (Nev. Mar. 10, 2000)

A sentence in which the minimum term exceeds forty percent of the maximum term may be imposed if pursuant to a freely bargained for plea agreement.

Defendant, Robert Breault, pled guilty to mayhem and assault with a deadly weapon, and was sentenced to serve a maximum term of seventy months. His sentence included a minimum parole eligibility of forty-two months on the mayhem conviction, and a maximum term of twenty months with a minimum parole eligibility of twelve months on the assault conviction. The sentences were to be served consecutively.

The defendant filed a proper person motion to correct an illegal sentence that did not comply with a statute requiring that the minimum term of imprisonment must not exceed forty percent of the maximum term imposed. The district court denied the motion and the defendant appealed.

While the Nevada Supreme Court acknowledged the sentences imposed on the defendant violated Nev. Rev. Stat. 193.130 (1), the court pointed out that the defendant entered into a plea agreement for the sentence, thereby waiving his rights to any defect associated with the terms of his sentence. The court held that, because the plea was entered knowingly and voluntarily and the defendant expressly waived all defects associated with the minimum and maximum terms, the court would not permit the defendant to subsequently challenge the sentences under the statute. That the minimum terms exceeded forty percent of the maximum terms imposed merely affected the appellant's parole eligibility and not the actual length of his sentences.

The court concluded that it would invalidate sentences not complying with the forty percent provision of Nev. Rev. Stat. 193.130 (1), except where the defendant knowingly and voluntarily agrees to the sentence and expressly waives the defect impacting only parole eligibility.

Hughes v. Nevada
996 P.2d 890 (Nev. Mar. 10, 2000)

In Nevada, a court must exercise discretion beyond simple consideration of the number of felonies committed in finding a defendant to be a habitual criminal, but need not make particularized findings.

The state charged Hughes in three separate cases with three counts of robbery with the use of a deadly weapon and one count of second degree kidnapping of a person sixty-five years of age or older. In each case, the state also alleged that Hughes was a habitual criminal under the Nevada "three strikes" law, Nev. Rev. Stat. 207.010(1)(b). The defendant's prior convictions included a 1980 conviction for false imprisonment, a 1981 conviction for attempted robbery, a 1982 conviction for robbery, and a 1989 conviction for robbery. The district court sentenced Hughes to three consecutive life terms without the possibility of parole for the robbery with the use of a deadly weapon conviction and to a concurrent term totaling twelve to thirty years for the second degree kidnapping of an elderly person conviction. Hughes appealed, arguing that the state violated his due process rights under the Fourteenth Amendment of the United States Constitution by failing to make a specific finding regarding whether it was "just and proper" to adjudicate him as a habitual criminal. Hughes argued that the sentencing court did not specifically address the nature and gravity of his prior convictions.

The Nevada Supreme Court held that while Nevada law requires a sentencing court to exercise its discretion and weigh the appropriate factors for and against adjudicating a person as a habitual criminal, there is no strict requirement that the sentencing court must make particularized findings. The sentencing court need only show that it is exercising its discretion; failure to specifically consider the gravity and nature of the prior crimes is not determinative as to whether the sentencing court used its discretion.

Moore v. Nevada
997 P.2d 793 (Nev. Mar. 10, 2000)

Courts may use commission of a felony and premeditation as alternative means of establishing the single mens rea element of first-degree murder, rather than constituting independent elements of the crime.

Defendant, Moore, shot and killed a bartender in the commission of a robbery. Moore claimed that the shooting was an accident, and, as proof, noted that after fleeing he returned to check on the bartender's condition. The state prosecuted the case using the alternative theories of premeditation/deliberation and felony-murder to prove the elements of first-degree murder. Moore was found guilty of first-degree murder and robbery with use of a deadly weapon.

Moore appealed claiming that the linkage of theories was improper and that the state was obligated to choose only one theory for prosecution of the case. Moore also asserted that the criminal information was insufficient for vagueness, and alleged prosecutorial misconduct.

The Nevada Supreme Court affirmed, holding that Nev. Rev. Stat. 200.030 did not require the state to prosecute the case under a single theory, thus allowing the state to use alternative theories in proving the elements of first-degree murder.

In addition, the court found that the information not only included the premeditation/deliberation theory, but specifically included language that alleged the crime was committed in the course of committing robbery. The court held that this language put the appellant on sufficient notice that the state was seeking a felony-murder conviction.

With regard to prosecutorial misconduct, the court found improper a statement by the prosecutor that he personally believed in the defendant's guilt. However, the court held that the error did not affect the fairness of the trial and allowed the conviction to stand.

Gaines v. Nevada
998 P.2d 166 (Nev. Mar. 13, 2000)

Genetic marker testing may be performed on violent and repeat offenders, and is therefore not limited to sex offenders.

Appellant, Gaines, faced felony charges arising from three separate incidents. On April 7, 1998, Gaines pled guilty to the felony of unlawful use of coins in a gaming machine and was sentenced to twelve to forty-eight months (Case A). The district court suspended the sentence and placed Gaines on probation for no longer than four years.

Several months later, while on probation from Case A, Gaines was arrested for burglary and forgery from a failed attempt to cash three fake one hundred dollar Visa traveler's checks at a casino (Case B). Gaines' probation in connection with Case A was revoked because of the arrest in Case B. Prior to his probation revocation hearing on Case A, Gaines was rebooked on a separate burglary charge stemming from a check forgery in June 1998 (Case C).

As part of Gaines' plea agreement, he pled guilty to two counts of burglary from Cases B and C, and one count of forgery from Case A. Additionally, the plea stated that the state retained the right to argue at sentencing, but would not oppose concurrent time between the burglary counts. Gaines was

sentenced in December 1998, at which time he had been in custody for 217 days. The district court awarded 217 days time served in Case A, but gave no credit for Cases B and C. Gaines requested credit on all three cases, but the court denied Gaines' request.

Gaines appealed, arguing that the district court erred in sentencing. He contended that the court abused its discretion by not applying credit for time served on all the cases. He argued that the court could not apply Nev. Rev. Stat. 176.055 (prohibiting the court from applying credit for the other cases) because it conflicted with Nev. Rev. Stat. 176.035(2). In addition, Gaines argued that genetic marker testing, which the district court required him to undergo, should not have been performed on him as the legislature only intended it to be used for sexual offenders. Gaines also raised constitutional claims under the Fourth, Eighth, and Fourteenth Amendments.

The Nevada Supreme Court rejected Gaines' first argument that the statutes were in conflict, and that Nev. Rev. Stat. 176.035(2) only authorized the district court to run sentences concurrently, not that the concurrent sentences be identical with regards to time served.

The court also held that Nev. Rev. Stat. 176.0913 clearly does not limit genetic marker testing to sex offenders. In addressing the constitutional claims, the court held that, under the "special needs" exception to the Fourth Amendment warrant requirement, the involuntary testing was reasonable and a compelling governmental interest outweighing the privacy issues of a convicted criminal. The court also held the statute requiring genetic testing was rationally related to legitimate governmental interest in apprehension of repeat and violent offenders and did not violate substantive due process rights.

Finally, the court rejected Gaines' contention that the testing violated the Eighth Amendment by inflicting barbarous physical punishment and inflicting pain without justification. The court held that the extraction of blood from certain enumerated offenders was not barbarous.

Nevada v. Freese

997 P.2d 122 (Nev. Mar. 13, 2000)

An oral canvass is sufficient without specific questioning if the totality of the circumstances demonstrates that the defendant is making a voluntary and knowing plea (overruling Nevada case law).

Defendant Bryan Freese brought a post-conviction petition for writ of habeas corpus, alleging inadequacy of the oral canvass before he pled guilty to sexual assault upon a minor under age sixteen. During Freese's oral canvass, the court asked Freese whether he understood the nature of the offense, the elements of the offense, the possible sentence, the content of the plea, and his voluntariness and adequacy of representation. Freese argued that this canvass was insufficient. He asserted that the court is required to engage in ritualistic questioning and to make specific inquiries, and that the sentencing court did neither. The state disagreed, arguing that Freese's guilty plea was the result of a voluntary and informed choice. The state claimed that an oral canvass need not be ritualistic. Instead, the state asserted the court should look at the totality of the circumstances to determine whether the plea was voluntary and whether the defendant understood the plea he was making.

The district court disagreed with the state's reasoning and granted Freese's petition. In their ruling, the court relied on *Koerschner v. State*, 892 P.2d 942 (Nev. 1995), and *Kidder v. State*, 934 P.2d 254 (Nev. 1977), which require the district court judge to ask a defendant specifically if he understands the rights he is waiving as a result of a guilty plea and to review the elements of the crime with the defendant.

On appeal, the Nevada Supreme Court overruled both *Koerschner* and *Kidder*, finding that it need only consider the totality of the circumstances and not the inclusion of specific questions in determining whether the defendant has entered a plea freely, voluntarily, and knowingly. In overruling both cases, the court noted that *Koerschner* was based upon a version of Nev. Rev. Stat. 174.035 that was since amended. The statute no longer requires the court to personally address a defendant regarding his plea agreement unless the agreement was oral. The court expressly overruled both cases to the extent that they stood for the requirement of a ritualistic oral canvass containing specific inquiries. The court held that it would not throw out a plea if the record demonstrated that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of his plea.

Although the court specifically rejected the requirement that the canvass must include a specific review of the elements of the crime and specific inquiries about whether the defendant understood the rights he was waiving, it considered these factors in determining that Freese's canvass was sufficient. They noted that at the time Freese entered the plea, the court questioned him about whether he read and understood the agreement and he answered affirmatively. Furthermore, Freese never indicated any inability to read or understand the agreement. The court found that all correspondence with the district court proved Freese to be competent, intelligent, and able to understand his agreement. Thus, the court held that Freese was aware of the rights he was waiving.

Fullerton v. Nevada

997 P.2d 807 (Nev. Apr. 6, 2000)

Sale of unregistered securities held to be a general intent crime.

The state charged appellants Fullerton, the secretary/treasurer and founder of First Phoenix, Inc., and Bennett, the company's president, with numerous violations of Nevada's Uniform Securities Act. At trial, the state presented evidence of checks signed by appellants to Joel McVickers. These checks were purportedly commission checks for McVickers' sale of First Phoenix stock. McVickers testified that he orally agreed to sell the stock for a five percent commission but was not licensed to sell securities in Nevada. The jury found Fullerton and Bennett guilty on all counts. The district court imposed two years in prison for counts I through VII, to run consecutively, and two years in prison for the remaining counts, to run concurrently. The district court suspended all prison time and placed appellants on probation for a total of thirty-five years each, with probation ending sooner if the appellants paid restitution.

Fullerton and Bennett appealed, alleging that the court erroneously defined "willfully," making sale of unregistered securities a general intent crime. The appellants also argued that there was insufficient evidence to support their conviction, and that the court erred by imposing prison sentences, excessive proba-

tion, and restitution. The Nevada Supreme Court upheld the district court on the general intent, prison time, and restitution issues, and reversed on the evidence and probation claims.

The court concluded that the district court did not err in giving a jury instruction which defined sale of unregistered securities as a general intent crime. The court reasoned that they had previously approved the same definition of "willfully" in the context of other general intent crimes and such a conclusion conforms with the majority of federal and state courts that have considered the issue under the Uniform Securities Act.

The court also rejected the appellants' claim that a prison sentence was not an option. The court held that, while Nevada statutory law does not allow for a prison sentence, it applies only to those who have violated a regulation or order. In this case, the court noted that appellants violated a provision of Chapter 90 of the Nevada Revised Statutes and that violation of Chapter 90 is a Class C felony. Thus, the district court did not err in sentencing the appellants to a suspended prison sentence.

Furthermore, it held that sales for which the state accused them of paying improper commissions were exempt from registration, and the trial court's restitution order was proper.

The court agreed with the appellants on the insufficient evidence claims, reasoning that the payment of a commission is a material element of the exemptions under Nev. Rev. Stat. 90.460. Since the state did not prove that there had been any commission payments in the other seventeen counts, the state could not convict the appellants on those counts.

The court also agreed with appellants' claim the trial court erred in sentencing them to more than five years probation. The court cited the plain statutory language of Nev. Rev. Stat. 176.500, which allows a five-year maximum probation.

Fullerton v. Nevada

8 P.3d 848 (Nev. Sept. 19, 2000)

A defendant claiming exemption from registration for certain transactions must provide evidence showing entitlement to such exemption; the opposing party must then prove beyond a reasonable doubt that the exemption does not apply.

Appellants were convicted of twenty-one counts of sale of an unregistered security in violation of Nev. Rev. Stat. 90.460. The appellants claimed an exemption for nonpayment of commissions for seventeen of the twenty-one sales. Nev. Rev. Stat. 90.530 provides that an exemption may be claimed in an offer to sell, or in a sale of, unregistered securities only if "no commission or other similar compensation is paid or given, directly or indirectly, to a person, other than a broker-dealer licensed or not required to be licensed under Nev. Rev. Stat. ch. 90, for soliciting a prospective purchaser in this state."

Witness testimony only linked four commissions paid out of the twenty-one counts. The appellant then confirmed in testimony that he did pay commissions on the four sales of securities identified by the witness.

On appeal, the Nevada Supreme Court affirmed four counts of sale of an unregistered security and reversed the remaining seventeen counts for lack of

evidence. The state petitioned for a rehearing. The state argued that the court improperly applied the law with respect to the burdens of production and proof in relation to the exemption of Nev. Rev. Stat. 90.530.

The court held that the appellants' testimony was sufficient to show competent evidence that commissions were not paid on the seventeen disputed sales. The court concluded that the state then had the burden to prove otherwise, which it failed to do. The court affirmed the previous reversal of the convictions on the remaining seventeen counts.

Parrish v. Nevada

12 P.3d 953 (Nev. Nov. 22, 2000)

Trafficking sentence vacated and remanded with instructions to consider substantial assistance in sentencing.

Parrish was arrested and found guilty of trafficking controlled substances and resisting and obstructing an officer. He moved for a suspended sentence based on the assertion he provided substantial information.

Parrish was cooperative with detectives, giving detailed information about fourteen other traffickers. He provided names, telephone numbers, maps, and surveillance information. Under Nev. Rev. Stat. 453.3405(2), the court has discretion to reduce or suspend sentences if substantial assistance is given in the "identification, arrest or conviction" of other drug traffickers. The police never investigated the information. Officers claimed arrests must result to constitute substantial assistance and reduce a sentence. When Parrish was sentenced, the court made no finding regarding substantial assistance.

The record was found ambiguous regarding substantial assistance, so a new sentencing hearing was ordered.

Bridges v. Nevada

6 P.3d 1000 (Nev. Aug. 23, 2000)

Conviction upheld despite prejudicial remarks from prosecutor and reliance on jury instructions that have subsequently been clarified.

Sebastian Bridges' wife Laurie left him and eventually moved in with Hunter Blatchford. Bridges found her and asked to meet with both Laurie and Blatchford in order to gain closure. Bridges then drove them to a remote location, shot and killed Blatchford, buried him in the desert, and took Laurie back with him. While he was pulled over on the side of the road, a police officer came to investigate, became suspicious when he saw the blood and dirt in the car and eventually arrested Bridges, who admitted to burying the body. Bridges was convicted of various counts of kidnapping, burglary, and murder and was sentenced to death.

On appeal, Bridges alleged improper comments by the state. Bridges claimed that the prosecutor misled the jury by repeatedly using terms such as "aggravating" and "aggravation" to refer to evidence that was not relevant to the statutory aggravating circumstance, and by improperly drawing inferences from Bridges' choice not to testify. He also argued that the jury instructions improperly blurred the distinction between the first-degree murder elements of premeditation and malice.

The Nevada Supreme Court found that, since Bridges did not properly preserve the issues for appeal, he was only entitled to relief if there was plain or constitutional error. The court found that Bridges did not demonstrate plain or constitutional error on any of the three alleged errors.

The court agreed with Bridges that the prosecution's remarks were improper, and strongly criticized the prosecutor's performance, warning prosecutors against using such misleading references in the future, but determined that the error was harmless under the facts of the case.

The court then held that the preferred instructions on premeditation had been clarified in a recent case, *Byford v. State*, 994 P.2d 700 (Nev. 2000), but that Bridges' case had been decided before *Byford* and that the evidence on premeditation in Bridges' case was overwhelming.

Dechant v. Nevada

10 P.3d 108 (Nev. Oct. 19, 2000)

District courts may require a private investigator to disclose work product relevant to trial that is not protected by any other privilege.

Dechant was accused of murdering her boyfriend, Weinstein. In the course of the investigation, Weinstein's mother hired a private investigator, who quickly identified Dechant as his prime suspect. At trial, Dechant subpoenaed the private investigator's notes, but the district court quashed the subpoena. Dechant was convicted of first-degree murder and appealed.

Dechant argued on appeal that the district court improperly held that it did not have discretion to require disclosure of the notes. Dechant also contended the court erred in allowing a former police officer's testimony to impermissibly question the veracity of her testimony.

The Nevada Supreme Court found for Dechant, holding the district court does have discretion to require discovery of documents in the private investigator's possession that are not protected by other privileges. The court also held that a lay witness's opinion concerning the credibility of statements of another is inadmissible and the district court erred by permitting the police officer to attack the appellant's credibility. The court held that the district court's cumulative errors mandated a new trial.

Romero v. Nevada

996 P.2d 894 (Nev. Mar. 13, 2000)

To determine whether malicious destruction of property is a felony or misdemeanor, the value of the property affected, or the loss sustained, should be measured by the fair market value, when property is completely destroyed, and by the cost to repair, when the property is partially destroyed.

The Eighth Judicial District Court in Clark County convicted Romero on charges of burglary, aggravated stalking, and felony malicious destruction of private property, because Romero threw human excrement at a former coworker in the retail store where he was formerly employed. His actions resulted in damage to the coworker's clothing, store furnishings and merchandise, and a computer. Romero contended the state failed to establish that the value of the damaged property or loss sustained exceeded the felony threshold.

The state argued that the valuation of property damages, as referenced in Nev. Rev. Stat. 206.310 and 193.155 (Destruction Statutes), was broader than the valuation of damages referred to in the larceny statutes. The appellant cited *Bryant v. State*, 959 P.2d 964, 966 (Nev. 1998), in contending that the measure of damages sustained should be ascertained by the fair market value.

The state admitted an expense list into evidence, which outlined replacement figures for damaged items totaling \$5,010, as well as ancillary costs resulting from an increase in security personnel. This amount exceeded the statutory threshold to convict the appellant of a felony. The state argued that the language, "loss resulting from the offense," as contained in the Destruction Statutes, provided for a broader interpretation than the language in the larceny statutes, thereby allowing valuation of damages at replacement cost.

The Nevada Supreme Court held that the intent of the Destruction Statutes was to make criminal penalties proportionate to the value of the property affected, making fair market value the appropriate valuation when property is completely destroyed and cost to repair the appropriate valuation when property is partially destroyed. Furthermore, the court held that ancillary consequences accompanying a crime may not be included in the calculation for determining when the statutory threshold is met.

The court concluded the district court erred by allowing the security costs and replacement value of the property to be introduced into evidence. The conviction was reversed and remanded for entry of a judgment of conviction for gross misdemeanor malicious destruction of private property.

English v. Nevada

9 P.3d 60 (Nev. Aug. 24, 2000)

Sentences for domestic violence battery occurring after January 1, 1998, may be enhanced by convictions that occurred before January 1, 1998.

Appellant, English, was charged with domestic violence battery in connection with an assault on his live-in girlfriend on May 13, 1998. The offense was enhanced to a felony, due to two prior domestic violence battery convictions on September 28, 1995 and February 11, 1998.

On appeal, English argued that Nev. Rev. Stat. 200.485 does not permit convictions that occurred before January 1, 1998 to be used for enhancement. Nev. Rev. Stat. 200.485 provides, in part, that a person who is convicted of domestic violence, for the third time in seven years, is guilty of a category C felony. English argued that statutory language stating that it does not apply to offenses that are committed before January 1, 1998, could be interpreted to mean that convictions prior to this date cannot be used for enhancement purposes.

A divided Nevada Supreme Court held, in an opinion joined only by Justices Agosti and Shearing, that convictions occurring prior to January 1, 1998 may be used to enhance the penalty of the appellant's present conviction. The court recognized the potential ambiguity, but reasoned that the language of the statute meant that a conviction prior to January 1, 1998 could not be enhanced, but that such a conviction could be used to enhance a conviction after January 1, 1998. The court held that the domestic violence statute was modeled after

the DUI enhancement law that allowed offenses prior to the bill's enactment to be used for enhancement purposes.

Justices Maupin and Becker concurred, disagreeing with the court's finding that there was an ambiguity in the statute that required statutory construction. They agreed with the affirmance, but argued that no statutory construction was needed.

Justice Leavitt dissented, joined by Justices Rose and Young. The dissent agreed with the majority that the statute is ambiguous. The dissent, however, argued that when a penal statute is ambiguous, a strict, narrow construction which is liberal in favor of the defendant is necessary.

White v. Grigas

2000 U.S. App. LEXIS 27227 (9th Cir. Oct. 25, 2000)

Under Nevada law, the courts may sentence defendants as habitual criminals by weighing the appropriate factors before they make their decision.

The Ninth Circuit upheld the defendant's 1986 conviction for burglary and his sentence as a habitual criminal. The court found that although it may have been error to force a defense witness to testify in shackles, the error had no injurious effect on the verdict. Additionally, the sentencing of the defendant as a habitual criminal complied with Nevada law, since courts in this state are only required to weigh the appropriate factors rather than to find that the sentence is "just and proper."

Additionally, the defendant missed the deadline for appealing the denial of certification for his other claims. The court refused to hear his other claims due to his failure to show good cause for granting an extension.

Dennis v. Nevada

13 P.3d 434 (Nev. Dec. 4, 2000)

In determining the possible excessiveness of a death sentence, an appellate court need only consider the crime and defendant at hand.

In 1999, appellant, Dennis, pled guilty to first-degree murder after strangling a woman to death. Subsequently, a three-judge panel held a penalty hearing in which it was determined that three prior felony convictions had been proven beyond a reasonable doubt. The panel also found that Dennis' mental illness and intoxication at the time of the killing were mitigating circumstances. The panel held that the prior convictions outweighed the mitigating circumstances and returned a verdict of death. Dennis appealed, arguing that the verdict was excessive and that the appellate court should compare the background and circumstances surrounding other death sentence cases to determine excessiveness.

The Nevada Supreme Court held that the panel proved aggravating circumstances when it showed that Dennis had been convicted three previous times of felonies involving the use or threat of violence. The court also determined the sentence was rendered without the influence of passion, prejudice, or any arbitrary factor, because it considered evidence and circumstances surrounding the crime and Dennis' background.

Finally, the court affirmed the death sentence, holding that it was not excessive and stating that in determining the excessiveness of a verdict of

death, it is only required to consider the crime and defendant at hand. The court held that it would consider whether the crime committed and the defendant were of the type that warrants the death sentence, but held that the court would not perform a proportionality comparison to other individuals. The court held that Dennis' crime, a cold-blooded and calculated killing, was the sort of crime to which the death penalty has been applied, and that Dennis, shown to be a dangerous and violent man, was the sort of defendant to whom the sentence had been given.

United States v. Rojas-Millan
234 F.3d 464 (9th Cir. Dec. 8, 2000)

When determining whether a defendant is entitled to a sentence adjustment based on minor participation in the criminal act, the court should consider the role the defendant played in the overall scheme of the criminal activity, not just the roles played by those convicted or charged in the criminal act.

Defendant, Rojas-Millan, was arrested in a routine traffic stop based on an officer's belief that the vehicle the defendant was driving had fictitious California license plates. During the stop, but prior to the arrest, the officer obtained consent to search the vehicle, which resulted in the discovery of four kilograms of methamphetamines. Rojas-Millan was convicted of possession with intent to distribute and sentenced to 188 months in prison.

Rojas-Millan appealed the stop, search, detention, and sentencing. He claimed that he was stopped without probable cause or reasonable suspicion, and that he was detained and searched improperly. In addition, he challenged the length of his sentence.

The Ninth Circuit upheld the conviction, holding that the officer's reasons for conducting a stop were grounded in specific and articulable facts, that vague and contradictory answers to the officer's questions justified his search, and that the district court's reliance on Rojas-Millan's signing of a Spanish language search consent form was not clear error.

The court did, however, find error in the sentencing. Rojas-Millan argued that he should have been given a downward adjustment based on his role as a minor participant in a larger drug distribution scheme. The district court concluded that a downward adjustment should be made based solely on whether the defendant was a minor participant in comparison to other charged defendants. The appeals court held that consideration should be given to all participants in the scheme and not just to the defendants in the given case. To not account for such individuals, the court held, would produce arbitrary results, subjecting less culpable defendants to longer sentences simply because their more involved co-conspirators managed to escape arrest or were tried separately.

The court also addressed whether the district court considered a downward adjustment based on aberrant behavior but declined to rule. The court was unclear whether the district court concluded it lacked the authority to depart downward, or, instead, exercised its discretion and declined to do so. On remand, the district court was instructed to clarify its ruling.

Dissenting to this part of the decision, Justice Graber believed that the district court appropriately addressed aberrant behavior by the statement "I reject the aberrant behavior request for a downward departure," concluding that the wording "rejecting a request" means that the court considered but denied the request.

CRIMINAL LAW: JURY SELECTION AND INSTRUCTIONS

Graham v. Nevada

992 P.2d 255 (Nev. Jan. 26, 2000)

A court is under no obligation to offer jury instructions for an offense that the facts of the case will not support.

Appellant, Graham, was charged with the first-degree murder of Chelsey Hachez, the eight-month-old daughter of his live-in companion. He was found guilty of first-degree murder based on the theory that he subjected the victim to child abuse. The trial court gave jury instructions on first-degree murder, but refused to give instructions on second-degree murder. Graham appealed, claiming that he was entitled to a new trial because the district court refused to offer instructions and verdict forms on second-degree murder.

The Nevada Supreme Court found that the trial court was only required to give jury instructions that could be supported by the proofs of the case. In this case, the refusal to give jury instructions on second-degree murder was proper since the proofs of the case could only support a theory of first-degree murder. Nev. Rev. Stat. 200.030(1) specifically enumerates murder by means of child abuse as a first-degree murder, while Nev. Rev. Stat. 200.030(2) defines second degree murder as all other kinds of murder not enumerated in the definition of first-degree murder. Since murder by acts of child abuse is specifically enumerated in the definition of first-degree murder, the court held the facts of this case could not support a second-degree murder charge. Therefore, the court held that the trial court acted properly in refusing to give jury instructions on second-degree murder and affirmed the conviction.

Boykins v. Nevada

995 P.2d 474 (Nev. Feb. 4, 2000)

Murder conviction reversed due to district court's failure to give proper jury instruction regarding battered woman syndrome.

Appellant, Boykins, was charged with involuntary manslaughter with use of a deadly weapon for shooting her live-in lover. At trial, Boykins argued that she shot Calvin Swazya in self-defense. Boykins originally told police that the shooting was accidental, but evidence at trial proved this to be untrue. Boykins then alleged that she suffered from battered woman syndrome and presented evidence that women who suffer from battered woman syndrome often claim that they accidentally kill their batterer.

Boykins asked that the jury be instructed that it could consider battered woman syndrome evidence to determine whether the defendant actually

believed that she needed to use deadly force, whether her belief was reasonable, and to assist in determining the credibility of her testimony.

The district court declined to give Boykins' jury instructions, instead finding that the court's instructions adequately advised the jury on the relevance of domestic violence to a claim of self-defense. Boykins was convicted and appealed.

Boykins argued that the district court erred in refusing to give the jury instruction she requested regarding battered woman syndrome. She alleged that the instruction was necessary to avoid confusion. Furthermore, Boykins argued that the court's instruction was insufficient in making clear that the jury could consider evidence regarding battered woman syndrome in evaluating whether a person under the circumstances would believe that she was in imminent fear of her life or great bodily injury. Finally, Boykins argued that the court's instruction failed to address the effect of the syndrome on her state of mind at the time of the shooting, or her claim that the shooting was accidental despite contrary evidence.

The court agreed, holding that the district court's instructions lacked consistency and failed to give a necessary instruction regarding the relationship between a person's state of mind and the battered woman syndrome. The court noted that the district court had offered only one instruction discussing the relationship between domestic violence and battered woman syndrome. The court was particularly troubled by the fact that the wording of the other eleven instructions encompassing the law of self-defense did not contain any language that provided that the jury must consider the reasonableness of a person's belief as it existed when that belief formed. Accordingly, the court remanded the case for a new trial with specific jury instructions regarding battered woman syndrome.

Justice Young dissented, arguing that self-defense only arises to legally justify a killing. Since Boykins had claimed for over a year that the shooting was accidental, Justice Young argued that battered woman syndrome was unnecessary as a defense.

Justice Young also argued that, even if testimony concerning battered woman syndrome was relevant, Boykins' proffered instruction overstated the admissibility of evidence concerning domestic violence. The court may allow evidence of domestic violence and expert witness testimony on the effects of domestic violence only to show the defendant's perception of imminent danger and the defendant's perceived need to use deadly force. Justice Young argued that Boykins' instruction did not include the imminency element. Further, Boykins' instruction, in Justice Young's view, improperly included the applicability of domestic violence to a witness's credibility. Justice Young wrote that using Boykins' instruction would require the jury to disregard Boykins' sworn testimony that the shooting was accidental.

Byford v. Nevada
994 P.2d 700 (Nev. Feb. 28, 2000)

Kazalyn instruction abandoned, and a new jury instruction established to clarify that first-degree murder requires showing premeditation, deliberation, and willfulness

Byford, and a co-defendant Williams, were originally convicted of murder in 1994. Their convictions were overturned and the case remanded for a new trial in 1997. Neither defendant testified at the new trial, but Williams introduced Byford's testimony from the original trial which included an admission of a prior felony conviction for attempted theft of a stolen vehicle. The trial court found both defendants guilty. Williams was sentenced to life in prison without parole, and Byford was sentenced to death.

Byford appealed on numerous grounds. Byford asserted the joinder of his case with Williams' was prejudicial and damaged his defense. The Nevada Supreme Court agreed, but found the error harmless because the result would not have changed. The court found that severance of the cases would not have prevented the admission of his prior testimony and that Byford was not prejudiced in this regard.

Byford argued that the jury instruction on premeditation was improper because it allowed a jury to find willful, deliberate murder solely on the basis of premeditation.

The court found that the evidence in the case was sufficient to establish premeditation and deliberation, but expressed concern over the instruction, which the court referred to as the *Kazalyn* instruction after the case in which it was first used, *Kazalyn v. State*, 825 P.2d 578 (Nev. 1992). The court noted that the *Kazalyn* instruction blurred the distinction between premeditation and deliberation, and that many courts have come to consider the terms to be redundant. The court decried that trend, finding that it blurs the distinction between first and second-degree murder, and held that the court should abandon that line of authority. The court directed district courts to cease treating premeditation alone as proof of willful murder. The court established a new instruction that stresses that willfulness, premeditation, and deliberation must all be proven to convict for first-degree murder.

Justice Maupin concurred with the result, but recommended that the *Kazalyn* instruction be modified to eliminate premeditation and deliberation as distinct concepts, and to allow premeditation to suffice as proof of deliberation and vice versa.

King v. Nevada
98 P.2d 1172 (Nev. Mar. 13, 2000)

State's peremptory challenge to the only African-American venireperson was not improper because the reasons given for the state's objection were race neutral and were not merely a pretext for racial discrimination.

Undercover police officers bought drugs from King as part of a sting operation involving a police informant. When the police later returned to arrest the appellant, shots were fired between police and appellant. King was convicted on charges of trafficking in a controlled substance, three counts of attempted murder, and discharging a firearm into a structure. King appealed.

King argued that the state's peremptory challenge to the only African-American venireperson violated the Equal Protection Clause of the United States Constitution. He also alleged that the court erred in failing to give a jury instruction regarding the unreliability of an informant's testimony. In addition, King argued improper execution of a search warrant, improper statements by the prosecutor, and failure of the prosecution to disclose exculpatory evidence.

The Nevada Supreme Court found the state's challenge to an African-American venireperson was not merely a pretext because no other juror was admitted who exhibited the same characteristics, youth and inexperience, for which the potential juror was dismissed. The court also held that the court was not required to issue a jury instruction warning on the unreliability of an addict's testimony because, unlike *Champion v. Nevada*, 490 P.2d 1056 (Nev. 1971), cited by King, the addict in this case was not known to be unreliable.

The court rejected King's other challenges. It held that the overwhelming evidence of King's guilt overrode the impropriety of the police and prosecution's behavior.

Cordova v. Nevada

6 P.3d 481 (Nev. Aug. 21, 2000)

Statutory jury instructions defining implied malice do not create a mandatory presumption of malice.

Cordova, who had been drinking, borrowed a gun and shot and killed Harding at his apartment as he was opening the door. Cordova was found guilty of second-degree murder with the use of a deadly weapon and sentenced to two consecutive terms of life imprisonment with the possibility of parole.

On appeal, Cordova argued that a jury instruction that allowed the jury to imply malice when there was no provocation, or when a killing shows an abandoned heart, was improper because it created a mandatory presumption, and relieved the state of its burden of proof. He also argued that the sentence enhancement to felony murder for use of a deadly weapon was improperly applied because use of a deadly weapon was already taken into account as part of the crime. Cordova also claimed that a police witness was improperly allowed to testify regarding Cordova's veracity.

The Nevada Supreme Court held that the jury instruction defining implied malice was proper. The jury was also instructed on the presumption of innocence and that the state's burden was proof beyond a reasonable doubt. The court clarified that using the word "may" in the implied malice instruction, rather than "shall," would be preferable. The court held that the district court did not err when enhancing the sentence because enhancement was only improper if the use of a weapon was an integral part of the crime. The court held it was not. Finally, the court held that the police witness was not giving expert testimony, and thus did not violate the rule against expert witnesses testifying as to the veracity of the defendant.

Collman v. Nevada**7 P.3d 426 (Nev. Aug. 23, 2000)**

A jury instruction that murder by child abuse automatically establishes malice aforethought is erroneous.

Appellant, Collman, was convicted of murdering the son of his live-in girlfriend by child abuse. At trial, the jury was instructed that if the three-year-old victim had died through child abuse the crime was murder in the first degree, because the element of malice aforethought was automatically present.

On appeal, Collman challenged numerous evidentiary rulings, but did not challenge the jury instruction. Nonetheless, the Nevada Supreme Court asked for supplemental briefs in order to address the subject. The state supported the instruction with three alternative arguments: (1) killing by any of the means mentioned in Nev. Rev. Stat. 200.030(1)(a) is premeditated as a matter of law and this proves malice aforethought; (2) a specific intent to kill is not a necessary element of murder; or (3) murder by child abuse is analogous to felony murder and, just as malice is supplied by the intent to commit a felony, malice is supplied by the intent to commit child abuse.

The court rejected all of the state's arguments. First, although premeditation is usually consistent with the other means described in Nev. Rev. Stat. 200.030, poison, lying in wait, and torture, the court held that, because child abuse can be an impulsive act, murder by child abuse is not always premeditated. In addition, premeditation does not prove malice, since a justified killing, like one done in self-defense, is premeditated but not done with malice. Second, whether specific intent to kill is a necessary element of murder is irrelevant since malice aforethought and specific intent to kill are not the same thing; thus, even if the state did not have to prove the former it still had to prove the latter. Finally, the state's attempt to analogize felony murder to murder by the means enumerated in Nev. Rev. Stat. 200.030(1)(a) was not consistent with most of the holdings of the Nevada Supreme Court and other state courts, which attempt to restrict the application of the felony murder rule. Additionally, the cases supporting the state's position dealt with murder by torture and held that torture, like felony murder, does not require proof of malice. The court rejected that analysis, holding that torture can result in death without the presence of legal malice.

Even though the state did not prevail in its arguments regarding the correctness of the jury instruction, the court did not overturn the verdict. Applying a harmless error analysis, the court found the jury had other proper instructions negating the erroneous one and would have believed the defendant committed his crime with malice aforethought even without it.

The court departed from the traditional rule that an erroneous jury instruction regarding an element of the offense is grounds for automatic reversal and found the analysis is appropriate when an inaccurate jury instruction is not "structural" in form and effect, but omits, misdescribes or presumes an element of the offense. Collman argued that in the past an inaccurate jury instruction regarding essential elements of the offense was not subject to harmless error analysis but instead required automatic reversal. The court noted it had created exceptions to that rule in the case Collman cited, *Thompson v. Nevada*, 838 P.2d 452 (Nev. 1992). Also, in *Neder v. United States*, 527 U.S. 1 (1999), the

United States Supreme Court held that harmless error analysis was proper if the erroneous instruction concerned an element of the offense but did not negate the jury's findings. By applying harmless error analysis, the court chose to follow *Neder* and overrule *Thompson* to the extent that it was inconsistent.

Proceeding with the harmless error analysis, the court found that the jury had received other proper instructions that correctly stated the relationship between malice and murder. The court also held the jury's finding that the victim's death involved torture necessarily proved that the defendant had a state of mind that implied malice. Finally, the court concluded the verdict would have been the same even without the erroneous instruction; therefore, the error was harmless and the verdict should be upheld.

Chief Justice Rose disagreed with the court's application of harmless error analysis, preferring the traditional rule that a verdict obtained with incorrect instructions regarding an essential element of the offense should be reversed. He noted that *Neder* was not binding and that it encroached on the power of the jury to determine guilt or innocence.

Additionally, the Chief Justice found fault with the court's harmless error analysis. He noted there was nothing to indicate which instructions the jury relied on to come to their verdict. He also argued that the finding that the child's death resulted from torture, which occurred during the penalty phase, could not be used to prove what the jury believed during the guilt phase.

Peck v. Nevada

7 P.3d 470 (Nev. Aug. 24, 2000)

Courts need not give jury instructions for a related offense that is a lesser offense than the crime charged.

Following a University of Nevada football game in Reno, a woman was urinating under some trees when Peck grabbed her from behind and threatened to kill her if she screamed. He dragged her backwards, causing her to fall, digitally assaulted her, and forcibly raped her. Peck denied that his victim fell to the ground and insisted that they had consensual intercourse while standing up. While on the ground, the woman felt a set of keys, which she took prior to running to a friend's house. The police subsequently located the automobile and determined it was registered to Peck and his wife.

Upon arriving at Peck's home, officers were greeted by Peck's wife, who invited them into their apartment. Peck's wife claimed officers barged into their home and that she signed a consent to search only after they threatened to return with a warrant and tear up the apartment. Officers found Peck attempting to hide in a closet, and they found evidence that Peck had recently shaved his beard, evidence Peck unsuccessfully attempted to suppress.

The jury was unable to reach a verdict on two charges of sexual assault, and a mistrial was declared. Prior to the declaration, however, the foreman signed jury verdict forms indicating both "guilty" and "not guilty," although the trial judge accepted neither. In a second trial, Peck was found guilty on both counts. On appeal, Peck asserts the district court erred by: (1) failing to instruct the jury on the lesser-included offense of battery with intent to commit sexual assault and the lesser-related offenses of indecent exposure and open or gross lewdness; (2) denying his motion to suppress evidence obtained during a search

of his apartment; and (3) allowing his wife to testify against him. Additionally, Peck claims his conviction is barred by double jeopardy and the principle of merger of offenses.

Regarding the failure to provide jury instructions on the lesser-included offense, the Nevada Supreme Court held there was no error, because a jury instruction for the crime of battery with intent to commit sexual assault was contrary to Peck's testimony that the encounter was consensual. In regards to failing to provide jury instructions on lesser-related offenses, the court overruled its holding in *Moore v. Nevada*, 776 P.2d 1235 (Nev. 1989), which provided that instructions should be given when: (1) the lesser offense is closely related to the offense charged; (2) the defendant's theory of defense is consistent with a conviction for the lesser offense; and (3) evidence of the lesser offense exists. The court reasoned that the *Moore* decision was inappropriate because it affords the defense greater rights by permitting conviction for a crime that the state never attempted to prove or disprove.

The court also rejected Peck's contention that the district court erred in failing to suppress the evidence found at Peck's apartment on an alleged coerced consent to search. The court held that the district court's finding that there was consent was supported by substantial evidence, which could not be disturbed on appeal. Likewise, although Peck's wife has a statutory privilege to refuse to testify under a spousal immunity provided by Nev. Rev. Stat. 49.295(1)(a), her failure to invoke her right, and Peck's failure to object to her testimony, resulted in waiver.

Finally, because Peck was not acquitted at his first trial, because a verdict was not accepted or recorded, and because a jury was not polled, no double jeopardy resulted, and Peck could be retried without implication. Similarly, Peck's act of forcible digital penetration and coercive sexual intercourse were of a different type of sexual assault, both separate and distinct, such that the two acts did not merge. Thus, both counts of sexual assault were upheld and the judgment of conviction was affirmed.

Runion v. Nevada
12 P.3d 52 (Nev. Dec. 4, 2000)

Combination of improper jury instruction on self defense and prejudicial comments made by prosecutor result in overturned murder conviction.

Runion was driving his vehicle when another vehicle driven by Goldman pulled along side. A confrontation ensued, in which Runion claims that the passengers in the other vehicle were flashing gang signs. Runion stated that Goldman was the aggressor and that he thought Pendergraft, a passenger in the other vehicle, had pulled and fired a gun. To protect himself and his passenger, Runion fired his gun and killed Pendergraft. Runion claimed self-defense. There was no gun found in the passenger compartment of Goldman's vehicle, only a gun in the engine compartment, which had not been fired. Runion was convicted of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon.

Runion argued on appeal that the jury instruction on self-defense was confusing and misleading, and that the prosecutor's closing arguments prejudiced the jury.

The Nevada Supreme Court agreed that the jury instructions were improper. The district court issued jury instructions based on the 1993 version of Nev. Rev. Stat. 200.200, rather than the amended instruction of the 1996 version, the time in which the offense took place. The court held that actual danger was not necessary to justify self-defense. Rather, the appearance of danger that one is about to suffer great bodily injury would be justified in acts of self-defense. Since the trial court limited the defense to actual danger and precluded the defense counsel from arguing apparent danger, the court held that these actions might have misled the jury to conclude that Runion's actions were not justified when he mistakenly thought Pendergraft brandished a gun.

Finally, the court held that the prosecutor's comments during closing argument regarding Runion's failure to present corroborating testimony, which the district court ruled as hearsay, resulted in improper and prejudicial advantage to the state. The court remanded the case to the district court for a new trial.

Wegner v. Nevada
14 P.3d 25 (Nev. Dec. 5, 2000)

When a defense theory is supported by evidence, the failure to instruct the jury on that theory constitutes reversible error.

Wegner, a licensed day care operator, was accused of first-degree murder in the death of a fourteen-month-old child. She was convicted despite conflicting expert testimony on whether the child suffered the head injury on the same day she was in the supervision of the defendant. The only evidence used to convict her was from expert testimony.

Wegner appealed the decision, alleging flawed and omitted jury instructions. She argued that the instructions created a mandatory presumption of malice aforethought. The instructions told the jury that murder by child abuse is deemed to be first-degree murder whether intentional or not. She also challenged the trial court's refusal to give an involuntary manslaughter instruction.

The Nevada Supreme Court held that the instruction improperly created an unconstitutional mandatory presumption of malice aforethought, because there was evidence that the injury to the child could have happened several days prior to the alleged child abuse. The court held this to be harmful error, because the jury could have found the defendant did commit child abuse, but only aggravated an existing injury, which would not constitute malice aforethought.

The court also agreed with Wegner that the court erred in refusing to give the involuntary manslaughter instruction. The court held that if a defense theory is supported by evidence that could support a corresponding jury verdict, the court must offer a jury instruction on that theory. The court reversed and remanded the case for a new trial.

CRIMINAL PROCEDURE

Morales v. Nevada

992 P.2d 252 (Nev. Jan. 26, 2000)

Defendant is entitled to eight peremptory jury challenges in any case in which life imprisonment is an option, not just in cases where it is the minimum possible sentence.

Las Vegas police officers observed appellant Morales engaging in a hand-to-hand drug sale. They followed and stopped him after he ran a red traffic light. As he exited the car, Morales dropped a cigarette package on the ground that was found to contain 28.3 grams of cocaine. At the time of the offense, carrying over twenty-eight grams of cocaine carried a possible life sentence, but at the time of the trial the cocaine only weighed 27.9 grams.

Morales' attorney requested eight peremptory challenges rather than four, since the offense could be punished by life imprisonment. The district court held that eight challenges were allowed only in cases where life imprisonment is the minimum sentence, and allowed Morales only four. Morales was convicted in the Eighth Judicial District Court on one count of trafficking in a controlled substance. Morales appealed on the peremptory challenge issue, and also alleged there was insufficient evidence for a conviction due to the lower weight of the cocaine.

The Nevada Supreme Court reversed, holding that Nev. Rev. Stat. 175.051 entitles a defendant to eight peremptory challenges whenever a life sentence is possible. The district court relied on *Nootenboom v. Nevada*, 418 P.2d 490 (Nev. 1966), which the Nevada Supreme Court held was no longer good law due to substantial statutory changes.

However, the court also denied Morales' insufficient evidence claim because a reasonable jury could find that the cocaine weighed 28.3 grams at the time of the offense as well as reasonably determine that a weight loss due to moisture loss is expected over time.

Sheriff, Washoe County v. Marcus

995 P.2d 1016 (Nev. Feb. 23, 2000)

Prosecutors may dismiss a complaint without prejudice and re-file it once without violating the Equal Protection Clause.

Richard Marcus was arrested for driving under the influence of alcohol and pled not guilty. Prior to trial, the state moved for a continuance because the arresting officer was unable to make the scheduled court date. Marcus opposed the continuance, pointing to the good cause requirement of Nev. Rev. Stat. 174.515. The Justice of the Peace agreed with the defense that the prosecutor failed to show diligence in obtaining the presence of the witness. The state then invoked Nev. Rev. Stat. 174.085(5), which allows the prosecutor to successfully dismiss a charge without prejudice in order to amend.

When the state later re-filed the same charges, Marcus moved to dismiss. He claimed the justice court had no authority to dismiss the original case without prejudice. The court ruled that the statute clearly authorized "two bites at the apple." In response, the defense filed a petition for a writ of habeas corpus in the district court, which was granted at a brief hearing. The state appealed,

arguing the validity of Nev. Rev. Stat. 174.085(5), while Marcus asserted the statute's unconstitutionality.

The Nevada Supreme Court held the statute to be constitutional. The court rejected Marcus' claim that the law violated the Equal Protection Clause of the Constitution, holding the right to have a complaint dismissed only for cause is not a fundamental trial right. The court held that Nev. Rev. Stat. 174.085(5) is rationally related to the governmental interests in allowing dismissal to avoid burdensome grand jury process before the reinstatement of charges.

Gallimort v. Nevada

997 P.2d 796 (Nev. Mar. 10, 2000)

Guidelines established for district courts to determine when a defendant waives the right to a jury trial.

Gallimort, wielding both a gun and a kitchen knife, kidnapped his former girlfriend, Cynthia, from her apartment. Cynthia escaped, but not before Gallimort inflicted a number of knife wounds. The state charged Gallimort with first-degree kidnapping with use of a deadly weapon and battery with use of a deadly weapon. After a bench trial, Gallimort was convicted.

Gallimort appealed, alleging that interpreters were not provided for him at all stages of trial and that those interpreters that were provided were not qualified, that he did not knowingly and intelligently waive his right to a jury trial, and that police failed to collect the knife Gallimort allegedly used to stab Cynthia, causing the loss of important evidence.

The Nevada Supreme Court found that an interpreter was present throughout Gallimort's trial, Gallimort made no objections during trial about translation difficulties or inaccuracies, and Gallimort was able to assist his counsel, through an interpreter, in his defense.

Next, the court concluded that Gallimort was aware of his right to trial by jury and that he waived that right knowingly and intelligently. The record showed that Gallimort and the trial judge discussed Gallimort's wish to waive his right to a jury trial, Gallimort signed the written waiver before the judge pronounced his verdict, and that Gallimort spoke to his attorney about the option of a jury trial versus a bench trial.

The court recommended that district court judges inform defendants of the number of members of the community composing a jury, the defendant's ability to take part in jury selections, the requirement that jury verdicts must be unanimous, and that the court alone decides guilt or innocence if the defendant waives a jury trial. While the court did not make these instructions mandatory, it urged district courts to adopt these instructions to ensure that the defendant is fully informed and to avoid any misunderstandings by defendants.

Finally, the court held that in order to determine if the trial court erred in failing to collect the knife, the defendant must show that the evidence was material, and, if so, whether the police investigator's actions were negligent, grossly negligent, or in bad faith. The court concluded that the evidence against Gallimort, the testimony of the victim, eyewitnesses, and medical evidence proved the charges, rendering evidence of which knife was used immaterial to the outcome of the case. Further, the court found the police investigator

was merely negligent in not securing the knife from Cynthia because she could not positively identify the knife as the one that Gallimort used to stab her.

Krauss v. Nevada

998 P.2d 163 (Nev. Mar. 10, 2000)

Defendant may stipulate to prior DUI convictions and may waive presentation of proof of the convictions.

Defendant was convicted of driving under the influence (DUI), and evidence of two prior convictions was admitted for sentence enhancement purposes. At trial, Krauss conceded that he did not challenge the previous convictions and affirmed that counsel had represented him during those convictions. Krauss filed a post-conviction writ of habeas corpus, arguing that his counsel was ineffective for failing to challenge the prior conviction's validity.

The Nevada Supreme Court unanimously held that even though it was unclear whether the state produced sufficient evidence of prior convictions at the hearing, a defendant may stipulate to the validity of those convictions. The court noted that counsel's failure to challenge those convictions may be reasonable when based on information and strategic choices provided by the client. This holding overrules *Robertson v. Nevada*, 863 P.2d 1040 (Nev. 1993), which held that a defendant may not stipulate to or waive proof of prior DUI convictions.

Nevada v. Eighth Judicial Dist. Court

997 P.2d 126 (Nev. Mar. 13, 2000)

An information may be amended any time prior to trial with additional theories of the charges, provided it contains no new, additional charges.

After preliminary hearing, the defendant, Darris Taylor, was bound over to district court on a murder charge. The state filed a criminal information identical to the original criminal complaint. Subsequent to the filing of the information, the state filed an amended information severing an ex-felon in possession of a firearm count and adding an additional witness. On the morning the trial was to begin, the state filed a second amended information, adding alternative theories of liability with respect to the murder charge.

Taylor argued the second amended information should be dismissed because Nev. Rev. Stat. 173.075(1) required the state to provide a clear and definite statement of the offense, which it failed to do. Further, he challenged the second amended information on the basis that additional offenses were charged thereby prejudicing defendant's rights. The district court granted Taylor's motion to strike the second information and the state subsequently sought a writ of mandamus.

The Nevada Supreme Court held the district court abused its discretion in striking a theory of felony murder, as the defendant had previous notice of the theory in the initial information and that the second amended information merely provided additional theories with respect to that charge. As such, the court granted the state's petition for a writ of mandamus in part, and instructed the district court to vacate its order granting the defendant's motion to strike the second amended information with respect to the felony murder theory.

The court further held the addition of the aiding and abetting theory to the second information was prejudicial to the defendant's rights. The court held the documents failed to provide the defendant with adequate notice of this theory prior to trial and would not interfere with the district court's ruling regarding this portion of the amended information.

Cabanilla v. Bates

2000 U.S. App. LEXIS 29212 (9th Cir. Mar. 17, 2000)

Mentally retarded defendant's first "incomprehensible" petition for writ of habeas corpus treated as non-existent, allowing consideration of her claims of unknowing and involuntary plea and ineffective assistance of counsel.

Ruth Cabanilla was convicted of first-degree murder after she shot her ex-husband in the head during a dispute. Petitioner Cabanilla had an IQ of 61, and at the time of her hearing on a petition for a psychiatric evaluation she told the judge she was guilty and wanted to go to prison. Two court-appointed psychologists evaluated her competency to stand trial. One found she understood the nature of the charges and had sufficient mental capacity to aid and assist counsel in her defense. The second report was not a part of the record. After a series of yes and no questions the court accepted the guilty plea and sentenced Cabanilla to two consecutive life terms with the possibility of parole.

At this brief hearing, counsel did not present evidence showing that Cabanilla had been taking medication for psychotic hallucinations, in steadily increasing dosages while in the Washoe County Detention Center. These medications had side effects including lethargy, confusion, and drowsiness. While in prison, Cabanilla voluntarily dismissed a notice of appeal, and just before a voluntary dismissal of a direct appeal, she filed a Petition for Writ of Habeas Corpus (Post-Conviction). She filed the form without assistance of counsel and the court determined it was "incomprehensible," and dismissed the petition. Later, with the assistance of an inmate, she filed another Petition for Writ of Habeas Corpus, this time alleging ineffective assistance of counsel, compelled medication, and that she did not knowingly and intelligently enter her plea. The necessary documents showing the use of medications were attached. This second petition was dismissed because it failed to allege new or different grounds for relief. Cabanilla appealed and the Nevada Supreme Court dismissed, holding that a petitioner must show good cause and actual prejudice to file a successive state habeas petition.

The defense then filed in federal court and the state argued that the federal court was precluded from hearing the case because the claims were defaulted in state court, and that the compelled medication claim had not been exhausted in the state system. The court affirmed the denial of relief on the claim of compelled medication because there was no record of the medications in the court documents and therefore the appeals court could not renew the claim. However, the claims of unknowing and involuntary plea and ineffective assistance of counsel were vacated and remanded for an evidentiary hearing. The Ninth Circuit construed the language of the district court literally in finding the first petition "incomprehensible," determining that an incomprehensible petition should be treated as if it never existed. Consequently, the second petition was

not barred. Because the petition stated a claim that entitled Cabanilla to relief, an evidentiary hearing was warranted.

**Alvarado Ochoa-Lopez v. Warden, Lovelock Correctional Center
997 P.2d 136 (Nev. Apr. 6, 2000)**

Failure to complete a written plea agreement is not per se reversible error.

Appellant Lopez pled guilty to a lesser charge of drug trafficking with both parties free to argue what type of sentencing would be given. At sentencing, Lopez moved to withdraw his previously entered guilty plea, but was sentenced to fifteen years in prison and a fine of \$100,000.

Lopez did not appeal, but filed a writ of habeas corpus arguing that the guilty plea was not willingly and knowingly entered. Following the court's denial of the petition, this appeal was entered. Lopez argued that the guilty plea was not valid because the court accepted his plea without a written plea agreement as required by Nev. Rev. Stat. 174.035(6), and that the violation was a per se reversible error.

The court held that failure to complete a written plea agreement is not a per se reversible error. The court stated that although Nev. Rev. Stat. 174.035 requires a written plea agreement, it may determine whether or not a plea is valid by looking at the totality of the circumstances. The two factors considered by the court were that Lopez was extensively canvassed to ensure that he knew that sentencing was left to the court, and that the court ensured Lopez completely understood the elements of the charge to which he was pleading.

Valerio v. Bayer

2000 U.S. App. LEXIS 7271 (9th Cir. Apr. 19, 2000)

Petition for writ of habeas corpus denied because there was no error in lower courts' rulings.

Appellant, Valerio, was sentenced to death for murder with two aggravating circumstances, prior felony conviction involving violence, and murder involving torture, depravity of mind, or mutilation. The Nevada Supreme Court affirmed his conviction on direct appeal. Valerio then made two petitions for post-conviction relief; each was denied. Valerio then filed another petition in federal court, asserting numerous grounds for relief. Valerio contended that the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) was inapplicable because this petition was a renewal, not a new appeal. The court held that unless the lower court retained jurisdiction over the first petition, which it did not because of a failure to exhaust state remedies, the current petition was the first petition, because the original petition was filed prematurely. For purposes of the AEDPA, the current petition was filed after the AEDPA became law.

Valerio claimed that the jury relied on a constitutionally vague aggravator ("that the murder involved torture, depravity of mind, or mutilation"). On direct appeal of his conviction, the Nevada Supreme Court cured this defect by applying a narrow construction that required a showing of "some form of torture or serious physical abuse." Valerio claimed the Nevada Supreme Court did not have the authority to re-examine evidence of the aggravated circum-

stance when the jury had an invalid instruction and that the Nevada Supreme Court did not apply its limiting instruction correctly.

Evidence in the record showed that the victim had been stabbed forty-five times (in groupings of eight) and had defensive wounds on her hands and arms, indicating the stabbings were done prior to the victim's death. The Ninth Circuit rejected these arguments on the ground that Valerio failed to argue that the aggravator remained unconstitutionally vague, thereby waiving the right to bring it up at this appeal. The court explained that the failure to consistently apply the narrow construction to the facts of different cases is not a basis for a federal habeas corpus remedy.

The court held that the Nevada Supreme Court's finding that the victim had been tortured and/or received serious physical abuse was a finding that a "rational fact finder could have made" based on the evidence in the record. Since the standard of review for the application of the narrow construction rule is the "rational factfinder," the court held the decision by the Nevada Supreme Court was appropriate.

Jennings v. Nevada

998 P.2d 557 (Nev. May 4, 2000)

Amendment of criminal information after defendant testifies is a violation of Sixth Amendment right to a fair trial.

Charles Edward Jennings was convicted of first-degree murder of a former co-worker with the use of a deadly weapon. After the case had proceeded to trial and Jennings had testified on his own behalf, the state amended its information to add a felony-murder theory alleging Jennings kidnapped the victim prior to shooting him. Jennings was convicted and sentenced to two consecutive life sentences without the possibility of parole.

Jennings appealed on the grounds that his Sixth Amendment right to a fair trial was violated by the state's amendment of the information after he had testified. Under Nev. Rev. Stat. 173.095, the state may amend a criminal information any time prior to verdict as long as no additional or different offense is charged and no substantive rights of the defendant are prejudiced.

The Nevada Supreme Court held that amendment of the information to include an alternative theory of the mental state required for first-degree murder does not charge an additional or different offense. Amendment of the information after Jennings testified did, however, violate his fundamental right to be informed of the nature and cause of the charges against him in order to permit him adequate preparation of a defense.

Woerner v. Justice Court

1 P.3d 377 (Nev. June 5, 2000)

The justice court does not have proper authority to order a competency evaluation of a mentally ill individual accused of first-degree murder in lieu of a preliminary hearing.

Petitioner Woerner was charged with first-degree murder. The district court found Woerner incompetent to stand trial, ordered involuntary commitment, and dismissed the case. Two years later, the district attorney filed a petition in family court seeking Woerner's continued involuntary commitment.

The family court discharged Woerner as an outpatient, finding that she was mentally ill, but that the hospital commitment was not the least restrictive acceptable environment for her. The family court did not address the issue of Woerner's competence to stand trial for first-degree murder. The district attorney then re-filed the murder charge in family court and Woerner was arrested after the court ordered Woerner be released as an outpatient.

Woerner moved to dismiss in justice court. The court denied Woerner's motion. Instead, the justice court ordered Woerner to undergo a competency evaluation. The justice court conducted no preliminary hearing, concluding that such a proceeding would be useless, since Woerner's incompetence rendered her unable to understand the nature of the charges against her or to assist counsel in her defense. Woerner filed a petition for a writ of mandamus requesting that the Nevada Supreme Court: (1) direct the justice court to dismiss her criminal case because the district court had already found her incompetent to stand trial and no contrary finding had been made; and (2) direct the district attorney to refrain from seeking incarceration or further criminal proceedings against her until first establishing her competency.

The court held that incompetence only prevents a criminal defendant from being tried or punished; it has no bearing on whether a defendant can be charged with a crime. Furthermore, the court found that Nev. Rev. Stat. 178.425(5) specifically contemplates re-filing of criminal charges after a prior dismissal, with the statute of limitations being the only restriction imposed on the re-filing.

In ruling on whether the justice court exceeded its jurisdiction, the court held that the justice court was not empowered to consider the issue of Woerner's competence because Nev. Rev. Stat. 178.405 gives the authority to decide that question to the trial court. Furthermore, the justice court erred in ordering a competency evaluation and in failing to conduct a preliminary hearing. The court reasoned that, under Nev. Rev. Stat. 171.196, the murder charge is not triable in justice court.

The court granted Woerner's petition in part, issuing a writ of mandamus directing the justice court to vacate its order for a competency evaluation and to conduct a preliminary hearing. The court declined to direct the justice court to dismiss the case, or to direct the district attorney to refrain from further prosecution.

Hart v. Nevada

1 P.3d 969 (Nev. June 14, 2000)

Laches precludes consideration of appellant's post-sentence motion to withdraw his guilty plea because the motion was filed six years after sentencing and the state would suffer prejudice if forced to try the case now.

Hart pled guilty to second-degree murder and was sentenced in July 1990. Hart did not file a timely direct appeal, but in September 1996, filed a motion to withdraw his guilty plea. The state asserted the proper procedure was to file a writ of habeas corpus. The state also argued that laches barred a withdrawal of the guilty plea. Hart insisted that a motion to withdraw a guilty plea was not subject to time restrictions.

The court first analyzed whether a post-conviction motion to withdraw a plea is subsumed by Nev. Rev. Stat. ch. 34, governing a post-conviction petition for a writ of habeas corpus. The court held that Nev. Rev. Stat. 34.724(2)(a) exempts a post-conviction motion to withdraw a plea from the requirements of Chapter 34 because the motion is "incident to the proceedings in the trial court." The court emphasized that a motion to withdraw a plea should be clearly labeled in order to prevent the motion from being considered a writ of habeas corpus, which is subject to different procedural requirements.

The court then held that for a post-sentence motion to withdraw a plea to be considered, the defendant must show that the withdrawal would correct manifest injustice. The court further held that the equitable doctrine of laches must be considered in determining if the defendant has met this burden. The court listed four factors to consider in applying laches: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver arose from defendant's knowing acquiescence in existing conditions; (3) whether circumstances exist that prejudice the state; and (4) if the defendant previously sought relief from the judgment, failure to include a motion to withdraw the plea originally should weigh against the later motion. Here, Hart's unexplained delay of over six years in filing the motion and the probability that the state would suffer prejudice if now forced to try a 1989 murder led the court to hold that laches precluded consideration of Hart's motion on the merits.

Speer v. Nevada

5 P.3d 1063 (Nev. Aug. 21, 2000)

Any prior felony DUI conviction can be used to enhance a subsequent DUI conviction as long as the prior offense occurred within the seven years immediately preceding the date of the principal offense or after the principal offense.

Speer pled guilty to driving under the influence (DUI) and at sentencing the state introduced evidence of a previous misdemeanor conviction from 1996 and a felony conviction from 1991. The 1991 offense had been enhanced to a felony due to two DUI convictions prior to 1991. The 1996 offense was treated as an un-enhanced "first offense," but as part of the plea agreement, the parties agreed that despite the first offense treatment, a future offense could be treated as a felony. The district court enhanced this new conviction to a felony and sentenced accordingly.

Subsequently, Speer filed a post-conviction petition for a writ of habeas corpus claiming the court erred using the prior felony conviction for enhancement purposes. He argued that only misdemeanor convictions might be used to enhance a subsequent offense to a felony.

The Nevada Supreme Court concluded that any two prior offenses may be used to enhance a subsequent DUI so long as they occurred within seven years of the principal offense and are evidenced by a conviction. Whether a prior offense was a misdemeanor or a felony is not relevant under the statute. The court affirmed, holding that the district court did not err by allowing defendant's prior felony DUI conviction to be used for enhancement purposes.

United States v. Lopez-Lopez**2000 U.S. App. LEXIS 22730 (9th Cir. Sept. 6, 2000)**

Despite some evidence constituting probable cause that a search warrant was tainted, the search warrant is still valid if untainted evidence alone would have been sufficient.

Federico Lopez-Lopez was convicted for drug trafficking following an initial traffic stop, which led to a search of his vehicle and the discovery of illegal narcotics. Lopez was detained while the officer awaited a Spanish-speaking officer to talk to Lopez's passenger, who appeared nervous. While awaiting the officer, the police noted several suspicious items, including a tampered-with front gas tank, large amounts of cash, inconsistent statements, visible nervousness of the passenger, and the strong odor of air freshener. This led to additional questioning and Lopez's arrest.

Lopez argued that the district court erred in denying his motion to suppress seized evidence and his motion for a new trial because the initial stop was invalid. He asserted that the duration and scope of the stop was unreasonable, evidence constituting probable cause for a search warrant was tainted, and a government witness committed perjury.

The Nevada Supreme Court held that Nev. Rev. Stat. 484.305, which states that a vehicle must be driven in one lane when practicably possible, is not unconstitutionally vague. The court held that the duration and scope of the officer's inquiry was reasonable for two reasons. Although the subject matter of the officer's questioning deviated from the initial cause for the stop, officers may broaden the scope of questioning if they notice additional suspicious circumstances. Further, because the passenger did not speak English it was not inappropriate for the officer to request a Spanish-speaking officer. The court held that while some of the evidence constituting probable cause was tainted, there was still enough untainted evidence to constitute probable cause for a search warrant. The court also invalidated held Lopez's argument that he was entitled to a new trial because a government witness committed perjury. The court held that not all trials in which perjured testimony is offered require a new trial. In this case, the court held that there was ample evidence to corroborate the perjured testimony, making it within the district court's discretion to deny the motion for a new trial.

Paschall v. Nevada**8 P.3d 851 (Nev. Sept. 19, 2000)**

Justice courts have jurisdiction to suspend prior DUI convictions; DUI ordinance did not have to be approved by the Nevada Department of Transportation.

In 1997 and 1998, Paschall received two driving under the influence (DUI) citations. Since Paschall had two prior DUI convictions within seven years, the 1997 and 1998 charges were enhanced from misdemeanors to felonies. Paschall's prior convictions resulted in a suspended sentence and he moved for the prior convictions to be invalidated to avoid the effects of the enhancement statute. All motions were denied and Paschall was found guilty of both felony charges.

Paschall argued on appeal that the justice courts exceeded their jurisdictional power by suspending his sentences in his prior convictions and that his prior conviction was invalid because the DUI ordinance had not been approved by the Department of Transportation.

The Nevada Supreme Court affirmed the convictions, holding the Nevada Constitution gives the legislature authority to grant justice courts the power to suspend sentences under Nev. Rev. Stat. 4.373. The court held that the justice courts properly entered the prior convictions. The court also held the DUI ordinance did not fall within Nev. Rev. Stat. 484.779(3), which deals with the use and flow of traffic on state highways, or with the regulation of a specific highway. The court held the DUI ordinance was of public safety and therefore did not need approval from the Department of Transportation.

Parsons v. Nevada

10 P.3d 836 (Nev. Oct. 23, 2000)

District court may not determine constitutional validity of prior DUI convictions in pre-trial hearing.

Appellant, Parsons, was accused of third offense driving under the influence (DUI). As a preliminary matter, the justice court undertook an examination of the facts concerning the two prior offences to determine whether his third conviction should be enhanced to a felony. During this proceeding, Parsons challenged the constitutional validity of one of the convictions. Parsons argued that he did not have sufficient knowledge of the DUI requirements to enter a valid guilty plea. The justice court held that one of Parsons' convictions was based on a deficient complaint and refused to hold him for trial.

The state then filed a criminal information by affidavit in the district court, which the district court permitted on the grounds that the justice court made an egregious error in considering the constitutionality of the convictions at preliminary hearing. A trial was held and Parsons was convicted. On appeal, a three-judge panel of the Nevada Supreme Court reversed the conviction because the district court improperly allowed the state to file information by affidavit. The court denied the state's petition for rehearing, but subsequently granted a petition for en banc reconsideration.

Upon reconsideration, the court determined that the constitutionality of prior convictions is not the proper subject of preliminary factual examinations for enhancement purposes. Nevertheless, the court reversed Parsons' conviction because it held that the justice court had ruled based on language in a previous Nevada Supreme Court case, and that the district court erred in considering the justice court's action egregious error and allowing the information by affidavit.

Loveland v. Hatcher
231 F.3d 640 (9th Cir. Nov. 3, 2000)

Federal courts may review the merits of a post-conviction relief petition when it is unclear whether the state court dismissed the petition because of state procedural default or on the merits of the petitioner's federal constitutional claims.

After being found guilty of sexual assault, the petitioner believed his counsel was filing an appeal on his behalf. Over a year after being convicted, petitioner's counsel withdrew without ever filing a direct or post-conviction appeal. Petitioner then filed a pro per habeas petition with the Nevada trial court. When the trial court denied the petition on the merits, petitioner appealed to the Nevada Supreme Court. Petitioner then filed a writ of habeas corpus in the federal district court asserting a violation of his due process rights when the Nevada Supreme Court had not ruled on his pending petition appeal. Subsequently, the Nevada Supreme Court affirmed the trial court ruling, stating that the petitioner did not file his petition within the statutory one year time period and he failed to demonstrate good cause and prejudice to overcome the procedural bar. The district court ultimately dismissed the petition on grounds that Nevada law procedurally barred it.

On appeal, the petitioner contended that the state procedural bar rule is not an adequate and independent ground for the state's denial of his post-conviction relief petition. Loveland alleged the Nevada state courts did not consistently apply the statutory time limit, and the Nevada Supreme Court at least partially denied the petitions on the merits. He also alleged ineffective assistance of counsel.

The Ninth Circuit held that the Nevada Supreme Court consistently applied the state rule barring review of the merits of an untimely post-conviction petition unless the petitioner demonstrates the existence of both good cause and prejudice. The court held that had the Nevada Supreme Court dismissed the petition solely on the basis of the state's procedural bar without examining the merits of the petition's federal constitutional claims, the federal court would have been precluded from considering petitioner's federal petition, but the Nevada Supreme Court denied the petition independently by applying the state procedural bar rule and did not rule separately on the merits.

Thus, the federal court had the duty to examine the petitioner's federal petition to determine whether petitioner's constitutional claims were valid and if he could demonstrate good cause and prejudice which excused his state procedural default. The court held that an evidentiary hearing was necessary to determine if ineffective assistance of counsel caused the state procedural default. The appeals court reversed the district court's dismissal of the petition and remanded the matter to the district court for an evidentiary hearing.

EMPLOYMENT LAW

State Indus. Ins. Sys. v. Perez **994 P.2d 723 (Nev. Mar. 9, 2000)**

A disability claim may be re-opened without presentation of new medical evidence if other non-medical factors justify the re-opening.

Respondent Perez injured his back during his employment with Forrest Concrete Company. Perez accepted a lump sum Permanent Partial Disability (PPD) award of \$14,721.51 and vocational rehabilitation training. The results of an evaluation of Perez's vocational rehabilitation showed that he had low vocational aptitude, a third grade education, and spoke little English. Additionally, Perez had problems with his sight and hands. As a result of these problems, the vocational rehabilitation specialists found Perez to be a poor candidate for vocational rehabilitation.

Perez, unsuccessful in his rehabilitation, claimed that the "odd-lot" doctrine entitled him to Permanent Total Disability (PTD). His lawyer wrote a letter to a rehabilitation counselor with the Employers Insurance Company of Nevada (EICON). EICON did not respond to the request and Perez appealed. An appeals officer reversed EICON's denial of Perez's claim for total disability.

EICON argued that the appeals officer did not have jurisdiction to consider the Perez claim for permanent total disability because Perez failed to seek reopening in accordance with Nev. Rev. Stat. 616C.495(2). EICON also asserted that Perez's claim was insufficient because it did not refer to any medical evidence.

The Nevada Supreme Court held that the letter to EICON from Perez's attorney qualified as an application for re-opening the claim. EICON, in its failure to respond, had constructively denied Perez's claim, allowing him the right to appeal.

The court also held that total disability claims may include both medical and non-medical components, and that factors other than physical impairment may be considered in determining whether an injury qualifies a worker for PTD benefits. The court never addressed the statute itself and instead focused on Perez's non-medical condition. Since it was not new medical evidence which made Perez eligible for PTD but his old disability plus newly discovered factors, the court found the statutory requirement of medical evidence in Nev. Rev. Stat. 616C.390 inapplicable. The court further found this to be in accord with legislative intent. It held that the legislature did not intend to deprive an injured worker of PTD benefits if the worker is not amenable to vocational rehabilitation.

Justice Maupin's concurrence distinguished between the reopening of a PPD claim to effect an increase in benefits, and the reopening of a claim, like Perez's, to seek a change from PPD rating to PTD rating. The latter, he stated, unlike the former, may have either medical or non-medical components. However, other conditions do not require medical evidence. For example, a rehabilitation program may demonstrate the worker's inability to return to employment because of non-medical conditions.

Justice Maupin would reopen a PPD award to claim PTD status if the claimant establishes: (1) an objective change in the worker's medical condition stemming from the industrial injury which demonstrates a scheduled total disability under Nev. Rev. Stat. 616C.435(1); (2) a legitimate inability to rehabilitate the worker such that he or she qualifies for unscheduled disability; or (3) changes in the worker's medical condition, which, in combination with non-medical issues, would justify "odd-lot" status.

University of Nevada, Reno v. Stacey
997 P.2d 812 (Nev. Apr. 6, 2000)

University decision on granting tenure is totally discretionary rendering the University immune from suit.

University of Nevada, Reno (UNR) professor Peter Stacey failed to receive tenure after several tries and sued the university for breach of contract. Stacey argued his excellent performance evaluations obligated the university to grant him tenure under his contract. The trial court allowed the breach of contract issue to go before a jury, which awarded Stacey damages and UNR appealed.

The Nevada Supreme Court reversed, holding that UNR's motion for summary judgment should have been granted because the contract was clear and unambiguous and subject "to only one interpretation" and therefore there was no genuine issue of material fact to allow trial. The court held the contract clearly stated that UNR's decision to grant tenure was completely discretionary, citing numerous provisions that demonstrated the decision to grant tenure is based on a multitude of subjective factors and is not guaranteed by excellent performance evaluations.

The court also agreed with UNR's assertion that the university is statutorily immune from suit. Nev. Rev. Stat. 41.032(2) provides state agencies with immunity from suit for performance of discretionary acts. The court held that granting tenure was an act requiring personal deliberation or judgment and restated the court's reluctance to involve itself in such decisions.

Frantz v. Johnson
999 P.2d 351 (Nev. May 4, 2000)

The district court erred in calculating damages by pro-rating expert witness's five-year loss analysis when it had determined a loss of only eighteen months.

A former sales manager for a plastic card company, Johnson Business Machine (JBM), went to work for the direct manufacturer of the cards, Plastic Graphics, Inc. (Plastic). JBM later claimed violations of the Nevada Uniform Trade Secrets Act, Nev. Rev. Stat. 600A.090. Following a bench trial, the district court awarded compensatory and punitive damages to JBM based upon a pro-rata share of JBM's expert witness's calculation of loss. The loss analysis was based on a five-year loss. The court determined that the actual period of loss was eighteen months and simply pro-rated the five-year calculation to an eighteen-month period.

The Nevada Supreme Court reversed the compensatory damage calculation due to the use of incorrect figures, along with the punitive damages calcu-

lation, but affirmed the rest. Since the district court utilized a pro-rated calculation including damages used in the five-year calculation but outside the established eighteen-month period of loss, the compensatory damage calculation was erroneous. When the court remanded for re-calculation on the compensatory damages, the punitive damages were also vacated pursuant to Nev. Rev. Stat. 600A.050(2) (punitive damages may be no more than two times the compensatory damage award).

Lipps v. S. Nev. Paving
998 P.2d 1183 (Nev. May 4, 2000)

Nevada Industrial Insurance Act immunity provisions preclude recovery in tort for the wrongful death of an employee injured by a construction company operating pursuant to a construction agreement with a licensed principal contractor.

Amzel Michael Lipps, Jr. was killed while servicing a construction truck owned by Southern Nevada Paving. Southern Nevada Paving was acting as a licensed subcontractor for Gilbert Western Construction, a licensed general contractor hired by the Mohave Indian Tribe to build roads for a casino project. Lipps was an employee of C&J Trucking, an independent contractor hired directly by the tribe to service Southern Nevada Paving's equipment. Amzel Lipps, Sr. filed suit against Southern Nevada Paving for his son's wrongful death. Southern Nevada Paving was granted summary judgment under the immunity provisions of the Nevada Industrial Insurance Act (NIIA) and Lipps appealed.

The Nevada Supreme Court affirmed the district court's summary judgment. According to Nevada law, the exclusive remedy of injured employees against their employers is the Nevada Workers' Compensation system. Under Nev. Rev. Stat. 616A.210(1), all subcontractors, independent contractors, and their employees are deemed employees of the principal contractor for the purposes of the NIIA. Claims for tort damages may not be brought against statutory employers or co-employees.

Even though C&J Trucking was retained directly by the tribe, the court reasoned that NIIA immunity provisions apply because the tragedy arose in the construction context in which Southern Nevada Paving was working pursuant to a construction agreement with a licensed principal contractor. The court also held that C&J was an independent contractor and was therefore a statutory co-employee of Southern Nevada Paving, precluding recovery in tort under the NIIA.

Barrick Goldstrike Mine v. Peterson
2 P.3d 850 (Nev. June 9, 2000)

Claimant must file both a notice of injury and a claim for compensation within the statutorily prescribed time period in order to have a valid claim, unless claimant can show a valid excuse for the delay.

Respondent Peterson injured his back while working as an electrician for Barrick Goldstrike Mine. After immediately notifying his supervisor of his injury, Peterson and the supervisor together filed an "Employee's Notice of Injury or Occupational Disease" form. Peterson remained in pain for nearly

three weeks. Shortly thereafter, Peterson's back pain subsided but he began experiencing leg pains. One hundred and eleven days after the injury, Peterson sought medical treatment. Although Peterson had not connected his leg pains to his back injury, doctors found that the leg pain resulted from a herniated disk in his back. Once the doctors discovered this connection, Peterson filed a worker's compensation claim. Barrick's insurance administrator denied Peterson's claim on the grounds that he had not filed the claim within ninety days of the injury. Peterson appealed. Peterson argued that the ninety-day deadline is inapplicable here because the statute only applies if an employee seeks medical treatment within ninety days of the accident.

The Nevada Department of Administration (NDA) reversed the insurance administrator's decision, ruling that Peterson had given Barrick actual notice of the injury. Barrick appealed the ruling, and an appeals officer of the NDA affirmed the decision. The appeals officer agreed that Peterson had not filed an untimely claim because he had given Barrick actual notice. The NDA ruled that an employer could deny benefits only if the injured employee failed to both file a notice of injury and to file a timely worker's compensation claim. The appeals officer also noted that Peterson sought medical attention when the pain worsened and filed a claim when medical evidence proved his injuries to be a result of his work accident. Alternatively, the appeals officer concluded that such a situation excuses Peterson's failure to file a timely claim. Barrick appealed to the Nevada Supreme Court, arguing that Nev. Rev. Stat. 616C.025(1) requires both a notice of injury and a timely claim for compensation, not just one or the other.

The court affirmed NDA's ruling. Although the court concluded that the NDA erroneously interpreted the statute, it found substantial evidence in the record to support the NDA's alternative finding that Peterson's failure to file a timely claim for compensation was excused under Nev. Rev. Stat. 616C.025(2).

In making its decision, the court clarified its decision in *Bally's Grand Hotel & Casino v. Reeves*, 948 P.2d 1200 (Nev. 1997). That case suggested that the court must remand a case to the insurer for consideration of the employee's excuse. However, the court in the present case stated that it did not intend this result. Such a result would delay benefits, which the legislature intended the insurer to pay quickly and efficiently, once the employee satisfies the statute. Here, Barrick conceded that it would reject Peterson's excuse upon remand. Thus, to remand this case to the insurer would just add a needless level of litigation. Consequently, the court concluded that they need not remand this case and that the appeals officer properly considered Peterson's excuse.

The court did conclude that the NDA erroneously interpreted Nev. Rev. Stat. 616C.025(1), holding that an employee must satisfy both requirements of the statute, not just one step as the NDA ruled.

Las Vegas Housing Authority v. Root
8 P.3d 143 (Nev. Aug. 30, 2000)

Under the last injurious exposure rule, an employee is not required to prove responsibility of a former employer's worker's compensation claim if there is a causal connection between the disability and the most recent injury.

Gerald Root suffered an injury to his right shoulder in 1981 while employed by the Las Vegas Housing Authority (LVHA). After the injury, he filed a workers compensation claim with State Industrial Insurance System (SIIS), LVHA's insurance provider. He was treated and the claim closed in 1982. Seven years later, in 1989, he went to work for the City of Henderson and again injured his right shoulder. CDS of Nevada, the claim administrator for the city, ultimately accepted the claim, and surgery was performed in April 1995. However, prior to surgery and during recovery, Root's left shoulder was injured as he favored the right shoulder. He sought treatment and requested his original 1981 claim be reopened. Shortly thereafter, in early 1996, Root suffered a rotator cuff tear in his left shoulder.

CDS rejected the claim stating it was a pre-existing injury, while SIIS denied the reopening request on the original claim. Doctors had differing opinions as to the cause of the injuries. However, the appeals officer ruled that Root's disability was the primary cause of his pre-existing condition and ordered SIIS to reopen the 1981 claim, thus affirming CDS's denial.

LVHA and SIIS filed for judicial review in the district court and appealed when the motion for review was denied. The Nevada Supreme Court ultimately held that the administrative officer erred in construing the law when the officer failed to apply the last injurious exposure rule. The court, quoting 4 A. Larson, *The Law of Workmen's Compensation* 95.20 (1984), reversed under the last injurious exposure rule which provides that "in occupational disease, successive-employer cases places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability." Therefore, the court reversed the administrative decision and directed the City of Henderson to accept Root's 1996 claim.

Conway v. Circus Circus Casinos, Inc.
8 P.3d 837 (Nev. Sept. 15, 2000)

Simple allegation of intentional tort, without accompanying proof, will not overcome the exclusive remedy feature of workman's compensation.

Circus Circus had its PBX office moved to the casino's basement in conjunction with expansion efforts. The employees claimed that, after several weeks of working in the basement, they began to notice noxious fumes that gave them stomachaches, headaches, and dizziness.

The exclusive remedy provision of the Nevada Industrial Insurance Act (NIIA) provides that an employee's rights and remedies for an injury sustained by accident arising out of and in the course of the employment come exclusively from the NIIA. An employee may avoid the NIIA's exclusive remedy provision only if the employer deliberately and specifically intends to injure the employee. While exposure to noxious fumes would normally be classified as an unexpected and unforeseen event, the employees alleged that exposure was due to intentional conduct by Circus Circus and not an accident.

The Nevada Supreme Court held the employees failed to include facts in the complaint that showed a deliberate intent on the part of Circus Circus to injure the plaintiffs. Because the employees failed to plead facts showing that Circus Circus deliberately and specifically intended to injure them, the court determined that the injuries sustained were accidents that arose during the normal course of business. The employees' bare allegations were not enough to avoid being barred by the exclusive remedy provision.

Clark County Sch. Dist. v. Riley
14 P.3d 22 (Nev. Dec. 5, 2000)

Failure to provide at least fifteen days notice of an intention to dismiss a post-probation employee or failure to inform the employee of his or her right to a hearing results in no termination or loss of post-probationary status.

Respondent worked as a probationary teacher for Clark County School District (CCSD) during the 1993-1994 school year and was rehired for the following year with post-probationary status. On November 17, 1995, CCSD informed Riley in writing that his teaching license was invalid due to his failure to renew his competency testing. Riley was given four days to rectify the issue. He had been given a provisional teaching certificate when he moved from California and qualified for an exemption from renewed competency testing in Nevada. Until the respondent received the letter, he was unaware that the letters from his California employers were insufficient because they were not on proper Nevada Department of Education forms.

On November 21, 1995, Riley was released from his duties. He compiled the appropriate documents and submitted them to the appellant on November 30, 1995, while also reapplying for his position. CCSD rehired Riley with probationary status, although there was some argument as to the actual rehire date. CCSD contends that the respondent was rehired on December 1, 1995, requiring the respondent to adhere to a collective bargaining agreement (CBA) by conducting any grievances through arbitration.

The Nevada Supreme Court held that the termination date was irrelevant due to the fact that the respondent was only given four days notice of the pending termination. Therefore, the court held that Riley, as a post-probationary teacher, had not been terminated, an action that requires at least fifteen days notice, and notice of the right to a hearing. The court held that this determination made Riley's rehiring a fiction, meaning that he never lost his post-probationary status in the first place.

The court also held that the appellant's argument concerning the CBA was irrelevant. But, even if it was an issue, Riley's claims were based on his statutory rights as a post-probationary teacher, rendering his claim within the court's jurisdiction to determine questions of statutory law that may or may not fall outside of the CBA.

EVIDENCE

Ronning v. Nevada

992 P.2d 260 (Nev. Jan. 26, 2000)

The state may prove prior convictions for use in sentencing enhancement at some point prior to the sentencing hearing.

Ronning pled guilty to felony driving under the influence (DUI). The appellant had two prior DUI convictions and the prosecution sought to use those prior convictions for enhancement purposes in sentencing. Ronning argued that since the state failed to prove his two prior DUI convictions at sentencing, the case should be remanded for re-sentencing as a second-offense DUI. The district court had previously conducted hearings regarding the constitutionality of the prior convictions and had admitted them into evidence prior to the sentencing hearing. The prosecution did not attempt to reintroduce proof of the prior convictions during the sentencing hearing and the appellant argued that the district court, therefore, erred in holding the prior convictions valid.

On appeal to the Nevada Supreme Court, the court held that the convictions had been entered into evidence prior to the sentencing hearing, and concluded the use of the prior convictions was valid for sentencing enhancement.

Ronning appealed for rehearing, arguing that in the original case the Nevada Supreme Court overlooked *Robertson v. State*, 903 P.2d 820 (Nev. 1995), and Nev. Rev. Stat. 484.3792(2), which Ronning contended required the state to provide evidence of the former convictions at the sentencing hearing, and only then. The court denied rehearing, and Ronning petitioned for en banc consideration.

The court reconsidered en banc in order to clarify the law regarding when the state could show evidence of prior convictions. The court held that *Robertson* allowed the state to show evidence of the convictions at the sentencing hearing, but that it did not restrict the show of proof only to that time. The court also held that Nev. Rev. Stat. 484.3792(2) did not require that proof be shown only at sentencing hearings.

Mazzan v. Warden, Ely State Prison

993 P.2d 25 (Nev. Jan. 27, 2000)

Prosecutors' oral communication of Brady material was inadequate, and thus a violation of Brady, since only disclosure of the actual documents in possession of the prosecution would have provided the full range and detail of the information's value in defending the case.

Defendant, Mazzan, was convicted of murder and sentenced to death. The Nevada Supreme Court affirmed defendant's conviction and sentence, as well as affirming the denials of his subsequent petition for post-conviction relief and his first petition for a writ of habeas corpus. Mazzan filed a second writ of habeas corpus, which the district court also denied. Mazzan then appealed the denial to the Nevada Supreme Court.

Before and during trial, prosecutors provided the defense only with a minimal oral synopsis of information required to be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963). In some instances, prosecutors' statements that the information was of no value to the defense accompanied these oral disclosures.

This material included information on the victim's drug dealings, his associations with other drug dealers, police reports and other information regarding other possible suspects, and information placing these suspects in the victim's vicinity at the time of the murder. The prosecution also refused to turn over this information to defendant's post-trial counsel.

The court explained that *Brady* requires the prosecution to disclose evidence favorable to the defense when that evidence is material either to guilt or punishment, and noted that failure to do so is a violation of due process regardless of the prosecutor's motive. The court further explained that even failure to disclose evidence that the defense did not request violates due process if the non-disclosed evidence creates a reasonable doubt that did not otherwise exist. A *Brady* violation is material if there is a reasonable possibility that the omitted evidence would have affected the outcome.

The court stated that the prosecution "is responsible for determining whether evidence is material and should be disclosed," and in doing so must consider the evidence collectively and should resolve doubtful situations in favor of disclosure. The court held that *Brady* material includes not only exculpatory evidence, but also evidence that gives the defense grounds "to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses or to bolster the defense case against prosecutorial attacks." Further, evidence that must be disclosed under *Brady* need not be independently admissible.

The court accordingly held that a *Brady* violation has occurred when: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state, either intentionally or inadvertently; and (3) the evidence was material. The court applied these elements to the case and held that oral disclosure was inadequate, since only the documents and police reports themselves would have given the defense a full understanding of how the information could aid the defense.

Petty v. Nevada

997 P.3d 800 (Nev. Mar. 10, 2000)

Character evidence of a victim's violent and dangerous history is admissible to establish a self-defense claim.

Defendant, Petty, was found guilty of first-degree murder for the shooting of an acquaintance. Petty argued self-defense and attempted to offer the testimony of two probation officers as evidence of the victim's violent character as well as copies of the victim's 1990 conviction for robbery and 1997 conviction for aiming a deadly weapon at a person. The district court refused to allow the testimony, and Petty appealed.

The Nevada Supreme Court reversed the conviction. Under Nev. Rev. Stat. 48.045(1)(b) and Nev. Rev. Stat. 48.055, evidence of a victim's character may be admissible to establish the state of mind of the accused for a self-defense claim. The court held that opinion evidence such as the testimony of the probation officers was an acceptable way of showing the victim's violent tendencies.

The court also held that evidence of a specific act is admissible only if the accused knew of the act at the time of the murder. Testimony showed that

Petty knew of the 1990 conviction, but not of the 1997 conviction at the time of the killing. The court held that the trial court erred in excluding evidence of the 1990 conviction that Petty was aware of, but was correct to exclude the 1997 conviction, of which Petty had no demonstrated knowledge.

Jackson v. Nevada

997 P.2d 121 (Nev. Mar. 13, 2000)

A written stipulation signed by all parties is an indispensable element for polygraph results to be considered reasonable, and thus admissible, in Nevada, and any party may refuse the stipulation for any reason.

Defendant, Jackson, was charged with burglary and robbery. At trial, the state declined to enter into a stipulation allowing the admission into evidence of polygraph results. Jackson proceeded with the polygraph test without the stipulation, and the district court subsequently denied a motion to allow the jury to consider the results of the test. Jackson was convicted and appealed, contending that the district court erred in refusing to admit the results of a polygraph test.

The Nevada Supreme Court held that for polygraph results to be considered admissible in Nevada, a written stipulation providing for defendant's submission to the test, signed by the prosecution, the defendant, and the defendant's attorney, is required. Without this stipulation, polygraph evidence may be properly excluded. Accordingly, the court held that the district court properly excluded Jackson's polygraph test results because no written stipulation was obtained from all parties. The court further held that any party may refuse to make the stipulation for any reason, or no reason at all.

Walker v. Nevada

997 P.2d 803 (Nev. Apr. 6, 2000)

Prior bad acts irrelevant due to time passed and nature of threat posed.

Walker shot and killed her husband, Anthony, during an argument. At trial, Anthony's son, Anthony, Jr., testified that Walker had twice before threatened Anthony with a firearm. The first incident occurred ten years before Anthony's death, at a picnic, where Walker pointed a pistol at Anthony and threatened to kill him. The second incident occurred six years before Anthony's death when Walker pointed a rifle at Anthony, telling him to come no closer and that she wanted money for her children. Walker was convicted of first-degree murder.

Walker appealed on the grounds that Anthony, Jr.'s testimony was improperly admitted because it was improperly used to show criminal propensity and action in conformity with that propensity. The state argued that these acts were relevant to show Walker's "true intent" at the time she shot Anthony.

The Nevada Supreme Court held that the passage of time, six and ten years respectively, made the incidents less relevant to Walker's intent at the moment she shot Anthony. Additionally, the court made a crucial distinction between Walker's conduct in these two prior acts and the conduct at issue. Since Walker's prior acts did not involve the actual firing or attempted firing of a weapon at Anthony, the court determined that these incidents did not clearly establish intent to kill, only intent to threaten.

Therefore, the court concluded that the prior acts were only minimally relevant to Walker's later intent to kill Anthony and the danger of prejudice substantially outweighed the probative value of the prior bad acts. Consequently, the court reversed the judgment of conviction and remanded for a new trial.

Flores v. Nevada

5 P.3d 1066 (Nev. Aug. 21, 2000)

District court abused discretion in admitting evidence of gang membership and prior murder committed by accomplice because probative value was outweighed by prejudicial effect.

Flores and his friend, Escobar, were convicted of murder with a deadly weapon. At trial, a gang unit officer testified that the two men were members of a gang. The court also admitted evidence that Escobar had committed a prior murder with the same weapon. Flores appealed his conviction, alleging improper admission of this evidence.

The state argued that the evidence was admissible as motive and under the complete story doctrine, which allows evidence of other bad acts to provide necessary context. Flores argued that it was inadmissible because it was improperly used to show character.

The Nevada Supreme Court reversed. The court held that the prior murder evidence was not proper to show motive, as gang membership was only speculation as to motive, not legitimate evidence of motive to commit murder. The court also held that, though the prior murder had some relevance to identifying Flores, the prejudicial value of the evidence outweighed its probative nature.

Walker v. Nevada

6 P.3d 477 (Nev. Aug. 21, 2000)

In determining the admissibility of statements against penal interest at trial, independent evidence is not required to establish credibility.

The defendant, Walker, shot a minor during a stolen property dispute. The jury acquitted the defendant of attempted murder, but found him guilty of battery with the use of a deadly weapon. At trial, the district court refused to allow into evidence a statement that a co-defendant made that could have cast doubt on whether Walker performed the shooting. The court excluded it under the hearsay exception, finding that the statement lacked trustworthiness.

Walker appealed, alleging the district court erred when it failed to admit the statement, arguing that the statement should have been allowed as a statement made against penal interest. The Nevada Supreme Court affirmed the conviction, although it found that the district court should have allowed the statement. The court called the failure to admit the statement harmless error.

The court then used this opinion to clarify the statutory test for the admission of statements against penal interest during trial. The court noted that the statute's use of the term "corroborating circumstances" gave an invalid impression that specific evidence was needed to ascertain the credibility of the statement.

The court held that the statutory test to determine the admissibility of statements against penal interest under Nev. Rev. Stat. 51.345 is whether the

totality of the circumstances indicates that the statement is credible or corroborates the notion that the statement was not fabricated to exonerate the defendant. Therefore, corroboration by independent evidence is not required to establish the credibility of the statement.

Garner v. Nevada

6 P.3d 1013 (Nev. Aug. 23, 2000)

Conduct after the occurrence of a crime may be used as circumstantial evidence against defendant and failed plea negotiations may be used as evidence of culpability at trial.

Defendant, Garner, was charged with conspiracy, burglary, kidnapping, and first degree murder in the robbery of a bar and the murder of its bartender. On appeal, he asserted there was insufficient evidence to convict, that the state improperly commented at trial on his attempt to plea bargain, and that the jury instructions were erroneous.

Garner argued that evidence of occurrences after the robbery used to prove conspiracy could not be used to prove robbery. The Nevada Supreme Court held that the trial court could consider conduct occurring after a crime to prove the commission of a crime, and held the evidence sufficient to prove charges of conspiracy and aiding and abetting against Garner. The court held that there is no per se basis for holding an accomplice to one crime liable for a related crime by the principal simply because the crime was foreseeable; where the relationship between the defendant's acts and the charged crime is too attenuated, the state must provide some showing of specific intent to aid in, or specific knowledge of, the crime charged.

Garner also claimed that the state improperly used his attempts to negotiate a plea agreement. In determining whether a discussion should be characterized as a plea negotiation, the court considers whether the accused had a subjective but reasonable expectation of negotiating a plea at the time of the discussion. A defendant that attempts to negotiate prior to confession but fails in that attempt and confesses anyway has not subjectively manifested the expectation that a plea has been entered into. The court found that Garner made no substantive admissions in his attempts to negotiate a plea. All crucial admissions came after negotiations ended. The court held that since Garner was not prevented from testifying at trial, at which time he could give his own account of the events, the prejudice of such evidence of plea bargaining was negligible and harmless beyond a reasonable doubt.

The court also found that the trial court's jury instruction on voluntary intoxication erroneously placed the burden of proof on Garner to prove he did not have specific intent to commit the crimes charged. However, the court held the error was harmless because Garner was not entitled to an instruction on voluntary intoxication, because voluntary intoxication does not reduce the criminality of an act.

Harte v. Nevada**13 P.3d 420 (Nev. Dec. 4, 2000)**

Court did not err in denying defendant's motion to suppress confession, granting state's motion to exclude defendant's expert from testifying during penalty phase, or permitting evidence of defendant's statements during penalty phase to show future dangerousness.

Appellant, Harte, while being questioned in relation to an unrelated crime, confessed to killing a cab driver during a robbery. Harte was convicted of the crime, and argued that his conviction should be vacated because the district court erred by: (1) denying Harte's motion to suppress his confession on the grounds that it was obtained without a valid waiver of rights and in violation of his right to counsel; (2) granting the state's motion to exclude Harte's expert witnesses during the penalty phase; and (3) permitting the state to introduce evidence during the penalty phase to show the defendant's dangerous nature.

The Nevada Supreme Court examined the record and found that while there was some initial confusion on the defendant's part during questioning, he was reminded of his right to counsel and showed sufficient understanding by comments made during the questioning. The court also found that Harte's ambiguous request for counsel during the interview did not invalidate his confession under *Sechrest v. Nevada*, 705 P.2d 626 (Nev. 1985), which followed a United States Supreme Court ruling in *Edwards v. Arizona*, 451 U.S. 477 (1981), that once an accused has expressed a desire to deal with police only through counsel, he is not subject to further interrogation until counsel has been made available to him. The court held that *Sechrest* had been overruled by *Davis v. United States*, 512 U.S. 452 (1994), which held that the *Edwards* rule applies only when the suspect has unambiguously requested counsel by articulation. The court concluded that substantial evidence existed that Harte did not invoke his right to counsel.

Harte also challenged the district court's ruling that excluded three expert witnesses, a Lutheran Pastor, a Catholic Priest, and a Jewish Rabbi, during the sentencing phase. None of these witnesses had any personal knowledge regarding the defendant and testified only as to religious reasons for opposing the death penalty. The Eighth and Fourteenth Amendments require that a sentencer must not be precluded from considering as a mitigating factor any aspect of a defendant's character, or any record of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death. Nev. Rev. Stat. 175.552(3) provides that during sentencing "evidence may be presented that shows mitigating circumstances" which may not be ordinarily admissible. Nev. Rev. Stat. 200.035(7) provides that any mitigating circumstances may be considered. The court agreed with other courts, which have rejected constitutional challenges to exclusion of evidence relating only to the merits of capital punishment. In addition, the court held that Nev. Rev. Stat. 175.552(3) and Nev. Rev. Stat. 200.035(7) did not require evidence to be admitted pursuant to constitutional dictates.

Harte's claim that the district court erred by admitting excerpts of a letter written by him about inciting riots and escaping from prison during sentencing was improper because they were unfairly prejudicial. The court disagreed, holding that Harte's statements were sufficiently probative of his potential dan-

gerousness. The court held that evidence of a defendant's character is admissible in the penalty phase where the evidence is relevant and the danger of unfair prejudice does not substantially outweigh its probative value.

In dissent, Chief Justice Rose wrote that while he did concur with the majority's decision to affirm the district court's judgment, he disagreed with the court's conclusion that Harte's request was equivocal. Chief Justice Rose argued that the Nevada Supreme Court did not have to follow United States Supreme Court precedent that restricted individual protections, and could continue to allow greater individual protections provided in the Nevada Constitution.

Koerschner v. Nevada

13 P.3d 451 (Nev. Dec. 4, 2000)

In considering a defendant's request for a psychological examination of a child-victim in a sexual assault case, the predominant question is whether a compelling need for protection of the child exists.

Appellant, Koerschner, took his niece to the hospital with severe bleeding in the area of her cervix. Initially, the girl said that the bleeding was caused by falling down a flight of stairs; however, after examination she described a sexual assault she claimed Koerschner perpetrated. Subsequent examination by a doctor concluded that a fall did not cause the injury. The state charged Koerschner with three counts of sexual assault on a minor, and the jury found him guilty of two of the counts.

Koerschner contended the district court erred in denying his application for a psychological examination of the victim. The court had previously ruled in *Keeney v. State*, 850 P.2d 311 (Nev. 1993), that it would be error to preclude a defendant from having an alleged child-victim examined by an expert if the victim is not shown by compelling reasons to be in need of protection. This requirement shifted the burden from the defendant, where previous precedent placed the burden, to the state. To the extent that *Keeney* shifted the burden from the defendant to the state, the court overturned it.

Additionally, the court held that the compelling need for protection of the victim is the overriding judicial question that must be resolved. Therefore, to show there is not a compelling need for the protection of the witness, the defendant must show that: (1) the state used an expert; (2) the evidence is supported by little or no corroboration beyond the victim's testimony; and (3) there is a reasonable basis to believe the victim's mental state may affect the truthfulness of their statements. The court is not necessarily required to give equal weight to these factors.

Applying this to the *Koerschner* case, the court found that the defendant failed to prove a compelling need for the examination, as the state did not use an expert, there was medical evidence corroborating the sexual assault, and there was no evidence that the victim's mental state would affect her truthfulness.

Chief Justice Rose and Justice Shearing filed separate concurrences. Justice Rose agreed with the ruling, but did not agree with the majority opinion's holding which overturned precedent that attempted to level the playing field when the state prosecutes a child sexual assault case. Chief Justice Rose

argued that the new rule is less equitable and makes it much more difficult for a person accused of sexual assault on a child to get expert assistance that may be required for the defense; and at times, this makes the trial of a child sexual assault case less fair; and therefore, the final verdict less reliable. However, Justice Shearing replied that the playing field is virtually always tipped heavily against the child-victim, rather than against the defendant and that the defendant should only be allowed to conduct a psychological examination of the child-victim in the cases where there is a compelling reason for such examination.

Nevada v. Lisenbee
13 P.3d 947 (Nev. Dec. 5, 2000)

Controlled substance discarded in flight from an illegal police seizure is admissible as evidence.

Officers detained defendant, Lisenbee, in a search for a suspect matching the defendant's description. He produced identification that demonstrated he was not the suspect in question and showed the officers the legal pocketknife and cellular phone under his shirt. The officers then attempted to seize Lisenbee's knife and after a short struggle, the defendant fled. After Lisenbee was apprehended, the officers retraced his path and found a controlled substance they claimed Lisenbee discarded during flight.

Lisenbee was charged with possession of a controlled substance. Lisenbee moved to dismiss because he was seized in violation of his Fourth Amendment rights. The district court held that the stop was improper and granted the motion. The state appealed.

The Nevada Supreme Court reversed. The court agreed that the initial seizure was improper, but held that once the defendant fled from police custody, the illegal seizure ended and any evidence subsequently discovered was admissible. The court also held that items voluntarily discarded are not afforded Fourth Amendment protection because the defendant loses the expectation of privacy upon discarding the items. The controlled substance was held admissible and the motion to dismiss reversed.

In dissent, Justice Young contends that the defendant's flight did not effectively end the illegal seizure. The dissent argues that Lisenbee should have the right to attempt to preserve his freedom and that any evidence discovered as a result of the initial illegal seizure should be inadmissible.

Proferes v. Nevada
13 P.3d 955 (Nev. Dec. 5, 2000)

Inevitable discovery rule does not apply when police do not have a valid reason for the original stop or search of the defendant.

Defendant, Proferes, knocked on the door of a house being searched by the Elko SWAT team. The officers answered the door and told him to come into the house. Once inside, he was detained for questioning. The officers asked him if he had any weapons or drugs, and the defendant told them that he did. The police then recovered amphetamines from Proferes' pocket. At a suppression hearing, the state countered Proferes' argument that the detention and search were illegal by invoking the inevitable discovery rule, which allows

unconstitutionally seized evidence to be admitted if the state can show the evidence would inevitably have been discovered by legal means. Proferes was convicted of possession of a controlled substance with intent to sell.

Proferes appealed, claiming the detention and search violated the Fourth Amendment and his *Miranda* rights. The court held that knocking on a door of a house is not enough for reasonable suspicion, and the subsequent search was a violation of defendant's Fourth Amendment rights. Additionally, since the officers did not inform the defendant of his *Miranda* rights once he was detained, everything the defendant said and everything the officers found was inadmissible at trial.

Lay v. Nevada

14 P.3d 1256 (Nev. Dec. 19, 2000)

Failure to disclose evidence favorable to the defense prior to trial violates due process.

Appellant, Lay, was convicted of first-degree murder with use of a deadly weapon and sentenced to life without the possibility of parole. At trial, the paramedic who treated the victim testified that the victim's dying declaration named the defendant as his killer. However, three to five times prior to trial, the paramedic claimed that the victim made no dying declaration. The paramedic's report contained no information regarding a dying declaration. When questioned by his law clerk as to whether the paramedic's prior statements should be disclosed to the defense, the prosecutor replied that it was not necessary, and that a summary of the paramedic's testimony was already filed with the court.

Lay appealed, arguing that he was not provided with potentially exculpatory evidence.

The Nevada Supreme Court reversed, holding that the undisclosed prior statements of the paramedic would have allowed the defense an opportunity to impeach her trial testimony and that there is a reasonable probability that the trial would have resulted differently given that opportunity. Thus, the undisclosed evidence was material and failure to disclose was a violation of due process.

FAMILY LAW

Carson City Dist. Attorney v. Ryder

998 P.2d 1186 (Nev. May 8, 2000)

Child support arrearages may only be satisfied by either paying all arrearages, or paying twelve months of child support and arrearage payments.

The respondent, Stephen Ryder (Stephen), and the appellant, Mary Ann Ryder (Mary Ann), were divorced in California in 1986. Stephen was ordered to pay child support and to obtain medical insurance for his daughter. By mid-1994, Stephen was in arrears. In 1994, the San Francisco Superior Court ordered Stephen to pay the original child support and an additional \$425 for arrearages. The total owed for back support was approximately \$20,000. By 1996, both parties were residents of Nevada. In February 1996, the Carson City district attorney's office informed Stephen that Mary Ann had filed a complaint

regarding his arrearages and that \$625 would be withheld from his wages. A child support master conducted a hearing and recommended Stephen pay \$5,625 within thirty days and continue paying \$625 per month.

Stephen objected to the master's holding and requested a hearing in district court. At the first hearing, the court held that Stephen had a continuing order to pay. Prior to the second hearing, Stephen made a payment of \$3,450. At the second hearing, the district court held Stephen was current in the ongoing child support obligations as a result of the payment. The district court further held that despite his delinquency, suspension of his driver's license was unjustified and counterproductive to the continued payment of child support. The district attorney and Mary Ann appealed the district court's order rejecting the master's findings and recommendations.

The Nevada Supreme Court held the district court's holding was erroneous. The court held the plain language of the statute clearly stated that both past due payments and ongoing support payments must be considered when determining whether a parent is in arrears.

The court held the respondent did not satisfy his child support arrearages with the single payment for \$3,450. The court also held the respondent's payment did not cover twelve months of ongoing support and court arrearages, which would have also allowed respondent to satisfy his arrearages.

***In re Termination of Parental Rights as to N.J.*
8 P.3d 126 (Nev. Aug. 24, 2000)**

When making decisions to terminate parental rights, Nevada has abandoned the parental fault/best interests standard for the best interest/parental fault standard.

Respondents, Hikmet and Raja J (the Js), had a child in Iraq in 1988. In 1990, they traveled to the United States and left the child with Raja's sister and brother-in-law, Talia and Sam Z (the Zs). In 1996, the Zs, after caring for the child for approximately six years, were granted guardianship of the child. They then petitioned the court to terminate the Js parental rights in order to adopt the child.

The parties told drastically different stories at the hearing, with the Zs claiming that the Js gave them the child to raise. The Js denied this and argued that they could not get back to the United States to see the child due to Iraq's invasion of Kuwait. The evidence did show that the child's biological mother only visited the child twice in seven years; the Js only spoke to the child once over the telephone during this time. The district court denied the Zs petition to terminate the respondents' parental rights, a decision that the Zs appealed.

The Nevada Supreme Court reversed the district court's orders, denying the Zs' petition to terminate the Js' parental rights and their motion for a new trial. The main issue on appeal was whether the district court used the correct standard for termination of parental rights. The standard used before this opinion was the jurisdictional/dispositional standard set forth in *Champagne v. Welfare Division*, 691 P.2d 849 (Nev. 1984), which established parental misconduct as the threshold issue to be considered before taking the best interests of the child into account.

The court overruled *Champagne* and other cases decided based on it, and held that the standard to use is the child's best interest/parental fault standard. The court held that this standard would better conform to the stated purpose of the Nevada parental termination statute, Nev. Rev. Stat. 128.105, that the primary concern in a parental rights termination case should be the welfare of the child.

Kantor v. Kantor

8 P.3d 825 (Nev. Sept. 15, 2000)

Courts are under no independent duty to affirm validity of a prenuptial agreement when parties have stipulated to its validity.

Gary and Janet Kantor entered into a pre-marital agreement that laid out which assets were to be considered community property in the event that their marriage failed. Gary filed for divorce. Janet's original answer denied the validity and enforceability of the agreement. In her amended answer, she admitted its validity. Seven weeks prior to trial, Janet requested leave of the court to amend her amended answer to challenge the validity of the agreement.

The district court denied her request. Janet appealed the denial, contended that the district court should not have applied the terms of the agreement, and appealed the award of attorney's fees.

The Nevada Supreme Court held that the district court did not abuse its discretion in denying the request to amend because both parties had already relied on the validity of the agreement and because allowing a validity challenge seven weeks before trial would have required an extensive delay. The court also held that the district court was correct in applying the terms of the agreement because it was under no obligation to determine the validity of the agreement since Janet's amended answer admitted its validity. Furthermore, the court affirmed the award of attorney's fees, because the agreement specifically had a provision for recovery of attorney's fees if one party attempted to nullify the agreement.

Gepford v. Gepford

13 P.3d 67 (Nev. Nov. 30, 2000)

District court abused its discretion in reversing child custody arrangement.

Mr. and Mrs. Gepford divorced under relatively amicable terms in 1991, when their two children were quite young. At that time, the parents retained dual custody, but shortly thereafter, Mr. Gepford decided to move to Idaho. The parents reached a verbal agreement whereby Mr. Gepford would retain primary legal custody while Mrs. Gepford's child support obligation would be reduced. Mr. Gepford did not realize that written consent from Mrs. Gepford was required by Nevada statute before relocating the children out of state.

Several years later, while one of the children was away with his stepmother, the other child was home recovering from pneumonia. He also suffered from asthma and attention deficit disorder, a condition for which he was required to take medication three times daily. Mr. Gepford left the ten-year-old alone to assist a friend, but gave him his pager number. During that time, Mrs. Gepford happened to call and was greatly alarmed that the boy was alone. She

phoned the police, who went to the home, but determined the boy was in no danger.

After the incident, Mrs. Gepford sued to regain physical custody. The district court found for Mrs. Gepford, citing Mr. Gepford's poor judgment in leaving the boy alone and his failure to obtain written consent before moving from the state with the children in making their determination. They also concluded, based on evidence at trial, that Mrs. Gepford would be more likely than Mr. Gepford to ensure the children would retain a relationship with both parents.

The Nevada Supreme Court, however, found this evidence insufficient to alter the custody arrangement. They reversed and remanded, citing Mr. Gepford's good parental reputation and his long-standing physical custody. They de-emphasized the sole incident of leaving the boy alone and discounted the re-location of the boys without written consent as only one of many factors used in making a determination such as this.

Justice Shearing dissented, with Justices Leavitt and Becker supporting the dissent. Justice Shearing's opinion focused on the district court's role as the fact-finder and objected to the court taking on that function. They concluded that the evidence presented was wholly sufficient to support the district court's finding.

Rodriguez v. Rodriguez
13 P.3d 415 (Nev. Nov. 30, 2000)

Marital misconduct may not be considered in determining an award of alimony.

Glenda and Antonio Rodriguez had been married for twenty-one years when they filed for divorce in 1994. At the time of trial, Antonio earned at least \$75,000 per year and Glenda earned approximately \$14,000 per year. The trial judge ignored Glenda's health problems and limited earning capacity, and instead refused to award Glenda alimony because she had initiated the parties' separation by leaving the family to pursue an extra-marital affair.

The Nevada Supreme Court held that a trial court may not consider either party's misconduct or fault when considering an award of alimony. The court analyzed the language of Nevada's alimony statute, Nev. Rev. Stat. 125.150(1), and its legislative history, concluding that the statute clearly articulates the legislature's intent that as a no-fault divorce state, fault or bad conduct should not be considered when deciding issues of alimony. The court found that alimony is financial support paid from one spouse to the other whenever justice and equity require it, and not a "sword to level the wrongdoer," or a "prize to reward virtue."

The court endorsed the *Buchanan* factors, as set forth in *Buchanan v. Buchanan*, 523 P.2d 1 (Nev. 1974), as sufficient in determining an equitable alimony award. The *Buchanan* factors require the trial court to consider each spouse's physical and mental condition when examining his or her financial condition, health, and ability to work. Consideration of these factors incorporates any economic injury caused by a spouse's fault or misconduct, without considering the conduct itself. The court held that the trial judge clearly abused

his discretion when he considered Glenda's misconduct and ignored her financial condition, health, and ability to work when determining alimony.

PROFESSIONAL RESPONSIBILITY

In re Honorable Frances-Ann Fine **13 P.3d 400 (Nev. Nov. 30, 2000)**

Ex parte communication between a judge and court appointed experts must be limited to procedural or administrative matters; willful misconduct does not require malice.

In 1998, a Las Vegas attorney filed a complaint charging Judge Frances-Ann Fine with numerous violations of the Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline (ARJD) and the Nevada Code of Judicial Conduct (Canons). The complaint alleged that Judge Fine conducted ex parte communications in three pending cases, and appointed a cousin as a mediator in a pending case without disclosing her relationship.

The Nevada Commission on Judicial Discipline (Commission) held evidentiary hearings on the complaint. The Commission found that Judge Fine engaged in ex parte communication with experts in a case pending before her, *McMonigle v. McMonigle*, in violation of ARJD 11(3) and Canons 2A and 3B(7). The Commission also found that Judge Fine appointed her first cousin as a mediator in another case she heard, *Kinnard v. Kinnard*, without revealing the relationship to either party. Additionally, the Commission found that Fine engaged in ex parte communication with the mediator and experts in this case, and with experts in another case, *Greisen v. Greisen*.

Judge Fine argued that appointing her first cousin did not violate the canon because her cousin did not fit within the canon's definition of family members. Judge Fine also argued that some of the ex parte communications were authorized by EDCR 5.70, and some by Canon 3B(7)(c), which allows communication with "court personnel." She also argued that she could be removed only for willful misconduct, which required an element of bad faith or malice that was not present in her conduct.

The Commission disagreed and, citing its 1995 decision to discipline Judge Fine for engaging in ex parte communications, held that Judge Fine showed a continuing pattern of ex parte communications with parties regarding issues on which she would ultimately decide. The Commission found that Judge Fine had discarded her judicial capacity and become an advocate, and ruled that it had no other choice but to remove her from office.

The Nevada Supreme Court upheld the Commission's decision. The court determined that whether or not a first cousin was listed under the canon's definition was immaterial to the ultimate question of nepotism. The court held that there was clear and convincing evidence to support the Commission's finding that Judge Fine was guilty of nepotism and favoritism because her selection of her cousin as mediator in a pending case was based somewhat on their relationship.

The court also held that EDCR 5.70 was not an exception to Canon 3B(7), which expressly disallows ex parte communications. The court agreed with

Judge Fine's contention that court-appointed experts were "court personnel," but held that *ex parte* communications with such personnel should be restricted to procedural or administrative matters. The court held that Judge Fine's contacts were on substantive issues, and, thus, not protected by Canon 3B(7)(c).

The court found that willful misconduct included an intentional or knowing violation of the judicial canons. Since Judge Fine had been previously disciplined for similar conduct, the court held that Judge Fine's behavior was knowing and intentional and did not require malice to be a violation of the Canons.

OTHER PROFESSIONAL RESPONSIBILITY DEVELOPMENTS

In other professional responsibility cases, the Nevada Supreme Court addressed attorney disciplinary issues in the 2000 session. Attorneys were disbarred or suspended for a variety of infractions, including filing false documents (1); misappropriation of client funds (2), (3), and (7); failure to pursue client claims (2), (6), (7), and (8); failure to keep clients informed (2), (6), and (7); failure to respond to disciplinary authority (1); and various other acts of dishonesty (3) and (7). In one case, the court recommended permanent disbarment on the grounds that the attorney posed a "serious threat of harm." (4)

Discipline was occasionally reduced due to mitigating factors including length of practice without disciplinary problems (3); restitution (2) and (3); cooperation with the disciplinary committee (2) and (3); willingness to face addictions (2); and remorse (3). A lengthy disciplinary history and failure to cooperate with disciplinary authority was cited as reasons to issue more serious discipline (1), (2), (6), and (8). In addition, the Nevada Supreme Court reinstated an attorney from a five-year suspension on the condition that he remain free from alcohol abuse (5).

1) *In re* Discipline of William C. Watters, Esq., 2000 Nev. LEXIS 80 (Nev. June 6, 2000)

2) *In re* Discipline of Ronald L. Cordes, Esq., 2000 Nev. LEXIS 153 (Nev. Nov. 30, 2000)

3) *In re* Discipline of Hamilton D. Moore, 2000 Nev. LEXIS 149 (Nev. Nov. 30, 2000)

4) *IN RE* Discipline of Stone, 2000 Nev. LEXIS 152 (Nev. Nov. 30, 2000)

5) *In re* Reinstatement of Paul Fitzgerald, 2000 Nev. LEXIS 151 (Nev. Oct. 23, 2000)

6) *In re* Discipline of Arnold Weinstock, Esq., 2000 Nev. LEXIS 154 (Nev. Oct. 23, 2000)

7) *In re* Discipline of Dwight E. Duncan, 2000 LEXIS 150 (Nev. Nov. 30, 2000)

8) *In re* Discipline of Michael V. Stuhff, 2000 Nev. LEXIS 45 (Nev. Jan. 19, 2000)

TORTS

Calloway v. City of Reno **993 P.2d 1259 (Nev. Feb. 29, 2000)**

Plaintiffs cannot sue in tort for economic loss in construction defect cases.

Townhouse owners brought claims against the developer, contractor, city, and subcontractors, alleging their homes contained construction defects causing extensive water damage to their homes from rain and snow. The owners settled their claims against the developers and contractors for considerably less than their claims were worth, but continued to press their tort claims against the subcontractors. The subcontractors defended by claiming that the homeowners had suffered only economic loss, and that such damages could only be found against those with whom the homeowners were in privity. The homeowners alleged that the losses were not subject to the economic loss doctrine due to their foreseeability.

The economic loss doctrine provides that when a defectively designed product damages only itself and the loss is purely economic, liability only exists for those parties with whom the damaged party is in privity. Only if the product causes personal injury or damage to other property are tort remedies allowed. The owners argued that the defective framing of the town homes damaged other property, the homes themselves, when water damage occurred.

The court held that the homes were integrated products that damaged only themselves, and denied the appellants request for relief. The court in this case expressly overruled *Charlie Brown Constr. Co. v. Boulder City*, 797 P.2d 949 (Nev. 1990), with regard to its holding on the role of foreseeability of damages and economic loss doctrine.

Olivero v. Lowe **995 P.2d 1023 (Nev. Mar. 24, 2000)**

A \$55,000 compensatory and punitive damages award was not excessive in light of homeowner's outrageous conduct.

Olivero appeared at the construction site of his new home where Lowe, a laborer, was working. Olivero confronted Lowe regarding delays in the construction schedule and, without apparent provocation, brandished a handgun and punched Lowe. Olivero then allegedly pointed the weapon at Lowe's head, threatened to take his life, and forced him to dismantle a portion of the completed work. Lowe filed suit against Olivero alleging assault, battery, and intentional infliction of emotional distress. The district court awarded Lowe compensatory damages of \$10,000 and imposed punitive damages of \$45,000.

Olivero appealed on several grounds: (1) failure of predicate proof to substantiate any award of compensatory damages; (2) improper review by the court of companion criminal proceedings; (3) refusal by the court to allow closing argument; (4) Lowe's late service of a trial memo submitted to the trial judge; and (5) improper imposition of punitive damages.

The Nevada Supreme Court held that in cases where emotional distress damages are not secondary to physical injuries, but rather precipitate physical symptoms, either a physical impact must have occurred or proof of serious emotional distress causing physical injury or illness must be presented. Here,

there was a physical impact that provided for personal injury and emotional distress recovery. Lowe testified that he still experienced terror and was unable to continue working as a result. Consequently, the court concluded the compensatory award was not excessive.

The court also concluded that Olivero was not harmed by the district court's review of another criminal proceeding against him, because it was Olivero's attorney who first raised the issue and, after review, the district court struck all evidence in regard to the criminal case.

Further, the district court did not err in refusing Olivero's request for closing argument because the decision to allow a closing argument during a bench trial is entirely within the discretion of the district court. Lowe's late service of the "blind" trial brief to the court was held harmless, because this error would not have affected the outcome of the trial.

Finally, the court concluded that Olivero failed to demonstrate the punitive damages were awarded under the influence of passion or prejudice. Indeed, the court found the totality of the evidence showed that Olivero demonstrated an outrageous exercise of physical domination over Lowe. Consequently, the court affirmed the district court's ruling in favor of Lowe and upheld the award of both compensatory and punitive damages.

Cramer v. Peavy

3 P.3d 665 (Nev. July 14, 2000)

Jury instructions contained in Nev. Rev. Stat. 616.215(10) create a narrow exception to the collateral source rule and do not violate the separation of powers doctrine.

Appellant, Cramer, was a cab driver who sustained injuries in an accident with another cab. Cramer had been involved in two other accidents, one two years prior to the accident at issue, and the other a year later. Cramer sued Checker Cab for injuries, and Checker responded by questioning the severity of the injuries received in the collision with its cab. A jury returned a verdict for Checker and Cramer appealed.

Cramer claimed the district court abused its discretion by not granting a mistrial when the jury was made aware that he had received compensation from the State Industrial Insurance System (SIIS). Cramer further alleged that Nev. Rev. Stat. 616.215(10) was unconstitutional because mandatory jury instructions superseded the collateral source rule, violating the separation of powers doctrine.

While noting the impropriety of the respondent's comments concerning the appellant's SIIS compensation, the Nevada Supreme Court upheld the district court's ruling because the references were neither so egregious or numerous as to affect the verdict. The court noted that the function of Nev. Rev. Stat. 616.215(10) was to address the jury's assumption that plaintiffs were not required to repay SIIS from their damage award. Consequently, juries would try to guess how much the plaintiff had received from SIIS and reduce the damages award accordingly. It was the legislature's intent to curb this jury practice. Therefore, the court held that the statute did not violate the separation of powers doctrine and created a narrow exception to the collateral source rule.

Shafer v. Wal-Mart Stores, Inc.**2000 U.S. App. LEXIS 26004 (9th Cir. Aug. 3, 2000)**

An award of zero damages for pain and suffering is clearly erroneous where plaintiff is severely disabled or suffers loss of consortium, and victims may recover the full cost of necessary attendant care, including that provided by a family member.

Plaintiff was seriously injured while in a Wal-Mart store, and he and his wife subsequently brought suit for damages and loss of consortium. The trial court computed damages of over \$2,000,000 for future medical and attendant care, and just less than \$1,000,000 for loss of future earnings. The court did not compensate for attendant care provided gratuitously by the plaintiff's family members.

The Ninth Circuit found that the federal district court improperly computed the future cost of attendant care necessitated by plaintiff's injuries. Nevada law holds that victims are entitled to recover the full cost of whatever attendant care is necessary, including that provided gratuitously by a family member, as measured by the reasonable value of the services.

The Ninth Circuit also ruled that the trial court's computation of damages awarded the plaintiffs zero recovery for pain and suffering and loss of consortium. Nevada case law on additur requires that, where there is a severe disability or loss of consortium, an award of zero damages for pain and suffering is inadequate and constitutes a clearly erroneous decision in the trial court that may be reviewed. The Ninth Circuit remanded for trial court review.

Flowers v. Carville**112 F. Supp. 2d 1202 (D. Nev. Aug. 24, 2000)**

A public figure cannot recover for defamatory statements made if the statute of limitations has expired in the state where the defendant resides, or if those statements are made without actual malice.

Plaintiff, Gennifer Flowers, brought action for allegedly defamatory statements made by the defendants in books and during television interviews. Flowers brought the action within Nevada's statute of limitations of two years, but outside New York's (the residence of the defendants) one-year limitation. Under Nevada's borrowing statute, a cause of action arising in another state may not be maintained in Nevada if the statute of limitations of that state would bar a claim. The trial court found for defendants, holding that defamation actions generally arise at the place the defendant resides when the tortious conduct occurs. Flowers appealed.

The United States District Court applied New York law to the statute of limitations claims because it found defamatory statements made outside Nevada insufficient to satisfy the overwhelming interest standard. The action was held to accrue from the time the original statement was made, prohibiting Flowers from applying a continuing tort theory if the statements were reprinted at later times. The court also found First Amendment protection, as the disputed assertions were entirely comprised of opinion, and devoid of any factual assertion.

Finally, the court found Flowers to be a limited purpose public figure, drawn into the public eye by her involvement in a public controversy. In

defamatory speech actions, public figures must show that the statements were made with actual malice, a standard the court found Flowers did not fulfill.

Quintero v. McDonald
14 P.3d 522 (Nev. Dec. 19, 2000)

Juries may assign fault for an accident to the defendant, but not award damages to the plaintiff.

Quintero was a passenger in a vehicle driven by McKennery when it was involved in a minor accident with a vehicle driven by McDonald. The accident occurred as both vehicles were backing out of parking spaces. Quintero filed an action against both parties claiming neck and back injuries, but settled with McKennery before trial. At trial, Quintero presented evidence of severe neck and back pain, while McDonald presented evidence that indicated that Quintero continued to perform housekeeping and babysitting chores, had several lapses in her chiropractic treatment, and was involved in an accident the previous year in which she sustained similar injuries. The jury found McDonald sixty-five percent liable, McKennery thirty-five percent liable and Quintero not liable, but did not award any damages to Quintero.

Quintero moved for judgment notwithstanding the verdict, or in the alternative, a new trial. Quintero's basis for the motions was the jury's allocation of fault, not its failure to award damages. The court denied the motion and Quintero appealed.

The Nevada Supreme Court found that a jury is permitted wide latitude in awarding damages, and courts uphold a jury's findings if they are supported by substantial evidence. The court held that substantial evidence supported the jury's verdict; and, that the jury was within its discretion to assign fault for the accident to the defendant, but award no damages to the plaintiff.

