TUESDAY AFTERNOON
JULY 26, 2005

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

IN RE WINSTONS

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional States of Columbia and Franklin, two of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

IN RE WINSTONS

Columbia Center for Disability Law
Protection and Advocacy System for Columbia
645 Walther Way, Suite 208
Santa Claritan, Columbia 55515

MEMORANDUM

To: Applicant

From: Ginny Klosterman

Date: July 26, 2005

Subject: **In re: Ralph, Margaret and Clint Winston**

The Winstons have asked us to represent them in their attempt to purchase a home in Pinnacle Canyon Estates, a "55-and-older" residential community. Ralph and Margaret Winston have a 23-year-old developmentally disabled son, Clint, who lives with them. When Ralph and Margaret tried to purchase a house in Pinnacle Canyon Estates, they were told that Clint couldn't live there because the residential community has a minimum age of 35 for residents. We have received a letter from the attorney for Pinnacle Canyon Estates Homeowners Association that reiterates and explains its position.

Please write a letter in response that argues persuasively that Pinnacle Canyon Estates Homeowners Association is legally required to waive the age restriction for Clint. In addition to arguing our affirmative position, be sure to address and refute the arguments made in the letter from the attorney for Pinnacle Canyon Estates Homeowners Association.

Transcript of Interview of Ralph and Margaret Winston

Ginny Klosterman (Ginny): Mr. and Mrs. Winston, do you mind if I tape record our interview? It will help me remember what you tell me. I won't do it if you are not comfortable with it.

Margaret Winston (Margaret): No, it is fine with us if you record it.

Ginny: Thanks. Why don't you tell me your full name, your ages, and what is going on that brought you to me?

Mr. Winston (Ralph): My name is Ralph Winston, and I am 59. My wife is Margaret Winston, and she is. . .57?

Margaret: No dear, I'm still only 56. (Laughs.) We are here because we tried to buy a house but were rejected. We have a developmentally disabled son who lives with us, and we think they don't want us to live there because of that.

Ginny: What do you mean, you were rejected?

Margaret: The homeowners association for the community told us that our son couldn't live in the house with us because it is an over-55 only community, and our son is much younger than 55. He has to live with us. He has severe developmental disabilities, and if he didn't live with us he would have to be in some sort of institution, and that is out of the question.

Ginny: What is your son's name?

Ralph: Clint.

Ginny: Can you tell me a bit about your son?

Margaret: He is a wonderful loving person, and we are very proud of him. He was born with serious developmental problems. He functions pretty well, but he can't be safely left alone and can't live without us. He is 23 years old but functions at a level well below that. He has a lot of trouble learning, remembering, and he has some communication difficulty, of course.

Ginny: Ok. What is the name of the community?

Ralph: Pinnacle Canyon Estates.

Ginny: Did you have a particular house in mind?

Margaret: Yes. We saw a listing in the paper for a house for sale by the owner, and when

we looked, the house was just perfect. Both Ralph and I are getting a little older, and now that our other children have moved out we don't need all the space just for the three of us. The seller was very nice and very reasonable concerning the price of the house.

Ginny: What was the seller's name?

Margaret: Her name is, I've got it written down here, Pamela Garcia. Pamela wanted to sell because her husband had died and she wants to move to Tucson. So it was a good match. The house has a nice arrangement with a bedroom on one side that would work well for Clint. And it is a very nice community, with a lot of people about Ralph's and my age.

Ginny: When did you find out that the community didn't want you to buy?

Ralph: We had set everything up, and it was a few days before escrow was going to close. At that time, a representative from the Pinnacle Canyon Estates Homeowners Association, Phyllis Lim, told us that our son couldn't live in the home with us because it is a 55-and-over community and he isn't 55 or older. She was very nice, actually. She said they were very sorry, that it had nothing to do with the fact that Clint is developmentally disabled, and that there are in fact a lot of disabled people in the neighborhood. She said something about them having to maintain their situation under the law as housing for a 55-and-over community and that letting anyone under 35 live there is not permitted by something called "the C C and Rs." I didn't know what that meant, and I didn't really believe that had anything to do with it. We thought they just didn't want anyone with disabilities to live there.

Ginny: Yes, it is confusing. The letters C C and R are an abbreviation for covenants, conditions and restrictions. They are very common community requirements for property in a neighborhood and include a bunch of stuff. Some neighborhoods want to be for older residents only and put age requirements in the CC&Rs.

Ralph: Oh, I see. Is it legal for them to do that?

Ginny: That's hard to say. Sometimes 55-and-over communities are allowed in effect to discriminate on the basis of age. But it is not permissible for housing communities to make it hard for people with disabilities to select the housing they want. What did you do when she told you that?

Ralph: Well the seller, Pamela Garcia, got pretty mad and said that was ridiculous, the rules were silly, and where was Clint supposed to live? But we cancelled the closing. She

said if we could get the community to agree to let Clint live with us, she will be happy to sell us the house. She also suggested we see a lawyer because she thinks the community should be sued, or something. She was very supportive of us. Of course, she probably wants the sale, but it's not like the price is a great deal for her. So is there anything that can be done?

Ginny: What are your goals at this point? Is it really to find another house somewhere else?

Ralph: We'd like to move into that house if we could. We aren't in an incredible hurry, but we need to move eventually. And I'm kind of worried, because we'd like to live in a community where people are our age, but, if they are all going to do this, we won't be able to do so unless we have Clint institutionalized, and we don't want that and can't afford it.

Ginny: Tell me more about why Clint can't live on his own.

Margaret: He can't prepare meals. He might burn himself on the stove. He needs help with basic housekeeping and hygiene. He can't handle his own finances, things like paying bills and having a checking account. People could easily take advantage of him when it comes to handling money.

Ginny: Does he have a job?

Ralph: He works in a sheltered workshop, you know, where they hire disabled people. But he can't safely use public transportation, so one of us has to drive him there and back.

Ginny: Do you think he would pose difficulties for the other people living in the neighborhood?

Margaret: Oh my goodness, no. Clint is quiet and shy, kind and very gentle. He doesn't really approach strangers and doesn't leave the house without one of us.

Ginny: Has there ever been a problem at any of the places you've lived before?

Margaret: With Clint? No, never.

Ginny: Ok. I think that the appropriate first step is for me to research this a bit more, because I've never run into a situation exactly like yours. But if things are as I think, I can call the Pinnacle Canyon Estates Homeowners Association and request that it waive the 55-and-over age restriction. I've made requests similar to that before for various clients with disabilities, and some homeowner associations are quite flexible about it, while others are not. So they might agree to that. If not, we could go to court to seek a ruling that their

refusal to grant your requested waiver violates the Columbia Fair Housing Act. Going to court wouldn't be as extreme as it might sound. Hopefully, we will be able to resolve it with a phone call. Does that sound like a good way to proceed?

Margaret: Yes, that is what we would like you to do, isn't it, Ralph?

Ralph: Yes, I think so. I'd like to work it out if we could, and if we can't, well then let's make Pamela Garcia happy, and sue them. It is worth it to see if we can live there.

Ginny: Ok, then I'll get started with some research and then give them a call.

Ralph: Thank you very much for spending time with us.

End of Interview

COLUMBIA CENTER FOR DISABILITY LAW

Protection and Advocacy System for Columbia

645 Walther Way, Suite 208
Santa Claritan, Columbia 55515

MEMORANDUM

To: File

From: Ginny Klosterman

Date: July 5, 2005

Subject: Phone Call to Pinnacle Canyon Estates Seeking Reasonable Accommodation for Clint Winston

On July 5, 2005 I called Ms. Phyllis Lim ("Lim") of the Pinnacle Canyon Estates Homeowners Association (the "Homeowners Association"). Lim, it turns out, is a real estate lawyer who is the general manager of the Homeowners Association. I told her I was calling on behalf of the Winstons, explained what had happened when the Winstons wanted to purchase the home from Pamela Garcia, and asked Lim if their story was correct. Lim said it was, and that Pinnacle Canyon Estates is a 55-and-older community with a 35-and-older age restriction in the CC&Rs. I then requested that the Homeowners Association waive, for Clint Winston, the CC&R requiring all residents to be over 35. I explained that Ralph and Margaret Winston themselves are both over 55, that their son must live with them because he is developmentally disabled, and that they want to live in a community of people their age but are unwilling to contemplate institutionalization for their son. I also explained that the Columbia Fair Housing Act ("CFHA") prohibits discrimination against people with disabilities, and all we want them to do is waive the age restriction. I suggested that a waiver was also the decent thing to do under the circumstances. To let her know that this wouldn't just go away if they turned down the waiver offer, I alluded to the fact that the Winstons were willing to pursue this and had indicated that the seller, Pamela Garcia, supported them.

Lim said she understood how the Winstons might feel, and that she would ask the Homeowners Association to consider it. But she seemed to almost predict that the Homeowners Association would decline the request. She said the Homeowners Association would follow up with a letter indicating its decision.

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July 22, 2005

Ginny Klosterman, Esq.
Columbia Center for Disability Law
645 Walther Way, Suite 208
Santa Claritan, Columbia 55515

Reference: Pinnacle Canyon Estates Homeowners Association — Ralph and Margaret Winston, Pamela Garcia Request for Age Waiver

Dear Ms. Klosterman:

Phyllis Lim, the general manager of Pinnacle Canyon Estates Homeowners Association ("Homeowners Association"), has referred to me the request you made on behalf of Mr. and Mrs. Winston for a waiver of the Homeowners Association's age restrictions. They want to purchase the residence of Pamela Garcia and intend to have their disabled son, Clint, reside on the premises with them after they move in.

As you know, Pinnacle Canyon Estates ("PCE") has a general requirement that limits occupancy of residences in the development to "older" persons, meaning those who are aged 55 and above. It is the essence of living in the PCE community that this requirement be observed scrupulously. That is why people chose to live there and is, no doubt, why the Winstons, who are in their late 50s, have offered to purchase the Garcia residence.

As I understand it, Clint Winston is a 23-year-old developmentally disabled person. He requires constant adult supervision and has always lived with his parents. We do not dispute that Clint is disabled within the meaning of the applicable disability laws, and we sympathize completely with Mr. and Mrs. Winston, but, for reasons I will explain here, the Homeowners Association is unable to waive the age requirement.

You have suggested that to refuse to do so would amount to unlawful discrimination against Clint because he is young and disabled. I take issue with your characterization.

First, Clint Winston's disability has nothing at all to do with the Homeowners Association's decision to exclude him from residing in the development. That decision is purely a function of his age. To allow Clint to reside with his parents on the premises would violate PCE's covenants, conditions & restrictions (CC&Rs). Under the CC&Rs, which as you know are contractual in

nature, no person under the age of 35 may reside on the premises, even if the principal occupants are over 55. If Clint were at least 35, we would not be having this dispute.

Second, PCE, as a housing development for older persons, is completely exempt from the age discrimination laws. We are legally entitled under the Columbia Fair Housing Act (C.R.S. §41 *et. seq*.) to exclude persons who do not meet our age criteria. Indeed, we are *required* to discriminate in order to continue to qualify for the exemption. We currently meet the criteria set forth in C.R.S. §42, and it is our desire to maintain those qualifications that is a principal reason for our rejection of the Winstons' request for a waiver.

One of the requirements for maintaining eligibility for our exemption is that at least 80% of the units in the development be occupied by persons 55 years of age or older. At the current time, we are right at the 80% level. One of our major concerns is that if we embark on a pattern of waiving the age requirement, we will fall below the 80% breakpoint, as a consequence of which we will lose our age selection exemption.

Third, and it is tied to the commitments we make to the property owners in our CC&Rs concerning the 55-and-older nature of the community, there is the danger that allowing younger persons to reside in the development will disrupt the peace and quietude that the property owners have a contractual right to expect. As a matter of fact, we get an average of two requests a month from current residents for waivers that would allow their teenage and young adult children to move in with them. Sooner or later, the number of teenagers and rowdy young adults would increase traffic and noise pollution to the great detriment of the older residents. The concomitant result would be a diminution in the property values associated with the restrictive nature of the development.

Moreover, granting such waivers would completely change the nature of the PCE community, a consequence that we are not required to risk either under the age laws or the disability laws. The Homeowners Association is not required to waive its statutorily granted ability to preserve the nature of the community. It would not be reasonable to require the Homeowners Association to do so. And to preserve the nature of the community, we must continue to demonstrate our intent to maintain the nature of the PCE community as 55-and-older.

Fourth, death from natural causes and illness is a frequent event among the community's property owners. If that were to happen to the Winstons, what would happen to Clint? Who would care for him? It is a constant concern that the Homeowners Association should not have to shoulder. It would create severe administrative problems, such as, for example, our having to make interim arrangements, tracking down other family members, and the like. The Homeowners Association is not a social services agency and consequently is not equipped to take on these tasks. Under the case law interpreting the disability laws, such an administrative burden obviates the need for entities such as the Homeowners Association to accommodate younger people.

The combination of the administrative burdens, the change in the character of the community, and the probable loss in property values that would result from the granting of frequent waivers creates an undue hardship on the PCE community that it is not required to endure.

As I have said, our concern is *not* that Clint is disabled. We have a number of disabled residents in

the development, a circumstance that surprises no one in light of the aged constituency of the community. To the extent that we may have a desire (although we have no affirmative *obligation*) to accommodate the Winstons in their request, it would put us in the untenable position of giving them and Clint *favored* treatment, as opposed to the totally neutral treatment that our age-based policy confers. Rather than being a neutral application of our neutral policy, it would thus be a form of reverse discrimination in *favor* of a disabled person who is not otherwise qualified to be a resident.

I direct your attention to the decision of the courts of our neighboring State of Franklin. In Noble v. Ventosa Ridge Estates, applying a statute identical to the Columbia statute, the Franklin court completely supports our position.

There are no Columbia cases on point. Even the Columbia Court of Appeals' decision in Townley v. Rocking J Residential Community, which arguably comes closest, supports our position that while we *may* have an obligation to make a disability accommodation for *homeowner/residents* who qualify for initial admission under our neutral criteria, we are not required to do so for those who, like Clint, are not qualified for admission as residents.

As a matter of fact, we have never failed to make accommodation for our qualified residents. Over the years, members of the community have spent hundreds of thousands of dollars on access and disability improvements, such as wheelchair ramps, oversized elevators, restroom grab bars, and the like in the community's common areas.

Finally, it goes without saying that there has been a residential housing glut in our greater metropolitan area for the past several years. There are many desirable houses for sale that are not in 55-and-older communities. The Winstons should not have any problem finding housing outside of PCE that will accommodate both them and their son.

Very truly yours,

Emma Zucconi

Emma Zucconi

TUESDAY AFTERNOON
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IN RE WINSTONS

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SELECTED PROVISIONS OF THE COLUMBIA FAIR HOUSING ACT

§41 Definitions

In this article, unless the context otherwise requires:

1. "Disability" means a mental or physical impairment that substantially limits at least one major life activity, a record of such an impairment or being regarded as having such an impairment.

2. "Dwelling" means any building, structure or part of a building or structure that is occupied as, or designed or intended for occupancy as, a residence by one or more families.

3. "Familial status" refers to the status of one or more individuals being younger than the age of eighteen years and domiciled with a parent or another person having legal custody of the minor or minors.

4. "Person" means one or more individuals, corporations, partnerships, associations, legal representatives, mutual companies, trusts, trustees, receivers, and fiduciaries.

§42 Housing for older persons exempted; rules; definition

A. The provisions of this article relating to familial status do not apply to housing for older persons.

B. Housing qualifies as housing for older persons if:

1. At least eighty percent of the units are occupied by at least one person fifty-five years of age or older per unit, and

2. The housing community demonstrates, by publication of and adherence to policies and procedures, an intent by the owner or manager to provide housing for persons fifty-five years of age or older.

§43 Discrimination in sale or rental

A person may not refuse to sell or rent after a bona fide offer has been made, or refuse to negotiate for the sale or rental of or otherwise make unavailable, or deny a dwelling to any person because of race, color, religion, sex, familial status or national origin. A person may not discriminate against any person in the terms, conditions or privileges of sale or rental

of a dwelling, or in providing services or facilities in connection with the sale or rental, because of race, color, religion, sex, familial status or national origin.

§44 Discrimination due to disability; definitions

* * *

B. A person may not discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability of:

1. That person;

2. A person residing in or intending to reside in that dwelling after it is so sold, rented or made available;

3. A person associated with that person.

C. For the purposes of this section, "discrimination" includes:

1. A refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the person if the modifications may be necessary to afford the person full enjoyment of the premises.

2. A refusal to make reasonable accommodations in rules, policies, practices or services if the accommodations may be necessary to afford the person equal opportunity to use and enjoy a dwelling.

Noble v. Ventosa Ridge Estates

Franklin Court of Appeal (2004)

This case presents a conflict between the Franklin Fair Housing Act's ("Franklin FHA") requirement that people with disabilities be given equal opportunities concerning choice and use of housing and the exemption to the FHA given to communities that qualify as "55 or over." This context appears to be a case of first impression for Franklin courts, and the parties present no case on point from any jurisdiction. The cross-motions for summary judgment concede that there are no material facts in dispute and the issue is the application of the law to those facts. The trial court granted summary judgment for the Defendant and denied summary judgment for the Plaintiffs.

Plaintiffs Mary and Frank Noble are the parents of Doug Noble who, at the time of the events, was a 34-year-old man. Because of Doug's disability, he is unable to live independently and is cared for by his parents. Mr. and Mrs. Noble contracted to purchase from Arnold Peck his home that was for sale in Ventosa Ridge Estates ("VRE"), a development governed by defendant. VRE is a residential community that requires at least one person 55 years of age or older to reside in each unit. VRE's covenants, conditions and restrictions ("CC&Rs") provide that no person under the age of 45 may reside in the community. Accordingly, when the president of the Ventosa Ridge Homeowners Association ("Association") learned of the purchase agreement between the Nobles and Peck, she informed Peck that a person younger than 45 years could not live in the subdivision and that the restriction could not be amended or waived by the Association.

The Nobles filed a housing discrimination action, alleging that the Association had engaged in unlawful housing discrimination against a disabled person in violation of the Franklin FHA by failing to make a reasonable accommodation to allow Doug Noble to live in a VRE home with his parents. The Nobles alleged that the Association should have waived the age restriction as a reasonable accommodation, and that the Association's actions have a disparate impact on persons with disabilities. The Nobles do not allege, for purposes of the motions, that the Association had a discriminatory intent. Nobles contend that the

enforcement of the age restriction covenant prevents adults with serious disabilities from living with their parent caregivers in the housing community of their choice, which might force institutionalization of the disabled adult, and which results in a disparate effect on a person with a disability.

The Association denies discrimination based on disability and asserts that its actions were lawful and were intended to enforce the age restriction equally. The Association asserts that the Franklin FHA requirement of a reasonable accommodation does not require it to waive the age requirement, because the Franklin FHA only requires equal treatment to people suffering from a disability and does not require them to grant greater than equal opportunity to use and enjoy a dwelling. The Association also contends that enforcement of the age restriction does not constitute discrimination under the Franklin FHA because it applies to all people under the age of 45 regardless of disability.

Pursuant to the Franklin FHA, a verbatim adoption of the Federal Fair Housing Act, it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a disability of (A) that buyer or renter; (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter. Discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."

Although the Franklin FHA prohibits housing discrimination on the basis of familial status, qualified "housing for older persons" is exempt from the familial status anti-discrimination provisions in the Franklin FHA. This exemption gives qualified "housing for older persons" (also called "55-or-over") communities the ability to put whatever age restrictions it desires in the CC&Rs without concern that it might be violating the familial status provisions of the FHA. Housing qualifies as "housing for older persons" if

> (i) at least 80 percent of the units are occupied by at least one person who is 55 years of age or older;

(ii) the housing facility or community demonstrates, by publication of, and adherence to, policies and procedures, an intent by the owner or manager to provide housing for persons fifty-five years of age or older.

Accordingly, the parties have competing rights and interests at stake. The age restrictions governing the housing development are a sanctioned form of discrimination. There is a specific exception for communities like the VRE community. In order to qualify for the exception, VRE must establish its intent to maintain housing for occupants 55 and older. VRE must adhere to policies and procedures that demonstrate this intent. In this case, VRE's policy included a provision that no person under the age of 45 shall reside on the property. The Nobles' competing interest is found in the Franklin FHA requirement that providers of housing reasonably accommodate those with disabilities to allow them to enjoy housing on an equal basis with others.

We find that the VRE Homeowners Association's actions do not constitute a failure to reasonably accommodate the needs of a person with a disability. First, the Association is not discriminating against Doug Noble on the basis of his disability, so it does not appear that the Franklin FHA requires it to make a reasonable accommodation. Doug Noble was excluded because of his age rather than because he is a disabled person. The purpose of VRE's age restriction is lawful and does not discriminate based on disability. A significant number of disabled residents reside in VRE, which demonstrates that the Association has not excluded anyone over the age of forty-five on the basis of disability. The Association excluded Doug Noble solely because he did not meet the age requirement, and the Franklin legislature allows communities to maintain age minimums if they follow the requirements, as VRE has done here. There is thus no causal nexus between the Association's invoking of its forty-five and over requirement and Doug Noble's disability.

In addition, the Association is not required to waive its forty-five and over requirement to reasonably accommodate Doug Noble. The goal of a reasonable accommodation is to allow a disabled person to enjoy housing on an equal basis with others, but the requested accommodation here would give Doug Noble greater than "equal opportunity," as it would

give him an advantage over all nondisabled people under 45. A duty to accommodate only arises when necessary to afford a disabled person an "equal opportunity" to use and enjoy a dwelling. It is doubtful that any accommodation would be reasonable if it would require abandoning a statutorily granted ability to assert a facially disability-neutral restriction, and, in any event, an accommodation is not reasonable if it requires a fundamental alteration in the nature of a program or imposes undue financial and administrative burdens. To allow a person younger than the age of 45 years to live at VRE would fundamentally alter the nature of its community and jeopardize its status as "housing for older persons" under the Franklin FHA. In addition, allowing an exception for Doug Noble could result in a large number of people under age 45 seeking to live in VRE with their parents and thus create undue administrative burdens. Applying the facially neutral age restriction will not force the Nobles to institutionalize their child and is only a minimal restriction on their housing choices.

Affirmed.

Project HOME vs. City of Catalina

Columbia Court of Appeal (1998)

This is an appeal from the trial court ruling granting summary judgment for Project HOME and denying summary judgment for the City of Catalina (“City”). This case arises under the Columbia Fair Housing Act ("CFHA"). The plaintiff alleges that the defendant City's failure to grant a requested zoning permit for a proposed home for homeless persons constitutes "a refusal to make reasonable accommodations in the rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. . . ."

Plaintiff Project HOME is a Columbia nonprofit corporation that provides a continuum of services to homeless persons who are mentally ill and/or recovering substance abusers. The organization operates emergency shelters open to any chronically homeless person in the City and offers treatment at two drug- and alcohol-free transitional homes. Recognizing that many residents of the transitional homes would benefit from more privacy and independence than the two homes afford, Project HOME sought to create a "Single Room Occupancy" ("SRO") facility with small individual rooms and community kitchen facilities that would give the resident a sense of control over his or her environment.

Project HOME acquired a building on Fairmount Avenue to use for its proposed SRO. The property includes a substantial side yard which extends the entire depth of the block, but no rear yard. When Project HOME applied for a zoning and use permit for the Fairmount Avenue property, two civic associations opposed the introduction into the neighborhood of a new residential facility for persons beset with handicaps, and the City denied the zoning and use permit application on the ground that the Fairmount property has no rear yard. Under the Catalina Zoning Code, a commercial building or a residential building housing families must have a rear yard. Project HOME sought a waiver from the back yard requirement on the ground that the ample side yard is an adequate substitute. The City refused.

Project HOME and potential residents seek a declaration that as a matter of law the City's conduct constitutes a violation of 44C(2) of the CFHA, which provides that unlawful discrimination includes failure to make "reasonable accommodations in rules, policies, practices or services . . . necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling." They argue that the reasonable accommodation they seek, that the back yard requirements are waived because the side yard is adequate, is necessary in order to provide their disabled residents with the housing of their choice. The City seeks a ruling that as a matter of law it need not waive the requirement.

The CFHA is copied from its federal counterpart. In creating the CFHA, the Columbia legislature expressed its intent "that the state undertake vigorous steps to provide equal opportunity in housing . . . extend housing discrimination protection to the disabled, exempt housing for the elderly from the provisions prohibiting discrimination against families with children. . .and obtain substantial equivalency with the federal government's housing discrimination enforcement efforts."

We are mindful of the CFHA's stated policy "to prevent housing discrimination and provide for fair housing throughout Columbia." One of the purposes of the CFHA is to "integrate people with disabilities into the mainstream of the community." The CFHA is a broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals. Because it is a broad remedial statute, its provisions are to be generously construed, and any exemptions must be construed narrowly in order to preserve the primary operation of the purposes and policies of the CFHA.

Concerning the reasonable accommodation requirement, we stress the CFHA's imposition of an affirmative duty to reasonably accommodate disabled persons. A facially neutral requirement that affects disabled and non-disabled individuals alike implicates the reasonable accommodation section of the CFHA when it prevents a disabled individual from gaining access to proposed housing. The legislative history of the reasonable accommodation portion of the CFHA indicates that one of the purposes behind the reasonable accommodation provision is to address individual needs and respond to

individual circumstances and that the concept of reasonable accommodation has a long history in regulations and case law dealing with discrimination on the basis of a person's disability. A discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a person with disabilities an equal opportunity to use and enjoy a dwelling.

The City argues that there is no CFHA violation because there is no "causal nexus" between the section of the Zoning Code provision at issue--the rear yard requirement--and the handicaps of the prospective residents. The City contrasts the case at hand with a situation in which a zoning code barred the installation of elevators in three-story buildings. In such a case, a disabled person who sought to install an elevator so that he could live in a three-story building would be able to show a direct causal link between the Zoning Code and a City action that bars him from residing in this dwelling because of his handicap. Although the City acknowledges that "discrimination" is defined in §44C as a refusal to make a reasonable accommodation, it argues that what is unlawful under the CFHA is discrimination "<u>because</u> of disability." §44B (emphasis added).

The City reads the statute too narrowly. The CFHA provision concerning discrimination based on a refusal to make a reasonable accommodation contains an independent definition of "discrimination"--a definition not modified by the phrase "because of a disability" found in §44B. Thus the language of §44C does not suggest that, to establish a CFHA violation on the basis of discrimination against a person with a disability, a plaintiff must show a "causal nexus" between the challenged provision and the disabilities of the prospective residents, and cases that have interpreted §44C provide strong support for the conclusion that no such causal nexus is required.

In addition, according to the legislative history of the CFHA, one method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on land use in a manner that discriminates against people with

disabilities. Such determination often results from false assumptions about the needs of disabled people, as well as unfounded fears of difficulties about the problems their tenancies may pose. These and similar practices are prohibited by the CFHA. The City's argument that the statute only reaches special restrictions that specifically prohibit the sale or rental of a dwelling to disabled individuals is thus without merit. So is the City's argument that prohibiting the SRO facility from operating would have no discriminatory effect on plaintiffs or disabled persons in general because there are other facilities in Columbia.

Enforcement of a restrictive covenant or ordinance can, despite the apparent neutrality of the covenant or ordinance toward people with disabilities, constitute discrimination because of a disability. A reasonable accommodation would have been to waive enforcement of the covenant. Such an accommodation would not impose an undue financial or administrative burden on the private defendants nor would it undermine the basic purpose behind the practice of enforcement, namely, to maintain the residential nature of the neighborhood.

A plaintiff can thus establish a violation of the CFHA by showing that the defendant failed to make reasonable accommodations in rules, policies or practices, including rules, policies or practices that do not themselves discriminate on the basis of disability. If a restriction is an impediment to the disabled person's ability to obtain equal housing opportunity, the disabled person is permitted to invoke the "reasonable accommodation" requirement of the CFHA so long as the accommodation "may be necessary" to afford that person equal opportunity to use and enjoy a dwelling.

In this case, a waiver of the back yard requirement is necessary to afford the plaintiffs the equal opportunity to use and enjoy the Project HOME dwellings envisioned for the property. While an accommodation is not reasonable if it imposes a fundamental alteration or substantial administrative or financial burdens on the accommodating party, the City does not appear seriously to dispute that the requested substitution of side yard for rear yard is reasonable. Substituting side yard for rear yard would impose no financial or administrative burden on the City. Nor does it appear that granting the accommodation

requested would require a fundamental alteration of the Zoning Code.

Affirmed.

Townley v. Rocking J Residential Community

Columbia Court of Appeal (2003)

In this case we are asked to decide whether a community permitted by an exemption in the Columbia Fair Housing Act ("CFHA") to exclude persons under the age of 55 violates the CFHA's disability discrimination provisions by refusing to waive its minimum age requirement for an over-55 prospective resident with a disability who requires a live-in caretaker under the age of 55.

According to undisputed facts, plaintiff Art Townley ("Townley"), a 68-year-old man who has a disability that renders him unable to live independently, agreed to purchase from seller Dina Whitmore a home in Rocking J Residential Community ("Rocking J") housing development. Rocking J requires at least one person fifty-five years of age or older to reside in each unit. The Rocking J covenants, conditions and restrictions ("CC&Rs") state that no person under the age of 55 may reside in the community. Townley's live-in caregiver, Frank Johnson ("Johnson"), who has lived with and taken care of Townley for the past five years, is currently 32 years old. When Ms. Whitmore notified the Rocking J Homeowners Association (the "Association") of the purchase and that the buyer would have a 32-year-old live-in caregiver, the Association told Ms. Whitmore and Townley that Townley was welcome as a resident but Johnson would not be permitted to live in any home at Rocking J.

Townley and Ms. Whitmore filed suit to enjoin Rocking J from refusing to permit Townley's live-in caregiver to live in the home. They alleged that Rocking J is required under the CFHA to permit underage caregivers to live with over-55 residents, in order to allow adults with serious disabilities opportunities to live in the housing community of their choice. The trial court granted summary judgment for Rocking J.

Rocking J argues that because Rocking J qualifies as a "55 and over" community under the CFHA, the community is entitled to enforce its CC&R concerning the age requirement. Its position is that if it lets anyone under the age of 55 live in the community, the community

will lose its status as exempt “housing for older persons,” resulting in a fundamental alteration in the nature of the community. It also argues that permitting the plaintiff buyer to have a 32-year-old living in his home would result in granting to the plaintiff buyer greater than equal opportunity to use and enjoy a dwelling, while the CFHA does not require anything more than equal treatment. It also argues that it does not discriminate against Townley on the basis of disability because it already has many disabled elderly residents living there.

The CFHA's "housing for older persons exemption" does not exempt the defendants from its CFHA-imposed obligation to reasonably accommodate persons with disabilities. Section 41 of the CFHA prohibits discrimination against families with children. At the same time, however, Section 42 of the CFHA explicitly exempts “housing for older persons” from the prohibition against familial status discrimination. In other words, if an over-55 housing community abides by the CFHA’s requirements regarding occupancy by persons over the age of 55, such qualifying communities are free to exclude underage persons from the housing community and not be found liable for familial status discrimination. This exemption, however, only protects the housing community from liability for status discrimination. See §42. It does not protect the over-55 community from discrimination claims based upon race, color, national origin, religion, gender or disability.

The Supreme Court of Columbia, adopting United States Supreme Court interpretations of the identical Federal Fair Housing Act, has held that an accommodation is not reasonable (1) if it would require a fundamental alteration in the nature of a program, or (2) if it would impose undue financial or administrative burdens on the defendant. Defendant argues that the waiver would fundamentally alter the nature of the community by jeopardizing its "55 and over status."

Under the “55 and over” housing exemption, an over-55 housing community is exempt from familial status discrimination if: (1) at least eighty percent of the units are occupied by at least one person who is fifty-five years of age or older per unit, and (2) the housing community publishes and adheres to policies and procedures that demonstrate the intent

to maintain the community as 55 or over, only. Nothing in the statute requires that all occupants of a unit be over the age of 55 in order to obtain or maintain eligibility for a "55 and over" exemption. The statute specifically requires only "one person who is fifty-five years of age or older. . ." §42 (B)(1). The federal regulations promulgated by The Department of Housing and Urban Development (HUD), which we find useful and persuasive, fully contemplate situations where persons under the age of 55 will reside in over-55 housing communities. Under those regulations, a community will meet the 80% occupancy rule where there are units occupied by persons under 55 who are necessary to provide reasonable accommodation to disabled residents. Thus the HUD regulations implicitly contemplate that an over-55 community does not lose its status as "housing for older persons" if a caretaker under the age of 55 resides with an over-55 resident.

Accordingly, Rocking J is not correct that the community will jeopardize its status as a "55 and over" community if it waives the age requirement for Townley's live-in caregiver. A waiver will not have any impact on the "55 and over" status of the community. Townley's household will still count toward the 80% occupancy requirement, because there will be one person over 55 living in his unit. And the waiver would not indicate that Rocking J had failed to publish and adhere to policies and procedures that demonstrate the intent that Rocking J be housing for older persons and is not inconsistent with the community's intent to remain an over-55 community. A waiver granted in order to comply with a state law that requires reasonable accommodation for a disabled person's need for a live-in caregiver can not be interpreted as an intent to relinquish its status as "housing for older persons." As long as Rocking J's general policies, practices, procedures and services are specifically aimed at providing compatible housing for older persons, the waiver will not jeopardize the community concerning the intent requirement for the exemption.

Nor will the waiver inevitably cause a fundamental change by resulting in a "flood" of people wishing to share a residence with underage individuals. Reasonable accommodations vary depending on the facts of each case, and what is reasonable in a particular circumstance is a fact-intensive, case-specific determination. The CFHA allows Rocking J to consider each request individually and to grant only those requests that are reasonable.

Presumably, only a narrow group of persons would be entitled to the limited exception to the CC&Rs necessitated by disabled individuals' need for an underage live-in caretaker.

Defendant also argues that a waiver is unreasonable because the CFHA requirements that people with disabilities be given equal treatment does not require giving the plaintiff-buyer greater than equal opportunity to use and enjoy a dwelling. Defendant's argument might be persuasive if the definition of "discrimination" under the disability prohibitions of the CFHA were the same as the definitions prohibiting "discrimination" due to an individual's race, color, religion, sex, national origin or familial status. The CFHA prohibition on "discrimination in the sale or rental of housing" has been interpreted to require entities to provide "equal treatment" in their dealing with (for examples) men and women, Hispanics and non-Hispanics, African-Americans and Caucasians. In interpreting this requirement, courts have clearly distinguished "equal treatment" from the affirmative duty to provide a "reasonable accommodation" and an "equal opportunity." Thus the discrimination provisions that require "equal treatment" under this portion of the CFHA have not been interpreted to impose on housing providers a duty of greater than equal treatment to avoid or to rectify discrimination in housing on the basis of an individual's race, color, religion, sex, national origin or familial status. In contrast, the CFHA's provisions defining discrimination due to disability require more of housing providers than to provide equal treatment to disabled and non-disabled persons alike. These CFHA provisions place on housing providers an affirmative duty to, among other things, "reasonably accommodate" a person with a disability if the accommodation may be necessary to afford the person "equal opportunity" to use and enjoy a dwelling, §44C(2). "Equal opportunity" under this portion of the CFHA gives the disabled the right to live in the residence and community of their choice because that right serves to end their exclusion from mainstream society.

Accordingly, although Defendant is correct that the CFHA's general prohibitions concerning housing discrimination do not require an entity to provide anything more than "equal treatment," Defendant is not correct that they have no obligation to give more than "equal treatment," because the CFHA's "reasonable accommodation" requirement concerning housing for people with disabilities by its very nature may impose a duty of

more than equal treatment. To reasonably accommodate a disabled person, an individual or group may have to make an affirmative change in an otherwise valid policy. Thus the Rocking J community's CFHA imposed-obligation is more than to provide "equal treatment" for all disabled residents. It is to make necessary alterations in its rules so as to allow Townley "equal opportunity" to live in the residence of his choice.

Similarly, the fact that the Defendant does not generally discriminate against residents with disabilities does not insulate Defendant from its obligation to make a reasonable accommodation to Townley. Defendant's argument that it could not be found to have discriminated against Townley on the basis of disability because it already has many disabled elderly residents living there misses the point. The issue here is not whether the Defendant excludes or discriminates against residents with disabilities in general, but whether it failed to provide a *reasonable accommodation* to a particular individual who needed it in order to live in the Rocking J community. The fact that other disabled persons already live in the community does not relieve the community from its obligation to make reasonable accommodations to permit another disabled individual to live there.

This state has adopted the public policy of assisting the physically and developmentally disabled by promoting their deinstitutionalization and encouraging community integration. The overriding policy of the CFHA, which is to ensure equal opportunity to disabled persons to have adequate opportunities to select the housing of their choice, requires that Rocking J waive the age requirement. Consequently, state policy reflected in the CFHA and other statutes concerning disabled persons requires Rocking J to reasonably accommodate Townley by waiving its age requirement for a live-in caretaker for Townley.

Reversed.

Answer 1 to Question PT-A

1)

To: Emma Zucconi
Rommett, Fairbrooks, Fromkin & Zucconi, LLP

July 26th, 2005

Columbia Center for Disability Law
Santa Claritan, Columbia

Reference: Pinnacle Canyon Estates Homeowners Association--Request for a Disability Waiver

Dear Ms. Zucconi,

It is with great regret that we received your letter in the matter of the Winstons. The Winstons, naturally, still wish to live in the fine community of Pinnacle Canyon Estates, and the denial of the Homeowners Association of their request for a simple waiver, preventing them from completing the sale of the property from Pamela Garcia, represents, of course, a considerable blow to their aspirations, as they could hardly be expected to place Clint Winston in an institution. While we appreciate the concerns and arguments you have advanced in your letter, we believe that a closer examination of the applicable law will lead you to the same conclusion we have reached: that the denial of the waiver is in violation of the provision of the Columbia Fair Housing Act. We have no desire, of course, to be forced to go into litigation, even though the case is appropriate for summary judgment given the undisputed facts, when reconsideration of the applicable precedents and statutes may lead them to the same conclusion we have reached: that a waiver for Clint is a "reasonable accommodation" under the act.

The Statute

Perhaps, in your excitement over this case, and your obvious concern over maintaining the character of the community, you neglected a few of the finer points of the statute. The Columbia Fair Housing Act (CFHA) is concerned with any sort of discrimination that results in the denial of equal opportunity to enjoy a community, and the age-restrictive nature of Pinnacle Canyon Estates is not a defense to a disability discrimination claim.

Statutory Language

We would like to draw your attention to Section 44 of the CFHA, which bans discrimination on the basis of disability in any of the "terms, conditions or privileges of sale or rental of a dwelling ... because of a disability" either of the person directly purchasing or

renting, or because of the disability of a person "residing in or intending to reside in that dwelling." Additionally, "discrimination" is defined as including a "refusal to make accommodations in rules, practices or services" is [sic] the accommodations are "necessary to afford the person equal opportunity to use and enjoy a dwelling." The statute defines a disability as any "mental or physical impairment that substantially limits at least one major life activity" and "dwelling" as "any building ... designed for occupancy." And the "condition" - - the minimum 35 year age requirement - - is equally obvious.

The Statutory Requirements Are Satisfied

While we appreciate your acknowledgment of Clint's disabled status, we would like to make it clear that Clint's disability would not be in dispute in this case: Clint cannot handle basic housekeeping or cooking, cannot handle his own finances, and cannot safely use public transportation – that is, he is restricted in ordinary domestic activities, economic life, and transportation, and these are clearly "major life activities." Similarly, a single-family house at Pinnacle Canyon is clearly "major life activities." Similarly, a single-family house at Pinnacle Canyon is clearly a "dwelling" as it is a building designed for occupancy. Additionally, Clint would, naturally, be a resident in the building, so he falls under 44B2. So the basic provisions are clearly satisfied.

Because Clint is so clearly disabled, a "refusal to make reasonable accommodations in rules," such as the "C C Rs" which the homeowners association refers to, could potentially implicate CFHA - 44C2. As we will explain below, the precedents of *Columbia* [sic] clearly support modification or waiver of age requirements; similarly, the precedents define "equal opportunity" much more broadly than strictly "equal treatment."

Facially Neutral Requirements Can Implicate Disability

Thankfully, we have more cases for guidance than simply *Townley*, which you referenced in your letter. *Project HOME* dealt with reluctance by a government, under pressure from various homeowners' associations, to provide accommodations in their zoning codes from persons with disabilities. The court there was dealing with a facially neutral statute that resulted in a denial of a permit for a facility because it lacked a backyard – a neutral statute that resulted in people with disabilities being denied housing. The court there indicated that any sort of "facially neutral requirement" – such as a minimum age of 35 – that resulted in the "prevent[ion of] a disabled individual from gaining access to proposed housing" would violate the CFHA. The court additionally commented that "traditional" requirements may have to be changed to accommodate those with disabilities.

Enforcement of Facially Neutral Restrictive Covenants Can be Discriminatory

We would certainly hope that the application of this binding precedent to the case

would be obvious, it should be clear that under Columbia law, courts have interpreted neutral restrictions that result in individuals with disabilities being denied housing as being discriminatory, and therefore requiring reasonable accommodations. Clint Winston is disabled, and the refusal of the community to waive the requirement can constitute discrimination. The fact that it is a neutral rule applied fairly and broadly is, unfortunately for your clients, not a defense. Of course, while the court in *Project HOME* was dealing directly with zoning, it also explicitly ruled that enforcing a "restrictive covenant or ordinance, can *despite the apparent neutrality of the covenant* ... constitute discrimination because of a disability" as part of its holding (emphasis added).

Equal Opportunity is more than Equal Treatment

As the Court in *Townley* indicated, the requirement of "equal treatment" under CFHA-43 is different from "reasonable accommodation" and "equal opportunity" under s44. The Court in Townley found the "equal opportunity" provisions create an affirmative duty to reasonably accommodate, even when dealing with neutral rules and regulations - - that equal opportunity can incorporate an affirmative duty to waive a general rule in a specific case. In this case, in order to avoid discriminating against an individual with a disability, the CFHA is obliged to make all reasonable accommodations for him.

Waiving an enforcement of a covenant can be reasonable

An individual with a disability, such as Clint Winston, is allowed to invoke the "reasonable accommodation" requirement if the accommodation "may be necessary" to allow that individual full and fair access to housing. The court has expressly found that a "reasonable accommodation would have been to waive enforcement of the covenant;" this is especially true when it would not "impose an undue financial or administrative burden ... nor would it undermine the basic purpose behind the practice of enforcement." Similarly, to "reasonably accommodate a disabled person, an individual or group may have to make an affirmative change in an otherwise valid policy[.]"

The test as outlined in Project HOME indicates what is "reasonable" only in the negative; that is, it defines an unreasonable burden as an undue financial or administrative burden or an accommodation that would undermine the basic purpose behind the practice of enforcement. In this case, we are merely asking that one developmentally disabled individual, so disabled that he is effectively unable to function without adult supervision at all times, be allowed to live with his parents. As he has something of an outside occupation in the workshop, he would not be present during the day, and Margaret and Ralph Winston would be available during the evenings to supervise him and make sure he does not disturb the other residents. Moreover, Clint is "quiet and shy ... [h]e doesn't really approach strangers," meaning that he would be unlikely to disturb the peace of the other residents.

In this instance, the waiver of the age requirement would not lead to a fundamental change, nor would it even lead to minor children residing in the community, but simply one quiet, loving, disabled adult. Specifically, it would not be a financial or administrative

burden, because the Winstons would be responsible for caring for Clint, nor would it undermine the basic purpose of enforcing the age restriction, because the Winstons themselves would still meet the age restriction, and Clint is in any event not a minor that the PCE is allowed to discriminate against.

Public Policy Supports the Grant of Accommodations

In drafting the CFHA, Columbia was trying to copy federal law, as well as to "undertake vigorous steps to provide equal opportunity in housing ... extend housing discrimination protection to the disabled, exempt housing for the elderly from the provisions prohibiting discrimination against families with children ..." (with "children" in this context meaning minor children). The legislature, in their inquiry into the problems of people with disabilities, have found that facially neutral rules and regulations resulted in the disabled being denied access to housing. Alas, we fear that what is happening in this case, with the application of Pinnacle Canyon's sensible, neutral rule regarding age being used in such a manner that Clint Winston will not have a place to live, precisely the sort of application of neutral rules to discriminate that the legislature was concerned with.

The legislature also intended to assist the physically and developmentally disabled by promoting their deinstitutionalization and encouraging community integration. Of course, Pinnacle Canyon is essentially trying to force the Winstons to institutionalize their own child, against the goal of encouraging integration, by preventing him from living with the two people who have helped him lead his life happily despite his disability. This goal of integrating the disabled - - of making them welcomed and accepted as part of the community - - is completely thwarted when they are denied their ability to live with their caregivers - - and it was probably this concern that led the legislature to include the aforementioned inclusion of "[disabled people] residing in or intending to reside in that dwelling.

Additionally, while you maintain that *Townley* is only applicable to "homeowner/residents," the statute itself makes no distinctions between people with disabilities, people living with people with disabilities, and people associated with people with disabilities. To assume that courts will make distinction when the legislature did not – and in fact expressly included all three categories, including the one at tissue – strikes me as a rather adventurous litigation strategy. This is especially so when you consider that remedial statutes are to be "generously construed, and any exemptions must be construed narrowly" in order to effectuate the goals of the statute. The goals are clearly to protect individuals with disabilities from discrimination, even discrimination based on neutral statutes.

Conclusion

Pinnacle Canyons [sic] is under a duty not to discriminate against the disabled, even in its applications of neutral rules. Clint is disabled; he is being denied reasonable accommodations, which would not impose a financial burden or change the nature of the community or undermine the purpose of the restriction. The PCE is under an affirmative

duty under the law to avoid discriminating even with respect to neutral law, and their position on the waiver issue is resulting in discrimination and a denial of Clint's rights to "equal opportunity" for housing.

Claims of Pinnacle Valley

We hope that you see the logic and justice in the Winstons' request for a simple waiver of the 35-year age minimum for one person. However, we are very much cognizant of some of the concerns and legal issues raised in your letter, and we would like to do our best to alleviate them, to the extent we have failed to do so already.

"Purely a Function of Age"

You indicated in your letter that the decision to deny Clint Winston a waiver was "purely a function of his age." We do not dispute that, and of course believe that you only have the best of intentions, of maintaining the nature of the community as being geared towards "older persons." But as we indicated above, the basis on which you discriminate under the CFHA does not matter; "discrimination" is merely a function of denial of opportunities, and the non-waiver has denied Clint the opportunity to live in that beautiful community. CC&Rs are certainly contractual – but contractual provision must be waived under the CFHA if they result in discrimination against the disabled.

"Completely Exempt from the Age Discrimination Laws"

Your claim that PCE, as a housing development for older persons, is exempt from age discrimination laws is inaccurate, for the reasons described above. However, your letter did indicate a legitimate concern with falling below the "80% breakpoint" and ceasing to be considered as "housing for older persons," and that you are on the 80% level currently. On this subject, I have wonderful news and can completely alleviate your concerns. As the court indicated in *Townley* – and as you indicated in your letter – the 80% requirement only applies to units, not individuals. As the "unit" the Winstons will be purchasing would have not one, but two individuals over 55 living in the unit, a waiver of the age requirement for Clint would have no effect and would maintain Pinnacle Canyon at its current level of 80% of units being inhabited by those over-55. As far as your concern over a "pattern" of waiving the age requirement, Courts have explicitly stated that disability discrimination is a very "fact-specific" process; obliging the Winstons with a waiver in this case would not have the effect of obliging the Homeowners Association to grant them in future cases. It would not "undermine the basic purpose behind the practice of enforcement" of the age restrictions, because the individuals living there would primarily meet them; it is simply an additional accommodation.

We acknowledge that you may be concerned over any sort of "disability" being used as the basis for a waiver; after all, what if disabled individuals under 55 were to try to live in Pinnacle Valley? You may well be obliged to grant accommodations to some of them – but as you point out in your letter, accommodations must be "reasonable." This is a one-

off case, and there has been no indication there has been a flood of under-55 disabled individuals seeking to purchase homes (and they would still have to find the money, mind) in Pinnacle Canyon. But, as indicated above, this is very "fact specific," and accommodations allowing households of those under-55 may well be viewed as "unreasonable by the courts." Even if they are not, if the PCE is already legally obliged under the CFHA, denial of a waiver in this case will not affect their legal duties *viz* other disabled individuals, so the waiver or lack thereof in this case won't affect your clients['] rights.

We, of course, share your concern over current residents who wish to allow teenagers or rowdy young adults to live in your fine community. However, allowing one disabled individual – who cannot drive himself and has difficulty communicating – will not result in a significant increase in "traffic and noise pollution." Clint will not add to traffic, for the simple reason that he cannot drive, and there is no indication anywhere that he is "rowdy" in the least. Of course, your clients may be concerned with the broader principle, but a concern with broad principles in the general case is hardly a viable excuse to discriminate in specific cases. Again, in *Townley*, the court rejected a very similar slippery-slope argument, and it would seem unlikely that the court would accept it here, given the "fact-specific" nature of disability claims. Of course, we very much hope that your clients will somehow see the folly of prolonged litigation on this issue.

Financial and Administrative Burdens

As far as the administrative burdens you are concerned with, you should keep in mind that the courts have warned against the dangers of overestimating the actual administrative burdens individuals with disabilities would pose – the "false assumptions" that people, regretfully, so often make when assessing the costs of disabled individuals. The PCE would only be obliged – if at all, and I am not entirely sure that is the case – to assist with Clint Winston in the event of the death of both Ralph and Margaret Winston. If those sorts of concerns are helping thwart the waiver, we would of course be willing to discuss them with the PCE, and perhaps appoint a trustee or administrator, or prepare an acceptable will to be witnessed by members of the Homeowners Association, to take over in the case that both of the older Winstons perish, so that your Homeowners Association would not be burdened with the tasks of a "social services agency." Additionally, insofar as there are financial burdens, surely prolonged and pointless litigation would pose a more severe one than administrative tasks in the event of the deaths of people who are currently over 15 years below the average U.S. life expectancy.

Overall

I am quite concerned, of course, about your arguments revolving around "reverse discrimination." Unlike the courts in Franklin, Columbia Courts have not found "reverse discrimination" to be a concern in interpreting disability discrimination. While we certainly respect the courts of Franklin, their holdings are not binding on our courts, and our courts have clearly rejected "neutrality" as a basis for evading liability, affirmative duties and responsibilities under the CFHA. In Franklin, "equal treatment" is sufficient to satisfy their

version of the FHA; in Columbia, it is not, and the law imposes and affirmative duty to act.

Additionally, we are puzzled by your letter's references to section 42's exemption for "housing for older persons." We fear that you may be misstating the law. Pinnacle Canyon is clearly[,] at the current time, evincing an intent to provide housing to those persons fifty-five years of age or older. However, the exemption for "housing for older persons" only applies to the provisions of the CFHA relating to familial status – and, as indicated in 41's definitions section, "familial status" refers to "individuals younger than the age of eighteen years." Which is to say, the CFHA's discrimination exception speaks to families having minor children, and only allows familial discrimination on that basis. There is no exception for other forms of discrimination on that basis. There is no exception for other forms of discrimination, or indeed for disability discrimination. We would hate for the Homeowners association of a place the Winstons very much intend to live waste their money on litigating an issue based on a simple, and understandable, misreading of the statute.

We of course applaud the accommodations and expenses the PCE have undertaken to make accommodations for your disabled residents. Of course, the general gives way to the specific; accommodations are required in every case where they are appropriate and reasonable – as the court in *Townley* indicated, general non-discrimination does not "insulate [from] obligation[s] to make a reasonable accommodation;" the test is for, as the court indicated, a particular individual and not the disabled in general. However, your client's generosity on accommodations is a great thing, and a significant factor in our client's desire to move there. And as far as a housing glut is concerned, the fact our client's wish to move to the PCE in such a glut, even after being denied a waiver, is indicative of how pleasant a place it is, and of the unique nature of any given piece of property. Moreover, given such a glut, the PCE may wish to consider the consequences of not letting its members sell their property to willing, qualified, and age-appropriate *bona fide* buyers.

Conclusion

The proposed accommodation is not a "fundamental alteration [of the nature of the property or covenant] or substantial administrative or financial burden." As indicated above, many of the concerns you outline in your letter concern a great many things that have little or nothing to do with Clint Winston. Waivers will still be granted on an individual basis, Clint will not significantly impact the community, and we can work around any financial or administrative burdens the PCE is concerned with. We would hate to have to litigate this case, as Columbian law is clear that neutral laws can be considered "discriminatory," that the Winstons fall under the protections given to individuals living with disabled persons, and that a waiver of a condition of a covenant is clearly a "reasonable accommodation," and such litigation would only result in a waste of resources for a Homeowner's Association that the Winstons fully expect to join shortly.

We are quite cognizant of the emphasis on the legal concerns in this letter. We must, of course, point out that nobody disputes that Clint Winston is a caring, loving individual, or that his parents are excellent caretakers. Nor is it doubtful that a disabled

person with limited communication skills, such as Clint, would damage the quiet and placid nature of the community in the same manner as minor children or non-disabled adults would.

Truly Yours,

The Columbia Center for Disability Law

Answer 2 to Question PT-A

1)

To: Emma Zucconi, attorney for Pinnacle Canyon Estates Homeowners Association
From: Applicant, Columbia Center for Disability Law
Date: July 26, 2005

Subject: In re: Ralph, Margaret, and Clint Winston

Dear Ms. Zucconi,

I am writing in response to your letter dated July 22, 2005, refusing to grant a waiver to Ralph, Margaret, and Clint Winston from the Pinnacle Canyons [sic] Estates (PCE) covenants, conditions, and restrictions (CC&R). We are disappointed that the PCE Homeowners Association declined to grant the Winstons a waiver from the CC&R provision forbidding persons under the age of 35 from residing on the premises. I write to you now to note that it is our position that the PCE Homeowners Association is legally required to waive the age restriction for Clint in order to comply with § 44C of the Columbia Fair Housing Act (CFHA) preventing discrimination due to disabilities, and to reiterate our request for that waiver.

Under the CFHA, PCE is required to provide "reasonable accommodations in rules, policies, practices or services if the accommodation may be necessary to afford the [disabled] person equal opportunity to use and enjoy a dwelling."

Clint Winston, the 23[-]year[-]old son of Ralph and Margaret, is disabled under the definition used by the CFHA, as he suffers from a mental impairment that "substantially limits at least one major life activity." § 41. Clint functions well below his 23[-]year[-]old level, and has some difficulty learning, remembering and communicating. He is unable to cook for himself or perform his own housekeeping or money management. Thus, he is incapable of living on his own, a major life activity. Furthermore, while he works in a sheltered workshop, he is unable to use public transportation to and from, so he is reliant on Ralph and Margaret to drive him, thus limiting another major life activity, employment.

Clint's parents take care of him, provide assistance with his housekeeping and get him to and from work. Without their assistance, since he cannot live on his own, he would require institutionalization, which his parents absolutely reject. It is their wish that he live with them in the house they attempted to buy in PCE. Section 44C of the CFHA includes in the definition of discrimination against disabled persons the refusal to make "reasonable accommodations in rules" if that accommodation is necessary to afford the disabled person "equal opportunity to use and enjoy a dwelling." Therefore, PCE must provide "reasonable accommodations" so that Clint may enjoy "equal opportunity to use and enjoy a dwelling" with his parents. § 44C. For this reason, the failure to grant a waiver results in

discrimination against Clint and his family on the basis of his disability, not on his age as you suggest in your letter we have been arguing.

Equal Opportunity to use and enjoy a dwelling

Columbia courts have interpreted the "equal opportunity to use and enjoy a dwelling" provision to give a right to disabled individuals to live in the residence and community of their choice. Rocking J. The provision was intended to "end their exclusion from mainstream society". Rocking J. For this reason, the mere fact that other housing exists in the community for the Winstons is insufficient to argue that a reasonable accommodation need not be made to allow them equal opportunity to enjoy PCE. Furthermore, § 44B of the CFHA forbids discrimination against any person on the basis not only of the disability of that person, but of "a person residing in or intending to reside in that dwelling" after sale, and of "a person associated with that person." Therefore, since discrimination includes the refusal to make reasonable accommodations, Ralph and Margaret have the same right to those reasonable accommodations as do their son, and it is their intent that he live with them in PCE.

Section 44C covers waivers from rules of otherwise general application

A refusal to make reasonable accommodations in rules to accommodate a disabled person violates § 44C even if that rule is of otherwise general application. The Columbia Court of Appeal held that no "causal nexus" is required between the reasonable accommodation requested and the handicap of the prospective resident. Project Home. The court in Project Home noted that the § 44C contains "an independent definition of 'discrimination'" that is not modified by § 44B's requirement that the discrimination be "because of disability." The Columbia Court of Appeal similarly noted in Rocking J that the CFHA provisions regarding disability discrimination are not governed by the same "equal treatment" construction given to the CFHA provisions governing other types of discrimination (such as race or sex). The court noted that § 44C requires "more of housing providers than to provide equal treatment to disabled and non-disabled persons alike." Rocking J. Therefore, your argument that Clint's disability has nothing to do with application of the age limitation in the CC&R is irrelevant to PCE's legal requirement to provide reasonable accommodation to Clint in the form of a waiver.

While the Franklin Court of Appeal in Noble did find that a similar age restriction in a 55+ community did not need to be waived to accommodate a disabled person, that court used reasoning that has been explicitly rejected by the Columbia Court of Appeal. While the Fair Housing statute in Franklin and Columbia may be identical, the construction made by the courts of the statute have deviated. The Franklin court in Noble argued that the age requirement was not discrimination "based on disability," and found "no causal nexus" between the requirement and Noble's disability, while the Columbia court rejected a requirement for causal nexus in Project Home as I have noted. Similarly, the Franklin court limited Noble's rights to accommodation to situations where necessary to allow a disabled person enjoyment of housing on "an equal basis" with others, while the Columbia court

explicitly found a greater requirement in Rocking J. The reasoning of the Franklin court has been rejected by the Columbia courts, and does not justify PCE's refusal to grant Clint a waiver.

PCE's accommodation of other disabled residents does not rebut their discrimination in this case.

You argued that PCE has never failed to make accommodation for your qualified residents. This is an admirable position for PCE to take, and shows an attention to the needs of disabled residents that we hoped would be extended to Clint. However, the lack of discrimination against other residents does not affect your legal responsibility to reasonably accommodate Clint. Rocking J. The purpose of the CFHA was in part to address individual needs and circumstances. Project Home. The obligation of the community to make these reasonable accommodations extends to each and every disabled individual who requires it.

The reasoning of Rocking J is not limited to individuals who have already qualified for residence[.]

Furthermore, your argument that Rocking J is limited to homeowners/residents who qualify for admission under the neutral criterial is not supported by either the statute in question or the case. While Rocking J does indeed concern a disabled man over 55 and his request for a waiver for his assistant who did not meet the age requirement, the reasoning in no way limits the case to this scenario, but addresses generally the waiver of the age requirement as a reasonable accommodation to a disabled person. Furthermore, as noted previously, the protections of § 44 extend not only to the disabled person himself, but to persons associated with him, and to cases where the disabled person will be living in the residence after sale, and thus will extend to the Winstons here.

The waiver being asked for here is a "reasonable accommodation" as 1) it will not result in the fundamental alteration in the nature of a program and (2) it will not impose undue financial or administrative burdens on defendant[.]

The Supreme Court of Columbia has held that an accommodation is not reasonable if it (1) requires a fundamental alteration in the nature of a program, or (2) imposes undue financial or administrative burdens on the defendant. Rocking J. The waiver of the age limitation in the CC &R requested by the Winstons meets neither of these criteria and thus is a reasonable accommodation that PCE is legally obligated to make.

Fundamental alteration in the nature of the program

In your letter, you suggest that this waiver will result in a fundamental alteration in the PCE

community for a number of reasons; however, none of these reasons are entirely accurate.

First, you argue that the grant of the waiver will result in the loss of the exemption under § 42 because PCE must maintain 80% unit occupancy by person 55+. However, the language of the waiver provision only requires that 80% of the units are occupied by at least one person 55 or older. Here, both Ralph and Margaret are over 55; therefore, they will be part of the 80% requirement you need regardless of whether Clint lives with them. Rocking J.

Second, you argue that PCE will run the risk of losing its exemption from the familial status provisions because PCE is required by § 42 to publish and adhere to policies and procedures demonstrating "an intent by the owner or manager to provide housing for persons fifty-five years of age or older." However, as the Columbia Court of Appeal noted in Rocking J, a waiver granted "in order to comply with state law" by reasonably accommodating the needs of a disabled person does not demonstrate any change in an intent to provide housing for the elderly.

Third, PCE will not be subject to a fundamental change based on changes in the community resulting from a flood of applications. You note that you receive two requests a month for waivers. However, granting Clint's waiver, as required by law, will not require you to grant the waivers of non-disabled persons. This is a waiver based on Clint's disability, not his age, and each waiver will still remain a "fact-intensive, case-specific' determination. Rocking J. Therefore, your concerns that frequent granting of waivers will result in a change in the suitability of the community for your elderly residents, and a decrease in property values, are unwarranted as this waiver would not require you to remove the age provision entirely.

Undue financial and administrative burdens

In your letter, you also suggest that this waiver will present undue financial and administrative burdens for PCE, and is therefor an unreasonable accommodation. However, the waiver will not present the burdens you describe. First, PCE already makes accommodations to its common areas to provide for its other disabled residents, this showing that PCE is able, and admirably, willing, to so accommodate its residents. Second, you suggest that the potential of the Ralph and Margaret predeceasing Clint presents the danger of administrative costs in caring for Clint after their deaths. This concern relates to "unfounded fears of difficulties about the problems their [the disabled persons] tenancies may pose." Project Home. It is exactly these types of concerns that resulted in the housing discrimination against disabled persons that the CFHA' s provision against disability discrimination were enacted to prevent. PCE has other disabled residents that have not apparently provided this type of administrative burden. Furthermore, as an elderly housing community, [it] is likely often formed to make interim arrangements and track down family members. The concern that Clint's disability in and of itself presents an administrative burden is not a sufficient or acceptable rationale to avoid the application of Columbia law preventing discrimination against the disabled in housing.

Finally, Ralph and Margaret are in their late fifties, and will likely be available to take care of Clint for many years. On the event of their deaths, the Winstons had other children that will likely be available to caretake for Clint. The Winstons, as Clint's caretakers and like parents everywhere, have the responsibility of arranging for his needs now and after their death. PCE, as a housing association, bears no greater administrative burden from their residency than they do for other residents.

For these reasons, we ask that you reconsider the decision to refuse a waiver of the age limitation in the PCE CC&Rs for the Winstons. PCE is legally required to waive the age provision, even though it is a provision of general applicability, in order to make a reasonable accommodation for Clint. Furthermore, the waiver does not present the danger of a fundamental alteration to the nature of PCE, nor does it present a risk of undue financial and administrative burdens and thus is a reasonable accommodation. Clint is a quiet, gentle man who has never posed a difficulty at any of the places he's previously lived, and the Winstons are ready and willing to pursue this matter in court if that becomes necessary. We hope that it does not come to that.

Respectfully,

Applicant

THURSDAY AFTERNOON
JULY 28, 2005

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

PROPERTY CLERK v. GRINNELL

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

PROPERTY CLERK v. GRINNELL

City of Madison, Columbia

Office of the City Attorney

MEMORANDUM

To: Applicant

From: Deena Wright, City Attorney

Date: July 28, 2005

Re: **Property Clerk v. Paul and Sarah Grinnell**

On April 29, 2005, Paul Grinnell was arrested for the crime of driving under the influence of alcohol ("DUI") in the city of Madison, Columbia. His blood alcohol level was .08 percent, which was above the legal limit. Paul Grinnell pleaded guilty to the charges two weeks ago. The issue now is the fact that the Grinnells' vehicle was seized at the time of Paul Grinnell's arrest. Sixty days ago, both Paul and his wife Sarah Grinnell were served a summons and complaint indicating that the Property Clerk was seeking the forfeiture of their vehicle, and giving them 10 days to answer. After the answer was filed, a hearing was scheduled. That hearing was today.

As you know, I have recently implemented a "Zero Tolerance on Drinking and Driving" initiative. I instructed the Madison Police Department to seize and initiate forfeiture actions on vehicles being driven by drivers who are arrested for drunk driving violations. The forfeiture statute has been on the books for many years, but has never been used in the DUI context until this case.

Following the hearing, the Grinnells' counsel sought to dismiss the action claiming the forfeiture statute violated the Eighth Amendment as applied to Paul Grinnell, and separately

argued that Sarah Grinnell's interest should not be forfeited under § 311-2 of the statute. The court gave the parties until tomorrow to brief these issues.

Please write a memorandum of points and authorities in response to the judge's order to brief these issues.

City of Madison, Columbia

Office of the City Attorney

MEMORANDUM

To: All Deputy City Attorneys
From: Executive Committee
Re: **Persuasive Briefs**

To clarify the expectations of the City Attorney and to provide guidance to associates, all persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), whether directed to an appellate court, trial court, arbitration panel, or administrative officer, shall conform to the following guidelines.

All briefs include a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts so stated support our position.

The City Attorney follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, IMPROPER: COLUMBIA HAS PERSONAL JURISDICTION. PROPER: DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

The Deputy should not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

TRIAL TRANSCRIPT

CLERK: Calling the matter of Property Clerk versus Paul Grinnell and Sarah Grinnell for trial.

DEENA WRIGHT (WRIGHT): City Attorney Deena Wright appearing for plaintiff Property Clerk.

THOMAS SCHWAB (SCHWAB): Tom Schwab appearing for defendants Paul and Sarah Grinnell.

COURT: You may proceed, Ms. Wright.

WRIGHT: Thank you, your honor. We will be brief. The plaintiff asks that the judgment of conviction in *People v. Paul Grinnell* be marked as Plaintiff's Exhibit 1 and be admitted.

COURT: Any objection?

SCHWAB: No objection.

COURT: Plaintiff's 1 is received into evidence.

WRIGHT: Counsel for defendants and I have stipulated to the following facts: The car which is the subject of this forfeiture, a 2003 Honda Civic, is registered in Columbia, and the title is in the names of Paul Grinnell and Sarah Grinnell; that at the time of his arrest for drunk driving, Paul Grinnell was driving the 2003 Honda Civic; and that Paul Grinnell pleaded guilty to an offense for which he could have been fined $1,000.

SCHWAB: We agree to the stipulated facts, your honor.

WRIGHT: We believe that Exhibit 1 and the stipulated facts establish a prima facie case for forfeiture, and therefore, the plaintiff rests.

COURT: Mr. Schwab, you may call any witnesses.

SCHWAB: Thanks. I call Paul Grinnell.

[The witness is sworn and identified.]

DIRECT EXAMINATION BY SCHWAB

Q: Please describe your activities on the evening on which you were arrested for the DUI.

PAUL GRINNELL (A): About three months ago, I stayed late at work to finish rearranging my store. I work as an assistant manager at Kroll-Mart. We just expanded the floor space of my store, and another assistant manager and I had to stay late moving stuff around. At

about 10:00 p.m. we finished and decided to have a drink to sort of celebrate. That was my mistake. I hadn't eaten anything much since lunch, and I was pretty tired. I only had a couple of beers. I know, it probably sounds like every DUI you've ever heard about – but really, I didn't think I was drunk. Anyway, we both got into our cars at around 11 p.m. to head home. It takes me about a half-hour to drive home from where I was. About twenty minutes after getting on the road, I got pulled over by a Madison Police Department patrol car. The officer said that my car was weaving. He did a breathalyzer on me. It measured .08. He arrested me, and took me to the police station.

Q: What happened at the police station?

A: I was booked – fingerprints, mug shot, jail cell and one phone call. It was a nightmare.

Q: Was this the first time?

A: Yes, I had never been arrested for anything before. And I've only had one speeding ticket my entire life. I had to call my wife to come down to the station to bail me out.

Q: Now I'd like to turn to the seizure of your car. What happened?

A: My car got impounded. The officer told me that the Madison Police Department was instructed to seize vehicles involved in DUI's. Then we got this summons and complaint. It says that my car could be forfeited to the City because of this.

Q: What's your wife's name?

A: Sarah.

Q: How many cars do you own?

A: We only have the one car.

Q: And the car's owned and registered in both of your names?

A: Yes.

Q: And do both of you work outside of the home?

A: Yes, I work downtown, and Sarah works in Greenfield, about 15 miles away.

Q: How do you manage with only one car?

A: Sarah takes public transportation when I have to stay late. Otherwise, we carpool. She drops me off and picks me up. So as of right now, since the car's been impounded, I have an hour-long commute by bus each way. Sarah's is about an hour-and-a-half each way.

Q: What kind of car was impounded?

A: It's a two-year old Honda.

Q: What's its approximate value?

A: About $15,000, I'd say.

Q: Is it paid off?

A: Yes, we actually got it as a gift from Sarah's parents. There's no way we could've afforded the car on our own. We had about $5,000 saved up a couple of years ago, and we looked around for used cars, but we couldn't find anything reliable and safe at that price. We've tried to qualify for loans, but we don't make enough money. We also had a baby two years ago, so now we don't even have any savings.

Q: Tell me more about your financial situation.

A: Well, I make about $24,000 a year. Sarah makes about $18,000. I don't know how much longer Sarah will be able to hang onto her job. She's been late to work the last week or so because the buses are always late. Luckily, Sarah's mom has been able to take care of the baby for us, but that's going to change. That's another reason we need our car back. Starting in a couple of months, we have to put Cammie, our daughter, in daycare. We won't be able to manage that without a car.

Q: How much drinking do you do?

A: I hardly ever drink at all. Once a month, maybe a beer or two. That's it.

Q: Well, thank you, Mr. Grinnell. That's all I have for now.

CROSS-EXAMINATION BY WRIGHT

Q: Just a few questions, your honor. Mr. Grinnell, was your car insured, as required by law?

A: Yes.

Q: How much did that cost?

A: About $1200 a year.

Q: You must have had the car serviced periodically— oil changes, lube jobs, new tires, etc.?

A: Yes, but not very often.

Q: Still, you must have spent a couple of hundred dollars a year on the car?

A: Probably.

Q: And we all know how expensive gas is. Mr. Grinnell, did you ever calculate whether public transportation was in fact cheaper than driving?

A: No, because it wasn't convenient.

Q: Nothing further, your honor.

SCHWAB: Your honor, I have no redirect. I now call Sarah Grinnell.

[The witness is sworn and identified.]

DIRECT EXAMINATION BY SCHWAB

Q: Ms. Grinnell, are you a co-defendant in this forfeiture action?

SARAH GRINNELL (A): Yes, they're trying to take our only car.

Q: And are you a co-owner of the vehicle in question?

A: I am. Actually, my parents gave the car to the two of us. We can't afford to buy another one.

Q: You are employed?

A: Yes. I'm a receptionist in a medical service office but I only get paid about $18,000 a year.

Q: And you have a child?

A: Yes. Cammie, our daughter, is two.

Q: If you lost this car would your family be affected?

A: Oh my goodness, it would be terrible. Paul and I work in different directions. Usually, one of us drops off the other and then picks up after work. Public transportation isn't very good and it takes so long. It's been terrible since they seized the car. I've been late to work several times and I'm worried I'm going to get fired. And then there's Cammie. I don't know what's going to happen to her.

Q: What about Cammie?

A: Well, my mother has been taking care of her but she's not that well. We have to place Cammie in daycare soon but I don't know how we'd get her there. And then we have to worry about pick-up. What will we do if she gets sick and they call us to take her home or to the doctor?

Q: OK. Let me ask you about Paul. Is he in the habit of drinking?

A: Oh no, almost never. Maybe once a month, on the weekend, and usually just at home or at a friend's house.

Q: Have you ever known him to drink and drive?

A: Never.

Q: So on the evening in question did you have any inkling that Paul would be driving in a legally intoxicated state?

A: No, none at all.

Q: Nothing further, your honor.

COURT: All right. Your witness, Ms. Wright.

CROSS-EXAMINATION BY WRIGHT

Q: Thank you, your honor. Ms. Grinnell, your husband called you from work the day he was arrested, correct?

A: Yes. He called around 4:30 to see if I could get a ride home.

Q: And he told you he'd be working late that night, didn't he?

A: Yes. They were finishing up a big rearrangement of the store. He said he wouldn't be done until about 10 o'clock.

Q: He also told you that he and his co-worker would go out to celebrate the conclusion of this job?

A: Well, he said they'd probably stop for something afterward. He mentioned that he hadn't had any lunch and he wouldn't have time to get any dinner.

Q: And he told you they would stop at the Roadhouse Bar and Grill?

A: Yes.

Q: And you know he was pretty tired because he had been working so hard, right?

A: Yes, he had been working long hours.

Q: I have nothing further.

SCHWAB: No more questions.

*** * *END OF TRIAL* * ***

State of Columbia

Record of Arrest and Disposition

NAME	OFFENSE	DATE OF OFFENSE	DISPOSITION	DATE OF DISPOSITION
Grinnell, Paul 555 2830	DUI	April 29, 2005	Guilty plea; Misdemeanor; $500 fine; 90 day license restriction; DUI school	July 18, 2005

PLAINTIFF'S EXHIBIT 1

THURSDAY AFTERNOON
JULY 28, 2005

California
Bar
Examination

Performance Test B
LIBRARY

PROPERTY CLERK v. GRINNELL

LIBRARY

SELECTED PROVISIONS OF THE COLUMBIA CIVIL FORFEITURE ACT

§ 310. Definitions

In this article:

1. "Property" means and includes: real property, personal property, money, negotiable instruments, securities, or any thing of value or any interest in a thing of value.

2. "Proceeds of a crime" means any property obtained through the commission of a crime defined herein, and includes any appreciation in value of such property.

3. "Substituted proceeds of a crime" means any property obtained by the sale or exchange of proceeds of a crime, and any gain realized by such sale or exchange.

4. "Instrumentality of a crime" means any property, including vehicles, other than real property and any buildings, fixtures, appurtenances, and improvements thereon, whose use contributes directly and materially to the commission of a crime defined in subdivision six hereof.

5. "Real property instrumentality of a crime" means an interest in real property the use of which contributes directly and materially to the commission of a specified felony offense.

6. "Crime" means violation of any penal code section, whether charged as a misdemeanor or felony.

7. "Defendant" means a person against whom a forfeiture action is commenced and includes a "criminal defendant" and a "non-criminal defendant".

8. "Criminal defendant" means a person who has criminal liability for a crime defined herein. For purposes of this article, a person has criminal liability when (a) he has been convicted of a crime, or (b) the Property Clerk proves by clear and convincing evidence that such person has committed a crime.

9. "Non-criminal defendant" means a person, other than a criminal defendant, who possesses an interest in the proceeds of a crime, the substituted proceeds of a crime or an instrumentality of a crime.

10. “Property Clerk” means all persons appointed or elected by counties or cities to maintain custody of property subject to forfeiture and to initiate and prosecute forfeiture actions.

§ 311 Procedures

1. A civil action may be commenced by the Property Clerk against a criminal defendant or non-criminal defendant to forfeit the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime or the real property instrumentality of a crime, or to recover a money judgment in an amount equivalent in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime. Any action under this article must be commenced within five years of the commission of the crime and shall be civil, remedial in nature, and shall not be deemed to be a penalty or criminal forfeiture for any purpose.

2. No property shall be forfeited under this section if, and to the extent that, the property is held by an owner who did not know of, or consent to, the act or omission constituting the crime.

3. In a forfeiture action commenced by the Property Clerk against a criminal defendant or a non-criminal defendant, the burden shall be upon the Property Clerk to prove by a preponderance of the evidence the facts necessary to establish a claim for forfeiture.

4. An action for forfeiture shall be commenced by service pursuant to this chapter of a summons with notice or summons and verified complaint. No person shall forfeit any right, title, or interest in any property who is not a defendant in the action.

Bennis v. Michigan
United States Supreme Court (1996)

Petitioner Tina Bennis ("Bennis") was a joint owner, with her husband, John, of an automobile in which her husband engaged in sexual activity with a prostitute. A Michigan court ordered the automobile forfeited as a public nuisance, with no offset for her interest, notwithstanding her lack of knowledge of her husband's activity. We granted certiorari in order to determine whether Michigan's abatement scheme has deprived petitioner of her interest in the forfeited car without due process, in violation of the Fourteenth Amendment. We affirm.

Detroit police arrested John after observing him engaged in a sexual act with a prostitute in the automobile while it was parked on a Detroit city street. John was convicted of gross indecency. The State then sued both Bennis and her husband, John, to have the car declared a public nuisance and abated as such under Michigan's forfeiture law.

Bennis defended against the abatement of her interest in the car on the ground that, when she entrusted her husband to use the car, she did not know that he would use it to violate Michigan's indecency law. The Wayne County Circuit Court rejected this argument, declared the car a public nuisance, and ordered the car's abatement. In reaching this disposition, the trial court judge recognized the remedial discretion he had under Michigan's case law. He took into account the couple's ownership of "another automobile," so they would not be left "without transportation." He also mentioned his authority to order the payment of one-half of the sale proceeds, after the deduction of costs, to "the innocent co-title holder." He declined to order such a division of sale proceeds in this case because of the age and value of the car (an 11-year-old Pontiac sedan recently purchased by John and Bennis for $600); he commented in this regard: "There's practically nothing left minus costs in a situation such as this."

The gravamen of Bennis' due process claim is not that she was denied notice or an opportunity to contest the abatement of her car; she was accorded both. Rather, she

claims she was entitled to contest the abatement by showing she did not know her husband would use it to violate Michigan's indecency law. But a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.

In *Calero-Toledo v. Pearson Yacht Leasing Co. (1974),* the most recent decision on point, this Court concluded that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." Petitioner is in the same position as the various owners involved in the forfeiture cases beginning with the earliest in 1827. She did not know that her car would be used in an illegal activity that would subject it to forfeiture. But under these cases the Due Process Clause of the Fourteenth Amendment does not protect her interest against forfeiture by the government.

Petitioner relies on a passage from *Calero-Toledo*, that "it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." But she concedes that this comment was *obiter dictum*, and "it is to the holdings of our cases, rather than their dicta, that we must attend." And the *holding* of *Calero-Toledo* on this point was that the interest of a yacht rental company in one of its leased yachts could be forfeited because of its use for transportation of controlled substances, even though the company was "in no way involved in the criminal enterprise carried on by [the] lessee" and "had no knowledge that its property was being used in connection with or in violation of [Puerto Rican Law]." Petitioner has made no showing beyond that here.

In *Altman v. U. S.* (1993), this Court held that because "forfeiture serves, at least in part, to punish the owner," forfeiture proceedings are subject to the limitations of the Eighth Amendment's prohibition against excessive fines. There was no occasion in that case to deal with the validity of the "innocent-owner defense," other than to point out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute

itself is "punitive" in motive. In this case, however, Michigan's Supreme Court emphasized with respect to the forfeiture proceeding at issue: "It is not contested that this is an equitable action," in which the trial judge has discretion to consider "alternatives [to] abating the entire interest in the vehicle."

In any event, for the reasons pointed out in *Calero-Toledo*, forfeiture also serves a deterrent purpose distinct from any punitive purpose. Forfeiture of property prevents illegal uses "both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." This deterrent mechanism is hardly unique to forfeiture. For instance, because Michigan also deters dangerous driving by making a motor vehicle owner liable for the negligent operation of the vehicle by a driver who had the owner's consent to use it, petitioner was also potentially liable for her husband's use of the car in violation of Michigan negligence law. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner.

We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." The State here sought to deter illegal activity that contributes to neighborhood deterioration and unsafe streets. The Bennis automobile, it is conceded, facilitated and was used in criminal activity. Both the trial court and the Michigan Supreme Court followed our longstanding practice, and the judgment of the Supreme Court of Michigan is therefore affirmed.

U.S. v. Crandall
United States Court of Appeals, 4th Circuit (1995)

We must consider in this case the important question of whether civil forfeiture to the United States of a 33-acre farm, due to its involvement in violations of the federal drug laws, constitutes an excessive fine under the Eighth Amendment. In *Altman v. U. S.* (1993), the Supreme Court stated that the purpose of the Eighth Amendment was to limit the government's power to punish. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense. That is, the notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. Thus, the question was not whether forfeiture is civil or criminal, but rather whether it is punishment. The Court concluded that forfeitures were a form of punishment subject to the Excessive Fines Clause of the Eighth Amendment. *Altman* left to the lower courts the task of articulating the appropriate standard for determining excessiveness.

We articulate in this case a proportionality test, for determining whether a civil forfeiture is excessive. After applying the proportionality test to the facts of this case, we affirm the decree and judgment of forfeiture entered by the district court.

Facts

The United States brought this civil *in rem* action in July 1991 against Tract 1 of Little River Farms in Orange County, North Carolina, seeking to take title to the 33-acre property. The property is valued at approximately $500,000 and is owned by Robert H. Crandall, who inherited the property from his mother at the time of her death in 1978. The government alleged in its complaint that the property was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of the Controlled Substances

Act, and that the property constituted proceeds traceable to the exchange of controlled substances, and is therefore subject to forfeiture.

Crandall, who is the sole owner of Little River Farms, intervened and filed a claim to the property in answer to the forfeiture complaint. Crandall alleged that the property did not constitute the proceeds of any drug dealing and that it was not used to facilitate the commission of any violation of the drug laws. In his answer, he specifically denied the government's allegations of his involvement in drug transactions and claimed that he had no knowledge of, and did not give any consent for, the subject real property being used or intended for use to commit or facilitate the commission of a violation of the Controlled Substances Act.

At trial, the government's principal witness, John Baucom, testifying under grant of immunity, stated that Crandall had distributed, packaged, sold, purchased and used controlled substances, including marijuana, cocaine and quaaludes, on Little River Farms. Baucom, who had worked for Crandall at Little River Farms, testified that he was paid in marijuana and cocaine by Crandall for doing maintenance-type work on the property, such as cutting grass, and for doing landscaping and minor carpentry work. He stated that on approximately 30 to 40 occasions, Crandall paid him $100 and a half-gram of cocaine in the basement of the farmhouse. Baucom also testified that he had observed Crandall in the basement with between one and two pounds of marijuana and that he saw others pick up marijuana from Crandall on at least three occasions. Baucom testified that at times, he was instructed by Crandall to serve as a lookout while Crandall consummated drug deals on the farm.

Crandall presented other witnesses, who had been employed on Little River Farms, who testified that they had never seen Crandall give Baucom any drugs. These witnesses also stated that they had never seen Crandall either use or store drugs on the property. Crandall himself took the stand and testified that he had inherited the property from his parents and that he had not engaged in any illegal activities.

At the conclusion of the evidence, the jury found in favor of the United States, concluding that the property had been used to facilitate the commission of violations of the drug laws, that the property was improved by the proceeds of drug exchanges, and that Crandall could not claim a lack of awareness. The court entered a decree and judgment forfeiting the 33-acre farm to the United States subject to prior liens recorded against the property. This appeal followed.

Discussion

The Controlled Substances Act includes provisions for the forfeiture to the United States of property used in or intended to be used in the commission of a violation of drug laws which are punishable by more than one year's imprisonment. The forfeiture proceeding is civil in nature and relies on the nexus between the property and illegal drug activity. Property is subject to forfeiture if it is given in exchange for drugs; if it is "traceable" to a drug transaction; if it is used in committing or facilitating the commission of a drug offense; or if it is intended for such use. The owner of an interest in the property may defend against forfeiture by showing that the offense involving the property was committed without his knowledge or consent. Because a forfeiture action is *in rem*, elements of a claim establishing forfeiture focus principally on the property's role in the offense and not on the owner's guilt.

The procedure governing a civil forfeiture action is that the government may seize property if it can establish probable cause to believe that the property has the statutorily prescribed nexus to illegal drug activity which is punishable by more than one year's imprisonment. It is not an element of the government's case to prove the involvement of the property's owner in the commission of the offense giving rise to the forfeiture. By establishing that the violation occurred without the knowledge or consent of that owner, however, the owner establishes a defense to the forfeiture.

The *in rem* nature of a forfeiture action and the adverse effect on the property's owner of

such forfeiture raises unique questions about the proper application of the constitutional limit of excessiveness, which Crandall claims was exceeded.

In this case, after Crandall made the Eighth Amendment objection and the jury rendered its verdict, but before the court entered the decree and judgment of forfeiture, the Supreme Court decided *Altman*, which held that *in rem* civil forfeiture proceedings are subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

In order to resolve Crandall's Eighth Amendment challenge, we must first discharge the task given to us by *Altman* of articulating the standard under which to determine when a forfeiture is excessive. There are two approaches to an excessiveness inquiry: the traditional Eighth Amendment proportionality principle, and the instrumentality principle.

While we have not addressed the question directly, in light of *Altman*, an inquiry into the proportionality between the value of the property sought to be forfeited and the amount needed to effectuate the legitimate punitive and remedial purposes of the forfeiture would seem to be in order. We now undertake to state the appropriate standard to be applied in conducting an excessiveness analysis under the Eighth Amendment for *in rem* forfeitures.

We are guided in part by our decision in *United States v. 38 Sailors Cove Drive* (4th Cir., 1992). We regard *Sailors Cove* as instructive, for it principally used a proportionality analysis in reaching the conclusion that the forfeiture at issue there was not excessive. *Sailors Cove* was a pre-*Altman* case in which we considered the Eighth Amendment contentions of an owner convicted in state court of the narcotics offenses on which the forfeiture was based. The claimant Levin twice sold cocaine inside his condominium to a confidential informant. The quantity totaled no more than 2 1/2 grams; the total sales price was $250. The confidential informant had requested that the first sale take place inside the condominium; the record was unclear as to who had suggested that the second sale take place there. Except for a small third sale that took place outside the condominium, Levin declined to make further sales despite frequent additional requests by the informant. Levin

was eventually arrested by local authorities; he pleaded guilty to a state-law offense and received a sentence of probation and a small fine. A search of his condominium did not turn up any indication of narcotics activity. As a result of Levin's conduct, the federal government commenced an *in rem* forfeiture proceeding against the condominium, whose value was $150,000, and in which Levin had an equity interest worth $75,000. We rejected Levin's arguments that the forfeiture of that interest as punishment for $250 in narcotics sales violated the Cruel and Unusual Punishment Clause of the Eighth Amendment or its Excessive Fines Clause.

We noted that the distribution of narcotics, even in quantities as small as those sold by Levin, is a grave offense, for which a defendant could be fined $75,000 under state law, and $1 million under federal law. We concluded that in light of this range of possible fines, a forfeiture of $75,000 was not a grossly disproportionate punishment within the meaning of Eighth Amendment jurisprudence. With respect to the Excessive Fines Clause in particular, we stated that we need not decide at exactly what point a fine or forfeiture might violate the Excessive Fines Clause, for wherever such a line could be drawn, this forfeiture would be proper.

The ruling of the district court that the forfeiture in the present case did not violate Crandall's rights under the Excessive Fines Clause fits well within this standard. The purchase, distribution and sale of narcotics are serious offenses, and the charges at issue here were sufficient to expose Crandall to very substantial penalties amounting to more than $1,000,000. Certainly considering that in *Sailors Cove* we upheld the forfeiture of a $75,000 interest in real property apparently fortuitously used for two isolated sales of 2 1/2 grams of cocaine for $250, the forfeiture here of property having a value perhaps close to $500,000 as punishment for its intentional and pervasive use to distribute and purchase significant quantities of illicit drugs cannot be regarded as excessive in comparison to the nature of the offense. We note in passing that an additional factor not relevant in this case, but instructive in informing future decisions of district courts, would consider the harshness of the forfeiture on innocent third parties.

We conclude that the district court properly rejected Crandall's contention that the forfeiture of the property violated the Excessive Fines Clause of the Eighth Amendment.

Affirmed.

U.S. v. Metzger
United States Court of Appeals, 2d Circuit (1995)

Marcia Metzger ("Metzger"), the owner of property in Pembroke, New York (the "property"), appeals from a judgment entered in the United States District Court of New York following a bench trial ordering the forfeiture of the defendant property to the United States pursuant to the Controlled Substances Act ("CSA"), as a result of the use of the property by her son Mark Metzger ("Mark") to grow marijuana. On appeal, Metzger contends principally (1) that the district court erred in rejecting her defense that she was an innocent owner, and (2) that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment. For the reasons below, we reject her contentions and affirm the decision of the district court.

The land in question, an 85-acre parcel in Pembroke, New York, was purchased by Mark in January 1985 for $26,000 cash; most of that money was supplied by Metzger. In December 1986, Mark conveyed the property to Metzger for one dollar. Between 1986 and 1990, a house was constructed on the land at an estimated cost of $40,000. The property is not Metzger's primary residence; she lives some 10-15 miles away in Depew, New York.

In August 1990, law enforcement agents conducted a consensual search of the property. They found a total of 1,362 marijuana plants growing on and around the farm, 845 of them on the property itself. Mark told the agents he kept some of his marijuana on the adjacent property "because he did not want to get caught with marijuana on his property." Inside a barn located near the house, 183 harvested marijuana plants were found drying along the wall.

Inside the house, the agents found in Mark's bedroom a loaded revolver in a dresser drawer. A film canister containing marijuana seeds was found on top of a second dresser, and an electronic seed separator was found in the closet. In a cupboard accessible from both the kitchen and the dining room, a small cellophane bag containing marijuana was discovered, and inside a hutch in the dining room several packages of cigarette rolling paper and a silver marijuana pipe were found.

Mark was convicted in state court, after a plea of guilty, of criminal possession of marijuana. The United States commenced this action in the district court seeking forfeiture of the defendant property pursuant to the CSA. Metzger filed a claim to the property and contended that the property was not subject to forfeiture because she owned it and was innocent of any wrongdoing. She also contended that a forfeiture of the property would violate the Excessive Fines Clause of the Eighth Amendment.

The district court held a six-day bench trial and heard testimony from Metzger and law enforcement agents. One agent testified that Mark had been arrested in 1980 for growing marijuana while living in Metzger's residence. In connection with that arrest, officers executed a search warrant at Metzger's home; in her garage, they found 1,000 containers of marijuana seeds; in her basement, they found marijuana plants, packaging material, and plant lights. In Mark's bedroom in Metzger's home, they found in plain view, marijuana, marijuana packaging material, scales, photographs of Mark standing next to tall marijuana plants, and books on growing marijuana. Another agent testified during the search of the property at issue here, Metzger told him "that she was aware that Mark had a problem with marijuana, that he had been arrested several years prior for growing marijuana at her house, and she told me that she built the farm so that Mark would have a place to do his farming."

As to the property at issue here, Metzger testified that she visited the farm once a week to cook, clean, and do her son's laundry, but that she did not have knowledge of her son's marijuana farming. Although admitting that she had gone into cabinets and drawers where the police later discovered marijuana, drug paraphernalia, and a handgun, she testified that she did not see those items.

The district court denied Metzger's claim. Crediting the testimony of the law enforcement officers, the court expressly found that Metzger's testimony was not wholly credible. The court concluded that the defendant property was forfeitable, finding that the property had been used to facilitate a narcotics felony, and that Metzger was not an innocent owner.

The district court also rejected Metzger's excessive-fines contention, stating that "this is not a case where a small amount of drugs was found in a discrete part of the defendant property on one single occasion. To the contrary, Mark used the entirety of the defendant property to further his advanced drug enterprise."

On appeal, Metzger argues that the district court erred in rejecting her innocent-owner defense and her Eighth Amendment excessiveness contention. We reject both arguments.

A. The Innocent-Owner Defense

The CSA provides that a parcel of real property that has been used to commit or to facilitate the commission of a narcotics felony is forfeitable to the United States, unless the owner can establish a degree of innocence:

> "no property shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

Matters of knowledge and willful avoidance of knowledge are questions of fact, and the district court's findings as to those facts may not be set aside unless they are clearly erroneous. Assessment of the credibility of witnesses is peculiarly within the province of the trier of fact and is entitled to considerable deference.

A total of 1,362 marijuana plants were found growing on and around the property, 845 of them on the property itself. In addition, the house was used to store seeds, guns and marijuana; the barn/greenhouse was used to dry and strip the plants, as well as house the pots in which the marijuana grew; larger plants were transported across the defendant property and through a path to several marijuana fields; and guard dogs kept watch over the marijuana fields.

The trial court's finding that Metzger's testimony that she never saw Mark's substantial marijuana crop was not credible was supported by the magnitude of Mark's marijuana growing operation on the property, with some large plants growing within 80 feet of the

house, and by Metzger's own testimony that in cleaning and putting away laundry on the defendant property, she had gone into cabinets and drawers where the police later discovered marijuana and drug paraphernalia. The court's finding that Metzger either knew or deliberately avoided knowing of the unlawful use of the defendant property in 1990 was also supported by the testimony of law enforcement agents, which the court expressly found credible, as to Mark's 1980 arrest for growing marijuana and the items seized at that time from Metzger's house, and as to Metzger's statement at the time of the search of the defendant property that she had been aware of the previous arrest and of Mark's problem with marijuana.

In light of the record and the credibility assessments made by the trial court, we cannot conclude that there is clear error in the court's findings that Metzger either knew of or deliberately closed her eyes to the fact that her son was growing marijuana on the property. Accordingly, we uphold the finding that Metzger was not an innocent owner.

B. The "Excessive Fines" Clause

The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Altman v. U.S.* (1993) the Supreme Court ruled that an *in rem* civil forfeiture under the CSA constitutes punishment and, as such, is subject to the limitations of the Excessive Fines Clause of the Eighth Amendment. The *Altman* Court declined, however, to delineate the factors that should inform a determination of whether a given civil forfeiture is constitutionally excessive. Today, we adopt the instrumentality principle and now undertake to state the appropriate standard to be applied in conducting an excessiveness analysis under the Eighth Amendment for *in rem* forfeitures. To do this, we begin by looking more closely at the historical justification for forfeiture and the effect that a forfeiture has on the property's owner.

In rem forfeitures were historically grounded on the fiction that the property itself was considered the "offender" and accordingly, the innocence of an owner was not a defense.

Nonetheless, a forfeiture of property effects punishment on its owner. This appears more clearly so when, as provided in the Controlled Substances Act, the forfeiture law provides an innocent owner defense, implying that some owner culpability is being punished by the Act's forfeiture provisions. Since, however, the property itself is the object of the action, and not its value, the value of the property is irrelevant to whether it is forfeitable. The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense. Any analysis under the Eighth Amendment into excessiveness thus must go to whether the property was an instrumentality of the offense.

It is apparent that Congress, in providing for civil forfeiture of property involved in drug offenses for which punishment exceeds one year, did not intend to punish or fine by a particular amount or value; instead, it intended to punish by forfeiting property of whatever value which was tainted by the offense. Accordingly, the constitutional limitation on the government's action must be applied to the degree and the extent of the taint, and not to the value of the property or the gravity of the offense.

The question of excessiveness is thus tied to the "guilt of the property" or the extent to which the property was involved in the offense, and not its value. This point can be illustrated by comparing two hypotheticals. Forfeiture of a $14 million yacht, specially outfitted with high-powered motors, radar, and secret compartments for the sole purpose of transporting drugs from a foreign country into the United States, would probably offend no one's sense of excessiveness, even though the property has such a high value. On the other hand, forfeiture of a row house, which is owned by an elderly woman and which shelters her children and grandchildren, upon discovery of a trace amount of cocaine in a grandson's room, might arguably be found to be excessive, even though the house has a relatively low value of $30,000. In both cases, the intuitive excessiveness analysis centers on the relationship between the property and the offense – the more incidental or fortuitous the involvement of the property in the offense, the stronger the argument that its forfeiture is excessive. When measuring the strength or extent of the property's relationship to the

offense, i.e., its instrumentality in the offense, we would look at whether the property's role was supportive, important, or even necessary to the success of the illegal activity. We would also inquire into whether the use of the property was deliberate or planned, as distinguished from incidental or fortuitous. We would note whether the property was used once or repeatedly, whether a small portion was used, and whether the property was put to other uses and the extent of those uses.

While our aim under this instrumentality test for determining excessiveness is directed at discovering the property's role in the offense, we are also mindful that the punishment effected by a forfeiture is imposed on the owner. Thus, while the extent of the owner's culpability may be of minor relevance to the question of whether a forfeiture can properly be imposed, it becomes more relevant when determining whether the "fine" is excessive. Thus, where the owner's involvement in the offense is only incidental, as opposed to extensive -- e.g., where he is simply aware of the offense but not a perpetrator or conspirator -- this fact will weigh on the excessiveness side of the scales.

Finally, we note that since the property in kind is at stake, and not its value, a judgment of forfeiture is largely an all-or-nothing situation, and an inquiry into excessiveness can determine only on which side of the line the facts place the property. We might very well say that it would be an excessive fine to forfeit a building in which an isolated drug sale happens to occur, but that it would not be excessive to forfeit a building that acted solely as a drug emporium for packaging, selling, distributing, and using drugs. However, a concern about excessiveness may be tempered by the pragmatic possibility of separating offensive property from nonimplicated property, when the offending property is readily separable.

For these reasons, we now hold, in determining excessiveness of an *in rem* forfeiture under the Eighth Amendment, that a court must apply a three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility

of separating offending property that can readily be separated from the remainder. In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following factors: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spatial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. No one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended.

Addressing first the nexus between the property and the offense, Metzger's property served as the situs for a significant marijuana operation comprising cultivation, storage and processing. While it would appear that the farm had some purposes other than serving as an instrument of drug activity, the property nevertheless was an important, if not necessary, instrument for the drug activity, in providing a secluded location.

On the extent of the use of the property for illegal activities, evidence showed not only the large number of plants growing on the property, but also that the use permeated to the barn and the house.

Considering the second part of the test, the role and culpability of Metzger, it can hardly be argued that she was not culpable. Though she was not prosecuted for or convicted of any offense, the court's findings plainly indicated that she had a significant degree of culpability in the criminal use of the property. The court found that Metzger "would have to have been blind not to have been aware of her son's marijuana activities, or would have to have consciously and purposefully ignored signs of such activities," and it found that her testimony that she was not aware was "simply not credible." Those findings are amply

supported not only by the evidence of Metzger's frequent visits to the property, the proximity of numerous plants to the house, and her forays into cabinets and drawers where marijuana and drug paraphernalia were found, but also by the evidence relating to Mark's previous arrest for growing marijuana while living in Metzger's own residence. Just prior to that arrest, the officers had found 1,000 containers of seeds in her garage, marijuana plants growing under strong lights in her basement, and in plain view in Mark's room in her home, marijuana, marijuana packaging material, scales, photographs of Mark standing next to tall marijuana plants, and books on growing marijuana. Admittedly aware of Mark's involvement in growing marijuana, she proceeded to buy him a farm.

Finally, while Metzger has urged that we mitigate the punishment that the forfeiture will impose on her by forfeiting only the areas of the 85-acres where the cultivation occurred, she has provided no evidence that this area is on a separately platted property that could be readily separated. In the absence of such evidence, and in light of the ample evidence in support of forfeiture, the entire 85-acre property, as identified in the warrant for its seizure, may be forfeited.

Judgment affirmed.

Answer 1 to Question PT-B

1)

MEMORANDUM OF POINTS AND AUTHORITIES

The following memorandum seeks to prove two arguments.

The first is that Section 311 of Columbia Civil Forfeiture Act does not violate the Eighth Amendment as applied to Paul Grinnell, because the forfeiture satisfies both the proportionality and instrumentality tests that are used to gauge the constitutionality of such forfeitures.

The second is that Sarah Grinnell's interest in the car should also be forfeited, despite Section 311-2 of the Columbia Forfeiture Statute, because her ignorance of the crime was willful, and she was therefore not an unknowing or innocent owner under the terms of Section 311-2.

Statement of Facts

One night three months ago, Paul Grinnell stayed late at his job at Kroll-Mart to complete a task with a co-worker. They celebrated by becoming intoxicated. At the time he commenced drinking, Mr. Grinnell knew that he was "extremely tired," and moreover that he was drinking on an empty stomach because he had not eaten lunch. Nonetheless, he imbibed what he describes as "a couple of beers." Intoxicated, he got into his car to go home. En route, at about 11:20 that evening, a patrol car pulled him over for weaving across the road. His blood alcohol level was measured at 0.08, which is above the legal limit for a charge of driving under the influence of alcohol ("DUI"). He was thus charged with DUI and pleaded guilty. DUI carries a potential fine of $1,000.

Pursuant to this charge, the car that the defendant drove to commit his crime, a 2003 Honda Civic, was seized and impounded. The vehicle is registered in Columbia, and title is in the name of Paul Grinnell and Sarah Grinnell, his wife.

Although Ms. Grinnell was not in the car at the time of the crime, she was aware of the circumstances that led to its perpetration. She received a phone call from Paul at 4:30 that afternoon. Paul told her that he and his co-worker would finish their task at 10:00 that night. He also told her that they planned to celebrate by stopping at the Roadhouse Bar and Grill. In addition, Paul informed Sarah that he had not eaten any lunch. Sarah knew that he was extremely tired, because he had been working so hard. She was thus aware of all of the elements that led to Paul's inebriation. She knew, moreover, that he planned to drive home afterwards. Nonetheless, despite the high apparent risk of intoxication before driving, Sarah did nothing to prevent Paul from becoming intoxicated and then committing DUI.

Argument

(A) THE FORFEITURE OF PAUL GRINNELL'S INTEREST IN HIS AUTOMOBILE DOES NOT VIOLATE THE EIGHTH AMENDMENT, BECAUSE IT IS NOT DISPROPORTIONATE TO THE CRIME COMMITTED UNDER THE TRADITIONAL PROPORTIONALITY TEST, AND THE PROPERTY IS SUFFICIENTLY RELATED TO THE OFFENSE TO SATISFY THE INSTRUMENTALITY TEST[.]

The seizure of Paul Grinnell's interest in the automobile under the Columbia Forfeiture Act does not violate the Eighth Amendment under either a proportionality or instrumentality test.

The Eighth Amendment provides that excessive fines shall not be imposed for criminal activity. In Altman v. US, the Supreme Court held that this provision applies to in rem civil forfeitures, because such forfeitures constitute punishment. Section 311 obviously allows for such forfeitures, and thus comes under the purview of the Eighth Amendment's "excessive fines" clause. Section 311 of the statute states, in relevant part, that a civil action may be commenced by the Property Clerk against a criminal defendant (such as Paul Grinnell) to seize any property that constitutes the "instrumentality of the crime." Section 311, therefore, is clearly a forfeiture statute, and is thus "punitive" under Altman. The Altman Court declined, however, to delineate the factors that should inform a determination of whether such a given civil forfeiture is constitutionally excessive under the Eighth Amendment.

In the absence of the Supreme Court's deciding the appropriate standard, two alternative standards have emerged among the circuit courts to gauge constitutionality.

The first is a traditional proportionality test, adopted by the Fourth Circuit Court of Appeals in US v. Crandall. Under this test, the court conducts an inquiry into the proportionality between the value of the property sought to be forfeited, and the amount needed to effectuate the legitimate punitive and remedial purposes of the forfeiture.

The second test is the instrumentality test, adopted by the Second Circuit Court of Appeals in US v. Metzger. Unlike the proportionality principle, the instrumentality test examines the degree of relatedness between the property seized and the crime committed.

No matter which of these principles the Columbia courts apply, the seizure of Paul Grinnell's automobile should be held constitutional as to his interest, because the forfeiture satisfies both tests. Each test will be discussed in turn.

(1) THE VALUE OF THE FORFEITED AUTOMOBILE IS NOT DISPROPORTIONATE TO THE AMOUNT NEEDED TO PUNISH AND DETER THE DEADLY CRIME OF DRIVING UNDER THE INFLUENCE[.]

The first possible test is under the traditional proportionality principle. Again, as articulated by the Fourth Circuit in Crandall, the proportionality principle compares the property seized to the amount needed to effectuate the legitimate punitive and remedial purposes of the forfeiture. In Crandall, for example, the government seized $500,000 of real property to punish the property's use in illicit drug sales. Despite the high value of the property, the court found the seizure nonetheless appropriate, considering not only the degree of potential fines, but the harms that the government sought to prevent with this punitive measure. The court relied in large part on its prior decision in Sailors Cove. In that case an equity interest of $75,000 was seized in connection with a drug sale valued at $250. Despite this disparity, the court found the seizure proportional, in part based on the seriousness of the offense of selling drugs.

Similarly, in the case at hand, the proportionality of the punishment and offense must not only be gauged by the amount of the proper fine, but by the seriousness of the offense committed. The crime of DUI carries a potential fine of $1,000. Despite this, however, it is a consistent killer of innocent victims, including many children. It results in thousands of dollars of property damage per year and thousands of lives lost. Despite its relatively small fee and misdemeanor status, therefore, DUI is an extremely serious offense, that carries a high risk of innocent death. When balanced against this high risk of death, and the city's legitimate interest in preventing and punishing such dire results, the seizure of a $15,000 automobile hardly ranks as "grossly disproportionate" to violate Mr. Grinnell's rights under the Eighth Amendment.

(2) THE FORFEITED AUTOMOBILE SATISFIES THE INSTRUMENTALITY PRINCIPLE, BECAUSE IT PLAYED A CRUCIAL ROLE IN THE OFFENSE, ITS OWNER WAS HIGHLY CULPABLE, AND THE PROPERTY CANNOT BE EASILY DIVIDED[.]

The second test that the court may use to gauge the constitutionality of the forfeiture is the instrumentality principle. As articulated by the Second Circuit in Metzger, the instrumentality principle judges the connection between the property seized and the offense committed. The question under the instrumentality principle, therefore, is not how much the confiscated property is worth, but whether the confiscated property had a close enough relationship to the offense to justify its seizure. The operative measure, in the words of the Second Circuit Court of Appeals, is not the measure of the property value or even the offense, but rather the "extent of the taint."

Using the instrumentality test, the court will use a three-part test to gauge the "taint" of the property seized. This test considers (a) the nexus between the offense and the property and the extent of the property's role of the offense, (b) the role and culpability of the owner, and (c) the possibility of separating offending property that can readily be separated from the remainder.

(a) THE AUTOMOBILE BEARS A SUBSTANTIAL NEXUS TO THE CRIME[.]

The first prong of the test is the nexus, or connection, between the property and the offense. There is no doubt in the case at hand that there is a very close nexus to the crime of DUI and the car that was used to perpetrate that crime. More specifically, the Fourth Circuit enumerated several factors that will help prove the item's instrumentality. The first is whether the use of the property in the offense was deliberate and planned, as opposed to merely incidental and fortuitous. There is little doubt in Paul's case that the use of the car was deliberate and planned. His celebration by getting drunk on an empty stomach was also deliberate and planned. Although he did not intend to be pulled over for DUI, all of the actions that led up to his capture, and constituted his offense, were deliberate choices that he made. A second consideration is whether the property was important to the success of the illegal activity. Undoubtedly, the seized car in which Paul committed the crime was essential to the commission of a crime which requires driving. Third, the court will examine the time during which the property was illegally used and the spatial extend [sic] of its use. In Paul Grinnell's case, although the car of course had other uses, it was used in its entirety on this occasion to commit the crime of DUI. The court will fourth examine whether this illegal use was an isolated event or had been repeated. This test admittedly favors the defendant, as this is his first DUI offense. Nonetheless, the seriousness of his act, and the punitive interests of the state, still justify the finding, on balance, of a substantial nexus between the property and the crime. Fifth and finally, the court will examine whether the purpose of acquiring the property was to carry out this offense. Again, this factor favors Paul. However, the first three factors of the Fourth Circuit's test do not. The car was highly connected to the infraction, and the activity leading up to it was deliberate and planned. On balance, therefore, a substantial nexus must be found.

(b) PAUL GRINNELL WAS HIGHLY CULPABLE BECAUSE HE KNOWINGLY AND WILLINGLY INTOXICATED HIMSELF BEFORE DRIVING[.]

The second prong of the instrumentality principle is the role and culpability of the owner of the property forfeited. In the case at hand, there is no doubt that Paul is highly culpable. He pleaded guilty to drunk driving, and knowingly became intoxicated while highly tired and hungry before operating his car. Paul's culpability is therefore undisputed.

(c) THERE IS NO POSSIBILITY OF SEPARATING THE "OFFENSIVE" PART OF PAUL GRINNELL'S FROM THE "INNOCENT" PART[.]

The third factor that the instrumentality principle examines is whether a complete forfeiture can be avoided by dividing the property, and effecting only the forfeiture of the implicated part. As discussed above, Paul undoubtedly used the entirety of the car when he drove it under the influence of alcohol. The entire car thus bears the crucial "taint" of his offense. As a result, it should be forfeited in its entirety.

CONCLUSION: PAUL GRINNELL'S EIGHTH AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED BY THE FORFEITURE, UNDER EITHER A PROPORTIONALITY OR INSTRUMENTALITY TEST[.]

The inevitable conclusion of the above analysis is that no mat[t]er which test the court decides to employ, Paul Grinnell's Eighth Amendment Rights under the Federal Constitution have not been violated, because the forfeiture was not grossly disproportionate to the state's punitive interest, and the car undoubtedly was a crucial and indivisible instrument of the crime.

(B) SARAH GRINNELL'S INTEREST SHOULD ALSO BE FORFEITED DESPITE SECTION 311-2 OF THE FORFEITURE STATUTE, BECAUSE HER ACTIONS CONSTITUTED WILLFUL IGNORANCE OF THE HIGH RISK OF THE OFFENSE OCCURRING[.]

The next major issue is whether Sarah Grinnell, as a self-claiming "innocent owner," should have her interest forfeited under the forfeiture statute. The conclusion is inevitably that she should, because ultimately she was not an innocent owner under a reasonable interpretation of the statute as guided by Metzger.

(1)SARAH GRINNELL HAS NO CONSTITUTIONAL CLAIM UNDER A LONG LINE OF SUPREME COURT JURISPRUDENCE [.]

Before addressing the specifics of Section 311-2, it is useful to realize that Sarah Grinnell, unlike her husband, does not even have a potential constitutional claim against the forfeiture. In Bennis v. Michigan, the Supreme Court refused to protect a wife against the abatement of her interest in a car, because she was not aware of the fact that her husband had used it to sleep with a prostitute. Despite her claims of ignorance and innocence, Ms. Bennis' interest in the car was abated. The Supreme Court justified its decision by pointing out that the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense. It further pointed to Calero-Toledo, in which an innocent owner of a yacht had his property interest abated on account of a crime in which the company was in no way involved.

The lesson of these holdings from the High Court is clear. Even if Ms. Grinnell were an innocent owner, she would have no Constitutional right to demand the restitution of her interest. She must therefore rely entirely on the defense mechanism of Section 311-2 of the Columbia Forfeiture Statute.

(2) SARAH GRINNELL IS NOT AN INNOCENT OWNER UNDER THE FORFEITURE STATUTE, BECAUSE HER IGNORANCE OF THE CRIME AMOUNTED TO WILLFUL IGNORANCE[.]

Again, in the absence of any possibility of a legitimate constitutional claim, Sarah Grinnell must rely on the statutory defense of Section 311-2 of the Forfeiture Statute. That section reads, in relevant part, that property shall not be forfeited to the extent that it is owned by an owner who did not know of or consent to the crime (emphasis added). Sarah thus argues that because she was not in the car at the time of the offense, and because she did not consent to Paul's driving under the influence of alcohol, she is an innocent owner under the statute whose interest should be preserved.

This conception of innocence, however, is too narrow to be upheld. While it is clear under Altman that the trial judge has discretion to consider "alternatives to abating the entire interest in the vehicle" (see Bennis), it is also clear under that same decision that the presence of a defense such as Section 311-2 is a strong indication that this is a punitive statute. As such, the strong punitive interest of the city must be taken into account. Indeed, the city has a strong punitive interest in punishing not only the perpetrators of DUI, but also those who know that a DUI offense is about to occur, and who fail to act. The city thus has a strong interest in punishing the "willfully ignorant" such as Sarah Grinnell.

This was the approach taken by the Second Circuit in US v. Metzger. In that opinion, Marcia Metzger's land was seized for the drug violations of her son. She claimed innocence, alleging that she had no knowledge of his illegal use of the land. The court rejected her arguments, because it agreed with the district court that her ignorance was willful. Metzger made frequent visits to the property, where her son had planted multiple marijuana plants in close proximity to the house. She forayed into cabinets where he kept his drug paraphernalia. And she knew of her son's previous arrests for drug possession, and even admitted on prior occasion that she knew he had a marijuana problem. The Metzger majority thus held that blinding oneself to the clear truth, or high probability of an infraction, does not count as "innocence" or "lack of knowledge."

The same can be said of Sarah Grinnell. Before her husband committed the crime of DUI, he called her from work. He told her that he would be using the car that evening to get home, after an alcoholic celebration with his co-worker. He further revealed that he would be drinking on an empty stomach, and Ms. Grinnell knew that her husband had been extremely tired from working so hard. Nonetheless, she did not encourage him to take a taxi, or not to drink, or offer to have a friend pick him up. Mrs. Grinnell may not have been in the car during the accident, but her silent response to a clear likelihood of DUI rendered her complicit to its perpetration. Thus, she cannot be said to have suffered a forfeiture as an owner who "did not know of" or "consent to" the crime. In some ways, under the standard articulated by Metzger, Ms. Grinnell was as culpable as her husband.

Sarah Grinnell will counter by drawing the distinction that Mrs. Metzger knew of her son's systematic drug problem, whereas Mr. Grinnell had no such problem with alcohol or DUI. This distinction is unimportant. The sole basis of Mrs. Metzger's culpability was her willful ignorance. Such willful ignorance is the same act if executed once (as in the case of Ms. Grinnell) or multiple times (as in the case of Ms. Metzger). This distinction, therefore, will

not establish her innocence or non-consent.

Sarah Grinnell will also counter by pointing to the dicta of the Metzger decision, stating that forfeiture of an entire asset may be "excessive" when one owner's involvement is merely incidental, as opposed to extensive. This includes situations where that owner is simply aware of the offense, but not a perpetrator or conspirator. Ms. Grinnell will thus rely on this dicta to claim that the forfeiture of the entire car is "excessive" under the standard articulated in Metzger's dicta.

Yet this argument ignores the equally important qualifying dicta later in that same opinion. The court went on to say that this concern about excessiveness may be tempered by the pragmatic possibility of separating offensive property from non-implicated property. As discussed above, the Grinnells' car, in its entirety, was used in committing the crime, and unlike a piece of land, it cannot be broken up, separated, or sold in pieces. Therefore, the means to temper such theoretical "excessiveness" is impossible, and the entire automobile should be seized.

CONCLUSION: SARAH GRINNELL IS NOT ENTITLED TO A DEFENSE UNDER SECTION 311-2 BECAUSE HER IGNORANCE WAS WILLFUL[.]

The city's penal interest in punishing drunk driving extends not only to the perpetrators of that crime, but those who learn of its immediate perpetration yet do nothing to stop it. Because Sarah Grinnell was effectively advised by her husband that there was a high likelihood that he would drive under the influence of alcohol, she does not qualify as a "non-consenting," "unknowing" or "innocent" party under the language of Section 311 of the Columbia Forfeiture Statute.

Answer 2 to Question PT-B

1)

Memorandum of Points and Authorities

Statement of Facts

The Property Clerk of the City of Madison instituted an action under Section 311 of the Columbia Civil Forfeiture Act for the purpose of causing the automobile belonging to Paul and Sarah Grinnell to be forfeited as the instrumentality of a crime in response to Paul Grinnell's plea of guilty to Driving Under the Influence of Alcohol (DUI).

The stipulated and uncontested facts show that on April 29, 2005, Mr. Grinnell went to the Roadhouse Bar and Grill at about 10:00 p.m. Mr. Grinnell admits that he was tired after a long day of work, had not eaten lunch or dinner, and had a couple of beers on an empty stomach. He proceeded to drive home in his 2003 Honda Civic and was stopped by the Madison Police Department for weaving on the road. The police officer performed a breathalyzer test. Mr. Grinnell had a blood alcohol level of 0.08 percent, which is above the legal limit, and was arrested for DUI. On July 18, 2005, Mr. Grinnell pleaded guilty to the misdemeanor offense of DUI and was fined $500 (the maximum fine is $1000), had a 90-day restriction placed on his driver's license, and was ordered to attend DUI school.

The Property Clerk began this civil forfeiture proceeding against the 2003 Honda Civic automobile that Mr. Grinnell was driving on the night he was arrested for DUI. The automobile is jointly owned by Mr. Grinnell and his wife, Sarah. It has a fair market value of $15,000. The car is the only one owned by the Grinnells. Additionally, the Grinnells have a two[-]year[-]old baby daughter, Cammie. Mr. Grinnell works as an assistant manager at Kroll-Mart and makes about $24,000 annually. Ms. Grinnell works 15 miles away in Greenfield as a receptionist and makes about $18,000 per year.

Typically, Ms. Grinnell drives the Honda Civic and drops off Mr. Grinnell at Kroll-Mart on her way to work. On the evening of his arrest, Mr. Grinnell drove the Civic because he had to work late. At the hearing, Ms. Grinnell admitted that on the night Mr. Grinnell was arrested for DUI, she was aware that he was tired, had not eaten all day, and was planning to go out for drinks late in the evening. Ms. Grinnell admitted that she knew Mr. Grinnell planned to drive home in the Honda Civic after drinking at the Roadhouse Bar and Grill. Ms. Grinnell admitted that she is aware that Mr. Grinnell drinks about once per month.

Argument

I. The Forfeiture of Paul Grinnell's Honda Civic Automobile under the Columbia Civil Forfeiture Act ("CFA") is Not an Excessive Fine Prohibited by the Eighth Amendment[.]

Mr. Grinnell asserts that the forfeiture of his 2003 Honda Civic automobile used while he was arrested for DUI constitutes an "excessive fine" prohibited by the Eighth Amendment to the United States Constitution. On the contrary, courts have held since 1827 that forfeiture of property used in the commission of crimes is valid and constitutional. Bennis v. Michigan. We show below that the forfeiture of Mr. Grinnell's car is fully consistent with the United States Constitution and appropriate case law.

A. The CFA permits the Property Clerk to seize and initiate a forfeiture action against the Honda Civic automobile used by Mr. Grinnell in the commission of the crime of DUI.

The Columbia Civil Forfeiture Act ("CFA") permits the Property Clerk to institute a civil action against a criminal or non-criminal defendant to seize and forfeit property that is, inter alia, the "instrumentality" of a crime. CFA Section 311-1. The forfeiture is civil in nature and is not a penalty of a criminal forfeiture. CFA S. 311-1. The action may be instituted against a criminal defendant, defined as one who has been convicted of a crime. CFA S. 310-8(a). Mr. Grinnell's plea of guilty to misdem[e]anor DUI constitutes such a conviction of a crime. CFA S. 310-6.

Mr. Grinnell's 2003 Honda Civic is subject to forfeiture because the CFA applies to "instrumentalities of a crime," meaning vehicles whose use contributes directly and materially to the commission of the crime. CFA S. 310-4. Since the crime of DUI requires driving an automobile, it is without question that the car Mr. Grinnell was driving on the evening of his arrest (the 2003 Honda Civic at issue) is an instrumentally of a crime and is subject to forfeiture.

B. The Eighth Amendment prohibition against Excessive Fines applies to the CFA only if the forfeiture of Mr. Grinnell's automobile is "punishment" for the crime of DUI.

The United States Supreme Court in Bennis v. Michigan reaffirmed that forfeiture actions are "too firmly fixed" in the jurisprudence of this country to be displaced. For over 175 years, courts have approved forfeiture of property as deterrent action to prevent further illicit use of the property. Bennis.

In Altman v. U.S., the Supreme Court stated that to the extent that a civil forfeiture serves as punishment for the owner, the Eighth Amendment prohibition against "excessive fines" may play a role, but the Court did not adopt a test to establish when forfeiture becomes a punishment.

(i) By its terms, CFA 311 does not impose a penalty on Mr. Grinnell and the Eighth Amendment does not apply to the CFA.

CFA Section 311-1 states that the forfeiture will not be deemed a "penalty" for any purpose. It is a civil, remedial action against the property used in the crime. Therefore, a court looking to the plain language of the statute should find that the CFA is intended not to punish offenders but simply to remedy the problems caused by their crimes. The forfeiture of Mr. Grinnell's car is simply a method to ensure the safety of other drivers on the road. To the extent that the car's forfeiture is not a penalty, the Eighth Amendment does not apply to this action. Accordingly, the plain language of CFA S. 311 suggests that the court reject Mr. Grinnell's assertion that the forfeiture violates the Eighth Amendment.

(ii) Even if the Eighth Amendment applies to the CFA, the forfeiture of Mr. Grinnell's car is not an "excessive fine."

The Supreme Court has stated that the Eighth Amendment may apply to some forfeiture statutes. Bennis; see also Altman v. U.S. One piece of evidence that the statute is penal is whether it allows an "innocent owner" defense. Altman. Indeed, CFA Section 311-2 is such a defense to a civil forfeiture action. Although Altman does not hold that such a defense is dispositive on the issue, it may indicate a punitive component to the CFA. However, even if the Eighth Amendment excessive fines clause applies to the CFA, the forfeiture of Mr. Grinnell's car is not an excessive fine under any of the two tests adopted by other courts. See U.S. v. Crandall and U.S. v. Metzger.

(a) The forfeiture of Mr. Grinnell's car is "proportional" to his crime and therefore is not "excessive."

In U.S. v. Crandall, the 4th Circuit articulated a "proportionality test" to establish whether a civil forfeiture is excessive under the Eighth Amendment. See also U.S. v. 38 Sailors Cove Drive. In Crandall, the court affirmed the forfeiture of a 33 acre farm worth $500,000 since the property was traceable to the proceeds of criminal drug dealing. The court held that there was a "nexus" between the property and the crime. A "nexus" can be established if the property was given in exchange for the criminal proceeds (drugs), or the property was "traceable" to the crime, or it was used in committing the crime or was intended for such use. Crandall.

Once a "nexus" is established, the court adopted a test such that the forfeiture was constitutional if it was "proportional" to the gravity of the crime as measured by the potential punishment under state and federal law. Crandall. In this case, the forfeiture of the $500,000 property was proportional because the defendant's punishment could be up to $75,000 under the state law or $1,000,000 under federal law. Crandall. Courts can also look into the seriousness of the offense. Crandall.

The forfeiture of Mr. Grinnell's car satisfies the "proportionality" test. First, there is a "nexus" between Mr. Grinnell's crime – DUI – and the property subject to forfeiture – the 2003 Honda Civic he was driving while intoxicated, since he was using the car while committing the crime. Second, the amount of the forfeiture is "proportional" to the gravity of the crime. Mr. Grinnell's car is worth about $15,000. The maximum fine for DUI is $1000, less then the value of his car. Although this factor weighs against proportionality, the gravity of the crime compensates. Driving while intoxicated is a very serious crime that can lead to tragic consequences such as the death of innocent persons. The City Attorney has implemented a "Zero Tolerance on Drinking and Driving" initiative to combat the seriousness of the offense. Removing Mr. Grinnell's car from the road substantially furthers this policy as Mr. Grinnell will not be able to commit the offense of DUI without his only car.

For these reasons, the forfeiture of Mr. Grinnell's car is not grossly disproportionate to the gravity of possible death caused by DUI, and the forfeiture satisfies the Crandall court's proportionality test.

(b) The forfeiture of Mr. Grinnell's car is valid since it was the "instrumentality" of his crime[.]

The Second Circuit in U.S. v. Metzger characterized forfeiture as an "in rem" action against the property itself as the "offender" rather than as punishment for the owner. The action is against the property itself, so the Metzger court held that the value of the property is irrelevant as to whether the forfeiture is an excessive fine. To determine whether the forfeiture is an excessive fine under the Eighth Amendment, the court adopted the three-part "instrumentality" test. A court considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating the offending property from the remainder. Metzger.

In Metzger, the Second circuit affirmed the forfeiture of an 85[-]acre farm owned by the mother of a son convicted of growing marijuana. The court found that the marijuana was grown on the mother's property and was a substantial and meaningful instrumentality in the commission of the son's crime.

Forfeiture of Mr. Grinnell's car satisfies the "instrumentality" test.

First, there must be a "nexus" between the property and the crime. The Metzger court listed five nondispositive factors to be used in deciding the strength of the nexus. Applying these factors, it is clear there was a nexus between Mr. Grinnell's car and the crime. (1) Mr. Grinnell's use of the car was deliberate and planned since he intentionally drove the car after drinking at the bar. (2) The car was important to the success of the crime – in fact, Mr. Grinnell could not be convicted of DUI without having used the car. (3) The car was being driven and used while Mr. Grinnell was intoxicated. It is irrelevant that in the morning when he drove to work that he was sober since he was over the legal limit on the drive

home. The first three factors strongly favor the government. (4) Mr. Grinnell is being charged only with using the car once for DUI. There is no evidence of a pattern of DUI with the car. The factor favors Mr. Grinnell. (5) The car was not acquired to carry out the DUI. This, too, favors Mr. Grinnell.

On the whole, it seems that the factors favoring a nexus between the car's use in the DUI outweigh the factors that its use was merely incidental. The nexus factor is established.

Second, Mr. Grinnell was the sole driver of the car on the night in question and there is no question as to his culpability. In fact, Mr. Grinnell pleaded guilty to the DUI charge on July 18.

Third, the property is inseparable. The court cannot "partition" the car and the entire car must be forfeited.

Therefore, under the Metzger test, Mr. Grinnell's car was the "instrumentality" of a crime and is subject to forfeiture without being an excessive fine under the Eighth Amendment.

(c) Under either the proportionality test or the instrumentality test, the forfeiture of Mr. Grinnell's Honda Civic is not an excessive fine under the Eighth Amendment.

In conclusion, regardless of which test this court adopts, the forfeiture of Mr. Grinnell's automobile is a remedial action to prevent further instances of drunk driving. See Crandall and Metzger. The action is not a further punishment for Mr. Grinnell but is to serve as a deterrent. See Bennis. It is not an excessive fine under the Eighth Amendment (Altman) and the car's forfeiture is constitutional.

II. Mr. Grinnell's Interest in the 2003 Honda Civic Automobile Is Subject to Forfeiture Under the CFA.

Ms. Sarah Grinnell argues that CFA Section 311-2 establishes an "innocent owner" defense that precludes the forfeiture of her one-half interest in the 2003 Honda Civic. For over 75 years, courts have authorized forfeiture actions against even "innocent" owners. See Bennis v. Michigan. Ms. Grinnell's argument must fail.

A. For over 75 years, courts have rejected the "innocent owner" defense.

Forfeiture actions serve a deterrent purpose distinct from punitive purposes. The United States Supreme Court has on at least two occasions affirmed that the innocence of the owner of the property subject to forfeiture has "uniformly been rejected as a defense." Calero-Toledo v. Pearson Yacht Leasing Co. The fact that the owner did not know her car was being used in illegal activity and was subject to forfeiture does not give her a protectable interest under the Fourteenth Amendment Due Process clause. Bennis.

Even if Ms. Grinnell is entirely innocent in Mr. Grinnell's DUI actions, courts have rarely

accepted her "innocent owner" defense.

B. CFA 311-1 allows the Property Clerk to seek forfeiture of Ms. Grinnell's interest in the Honda Civic[.]

CFA 311-1 allows the forfeiture proceeding against a "non-criminal defendant" who is a person who possesses an interest in the instrumentality of the crime. CFA 310-9. Ms. Grinnell is the joint owner of the 2003 Honda Civic and the Clerk may seek the forfeiture of the car from her. She was properly joined in the action.

B[sic]. Even if an innocent owner defense applies under CFA 311-2, Ms. Grinnell's actions on the evening of Mr. Grinnell's arrest for DUI show that she knew of his driving under the influence of alcohol.

CFA 311-2 is the "innocent owner" defense. A person who "did not know of, or consent to" the acts constituting the crime is not subject to the civil forfeiture provisions. Ms. Grinnell states that she should be subject to Section 311-2 because she did not know that Mr. Grinnell ever used the car while intoxicated. Her assertion is contradicted by the stipulated and uncontested facts.

First, Mr. Grinnell should be charged with "knowledge" of her husband's DUI. On cross-examination during the hearing today, Ms. Grinnell admitted that she knows that her husband sometimes drinks[.] She also admitted knowing that on the day her husband committed the DUI that he was going to use the car. Mr. Grinnell called her at 4:30 to tell her to find another ride home. She knew he was going to work late and then go to the Roadhouse Bar and Grill to celebrate. Ms. Grinnell knew that her husband was tired, and had not eaten lunch or dinner. Therefore, the evidence shows that Mr. Grinnell "knew" of the facts relating to Mr. Grinnell's drinking the evening of his arrest.

Second, she should be charged with "consent." Ms. Grinnell did not caution Mr. Grinnell not to drink and drive and did not suggest that he simply come directly home from work if he was so tired. Therefore, Ms. Grinnell effectively consented to Mr. Grinnell's actions that night.

Since Ms. Grinnell "knew" and "consented" to Mr. Grinnell's actions that evening, she is not an "innocent" owner and the CFA S. 311-2 anti-forfeiture provisions do not apply to her.

Ms. Grinnell is similar to the mother in the Metzger case. In that case, the mother purchased a farm for her son even though she knew he had grown marijuana in the past. The court rejected the mother's innocent owner defense. Metzger. Likewise, Ms. Grinnell knew at 4:30 pm, before the DUI occurred, that her husband was going out drinking that night on an empty stomach and in a tired mental condition. Therefore, she should not be allowed to invoke the innocent owner defense.

C. The Honda Civic should be forfeited even though the forfeiture will be harsh on Ms. Grinnell.

Ms. Grinnell is a sympathetic victim in this case. However, the gravity of the drunk driving problem requires that harsh measures sometimes be taken. The Crandall court, in *dicta*, suggested that the harshness of forfeiture on third parties should be considered. However, as discussed above, Ms. Grinnell bears some culpability for her husband's actions that night. Should an innocent person have been killed or maimed by Mr. Grinnell's drunk driving, the court would not shirk from forfeiting the car. Simply because the police did their job first, Ms. Grinnell should not benifit.

Conclusion

The harshness of the forfeiture is fully justified in this case. Ms. Grinnell is not an "innocent owner" and her inter[e]st in the car is fully subject to forfeiture under CFA 311-2.