

THE PUBLIC LAWYER

FEBRUARY 1, 2005



NEVADA CASES

<http://www.leg.state.nv.us/scd/OpinionListPage.cfm>

There are no reported cases this month.

PRO BONO FOR GOVERNMENT ATTORNEYS

In many locations, such as state capitals, government attorneys are the largest pool of potential volunteers. In other locations, such as very rural counties, government attorneys may represent a large percentage of available volunteers. As a result, pro bono programs and government agencies are designing new ways and opportunities for government attorneys to participate in pro bono.

The ABA Center for Pro Bono and the ABA Government and Public Sector Lawyers Division offer an online publication, [Pro Bono Project Development: A Deskbook For Government and Public Sector Lawyers](#), to provide guidance in developing pro bono opportunities for government attorneys. The [Deskbook](#) addresses the issues that arise from government attorney pro bono participation, such as conflicts of interest, limitations on use of agency resources such as photocopiers, and restrictions on volunteering during office hours.

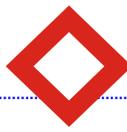
Government Agencies and Pro Bono Projects that Facilitate Pro Bono Participation by Government Attorneys Additional Resources

Government Agencies and Pro Bono

Government support of pro bono participation at the highest levels and the institution of clear policies have eased many former barriers to pro bono. For example, the Attorney General in Maryland established a Pro Bono Program Committee in 1989 to coordinate and oversee the Attorney General's Pro Bono Program. The Committee sets policy for the Program, provides its administrative support, and resolves any question about potential conflicts of interest.

A number of federal and state agencies have established pro bono policies for attorneys employed by the agency. Examples of such policies include:

[United State Department of Justice Policy
Statement on Pro Bono Legal and](#)



Volunteer Services

Washington State Office of the Attorney General

New York Attorney General

Texas Office of the Attorney General

The Minnesota State Bar Association has developed a [Model Pro Bono Policy and Procedures for Government Attorneys](#). The model policy provides sample language for a pro bono policy along with explanatory comments. The policy covers topics including the definition of pro bono, procedures for pro bono participation, identification with the government agency, and use of agency resources.

Developing relationships with top-level government attorneys may produce unexpected benefits. In Georgia, Atlanta Legal Aid Society (ALAS) worked closely with Governor Roy Barnes in designing anti-predatory lending legislation, which was recently enacted by the Georgia legislature. As a result of the relationship that the program developed with Governor Barnes, he served as a volunteer attorney with the ALAS for six months after leaving office. His example of continued support and commitment to pro bono work is an example for other government attorneys.

Projects that Facilitate Participation by Government Attorneys

Pro bono organizations and volunteer attorneys have worked together to develop projects designed to provide pro bono opportunities tailored to the restrictions faced by government employees. Projects seek to accommodate government attorneys by providing opportunities outside of working hours, providing a location to meet with clients, or finding an area of law – such as children’s SSI claims – that does not present

a conflict of interest.

The King County Bar Association (“KCBA”) has developed several successful projects for government attorneys. The KCBA works with the Washington Department of Labor attorneys to provide legal advice on wage claims through Casa Latina, a day laborers’ organization. In another project, local prosecutors participate in regular clinics at homeless shelters. Additionally, local prosecutors have adopted a women’s shelter and conduct legal clinics twice per month on their lunch hour.

Florida Rural Legal Services (“FRLS”) has a close working relationship with the local public defender and has worked to integrate them into the pro bono referral process. FRLS sends cases to the public defender, which then places the cases with private pro bono attorneys.

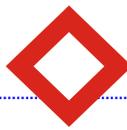
Legal Services of North Florida (“LSNF”) has worked to develop active government attorney involvement in its homeless project, night clinic program, senior citizen center intake and advice clinic, and telephone hotline. The telephone hotline is sponsored by different agencies such as the Florida Attorney Generals Office, Florida Department of Transportation, Florida Department of Community Affairs, and the City of Tallahassee attorney’s office.

Additional examples of pro bono projects involving attorneys from local and state government offices include:

Ohio Attorney General’s program

Broward County (FL) County Attorney’s Office program

The New York State Bar Association has published a [brochure](#) for government attorneys that deals with questions and concerns about pro



bono participation. The brochure answers questions such as the kind of pro bono work available to government attorneys and whether they will need and be able to obtain training.

Additional Resources

Additional guidance for developing a pro bono program for government attorneys can be found in the article “Setting Up and Running a Pro Bono Program in a Government Office: The NLRB’s Experience,” 7 THE PUBLIC LAWYER 2 (Summer 1999). For information on how to obtain a copy of this article, please see <http://www.abanet.org/policy/reprints.html>.

The ABA Center for Pro Bono’s Clearinghouse library contains additional materials concerning ways to facilitate pro bono participation by government attorneys, including sample policies from federal and state government agencies and examples of pro bono projects. Additionally, the ABA Center for Pro Bono and the ABA Government and Public Sector Lawyers Division offer an online publication, Pro Bono Project Development: A Deskbook For Government and Public Sector Lawyers. http://www.abanet.org/legalservices/probono/government_attorneys.html

NINTH CIRCUIT CASES

(Ninth Circuit cases can be found at <http://www.ca9.uscourts.gov/ca9/neopinions.nsf>)

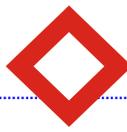
Gratzer v. Mahoney, No. 03-35613 (January 31, 2005). “Karl Eric Gratzer appeals the district court’s denial of his petition for habeas corpus, claiming that a jury instruction in his 1982 trial in Montana for deliberate homicide violated his constitutional right to due process. We affirm.”

Henderson v. Lampert, No. 03-35738

(January 28, 2005). “State prisoner Henderson appeals from the district court’s judgment denying his habeas petition. The district court had jurisdiction under 28 U.S.C. § 2254, and we have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 2253. Because the petition raises the same claims Henderson raised in an earlier petition that was dismissed on grounds of state procedural default, and because he cannot now challenge the grounds on which the first petition was dismissed, the current petition is a ‘second or successive’ petition barred by 28 U.S.C. § 2244(b)(1). We therefore affirm.”

United States v. Antelope, No. 03-30557 (January 27, 2005). “Lawrence Antelope is a convicted sex offender who shows promise of rehabilitation. The terms of his supervised release offer him treatment—but at a price he is not willing to pay. Antelope has repeatedly refused to incriminate himself as part of his sex offender treatment. He declines to detail his sexual history in the absence of any assurance of immunity because of the risk that he may reveal past crimes and that his admissions could then be used to prosecute him. In response, the government has twice revoked his conditional liberty and sent him to prison. The case he now brings requires us to decide whether the government’s actions violated his Fifth Amendment right against compelled self-incrimination. Because the Constitution does not countenance the sort of government coercion imposed on Antelope, and because his claim is ripe for adjudication, we reverse the judgment of the district court.

We decide also Antelope’s challenge to the release term prohibiting him from possessing ‘any pornographic, sexually oriented or sexually stimulating materials,’ which we vacate and remand, as well as his challenge to the term prohibiting him from access to ‘any “on-line computer service,”’ which we affirm.”



Gammoh v. City of La Habra, No. 04-56072 (January 26, 2005). “This case involves constitutional challenges to a city ordinance requiring ‘adult cabaret dancers’ to remain two feet away from patrons during performances. The district court rejected these challenges by dismissing some of the Appellants’ claims on the pleadings and granting summary judgment as to other claims. We denied emergency motions for a stay of enforcement of the Ordinance pending appeal and now affirm.”

Buckley v. Terhune, No. 03-55045 (January 25, 2005). “C.A. Terhune, Director of the California Department of Corrections, appeals the district court’s grant of Brian Buckley’s petition for a writ of habeas corpus. The State’s appeal is timely, and we have jurisdiction under 28 U.S.C. § 2253. The district court did not afford the state court’s determination of facts the appropriate level of deference. Accordingly, we reverse the judgment of the district court because it resulted from a misapplication of the strict standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996.”

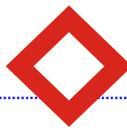
Rose v. Palmateer, No. 03-35937 (January 24, 2005). “State prisoner Rose appeals from the district court’s denial of his 28 U.S.C. § 2254 petition. He argues that he properly exhausted the claim that his confession and re-enactment of events were unlawfully induced and should have been suppressed, and he contends he did not validly waive his Ex Post Facto Clause objection to his sentence. The district court had jurisdiction pursuant to 28 U.S.C. § 2254(a). We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 2253(a), and we affirm.”

Garcia v. Carey, No. 02-56895 (January 20, 2005). “Petitioner Anthony Garcia was

convicted of robbery in California state court. The jury found that the robbery was gang related, and that a gun had been used. Garcia’s sentence was increased because of those two findings. After exhausting state remedies, Garcia filed a petition for habeas corpus in federal court, pursuant to 28 U.S.C. § 2254, challenging his sentence. The district court granted the petition on the ground that there was constitutionally insufficient evidence to support the imposition of the gang and gun sentencing enhancements. The State, in the person of prison warden Tom Carey, appeals. We affirm the district court’s grant of habeas relief.”

United States v. Omer, No. 03-30544 (January 19, 2005). “Timothy Omer appeals from his jury trial conviction and sentence for bank fraud in violation of 18 U.S.C. § 1344(1). Omer contends that the district court erroneously denied his pretrial motion to dismiss in which he argued that the indictment was fatally deficient because the indictment failed to allege materiality of the fraud. We review the sufficiency of an indictment *de novo*, *United States v. Pernillo-Fuentes*, 252 F.3d 1030, 1032 (9th Cir. 2001), and we reverse. ‘[I]f properly challenged prior to trial, an indictment’s complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment.’ *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). Omer’s indictment fails to recite an essential element of the charged offense—materiality of falsehood. Therefore, because Omer properly challenged the sufficiency of the indictment prior to trial, the district court should have dismissed the indictment.”

Cooks v. Newland, No. 03-56326 (January 19, 2005). “State prisoner Cooks appeals from the district court’s judgment denying his petition for a writ of habeas corpus. He argues that the

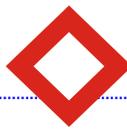


California Court of Appeal unreasonably applied *Faretta v. California*, 422 U.S. 806 (1975), and *Gideon v. Wainwright*, 372 U.S. 335 (1963), when it affirmed his robbery convictions. Cooks contends that the state trial court should not have consolidated two separate criminal cases in which he was a defendant, representing himself in one case and represented by counsel in the other. He asserts that this improperly forced him to choose between invoking his constitutional right to self-representation, as recognized in *Faretta*, or his *Gideon* right to counsel on both charges. The district court had jurisdiction pursuant to 28 U.S.C. § 2254, and we have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 2253. We affirm.”

United States v. Mayo, No. 04-10076 (January 14, 2005). “Eric Mayo appeals the district court’s denial of his motion to suppress evidence found in a search of his vehicle. While responding to a call about suspicious narcotics activity, officers arrested Mayo for a felony violation of California’s vehicle code. The officers searched Mayo’s car incident to this arrest, finding bags of stolen mail. Mayo seeks to suppress this evidence on the grounds that officers: (1) lacked reasonable suspicion to detain him, (2) unreasonably broadened the length and scope of their investigation during his detention, (3) lacked probable cause to arrest him on the vehicle code violation, and (4) expanded the scope of the search incident to arrest beyond constitutional limits when they searched the hatchback area of his car. We reject all four claims, and affirm the judgment of the district court. In doing so, we join other circuits in ruling that, for purposes of an automobile search incident to arrest, officers may search the cargo area behind the rear seat of a hatchback vehicle.”

Beardslee v. Woodford, No. 05-15042 (January 14, 2005). “Donald Beardslee, a California death row inmate whose execution is scheduled for Wednesday, January 19, 2004, at 12:01 a.m., appeals the district court’s order denying his motion for a preliminary injunction in his action pursuant to 42 U.S.C. § 1983 against Jeanne S. Woodford, Director of the California Department of Corrections, and Jill L. Brown, Warden of California State Prison at San Quentin, California. Beardslee seeks to prevent Brown from executing him in accordance with California’s lethal injection protocol, arguing that such an execution would violate his Eighth Amendment right to be free from cruel and unusual punishment and, potentially, his First Amendment right to freedom of speech. Beardslee also makes an emergency motion for a stay of execution. We have jurisdiction *United States v. Kama*, No. 03-30231 (January 13, 2005). Samuel Kama appeals the district court’s decision to deny his motion to return property, specifically, 2.49 grams of medically prescribed marijuana seized by the Portland Police Bureau’s Drug and Vice Division and, later, by the Drug Enforcement Administration. The district court denied Kama’s motion, concluding that it lacked equitable jurisdiction to consider the motion. Here, Kama argues only the merits of his motion and fails to address the threshold issue of whether the district court abused its discretion in declining to exercise its equitable jurisdiction. We conclude that Kama waived the equitable jurisdiction issue by failing to raise it in his opening brief, or for that matter, by failing to address the issue at all. Consequently, Kama’s arguments concerning the merits of his motion are rendered moot, and we affirm under 28 U.S.C. § 1292(a)(1), and we affirm the district court and deny the motion.”

Marshall v. Taylor, No. 03-56836 (January 13, 2005). “William Allen Marshall appeals the district court’s denial of his writ of habeas



corpus for an alleged violation of *Faretta v. California*. We have jurisdiction pursuant to 28 U.S.C. § 2253. Marshall asked to represent himself on the morning of his state court trial. The state trial court denied his request on the impermissible ground that Marshall lacked the requisite skill and knowledge to represent himself. The California Court of Appeal affirmed on the proper ground that Marshall's request was untimely. Marshall now contends (1) that the court of appeal's decision was contrary to *Faretta* and (2) that its finding of untimeliness was based on an unreasonable determination of the facts. We disagree. Therefore, we affirm the district court's denial of Marshall's habeas petition."

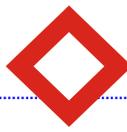
United States v. Bichsel, No. 04-30126 (January 13, 2005). "Because the indoor posting of applicable federal regulations was inconspicuous to visitors outside the United States courthouse in Tacoma, we must reach an issue of first impression: whether actual notice is sufficient to meet the conspicuous posting requirement of 40 U.S.C. § 1315 for the enforcement of 41 C.F.R. § 102-74.385, failure to comply with the lawful order of a federal police officer. We hold that actual notice is fair and adequate notice, and affirm Father William Bichsel's conviction under the regulation. "

United States v. Bruce, No. 03-30171 (January 13, 2005). "Violet Bruce appeals her conviction for simple assault on an Indian child less than 16 years of age on a reservation in violation of 18 U.S.C. §§ 1152 and 113(a)(5). In her sole claim of error, Bruce asserts that the case against her was brought under the wrong statute. The government charged Bruce under § 1152, which covers offenses committed in Indian country, but excepts crimes committed by an Indian against another Indian. Bruce

contends that she is an Indian, and the government should have charged her under 18 U.S.C. § 1153, which covers certain offenses committed by an Indian in Indian country. The district court denied her motion to dismiss on this ground. We conclude that Bruce presented sufficient evidence that, if believed, established her Indian status. We further hold that the court's error was not harmless. We therefore reverse."



In re Pegasus Gold Corp., No. 03-15958 (January 11, 2005). "We must decide difficult questions regarding the bankruptcy court's post-confirmation subject matter jurisdiction and the scope of a state's waiver of Eleventh Amendment immunity. We conclude that even though a bankruptcy court's post-confirmation 'related to' jurisdiction is substantially more limited than its pre-confirmation jurisdiction, there is a sufficiently close nexus in this case between the current action and the original bankruptcy proceeding to confer subject matter jurisdiction on the bankruptcy court. Nonetheless, because the current adversarial action is not 'logically related' to the original proofs of claims that the State of Montana filed in the underlying bankruptcy action, the State has not waived its Eleventh Amendment immunity with respect to the current action and the claims against it must be dismissed."



United States v. Combs, No. 03-30456 (January 11, 2005). “Robert Combs appeals his conviction, following a bench trial, for maintaining a place for the manufacture of controlled substances, attempting to manufacture methamphetamine, being a felon in possession of a firearm, and criminal forfeiture.

Combs asserts the district court erred in denying his motion to suppress evidence resulting from a search of his residence because the police did not physically knock on his door and therefore failed to adequately ‘knock and announce’ before executing the search warrant. Whether the Fourth Amendment requires an actual ‘knock’ on the door of a suspect’s home before a search can be conducted is an issue of first impression in our circuit. We hold that under the totality of the circumstances presented in this case, the police acted reasonably in executing the warrant without first physically ‘knocking’ on the front door of Combs’s residence. Because there was no Fourth Amendment violation, we affirm the district court.”

Watts v. McKinney, No. 03-16665 (January 10, 2005). “A lawyer must be zealous on behalf of his client. But zeal needs to be tempered by commonsense. The Supreme Court in *Hudson* proscribed the use of force for the malicious and sadistic purpose of causing harm. Watts' declaration, describing the vengeful acts of a frustrated investigator, identifies the unconstitutional purpose and deeds. To suppose that any reasonable person, let alone a trained prison officer, would not know that kicking a helpless prisoner's genitals was cruel and unusual conduct is beyond belief. The Supreme Court did not need to create a catalogue of all the acts by which cruel and sadistic purpose to harm another would be manifest; but if it had, such act would be near the top of the

list. The case must go to trial.”

Samish Indian Tribe v. State of Washington, No. 03-35145 (January 6, 2005). “Appellant Samish Indian Tribe sought by means of Federal Rule of Civil Procedure 60(b)(6) to reopen *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd* 641 F.2d 1368 (9th Cir. 1981), a judgment that denied the Samish treaty fishing rights on the ground that the tribe had not maintained an organized tribal structure. The Samish argued that federal recognition of their tribe in 1996 was an extraordinary circumstance that justified reexamining their treaty fishing rights. The district court denied the motion to reopen, holding that federal recognition is of limited relevance to the Samish’s treaty fishing rights, that the 1979 judgment was not erroneous, and that reopening the judgment would be extremely disruptive. We reverse.”

Knievel v. ESPN, No. 02-36120 (January 4, 2005). “Famed motorcycle stuntman Evel Knievel and his wife Krystal were photographed when they attended ESPN’s Action Sports and Music Awards in 2001. The photograph depicted Evel, who was wearing a motorcycle jacket and rosetinted sunglasses, with his right arm around Krystal and his left arm around another young woman. ESPN published the photograph on its ‘extreme sports’ website with a caption that read ‘Evel Knievel proves that you’re never too old to be a pimp.’ The Knievels brought suit against ESPN in state court, contending that the photograph and caption were defamatory because they accused Evel of soliciting prostitution and implied that Krystal was a prostitute. ESPN removed the action to federal court and moved to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The court granted ESPN’s motion on the ground that the photograph and its caption were not defamatory as a matter of law. We have jurisdiction pursuant to 28 U.S.C. § 1291,

and we affirm.”



FLEX TIME

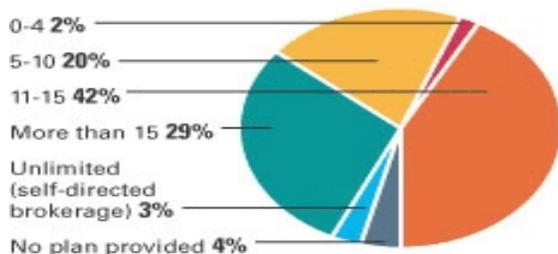
BenefitNews.com Connect asked its readers if they featured a flex time program to accommodate employee schedules. With over 200 responses, the breakdown is as follows:

42% allow flex time on an informal basis

32% do not allow flex time

27% have an official flex time policy

How many investment options does your 401(k)/403(b)/457 plan currently offer?



Source: 2004 EBN-Hay Survey on Benefits Management

Today's Word:

Obtund (*Verb*)

Pronunciation: [ahb-'tënd]

>**Definition 1:** Make dull or blunt, deaden

Usage 1: The adjective is obtundent "blunting, deadening"; obtundity is the noun.

Today's Word:

Insouciant (*Adjective*)

Pronunciation: [in-'su-see-ênt or æn-su-'syahnt]

>**Definition 1:** Lighthearted, lacking care or concern, blithely indifferent or nonchalant.

Usage 1: Careful of the spelling: an "a" and not an "e" in the suffix. The noun is "insouciance."