

THE PUBLIC LAWYER

PUBLIC LAWYERS SECTION

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NEVADA CASES

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

O'Neil v. State, 123 Nev. Adv. Op. No.2 (March 8, 2007). "This appeal presents the issue of whether the Nevada habitual offender statute, NRS 207.010, as interpreted by this court, violates the United States Supreme Court's decision in Apprendi v. New Jersey[1] by requiring "judicial fact-finding" beyond the mere fact of prior convictions. A grand jury indicted appellant Christopher O'Neill on three counts of "possession of a forged instrument, a violation of NRS 205.110." The State subsequently filed a notice of intent to have O'Neill classified as a habitual criminal pursuant to NRS 207.010. The jury found O'Neill guilty on all three counts. Based upon evidence of six prior felony convictions presented by the State at sentencing, the district court adjudicated O'Neill a habitual criminal. The district court then proceeded to impose concurrent life sentences with the possibility of parole after ten years on each count. The district court also ordered that service of sentence on Count I run concurrently with a sentence imposed in a separate case. The district court further ordered a special sentence of lifetime supervision to commence after any period of probation, term of imprisonment, or period of release on parole. O'Neill received no credit for time served. We conclude that NRS 207.010 does

not violate Apprendi and therefore affirm the adjudication of habitual criminality. We also conclude that O'Neill's other contentions do not warrant reversal. Accordingly, we affirm the judgment of conviction of three counts of possession of a forged instrument and the adjudication of habitual criminality. However, we remand this matter for entry of an amended judgment of conviction vacating the special sentence of lifetime supervision as O'Neill was not convicted of a crime warranting this sentence."

Matter of Eric L., 123 Nev. Adv. Op. No. 4 (March 8, 2007). "On May 24, 2005, respondent Eric L., a 17-year-old minor, was arrested on a series of drug offenses. Specifically, the State charged Eric with (1) trafficking a controlled substance, (2) transporting a controlled substance, and (3) possession of a controlled substance with intent to sell, with respect to both methamphetamine and marijuana, for a total of six counts. On May 25, 2005, appellant, the State of Nevada, filed a delinquency petition and a certification petition in the juvenile court. Given the nature of the crime, Eric's level of involvement in the crime, and Eric's age, the State petitioned the court to certify Eric to stand trial in district court as an adult. On September 12, 2005, the juvenile court denied the State's petition. The State now appeals. We conclude that while juveniles do have a constitutional right to a speedy trial in juvenile

proceedings, the State's right to appeal an order denying certification does not abridge that right. We further conclude that the State's right to appeal a denial of certification does not abridge a juvenile's statutory right to final disposition within one year under NRS 62D.310 because that one-year period is tolled while the matter is on appeal. Lastly, we conclude that, in this case, the juvenile court did not abuse its discretion in denying the State's certification petition. The record indicates that the juvenile court properly conducted its analysis under the discretionary arm of NRS 62B.390 as well as the Seven Minors' matrix setting forth the factors to consider when determining certification petitions. Accordingly, we affirm the juvenile court's order."

Labor Comm'r v. Littlefield, 123 Nev. Adv. Op. No. 5 (March 8, 2007). "In Nevada, the Labor Commissioner is charged with administering and enforcing prevailing wage laws, which govern the wages of workers employed on public works projects.[2] As part of his duties, the Commissioner is required to determine and publish, annually, the prevailing wage in each county for "each craft or type of work." [3] Moreover, in determining prevailing wages, the Commissioner is inherently obliged to classify different jobs.[4] In June 2003, respondents Kody Littlefield and Southern Nevada Operating Engineers Contract Compliance Trust (collectively, Littlefield) filed a petition for a writ of mandamus in the district court alleging that the Labor Commissioner abused his discretion when he refused to enforce the published prevailing wage for soils testers during Littlefield's employment, and when he deleted soils testers as a covered classification from the 2002-03 prevailing wage list. Littlefield claimed that removing this classification from the prevailing wage list constituted rulemaking in disregard of the procedures set forth by the APA. The parties agreed to stay the proceedings pending our decision in a related matter, Southern Nevada Operating Engineers v. Labor Commissioner. [5] On September 20, 2005, following our decision in Southern Nevada Operating Engineers, the Commissioner posted his prevailing wages list for

the October 1, 2005, through September 30, 2006, period. This list again omitted the "soils tester" classification and, for the first time, left off the "equipment greaser" classification. In response to the 2005-06 prevailing wages list, Littlefield applied for a temporary restraining order (TRO) and a preliminary injunction, seeking to preclude the Commissioner from deleting the soils tester and equipment greaser classifications without first complying with the rulemaking procedures set forth by the APA. The district court granted the TRO and, after a hearing, the preliminary injunction. The injunction directed the Commissioner to continue posting the soils tester and equipment greaser job classifications as part of the prevailing wages list. In addition, the district court ordered the Commissioner to refrain from deleting those classifications from any future prevailing wages list unless the Commissioner first satisfies APA rulemaking procedures. This appeal followed. With respect to the Labor Commissioner's annual prevailing wages list, we conclude that he must comply with the APA before adding, deleting, or substantially modifying worker classifications. Thus, when the Commissioner deleted the soils tester and equipment greaser classifications from the 2005-06 prevailing wage rate list without first complying with the APA's notice and hearing requirements, he engaged in ad hoc rulemaking. For this reason, the district court did not abuse its discretion when it enjoined the Commissioner from deleting the soils tester and equipment greaser classifications from the annual prevailing wage rate list without first complying with the APA. Accordingly, we affirm the district court's preliminary injunction."

Nevada Yellow Cab Corp. v. Dist. Ct., 123 Nev. Adv. Op. No. 6 (March 8, 2007). "This original petition for a writ of mandamus challenges a district court order disqualifying counsel for petitioner Nevada Yellow Cab Corporation in an insurance bad faith action against Insurance Company of the West (ICW). ICW had previously retained the firm Vannah Costello Canepa Riedy & Rubino

(VCCRR) to represent its insureds in tort actions brought by third parties. In one such case, VCCRR was retained by ICW to represent Yellow Cab. VCCRR was subsequently replaced by new counsel, and the case settled in the middle of trial for more than double the policy limits, with Yellow Cab required to contribute a substantial amount toward the settlement. Petitioner Robert Vannah was a VCCRR partner at the time that VCCRR represented Yellow Cab, although he did not personally work on the case. After ICW terminated VCCRR, the firm dissolved. Vannah and others formed a new firm, and an associate who had performed substantial work on Yellow Cab's representation in the tort action joined Vannah at his new firm. Yellow Cab subsequently hired Vannah and his new firm, petitioner Vannah Costello Vannah & Ganz (VCVG),^[2] to sue ICW for bad faith based on ICW's pretrial rejection of a policy-limits offer. ICW moved to disqualify Vannah and his new firm, and the district court granted its motion. In concluding that writ relief is not warranted in this case, we expressly adopt the majority rule that counsel retained by an insurer to represent its insured represents both the insurer and the insured in the absence of a conflict. Thus, an attorney-client relationship existed between ICW and the associate who had previously defended Yellow Cab, who was now employed by Vannah's new firm. As the district court did not manifestly abuse its discretion in determining that disqualification was warranted, based upon this former representation, the substantial relationship between the two representations, and the adversity of Yellow Cab's and ICW's positions in the bad faith case, we deny this petition."

Hightower v. State, 123 Nev. Adv. Op. No. 7 (April 5, 2007). "The victim in this case was a good samaritan who stopped his vehicle along the roadside to assist a stranded bicyclist in need of help. After the victim exited his vehicle to check a bicycle tire, Hightower's codefendant Derrick Farr repeatedly hit the victim in the face knocking him to the ground. While the victim was on the ground,

Hightower took his wallet and keys. Hightower, Farr, and a female then got into the victim's vehicle and drove away. Las Vegas Metropolitan Police Officer Christian Jackson responded to the area where the robbery occurred. Approximately five minutes later, he observed the victim's vehicle and conducted a felony traffic stop. Inside the vehicle were Hightower, Farr, and Estelle Golightly. Hightower and Farr were both identified by the victim as participants in the robbery. They were arrested; charged with conspiracy, robbery, and grand larceny; and had a joint trial. At trial, Golightly served as a defense witness. At the time, she was incarcerated for a gross misdemeanor conviction and a warrant on a probation violation. Prior to the beginning of the defense case, counsel for Farr informed the district court that he had brought clothing for Golightly to wear while testifying. The district court refused counsel's request to allow Golightly to change out of her jail clothing. Defense counsel for Hightower objected. Golightly testified at trial in her jail clothing. She admitted that she was currently in jail, serving a sentence for a gross misdemeanor and being held for a warrant on a probation violation. She also admitted that she was a crack cocaine addict and a prostitute. Golightly explained that the alleged victim was a john who had let her use his car in exchange for sex. Golightly further explained that Hightower and Farr went with her in the borrowed vehicle on the day they were arrested to pick up some laundry and get something to eat. As a general rule, incarcerated witnesses should not be compelled to appear at trial in prison clothing. However, the burden is on the defendant to timely request that the incarcerated witness be permitted to testify in civilian clothing. While the district court erred by compelling a defense witness to appear at trial while clad in jail attire, the error was harmless beyond a reasonable doubt. We therefore affirm the judgment of conviction."

Richardson Constr. v. Clark Cty. Sch. Dist., 123 Nev. Adv. Op. No. 8 (April 12, 2007). For several years, appellant/cross-respondent

Richardson Construction, Inc., contracted with respondent/cross-appellant Clark County School District (CCSD) to perform various public works projects. In January 1999, Richardson submitted a bidder's prequalification package to CCSD under CCSD's prequalification procedures. Shortly thereafter, Richardson initiated a series of lawsuits against CCSD over its existing contracts. In December 1999, Richardson received a letter from CCSD informing Richardson that its prequalification package had been denied.

NRS 338.1381 provides for a hearing for an applicant whose public works application has been rejected and for judicial review. Because the statute provides an express remedy but does not provide for a private cause of action, we conclude that NRS 338.1381 does not create a private cause of action. Moreover, recognizing a private cause of action under NRS 338.1381 would undermine the purpose of the public works bidding statutes and would require this court to read an additional remedy into the statute where an express remedy already exists. Lastly, the doctrine of primary jurisdiction compels us to refrain from exercising jurisdiction so that technical issues may first be determined by a governmental body with specialized knowledge. Accordingly, we affirm the district court's order.

Byford v. State, 123 Nev. Adv. Op. No. 9 (April 12, 2007).

"Appellant Robert Byford was convicted of first-degree murder and received a sentence of death. This court affirmed Byford's conviction and sentence in 2000.[2] Byford then filed in proper person a timely postconviction petition in the district court seeking habeas relief and appointment of counsel. The district court appointed counsel to represent Byford, and counsel filed a supplement to the petition. The district court eventually denied the petition without conducting an evidentiary hearing.

After our vacatur and remand of the district court's prior order, the district court should have reconsidered Byford's claims as instructed, conducted an evidentiary hearing if necessary, issued a new ruling, and either

drafted its own findings of fact and conclusions of law or announced them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order. None of this occurred here. The State prematurely drafted a proposed order before the district court notified the parties of its new ruling after reconsideration. In addition, the district court and the State should have provided Byford with an opportunity to review and comment upon the proposed order. Accordingly, we vacate the district court's order and remand the matter to the district court for proceedings consistent with this opinion.[8]"

Silver State Elec. v. State, Dep't of Tax., 123 Nev. Adv. Op. No. 11 (May 3, 2007). "The Nevada Department of Taxation (Tax Department), determined in June 2001 that Silver State owed approximately \$200,000 in sales tax and consequently sent Silver State a notice of deficiency determination. Silver State petitioned for redetermination and requested a hearing. Following a hearing, a hearing officer upheld the Tax Department's deficiency determination. Silver State administratively appealed the decision to the Nevada Tax Commission, which affirmed the decision. Silver State then petitioned for judicial review of the Tax Commission's decision. We conclude that NAC 360.452 is a valid regulation and that it does not exceed statutory authority. We also conclude that NRS 360.395 does not violate Silver State's right to equal protection. Therefore, we affirm the district court's order dismissing Silver State's petition for judicial review."

Monroe v. Columbia Sunrise Hosp., 123 Nev. Adv. Op. No. 13 (May 17, 2007). "Appellant Marilyn Monroe brought a medical malpractice suit against respondent Sunrise Hospital and Medical Center and several other caregivers on behalf of herself and her son, James Monroe, in connection with James' birth and delivery. Before the five-year NRCP 41(e) time limit expired, the district court granted Sunrise Hospital's motions for summary judgment against Monroe individually and for partial summary

judgment against James. Several years later, the district court dismissed the entire suit under NRCP 41(e). Because the district court's grant of summary judgment resolved all claims between Monroe and Sunrise Hospital, we conclude that dismissal of Monroe's individual suit under NRCP 41(e) was error.[1]"

Court Rule Changes Opposed

Business community, ACLU share distaste for amicus brief disclosure requirement

By Tony Mauro
Legal Times
June 11, 2007

<http://www.legaltimes.com>

Groups ranging from the American Civil Liberties Union to the U.S. Chamber of Commerce are urging the Supreme Court to withdraw a proposed rule that the groups say would compromise the privacy of their membership rosters.

The revised rule would require groups filing friend-of-the-court briefs with the Court to reveal whether parties in the case — or their lawyers — are members.

For example, if the Chamber filed an amicus curiae brief in support of Company X, or the ACLU filed for Protester Y, the organization would have to tell the Court whether X or Y, its lawyers, or opposing lawyers, are members of the respective organization.

A group of former government lawyers also objected to the rule's proposal that would, in cases in which the United States is a party, require amicus groups to research and reveal whether lawyers in the solicitor general's office listed on the government brief are members. "Forced disclosure of such information would . . .

intrude significantly on the privacy interests of career government attorneys," said the group, led by former Assistant to the Solicitor General James Feldman.

The rule appears aimed at preventing parties from being able to mastermind and file, in effect, two briefs with the Court — one in their own name and the other under the name of an amicus group.

But the groups that are objecting to the rule say it will instead have "a serious chilling effect" on membership, in the words of a joint letter filed by the National Chamber Litigation Center and the National Association of Manufacturers.

Robin Conrad, executive vice president of the chamber litigation center, the Chamber's litigating arm, says the rule would "erode abruptly one of the principal benefits provided by associations such as ours, namely amicus advocacy in Supreme Court proceedings."

Corporations would be reluctant to join trade associations if they thought their membership might be revealed in the contest of Supreme Court briefings, says the letter by Conrad and NAM general counsel Jan Amundson. In advocating their positions before government agencies, companies "rely on us to carry forward their message so that they will not be directly and publicly identified as supporting a particular view." Exposed companies can become targets of "boycotts, strikes, [and] adverse publicity," they write.

Conrad says the Court's current rule, which merely requires amicus groups to report whether a party or its counsel authored the amicus brief, has been a "strong and effective" way of discouraging parties from controlling the content of amicus briefs.

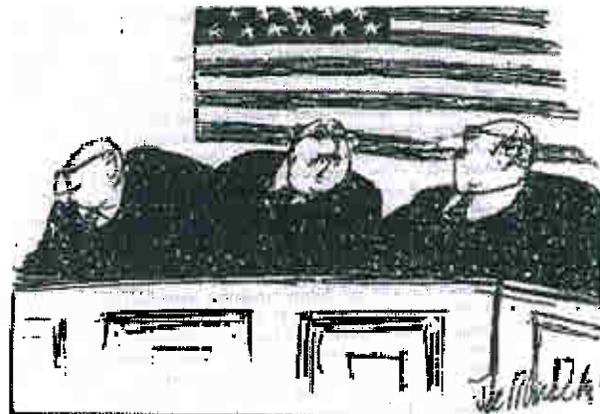
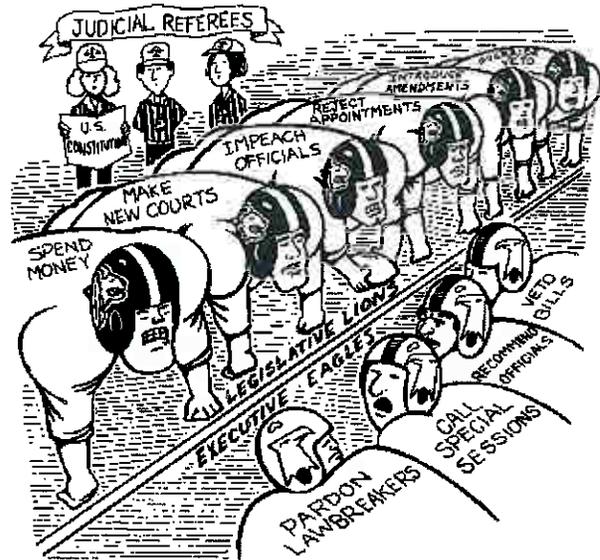
For their part, the ACLU and the Public Citizen Litigation Group also filed a joint letter objecting to the new rule. "Public disclosure of their private membership should not be the price of bringing or litigating a case in the Supreme Court," the letter stated.

Steve Shapiro, legal director of the 550,000-

member ACLU, says in an interview, "Requiring us to go through our entire membership rolls does not, I think, get at what the Court is interested in, namely double-dipping briefs."

The Court clerk's office solicited public comment on the rule changes on May 14 and said revised rules will take effect Aug. 1. A group of 41 appellate advocates, led by David Gossett, a partner at Mayer, Brown, Rowe & Maw, sent a letter that suggested a possible wording that would be less intrusive. The practitioners also commented on a range of other rule changes, including a proposal to require that briefs use New Century Schoolbook 12-point type instead of the current 11-point Roman type.

"Some question whether it is wise for the Court to specify as the required font a font that comes neither with Windows nor the Macintosh operating system," the letter states, arguing that the new font would create confusion and extra costs.



"Do you ever have one of those days when everything seems unconstitutional?"

FRIDAY, JUNE 1, 2007

WWW.USDOJ.GOV

Attorney General Alberto R. Gonzales Announces Expansion of Justice Department Efforts and Proposes New Legislation to Help Prevent and Combat Violent Crime

WASHINGTON — Attorney General Alberto R. Gonzales today, speaking before employees at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), unveiled new cities designated for targeted federal violent crime task forces and announced new comprehensive legislation that strengthens federal laws targeting violent criminals as part of the Department's expanding efforts to fight violent crime.

"Keeping America's neighborhoods safe is one of the central functions of government at all levels," said Attorney General Alberto Gonzales. "Today's new task forces are a part of our expanded efforts and commitment by the Department of Justice to support state and local law enforcement in the fight against violent crime. The legislation we have proposed today will make it easier for federal investigators and prosecutors to take dangerous criminals off the streets and put them behind bars for longer."

New Cities Designated for Violent Crime Task Forces

Today's announcement expands the Violent Crime Impact Team (VCIT) initiative to an additional four cities, including Mesa, Ariz.; Orlando, Fla.; San Bernardino, Calif.; and San Juan, Puerto Rico, bringing to 29 the total number of cities where the successful program has helped combat violent crime.

The VCIT initiative uses innovative technology, analytical investigative resources and an integrated federal, state and local law enforcement strategy to identify, disrupt, arrest and prosecute the most violent criminals in select cities across the nation. Modeled after Project Safe Neighborhoods' (PSN) successes, the VCIT initiative's primary goal is to reduce the number of homicides and other violent crimes committed with firearms in targeted communities throughout the country. Since its launch in 2004, VCIT partners have arrested more than 9,800 gang

members, drug dealers, felons in possession of firearms, and other violent criminals, including 1,650 identified as "worst of the worst" criminals, and recovered more than 11,100 firearms.

"ATF looks forward to taking the success we and our partners have achieved to these additional VCIT cities," said ATF Acting Director Michael J. Sullivan. "This is a program that works and brings the best resources of federal, state and local law enforcement to bear on violent crime."

Attorney General Gonzales today also announced the expansion of the FBI's Safe Streets Task Force program to include Orlando, Fla. The FBI has more than 180 Safe Street Task Forces nationwide that focus on gangs and violent crime. The task forces are comprised of local, state, and federal investigators representing more than 500 law enforcement agencies throughout the United States. By targeting and dismantling violent organized gangs that wreak havoc in cities and towns across the country, as well as investigating violent criminals involved in federal robberies, carjackings, murders and kidnappings, FBI's Safe Streets Task Forces are helping keep America's cities and neighborhoods safe.

"Fighting violent crime is deeply rooted in the FBI's nearly 100-year history," stated Assistant Director Kenneth W. Kaiser of the FBI Criminal Investigative Division. "Key to success is the FBI's formula for combating violent crime and gang activity, which includes leveraging our law enforcement partners, sharing intelligence, and preparing investigations for prosecution. The FBI is pleased to announce the establishment of its most recent Safe Streets Task Force in Orlando, adding to the more than 180 Task Forces engaged in disrupting violent crime and dismantling gangs nationwide."

New Legislation to More Effectively Fight Violent Crime

As part of today's announcement, the Department of Justice proposed the Violent Crime and Anti-Terrorism Act of 2007, a comprehensive package including violent crime legislation that amends and strengthens existing laws to ensure that federal law enforcement agencies are able to successfully investigate and prosecute many types of violent crime. The proposed bill will improve existing criminal

laws to close gaps and strengthen penalties, provide greater flexibility in the penalties that could be imposed on federal firearms licensees who violate the Gun Control Act, and restore the binding nature of sentencing guidelines. The bill also includes provisions that strengthen laws pertaining to drug enforcement, terrorism and child pornography.

Improving Violent Crime Prevention and Strengthening Anti-Gang Measures:

The proposed bill amends several criminal statutes to close gaps and strengthen penalties and existing tools used to combat violent crime, including firearms and gang violence. Specifically, these provisions:

- Strengthen the statutory prohibition on illegal firearm transfers by doubling the maximum penalty for transferring a firearm that will be used to commit a crime of violence or drug trafficking offense;
- Increase the maximum penalty for the general federal criminal conspiracy statute, making the conspiracy statute more useful in prosecuting conspiracies to commit offenses, such as firearms offenses, and bringing the maximum penalty for conspiracy in line with the sentencing guidelines;
- Amend the armed career criminal statute to create a tiered penalty approach for felons with prior drug trafficking or violent felony convictions;
- Extend the statute of limitations for violent crimes and for terrorism-related crimes to 10 years—from five years for violent crimes and eight years for terrorism-related crimes; and
- Create a new statutory prohibition against crimes of violence by illegal aliens.

Flexible Penalties for Firearms Dealers' Violations of the Gun Control Act:

The proposed bill provides additional flexibility in the penalties that can be imposed on federal firearms licensees (FFLs) that violate the Gun Control Act. Specifically, the bill will:

- Establish additional, graduated sanctions for certain violations of the federal firearms laws,

including suspension of federal firearms licenses and imposing civil monetary penalties. Such lesser sanctions will enable ATF to more effectively address violations of the Gun Control Act and provide greater incentives for licensees to comply with the law.

Restore Binding Nature of Sentencing Guidelines:

For every federal crime, the U.S. Sentencing Guidelines provide a range of punishments in which a criminal convict's sentence should fall. In *U.S. v. Booker*, the Supreme Court held that the Sentencing Guidelines are advisory, freeing federal courts to go below the guidelines range when they deem it reasonable to do so in specific cases. The proposed Sentencing Reform Act will:

- Restore the binding nature of the guidelines by making the bottom of the guideline range for each offense a minimum sentence that must be imposed when the elements of the offense are proven; and
- Provide rights of appeal to both the United States and the defendant to challenge the sentencing determinations made by the district court.

Other Important Provisions:

In addition to helping law enforcement combat violent crime, the proposed legislation also amends and strengthens laws targeting terrorists, sexual predators, and drug traffickers. Specifically, these provisions will:

- Strengthen laws against sexual predators by establishing a minimum sentence of two years for possessing child pornography;
- Provide technical improvements to the federal narcotics laws;
- Clarify the process for obtaining cell phone location orders in the context of an investigation;
- Amend terrorism-related authorities to close gaps in the law; and

- Provide additional resources and strengthen existing tools for law enforcement to combat terrorism.

Today's announcement comes two weeks after Attorney General Gonzales unveiled the framework for a new violent crime strategy to assist federal, state and local law enforcement in combating violent crime. The new strategy was developed after the Attorney General launched the Initiative for Safer Communities to investigate the increase of certain types of violent crime in 2005 and to devise solutions to help communities struggling with violent crime. The strategy calls for additional prosecutors, new training, more funds, enhanced prevention efforts and a crackdown against America's most violent offenders. The new efforts announced today supplement the work of federal, state and local law enforcement already combating violent crime through this strategy.

In addition to the programs mentioned in today's announcement, the Department of Justice continues to provide assistance to state and local law enforcement through existing efforts, such as the FBI's National Gang Intelligence Center, the U.S. Marshals Service's (USMS) Regional Fugitive Task Forces and district fugitive task forces, the Criminal Division-led National Gang Targeting, Enforcement & Coordination Center (GangTECC), Project Safe Neighborhoods (PSN), and the anti-gang strategies that are already in place in each judicial district across the country.

Editors Note: Las Vegas is included in the 29 cities which have a Violent Crime Impact Team (VCIT).

NINTH CIRCUIT CASES

www.ca9.uscourts.gov/ca9/newopinions.nsf

Tang v. Gonzales, No. 04-70804 (June 6, 2007).

"We review the petition of Zi Zhi Tang ("Tang"), a native and citizen of the People's Republic of China. Tang filed an application for asylum and withholding of removal, alleging that the abortion performed on his wife, Li Zhen Tang ("Li Zhen"), constituted persecution by the Chinese government as a forced abortion under 8 U.S.C. § 1101(a)(42)(B). The Immigration Judge ("IJ") denied Tang's application, stating that Tang had not demonstrated that the abortion procedure performed on his wife was "forced" within the meaning of the statute. The Board of Immigration Appeals ("BIA") affirmed. We grant the petition for review. We hold that Tang established that Li Zhen underwent a forced abortion within the meaning of § 1101(a)(42)(B), *see Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004), and is therefore statutorily eligible for asylum. We remand for the Attorney General to exercise discretion on Tang's asylum claim. We further hold that victims of forced abortion, like victims of forced sterilization, are statutorily entitled to withholding of removal. We therefore grant withholding of removal."

Gruman v. Lesman Fisheries, No. 05-35916 (June 6, 2007). "This case raises the question whether a fight aboard a ship between a seaman and his former maritime employer over unpaid wages can give rise to federal admiralty jurisdiction. Because Gruver has satisfied both the location and connection tests, the district court erred in concluding that it lacked subject matter jurisdiction to hear this case. We therefore REVERSE and REMAND for further proceedings. We find that it does and therefore reverse the district court's

dismissal of the case for lack of subject matter jurisdiction.”

[USA v. Narvaez-Gomez](#), No. 05-50501 (June 6, 2007). “Defendant Luis Narvaez-Gomez (“Gomez”), also known as Manuel Gomez-Felis, appeals his conviction and sentence for illegal re-entry after removal in violation of 8 U.S.C. § 1326. Gomez contends that the district court improperly (1) denied his motion to suppress post-*Miranda* statements, (2) excluded his cross-examination of government witnesses regarding official record-keeping, (3) imposed a 16-level enhancement for committing a prior crime of violence and (4) imposed a sentence greater than two years in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).”

[Gautt v. Lewis](#), No. 03-55534 (June 6, 2007). “We consider whether Darrell Anthony Gautt’s constitutional due process right to be informed of the charges against him was violated when he was charged with a sentencing enhancement under one statute, section 12022.53(b) of the California Penal Code,¹ but had his sentence enhanced under a second, different statute, section 12022.53(d). The first statute, not the second, was alleged by number and by nearly verbatim description in the information. We hold that Gautt’s due process right was indeed violated when, as a result of this discrepancy, he was sentenced pursuant to a twenty-five-year-to-life enhancement, rather than a ten-year enhancement, and that the California appellate court’s decision to the contrary constituted “an unreasonable application of [] clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d). We therefore reverse the district court’s denial of Gautt’s petition for a writ of habeas corpus. On remand, the district court shall grant a conditional writ of habeas corpus, ordering that the state release Gautt unless it re-sentences him.”

[USA v. Mayer](#), No. 06-50481 (June 6, 2007). “David Cary Mayer (Mayer) appeals his conviction

for travel with intent to engage in illicit sexual conduct under 18 U.S.C. § 2423(b). He argues that the district court should have dismissed the charges against him because the investigation that led to his arrest violated the First, Fourth, and Fifth Amendments. Specifically, Mayer contends that the government lacked reasonable suspicion when it sent an undercover agent to meetings of the North American Man/Boy Love Association (NAMBLA) and that the agent improperly instigated criminal conduct among its members. The district court denied Mayer’s motion to dismiss the indictment on these grounds, and we affirm.”

[USA v. Grisel](#) No. 05-30585 (June 5, 2007). “We took this case en banc primarily to reexamine the validity of *United States v. Cunningham*, 911 F.2d 361 (9th Cir. 6738 UNITED STATES V. GRISSEL 1990) (per curiam). In *Cunningham*, we held that second degree burglary under Oregon law is a categorical burglary offense under the analysis required by *Taylor v. United States*, 495 U.S. 575 (1990), for purposes of applying the Armed Career Criminal Act of 1984 (“ACCA”), 18 U.S.C. § 924(e). *Cunningham*, 911 F.2d at 363. We now hold that *Cunningham* was wrongly decided and expressly overrule it.”

[Abdala v. INS](#), No. 06-55774 (June 4, 2007). “Liban Abdala (“Abdala”) was ordered removed from the United States to Somalia as a result of his criminal convictions. While in Immigration and Naturalization Service (“INS”) custody, Abdala filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in which he challenged the length of his pre-deportation detainment. Shortly after filing that petition, Abdala was deported. We hold that because Abdala’s habeas claims challenged only the length of his detention, as distinguished from the lawfulness of the ABDALA V. INS 6713 deportation order, his grievance could no longer be remedied once he was deported. His petition was thus rendered moot by his removal.”

[Carnes v. Zamani](#), No. 05-15084 (June 4, 2007). “Appellants Phillip Carnes, Jennifer Carnes, Kathryn Schaller, Kevin Schaller, and H. Gene Carnes (“the Carneses”) appeal the district court’s denial of their motion for attorney fees and costs incurred in enforcing a judgment in their favor against appellees Michael A. and Nancy Zamani (“the Zamanis”). This appeal raises the question of whether Rule 69(a) of the Federal Rules of Civil Procedure applies to a motion for post-judgment attorney fees, and if so, whether under California law, the Carneses’ fee motion was untimely. The district court held that Rule 69(a) applied to the Carneses’ fee motion and that the motion was untimely. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.”

[Saberi v. Commodity Future Trading Commission](#), No. 05-71590 (June 4, 2007). “We are called upon to decide whether a rule of a commodity exchange can form the basis of federal agency action to punish its violation. If so, was the agency finding proper, under the circumstances? Petitioner Andy Saberi (“Saberi”) intentionally violated Chicago Mercantile Exchange (“CME”) Rule 8302.E, a speculative position limit rule. The Commodity Futures Trading Commission (“CFTC”) determined Saberi’s violation of CME Rule 8302.E was a violation of 7 U.S.C. § 6a(e) (“§ 6a(e)”) and imposed a cease and desist order, a \$110,000 fine, and banned Saberi from trading on all exchanges under CFTC control for 30 days. Contrary to Saberi’s contention in his petition for review, CME Rule 443 does not limit the CFTC’s ability to impose sanctions for a violation of § 6a(e). Further, contrary to Saberi’s contention, the CFTC’s imposition of sanctions does not violate due process. We deny the petition.”

[Animal Legal Defense Fund v. Veneman](#), No. 04-15788 (June 4, 2007.) “This case involves a challenge to the United States Department of Agriculture’s (“USDA”) decision not to adopt a draft policy that would have provided guidance to various regulated entities on the treatment of

nonhuman primates under the Animal Welfare Act. When USDA ultimately decided to abandon the draft policy, the Animal Legal Defense Fund filed suit alleging that USDA’s decision was arbitrary, capricious, and an abuse of discretion. The district court granted USDA’s motion to dismiss, and ALDF timely appealed. Over a vigorous dissent, a panel of this court reversed the district court. *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826 (9th Cir. 2006).”

[Ford Motor Company v. Todecheene](#), No. 02-17048 (June 4, 2007). “The tribal court did not “plainly” lack jurisdiction under the second exception, recognized in *Montana v. United States*, 6670 FORD MOTOR CO. v. TODECHEENE 450 U.S. 544, 565 (1981), to the general rule that tribes do not have jurisdiction over non-members. *See Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) (requiring exhaustion unless the tribal courts plainly lack jurisdiction). As such, the appeal is stayed until Ford exhausts its appeals in the tribal courts. The panel retains jurisdiction over the appeal. Ford will be deemed to have exhausted its tribal remedies once the Navajo Nation Supreme Court either resolves the jurisdictional issue or denies a petition for discretionary interlocutory review pursuant to Navajo Nation Code tit. 7, § 303 (“The Supreme Court [of the Navajo Nation] shall have the power to issue any writs or orders . . . [t]o prevent or remedy any act of any Court which is beyond such Court’s jurisdiction.”). The parties shall notify this court no later than 15 days from the date the Navajo Nation Supreme Court either denies a petition for discretionary review, or, if the Navajo Nation Supreme Court grants such a petition, the issuance of its opinion resolving the jurisdictional question. The petitions for rehearing en banc filed by Joe and Mary Todecheene and the Navajo Nation are **DENIED** as moot, and the petitions for rehearing and rehearing en banc filed by Ford Motor Company are **DENIED**.”

[Metcalf v. Golden](#), No. 05-55158 (June 4, 2007). “Appellants Donald and Janet Metcalf were the primary financial backers of a start-up company

[Ninth Circuit holds that online bankruptcy advice from expert system is unauthorized practice of law](#)

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A recent 9th Circuit case, [In re Reynoso](#) (February 27, 2007) holds that bankruptcy advice provided by an expert system “was the conduct of a non-attorney” and therefore “constituted the unauthorized practice of law.”

[Lawyers receiving unsolicited e-mails from prospective clients via website must hold information received in confidence](#)

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In the absence of an effective disclaimer, a lawyer who receives unsolicited information from a prospective client through an e-mail link on a law firm website must hold the information in confidence, even if the lawyer declines the representation. [Massachusetts Bar Opinion 2007-01](#). The opinion also addresses whether the lawyer’s firm can represent a party adverse to that prospective client.

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