

# THE PUBLIC LAWYER

PUBLIC LAWYERS SECTION

JULY 2007

## NEVADA CASES

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

Edwards vs. Ghandour 123 Nev. Adv. Op. No. 14 (June 7, 2007) “These proper person appeals present us with an opportunity to clarify two issues: (1) that our decision in Rickard v. Montgomery Ward & Co., holding that a defendant’s bankruptcy operates to toll NRCPC 41(e)’s five-year period for bringing an action to trial, applies only to the particular defendant or defendants who have filed for bankruptcy protection, not to defendants who are not bankruptcy debtors; and (2) that an appeal from the district court’s final judgment does not affect that judgment’s finality for purposes of claim preclusion. With regard to the tolling of NRCPC 41(e)’s prescriptive period during a bankruptcy automatic stay, a defendant’s bankruptcy filing generally invokes the automatic stay with respect to proceedings against that defendant only. Thus, an action can proceed against nondebtor codefendants, and NRCPC 41(e)’s five-year rule continues to run with respect to those codefendants unless the trial court enters a separate stay of the action. And since the automatic bankruptcy stay generally applies to actions “against the debtor,” not actions by a debtor, a plaintiff’s filing for bankruptcy protection usually will not implicate the bankruptcy stay or toll the

NRCPC 41(e) period. The district court also properly dismissed Edwards’ second action, which was barred by NRCPC 41(e)’s claim-preclusion provision. Edwards’ appeal from the NRCPC 41(e) dismissal order did not impact that order’s preclusive effect, and Edwards’ second action asserted the same claims for relief against the same defendants. We therefore affirm the district court’s order dismissing Edwards’ second action in Docket No. 44207, as well as the attorney fees award to Gilanfarr.”

McGrath vs. State, Dep’t of Public Safety, 123 Nev. Adv.Op. No. 15 (June 7, 2007) “In this appeal, we consider whether a workers’ compensation claimant who alleges that she has suffered extreme and unusual stress on the job is required to pinpoint a discrete, identifiable event giving rise to the stress. Because the plain, unambiguous language of NRS 616C.180 indicates that a workers’ compensation claimant must establish a causal relationship between her mental injuries and a discrete, identifiable, traumatic event and because the claimant here has not done so, we affirm the district court’s order denying judicial review of the appeals officer’s decision denying compensation. Appellant Lori McGrath was an employee of respondent, the Nevada Highway Patrol (NHP), and the founder of NHP’s K-9 program. McGrath alleges that, between the spring of 2001 and December 2002, she was the

target of a campaign of harassment and abuse orchestrated by coworkers and superior officers. McGrath's specific allegations are not directly relevant to this appeal, but include, among other things, the cancellation of the K-9 program in retaliation for McGrath's decision to file a complaint with the Equal Employment Opportunity Commission, inappropriate sexual advances, and a series of groundless internal affairs investigations initiated by coworkers. The plain, unambiguous language of NRS 616C.180 requires a workers' compensation claimant to demonstrate that a stress-related injury was caused by a discrete, identifiable event in time of danger. By contrast, when a claimant alleges that a stress-related injury was caused by a gradual escalation of stress over a period of time, that injury is not compensable under Nevada workers' compensation law. Therefore, we affirm the district court's order denying judicial review of the appeals officer's decision denying McGrath's workers' compensation claim."

[Johnson vs. State](#), 123 Nev. Adv. Op. No. 17 (June 14, 2007) "In this opinion, we consider whether a defendant may be convicted of attempting to lure a child under NRS 201.560 when the "child" is actually an undercover law enforcement officer posing on the Internet as a child. We conclude that such a conviction is proper. In his postconviction petition for a writ of habeas corpus, Johnson claimed his counsel was ineffective for failing to argue at any stage in the proceedings that, because Johnson did not communicate with any actual children, it was impossible for him to have violated the attempt provision of NRS 201.560. He also claimed his counsel was ineffective for allowing him to plead guilty under these circumstances. The district court denied Johnson's petition, ruling that a violation of the attempt provision of NRS 201.560 does not require an actual child victim. This appeal followed. A violation of the attempt provision of NRS 201.560 does not require an actual child victim. Conviction for violation of the attempt

provision is proper as long as the defendant intended to communicate with a child. The district court did not err in rejecting Johnson's claims that his counsel was ineffective for failing to argue otherwise and for allowing him to plead guilty. Johnson was also properly advised regarding the sentence of lifetime supervision, and the district court did not abuse its discretion in ruling that his guilty plea was entered knowingly and voluntarily. Accordingly, we affirm the order of the district court denying Johnson's petition."

[Matter of Discipline of Droz](#), 123 Nev. Adv. Op. No. 20 (June 28, 2007) "This matter concerns our automatic review under SCR 105(3) of a Southern Nevada Disciplinary Board hearing panel's recommendation for professional discipline. The panel recommended that disbarred Utah attorney Paul Droz, who has never been licensed in Nevada, be enjoined from practicing law in Nevada or appearing in any Nevada court, that he be fined \$3,000 and assessed the disciplinary proceeding's costs, and that the state bar be directed to refer this matter to appropriate law enforcement authorities for possible criminal investigation and to report the matter to the Utah and Arizona bars. We conclude that jurisdiction over Droz, as one who actually practiced law in Nevada (although without a license), is proper under SCR 99, and we approve the hearing panel's recommendations. Droz was admitted to the Utah bar in 1978. On June 1, 2006, he was disbarred in Utah, based on misconduct in connection with three matters. In those matters, Droz accepted retainers from clients but then failed to perform the requested services and failed to return or account for the unearned retainers. Droz neither responded to the Utah disciplinary authorities' inquiries nor appeared at the Utah disciplinary hearing. In sum, we conclude that the panel's recommended discipline is appropriate "to punish or prevent misconduct that occurs" in

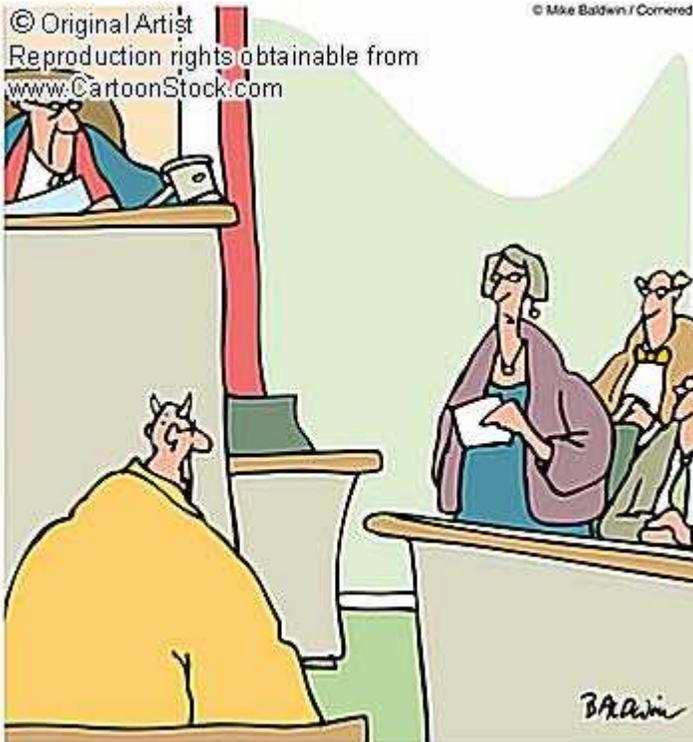
Nevada, and that it should be approved, with the one slight modification noted above.

Accordingly, Paul Droz is prohibited from practicing law in Nevada and from appearing in any Nevada court. Additionally, Droz shall pay the costs of this disciplinary proceeding and a fine of \$3,000. Further, we direct the state bar to refer this matter to any appropriate federal, state, or county law enforcement authorities for possible criminal investigation. We also direct the state bar to serve a copy of this opinion upon the Utah and Arizona bars. Finally, the state bar shall serve a copy of this opinion upon Droz at his last-known address.”

[Callie vs. Bowling](#), 123 Nev. Adv. Op. No. 22 (June 28, 2007) “In this appeal, we consider whether a judgment creditor in a domesticated foreign judgment may add a nonparty to a final judgment, under the alter ego doctrine, simply by moving to amend the judgment. We conclude that such a procedure violates the due process rights of the nonparty whom the creditor seeks to add. Instead, to observe the requisite attributes of due process, a judgment creditor who wishes to assert an alter ego claim must do so in an independent action against the alleged alter ego. Because the correct procedure was not followed in the present case, we vacate the district court’s amended domesticated foreign judgment. Because Callie did not receive notice and was not the subject of an independent action with respect to Bowling’s alter ego claim, we conclude that the district court erred by granting Bowling’s motion to amend the domesticated foreign judgment to add Callie, in his individual capacity, as an alter ego of ITB. Accordingly, we vacate the district court’s amended domesticated foreign judgment.”

[Schuster vs. District Court](#), 123 Nev. Adv. Op. No. 23 (June 28, 2007) “Donald Schuster has petitioned this court for a writ of mandamus or prohibition, alleging that the district court erred in denying his

pretrial petition for a writ of habeas corpus and/or motion to dismiss a grand jury indictment. Specifically, Schuster requests this court to compel the district court to dismiss the indictment on the ground that the State improperly refused to instruct the grand jury on the law relating to self-defense. Although we deny the petition, we conclude that this claim presents a substantial legal issue warranting a published decision. In February 2006, the State commenced grand jury proceedings relating to crimes allegedly committed during an altercation involving Schuster, his brother, and three teenagers. One of the teenagers was fatally wounded by a gunshot fired by Schuster, and other participants were injured. The State presented the following evidence to the grand jury. We have previously expressed an unwillingness to expand the rights of grand jury targets beyond those explicitly provided by statute or constitutionally required. Consistent with that approach, we now expressly hold that Nevada’s statutory scheme regulating grand juries does not impose an independent, mandatory duty upon the State to instruct the grand jury on the legal significance of exculpatory evidence. Accordingly, we deny Schuster’s petition for a writ of mandamus or prohibition.”



**"We find the defendant guilty as sin."**

### **MCCA Releases Report on Women GCs in the Fortune 500**

By Katherine Sesterhenn

[www.insidecounsel.com](http://www.insidecounsel.com)

The Minority Corporate Counsel Association (MCCA) released its 2007 survey of Fortune 500 companies. Survey results reveal that women continue to make inroads into top legal positions in large companies. According to the survey, women serve as the top lawyers at 90 Fortune 500 companies. This is an increase from 81 women GCs in the 2006 survey and 75 women GCs in 2005.

Of the 90 companies with women GCs, 84 women are Caucasian, three African American, one Hispanic American, and one Asian American. One woman declined to report her race/ethnicity. Sandra Leung of Bristol-Myers Squibb is the first Asian-American woman to become GC of a Fortune 500 company. The study also revealed:

- 39 women are currently serving as GCs of the highest grossing Fortune 250 companies, up five from 2006.

- The top states in terms of Fortune 500 companies with women GCs are New York and Texas (12 each), New Jersey (eight), California and Illinois (seven each).

- Fortune 501-1000 companies displayed a decrease in women GCs. 70 women currently serve as GCs among Fortune 501-1000 companies as compared to 74 in 2006. Explanations for the decrease in women GCs include retirement, moving up to Fortune 500 companies, and companies dropping off the Fortune 1000 list. In four instances last year, men were selected to replace the women GCs.

### **California Finalizes Workplace Harassment Training Rules**

By Mary Swanton

[www.insidecounsel.com](http://www.insidecounsel.com)

After spending nearly two years on revisions, the California Office of Administrative Law approved final regulations for the state's mandatory sexual harassment training law on July 18. The AB1825 regulations specify high standards for all forms of harassment training, especially e-learning.

AB1825 required employers with more than 50 employees doing business in California to provide sexual harassment prevention training to all supervisors every two years starting in 2005. Newly hired or promoted supervisors must be trained within six months of assuming a supervisory position. The new regulations governing that training take effect Aug. 17, 2007.

"The purpose of the regulations is to provide clarity to employers on the specific requirements of the California sexual harassment training law, as well as practical guidelines for

compliance," said Shanti Atkins, president and CEO of ELT, a provider of online compliance training. "The regulations have set a high bar for what constitutes effective training."

According to Atkins, the new rules are highly technical and set stringent requirements. "A 'check the box' approach to training will undoubtedly create liability, and many programs will be out of compliance," she said.



Bob unwittingly pleads insanity.

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### **Three Former Milwaukee Police Officers Found Guilty of Civil Rights Crimes**

WASHINGTON – A Milwaukee, Wis., jury today found three former Milwaukee police officers guilty of crimes relating to a brutal assault on two men in October 2004. Former police officers Jon Bartlett, Andrew Spengler and Daniel Masarik were each found guilty of conspiring to violate the civil rights of Frank Jude and Lovell Harris and of violating the civil rights of Frank Jude by assaulting him. Each of the defendants faces a sentence of up to 20 years in prison and a \$500,000 fine. A sentencing date has not yet been determined. Four other police officers involved in the

assaults have previously pleaded guilty to federal crimes in connection with the same incident. A fourth defendant, and current Milwaukee police officer, Ryan Packard, was acquitted on all counts.

The evidence at trial showed that Bartlett, Spengler and Masarik, after several hours of drinking at a house party hosted by Spengler, surrounded a vehicle containing Frank Jude, Lovell Harris and two women. The defendants stopped the vehicle and accused the passengers of stealing a police badge. The defendants identified themselves as police officers, brandished knives, physically pulled the victims from the vehicle, and intimidated Frank Jude and the other occupants of the vehicle into submitting to a search. The evidence also proved that Bartlett and another off-duty police officer forced Lovell Harris to sit on a curb while being guarded at knife point, and that Bartlett, Masarik and Spengler assaulted Frank Jude. In addition, the three punched and kicked Jude in the head, body and groin both before and while he was handcuffed, and Bartlett stuck a sharp object into each of Jude's ears.

"These officers used their positions of authority to brutally victimize Frank Jude and Lovell Harris," said Wan J. Kim, Assistant Attorney General for the Civil Rights Division. "While the vast majority of law enforcement officers carry out their difficult duties in a professional manner, the Department of Justice will continue to vigorously prosecute those who cross the line and commit such wanton and unlawful acts."

In announcing the convictions, Wan J. Kim, Assistant Attorney General for the Civil Rights Division, commended the U.S. Attorney's Office for the Eastern District of Wisconsin, the Criminal Section of the Civil Rights Division, and the Federal Bureau of Investigation for jointly spearheading this federal investigation and prosecution, which included the assistance of local authorities. Steven M. Biskupic, U.S. Attorney for the Eastern District of Wisconsin, noted the significant contribution of the Milwaukee County District Attorney's Office, investigators from the Milwaukee County District Attorney's Office, and the Milwaukee Police Department.

U.S. Attorney Biskupic, Assistant U.S. Attorneys Mel Johnson and Carol Kraft, and Trial Attorneys Stephen

Curran and Edward Caspar of the Civil Rights Division prosecuted this case.

The Civil Rights Division is committed to the vigorous enforcement of the federal criminal civil rights statutes, such as laws that prohibit the willful use of excessive force or other acts of misconduct by law enforcement officials. In fiscal year 2006, almost 50 percent of the cases filed by the Criminal Section involved excessive force or law enforcement misconduct. Since fiscal year 2001, the Division has filed 25 percent more such cases and convicted nearly 50 percent more defendants in these cases than in the preceding six years.



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"Yes, that's him there. The fellow making the finger-across-the-throat gesture."

### NINTH CIRCUIT CASES

[www.ca9.uscourts.gov/ca9/newopinions.nsf](http://www.ca9.uscourts.gov/ca9/newopinions.nsf)

[Foote vs. Del Papa](#), No. 06-15094 (July 3, 2007)

"In the early morning of February 1, 1987, Foote and a man who Foote later identified as his father (or father-in-law) entered the Mint Hotel in Las Vegas, Nevada. Jane Doe, Keith Taylor, and Foote's wife, Vicky, were seated together at a bar in the hotel. Foote and his father argued with Doe, Taylor, and Vicky. A security guard removed Foote and his father from the premises. Approximately 5:30 a.m., Vicky, Doe, and Taylor went to the

Foote's apartment. Vicky and Doe went inside while Taylor remained outside in his car. Doe testified at trial that she was drunk when she arrived at the apartment, where she and Vicky planned to gather some of Vicky's clothes. Doe also testified that they planned to lie to Foote, telling him that Vicky would spend the night at Doe's residence when in fact Taylor and Vicky planned to spend the rest of the night together. According to Doe, an argument erupted between the Footees. Brandishing a knife, Foote forced Doe to perform fellatio and had vaginal intercourse with her. Doe stated that after falling asleep for a time, she was able to leave the apartment with Vicky Chamberlain. The following month, Foote filed a complaint in United States District Court for the District of Nevada naming Chamberlain and the Public Defenders Office as defendants. Foote alleged that Chamberlain "refused to ask [him] pertinent Questions"; that she "approached [him] . . . with a plea Bargain, even though [he] demanded [his] right to trial"; that "all efforts to contact Ms. Chamberlain to prepare his defense [were] futile"; that "Chamberlain refused to supply [him] with all copies of records concerning [his] arrest"; and that she thereby failed to afford him "all of [his] rights as guarante[ed by] the Constitution of the United States." Foote appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. We have jurisdiction to review the district court's judgment under 28 U.S.C. § 2253(a). *See Olvera v. Giurbino*, 371 F.3d 569, 572 (9th Cir. 2004). We review the judgment de novo, *Nunes v. Mueller*, 350 F.3d 1045, 1051 (9th Cir. 2003), and we affirm."<sup>1</sup>

[Shroeder vs. Tilton](#), No. 06-15391 (July 3, 2007) "In May 1999, Russell Franklin Schroeder was charged under California Penal Code § 288 and § 288.2 with five counts of sexual misconduct in Santa Clara County Superior Court: three counts of committing a lewd act on his granddaughter Jessica D., one count of committing a lewd act on his

granddaughter Alicia D., and one count of exhibiting harmful material to Jessica. The events giving rise to the indictment took place in January 1994. At that time, Schroeder's daughter Marcia left Jessica and Alicia with Schroeder overnight while she went on a short trip. Schroeder allegedly made both girls perform oral sex on him, performed oral sex on Jessica, made Jessica touch her genitals with a vibrator, and showed pornographic movies to Jessica. Jessica testified at trial to these events. At trial, the prosecution introduced evidence, over the defense's objection, that Schroeder had previously molested both of his daughters, Marcia and Lisa, over a period of several years. Similar evidence suggested that Schroeder paid other young girls to take off their clothes, offered to pay young girls for oral sex, and had been seen naked by young girls. The trial court admitted this prior uncharged conduct under California Evidence Code § 1108. Section 1108 became effective in 1996, after Schroeder committed the charged offenses but before he was brought to trial. The jury convicted Schroeder on all five counts. The Santa Clara County Superior Court sentenced Schroeder to a term of twelve years. Schroeder appealed to the California Court of Appeal, arguing in part that applying § 1108 to his trial violated his rights under the Ex Post Facto Clause. We consider whether a California state trial court violated the Ex Post Facto Clause when it admitted evidence of prior sexual misconduct under California Evidence Code § 1108. In *Carmell v. Texas*, the Supreme Court explained that some, but not all, rules of evidence have an impermissible retroactive effect if used in criminal trials where the conduct at issue took place before the rule of evidence was adopted. *See* 529 U.S. 513, 530-33, 544-52 (2000). We now face the question of whether the California court unreasonably applied Supreme Court law in holding that California Evidence Code § 1108, which addresses the admissibility of prior sexual offenses, falls outside the scope of *Carmell*. Because § 1108 did not affect the quantum of evidence sufficient to convict Schroeder, the state did not violate his right

to be free from retroactive punishment when it allowed § 1108 evidence to be presented at his trial. The decision of the California courts was neither contrary to nor an unreasonable application of clearly established Supreme Court law under *Carmell*.

**AFFIRMED.”**

[United States vs. Gonzalez](#), No. 05-10543 (July 3, 2007)  
“Southwest Airlines Flight 2466, bound for Ontario, California, from Las Vegas, Nevada, had an uneventful takeoff. Before long, the cabin was in total chaos. Passenger Salvador Gonzalez became hysterical, demanded that the plane land, made statements about a bomb and, according to a flight attendant, said, “I’m blowing the plane up.” The crew and passengers tried to subdue him. He eventually was handcuffed and the plane was diverted back to Las Vegas. Gonzalez pled guilty to interference with a flight crew member in violation of 49 U.S.C. § 46504. He appeals the district court’s decision to impose a nine-level sentencing enhancement for reckless endangerment of the aircraft under the advisory United States Sentencing Guidelines (“Guidelines”). We are unpersuaded by Gonzalez’s argument that the enhancement is inapplicable. His conduct was a threat not only to crew and passengers but to the aircraft. In response to a question whether Gonzalez “was going to take the plane down,” Woodard testified, “I was afraid that he had a device or something [and that] it was going to do harm to myself and my crew and my passengers, yes.” The plane was diverted and it returned to Las Vegas without further incident. FBI agents arrested Gonzalez, who told them that “he knew what he was doing was wrong but felt he had to do something to land the plane.” At the change of plea hearing, Gonzalez acknowledged that, although he had used methamphetamine the day before the incident, he was aware of his actions and understood and knew what he was doing at the time of the incident. The precise statement that Gonzalez

made about the bomb is in dispute. In the change of plea hearing, Gonzalez denied making the specific statement "I have a bomb," but admitted to stating, "what do I have to do to get this plane to land? Do I have to say I have a bomb?" The Presentence Investigation Report ("PSR") recommended a nine-point base offense level enhancement (from 9 to 18) under United States Sentencing Guidelines § 2A5.2(a)(2) on the ground that Gonzalez recklessly endangered the safety of the aircraft. During the sentencing hearing, which took place over several sessions, the court heard testimony from flight attendants Nancy Castillo and Kyle Woodard. Gonzalez disputed the claim that he had recklessly endangered the safety of an aircraft. Because the evidence in this case was overwhelming, it is evident that the facts related to the enhancement were established by clear and convincing evidence. The dispute over Gonzalez's language with respect to the bomb does not change the calculus. Even accepting Gonzalez's version, coupled with the uncontroverted testimony of the flight attendants and other aspects of Gonzalez's behavior, the standard is easily met.

**AFFIRMED."**

[United States vs. Juvenile Male](#), No. 06-30587 (July 5, 2007) "In February 2005, the defendant-appellant ("defendant") was charged with "engaging in an act of juvenile delinquency by committing second degree murder." He was fifteen years and eleven months old at the time of the incident, and was eighteen years and seven months old when proceedings commenced. In May 2005, the government moved to have the proceedings transferred to adult criminal prosecution pursuant to the UNITED STATES V. JUVENILE MALE 7999 Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. § 5032. The government also filed a motion for observation and study, requesting that the defendant be committed to the custody of the Attorney General for a psychological examination, pursuant to 18 U.S.C. § 5037(e), to assist the court in

determining whether he should be transferred to adult status. The district court granted the latter motion and ordered the defendant to undergo an evaluation in accordance with the factors listed in 18 U.S.C. § 5032. The defendant was transferred to the Dakota Horizons Youth Center, a division of the Southwest Multi-County Correction Center, on June 10, 2005. Upon completion of the evaluation, a report ("Dakota Horizons Report") was filed with the district court detailing the experts' observations and conclusions. In December 2005, following receipt of the Dakota Horizons Report, the district court held a hearing on the motion to transfer. The government presented the testimony of an FBI agent who had investigated the case. On December 15, 2005, the district court granted the government's motion to transfer the case. The defense filed a notice of interlocutory appeal. August 2006, this court remanded because the district court had improperly concluded that it was required to assume, for purposes of a transfer determination, that the juvenile committed the offense charged in the information. *United States v. Juvenile Male*, No. 06-30038 (citing *United States v. Juvenile*, 451 F.3d 571 (9th Cir. 2006) (holding that assumption of the defendant's guilt is within the court's discretion, but is not mandatory)). The defendant now appeals from that amended decision. We have jurisdiction to hear this interlocutory appeal, *see United States v. Gerald N.*, 900 F.2d 189, 191 (9th Cir. 1990), and we review the district court's decision for abuse of discretion. *See United States v. Brandon P.*, 387 F.3d 969, 976 (9th Cir. 2004). As we have previously held, the district court abuses its discretion when it fails to make the findings required by § 5032 or when the findings it does make are clearly erroneous. *United States v. Doe*, 94 F.3d 532, 536 (9th Cir. 1996). Because we find that the district court made findings that were clearly erroneous, we vacate the district court's ruling and remand for further proceedings.

**VACATED AND REMANDED."**

[United States vs. Jernigan](#), No. 05-10086 (July 9, 2007)

“Defendant Rachel Jernigan was arrested on November 10, 2000, for allegedly robbing three banks. After Jernigan was placed in custody and awaiting trial, two more area banks were robbed by a woman whose description bore an uncanny physical resemblance to hers: both women were roughly five feet tall, Hispanic, and had acne or pock-marked complexions. Although the prosecution knew that other nearby banks had been robbed by a diminutive, Hispanic female with poor skin after Jernigan’s arrest, the prosecution failed to relay this information to defense counsel.

Proceeding without knowledge of the second alleged bank robber, Jernigan’s counsel argued at trial simply that his client was misidentified. However, the jury was not persuaded, and Jernigan was convicted of bank robbery on March 23, 2001. While in prison Jernigan learned that a woman fitting a similar description had been arrested for robbing several banks in the area. In January 2004, Jernigan filed a motion for a new trial asserting that (1) the government violated her due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose before trial material, exculpatory evidence known to the government, and alternatively that (2) evidence discovered after trial required that Jernigan receive a new trial pursuant to Federal Rule of Criminal Procedure 33. The district court denied her motion in January 2005, and Jernigan appealed. After a panel of this court affirmed the district court, we voted to rehear this case en banc. We disagree with both the original panel and the district court and hold that the suppressed evidence was material to Jernigan’s guilt. The district court’s decision is hereby reversed, and we remand for a new trial. The defense offered the following dissent: Notwithstanding the witness statements, the district court found the non-disclosed photographs taken from the surveillance video of the November 28, 2000 bank robbery establish that Jernigan and Rodriguez-Gallegos are “markedly different” in

appearance and “do not look alike, whatever similarities may be in their complexions or Hispanic appearance.” In addition, the district court found “someone having looked at them under these circumstances would have been able to make such a determination.” These findings are not clearly erroneous. Moreover, Judge Carroll, who had the benefit of observing Jernigan during the course of her four-day trial, was in a better position than this court to determine whether Jernigan resembles Rodriguez-Gallegos. In short, I would defer to Judge Carroll’s factual findings, conduct a *de novo* review of *Brady* materiality based on Judge Carroll’s findings, and affirm.”

[Tanner vs. Del Papa](#), No. 06-15405 (July 13, 2007) “In June 1993, Tanner shot and killed his wife, Julie Tanner, as she lay asleep in their bed. Tanner also forced their twelve-year-old foster son to engage in oral sexual intercourse with him sometime in April or May 1993. In December 1993, Tanner pleaded guilty in Nevada district court to first degree murder with the use of a deadly weapon and battery with intent to commit sexual assault. At Tanner’s plea hearing, the judge informed Tanner that if he did not plead guilty, he would have the right to a jury trial, the right to have the charges against him proved beyond a reasonable doubt, the right to confront witnesses against him, the right to present and subpoena witnesses, and the right to remain silent. Tanner said that he understood that he was giving up those rights by pleading guilty. The judge did not tell Tanner that he was entitled to take an appeal after pleading guilty. Kelly Lee Tanner appeals the district court’s denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Tanner contends that the district court erred in rejecting his claims that he received ineffective assistance of counsel in his state criminal proceedings, that his guilty plea was not knowing and voluntary, and that the district court should have granted his request for an evidentiary hearing. The district court issued a certificate of

appealability [sic] as to all three issues. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm. We hold that *Flores-Ortega*, in describing defense counsel's duty to consult with the client when there is reason to believe that a rational defendant in the client's position would wish to appeal, did not establish a new rule of constitutional law. Applying the *Flores-Ortega* standard, we conclude that Tanner has not shown that his counsel was deficient in failing to consult with him regarding an appeal. Further, we conclude that Tanner's plea was voluntary and knowing, and that he was not entitled to an evidentiary hearing on either his ineffectiveness claim or his challenge to his guilty plea. As a result, the district court correctly denied Tanner's habeas petition.

**AFFIRMED."**

[United States vs. Abbouchi](#), No. 05-50962 (July 13, 2007) "In this case, we consider the contours of a customs official's border search authority at a regional sorting hub for express consignment services like those offered by UPS. We hold that customs inspections conducted at UPS's regional sorting hubs like the one at Louisville, Kentucky, take place at the functional equivalent of the border. Defendant-Appellant Maher Hamdan Abbouchi was convicted and sentenced for having committed four counts of transfer of false identification documents in violation of 18 U.S.C. § 1028(a)(2). The government brought criminal charges against Abbouchi after U.S. Bureau of Customs and Border Protection ("Customs") officers who conducted random customs inspections of cargo at the UPS sorting hub in Louisville opened a package sent by Abbouchi to Lebanon. The package contained counterfeit social security and resident alien identification cards. The district court denied Abbouchi's motion to suppress this incriminating evidence, and a jury found him guilty as charged. Abbouchi timely appeals. He contends on appeal that the contents of his UPS package were inadmissible in evidence and should have been

suppressed. He argues that the Customs officers needed reasonable suspicion to open his UPS package because the UPS hub at Louisville is not the functional equivalent of the border, but rather is part of the "extended border." He also argues that social security cards are not "identification documents" within the meaning of § 1028(a)(2). Finally, Abbouchi challenges several aspects of the district court's supervised release conditions. We have jurisdiction under 28 U.S.C. § 1291. We affirm his convictions, but vacate his sentence and remand for resentencing. The search of Abbouchi's UPS package at the Louisville UPS hub took place at the functional equivalent of the border because it was the last practicable opportunity for Customs officers to conduct an inspection before Abbouchi's package departed from the United States. Thus, the Customs officers did not need reasonable suspicion to open and inspect the contents of his randomly selected package intended for overseas delivery. We also hold that there was sufficient evidence to establish that social security cards are "identification documents" within the meaning of 18 U.S.C. § 1028(a)(2). We agree that the district court committed plain error by requiring Abbouchi to participate in a domestic violence treatment program while on supervised release. Accordingly, we affirm the convictions but vacate the sentence. We remand for resentencing without the domestic violence treatment condition.

**AFFIRMED in PART, VACATED in PART, and REMANDED."**

[United States vs. Jimison](#), No. 06-30417 (July 16, 2007) "Jesse Jimison beat up his girlfriend and then fled in her car. He then became ill from drugs he had taken, stumbled into an unlocked ranch house and passed out. When he woke up, he grabbed up a couple of guns, gun accessories and clothes and continued his flight. He ended up at the house of Bill Hecker, an acquaintance. Jimison was crying and told Hecker that he had been on the run from the police and thought that he had just killed his

girlfriend. Jimison then continued to act erratically. He told Hecker “something about he was going to go Rambo,” and called the owner of the ranch house, apologizing for taking his guns and promised to return them. He then locked the stolen guns in the trunk of his girlfriend’s car and departed in a friend’s car, leaving the guns safely behind. Jimison pled guilty to felony possession of firearms. The district court enhanced his sentence under section 2K2.1(b)(5), finding that Jimison possessed the stolen guns “with the intent of fighting it out with law enforcement if he were caught.” Jimison now appeals. We consider when a defendant can be subject to a sentencing enhancement under U.S.S.G. § 2K2.1(b)(5) (2005), for possessing a firearm in connection with an offense that he never commits. Moving past the “Rambo” comment, the rest of the evidence demonstrates that Jimison acted just as the Sentencing Commission doubtless hoped he would when it adopted this enhancement. Soon after arriving at Hecker’s house, Jimison called the owner of guns, apologized and made arrangements to return them. He also safely locked the guns in the trunk of the car and departed, leaving the car and guns at Hecker’s house. Under these circumstances, there was insufficient evidence to conclude that Jimison formed a firm intent to have a shootout with law enforcement. Accordingly, we conclude that the district court erred in applying the Guidelines to the facts of this case and vacate defendant’s sentence.

**REVERSED and REMANDED.”**

<http://www.lawhaha.com/strange.asp#A6>

### **Dr. Seuss on Bankruptcy Law**

Bankruptcy Judge A. Jay Cristol (S.D. Fla.) was vexed by a bankruptcy statute saying that if an individual debtor in a voluntary chapter 7 or 13 case fails to file certain information within 45 days of filing his petition, the case shall be “automatically dismissed” on the 46th day.

Judge Cristol struggled with the statutory riddle of how a case could be automatically dismissed without court action or even a docket entry. He decided to analyze the question in the style of that noted bankruptcy giant, Dr. Seuss.

I do not like dismissal automatic,  
It seems to me to be traumatic  
I do not like it in this case,  
I do not like it any place.

As a judge I am most keen  
To understand, *What does it mean?*  
How can any person know  
what the docket does not show?

What is the clue on the 46th day?  
Is the case still here, or gone away?

...

It goes on for several more verses, but you’ll have to consult the full opinion for the rest of the story. Rumor has it the Cat in the Hat appeared pro hac vice on behalf of the debtor.

— In re Riddle, Case. No. 06-11313-BKC-AJC, U.S. Bankruptcy Ct., S.D. Fla, July 17, 2006. Thanks to Kevin McDowell.

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