

SIDEBAR



July 2009

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PRESIDENT'S MESSAGE

BY WENDY J. OLSON

Our Idaho Chapter of the FBA has finished a busy spring, and we are fortunate to have a little down time before we host the Tri-state Conference in Sun Valley, October 8 to 10.

On May 1, we conducted our third annual day-long CLE program, this time focusing on civil rights in the federal courts.

The program featured regionally and nationally known speakers, including Judge Candy Dale and Judge Ronald E. Bush. The various presentations demonstrated that Idaho and our federal court practitioners have played an important role in protecting valuable rights and liberties and in upholding constitutional protections for all persons.



The May 1 CLE program faced a few last minute hurdles of its own. District Judge U.W. Clemon, the first African-American federal judge in Alabama and a renowned champion of civil rights, had to cancel his in-person trip to Idaho to tend to a close friend's medical emergency.

Next, the funeral service for our own Allyn Dingel was set for May 1 at 10:00 a.m. — one that our members and many of our presenters wished to attend.

The day was a fitting tribute to the commitment of our chapter members to civil rights and reminded us all to be vigilant in that commitment.

College of Southern Idaho history professor Russ Tremayne started the program with a discussion of Idaho's World War II era Japanese internment camps. He noted that there was more than a bit of racism in one of this country's darkest civil rights moments, pointing out that while Japanese Americans were removed from their homes on the West Coast and relocated to places like Idaho's Hunt Camp, German Americans were not removed and relocated.

(Continued on page 2).

IN MEMORIAM ALLYN DINGEL

Russ's plain spoken presentation served as a reminder of the tension between national security and civil rights often felt in times of national stress. And his message was clear that all of our constitutionally created institutions may be subject to failing without significant commitment to civil rights.

The afternoon program featured Judge Dale's overview of employment civil rights statutes and litigation standards in federal court. Retired District Judge U. W. Clemon's gave the keynote address by video conference, Erin Aslan presented about human trafficking and prosecutions, and Judge Ronald Bush moderated a panel on pro bono prisoner litigation.

Judge Clemon reviewed the development of significant Supreme Court civil rights decisions

from *Plessy v. Ferguson* to recent cases from the Justice Roberts-led Court. His message, delivered only a month before President Barack Obama nominated Sonia Sotomayor to the Supreme Court, was clear: the current Supreme Court has lost its way on civil rights and needs new justices to help it find its way back.

Erin Aslan joined us from the U.S. Department of Justice's Civil Rights Division in Washington, D.C. Ms. Aslan provided a stark picture of human trafficking crimes committed against society's most vulnerable members – women, children, usually immigrants, most of whom seek a better way of life in the United States only to end up being enslaved by a variety of unscrupulous traffickers, including bar owners, diplomats and pimps.

Judge Bush was joined by ACLU attorney Lea Cooper, Nicole Hancock from Stoel Rives, and Paul Panther, Deputy Attorney General representing the Idaho Department of Corrections. These Idaho attorneys provided a valuable message about constitutional protections extending to prison inmates and the state's vested interest in running a prison system that conforms to those constitutional protections.

Judge Candy Dale began our afternoon session as many of us returned from the funeral services, with a reminder of Allyn Dingel's commitment to the under-represented throughout his career. Even while he was battling cancer, he had graciously accepted an appointment at the Federal Court as stand-by counsel for inmate Roland Roles in August 2008.



I can think of no greater supporter of civil and human rights than Allyn, who gave his time so generously to anyone in need, who carried no bias in his great soul, and who believed so firmly in our Constitutional guarantees of equality.

~ John Magel

IN MEMORIAM EDWARD “TED” PIKE

In *Roles v. Walden*, CV-05-174-S-BLW, Mr. Roles brought claims that prison officials had fired him from his woodshop position in retaliation for exercising his First Amendment right to complain about the supervision in the woodshop.

Allyn was instrumental in securing evidentiary stipulations and aiding the preparation of jury instructions. He attended trial every day, providing Mr. Roles valuable advice on trial practice, evidence and strategy. Although the jury decided the case in the prison’s favor, Judge Winmill and Mr. Roles expressed their appreciation to Allyn for his dedication to the case. Poking fun at himself as he always did, Allyn said that history had been made: at no other time had he appeared before a federal judge for days on end without saying a word in open court.

The Idaho Chapter of the FBA, as will all of the Idaho State Bar, will dearly miss Allyn and his support of our activities.

We were saddened as well to lose another pillar of our legal community, Ted Pike, less than a month later.

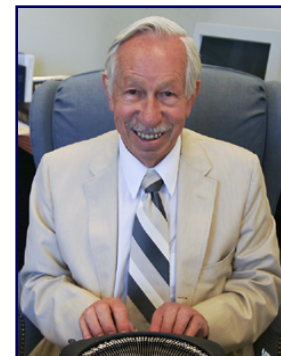
When his second term as prosecutor ended, Pike returned to private practice. He also helped boost the careers of a host of local lawyers.

“He was a mentor for everybody,” Idaho Falls attorney John Stosich said. “He was a class act. It was a real privilege to work with Ted.”

~ John Stosich

The May 1 CLE’s focus on civil rights was a timely reminder of the role that we, as federal court practitioners, must play in preserving civil rights and civil liberties for everyone.

Allyn and Ted served their clients, the bar and our justice system in this tradition. We will truly miss them.



Ted was a champion of the weak and downtrodden. He entered into battles despite overwhelming odds. Ted would risk his own reputation and popularity for a just cause.

~ Post Register

UPCOMING EVENTS

Friday, July 10, 2009 - 11:45 a.m. - Annual Meeting

Our Chapter's Annual meeting is being held on **Friday, July 10, 2009, at 11:45 a.m.** in the Payette River Room, Boise Centre on the Grove. The meeting will be brief, designed to vote on the proposed amendments to the chapter bylaws. The meeting will follow the Idaho State Bar's CLE scheduled in the Payette River Room. We will finish in time to get everyone to the 50-year and 60-year lawyer luncheon.

October 9 and 10, 2009 - Tri-State Federal Bar Conference including federal bar members from Utah, Wyoming and Idaho **Sun Valley, Idaho**

Evening Reception, Thursday, October 8, 2009

Email: Susie_Boring-Headlee@id.uscourts.gov



SUPREME COURT DECISION

Corley v. United States, 129 S. Ct. 1558, 173 L.Ed.2d 443 (Apr. 6, 2009)¹

Petitioner Corley was arrested for assaulting a federal officer at about 8:00 a.m. Around 11:45 a.m. FBI agents took him to a Philadelphia hospital to treat a minor injury. At 3:30 p.m. he was taken from the hospital to the local FBI office and told that he was a suspect in a bank robbery. Though the office was in the same building as the nearest magistrate judges, the agents did not bring him before a magistrate judge, but questioned him, hoping for a confession. At 5:27 p.m., some 9.5 hours after his arrest, Corley began an oral confession that he robbed the bank. He asked for a break at 6:30 p.m. and was held overnight.

The interrogation resumed the next morning, ending with his signed written confession. He was finally presented to a Magistrate Judge at 1:30 p.m., 29.5 hours after his arrest, and charged with armed bank robbery and related charges. The District Court denied his motion to suppress his confessions under Rule 5(a) and *McNabb-Mallory*. It reasoned that the oral confession occurred within §3501(c)'s six-hour window because the time of Corley's medical treatment should be excluded from the delay. It also found the written confession admissible, explaining there was no unreasonable delay under Rule 5(a) because Corley had requested the break.

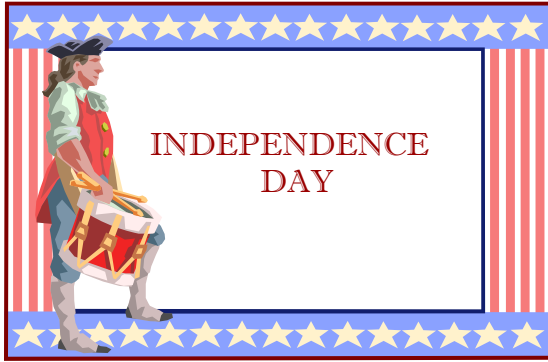
McNabb v. United States, 318 U. S. 332, and *Mallory v. United States*, 354 U. S. 449, “generally rende[r] inadmissible confessions made during periods of detention that violat[e] the prompt presentment requirement of [Federal Rule of Criminal Procedure] 5(a).” *United States v. Alvarez-Sanchez*, 511 U. S. 350, 354. Rule 5(a), in turn, provides that a “person making an arrest ... must take the defendant without unnecessary delay before a magistrate judge” Congress enacted 18 U. S. C. §3501 in response to *Miranda v. Arizona*, 384 U. S. 436, and some applications of the *McNabb-Mallory* rule. In an attempt to eliminate *Miranda*, §3501(a) provides that “a confession ... shall be admissible in evidence if it is voluntarily given,” and §3501(b) lists several considerations for courts to address in assessing voluntariness. Subsection (c), which focuses on *McNabb-Mallory*, provides that “a confession made ... by ... a defendant ... , while ... under arrest ... , shall not be inadmissible solely because of delay in bringing such person before a magistrate judge ... if such confession is found by the trial judge to have been made voluntarily and ... within six hours [of arrest]”; it extends that time limit when further delay is “reasonable considering the means of transportation and the distance to ... the nearest available [magistrate].”

The Third Circuit affirmed the District Court, relying on Circuit precedent to the effect that § 3501 abrogated *McNabb-Mallory* and replaced it with a pure voluntariness test. The Third Circuit Court concluded that if a district court found a confession voluntary after considering the points listed in § 3501(b), it would be admissible, even if the presentment delay was unreasonable.

US V. COREY CONT'D.

The United States Supreme Court vacated the Third Circuit's decision and remanded, holding that section 3501 modified *McNabb-Mallory* but did not supplant it. The Court reasoned that the Government's position would leave the Rule 5 presentment requirement without teeth, for if there is no *McNabb-Mallory* there is no apparent remedy for a presentment delay.

The prompt presentment requirement is not just an administrative nicety. It dates back to the common law. Under Rule 5, presentment is the point at which the judge must take several key steps to foreclose Government overreaching: e.g., informing the defendant of the charges against him and giving the defendant a chance to consult with counsel. Without *McNabb-Mallory*, federal agents would be free to question suspects for extended periods before bringing them out in the open, even though "custodial police interrogation, by its very nature, isolates and pressures the individual," *Dickerson v. United States*, 530 U. S. 428, 435, inducing people to confess to crimes they never committed.



Independence Day, as you know, is the national holiday of the United States of America commemorating the signing of the Declaration of Independence by the Continental Congress on July 4, 1776, in Philadelphia. At the time of the signing, the would-be United States consisted of 13 colonies under the rule of England's King George III. There was growing unrest in the colonies concerning the taxes that had to be paid to England, commonly referred to as "taxation without representation," as the colonists were not represented in the English Parliament.

As the unrest grew in the colonies, King George sent extra troops to help control any rebellion. In 1774, the 13 colonies sent delegates to Philadelphia to form the First Continental Congress. The delegates were unhappy with England, but were not yet ready to declare war.

In April 1775, as the King's troops advanced on Concord, Mass., Paul Revere would sound the alarm "The British are coming, the British are coming" as he rode his horse through the late night streets. The battle of Concord and its "shot heard round the world" would mark the unofficial beginning of the colonies' war for Independence. In May, the colonies again sent delegates to the Second Continental Congress. For almost a year, the congress tried to work out its differences with England, again without formally declaring war. By June 1776, their efforts had become hopeless and a committee was formed to compose a formal declaration of independence.



Headed by Thomas Jefferson, the committee included John Adams, Benjamin Franklin, Philip Livingston, and Roger Sherman. Thomas Jefferson was chosen to write the first draft, which was presented to the congress on June 28. After various changes, a vote was taken late in the afternoon of July 4.

Of the 13 colonies, nine voted in favor of the Declaration, two — Pennsylvania and South Carolina — voted no, Delaware was undecided, and New York abstained.

To make it official, John Hancock, President of the Continental Congress, signed the Declaration of Independence. It is said that John Hancock signed his name "with a great flourish" so "King George can read that without spectacles!"

The following day, copies of the Declaration were distributed. The first newspaper to print the Declaration was the Pennsylvania Evening Post on July 6. On July 8, the Declaration had its first public reading in Philadelphia's Independence Square. Twice that day the Declaration was read to cheering crowds and pealing church bells. Even the bell in Independence Hall was rung. The "Province Bell" would later be renamed "Liberty Bell" after its inscription — "Proclaim Liberty Throughout All the Land Unto All the Inhabitants Thereof."

Although the signing of the Declaration was not completed until August, the Fourth of July has been accepted as the official anniversary of United States independence. The first Independence Day celebration took place the following year, July 4, 1777.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Trustees of the Eighth District Electrical Pension Fund v. Craft Electric Co., CV-09-184-S-REB
E.R.I.S.A., Employee Benefits - Federal Question Jurisdiction

- James Piotrowski, Herzfeld & Piotrowski, Boise, Idaho, for the Plaintiff
- Michael D. Gaffney, Beard, St. Clair, Gaffney PA, Boise, Idaho for the Defendant

Plaintiff Delinquency Committee of the Eighth District Electrical Pension Fund is a committee of the Trustees of the Eighth District Electrical Pension Fund authorized to bring claims for delinquent contributions on behalf of the Eighth District Electrical Benefit Fund, the National Electrical Benefit Fund, the Idaho Electrical Joint Apprenticeship and Training Fund, the International Brotherhood of Electrical Workers, Local 291, and the Southwest Idaho Chapter National Electrical Contractors Association. Defendant Craft Electric Company conducts an electrical contracting business.

On or about February 21, 2007, Defendant's President executed a "Letter of Assent" by which Plaintiff alleges Defendant agreed to be bound by all of the provisions of a collective bargaining agreement negotiated by the Local Union, and agreed to be bound by all successor Local Union Agreements unless appropriate and timely notice of termination was given. Plaintiffs allege that Defendant failed to make trust contributions required to provide health, welfare, and retirement benefits to its employees. Plaintiff seeks through this law suit to enforce obligations it alleges Defendant owes under Trust Agreements, provisions of the Employee Retirement Income Security Act ("ERISA"), contracts, and Collective Bargaining Agreements.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Goodrich v. Mountain West Bank., CV 09-254-S-MHW

Fair Housing Act; Sexual Harassment; Breach of Contract; Negligence
Federal Question & Supplemental Jurisdiction

- Thomas G. Walker, COSHO HUMPHREY LLP, Boise, Idaho for the Plaintiff
- Mark S. Prusynski, Moffatt Thomas, Boise, Idaho for the Defendants, and
R. Wayne Sweney, LUKINS & ANNIS PS, Coeur d'Alene, Idaho, for the Defendants

Plaintiff Katrina Goodrich filed a Complaint against Mountain West Bank and John Cotner asserting claims for violations of the Fair Housing Act, violations of the Equal Credit Opportunity Act, negligence, sexual harassment, breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty.

Defendant Cotner was a vice president and manager at Mountain West Bank in Meridian, Idaho and his duties included participation in credit decisions. Plaintiff alleges that Cotner discriminated against her, a female credit applicant, borrower, and account holder at Mountain West, by “subjecting her to severe, pervasive and unwelcome sexual harassment in connection with residential real estate-related transactions and/or other credit transactions.” Plaintiff also alleges that Cotner put her into a “progressively more vulnerable financial position” and that Mountain West is responsible for Cotner’s actions.

Cameron v. East Side Highway Dist. et al, CV-09-235-N-BLW

Civil Rights - Federal Question Jurisdiction

- Patrick J. Kirby, Campbell, Bissell & Kirby, PLLC, for Plaintiffs
- Counsel for Defendant East Side Highway District, an Idaho Public Corp., has not yet appeared

Plaintiff Cameron, a real property owner in Couer d'Alene, began excavation work without a permit on a gravel road that he thought was not within the Highway District’s system. Plaintiff alleges that Defendant then required him to apply for a permit and to pay to chip seal the entire length of the road.

Plaintiff’s application for a refund was denied. Plaintiff requests a refund of the money he paid for chip sealing the road.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

[Child Doe] v. Corey, CV-09-229-E-MHW

Contract; Breach of Fiduciary Duty - Diversity Jurisdiction

- John Simmons, Idaho Falls, ID, for the Plaintiff
- Counsel for Defendants has not yet appeared

Plaintiff [Doe] is identified as a grandchild and remainder beneficiary of the Swendsen Trust, established by Richard I. Swendsen (“Dick Swendsen”). On September 19, 1995, Dick Swendsen exercised his right over this revocable trust and amended it by executing the “First Amendment to Richard C. Swendsen Restated Trust” (“1995 Amendment”). The 1994 Trust Restatement as modified by the 1995 Amendment specified the successor to Dick Swendsen as trustee to be Defendant Richard Corey, a nephew of Dick Swendsen. Richard Corey has acted as trustee of the Swendsen Trust since late 1997, following the death of Dick Swendsen on October 13, 1997.

The Trust Documents specify that the earnings of the Swendsen Trust are to be paid at least yearly to his widow, Beth A. Swendsen, until she dies, and that the trustee may use up to \$150,000 of the corpus of the Swendsen Trust “as the Trustee deems necessary for [Beth Swendsen’s] proper support, care, maintenance and health, and to support her in her accustomed manner of living, for as long as she shall live.” Plaintiff Swendsen is a beneficiary of the Swendsen Trust assets remaining when the life beneficiary, Beth Swendsen, dies.

Plaintiff alleges that, as trustee, Richard Corey loaned more than \$462,000 of Swendsen Trust assets to his son, Defendant Clayne Corey and that Clayne Corey is in wrongful possession of Swendsen Trust assets. He brought this action seeking an accounting of the assets of the Swendsen Trust established in part for the benefit of Plaintiff and for which trustee Richard Corey has for several years served as trustee. Plaintiff also seeks to recover \$552,904.54 of assets he alleges belong to the Swendsen Trust but are in the possession of Clayne Corey and to recover damages for Swendsen Trust assets which he alleges were wrongfully “dissipated and misapplied” by Richard Corey while he has served as trustee, to the extent they may not be recovered from Clayne Corey. Finally, Plaintiff seeks a Court order removing Richard Corey as trustee.

Defendant has not yet filed an answer or otherwise responded to the Complaint.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Hill v. Western Idaho Community Action Partnership, Inc., CV-09-217-S -REB

Breach of Contract - Diversity Jurisdiction

- Thomas Walker, COSHO HUMPHRY LLP, Boise, Idaho, for Plaintiff
- James Dale, STOEL RIVES, Boise, Idaho for Defendant

Plaintiff Riley Hill and Defendant entered into a partnership effective September 20, 1994, known as Valley One, a Limited Partnership (“Valley One”), for the development of real property located in the City of McCall, Valley County, Idaho. The parties entered into a second partnership effective December 15, 1995, known as Valley Two, a Limited Partnership (“Valley Two”), for the development of adjacent real property located in the City of McCall, Valley County, Idaho. Defendant was the managing general partner of Valley One and Valley Two.

Plaintiff alleges that Defendant did not recruit any limited partners for either Valley One or Valley Two and, consequently, neither Valley One nor Valley Two is a limited partnership under Idaho law. Plaintiff asserts that, as managing general partner, Defendant had a duty to take all actions necessary to preserve and protect the status of Valley One and Valley Two as limited partnerships and failed to do so. Plaintiff also alleges that Defendant failed and refused to fulfill its duties and responsibilities as managing general partner, including but not limited to (a) its failure and refusal to manage Valley One and Valley Two in such a manner as to maximize the financial benefits to the partners; (b) its failure and refusal to cause Valley One to pay Plaintiff \$109,942.75, plus interest at the statutory rate provided by Idaho Code § 28-22-104(1), for his work in the development of the Valley One Property, (c) its failure to cause Valley Two to pay Plaintiff for the acquisition of the Valley Two Property; and (d) its failure to cause Valley Two to pay real property taxes on the Valley Two Property paid for the Valley Two Property prior to the formation of Valley Two. Plaintiff reports that he paid all of the real property taxes from and after September 1, 1994, the date of acquisition.

As a result of their disagreements, the parties entered into a protracted negotiation commencing during December 2007. Plaintiff alleges that, on or about August 19, 2008, the negotiations culminated in an agreement (“Separation Agreement”) between the parties, but after the Separation Agreement was fully negotiated and agreed to, Defendant failed and refused to execute it and thereafter laid claim to the Valley Two Property, without having paid the acquisition price or any real property taxes since the Valley Two Property was acquired on September 1, 1994.

Plaintiff filed the instant action for: (a) breach of contract and breach of the covenant of good faith and fair dealing; (b) breach of statutory and fiduciary duties; and (c) fraud. Defendant has responded with a Motion to Compel Binding Arbitration and to Dismiss or Stay Proceedings, seeking a Court order, under the Federal Arbitration Act, 9 U.S.C. §§ 9, *et. seq.*, dismissing or staying the case and directing the parties to proceed to binding arbitration because, Defendant asserts, the parties agreed to arbitration.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Raymer, et al. v. Corporate Moves & Installations Inc., CV-09-233-N-REB

Personal Injury - Diversity Jurisdiction

- Dustin Deissner, VAN CAMP & DEISSNER, Spokane, Washington for the Plaintiffs
- Counsel for Defendant has not yet appeared

Defendant Corporate Moves & Installations maintains a business relationship with furniture manufacturers in the Post Falls, Idaho area, and has purchased furniture in Idaho and hired Plaintiff Raymer to haul those loads to the Defendant's facilities in the Denver, Colorado area. During May of 2008, Plaintiff worked as an owner operator of a Long Haul truck and contracted with Defendant to pick up cargo at the Corporate Moves facility in Idaho and deliver it to the company premises in Lakewood Colorado.

Plaintiff alleges that he arrived at the facility and was instructed by a worker named to back into the first bay for unloading. Plaintiff exited his truck and went onto the loading dock to determine if the truck was square to the dock and then attempted to exit the facility by the nearest stairs. Plaintiff alleges that he encountered cardboard that had accumulated on the steps, and when he attempted to go down the stairs he slipped on the cardboard and fell, resulting in severe injuries. Plaintiff Raymer and his wife bring claims against Defendant for negligence and loss of consortium. Defendant has not yet responded to the Complaint.

Fisher v. Pioneer Farm Equipment Co., CV-09-208-E-EJL

Fair Labor Standards; Equal Pay Act - Federal Question Jurisdiction

- Jacob Scott Wessel, Thomsen Stephens Law Offices, PLLC, Idaho Falls, Idaho, for the Plaintiff
- Brady James Hall, Moore & Elia, LLP, Boise, Idaho for the Defendant

Defendant Pioneer Farm Equipment hired Plaintiff Melanie Fisher on May 28, 2005 as a parts specialist. Plaintiff alleges that a male co-worker, hired in 2004 as a parts specialist in the same or substantially similar job position as Plaintiff, which requires equivalent skills and responsibilities, received a rate of pay higher than that paid to Plaintiff. Plaintiff further alleges that this differential rate of pay was not based on seniority or merit. She brings a claim under the Equal Pay Act, 29 U.S.C. §§ 206, 216, seeking back pay at a rate equal to that paid to her male co-worker.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Consolidated Grain & Barge Co. v. Plant Foods, Inc., CV 09-187-E-REB

Contract Dispute - Diversity Jurisdiction

- Gary Dance, MOFFATT THOMAS BARRETT ROCK & FIELDS CHTD.,
Pocatello, Idaho for the Plaintiff
- Reed Larsen, COOPER & LARSEN, Pocatello, Idaho, for the Defendant

In September 2008, Plaintiff Consolidated Grain & Barge Company and Defendant Plant Foods, Inc. entered into a contract for the purchase and sale of 1,000 pounds of urea. Plaintiff alleges that its supplier shipped ten separate rail cars loaded with urea to Defendant, but prior to the arrival of the urea Defendant requested that delivery not be made.

Plaintiff alleges that when the urea arrived in Idaho, Defendant unloaded three of the railcars but refused to accept delivery of the remaining seven loads and Plaintiff rerouted the loads to a storage facility. Defendant paid for the three loads it accepted. Between the time the parties entered the contract and Defendant refused delivery the price for urea dropped and Plaintiff sold the remaining seven loads of urea for less than the price provided in its contract with Defendant. Plaintiff seeks recovery for the difference between the contract price and the actual price at which it sold the seven loads of urea Defendant refused to accept.

Defendant's Answer alleges that the ten rail cars were shipped after Defendant canceled any agreement with Plaintiff and asserts as a defense, among other things, that any agreement between the parties was expressly denied, rescinded, and repudiated.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Roberts v. JKC Nampa, LLC, et al., CV-09-205-S-CWD

Sex Discrimination - Federal Question Jurisdiction

- Bradley Vincent Sneed, John Robert Kormanik, and Thomas Guy Hallam , Jr.,
Kormanik Hallam & Sneed LLP, Meridian, Idaho, for the Plaintiff
- Grant T. Burgoyne, Mauk and Burgoyne, Boise, Idaho, for the Defendants

Beginning in approximately March of 2005, Plaintiff Roberts was employed by Defendant JKC Nampa in the position of automobile salesman and he received paychecks from “Team Mazda Subaru.” At the time Roberts began his employment with JKC Nampa, John Minegar (“Minegar”) was already employed by JKC Nampa as a manager. Minegar was Roberts’ supervisor throughout Roberts’ employment with JKC Nampa. Minegar had no on-site supervisor.

Plaintiff alleges that Minegar, as an employee of Defendants, subjected him to verbal, visual and/or physical conduct of a sexual nature, including making sexually charged comments to Plaintiff or in Plaintiff’s presence, downloading pornographic images onto several of the office computers and then compelling Plaintiff, as well as other JKC Nampa employees, to view such images on those computers, and aggressively kissing Plaintiff on the mouth on one occasion. Plaintiff further alleges that, after he complained about Minegar’s conduct, JKC Nampa, through its agents and/or employees, treated Plaintiff differently and less favorably than other employees and ultimately terminated his employment in retaliation for his complaints. Plaintiff alleges that during his employment with JKC Nampa he performed the duties and responsibilities of his position in a satisfactory manner.

Plaintiff asserts claims for Sexual Harassment in Violation of Title VII of the Civil Rights Act and/or the Idaho Human Rights Act, Wrongful Discharge in Violation of Stated Public Policy, Breach of Implied Covenant of Good Faith and Fair Dealing in Employment Contract, Intentional and/or Negligent Infliction of Emotional Distress, and Retaliation/Wrongful Termination in Violation of Title VII of the Civil Rights Act and/or the Idaho Human Rights Act.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Melaleuca, Inc. v. OMS Investments, Inc. et al., CV-09-168-E-BLW

Trademark Infringement (Lanham Act) - Federal Question Jurisdiction

- Brandon H. Pace, Edgar R Cataxinos, H. Dickson Burton, and Krista Weber Powell, and Trask Britt PC, Salt Lake City, Utah, and M. Michael Sasser, with Sasser & Inglis, Boise, Idaho, for Plaintiff/Counterdefendants
- Christine Klenk, Christopher L. Wanger, Judith M. Schvimmer, Mark S. Lee, and Sarah E. Hollander, with Mannatt, Phelps, & Phillips, LLP, California, and John A. Bailey, Jr., with RACINE OLSON NYE BUDGE & BAILEY, Pocatello, Idaho, for Defendants/ Counterclaimants.

Plaintiff alleges that it has used the “ECOSENSE” trademark for household cleaning supplies since 1999 as a common law trademark and since 2000 as a registered trademark. Plaintiff alleges in its Complaint that Defendants OMS and The Scotts Co. LLC violated this trademark under sections 32 and 43a of the Lanham Act (15 U.S.C. §§ 1114 and 1125(a)) by Scotts’ use of the “Ecosense” trademark.

Plaintiff also alleges deceptive trade practices under Idaho law. OMS filed a U.S. Trademark application in 2005 for “Ecosense” as a herbicide and pesticide, and Plaintiff Melaleuca objected with a timely Notice of Opposition to the U.S. Patent Office. Plaintiff claims that Defendant is a competitor and has marketed its products under the mark “Ecosense” for household products and with the website www.ecosense.com.

Plaintiff seeks an injunction against Defendant Scotts’ use of “Ecosense” as a trademark as well as damages, punitive damages, restitution, and disgorgement of profits for the alleged unfair competition and cybersquatting. Defendants’ Answer denies that “ECOSENSE” has become a well recognized distinctive symbol of Melaleuca by consumers, denies that the Scotts’ products are for indoor use, denies that Melaleuca was unaware of the OMS use of “Ecosense” until very recently, and denies that potential customers of Plaintiff are diverted from ecosense.com to a Scotts’ website.

Defendant asserts these affirmative defenses: estoppel, waiver, or laches; unclean hands; failure to mitigate damages; implied consent to the acts in the complaint; and unjust enrichment.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Land O' Lakes Purina Feed LLC v. Rosa, CV-09-153-S-BLW

Breach of Contract - Diversity Jurisdiction

- Jennifer Marie Reinhardt and Jonathan C. Miesen, Stoel Rives, LLP, Boise, Idaho and Minneapolis, MN, for Plaintiff/Counterdefendant
- John O Fitzgerald, II, and Richard J. Worst, for Defendant/Counterclaimant

Plaintiff Land O' Lakes, a Minnesota corporation, brings suit against Defendant Rosa, a dairy farmer in Gooding, Idaho for breach of contract. Defendant Rosa contracted in multiple contracts to buy feed corn, and then bought in excess of his credit limit with Plaintiff. Plaintiff alleges that Mr. Rosa failed to pay his outstanding invoices for feed that was delivered. Plaintiff claims damages for breach of contract for failing to pay the purchase price for goods delivered, and damages for breach of contract for failure to provide assurances and failure to perform.

Defendant's Answer alleges that he was not in excess of his credit limit with Plaintiff and that Plaintiff breached the contracts because it failed to deliver the feed even though Defendant was current on payment. Defendant asserts that he provided reasonable assurances, which Plaintiff failed to accept.

Defendant asserts as affirmative defenses: 1) the amount-in-controversy for diversity jurisdiction is not met; 2) payment was made; 3) estoppel; 4) violation of implied duty of good faith and fair dealing; 5) Plaintiff has acted unreasonably and unfairly; 6) Plaintiff failed to mitigate damages; and 7) Plaintiff's wrongful conduct breached the contract and terminated or prevented Defendant's duty to perform. Defendant also counterclaims for damages to cover after Plaintiff's failure to deliver feed.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Land O' Lakes v. Gerratt, CV-09-209-S-BLW

Breach of Contract - Diversity Jurisdiction

- Jonathan Miesen and Jennifer Reinhardt, STOEL RIVES LLP, Minneapolis, MN, and Boise, ID for the Plaintiff
- Brent Taylor Robinson, Robinson & Associates, Rupert, Idaho, for the Defendant

Plaintiff is in the business of producing and distributing animal feed. Defendant operates a dairy farm in Idaho. During September 2008, Defendant submitted a credit application agreement to Plaintiff to purchase animal feed on credit. Plaintiff alleges that this agreement provided for Defendant to pay the entire amount of debt plus a finance charge on late payments. In early 2009, Defendant's purchases exceeded the credit limit in the agreement. Plaintiff alleges that Defendant agreed to make two payments of \$85,000 in April 2009 to bring his account back into compliance with the agreement. Defendant made the first payment but the second payment was returned by the bank unpaid and Defendant has made no further payments on the account.

Plaintiff filed this action seeking payment of the purchase price of the animal feed accepted by Defendant and asserting claims for breach of contract and common law fraud. Defendant filed an Answer disputing the amount owed and denying that additional damages are available to Plaintiff.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Steve Christensen v. Bannock County Sheriff's Department et al, CV-09-189-E-BLW

- Peter Max Wells, May Rammell & Thompson Chartered, Pocatello, Idaho, for Plaintiff
- Counsel for Defendant Bannock County Sheriff's Departments has not yet appeared

Defendant Bannock county allegedly wrongly arrested Plaintiff for illegal possession of a firearm. According to the Complaint, Plaintiff was convicted of a felony in 1978 and was released with all his civil rights restored in 1983. Plaintiff alleges that the Defendants arrested him without probable cause, prosecuted him intentionally or with reckless disregard for the truth that he had gun ownership rights, and that he had to defend himself against the possession of a firearm charges at a high cost to his business's operations and with attorney fees before the case was dismissed.

Plaintiff claims general and special damages—damages for the alleged violation of his 4th Amendment rights and damages in the amount of his costs and attorney's fees under 42 U.S.C. §§ 1983 and 1988.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

First Bank of Idaho v. Pitt, CV-09-285-S-LMB

Federal Deposit Insurance Act

- Gary T. Dance and Charles Edward Cather, III, Moffatt Thomas Barrett Rock & Fields, Chtd.
for the Plaintiff
- Andrew S. Pitt, Pro Se

Pursuant to 28 U.S.C. § 1331 and 12 U.S.C. § 1819, action was removed from the District Court of the Fifth Judicial District of the State of Idaho, Blaine County, by Federal Deposit Insurance Corporation - Plaintiff's Receiver.

According to the Complaint, Defendant executed and delivered to Plaintiff a promissory note in the original amount of \$2.95M (subsequent Change in Terms Agreements were entered increasing the credit limit). On the same day, to secure payment of the amounts owed under the Note and as part of the same transaction, Defendant executed and delivered to Plaintiff a construction deed of trust (subsequent modifications of the deed of trust were entered).

Plaintiff alleges that Defendant failed and refused to make full payment due under the applicable note. Plaintiff then exercised its option and declared the entire principal amount outstanding under the note and all accrued interest thereon immediately due and payable, directing the trustee under the deed of trust to commence foreclosure proceedings.

Plaintiff seeks roughly \$2.8M.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Monette v. Mossberg Corporation, et al., CV-09-199-N-EJL

Products Liability; Personal Injury - Diversity Jurisdiction

- James Edward Siebe, SIEBE LAW OFFICES, Moscow, Idaho for the Plaintiff
- Peter C. Erbland, Paine Hamblen LLP, Coeur d'Alene, Idaho,
for the Defendant Remington Arms Company
- Michael E. Ramsden, RAMSDEN & LYONS, Coeur d'Alene, ID, for the remaining Defendants

Plaintiff filed this action in state court in October of 2008; Defendants later filed a joint notice of removal to this Court. Plaintiff's son purchased a Springfield hunting rifle for Plaintiff at a Wal-Mart store in Post Falls, Idaho in 2005. On October 22, 2006, Plaintiff was hunting with his son. Plaintiff alleges that he handed the Springfield rifle to his son and it misfired, the bolt action exploding and injuring Plaintiff's hand. Plaintiff further alleges that the explosion was caused by the failure of the assembly pin in the firing mechanism.

Plaintiff named as Defendants Mossberg Corporation, the manufacturer of the Springfield rifle, Maverick Arms, Inc., a subsidiary of Mossberg whom Plaintiff asserts was responsible for the bolt and firing mechanism (either directly or indirectly), Wal-Mart Stores, Inc., who sold the rifle, and Remington Arms Company, who manufactured the ammunition used in the rifle. Plaintiff asserts claims for the negligent design, manufacture, and assembly of the rifle, negligence for failure to inspect and failure to warn, strict liability, breach of express and implied warranties, and negligent misrepresentation.

The parties stipulated to dismiss the claims against Remington Arms Company. The remaining Defendants responded to the Complaint asserting, among other things, that the rifle was not unreasonably dangerous when used in a reasonably foreseeable manner for its intended use.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

United States of America v. Fogleman, CV-09-315-S-REB

False Claims Act

- Amy S. Howe, Assistant United States Attorney, Boise, Idaho, for the Government
- Defendant's counsel has not yet appeared.

Action brought to recover from the Defendant, federal spousal annuity payments erroneously made to her deceased mother's account after her mother's death to which Plaintiff claims Defendant knew or should have known she was not entitled.

COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

Affiliates, Inc. et al, v. Armstrong, et al., CV-09-149-S-BLW

Tort Negligence - Federal Question Jurisdiction

- James M. Piotrowski and Marty Durand, Herzfeld & Piotrowski, Boise, Idaho, for the Plaintiffs
- Margaret Peg M Dougherty, Office of Attorney General, Boise, Idaho, for the Defendants

Plaintiffs are Idaho Medicaid providers of residential and care services for the developmentally disabled. Plaintiffs filed suit to prevent the Defendants, Richard Armstrong and Leslie Clement — the Director and Administrator of Idaho’s Department of Health and Welfare operating Idaho’s Medicaid program — from modifying the Medicaid rate structure. The proposed modification would reduce reimbursable hours for the Plaintiffs.

Plaintiffs allege that the changes to the structure and rates are preempted by federal law. Plaintiffs assert that Defendants are in violation of 42 U.S.C. § 1396a by having rates that are inconsistent with economy, efficiency, and quality of care required by statute. Plaintiffs also allege that Defendants are in violation of Idaho Code § 56-118, which requires all rate adjustments to be submitted to the legislature. Plaintiffs filed this action seeking temporary, preliminary, and permanent injunctive relief preventing the implementation of changes to the rate structure. Defendants’ Answer denies that the rate adjustment violates any provision of federal or state law.



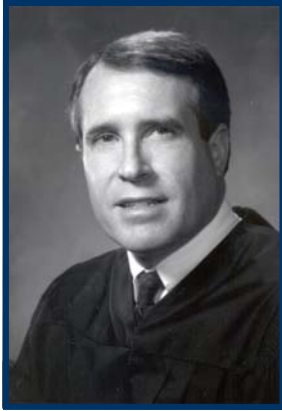
THANKS AND APPRECIATION TO
KATE BALL, EXTERN COORDINATOR
U OF I COLLEGE OF LAW
AND
DANIEL GORDON, LAW CLERK
FOR THE HONORABLE RONALD E. BUSH

AND

ANDREW JORGENSEN
JUDICIAL EXTERN
UNIVERSITY OF IDAHO COLLEGE OF LAW

FOR PROVIDING THE SYNOPSIS
OF THIS EDITION'S COMPLAINTS

JURY TRIALS -DISTRICT OF IDAHO



Chief Judge B. Lynn Winmill
 U.S. District Judge
 U.S. District Court, Idaho

US v. Robert Eugene Brewster, CR-08-35-N-BLW
 Criminal Jury Trial held in Coeur d'Alene, Idaho on April 6, 2009

Mr. Brewster, represented himself, with John E. Miller
 Law Office of John E. Miller, stand-by counsel,
 Coeur d'Alene, Idaho

Nancy D. Cook, Assistant U.S. Attorney, Coeur d'Alene
 for the Government

Verdict - Guilty Verdict on all Counts
 (Unlawful Possession of a Firearm)

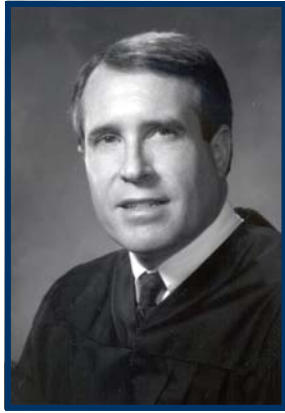
US v. Cory Ledéal King, CR-08-02-E-BLW
 Criminal Jury Trial held in Pocatello, Idaho on April 24, 2009

David R. Lombardi, Givens Pursley and
 P. Larry Westberg, Westberg, McCabe & Collins, Boise, Idaho
 For the Defendant

George W. Breitsameter, Assistant U.S. Attorney, Boise, Idaho
 for the Government

Verdict - Guilty on all Counts (Clean Water Act)

JURY TRIALS -DISTRICT OF IDAHO



Chief Judge B. Lynn Winmill
 U.S. District Judge
 U.S. District Court, Idaho

US v. Silvano Marcelion-Garcia, CR-08-245-E-BLW

Trial started on March 23, 2009

Steven Richert, Federal Defenders' Office, Pocatello, Idaho
 for the Defendant

Michelle Mallard, Assistant U.S. Attorney, Pocatello, Idaho
 for the Government

Verdict - Guilty (Illegal Re-entry)

US v. Jesus Castaneda, CR-07-187-E / CR-08-385-E-BLW

Criminal Jury Trial held in Pocatello on March 3, 2009

Nick Vieth, Federal Defenders' Office, Pocatello, Idaho,
 for the Defendant

Michael J. Fica, Assistant U.S. Attorney, Pocatello, Idaho
 and Anthony G. Hall, Assistant U.S. Attorney, Boise, Idaho
 for the Government

Defendant plead Guilty after the Jury was Seated

JURY TRIALS -DISTRICT OF IDAHO



Judge Edward J. Lodge
 U.S. District Judge
 U.S. District Court, Idaho

US v. Lorrie Mecham, CR-08-172-S-EJL

Jury selected on June 1, 2009

Andrew H. Parnes, Ketchum, Idaho, for the Defendant

Aaron N. Lucoff, Assistant U.S. Attorney, Boise, Idaho
 for the Government

Verdict - Guilty Verdict on all Counts (Sealed)

US v. Chris Arthur Christensen, CR-05-274-N-EJL

Jury Selected on May 12, 2009

David E. Dokken, Creason Moore & Dokken, Lewiston, Idaho
 for the Defendant

Nancy D. Cook, Assistant U.S. Attorney, Coeur d'Alene, Idaho
 for the Government

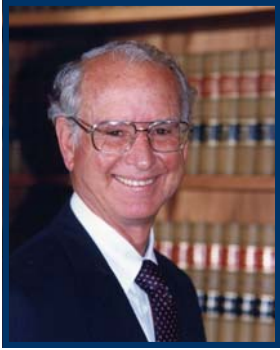
Not Guilty on 6 Counts & Undecided on 12 Counts
 (Unlawfully Dispensing Controlled Substances)

US v. Jerry Ferreira, CR-08-235-S-EJL

Trial March 10, 2009

Charles F. Peterson and Courtney Marie Peterson
 Charles F. Peterson Law Offices, Boise, Idaho
 for the Defendant

Christian F. Nafzger, Assistant U.S. Attorney, Boise, Idaho
 for the Government



Judge David R. Thompson
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

United States v. Sanchez, 07-50564

Appeal from: C.D. Cal. [Carter, J.]

Panel: Pregerson Thompson (author) District Judge Fogel

Subject Matter: Criminal Law

Affirming a decision by the district court, the panel held that in conducting the threshold inquiry on an *Ameline* remand – *i.e.*, whether it would have imposed the same sentence had it known the Sentencing Guidelines were advisory – the district court is prohibited from considering post-sentencing factors and circumstances.

The panel also held that the district court properly denied the defendant's request for placement in a Bureau of Prisons treatment program, an issue the defendant waived by failing to raise it at his original sentencing and in his first appeal.

NINTH CIRCUIT DECISIONS

In the Matter of SNTL Corp., 08-60001

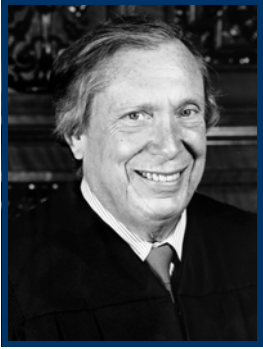
Appeal from: BAP

Panel: Hall Kleinfeld Silverman (per curiam)

Subject Matter: Bankruptcy

The panel affirmed the Bankruptcy Appellate Panel and adopted the BAP opinion as its own. In its opinion, the BAP reversed the bankruptcy court's summary judgment disallowing a creditor's multimillion dollar claim and denying the creditor's request for post-petition attorneys' fees and costs in a chapter 11 proceeding.

The BAP held that the creditor's release of the debtor's guarantor obligations did not irrevocably extinguish the creditor's claim against the debtor, and the debtor's liability was revived when the creditor compromised a preference action against it. The BAP also held that an unsecured creditor may include as part of its unsecured claim attorneys' fees incurred post-petition but arising from a pre-petition contract.



Judge Stephen S. Reinhardt
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

United States v. Lopez-Velasquez, 07-30241

Appeal from: D. Or. [King, J.]

Argued & Submitted: 7/9/08

Panel: Pregerson Reinhardt (author) District Judge Strom

Subject Matter: Criminal Law

The panel affirmed the district court's dismissal of an indictment charging illegal reentry after deportation in violation of 8 U.S.C. § 1326. The panel held that the defendant's 1994 deportation was fundamentally unfair and cannot serve as the basis for his illegal reentry conviction because he was prejudiced by the immigration judge's failure to advise him of his possible eligibility for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), where the defendant would have been a strong candidate for the discretionary relief had he applied for it.



Judge Richard C. Tallman
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

Smith v. Richards, 07-35857

Appeal from: E.D. Wash. [Leighton, J.]

Panel: W. Fletcher Gould Tallman (author)

Subject Matter: Habeas Corpus

The panel affirmed the district court’s denial of a 28 U.S.C. § 2254 habeas corpus petition. Petitioner Smith had been convicted in Alaska of two prior rapes, escaped from prison, and was convicted of rape in Washington. Alaska authorities filed a detainer and parole warrant for Smith and requested advance notice of his eventual release from prison in Washington. The day before he was to be released in Washington, the prosecuting attorney filed a petition and Smith was eventually civilly committed under Washington state law.

The panel held the state court reasonably applied federal law in concluding this civil commitment did not violate Smith’s due process rights, and observed the Supreme Court has not clearly spoken on how, if at all, one state’s detainer affects another state’s application of its laws in this context.



Judge A. Wallace Tashima
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

Tennison v. City and County of San Francisco, 06-15426

Appeal from: N.D. Cal. [Wilken, J.]

Panel: Hawkins Tashima (author) Thomas

Subject Matter: Civil Rights

The panel replaced the opinion filed December 8, 2008, and reported at 548 F.3d 1293, with this amended opinion and denied the appellants' petition for rehearing en banc as moot.

In this amended opinion, the panel affirmed the district court's summary judgment denying qualified immunity to two San Francisco homicide inspectors in this 42 U.S.C. § 1983 action. Plaintiffs served nearly thirteen years in state prison for a murder of which both plaintiffs were eventually declared factually innocent by the courts. Following their release from custody, plaintiffs filed a § 1983 action alleging that defendants withheld exculpatory evidence and manufactured and presented perjured testimony during plaintiffs' investigation and prosecution.

The panel held that *Brady* imposes a duty on police officers, not just prosecutors, to disclose exculpatory evidence. The panel held that a plaintiff is not required to establish that inspectors acted in bad faith in withholding the evidence. To establish liability under § 1983 for withholding exculpatory material from prosecutors, a plaintiff must show that police officers acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding the evidence. The panel held that in this case plaintiffs had sufficiently shown that the inspectors acted with reckless disregard for their rights and for the truth. The panel held that placing interview notes regarding exculpatory witness statements in a police file did not fulfill defendants' duty to disclose exculpatory information to the prosecutor. Evidence that a person, known to the officers, has told the officers that they have arrested the wrong people, has identified the people involved, including the shooter, and described the cars and the chase in a manner consistent with the evidence, should not have been buried in a file, but should have been made known to the prosecutor. The panel also held that defendants' delay in disclosing an exculpatory confession, made one month after the guilty verdict was rendered, was prejudicial and that it should have been clear to a reasonable officer that the confession should have been disclosed earlier. Finally the panel held that defendants should have disclosed evidence as to whether a reward was offered to a key prosecution witness.



Judge Susan Graber
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

Kessee v. Mendoza-Powers, 07-56153

Appeal from: C.D. Cal. [Gutierrez, J.]

Panel: Noonan O'Scannlain Graber (author)

Subject Matter: Habeas Corpus

The panel reversed the district court's grant of a 28 U.S.C. § 2254 habeas corpus petition challenging imposition of an upper term sentence based on a prior conviction. The panel observed that for purposes of review under the Antiterrorism and Effective Death Penalty Act of 1996, a state court's determination that is consistent with sister circuit interpretations of Supreme Court precedent, even if inconsistent with this Circuit's view, is unlikely to be contrary to or involve an unreasonable application of clearly established Supreme Court law.

The panel held that, although in this Circuit a defendant's probationary status does not fall within the "prior conviction" exception to the general rule that a sentencing judge may not make factual findings that increase the statutory maximum criminal penalty, *see Butler v. Curry*, 528 F.3d 624 (9th Cir.), *cert. denied*, 129 S. Ct. 767 (2008), a state court's interpretation to the contrary does not contravene AEDPA standards because *Butler* does not represent clearly established Supreme Court law.



Judge Sidney R. Thomas
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

Friedman v. Boucher, 05-15675

Appeal from: D. Nev. [Mahan, J.]

Panel: Third Circuit Judge Roth Thomas (author) Callahan dissenting)

Subject Matter: Civil Rights

The panel reversed the district court's summary judgment in a 42 U.S.C. § 1983 action alleging that a police detective and a county deputy district attorney violated plaintiff's Fourth Amendment rights, while he was a pre-trial detainee, when they forcefully extracted his DNA sample. The extraction occurred because the district attorney wanted to put plaintiff's DNA sample in a cold case data bank. Plaintiff alleged that the forcible extraction occurred after he was shackled and chained to a metal bar.

The panel held that shackling a detainee, chaining him to a bench, and forcibly opening his jaw to extract a DNA sample without a warrant, court order, reasonable suspicion, or concern about facility security was a violation of the detainee's clearly established rights under the Fourth Amendment. The panel also determined that no reasonable detective or prosecutor could have thought that the search was justified under the "special needs" exception, or that the Montana Statute authorized a forcible taking of a DNA sample from a Nevada citizen for Nevada law enforcement purposes. Similarly, the panel concluded that no reasonable detective or prosecutor could have thought that they could forcibly take a DNA sample from plaintiff without violating his Fourth Amendment rights. Accordingly, the panel held that the defendants were not entitled to qualified immunity. Finally, the panel held that police officer could not escape liability by claiming that he reasonably relied on the advice of the prosecutor. The panel held that when a right is clearly established and a reasonable officer should be familiar with that clearly established law, then the officer cannot escape liability purely by reliance on a prosecutor's equally unconstitutional actions.

Dissenting, Judge Callahan stated that she would find that an in-custody repeat sex offender, like plaintiff, did not have a reasonable expectation of privacy under the Fourth Amendment to prevent state authorities from using a buccal swab to take a DNA sample. Judge Callahan wrote that even were the majority's contrary position reasonable, she believed that the grant of qualified immunity nonetheless should be affirmed because the alleged constitutional violation defined by the majority was not clearly established.



Judge Kim McLane Wardlaw
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

Li v. Holder, 05-70053+

Petition for Review from: BIA

Panel: Schroeder, Wardlaw (author), Tallman

Subject Matter: Immigration

Holding: The panel granted a petition for review of a decision of the Board of Immigration Appeals denying asylum, withholding of removal, and protection under the Convention Against Torture to a citizen of China. Petitioner, who is of North Korean descent, alleged persecution by the Chinese police on account of his provision of humanitarian assistance, including food and shelter, to North Koreans seeking refuge in China.

The Board denied relief after characterizing the Chinese authorities' treatment of petitioner as prosecution for a criminal act – that of harboring foreign citizens – rather than persecution on account of political opinion. The panel held that substantial evidence did not support the Board's denial of relief where petitioner's actions, although in defiance of China's unofficial policy of discouraging such aid, violated no Chinese law.

The panel held that the IJ erred in concluding that the harm petitioner suffered, including repeated beatings and exposure to freezing temperatures, did not rise to the level of persecution. The panel also held that substantial evidence did not support the IJ's adverse credibility determination, which was based on speculation, fabricated inconsistencies, and minor discrepancies that did not go to the heart of petitioner's claims for relief. The panel held that the record compelled the conclusion that petitioner was persecuted on account of his political opinion, and it remanded the petition for a determination of whether changed country conditions rebutted the presumption of a well-founded fear of persecution.

**Idaho Chapter
FBA**

Wendy Olson, President
Assistant U.S. Attorney
U.S. Department of Justice
(208) 334-1211

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**Upcoming
Annual
Meeting**

**Friday
July 10, 2009**

11:45 a.m.

**Boise Centre
on the Grove
Payette River
Room**

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- To promote the welfare of attorneys and judges employed by the Government of the United States;
- To provide meaningful service for the welfare and benefit of the members of the Association;
- To provide quality education programs to the Federal legal profession and the public;
- To keep members informed of developments in their respective fields of interest;
- To keep members informed of the affairs of the Association, to encourage their involvement in its activities, and to provide members opportunities to assume leadership roles;
- To promote professional and social interaction among members of the Federal legal profession.

MAKE NO LAW

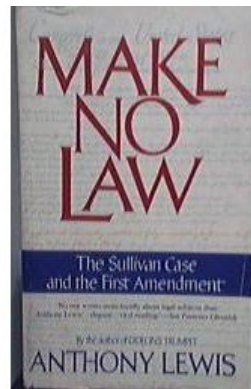
**THE SULLIVAN CASE AND THE FIRST AMENDMENT
"SUSIE'S BOOKSHELF"**

One of my favorite books is *Make No Law* by Anthony Lewis.

Here's what's written in the inside cover: The rights of every American were enhanced for generations by a legal struggle that began with an advertisement in *The New York Times* on March 29, 1960. The full-page ad, signed by, among others, Eleanor Roosevelt and Jackie Robinson, sought support for the campaign of Dr. Martin Luther King, Jr., to end racial segregation in the South and win blacks the right to vote.

The stakes were nothing less than the historic American freedom of speech and of the press.

Though the ad mentioned no names, L.B. Sullivan, a city commissioner of Montgomery, Alabama, claimed that he was libeled by its charges that Southern officials had brutally suppressed



Protests. He sued *The Times* and four black Alabama ministers listed as signers of the ad for \$500,000, and an all-white jury awarded him the full amount.

The cases threatened to intimidate the national press and broadcasters from covering the civil rights protests. It was an epic legal battle — one that was crucial to the continuing freedom of the American press.

I hope you enjoy this book as much as I have. It's an easy read; I like his style of writing.