The Defense Never Rests

Holiday Edition

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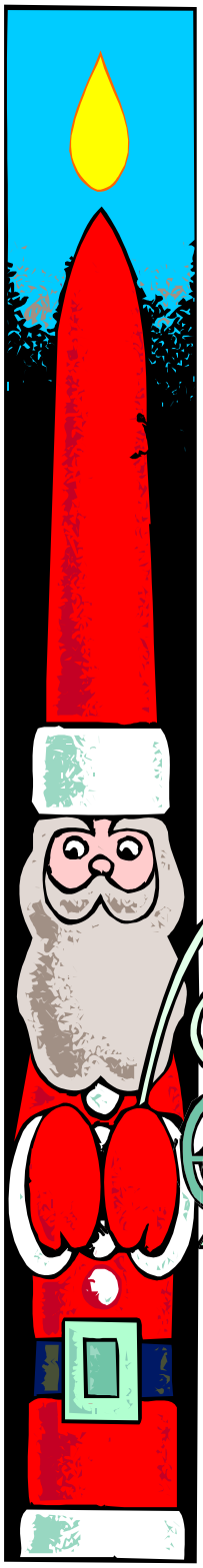

The Federal Public Defender's Office
for the Eastern District of Louisiana
wishes you and yours a wonderful holiday season.

YES, VIRGINIA,

THERE IS A SANTA CLAUS
BECAUSE MAN WITHOUT A COUNTRY
GETS HIS DAY IN COURT!

As you may recall from previous newsletters, we were hopeful that the United States Supreme Court would grant the writ of certiorari in **Zadvydas v. Underdown**, No. 99-7791. Well, on October 10, 2000, the Supreme Court did grant the writ! The case is scheduled for argument at the end of February. So much for Mardi Gras! The brief was due to the Court on Thanksgiving, and with the concerted effort of everyone in the office, we were able to get it out at 5:30 p.m. on the day *before* Thanksgiving. Just to let you know that the Supreme Court is just like any other court (only supreme), we heard from the Court one week after they *should* have received our brief, asking if we *intended* to file a brief! After some resuscitation, we described the box to the clerk. Only then was she able to locate it. It appears that it was placed on a shelf on the mistaken belief that Supreme Court briefs do not go regular post in recycled Xerox boxes! (Your tax dollars at work.) For once, Virginia's neurotic belief that anything that can go wrong will go wrong, resulted in concrete proof, purchased for $1.20 from the U.S. Postal Service, that we did timely file the brief.

With that said, fun was had by all. It is an exciting time and the whole office is pulling together. Our reply brief is due in January. We are learning a great deal about Supreme Court practice because while we are the petitioner in **Zadvydas**, we are consolidated with the respondent in a parallel matter from the Ninth Circuit. We are receiving many calls from other attorneys suggesting issues, cases, and arguments.

Virginia, be careful what you ask for, you just might get it!

In This Issue:

ANOTHER CJA INCREASE LIKELY

The Commerce, State, Justice and Judiciary Bill has passed both the House and the Senate. However, it has not been forwarded to the President because of a non-judiciary related veto threat. The House/Senate Conference Report provides for a $5.00 increase to both in-court and out-of-court time, which would raise the fees to $75 and $55, respectively. House Resolution Bill 4690 does not state when the increase will be effective. The Administrative Office will analyze the available funds to determine when the $5.00 increase will be implemented. The Government is now operating under a continuing resolution and a long term continuing resolution is not favored. Consequently, I anticipate that the problematic immigration provision holding up the appropriations bill will soon be resolved and allow the President (whoever he may be) to sign H.R. 4690. We will keep you advised.

NEW CASE MAXIMUMS

The Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, was enacted on November 13, 2000. It amends the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, by increasing the case compensation maximums for attorneys. The new case maximums are:

Felonies	$5,200	(previously $ 3,500)
Misdemeanors	$1,500	(previously $1,000)
Appeals	$3,700	(previously $2,500)
Other	$1,200	(previously $750)

The CJA amendments apply to cases pending on or after November 13, 2000, because the legislation became effective on that date. Please note that, with respect to the case compensation maximums, if a panel attorney provides **any** representational services **on or after November 13, 2000,** the new maximums apply to the entire representation, including services performed before November 13th. If **all** services were furnished **before November 13, 2000,** the former case compensation maximums apply.

(JUST IN CASE!) REIMBURSEMENT FOR MALPRACTICE EXPENSES

The Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, also provides for reimbursement of expenses in defense of certain malpractice actions. Section 3006A(d)(1) of Title 18, United States Code, reads as follows:

> Attorneys may be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court, and the costs of defending actions alleging malpractice of counsel in furnishing representational services under this section. No reimbursement for expenses in defending against malpractice claims shall be made if a judgment of malpractice is rendered against the counsel furnishing representational services under this section. The United States magistrate or the court shall make determinations relating to reimbursement of expenses under this paragraph.

We hope this will never be necessary, but thought that you would nonetheless want this information.

LAST CHANCE FOR FREE CLE THIS YEAR

Judge Ginger Berrigan is the chair of the Louisiana State Bar Association's Committee on Post-conviction Representation. Denise LeBoeuf, Nick Trenticosta, John Craft and Virginia Schlueter are members of the Committee. During this past year, the LSBA Committee has recruited several attorneys and firms to provide pro bono representation to persons under a sentence of death.

Thanks largely to Judge Berrigan there will be an excellent day long training seminar offered *free of charge*. If you are interested in learning more about investigating and litigating a death penalty post-conviction case please make plans to attend. The Committee will host the training on **Tuesday, December 19th**, at **Loyola Law School**, from **9am to 5pm**. The core trainers will be Denise LeBoeuf and Nick Trenticosta, two seasoned veterans of Louisiana capital litigation. The sessions will provide you with a basic understanding of state and federal capital post-conviction procedure, the elements of capital jurisprudence from the United States Supreme Court and the Louisiana Supreme Court, and a how-to guide to investigating and litigating a post-conviction death penalty case. A death penalty litigation manual will be distributed at the training.

The Office of the Federal Public Defender of the Eastern District of Louisiana is excited to notify Criminal Justice Act Panel members about this important training opportunity. We anticipate that 6 hours of CLE credit will be approved. PLEASE NOTE: Ethics and professionalism are not being offered. We recommend you attend and hope to see you there. For more information call Denise Barbarin in Judge Berrigan's chambers, 504-589-7515.

SUPREME COURT UPDATE

In 2000, the United States Supreme Court has issued a number of interesting decisions in criminal cases dealing with subjects in addition to the ***Apprendi*** issue. One of the more significant ones, involving the use of roadblocks to find drug offenders, was issued last week while the election controversy rolled on and seemed to escape public notice. What follows are brief synopses of some of the more interesting decisions issued this year.

Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000); January 12, 2000

Unprovoked flight can be a factor in a police officer's conclusion that there is sufficient reasonable suspicion to justify a Terry stop and frisk.

The defendant took flight when an eight car caravan of Chicago police officers entered a high crime area known

for open drug sales. Two police officers caught the defendant and patted him down, finding a firearm. He was arrested for being a felon in possession of a firearm.

The trial court granted the defendant's motion to suppress the firearm. The Illinois Supreme Court affirmed, determining that sudden flight in a high crime area does not create reasonable suspicion because flight may just be an exercise of the right to be on one's way.

The United States Supreme Court did not agree. While there may be innocuous reasons for leaving the scene rapidly, flight can be a factor that police officers take into account. The reasonable suspicion determination is based upon common sense judgments and inferences about human behavior. Flight is not necessarily indicative of ongoing criminal conduct, but the law allows officers to detain individuals temporarily to resolve ambiguities in their conduct. The law includes the risks that officers may stop innocent people. If the officers do not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.

The State of Illinois wanted a per se rule regarding unprovoked flight upon seeing a clearly identifiable police officer. The Court refused to create such a rule since there may be perfectly good, innocent reasons for wanting to escape from an area where there is about to be police activity.

Chief Justice Rehnquist wrote the opinion. Justices Stevens, Souter, Ginsburg and Breyer concurred in the reasoning but dissented from the result, finding that the officers here did not have enough reasonable suspicion to justify the stop.

Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375 (2000); March 28, 2000

An anonymous tip lead police officers to stop a juvenile and pat him down. The officers found a firearm. The Supreme Court, in a decision written by Justice Ginsburg, upheld the decision of the Supreme Court of Florida suppressing the evidence. The Court held that an anonymous tip that a person is carrying a gun, without more, is not sufficient to justify a police officer's stop and frisk of that person. In this case, the officer received an anonymous call from someone at an unknown location describing the subject's clothing and saying the he was carrying a gun. There was no indication as to how the caller knew the subject was armed and the police officers did nothing in the way of independent corroboration.

Bond v. United States, 529 U.S. 334, 120 S.Ct. 1462 (2000); April 17, 2000

The Chief Justice wrote the opinion from which Justices Breyer and Scalia dissented. The Court found that a law enforcement officer's squeezing of a bus passenger's carry-on bag violated the Fourth Amendment. Although the passenger had the expectation that his bag might be handled by bus employees or other passengers, he did not have any expectation that anyone would feel the bag in an exploratory manner. His expectation of privacy in the content of the bag was entirely reasonable.

Ohler v. United States, 529 U.S. 753, 120 S.Ct. 1851 (2000); May 22, 2000

Chief Justice Rehnquist, writing for the majority. Souter, Stevens, Ginsburg and Breyer dissented.

If a defendant preemptively introduces evidence of a prior conviction examination, the defendant cannot later claim on appeal that the admission was error.

The Government moved, in limine, to use the defendant's prior felony drug conviction as impeachment evidence. The district court ruled that the conviction could be used. When the defendant took the stand, the defense introduced the conviction on direct examination, hoping to lessen the blow. The defendant raised the in limine ruling on direct appeal. The majority of the Supreme Court found that until the government actually uses the evidence itself, the ruling in limine is simply speculative. The defendant, by choosing to admit the evidence herself waived the right to complain about the ruling.

The court wrote as though the defendant were up to something sneaky.

> Due to the structure of trial, the Government has one inherent advantage in these competing trial strategies. Cross-examination comes after direct examination, and therefore the Government need not make its choice until the defendant has elected whether or not to take the stand in her own behalf and after the Government has heard the defendant testify.
>
> Petitioner's submission would deny to the Government its usual right to decide, after she testifies, whether or not to use her prior conviction

> against her. She seeks to short-circuit that decisional process by offering the conviction herself (and thereby removing the sting) and still preserve its admission as a claim of error on appeal.

120 S.Ct. at 1854.

The dissent points out the widespread acceptance of the preemptive use of impeachment testimony. Allowing the defendant to introduce convictions on direct examination promotes fairness of the trial without handicapping the Government. This waiver rule will discourage defendants from introducing the evidence themselves and does nothing to promote fairness.

Dickerson v. United States, ___ U.S. __, 120 S.Ct. 2326 (2000); June 26, 2000

The Supreme Court, in an opinion by the Chief Justice and from which Justices Scalia and Thomas dissented, found that the provisions of ***Miranda*** requiring a specific litany of rights when police officers want to conduct a custodial interrogation of an arrested subject are constitutional.

In ***United States v. Dickerson***, 166 F.3d 667 (4th Cir. 1999), a district court suppressed a statement because it was obtained without the recitation of rights required by ***Miranda***. The Fourth Circuit appointed amicus counsel to brief and argue the proposition that Congress legislatively overruled ***Miranda*** with the passage of Title 18, United States Code, Section 3501 in 1968. The Fourth Circuit reversed saying that even though ***Miranda*** was violated, the statement was obtained properly according to Section 3501, a position never espoused by the Government. The Supreme Court granted Dickerson's application for a writ of certiorari and appointed the same amicus counsel to brief and argue the case in support of the Fourth Circuit's judgment.

Section 3501 was passed by Congress just two years after the ***Miranda*** decision. It was the position of the Fourth Circuit that the statute was created in response to the Supreme Court's invitation in ***Miranda*** to legislators to create other methods to protect suspect's right to remain silent. ("Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a cont
inuous opportunity to exercise it." 384 U.S. at 490) Section 3501 prescribes a totality approach to the issue of admissibility of a confession and does not require a specific litany before interrogation.

Under all the administrations in office since 1968, the Department of Justice has declined to take the position that Section 3501 overruled ***Miranda***. In fact, before the Fourth Circuit, the Department of Justice asserted that the provision is unconstitutional. The Fourth Circuit rejected that position, characterizing it as "elevating politics over law."

The Supreme Court, to the surprise of many, found that Miranda was of constitutional significance. By looking not at the ruling itself but at how it has been treated in the intervening years, the Court concluded that Miranda's warning based approach to determining the admissibility of statements made during custodial interrogations could not be overruled by legislative act.

The issue of the continuing viability of ***Miranda*** reached the Supreme Court after years of cases in which the more conservative successors to the Warren court have restricted the scope of ***Miranda***, consistent with their general rejection of the judicial rule-making of the 1950's and '60's. The ***Miranda*** rule is viewed by the dissenters as a prophylactic measure that exceeds the constitutional protections of the Fifth Amendment. For example, in ***Oregon v. Elstad***, 470 U.S. 298 (1985) the Court held that what the police learn or obtain as the direct result of an otherwise voluntary statement taken in violation of ***Miranda*** is not excludable. A second statement, taken in conformity with ***Miranda***, was not suppressible as fruit of the poisonous tree even though it was the direct result of an initial statement taken in violation of ***Miranda*** but under circumstances that showed it to be voluntary. An otherwise voluntary statement taken in violation of ***Miranda*** can be used for impeachment purpose if the defendant makes an inconsistent statement on the witness stand. ***Harris v. New York***, 401 U.S. 222 (1971). The Court has held also that the policies of deterrence mandating ***Miranda*** warnings are outweighed by immediate concerns of public safety. Answers to questions asked which are reasonably related to matters of public safety (regardless of good or bad faith on the part of the questioner) are admissible without regard to ***Miranda***. ***New York v. Quarles***, 467 U.S. 649 (1984).

Cleveland v. United States, ___ U.S. ___, 121 S.Ct. 365 (2000); November 7, 2000

In a case of great local interest, the Supreme Court unanimously ruled that unissued video poker licenses

are not property as contemplated by the mail fraud statute. The state's interest in such unissued licenses is regulatory and not proprietary. Because the mail fraud statute is aimed at protecting property interests, it does not apply to schemes directed at affecting the issuing of such licenses.

City of Indianapolis v. Edmond, ___ U.S. ___, ___ S.Ct. _____, 2000WL 1740936 (U.S.); November 28, 2000

Justice O'Connor wrote the opinion for a 6 justice majority which held that it violated the Fourth Amendment for the City of Indianapolis to set up drug checkpoints on city streets. Between August and November of 1998, the city set up roadblocks on six occasions. Signs were posted indicating that the roadblocks were ahead. At the roadblocks, approximately 30 police officers with drug-sniffing dogs would stop a predetermined number of cars. The drivers would be questioned while dogs were walked around the outside of the car. If further suspicions were aroused, the search would escalate. A total of 1,161 vehicles were stopped and 104 people were arrested.

The Supreme Court distinguished this type of roadblock from D.W.I. roadblocks because there was no relationship between the criminal activity being investigated and the operation of motor vehicles. There were also no special circumstances justifying a suspicion less search as is the case in drug testing school athletes or railway employees. Because these roadblocks were directed at uncovering evidence of ordinary criminal wrongdoing and were without special justification, they violated the Fourth Amendment.

The dissenters found that the roadblocks were no more intrusive than D.W.I. roadblocks and effectively served the state's legitimate interests.

TIME IS RUNNING OUT FOR CLINTON'S CLEMENCY

President Clinton is likely to commute the sentences of some Federal prisoners before he leaves office. It is inconceivable that the next President will use this enormous, unreviewable power again for four or eight years. In particular, prisoners who are low-level drug offenders serving very long sentences under the guidelines are likely beneficiaries of this opportunity. Also, prisoners who have illnesses, family situations or other situations that warrant mercy may also benefit. *Prisoners* must file a petition.

If you have clients, or former clients, who have exhausted their appeals, they should file a petition for commutation of sentence IMMEDIATELY with the Pardon Attorney, Roger C. Adams, 500 First Street, N.W., 4th Floor, Washington, D.C. 20530, telephone: 202-616-6070, fax: 202-616-6069. The forms can be found on the Criminal Justice Policy Foundation's website at http://www.cjpf.org or can be requested directly from the Pardon Attorney.