The Defense Never Rests

A Newsletter for CJA Panel Attorneys for the Eastern District of Louisiana

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Local News

- On February 1, 1999, Sally A. Shushan was sworn in as a United States Magistrate Judge. Her chambers are located in Room B-345 and her courtroom is B-309 of the Hale Boggs Building. The telephone number is (504) 589-7620.

- We welcome Valerie Welz Jusselin as an Assistant Federal Public Defender effective February 1, 1999. Ms. Jusselin previously held the position of Research and Writing Specialist in our office. Prior to her arrival in this office, she was an assistant district attorney in Orleans Parish and a partner in the New Orleans law firm of Sessions & Fishman, where she specialized in civil and criminal litigation. She also served on our CJA panel for three years.

- Recent changes in the U.S. Attorney's Office include the designation of Walter Becker as Chief of the Criminal Division and Jan Mann as Senior Litigation Counsel. Mary Jude Darrow has transferred to the U.S. Attorney's Office in Raleigh, North Carolina.

- With great sadness we report that Dan Markey died on January 22, 1999 of complications from a stroke. Dan was a former prosecutor in the U.S. Attorney's Office and an assistant district attorney in Orleans and Jefferson parishes. He served on our CJA panel for over fifteen years. He continued to show his dedication even after his initial stroke in early 1998 when he appeared for oral argument at the Fifth Circuit in the case of *USA v. Len Davis, et al.* His efforts on behalf of indigent defendants will certainly be missed.

- If you have any noteworthy news that you would like to include in future newsletters, please call us! Don't be shy!

Have a safe and happy one!

THREE IMPORTANT SUPREME COURT DECISIONS ISSUED IN DECEMBER

The Supreme Court issued three significant decisions in December, two dealing with important search and seizure issues and one with jury instructions in capital cases. These decisions will affect both federal and state courts.

❑ The harmless error rule applies to the use of improper jury instructions in capital cases.

Calderon v. Coleman, 119 S. Ct. 500 (1998)

At the sentencing phase of a capital case in California, the trial judge gave an inaccurate instruction about the governor's commutation power. The United States District Court granted habeas corpus relief because the trial judge did not tell the jury the California constitution would not let the governor commute the sentence of a twice convicted felon like Coleman without the approval of four judges of the California Supreme Court.

The Ninth Circuit affirmed the District Court. The Supreme Court agreed with the state that the District Court should not have granted relief without conducting the proper harmless error analysis. In a habeas case, a federal court may grant relief based on trial error only when that error "had substantial and injurious effect or influence on the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619 at 637 (1993). Because neither the Ninth Circuit nor the District Court applied the *Brecht* harmless error test, the case was remanded.

Justice Stevens, joined by Justices Souter, Ginsburg and Breyer dissented. Justice Stevens wrote that both the District Court and the Ninth Circuit had found that the error had affected the jury's deliberations and that a recitation of the exact language in *Brecht* should not have been required.

BOTTOM LINE -- In habeas cases, if you argue that an erroneous jury instruction was given, use the harmless error analysis language from *Brecht.*

❑ Full search of an automobile during a traffic stop without a custodial arrest is unconstitutional.

Knowles v. Iowa, 119 S.Ct. 484 (1998).

An Iowa statute allowed for a full search of a car stopped for speeding even if there was no arrest of the driver. The Supreme Court held that statute unconstitutional.

A policeman in Iowa stopped Knowles for speeding and gave him a ticket instead of arresting him. Iowa law said the officer had the discretion to decide whether or not to make an arrest. After writing a ticket, the officer conducted a full search of the car, without either consent or probable cause. He found marijuana and a pipe and then arrested Knowles for possession.

The Iowa Supreme Court upheld the search saying that it was justified so long as the officer had probable cause to make a custodial arrest even if there had not been an actual arrest. The United States Supreme Court disagreed. Neither of the two justifications for a search pursuant to an arrest does not exist when there is no arrest: 1) The real threat to the officer's safety in issuing a traffic ticket rather than making an arrest is minimal; and 2) the need to discover and protect evidence does not exist in a traffic stop.

This is an unanimous decision written by the Chief Justice.

BOTTOM LINE -- In attacking an automobile search that begins with a traffic stop, argue that the search of the car began before the officer decided to arrest the driver.

❑ There is no reasonable expectation of privacy on the part of someone who is on the premises for the purpose of conducting drug business.

Minnesota v. Carter, 119 S.Ct.469 (1998).

A police officer looked in an apartment window through a gap in the blinds and saw the lessee of the apartment and two other people, Carter and Johns, bagging cocaine. Carter and Johns argued that the officer's peek through the blinds was an unreasonable search. The state Supreme Court held that Carter and Johns had "standing" to claim Fourth Amendment protection because they had a legitimate expectation of privacy.

The United States Supreme Court reversed the state Supreme Court. The analysis of expectation of privacy under the "standing" doctrine has been rejected. To claim Fourth Amendment protection now, a defendant must demonstrate that he personally has an expectation of privacy in the place searched and that his expectation is reasonable.

While an overnight guest may have a reasonable expectation of privacy in someone else's home, a brief visitor may not. Also, the expectation of privacy in commercial property is much less than that in a home. Because Carter and Johns were in the apartment for purely commercial reasons for only a brief period of time, they did not have any reasonable expectation of privacy.

The Chief Justice wrote the opinion for a fragmented court. There are three concurring opinions and three dissenters.

BOTTOM LINE -- A defendant arguing a Fourth Amendment violation concerning premises where he was a guest has to be able to demonstrate a continuing legitimate presence on the premises.

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Downward Departures Now Possible for Cooperating Defendants Without a Government Motion

The Fifth Circuit has found a way for sentencing judges to give downward departures for substantial assistance without the government filing a motion under §5K1.1. In *United States v. Solis*, 161 F.3d 281 (5th Cir. 1998), the Fifth Circuit held that the broad discretion allowed sentencing courts under §5K2.0 to make downward departures applies in cases where the defendant has helped the government but has not been rewarded with a downward departure motion.

The Supreme Court expanded the breath of that discretion in *United States v. Koon*, 518 U.S. 81, 116 S.Ct. 2035 (1996). It must make Sgt. Koon quite happy that his case is doing so much good for so many criminal defendants. Surely that is what the cops had in mind when they were beating Rodney King.

In *Solis*, the sentencing court had actually applied the safety valve provision improperly and the government appealed. The Fifth Circuit found that the error was harmless since the sentencing court could have used the catch-all downward departure provision under §5K2.0 because the defendant's assistance to the government made this case land outside the "heartland" of cases as contemplated by the guidelines.

The government's rehearing application and suggestion for rehearing en banc are still pending before the Fifth Circuit.

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Fifth Circuit Says There is No Right To Counsel For Death Row Inmate Who Missed the One Year Deadline for Seeking Federal Habeas

Supreme Court denies stay and allows execution.

On January 11, the Supreme Court refused to hear the case of a Texas death row inmate who never was able to present the merits of his case to a federal court. Andrew Cantu-Tzin is now scheduled to be executed on February 16.

On December 2, 1998, the Fifth Circuit held that Cantu-Tzin was not entitled to a stay of execution or for appointment of counsel to argue the merits of his case because he had missed the one year deadline for filing his federal habeas corpus petition under the Antiterrorism and Effective Death Penalty Act of 1996.

Although the Fifth Circuit has recognized that the one-year deadline can be equitably tolled, two of the three judges on the panel found that Cantu-Tzin could have filed the petition on time. Judges Edith Jones and Rheas Barksdale concluded that Cantu-Tzin had been unreasonable and dilatory in his dealings with Texas state courts. His failure to file timely in federal court could not be excused because he made no effort to obtain federal relief until after the AEDPA deadline had unquestionably passed.

The Fifth Circuit appointed counsel solely for the purpose of litigation of the time-limitation issue but found that Cantu-Tzin was not entitled to appointment of counsel to pursue any substantive issues. *Cantu-Tzin v. Johnson,* 162 F.3d 295 (5th Cir. 1998).

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The First Reversal of the New Year

In an unusual case handled by our office, the Fifth Circuit has set aside a sentence finding that the relevant offense conduct relied upon by the probation officer and the court in sentencing the defendant was not relevant after all. In *United States v. Arthur Mitchell, III*, ___ F.3d ___ (5th Cir, No. 97-31252, January 29, 1999), the sentencing court used the amount of drugs found in the house where the defendant had spent the night as the relevant offense conduct for determining the sentence. The defendant was convicted of being a felon in possession of a firearm. The firearm for which he was convicted was found in the car he was driving when arrested.

The drugs in question were found in a strongbox inside the house where he had just spent the night. In close proximity to the strongbox was another firearm. In an earlier trial, he had been acquitted of possession of that firearm. The Fifth Circuit pointed out that it made no sense to conclude that the gun in the car was intended to be used to protect the drugs when the other gun was so much closer.

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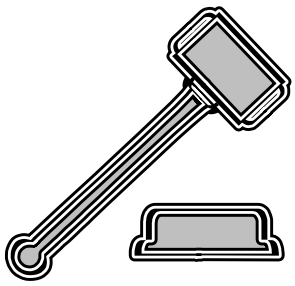

Federal Public Defender's Office
For the Eastern District of Louisiana
501 Magazine Street, Suite, 318
New Orleans, Louisiana 70130

Telephone: (504) 589-2468
Facsimile: (504) 589-2556
Toll Free: 1 (800) 296-4046

Virginia L. Schlueter
Federal Public Defender

Robert F. Barnard
John H. Craft
Roma A. Kent
Gary V. Schwabe, Jr.
Claude J. Kelly, III
Valerie Welz Jusselin
Assistant Federal Public Defenders

Barbara Daigle
Paralegal/CJA Panel Administrator

Edgar Wm. Casey
Staff Investigator

Donna Taylor
Administrative Officer

Liliana Guichard
Case Management Specialist

Magi Strickland
Legal Secretary

Verus Pearson
Clerical Assistant