The Defense Never Rests

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

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Local News

♦ The Volunteers of America Halfway House has moved. The new address is 2929 St. Anthony Street, New Orleans, Louisiana 70122, on the corner of St. Anthony and Abundance. Their new telephone number is 944-5678. This facility will house both men and women. Ed Bolger has kindly invited all panel lawyers to an open house on September 8, 1999. The open house is all day with a buffet lunch served immediately following a brief dedication at 11:00 a.m.

♦ The Clerk of Court's office has announced that tele-conferencing facilities are now available in the George Arceneaux, Jr. courthouse in Houma. With permission of the judicial officer presiding, the Houma facility can be used so that attorneys in that area will not have to attend conferences with the court in person.

♦ Despite countless resolutions calling for the increase to $75 per hour for both in and out of court fees for Criminal Justice Act Panel Attorneys, the Senate Appropriations Committee only approved an increase of $10 per hour for both in court and out of court time expended. The House of Representatives, however, only approved a $5 increase to the rates. Hopefully, the Appropriations Committees of the Senate and House will have an opportunity to meet before the end of this fiscal year (October 1, 1999) and decide what increase will be funded. See *House Report No. 106-283* and *Senate Report 106-76* or visit their website at www.house.gov.

THE MCDADE-MURTHA BILL MAKES FEDERAL PROSECUTORS TOE STATE ETHICAL LINES

The days when federal prosecutors could deal with defendants and potential defendants without worrying about the Rules of Professional Conduct are over.

Since April of 1999, federal prosecutors are no longer exempt from the state ethical rules that apply to all other attorneys. Rep. Joe McDade, a Republic Congressman from Pennsylvania sponsored legislation amending Title 28 of the United States Code to make federal attorneys obey the Rules of Professional Conduct. Rep. John Murtha, a Democrat, also from Pennsylvania, joined McDade in organizing support for the bill. Rep. McDade was indicted on federal bribery charges but was acquitted at trial. He felt that the charges against him were the result of prosecutorial excess. His bill, as originally proposed would have also created a new panel to investigate complaints of federal prosecutorial misconduct. The panel provision was jettisoned in a compromise to achieve passage.

The exemption from state ethical rules was first created by former Attorney General Richard Thornburgh in a memo issued in 1989. Relying on the supremacy clause, Thornburgh, by ukase, exempted his prosecutors from discipline by state bars. Attorney General Janet Reno made the policy formal Justice Department policy in 1994 when she declared that federal prosecutors could, under certain circumstances, make direct contact with people they knew to be represented by counsel. The ethical rules in all fifty states forbid such contact with represented parties.

The Citizen Protection Act was signed into law in October of last year. Its effective date was postponed for six months to give the Justice Department time to draft appropriate rules. New rules have been added to the Code of Federal Regulations implementing the act.

The Rules of Professional Conduct forbid lawyers from making direct or indirect contact with represented adverse parties. The Rules also forbid lawyers from giving advice to adverse parties other than the advice to seek counsel. The practice of obtaining a plea agreement from an unrepresented defendant, often used by federal prosecutors, is a violation of the Rules.

THE CITIZEN PROTECTION ACT
28 U.S.C.A. § 530B

Ethical standards for attorneys for the Government:

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of Title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

CODE OF FEDERAL REGULATIONS
TITLE 28–JUDICIAL ADMINISTRATION
CHAPTER I–DEPARTMENT OF JUSTICE
PART 77–ETHICAL STANDARDS FOR ATTORNEYS FOR THE GOVERNMENT

* * *

§ 77.3 Application of 28 U.S.C. 530B.

In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in § 77.2 of this part.

§ 77.4 Guidance.

(a) Rules of the court before which a case is pending.

A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.

(b) Inconsistent rules where there is a pending case.

(1) If the rule of the attorney's state of licensure would prohibit an action that is permissible under the rules of the court before which a case is pending, the attorney should consider:

(i) Whether the attorney's state of licensure would apply the rule of the court before which the case is pending, rather than the rule of the state of licensure;

(ii) Whether the local federal court rule preempts contrary state rules; and

(iii) Whether application of traditional choice-of-law principles directs the attorney to comply with a particular rule.

* * *

(c) Choice of rules where there is no pending case.

(1) Where no case is pending, the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought.

(2) In the process of considering the factors described in paragraph (c)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

* * *

(f) Investigative Agents. A Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under section 530B. A Department attorney who in good faith provides legal advice or guidance upon request to an investigative agent should not be deemed to violate these rules.

PERTINENT RULES OF PROFESSIONAL CONDUCT

Rule 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. A lawyer shall not effect the prohibited communication through a third person, including the lawyer's client.

Rule 4.3 DEALING WITH UNREPRESENTED PERSON

A lawyer shall assume that an unrepresented person does not understand the lawyer's role in a matter and the lawyer shall carefully explain to the unrepresented person the lawyer's role in the matter.

During the course of a lawyer's representation of a client, the lawyer should not give advice to a non-represented person other than the advice to obtain counsel.

For all the Rules of

RECENT SUPREME COURT DECISIONS

☐ Chicago's Gang Loitering Ordinance Ruled Unconstitutional

City of Chicago v. Morales et al, ___ U.S. ___. 119 S.Ct. 1849 (1999)

On June 10, 1999, the Supreme Court threw out Chicago's "gang loitering" ordinance. Noting that the ordinance covered a great deal of harmless behavior, Justice Stevens, writing for the majority, found it was both vague and overbroad. The Court held that: (1) the ordinance, which required a police officer, on observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse, and made failure to obey such an order a violation, was unconstitutionally vague in failing to provide fair notice of prohibited conduct; and (2) ordinance was also impermissibly vague in failing to establish minimal guidelines for enforcement.

The ordinance contained a definition of loitering that the Court found troubling.

> The term "loiter" may have a common and accepted meaning, but the ordinance's definition of that term--"to remain in any one place with no apparent purpose"--does not. It is difficult to imagine how any Chicagoan standing in a public place with a group of people would know if he or she had an "apparent purpose." This vagueness about what loitering is covered and what is not dooms the ordinance.

Chief Justice Rehnquist and Justices Scalia and Thomas dissented. Justice Thomas, in his dissent, predicted terror in the Loop:

The duly elected members of the

> Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery.

He jabbed the majority with a well chosen quote:

> The ordinance is not vague. "[A]ny fool would know that a particular category of conduct would be within [its] reach." *Kolender v. Lawson*, 461 U.S. 352, 370, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (White, J., dissenting).

* * *

□ **Failure to Charge the Jury As to An Essential Element of the Crime Can Be Harmless Error**

Neder v. United States, ___ U.S. ___, 119 S.Ct. 1827 (1999)

Also on June 10, 1999, the Supreme Court held that failing to charge the jury as to an element of the offense can be harmless error. Chief Justice Rehnquist wrote the opinion holding: (1) an erroneous jury instruction that omits an element of offense is subject to harmless-error analysis; (2) the error in refusing to submit materiality issue to jury regarding tax fraud offenses was harmless; and (3) materiality of falsehood is element of federal mail fraud, wire fraud, and bank fraud statutes.

The Chief Justice distinguished failure to charge the jury on an essential element from those errors that can never be harmless. Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

In this case, the error was harmless because the Government's evidence demonstrated that Nedert Neder failed to report over $5 million in income from loans. The failure to report such substantial income incontrovertibly establishes that Neder's false statements were material to a determination of his income-tax liability. Neder did not argue, either to the jury or before the Supreme Court, that his false statements of income could be found immaterial. Because the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction was properly found to be harmless.

* * *

□ ***Bruton* Still Lives!**

Lilly v. Virginia, ____ U.S. ____, 119 S.Ct. 1887 (1999)

In a third opinion issued June 10, 1999, the Supreme Court reversed a murder conviction and death sentence because of a confrontation clause violation. An accomplice's confession was admitted into evidence against the petitioner even though the accomplice was not called as a witness.

Out on a crime spree that included a number of robberies, three men stole a car and abducted its owner. The owner was later murdered. After being arrested, two of the men, including the petitioner's brother, gave statements confessing to the crimes but maintaining that petitioner killed the victim. At trial, the brother was called as a witness but invoked the Fifth Amendment. The prosecution then introduced into evidence the brother's confession. The Virginia Supreme Court found that the brother's confession was admissible under state evidence law as because it was inherently reliable as a declaration against penal interest.

The Supreme Court found that the issue was not one of reliability under evidence law, but one of the petitioner's right to confront the

witnesses against him. The Court noted that in ***Bruton v. United States,*** 391 U.S. 123, 88 S.Ct. 1620 (1968), the fact that the offending statement was against the penal interest of the declarant did not make it admissible against Bruton. The Bruton prohibition against implicating the defendant through a non-testifying accomplice's confession still stands.

* * *

FIFTH CIRCUIT RECOGNIZES THAT UNCONSTITUTIONAL JURY INSTRUCTIONS WERE STANDARDIZED IN JEFFERSON AND ORLEANS PARISH

Morris v. Cain, No. 98-30637, August 3, 1999 (Eastern District of Louisiana)

The Fifth Circuit, Judges Smith, DeMoss and Stewart, in an opinion written by Judge Stewart, has reversed the Eastern District of Louisiana and granted habeas corpus relief to Donald Morris. The Fifth Circuit has again ruled that once it is found that the trial court's reasonable doubt instruction violates ***Cage v. Louisiana***, the harmless error rule does not apply.

Morris was sentenced to three consecutive 99 year sentences for three counts of armed robbery. At his trial, the jury was told that reasonable doubt must "give rise to a grave uncertainty . . .". The Fifth Circuit also found that the decisions of the state courts that had denied Morris relief were in direct conflict with federal constitutional law, a requirement for granting habeas corpus relief after AEDPA.

> Before addressing Morris' claim, we pause to note that the state habeas court's legal determination – that any *Cage* error in the jury instructions given at Morris's trial was harmless – does not bind this Court's federal habeas corpus review. That decision was contrary to clearly established federal law as determined by the United States Supreme Court in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *Sullivan* plainly held that *Cage* error is not subject to harmless error analysis.

Importantly, the Court also observes in a footnote that instructions violating ***Cage*** and ***Sullivan*** were institutionalized in Jefferson and Orleans Parish courts.

> It is worth noting that the instructions in *Cage* used the phrase "actual substantial doubt," while the instructions at Morris's trial inserted the conjunction "or" into the mix, calling for "actual *or* substantial doubt" (emphasis added). Although it is arguable that the distinction is significant, we believe that the intent behind both instructions was the same, particularly given that the instructions here were standardized for use in Orleans and Jefferson Parishes for decades.

This recognition may be significant in cases where verbatim transcripts of the jury instructions cannot be produced.

* * *

WRIT APPLICATIONS ARE NO LONGER REQUIRED WHENEVER AN INDIGENT CLIENT ASKS FOR ONE

The Criminal Justice Act Plan for the Fifth Circuit no longer requires that appointed counsel file a writ application in the Supreme Court in every case where the client requests one. Section 4 of the December 21, 1998 revision of the Fifth Circuit's CJA plan now reflects the ruling of ***United States v. Austin,*** 513 U.S. 5, 115 S.Ct. 380 (1994). That case directed the Judicial Councils of the Circuits to revise their criminal justice plans to establish a procedure by which appointed counsel can be relieved of the obligation to file a writ application if the writ application would present only frivolous claims. The revised rule reads:

> Counsel shall promptly advise defendant in writing of the right to seek further review by the filing of a petition for writ of certiorari. If the defendant requests such a filing in writing, counsel shall file a petition for writ timely, unless relieved therefrom by the Court of Appeals either upon motion of counsel suggesting the futility of such a petition of upon a *sua sponte* finding and order by the Court of Appeals relieving counsel of that obligation.

The Federal Public Defender's Office has filed such motions in a number of case. Please feel free to call us if you need to see a sample motion.

* * *

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE:

The following amendments were adopted by the Supreme Court of the United States on April 26, 1999:

Rule 6. The Grand Jury
(d) WHO MAY BE PRESENT.

(1) *While Grand Jury is in Session.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session.

(2) *During Deliberations and Voting.* No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.

* * *

(f) FINDING AND RETURN OF INDICTMENT. A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not vote to indict, the foreperson shall so report to a federal magistrate judge in writing as soon as possible.

* * *

Rule 11. Pleas
(a) ALTERNATIVES.

(1) *In General*. A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. §18, fails to appear, the court shall enter a plea of not guilty.

* * *

(c) ADVICE TO DEFENDANT. Before

accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

* * *

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

* * *

(e) PLEA AGREEMENT PROCEDURE.

(1) *In General.* The attorney for the government and the attorney for the defendant - or the defendant when acting pro se - may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will:

(A) move to dismiss other charges; or

(B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any discussions between the parties concerning any such plea agreement.

* * *

Rule 24. Trial Jurors

* * *

(c) ALTERNATE JURORS.

(1) *In General.* The court may empanel no more than 6 jurors, in addition to the regular jury, to sit as alternate jurors. An alternate juror, in the order called, shall replace a juror who becomes or is found to be unable or disqualified to perform juror duties. Alternate jurors shall (i) be drawn in the same manner, (ii) have the same qualifications, (iii) be subject to the same examination and challenges, and (iv) take the same oath as regular jurors. An alternate juror has the same functions, powers, facilities and privileges as a regular juror.

(2) *Peremptory Challenges.* In addition to challenges otherwise provided by law, each side is entitled to 1 additional peremptory challenge if 1 or 2 alternate jurors are empaneled, 2 additional peremptory challenges if 3 or 4 alternate jurors are empaneled, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled. The additional peremptory challenges may be used to remove an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove an alternate juror.

(3) *Retention of Alternate Jurors.* When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a regular juror during deliberations. If an alternate juror replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

* * *

Rule 54. Application and Exception
(a) COURTS. These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.

* * *

UPCOMING OPPORTUNITIES FOR CRIMINAL CLE

❑ ***Appellate Defender Training: Hands-On Training by and for Appellate Defenders***
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FIFTH CIRCUIT SENDS MAN WITHOUT A COUNTRY BACK TO JAIL

Zadvydas v. Underdown; U.S. Immigration and Naturalization Service, No. 97-31345, August 11, 1999, Eastern District of Louisiana.

Judges Garwood, Davis and Barksdale;
Judge Garwood writing.

In the District Court, Judge Fallon granted habeas corpus relief to Kestutis Zadvydas, a permanent resident alien who had been ordered deported because of a lengthy criminal record. Zadvydas was being held by the INS pending deportation which seemed impossible. Zadvydas is the citizen of no country. He was born in a displaced persons camp in occupied Germany in 1948. His mother and father both were born in what is now Lithuania but in territory controlled by Germany and Russia, respectively, at the time of their births. Despite many years as a permanent resident alien in the United States Zadvydas never became a citizen. When the INS sought to deport him, no country would take him.

Judge Fallon ordered his release under the general habeas corpus provision of Title 28, United States Code, Section 2241. Judge Fallon ruled that Zadvydas was being held indefinitely because there was no hope of deportation. The Fifth Circuit disagreed, holding that not enough had been done to find a country to take him. The Court found that preliminary rejections by Lithuania, Germany, and the Dominican Republic (where his wife is a citizen) could very well still be overcome. Because there is still a strong possibility that a nation might be found to take Zadvydas, he was ordered returned to detention.

In this lengthy opinion, the Court takes pains to aim directly at the facts of Zadvydas' case. The Court distinguished Zadvydas from Cubans and other aliens who cannot be deported because of political and diplomatic difficulties among nations. Along the way, however, the Court does rule, for the first time, that while permanent resident aliens have more procedural due process rights during the course of deportation than excludable aliens, their substantive due process rights are limited, if not non-existent.