The Defense Never Rests

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

Holiday Edition

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The Dawning of a New Millennium

Photo by Ashbrooke Tullis©

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In This Issue:

Local News

♦ **Chief Pretrial Services Officer Jim Hobden reports that it is no longer necessary to file a motion to modify the conditions of a client's release so as to allow travel outside of the thirteen parish jurisdiction. Rather, a client may directly request permission of the pretrial services officer. The officer will contact the assistant United States Attorney and if there is no objection, the officer may authorize the travel without recourse to the magistrate judge who set the bond. If contested, then counsel for the client will be required to file a formal motion.**

♦ **Enclosed with this issue is a copy of the Fall, 1999 issue of The Defender's Advocate. If you wish to continue to receive copies of The Defender's Advocate, please complete the yellow form (enclosed) and return it to Fran Pratt of the Federal Defender Training Group. The address is provided on the form.**

EXTRA! EXTRA!

CJA $5 RATE INCREASE EFFECTIVE JANUARY 1, 2000!

CJA RATE INCREASE FIRST SINCE 1996

The Third Branch
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The Consolidated Appropriations Act contains funds for the first compensation rate increase for most Criminal Justice Act attorneys since 1996, and only the second adjustment in over 15 years. CJA panel attorneys will receive a $5-per-hour increase from the $65 in-court and $45 out-of-court rates currently in effect in most judicial districts. The Judiciary had requested funding to raise the in-court and out-of-court rates to $75 nationwide. To date, Congress has provided only funding to pay the full $75 rate in part or all of the 12 judicial districts.

At its September 1999 session, the Judicial Conference agreed to seek funding to implement the $75 rate in all judicial districts in FY 2001 in the event that Congress did not fund such rate in FY 2000. ***In the interim, the increase to $70 for in-court and $50 out of court is effective January 1, 2000. The increase is applicable to all work done on or after January 1, 2000.***

SUPREME COURT TO REVIEW *MIRANDA*

By John H. Craft

The United States Supreme Court has granted writs in a case which represents the Rehnquist Court's best opportunity to reverse one of the high points of the Warren Court's judicial activism of the 1960's, the ***Miranda*** decision, written by Chief Justice Warren himself. ***Miranda v. Arizona***, 384 U.S. 436 (1966).

No other Supreme Court decision has found its way into the fabric of popular culture as has ***Miranda***. Any ten year old with a television set in the house can recite the ***Miranda*** warnings. A recent informal poll of my teenaged sons and their friends demonstrated that more of them could recite the ***Miranda*** warnings than either the "Star Spangled Banner" or the Ten Commandments. Yet, according to the United States Court of Appeals for the Fourth Circuit, Congress legislatively overruled ***Miranda*** more than thirty years ago.

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. On December 6, 1999, 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 is 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 continuous 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:

> The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

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 issue of the continuing viability of ***Miranda*** reaches 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'and '60's. The ***Miranda*** rule is viewed by the conservative justices 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).

So, ***Miranda***, long ago robbed of its constitutional significance, is ripe for a more serious limitation as the result of a defendant's writ application. State legislatures will be poised to adopt statutes similar to Section 3501 soon after the Supreme Court rules if the Fourth Circuit is upheld.

What About Louisiana State Law?

In 1966, the Warren court invited the states to come up with independent own procedures to replace ***Miranda*** "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 continuous opportunity to exercise it." ***Miranda v. Arizona***, 384 U.S. 436, 490 (1966). Louisiana responded in 1974 with a codification of Miranda in both the state constitution and the Code of Criminal Procedure.

The Louisiana Constitution of 1974 includes its own version of the ***Miranda*** rights. Article I, Section 13 states:

> When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel.

The Louisiana legislature included the same language in Article 218.1 of the Code of Criminal Procedure. Although the Louisiana Supreme Court has held that Article I, Section 13, adopted and enhanced ***Miranda***, ***In re Dino***, 359 So.2d 586 (La.1978), Louisiana courts have always relied

upon ***Miranda*** and its progeny rather than creating jurisprudence founded on the state provisions, See, for example, ***State v. Green***, 390 So.2d 1253, 1257 (La. 1980).

The Louisiana Supreme Court has also shown in recent years that, even with an independent state basis for a constitutional ruling, it will follow the conservative lead of the United States Supreme Court. In ***State v. Tucker***, 626 So. 2d 707 (La. 1993), the court rejected years of jurisprudence as to what constitutes an arrest under independent state grounds to follow the more advantageously conservative definition applied by the United States Supreme Court in ***California v. Hodari D.***, 499 U.S. 621 (1991).

Furthermore, there is nothing in Louisiana jurisprudence which suggests that the basis for suppression of confessions obtained in violation of the state constitution is anything other than ***Miranda***. If the Supreme Court affirms ***Dickerson***, it is reasonable to assume that the limitations on ***Miranda*** will have an immediate effect on Louisiana jurisprudence. It is also reasonable to assume that the Louisiana legislature will act promptly to adopt something similar to Title 18, United States Code, Section 3501.

FORFEITURE REFORM BILL STILL ALIVE!

By John H. Craft

PROVISION FOR APPOINTMENT OF COUNSEL IN PENDING BILL

In 1984, Congress passed the Federal Asset Forfeiture Act which made it very easy for the federal government to seize property, placing the burden entirely on the property owner to prove lawful ownership of the property. The act even requires the payment of a deposit of $5000 or 10% of the value of the property seized before the owner can even challenge the seizure. Many complaints about the inequities brought about by that act have caused a large, bipartisan coalition of Congressman to seek reform.

Republican Representative Henry Hyde of Illinois and Democratic Representative Barney Frank, usually not on the same side of any issue, sponsored a bill in the House of Representative aimed at correcting the injustices inherent in the previous act. The bill, H.R. 1658, eventually had a total of 59 co-sponsors, 28 Democrats and 31 Republicans. The bill passed in the House of Representatives on July 1, 1999, by a vote of 375 to 48.

The bill as passed by the House creates substantial procedural rights for the owners of seized property. Among other features, H.R. 1658:

> --Shifts the burden of proof from the property owner to the government and from "a preponderance of evidence" to the more strict "clear and convincing evidence" that the property was used in a crime.
>
> --Establishes an "innocent owner" defense.
>
> --Allows property owners to use their property while a case is

pending in court.

--Eliminates the deposit of $5,000 or 10 percent of the value (whichever is less) before the seizure can even be contested in court.

--Repays owners for damage to property while in government custody.

–Provides for the appointment of counsel to represent someone making a claim for the return of seized property who is unable to afford counsel. Under H.R. 1658, counsel would be compensated at the CJA rates.

The bill is now pending before the Senate Judiciary Committee. Republican Senator Orrin Hatch of Utah, that committee's powerful chairman, has yet to announce his intentions with regard to the bill. A weaker, substitute bill has been introduced in the Senate by Republican Senator Jeff Sessions of Georgia, also a member of the Judiciary Committee. That substitute bill also has the support of Democratic Senator Dianne Feinstein of California. Although the existence of a rival bill suggests the possibility of some difficulty in passing, the likelihood of some reforming legislation remains strong.

UPDATE ON MAN WITHOUT A COUNTRY

By Robert F. Barnard

As noted in our earlier newsletter, the Fifth Circuit Court of Appeals in ***Zadvydas v. Underdown*** held that the INS can detain aliens as long as it takes to find a place to deport them. Mr. Zadvydas has lived in the United States since 1956 when he came here as an eight year old. The ***Zadvydas*** court found no distinction between long term, permanent resident aliens and aliens who recently arrived here and are held in exclusion. As we all recently witnessed in St. Martinville, Mr. Zadvydas is representative of several hundred people who have failed to find a host country. Recently the Fifth Circuit stayed the mandate in Mr. Zadvydas' case until January 11, 2000, the last day for applying for a Writ of Certiorari to the United States Supreme Court. It is anticipated that an application will be filed on or before that date.

From all of us at the Federal Public Defender's Office,
have a safe, happy and prosperous new year!!!