The Defense Never Rests

HOT HOT HOT 100°

Volume 2, Issue 3 **July, 2000**

Published by the Federal Public Defender's Office
for the Eastern District of Louisiana

THE DOG DAYS OF SUMMER

GONE CRAWFISHIN'

-THE MANAGEMENT

In This Issue:

OUR NATIONAL CONFERENCE

Our office hosted the National Seminar for Federal Defenders on June 5-7, 2000. Over 400 federal defenders attended the New Orleans seminar. Ten lucky (remember the lottery?) members of our local CJA Panel also had the opportunity to attend the conference. The conference, dedicated to Jack Mulvehill, was highlighted by a motivational, key-note speaker, Nobel Peace Prize nominee, Sr. Helen Prejean. As you probably know, she authored the book *Dead Man Walking*, which has now become a movie and an opera. The executive director of Moratorium 2000, Bill Quigley, accompanied Sr. Prejean. Her presentation was especially meaningful as Robert Lee Willie had previously been represented by three members of the Federal Public Defender's Office, Jack Mulvehill, Virginia Schlueter, and John Craft.

On a more pleasant note, our office hosted a crawfish boil for all 400 of the defenders. In addition to crawfish, we had jambalaya and Cajun music. We all passed a good time, *cher*!

In case you missed our June CLE program, we have a few copies of the materials available on a first come basis.

ANNUAL CLE

Our office took advantage of the excellent speakers in town for the FPD conference and conducted our annual CLE Seminar for CJA Panel Attorneys on June 7-8, 2000. We were pleased that in addition to our Eastern District of Louisiana panel members, several CJA panel members from Mississippi, along with some of the Fifth Circuit staff attorneys and district court law clerks were able to attend and received 12 hours CLE credit.

Although our annual CLE seminar has been presented, we will be offering shorter CLE sessions before the end of this year. In addition to the Lexis/Nexis training on August 11th, we are planning televised presentations of the Supreme Court Update for 1999-2000 and "Recurring Issues in Federal Death Penalty Cases" in the Fall.

WELCOME TO TWO NEW STAFF MEMBERS

The Office of the Federal Public Defender would like to introduce two new additions to our staff, Assistant Federal Public Defender Ron Small and Legal Research and Writing Specialist Gary Clements.

Ron Small graduated from Washington University School of Law in 1990 and in the last decade has managed to acquire membership in four state bar associations, Kansas, New Jersey, Mississippi and Louisiana. Prior to joining our staff, Ron was a Special Assistant United States Attorney in the District of New Jersey for three years. He also served as Chief of the Military Justice Division in the United States Air Force Judge Advocate General's Department Most recently, he practiced mass tort litigation with a Mississippi law firm.

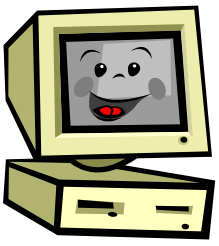
Gary Clements graduated from Loyola University School of Law in 1991. He is a member of both Texas and Louisiana state bar associations. He is fluent in Spanish and has extraordinary experience in the area of capital habeas corpus litigation. From 1992 to 1999, he was a staff attorney in the Loyola Death Penalty Resource Center.

***Reminder*!**

The fiscal year ends September 30, 2000, so try to get your vouchers in early enough to be paid before that date. Remember, work completed prior to January 1, 2000, is billed at a rate of $65 per hour for in court time and $45 per hour for out of court time. On January 1, 2000, the rates increased to $70 per hour for in court time and $50 per hour for out of court time.

FREE TRAINING AND ACCESS TO LEXIS/NEXIS

Our office now offers free access to Lexis/Nexis to panel members for panel related research. A computer is available in our library for your use. We have also arranged for a free Lexis/Nexis training class on August 11, 2000. There will be two ninety minute sessions (9:30 a.m. and again at 11:00 a.m.) We presently have space available and encourage you to participate. **CLE is pending, but preapproved.** Call Bill Healy, our Computer Systems Administrator, at 589-7930 to sign up for one of the classes.



THE GOVERNMENT'S CASE GOES TO POTTS

On Tuesday, July 11th, Alex Potts returned home to Jacksonville, Florida, after an Eastern District of Louisiana jury found him **NOT GUILTY.** Mr. Potts was charged with conspiracy and possession with intent to distribute 330 pounds of cocaine found in the cab of the tractor-trailer rig he was driving. David Turner, the owner of the rig died of cancer in jail awaiting trial. Mr. Potts was held without bond from the day of his February arrest until the jury concluded its one hour deliberation and acquitted him.

Mr. Potts took the stand in his own defense and testified that he had nothing to do with the cocaine and did not know it was there. Assistant Federal Public Defenders Roma Kent and Valerie Jusselin called two character witnesses who described him as "a very professional driver in a very unprofessional industry."

The arrest of Alex Potts and David Turner received nationwide attention when it was reported on the wire services and CNN that the Louisiana State Police had found the cocaine estimated to be worth $3.3 million in an 18-wheeler on Interstate 12.

KICKIN' IN THE WRONG DOOR

Paraphrasing Dr. John, "it must have been the right person but the wrong parish." In fact, everything about the warrant was wrong. At least that's the way Judge Marcel Livaudais saw it when he ordered the drugs suppressed in **United States v. Robert Moore**, USDC No. 99-034 "E." Authorities obtained an arrest warrant for a Robert Moore who lived in Jefferson Parish when the Robert Moore they really wanted to arrest lived in Orleans Parish. The warrant also had the wrong date of birth for the intended Robert Moore. Thus, Judge Livaudais ruled that the authorities had arrested the wrong person - according to the arrest warrant. Amazingly, the officers testified that they never read the warrant or warrant affidavit even before asking the Jefferson Parish Commissioner to sign it; they never read it when they drove into Orleans Parish even though the warrant clearly stated the residence was in Metairie; and they put a perfect finish on a monumental screw-up by not reading the warrant before kicking in Mr. Moore's door! And luckily for Mr. Moore, Bob Barnard's boots are also made for kicking!

YET ANOTHER UPDATE ON MAN WITHOUT A COUNTRY

The odd odyssey of the man without a country, Kestutis Zadvydas, continues. As you may recall, Mr. Zadvydas is not a citizen of any country. His petition for writ of certiorari is still pending before the United States Supreme Court. Despite the three separate occasions on which it was docketed, distributed and conferenced, the Supreme Court deferred its decision until Fall. It was interesting to learn in the process that although the writ was conferenced on a Thursday, even counsel for Zadvydas could not learn what action, if any, had been taken until it was broadcast over the Internet the following week. The Supreme Court advised counsel of only when and where the Court's action would be posted on the Internet (www.law.cornell.edu).

While the writ was being conferenced, the Solicitor General wrote the Court advising that he will seek a writ of certiorari in a Ninth Circuit case, **Ma v. Reno**, 208 F.3d 815 (2000) and, in fact, filed a petition on July 5, 2000. The **Ma** decision presents a split in the Circuits between the Fifth and the Ninth. The issues in **Zadvydas** and **Ma** are identical.

When we learned of this latest correspondence, we attempted unsuccessfully to fax the Supreme Court a reply letter. Because of the extraordinary volume, fax communications are not accepted by the Supreme Court. However, we were able to have our Washington, D.C. office hand-deliver a faxed copy of our reply letter, a courtesy which I am sure would be extended to any panel lawyer found in a similar, time-sensitive situation.

One of the issues in **Zadvydas** concerns the constitutional avoidance doctrine allowing courts to avoid deciding issues impacting the Constitution by resolving them on other grounds. Under the present statute, detention by the INS is purely discretionary after ninety days. The INS' District Director may, or may not, release an alien convicted of an aggravated felony once the ninety day period has expired.

In view of the new discretionary language, the present statute does not explicitly authorize indefinite detention of undeportable aliens. Statutes dating from the 1950's, and earlier, had time limits similar to the present statute. Courts have always read a "reasonable period" of detention into such statutes in order to avoid raising questions implicating the constitutionality of long term, indefinite detention. Mr. Zadvydas asserted a similar argument in his supplemental brief to the Fifth Circuit claiming the matter could be resolved on purely statutory grounds. In response, the government can only assert that the new statute **implicitly** permits indefinite detention. Mr. Zadvydas contends that where Congress' intent cannot be clearly discerned, such lack of clarity is not a sufficient basis from which to imply statutory authority.

The other issues pending before the Supreme Court, should it grant the writ, turn on the overarching Due Process question of whether the INS can indefinitely detain an alien under final orders of deportation and do so with immunity from judicial review. We should have an answer in the Fall as to whether the writ is granted since the Solicitor General now concedes these issues are ripe for review. The Court's ultimate resolution of this issue will have a direct impact on an estimated 3,000 detainees.

* * * * *

DRUG AMOUNTS SHOULD BE TREATED AS ELEMENTS OF THE CRIME

A series of recent decisions by the United States Supreme Court should result in reduced sentences for a number of defendants.

In three cases, the United States Supreme Court has made it clear that juries, and not sentencing judges, must decide whether the prosecution has proved aggravating factors which increase statutory penalties. The Court has held that aggravating factors are elements of crimes and not simply sentencing matters. As a result, the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.

In **Jones v. United States**, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the Court construed the federal car-jacking statute, 18 U.S.C. §2119, as creating three separate offenses because it calls for three levels of punishment based on the degree of force used. The Court rejected the government's contention that §2119 creates one offense with three separate punishments and held that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."

In **Castillo v. United States**, No. 99-658, decided June 5, 2000, the Court unanimously reversed a Fifth Circuit decision concerning use of machine guns by members of the Branch Davidians during a crime of violence. Under 18 U.S.C. §924(c)(1), there are various levels of sentencing enhancement for the use of particular kinds of firearms. The use of a machine gun carries a thirty year enhancement. The Court found that the statute creates separate offenses and that the type of firearm involved is an element to be found by the jury and not the sentencing court.

In **Apprendi v. New Jersey**, No. 99-478, decided June 26, 2000, a 5-4 decision, the Court threw out the sentence of a New Jersey man convicted of a firearms offense by jury trial. After trial, the prosecution filed a bill of information to enhance his sentence under New Jersey's hate crime law. The judge increased his sentence after finding that the crime (shooting into the home of an African-American family) was motivated by racial hatred. The Court held that the racial motivation was a factual element of a crime and should have been an issue for the jury.

WHAT ABOUT DRUG OFFENSES?

Federal drug sentences are enhanced according to the amount of the drugs involved. Nevertheless, recent practice in this district and in others has been to treat the drug amount as a sentencing issue only. Indictments have not alleged drug amounts in recent years based on **United States v. Watch**, 7 F.3d 422 (5th Cir. 1993) and its progeny. Neither the Supreme Court nor the Fifth Circuit has addressed the issue of drug amounts as elements of offenses in Federal cases. The Supreme Court, however, has indicated that it is interested. In a recent case from the Tenth Circuit, the Supreme Court granted writs and remanded to the Court of Appeals for reconsideration in light of **Apprendi**. See (**Carless) Jones v. United States**, No. 99-8176, ___ U.S. ___, 1205 S.Ct. 2739, 2000 WL 217939 (June 29, 2000).

In **Bledsue v. Johnson**, 188 F.3d 250 (5th Cir. 1999), the Fifth Circuit considered the Texas controlled substance law. Because the Texas statute used aggravated amounts to apply

greater penalties in a three-tiered system, the Court used **Jones v. United States** to conclude that there were, in fact, three separate offenses.

The federal statutory scheme also has three penalty tiers based upon amounts. Using cocaine and cracks as examples, with no amount charged, the maximum is twenty years without a statutory minimum. 21 U.S.C. § 841(a)(1)(C). The next level, requiring a minimum amount of 500 grams of cocaine or 5 grams of cocaine base, has a minimum of five years and a maximum of forty. 21 U.S.C. §841(a)(1)(A). An amount of greater than 50 grams of cocaine base or five kilograms of cocaine is required to impose a sentence of ten years to life. 21 U.S.C. §841(a)(1)(B). (See attached chart)

Despite the obvious analogy between the Texas law and the Federal law, the Fifth Circuit was able to avoid the issue in **United States v. Rios-Quintero**, 204 F.3d 214 (5th Cir. 2000). Ruling on February 10, 2000, the Court specifically noted that the impact of **Jones** upon the federal drug offenses would be an important issue of first impression in this Circuit. The Court applied the plain error standard because the defendant had not made a timely objection in the district court and Court concluded that there had been no plain error.

The only Circuit Court of Appeals to address the issue so far is the Eighth Circuit. On July 18, 2000, the Eighth Circuit ruled that, in light of **Apprendi**, the federal drug statutes do create separate offenses for greater amounts. **United States v. Aguayo-Delgado,** No. 99-4096, Eighth Cir., July 18, 2000. The Eighth Circuit gave the defendant no relief, however, because his sentence was within the statutory range for the lowest amount of drugs even though the sentencing judge had found that there was an aggravating amount.

The Fifth Circuit will have the chance to rule in accordance with **Jones**, **Castillo** and **Apprendi** in a case now pending before it. In the Seventh Ward Soldiers case here in the Eastern District of Louisiana, all but one of the defendants received life sentences for drug offenses. The amount of drugs involved was unspecified in the indictment and the issue of the amount of drug was not presented to the jury. At sentencing, an objection was raised that the maximum possible penalty was twenty years and not life because no amount of drug was charged or found by the jury. If the Fifth Circuit follows the Eighth recognizing the applicability of **Jones** to the drug statutes, a number of life sentences will be reversed.

Last month, the United States Supreme Court denied writs in **United States v. Len Davis, Paul Hardy, and Damon Causey** (120 S.Ct. 2747 (2000)). As you will recall, the Fifth Circuit vacated the death sentences of Len Davis and Paul Hardy (185 F.3d 407 (5th Cir. 1999)) and ordered them resentenced. The resentencing will now take place.