

Cases To Watch

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Cases of interest to be argued in the coming October Term include *Alvarez v. Smith*, 524 F.3d 834 (7th Cir. 2008), *cert. granted*, 129 S.Ct. 1401 (U.S. Feb. 23, 2009) (No. 08-351); *Maryland v. Shatzer*, 954 A.2d 1118 (Md. 2008), *cert. granted*, 129 S.Ct. 1043 (U.S. Jan. 26, 2009) (No. 08-680); and *Perdue, Governor of Georgia v. Kenny A.*, 532 F.3d 1209 (11th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3442 (U.S. Apr. 6, 2009) (No. 08-970).

In *Alvarez v. Smith*, the issue revolves around the Fourteenth Amendment's prohibition on the taking of property without "due process;" what this requires in the context of property seizures; and what line of reasoning the courts should follow in making that determination. Chicago's Police Department, acting under the Illinois Drug Asset Forfeiture Procedure Act (DAFPA), seized property belonging to the six plaintiffs. DAFPA permitted law enforcement officers to seize vehicles and money involved in certain drug crimes, without a warrant but on probable cause that the item seized was involved in a drug crime. When property was seized, forfeiture proceedings had to be instituted by the state's attorney. For property worth more than $20,000, up to 97 days could elapse between the seizure and the filing of judicial forfeiture proceedings; for property worth less than $20,000, it could be a maximum of 187 days. However, the proceeding could be delayed indefinitely for "good cause" or if there was a related proceeding pending in criminal court. The plaintiffs (three of whom never had criminal charges brought against them) filed a Section 1983 suit against the City of Chicago, its police superintendent, and the state's attorney, claiming that due process required that they be given a prompt post-seizure, probable cause hearing, even though the DAFPA did not require such a hearing. The U.S. Court of Appeals for the Seventh Circuit agreed. "[O]ur fresh look at this issue causes us to conclude that given the length of time which can result between the seizure of property and the opportunity for an owner to contest the seizure under the DAFPA, some sort of mechanism to test the validity of the retention of the property is required." Anita Alvarez, the Cook County State Attorney, sought review of the decision on the basis that it gave rise to a circuit split. The questions presented include: in determining whether due process requires a state or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding, should the district courts apply the "speedy trial" test (*United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972)) or the three-part due process analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

Maryland v. Shatzer addresses the ability of the police to resume questioning a suspect after the suspect demands an attorney and after the passage of a significant period of time between interrogations – in this case, two years and seven months. In 2003, police interviewed Shatzer in prison regarding allegations of child sexual abuse made against him. After the detective explained what he wanted to discuss, Shatzer invoked his Miranda rights and made it clear that he refused to talk without his attorney being present. As a result, the interview was terminated. In 2006, the investigation was revived because the child, now older, was able to make more specific allegations. A different detective, who was apparently unaware of the details of the 2003 interview, met with Shatzer (still incarcerated) and advised him of his Miranda rights. Shatzer signed a form waiving his right to an attorney and his right to remain silent. At no time did he indicate that he wished to have an attorney present. After Shatzer made admissions which formed the basis of child sexual abuse and other charges being brought against him, he moved to suppress his statements, arguing that his 2003 request for counsel during the interrogation prevented further interrogation without the presence of an attorney, pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981) (when an accused has invokes his right to have counsel present during custodial interrogation, a valid waiver cannot be established by showing only that he responded to further police-initiated interrogation, even if he has been advised of his rights, unless the accused himself initiates further communication, exchanges, or conversations with the police). The district court held that, because of the length of time, there had been a break in custody for Miranda purposes, so *Edwards* did not apply. The Court of Appeals of Maryland reversed and remanded, finding that the passage of time alone was insufficient to do away with the protections afforded by *Edwards*, and declined to recognize a "break in custody" exception to *Edwards* in the case of an inmate-suspect subject to uninterrupted, continuous incarceration between the first interrogation and the second. The question before the Supreme Court is whether the *Edwards* prohibition becomes inapplicable if, after the suspect invokes his right to counsel, there is a break in custody or a substantial lapse in time before re-interrogation commences pursuant to Miranda.

The last of the three cases involves entitlement to over $10M in attorneys' fees (to be paid by the taxpayers of Georgia) arising from a class action

continued on page 37

Nonverbal Testimony

cont. from page 17

17. C.J. Wigley, III, *Disclosiveness, willingness to communicate, and communication apprehension as predictors of jury selection in felony trials*, 43 Comm. Q. 342-51 (1995); C.J. Wigley, III, *Verbal aggressiveness and communicator style characteristics of summoned jurors as predictors of actual jury selection*, 66 Comm Monographs 266-75 (1999). ML

Federal

continued from page 18

In addition to finding no evidence of express preemption, that court refused to find field preemption, as the plaintiffs failed to show "that Congress exhibited a clear and manifest intent to render the regulation of carbon dioxide emissions from motor vehicles exclusively a federal domain."[18]

IMLA is participating as an amicus in both the *California v. EPA* case and *Central Valley Chrysler Jeep v. Goldstene*. Oral argument in front of the Second Circuit in *Goldstene* is set to begin around the time of the publication of this issue of the *Municipal Lawyer*. Whether either party will be able to deliver a knock-out punch in this round is yet to be seen, but, certainly, the parties are training for a possible bout in front of the big stage – the United States Supreme Court.

Notes

1. 42 U.S.C. §7521(a)(1) (West 2009).
2. 549 U.S. 497, 532 (2007).
3. Jennifer Parker, *Supreme Court Rejects Bush in Global Warming Debate*, ABCNews.com, Apr. 02, 2007, at http://abcnews.go.com/Politics/story?id=3000959&page=1&CMP=OTC-RSSFeeds0312.
4. The author agrees that Round Two started before Round One ended, so perhaps it should be called Round 1.75; for simplicity's sake, though, let's just call it Round Two.
5. 42 U.S.C. § 7543(b)(1) (West 2009).
6. *Id.*
7. Notice of Decision Denying a Waiver of Clear Air Act Preemption, 73 Fed. Reg. 12,156, 12,157 (Mar. 06, 2008).
8. *California et al. v. EPA, et al.* (No. 08-1178, filed May 05, 2008, D.C. Circuit).
9. Memorandum for the Administrator of the EPA, 74 Fed. Reg. 17, 4905 (Jan. 26, 2009).
10. *Obama Moves to Let States Cap Car Emissions*, MSNBC.com, Jan. 26, 2009, at http://www.msnbc.msn.com/id/28846202.
11. 529 F. Supp.2d 1151 (E.D. Calif. 2007).
12. 508 F. Supp.2d 295 (D. Vt. 2007).
13. This includes motor vehicle dealerships, manufacturers, and a manufacturers' industry association (the Alliance of Automobile Manufacturers).
14. 49 U.S.C. § 3902.
15. 71 Fed. Reg. 17,659.
16. Brief for Appellant at 22, *Central Valley Chrysler Jeep v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Calif. 2007) (No. 08-17378).
17. Green Mountain Chrysler Plymouth Dodge Jeep, 508 F. Supp.2d at 354.
18. *Id.* ML

Supreme Court

continued from page 23

lawsuit brought on behalf of foster children in the custody of the Georgia Department of Human Resources (DHR). The plaintiffs sued the state, the DHR, various counties, and each county's department of family and children services and its directors, alleging systemic deficiencies in the counties' foster care systems and asserting 15 causes of action under federal and state law. The complaint sought declaratory and injunctive relief, as well as attorneys' fees and expenses. The matter was resolved by way of a settlement agreement that stated "Plaintiff Class is entitled to recover its expenses of litigation, including reasonable attorneys' fees and nontaxable costs, pursuant to 42 U.S.C. § 1988 and Fed.R.Civ.P. 23(h)." If the parties could not reach an agreement, then the amount of any award was to be determined by the court, which is what happened. Counsel sought a total of $14,342,860 in fees, about half of which was an enhancement of the fee award for a job well done. Over the defendants' objections, the district court awarded a basic ("lodestar") fee of $6,012,802.90 and allowed the enhancement, noting that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." The defendants appealed, and the plaintiffs, "convinced that the district court was not generous enough," cross-appealed, insisting that they "deserve[d] even more" than the $10,500,000 total fees awarded to them.

The Eleventh Circuit noted that a merits-exceeding result for the plaintiffs had to be the product of one, or some combination, of "superior lawyering by plaintiffs' counsel, bad lawyering by defendants' counsel, poor decision making by the court, or dumb luck," but that Supreme Court precedent held that superior lawyering by the plaintiffs' counsel was not a proper basis for an enhancement. Further, there was a "perverse irony" in the "seven figure, court ordered gratuity in this case," in that it reduced the amount of state funds available to care for foster children, the very group in issue and described as some of Georgia's "most vulnerable citizens." Nonetheless, it declined to interfere with the award, indicating that, under the prior panel precedent rule, it was not free to decide the enhancement issue.

The matter now comes before the Supreme Court, which will decide whether a reasonable attorney's fee award under a federal fee-shifting statute can ever be enhanced based solely on the quality of performance and results obtained, when these factors already are included in the lodestar calculation, and whether an enhancement to the lodestar based on the quality of representation and results was contrary to the Court's prior rulings, particularly after the lodestar has been reduced for excessive hours billed.

IMLA will continue to update our members on these cases through our bi-weekly e-mail newsletter and this magazine. ML