"THE FEDERAL CORNER"

If You Ever Have to be Concerned about the Issue of Punishment in a Criminal Case, You Must Read Judge Block's Opinion in *United States v. Chevelle Nesbeth*

Buck Files

Some 40 years ago, fellow TCDLA member Pat Ireland and I were representing a constable from Lamar County who had been indicted for violating the civil rights of some devil worshippers by whipping up on them. [That wasn't the language of the indictment, but it was the gist of the offense.] In spite of our best efforts, the jury had no difficulty in returning a verdict of guilty. When it came time for sentencing, though, we had a great day. One of us -- and I do not remember who it was -- argued to United States District Judge William Steger that our client's conviction with the attendant collateral consequences was punishment enough. The lawyer from the Civil Rights Section of the Department of Justice stood up to respond and heard those words that many other prosecutors before him had heard: "Sit down." The judge then told our client to rise, looked at him and said, "Go back to Lamar County and enforce the law."

I had not thought about that case for a long time until I read the 42 page opinion of Senior United States District Judge Frederic Block of the United States District Court for the Eastern District of New York in *United States v. Chevelle Nesbeth*, Cause No. 15-CR-18 (FB). **This opinion should be required reading for every TCDLA member.**

So what makes *this* case so unique and the opinion so worthy of reading? At first blush, Chevelle Nesbeth is just another defendant in a federal drug case. This is what the PSR states about her:

> Ms. Nesbeth, who was 20 years old when convicted, was born in Kingston, Jamaica, has always been single, has no children, and lives with her mother in New Haven, Connecticut. In 2008, when she was 13, she joined her mother in the United States, who had previously left her with her father to be raised by him in Jamaica. Ms. Nesbeth is a U.S. citizen. She has been enrolled in college since 2013, and has helped to support herself as a nail technician at a children's spa. Between September 2012 and June 2013, she worked as a counselor at a facility that provides services to children in lower-income areas, and during the summers of 2010 through 2012, she held seasonal employment as a parks maintenance worker.
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> In the United States, Ms. Nesbeth was raised under lower-income circumstances, and her family had for a time 'required Food Stamp benefits.' As for her employment, the name of the facility where she assisted children from lower-income areas was Leap, in New Haven, and she worked as a 'counselor' to the children. And her work as a parks maintenance worker was for the Youth at Work agency, where she was 'a youth initiative worker.'
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> As for her education, Ms. Nesbeth anticipates graduating from Southern Connecticut State University in 2017. 'She was originally studying education,' but 'due to the instant conviction is now studying sociology.' She owes either $9,000 or $19,000 in student loans.
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> This is what the PSR states about her offense conduct:

> While visiting Jamaica at the behest of a boyfriend, she was given two suitcases by friends, who had purchased her return airline ticket, and was asked to bring them to an individual upon her arrival to the United States. *Id.* As disclosed during the trial, the drugs were in the suitcases' handles. Ms. Nesbeth 'm[et] the profile of a courier,' *id*., and there was a clear basis for the jury to reject her claim that she did not know she was bringing drugs into the country, and to render its guilty verdict.

Ms. Nesbeth's advisory Guideline range was 33-41 months. Amazingly, the probation department recommended a sentence of 24 months followed by three years of supervised release for five reasons: "Ms. Nesbeth was a first time offender; she is enrolled in college; she is employed; she 'has otherwise lived a law-abiding life;' and, she has a low risk of re-offending."

[Why is this *amazing* to me? Because I am unaware of *any* probation officer in the Tyler Division of the Eastern District of Texas ever having recommended a sentence below the advisory Guideline range. Such conduct would probably have resulted in a termination of employment.]

On May 25, 2016, Judge Block sentenced Chevelle Nesbeth to a sentence of one year probation with two special conditions: (1) six months' home confinement; and, (2) 100 hours of community service. What follows is an explanation of how Judge Block arrived at that sentence.

Judge Block's begins his opinion with these concerns about the notion of "civil death":

> *I am writing this opinion because from my research and experience over two decades as a district judge, sufficient attention has not been paid at sentencing by me and lawyers -- both prosecutors and defense counsel -- as well as by the Probation Department in rendering its pre-sentence reports, to the collateral consequences facing a convicted defendant. And I believe that judges should consider such consequences in rendering a lawful sentence.* (emphasis added)
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> There is a broad range of collateral consequences that serve no useful function other than to further punish criminal defendants after they have completed their court-imposed sentences. Many -- under both federal and state law -- attach automatically upon a defendant's conviction.
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> *The notion of 'civil death' -- or 'the loss of rights…by a person who has been outlawed or convicted of a serious crime' -- appeared in American penal systems in the colonial era, derived from the heritage of English common law.*(emphasis added)
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> *Today, the collateral consequences of a felony conviction form a new civil death*. Convicted felons now suffer restrictions in broad ranging aspects of life that touch upon economic, political, and social rights. In some ways, 'modern civil death is harsher and more severe' than traditional civil death because there are now more public benefits to lose, and more professions in which a license or permit or ability to obtain a government contract is a necessity. Professor Alexander paints a chilling image of the modern civil death:
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> > Today a criminal freed from prison has scarcely more rights, and arguably less respect, than a freed slave or a black person living "free" in Mississippi at the height of Jim Crow. Those released from prison on parole can be stopped and searched by the police for any reason … and returned to prison for the most minor of infractions, such as failing to attend a meeting with a parole officer… The "whites only" signs may be

> gone, but new signs have gone up -- notices placed in job applications, rental agreements, loan applications, forms for welfare benefits, school applications, and petitions for licenses, informing the general public that "felons" are not wanted here. A criminal record today authorizes precisely the forms of discrimination we supposedly left behind -- discrimination in employment, housing, education, public benefits, and jury service. Those labeled criminals can even be denied the right to vote. (emphasis added)

Later in the opinion, he refers to the experience of another federal district judge.

> My former colleague in the Eastern District of New York, Judge John Gleeson, recognized the devastating effects the collateral consequences of conviction had on a defendant who was unable to procure employment due to an offense she had committed seventeen years prior. *He explained that he had sentenced the defendant 'to five years of probation supervision, not to a lifetime of unemployment*.' (emphasis added)

Judge Block then discusses, briefly, the myriad of federal and state statutes and regulations that impact a convicted offender.

> Remarkably, there are nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons. Of those, federal law imposes nearly 1,200 collateral consequences for convictions generally, and nearly 300 for controlled-substances offenses. *District courts have no discretion to decide whether many of these collateral consequences should apply to particular offenders*. The result is a status-based regulatory scheme; by the very fact of an individual's conviction, he or she is subject to a vast array of restrictions. (emphasis added)

After receiving the PSR in Nesbeth's case, Judge Block ordered that he be advised of the federal collateral consequences that she would or may face as a result of her felony drug conviction. An addendum to the PSR heightened his concerns. His opinion goes on to set out six pages of federal and state statutes and regulations that provide for collateral consequences of a conviction. It is a veritable laundry list and is too long to either set out or even summarize.

Judge Block then requested responses from counsel. As he notes,

> Defense counsel has tracked most of the collateral consequences contained in the Probation Department's Addendum, with the focus on Ms. Nesbeth's limitations on her ability to obtain employment as an educator or a school administrator. *Counsel's submission concludes that 'the serious consequences that result from her federal drug conviction cannot be overstated. Compacting these consequences with a period of incarceration or even a lengthy period of supervision would be a severe and an unnecessary punishment*.' (emphasis added)
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> …the Government asserts that '[t]he obstacles resulting from her crime are by no means insurmountable,' and that '[w]hile she may end up choosing a different career path or taking longer to become a teacher than she previously anticipated, if she goes on to prove the instant offense was an isolated and solitary blemish on her record, the defendant can achieve the same level of success in life regardless of her criminal conviction,' thus, it believes that a guidelines sentence is appropriate.

Judge Block recognized that there is a split among the Circuits as to whether a sentencing judge may consider the collateral consequences of a conviction in fashioning an appropriate sentence; i.e.,

> … as the Tenth Circuit recently stated, 'the Supreme Court has [not] addressed the issue.' *United States v. Morgan,* 2015 WL 6773933, at (10th Cir. Nov. 6, 2015) (unpublished). In *Morgan,* the Tenth Circuit aligned itself with the 'reasoning of the Sixth, Seventh, and Eleventh Circuits' in holding that '[b]y considering publicity, loss of law license, and deterioration of physical and financial health as punishment, the [district] court impennissibly focused on the collateral consequences of Morgan's prosecution and conviction,' because these factors did not 'reflect upon the seriousness of his offense' under § 3553(a)(2)(A). *Id.* Its rationale was that those factors 'impennissibly favor criminals, like Morgan, with privileged backgrounds.'
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> On the other side of the ledger, the Fourth Circuit has viewed the loss of a defendant's 'teaching certificate and his state pension as a result of his conduct' as appropriate sentencing considerations, 'consistent with § 3553(a)'s directive that the sentence reflect the need for 'just punishment and "adequate deterrence."' *United States v. Pauley,* 511 F.3d 468, 474-75 (4th Cir. 2007) (citation omitted).

Fortunately for Judge Block -- and especially for Ms. Nesbeth -- he was a judge of a district court in the Second Circuit and the opinions of his Circuit permitted him to consider the impact of the collateral consequences of a conviction upon a defendant; *e.g.*,

> In *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009), the district court--despite a guidelines range of 78 to 97 months-sentenced the defendant to 20 months' imprisonment in part because the 'conviction made it doubtful that the defendant could pursue his career as an academic or translator, and therefore that the need for further deterrence and protection of the public is lessened because the conviction itself already visits substantial punishment on the defendant.' (internal quotation marks omitted). The circuit court affirmed, reasoning that the district court's analysis was 'required by section 3553(a),' and commented: 'It is difficult to see how a court can properly calibrate a "just punishment" if it does not consider the collateral effects of a particular sentence.'
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> The Second Circuit's embrace of collateral consequences as bearing upon the concept of 'just punishment,' has more recently been underscored in *United States v. Thavaraja*, 740 F.3d 253 (2d Cir. 2014), where the circuit court recognized that deportation is a permissible § 3553(a) factor.

Now Stand By -- Because Here Comes the Bomb!

> In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court held that the failure of defense counsel to advise his client 'that a conviction may have immigration consequences' violates the defendant's Sixth Amendment right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *Padilla*, 559 U.S. at 388. In so doing, it recognized that it had 'never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*.' (quoting *Strickland*, 466 U.S. at 689). However, it did not have to decide '[w]hether that distinction is appropriate,' since it ruled that '[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a

collateral consequence.' Consequently, '[t]he collateral versus direct distinction' was 'ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation.'

It is an open question, therefore, under what circumstances, if any, the failure of counsel to advise a defendant prior to a plea of at least the critical non-deportaton collateral consequences he or she faces, might rise to the level of an ineffective-assistance claim. But arguably the Supreme Court in Padilla has left the door open. Moreover, once again, as the Tenth Circuit noted in Morgan, the high court has also yet to rule whether, regardless of Sixth Amendment concerns, collateral consequences may be part of the § 3553(a) mix. 2015 WL 6773933 (emphasis added)

Thus, it is undecided whether counsel's failure to advise his client of any significant collateral consequences at the pleading stage or to address the issue at the sentencing phase, could ever rise to the level of ineffective assistance under the constitutional standard articulated in Strickland. (emphasis added)

What is established, however, is defense counsel's 'overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.' Strickland, 466 U.S. at 688. Thus, counsel has at least a professional responsibility to timely inform both the court, as well as his client, of the significant collateral consequences facing the defendant as a result of a conviction. (emphasis added)

For Judge Block, his concern about collateral consequence issues will not end with *Nesbeth.* His opinion places these burdens on the Probation Department, the defense lawyer and the prosecutor in future cases:

The Probation Department should include a collateral-consequences section in all future pre-sentence reports. The Federal Rules of Criminal Procedure authorize the Court to make such a request: Rule 32(d)(l) provides that 'the presentence report must ... (D) identify any factor relevant to: (I) the appropriate kind of sentence, or{ii) the appropriate sentence within the applicable sentencing range; and (E) identify any basis for departing from the applicable sentencing range,' and Rule 32(d)(2) requires that the pre-sentence report also include 'the defendant's history and characteristics' and 'any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).'

Thus, it is the obligation of both the defense lawyer and the prosecutor, as well as the Probation Department in the preparation of its PSR, to assess and apprise the court, prior to sentencing, of the likely collateral consequences facing a convicted defendant. (emphasis added)

My Thoughts

- My thanks to TCDLA member Jeff Haas who alerted me to *Nesbeth.*
- Because the United States Sentencing Guidelines have now been in effect for almost 29 years, there are fewer and fewer federal judges who remember what the practice of criminal law was before the implementation of these Guidelines – and Judge Block was not on the bench in 1987. His opinion flies in the face of every Guideline's prohibition about what a judge shall not consider in arriving at

an appropriate sentence. Neither does 18 U.S.C. § 3553(a) include collateral consequences of a conviction as a factor to be considered. Yet, the decisions of the Fourth and Second Circuits find this consideration to be permissible and Judge Block has run with it. Ms. Nesbeth was fortunate to have had her case in his court.

- Unless I have missed something, there are no Fifth Circuit opinions on this issue.
- Almost every day, TCDLA members face the unpleasant task of explaining the collateral consequences of a conviction to their clients. Yesterday, I was concerned about whether a client would become suicidal after I explained to him that he was going to have to register as a sex offender if he entered a plea of guilty to the charge against him. In every driving while intoxicated or drug case, we talk to our clients about driver's license suspensions and the requirement for an occupational license if they are to be able to drive in order to earn a living. And, it seems, every client charged with assault/family violence is convinced that not being able to have firearms in the future is a cruel and unusual punishment. Judge Block was not telling us anything new when he speaks of our obligation to advise our clients of these collateral consequences of a conviction. It doesn't hurt, though, to be reminded.
- Is this a *Padilla*-type concern? On the whole, no. Criminal defense lawyers are not going to have a duty to advise *every* client of *every* possible collateral consequence of a conviction. There are those cases, though, where an appellate court could find that the failure to a lawyer to advise of a particular collateral consequence could go to the issue of whether a defendant would have gone forward on a plea of guilty if he or she had been advised of this consequence.
- **PLEASE DO NOT RELY ON THIS ARTICLE. DOWNLOAD JUDGE BLOCK'S OPINION AND READ IT. IT'S WORTH YOUR TIME.**