

CHALLENGE TO THE CARIBBEAN PEOPLE

"YOU CAN BE ANYTHING YOU WANT TO BE"

Know Your Constitutional Rights!

Aggravated Felonies and Search Warrants

Caribbean people have been settling in the United States for centuries. Some have come by invitation; others by choice. Many medical doctors, nurses and teachers from the Caribbean have made their homes in the United States at the invitation of the U.S. Government. Agricultural workers still come into the United States on a seasonal basis, year after year. Students, family members of immigrants, and many undocumented persons from the Caribbean have made America their home. They have come for one reason and one reason only, To Make Better Lives for Themselves.

Caribbean people have come to know that America is not the "El Dorado" where the streets are paved with gold. The American dream can be attained and maintained but the "gold" for that dream must be mined. And it takes an awful lot of digging in most cases to find the gold. But those of us present can testify that you will obtain in the United States what you have worked diligently for.

The entire nation is absorbed in the debate concerning Homeland Security. Commentators on the proposed Department of Homeland Security have identified the anti-immigration bias of the Department in the wake of September 11. The first priority of the Department seems to be to keep out aliens from the United States and the initiatives to strengthen border patrols with Canada and to increase immigration controls for the Caribbean justify some persons to comment that the US "War" is more against immigration than against terrorism.

I have been very engaged in Immigration Issues over the past year. I always had an immigration practice but over the past year I have shared the grief and torment of scores of Jamaican families that are on the verge of breaking up because of the scare of removal/deportation of a member of the family. I have seen very industrious and innovative women in detention centers because they tried unlawfully to improve their resident status. I have seen husbands and wives who are beside themselves with grief because the husband will be removed on account of an incident when he disciplined his son and someone reported it to a teacher or to the Police.

On no account would you, sitting in your living rooms, and giving thought to the matter, would instinctively say that the Father who used his belt on his son, is an aggravated felon. But that is the law in the United States. Child Neglect or Beating a Child will be considered

felonies for which the parent will be removed. And it does not matter what penalty was imposed for the offense. Even if the father or mother was put on Probation, that will not affect the power of removal.

I must speak to you about the concept of Aggravated Felony. In 1996 Congress passed two specific statutes aimed at controlling immigration and removing alien residents who had committed offenses from the United States. In April 1996 the **Antiterrorism and Effective Death Penalty Act** was passed. In September of the same year, a more draconian statute, the **Illegal Immigration Reform and Immigrant Responsibility Act (IRAIRA)** was passed. As the same of the second Act of Congress implies, it was aimed against aliens and it has shattered many families. In the first place, an offense classified as an aggravated felony in the 1996 Act caught offenses that had been committed prior to 1996 and had not been classified at the date of the conviction and sentence as an aggravated felony.

Secondly, the IRAIRA introduced the concept of deportation regardless of the time at which the offense was committed. Prior to that persons who had spent 5 to 7 years in the United States prior to the commission of the offense could obtain a waiver. The 1996 Act removed that concession. So now if an LPR has resided in the USA for 20 years and then commits an offense classified as an aggravated felony he is going to be removed.

The List for Aggravated Felonies is long. It includes murder, sexual abuse of a minor; illicit trafficking in drugs; illicit trafficking in firearms; money laundering; certain unlawful monetary activity if the amount exceeds \$10,000.00; any crime of violence for which the maximum punishment is more than 1 year; any theft offense for which the punishment is more than 1 year; any offense of deceit or fraud where the amount exceeds \$10,000.00; any offense of forgery; driving under the influence; and numerous offenses relating to false Passports and false immigration documents.

It is legendary that when Caribbean nationals go abroad they make the finest employees in the area of their experience. There are those, however, who succumb to an American phenomena of "cutting corners" and join the "get rich quick crowd". If you are to be the best that you can be there are no short cuts to achievement. Those who do drugs tend to spend long periods of their lives in Jail. Those who import drugs into the country run the risk of spending more than a few days in the country. I have visited some of them in Jail and I can tell you that they are not in luxury hotels.

The Attorney General has been in great haste to remove as many Aliens convicted of aggravated felonies as possible from the United States and had denied that aliens in removal proceedings had any right to the ordinary Federal Courts. Official thinking was that Congress had given to the executive the absolute right to remove aggravated felons and therefore only the Immigration Courts could decide if the individual should be removed and when he should be removed. One legal commentator writing for the Lawyers Committee for

Human Rights said that Attorney General Ashcroft was bent on "Replacing Justice with Haste".

The Supreme Court has restored to the alien, even one in removal proceedings, his constitutional due process rights. In a celebrated case called **ZADVYDAS V DAVIS**, Justice Breyer ruled that the Writ of Habeas Corpus was still available to an alien in removal proceedings. He said:

“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders, but once an alien enters the country, the legal circumstance changes, for the due process clause applies to all persons within the United States, including aliens whether their presence here is lawful, unlawful, temporary or premanent. Aliens who have once passed through our gates even illegally may be expelled only after proceedings conforming to traditional standards of fairness encompassed in ‘due process’ of law”. (Aliens are not Martians. Judge Breyer is correct).

Applying the **Zadvydas** principle, the Supreme Court held that the Attorney General has 180 days from the date on which the alien's administrative proceedings became final to remove him from the country. If more than 180 days past, then the Attorney General can only continue to detain the alien if there is a reasonable possibility of his early removal from the US. This is an important principle, because under current legislation it is almost impossible to receive Bond once the alien has been arrested by the INS. You go to Krome – You will not get Bond.

I have used the **Zadvydas** principle in several pending cases. I will share with you one of my recent horror experiences. I represented a young man who was involved in a fight when he went to the protection of a young female who was being attacked. He was convicted of inflicting injury on the other male and was given a jail sentence. That young man had entered the United States at the age of 3 years. He had spent more than 23 years in the US as an LPR and did not commit a criminal offense in all that time save for the single act when he was trying to be a good Samaritan. All the young man's relatives are in the United States. The Judge would not release this young man although he was being removed to a country about which he has no first hand knowledge whatever and in which he has no support systems whatever. Such is the rigor of the law when it comes to the application of the "aggravated felony" principle.

The Immigration law takes me into many areas and into the lives of many people. Only today I was representing a Jamaican who has lived here since 1979 as an LPR. He is married and has 4 children, all born in the United States. In 1997 and again in 1998 he was found with a small amount of marijuana - less than 20 grams - on each occasion. They are misdemeanor offenses in Florida. He was arrested by the INS and has been in jail for over a year fighting against removal. The INS developed a practice called "Stacking" whereby they

would use two misdemeanor offenses for simple drug possession, and classify them as an “aggravated felony”. I have been fighting this “Stacking” principle and I have received support from cases decided in other parts of the country, although not in Florida or the 11th Circuit Court of Appeals. I lost before the Immigration Court, but I took the case to the Board of Immigration Appeals and I won there.

I am happy to report that Mr. Beckford has been released from INS custody on these charges. There is cleaning up to be done but this pernicious habit of Stacking two minor offenses to make it an aggravated felony has come to an end in Florida for the time being. I am happy that I was the [first Attorney](#) to take the point in the Immigration Court here and for the result.

Those of you who are interested will find the decision of the Third Circuit in **Gerbier v. Holmes, Case No. 00-2335** delivered on February 8, 2002 and of the Board of immigration Appeals in **Matter of Yanez, 23 I&N Dec. 390 (VBIA 2002)** immensely instructive.

There is just one other recent Court development that I want to bring to your attention. A young Haitian, St. Cyr, was deported although his case was under appeal. The Supreme Court left a small window of relief for aliens who entered pleas of guilty before April 1996 in the knowledge that they were not deportable and then found themselves in deportation proceedings afterwards. In the St. Cyr decision a limited number of aliens were permitted to apply for a waiver under the famous 212(c) section of the INA. I found it to my advantage and I have used it to obtain the release of a young Jamaican who was convicted of a sexual offense with a minor. It was thrust upon him. The minor came to his home and he was not aware of her age. He has a hope of being able to remain here.

Justice Breyer spoke of due process and of the high constitutional value of due process to everyone in the United States. I often speak of the rights which US Citizens enjoy but at the same time I have stressed that every person within the country has responsibilities as citizens. I read on the Internet recently that the Jamaican Government in its present strategy to combat crimes will be increasing stop and search patrols and citizens are being asked to cooperate.

In this country, the Police often stop motorists and on many occasions they search vehicles. The Police do not have a general right to stop and search anyone. The Fourth Amendment of the US Constitution and Article I Section 12 of the Florida Constitution protect persons from unreasonable searches and seizures.

A person has a reasonable expectation of privacy in his residence and therefore has a right to refuse a warrantless search of his residence in most circumstances. A law enforcement officer may obtain a search warrant from a judge if he swears a probable cause affidavit that any of the following facts exist: property is stolen or embezzled; property is used as a means to commit any crime; or used in gambling; or violation of obscenity statutes; when property

constitutes evidence relevant to proving a felony has been committed; when property is held or possessed in violation of fish or game laws; or laws relating to food or drugs; or cruelty to animals. The prevailing statute permitting the issuance of Search Warrants is F.S. 933.02-Search and Inspection Warrants.

If a law enforcement officer who is serving a search warrant gives due notice of his authority and purpose and is refused admittance to a structure or to anything inside, he may break open any outer door, inner door or window, or any part of the structure to execute the warrant. The knock and announce requirement only applies when the law enforcement officer is effecting a forcible entry. A law enforcement officer is entitled to walk through open doors and he is not required to stop and wait for permission to enter the house peaceably. The intent of the statute is that the officer should not be impeded in his search if he has a probable cause warrant.

Cooperating with the Police is one of the most important duties of a citizen. On the one hand the Police Force is known to have elements that are bigoted, racist, dishonest, and dishonorable. On the other hand, they are the law enforcement officers who insure that our rights are protected; that the streets are safe for us and our children; that our property is reasonably safe from marauders. It is difficult to know who is the rogue Cop. The first reaction therefore should be to comply. But you should know your rights. If arrested or detained, a person is under no obligation to provide information to the Police over and above identification.

The arrested person has an absolute right of silence and it is always in the interest of the arrested person to say nothing when arrested. If you say nothing, your words cannot be twisted. As they say nowadays, "No one can put a Spin" on words not spoken.

Miranda Rights are an essential part of due process. The Police must tell the arrested person that he has: (a) a right to remain silent (b) a right to an attorney and (c) that if he makes any statement it can be used against him at trial. It is always in the interest of the arrested person to ask for an Attorney and to insist on saying nothing without being able to consult with his attorney. These are all well known rights but I have come across so many people who convict themselves by what they say to the Police at or shortly after arrest.

In any encounter with the Police do not resist. The Police usually have the physical power to effect the arrest. One thing for sure, if there is any verbal protest, the Police will charge you for resisting arrest without violence. I have a case of a Wife who used a belt to discipline an older brother. When the Police came the Wife identified herself and told the Police that all was well and they were not needed. The Police entered and observed that the boy had bruises. They took him for medical treatment and charged the Wife for obstructing the Police. She was convicted and lost her job. She is a US Citizen.

There is a whole area of law on the Rules as to Stop and Frisk. I will leave that aspect for another meeting.

While I am on the subject of the Police I must deal with the Farrall case. The rogue FBI Agent has been acquitted. Some important lessons have been learned and although the two brothers have been killed and Farrall will at best receive a slap on the wrist, the public has not been silent. The Press has raised its voice loudly and clearly that Farrall, the drunken FBI Agent, killed the two boys. The Press has indicted FHP for corrupt practices and has convicted the FHP of "vehicular homicide most foul". There are two juries that tried this case - one - the 12 who said the evidence was insufficient to prove beyond a reasonable doubt that Farrall was driving the wrong way - the other - the Jury of Public Opinion.

To a man, woman and child, every citizen of the State of Florida and of the United States has convicted Farrall of vehicular homicide and has condemned the rotten FHP Officers for their conspiracy and cover-up. We who care for Caribbean people must take comfort that we have not been called upon to blow a trumpet against the wind. FHP will carry out its internal investigations. The rogues will be identified and expelled from the Force. The Williams case will be talked about forever in FHP and FBI circles and Farrall will not be the hero.

We have good judges in this County. We have good prosecutors in this County. We have good Police Officers in this County. I hope that we will get a United States Attorney General with a conscience.

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By Professor David P. Rowe speaking at a special Townhall Lecture, North Miami, Florida, U.S.A.

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