

DIOP V. ICE/HOMELAND SECURITY, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, NO. 10-1113, 9/1/11

In March of 2008, Chiekh Diop, a citizen of Senegal, was taken into custody by the Immigration and Customs Enforcement Bureau (ICE) of the U.S. Department of Homeland Security. He was ordered detained without bail in anticipation of being removed since he was an illegal alien who had been convicted of two felonies in Pennsylvania state courts. After more than two years in detention awaiting a removal decision, he petitioned the U.S. District Court for a Writ of Habeas Corpus, claiming that such prolonged detention was unlawful. The district court dismissed his petition, and Diop brought his case to the U.S. Court of Appeals for the Third Circuit.

A week after oral arguments were heard in that court, the immigration court reached the decision to waive Diop's removal and he was released from detention, after 1,072 days – or nearly three years. The Government then moved to have the appeal dropped, stating that the issue was moot. The appeals court concluded, however, that Diop's lengthy detention was "capable of repetition," and therefore decided to address the issue of whether such a lengthy period of detention without bail was lawful for illegal aliens facing a removal decision.

The law at issue in this case, 8 U.S.C. § 1226(c), states that illegal aliens facing removal can be detained while removal proceedings are pending. The court noted that the U.S. Supreme Court has settled the issue of whether Congress can authorize the detention without bail for aliens awaiting removal, ruling that it may, but that it left open the question of how long that detention could last. In addressing that question, the Court of Appeals held that: "At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community. This will necessarily be a fact-dependent inquiry that will vary depending on individual circumstances. We decline to establish a universal point at which detention will always be considered unreasonable."

The court then addressed whether Diop's 1,072 days in detention was unconstitutionally unreasonable, and therefore a violation of Due Process. "We conclude that it was." In reaching this conclusion, the court noted that there was nothing in the legislative history of the law that suggests that Congress intended such lengthy detentions without bail, and without a hearing to determine if a bond should be set.

IN RE: MARSHALL, SUPREME COURT OF IOWA, NO. 10-0652, 9/2/11

Iowa law provides for the arrest of a material witness when the witness might be unavailable for "service of a subpoena." (Iowa Code § 804.11.) The issue before the

Iowa Supreme Court was whether the continued detention of a material witness was permissible under this provision past the point in which the witness could be served with a subpoena to appear as a witness at a trial.

When police were investigating a murder that occurred in an apartment building, they interviewed Justin Marshall, who was staying in an apartment in the building. Marshall gave police what they later determined to be inaccurate information about his whereabouts at the time of the murder. They also learned that he had purchased a bus ticket to leave town and travel to Texas. To prevent him from leaving, a magistrate issued a warrant for his arrest as a material witness, finding that there was probable cause to believe that he had information about the murder. The magistrate set a bond of \$100,000 surety. Marshall was arrested on the warrant and held in jail, unable to post the bond. At the time, he could not be issued a subpoena to appear at trial because no one had yet been arrested and charged with the murder. As a result, he remained in jail.

Three months after the date of this incarceration, Marshall filed a motion to dismiss the material witness complaint against him, arguing that his continued detention violated the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Iowa and U.S. Constitutions. Before the court could rule on this motion, police arrested and charged another man for the murder. Once that suspect was in custody and given a trial date, it was possible to subpoena Marshall to appear as a witness at that trial. As a result of this development, the trial court ruled that the State lacked the authority to continue Marshall's detention, and ordered his release. The State appealed this ruling to the Iowa Supreme Court.

That court began its analysis by noting that the law clearly has allowed for the detention of material witnesses when necessary to ensure that they provide testimony. "Yet, at the same time, the notion of incarcerating an innocent individual who happens to be a witness to a crime is troublesome," the court wrote. "How can it be, for instance, that a wealthy person accused of a serious crime may be free on bail pending trial while an innocent but indigent witness of the crime who is unable to post required sureties is detained prior to trial?...Why do we allow a criminal defendant to demand a speedy trial, but afford no analogous right to a jailed witness? Constitutional implications of due process, equal protection, and search and seizure lurk in the shadows of these nettlesome questions."

The court reviewed the material witness detention statutes of other states and found that most of them either impose "substantial limitations" on the amount of time a material witness can be held, or allow for release after the witness has been deposed.

The court then turned to the Iowa statute, and found that the statute "explicitly focuses on the inability to serve a subpoena as a necessary criterion for the arrest of a material witness. If a subpoena can be served, however, the underlying basis for the arrest is no longer present. It logically follows that if the basis for the arrest of a

material witness is eliminated, there can be no basis for a continued detention.” The court ruled that “a material witness may be detained only so long as is necessary to serve a subpoena upon the witness. Once a subpoena to appear and testify is served on the witness, the authority to detain the witness pursuant to Iowa Code section 804.11 ends.”

LOUISIANA VS. DILLON, COURT OF APPEALS OF LOUISIANA, FOURTH CIRCUIT, NO. 2011-KA-0188, 8/24/11

In 1990, Larry Dillon was arrested and charged in New Orleans with issuing worthless checks. Bail was set at \$2,000, which Dillon was unable to post. About a week later he was released from jail as part of an emergency release mechanism put in place because of jail crowding. The emergency release order did not contain any information or obligation on the part of the defendant to appear in court, such as would appear on either a non-financial or financial release. After his release, the District Attorney filed an information and an arraignment date was set. Sheriff’s deputies attempted on three occasions to serve Dillon with the notice to appear for arraignment, using the address on file for Dillon, but Dillon was not at home during those attempts. After the third attempt, deputies left the notice on the door of the home. When Dillon failed to appear for his arraignment a warrant was issued. The warrant remained outstanding until 2010 – 20 years later – when Dillon was arrested.

At Dillon’s 2010 arraignment on the 1990 worthless checks charge he moved to have the case dismissed, claiming that the notice to appear that had been left on the door of his residence was insufficient and that his speedy trial rights had been violated. The trial court denied this motion, holding that the notice was sufficient and the reason that he was not brought to trial within the statutorily-required two-year period was due to Dillon’s actions in not appearing in court. Dillon appealed this decision.

The appeals court noted that there is nothing in the law or previous court rulings about the proper service of a notice to appear in court. A prior ruling of the court, however, does address the proper service procedures for serving subpoenas. In that case, the court held that leaving a subpoena on the door of a person’s home was insufficient. Instead, the court held that the individual must be served directly or the subpoena may be left with a family member of suitable age. Extending that ruling to the circumstances of the instant case, the court concluded that leaving the notice to appear on the defendant’s door was not sufficient notice. As a result, Dillon could not be held responsible for the interruption in the prosecution of his case. The court reversed the decision of the trial court.