CJA NEWS

A Newsletter for CJA Panel Attorneys

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SIGNIFICANT CASES

SUPREME COURT CASES

In *Greene v. Fisher*, No. 10-637 (Nov. 8, 2011), the Court addressed whether the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1), permits a federal court to grant habeas relief based upon Supreme Court precedent that post-dates the state court adjudication. The AEDPA provides in part that if a state court has considered and adjudicated a petitioner's claim on the merits, habeas relief is not permitted unless the state court's "decision . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Supreme Court held that this language requires federal courts to "'focu[s] on what a state court knew and did,'" and "measure state-court decisions 'against this Court's precedents as of the time the state court renders its decision.'" Thus, a federal court may not rely on a later-decided Supreme Court case as a basis to grant a writ of habeas corpus.

In *Cavazos v. Smith*, No. 10-1115 (Oct. 31, 2011), the Court reversed a Ninth Circuit decision ordering habeas corpus relief based upon the insufficiency of evidence. The Court emphasized that "it is the responsibility of the jury—not the court—to decide what

HIGHLIGHTS IN THIS ISSUE

The publication of this quarterly newsletter would not be possible without the able assistance of: Brad Hall and Kim Ferranti.

conclusions should be drawn from evidence admitted at trial," and that "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court." Rather, "[t]he federal court . . . may do so only if the state court decision was 'objectively unreasonable.'" The Court noted that "the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold"—and appeared to acknowledge that this may be precisely such a case. Nevertheless, the Court found that the Ninth Circuit had improperly "substituted its judgment for that of a California jury on the question whether the prosecution's or the defense's expert witnesses more persuasively explained the cause of a death." As such, habeas relief was improper.

In *Bobby v. Dixon*, No. 10-1540 (Nov. 7, 2011), the Court reversed a Sixth Circuit decision granting habeas relief based upon that court's view that the Ohio courts had improperly admitted the petitioner's statements into evidence. The Court explained, "The admission of Dixon's murder confession was consistent with this Court's precedents . . . . That does not excuse the detectives' decision not to give Dixon *Miranda* warnings before his first interrogation. But the Ohio courts recognized that failure and imposed the appropriate remedy: exclusion of Dixon's forgery confession and the attendant statements given without the benefit of *Miranda* warnings. Because no precedent of this Court required Ohio to do more, the Sixth Circuit was without authority to overturn the reasoned judgment of the State's highest court."

SIGNIFICANT SIXTH CIRCUIT CASES

Miranda/*Edwards*

In *McKinney v. Ludwick*, No. 10-1669 (Aug. 19, 2011), the Sixth Circuit found that the Michigan Court of Appeals had not unreasonably applied *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981), in concluding that although the petitioner had invoked his right to counsel, his initiation of further contact with police rendered his subsequent confession admissible. The sequence of events was as follows: During his initial questioning, the petitioner told police that he wanted to see a lawyer, thereby ceasing the interrogation. Then, as the interrogating officer was leaving, he told the petitioner that he could face the death penalty if the case was prosecuted federally. The following day, the petitioner reinitiated contact with the police, eventually making incriminating statements. The Michigan Court of Appeals found that the officer's statement about the death penalty "did amount to an impermissible interrogation," but that "the coercive effect of this interrogation had subsided by the time McKinney asked to speak with [the officer] the next morning." As to the first of these findings, the Sixth Circuit noted that contrary to the finding of the Michigan Court of Appeals, "it is by no means clear that [the] death-penalty comment . . . qualified as the functional equivalent of interrogation, as opposed to a 'subtle compulsion' to cooperate that is not foreclosed by *Miranda* and *Edwards*." But even assuming that the death penalty comment was an interrogation, the court found that the Michigan Court of Appeals was reasonable to conclude that "any coercive effect of [the] death-penalty comment had subsided" by the time that the

petitioner re-initiated the dialogue with police on the following day.

Fourth Amendment

United States v. Johnson, No. 09-6461 (Aug. 29, 2011), involved the search of the defendant's bedroom over his express objection but with the consent of his wife and her mother, both of whom arguably had greater possessory interests in the home. The court explained that "there is no reasonable dispute that the Defendant had a reasonable expectation of privacy in the bedroom, which he shared with his wife and which he used to store personal belongings." Thus, because he "was present when the police arrived and . . . expressly objected to the search," the court found under *Georgia v. Randolph*, 547 U.S. 103, 120 (2006), "the search of the bedroom was unreasonable . . . ." The court made clear that "*Randolph* does not distinguish among the 'multiplicity of living arrangements,'" and thus that "Johnson's express objection . . . was sufficient to render the search of the bedroom unreasonable as to him, notwithstanding the consent given by [his wife and his mother-in-law]."

In *United States v. Beauchamp*, No. 10-5102 (Oct. 25, 2011), the court ordered the suppression of physical evidence discovered when police officers illegally seized the defendant on the street and obtained his involuntary consent to search. The police initiated the seizure because when they approached the defendant, he "hurriedly walked away without making eye contact," which they deemed to be "suspicious." The defendant was walking around a fence when a police officer again approached him and exited the patrol car. When the officer requested that the defendant to stop and walk around the fence toward him, the defendant complied, appearing nervous. A frisk uncovered no weapons, but when the officer obtained permission to conduct a more thorough search he found crack cocaine between the defendant's butt cheeks. Under these circumstances, the court found that the defendant was seized when he complied with the police order to stop walking, turn around, and approach the officer, explaining, "the fact that Beauchamp first walked away from [police] before [they] located him and pulled up next to him would suggest to a reasonable person that the officers were targeting Beauchamp and therefore he would not feel free to leave," and that "a reasonable person in Beauchamp's position would perceive that the officer's instructions required compliance and restricted his ability to walk away." Next, the court found that the seizure was not supported by reasonable suspicion: "Beauchamp's exercise of his right to walk away—even if the walk was made hurriedly, briskly, or snappily—does not turn his otherwise innocuous behavior into the conduct of a 'suspicious suspect.'" Lastly, the court found that the defendant's consent to search was not voluntary because "Beauchamp gave his [consent] immediately after [an officer] had placed his hands on Beauchamp's body to conduct the frisk. A scared, defenseless man is not in a position to say no to a police officer whose hands are still on or just removed from his body while another officer is standing just a few feet away." Judge Kethledge dissented, largely on the ground that the majority had misapplied the deferential standard of review and improperly rejected the district court's factual findings about the manner in which officers "asked" the defendant to approach them and for his consent to search.

In *United States v. Richards*, Nos. 08-6465/6503 (Oct. 24, 2011), the court rejected the defendant's overbreadth challenge to the

search of his entire computer server for evidence related to the possession and distribution of child pornography where the Government's probable cause only related to two particular websites, JustinsFriends.com and JustinsFriends.net. Noting "the unique problem encountered in computer searches, and the practical difficulties inherent in implementing universal search methodologies," the court followed "the majority of federal courts [who] have eschewed the use of a specific search protocol and[] instead . . . employed . . . a case-by-case" reasonableness review. "[I]n general," the court explained, "'so long as the computer search is limited to a search for evidence explicitly authorized in the warrant, it is reasonable for the executing officers to open the various types of files located in the computer's hard drive in order to determine whether they contain such evidence.'" Applying this standard, the court rejected the argument that the warrant was overbroad because the "server was set up in a neatly compartmentalized and segregated fashion, rendering it entirely unnecessary to search beyond the content maintained in the JustinsFriends file directory." "[H]indsight is 20/20," the court explained, and "it was only after the search that [the Government] discovered that the JustinsFriends content was separated from the other sites and divided into distinct file directories." Thus, "[i]n light of the information known at the time the search warrant was issued, . . . it was not unconstitutionally overbroad." The court also noted that even if the warrant was overbroad, suppression of the evidence would be unwarranted because the agents who relied on the warrant acted in good faith pursuant to *United States v. Leon*, 468 U.S. 897, 905 (1984).

Multiplicity

In *United States v. Richards*, Nos. 08-6465/6503 (Oct. 24, 2011), the court rejected the defendant's argument that two separate counts of his indictment were multiplicitous because they charged him separately with transmitting child pornography via two versions of the same website. The court noted that although one of the websites "eventually replaced" the other, the two websites were registered separately, and the evidence suggests that they operated simultaneously at one time. Thus, the court approved of "punishing, through multiple offenses, a defendant who funnels child pornography through different websites . . . ."

Speedy Trial

In *United States v. Young*, No. 09-5823 (Sept. 21, 2011), the court rejected the defendant's constitutional speedy trial argument that "the delay of eleven years between his indictment and his conviction is presumptively prejudicial," and also that it "caused him actual prejudice in the form of lost witnesses, lost memories, and lost records." The unusually long delay stemmed in part from the fact that "the case was extraordinary in its complexity and otherwise." It "involved twenty-four other defendants and numerous motions to continue, join, sever, and dismiss." The defendant himself engaged in a "vigorous motions practice," sought several continuances of his own, and "never opposed a requested continuance from any party . . . ." Further, there had been two interlocutory appeals. Albeit while acknowledging the "unusual facts—especially the eleven-year delay," the court found that "Young was either responsible for or a participant in most of the delay, and he is unable to show that his

defense was prejudiced. . . . Ultimately, while the length of Young's case may be atypical, it is not unconstitutional."

Sentencing

In *United States v. McMurray*, No. 09-5806 (Aug. 4, 2011), the court held that the defendant's Tennessee conviction for aggravated assault does not categorically qualify as a "violent felony" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and that because the available *Shepard* documents do not confirm the nature of the conviction, the defendant was improperly sentenced as an armed career criminal. The Tennessee aggravated assault statute at issue encompasses the crime of "recklessly caus[ing] bodily injury to another" under certain aggravating circumstances. The court first found that pursuant to *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), and *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006), as well as the "overwhelming support in our sister circuits" for the proposition, "the 'use of physical force' clause of the ACCA, § 924(e)(2)(B)(i), requires more than reckless conduct." The court also found that because the Supreme Court held in *Begay v. United States*, 553 U.S. 137, 144-45 (2008), that "to qualify as a 'violent felony' under the 'otherwise' clause, the crime must 'involve purposeful, violent, and aggressive conduct,'" reckless aggravated assault "no longer qualifies as a 'violent felony' under the 'otherwise' clause of § 924(e)(2)(B)(ii)." Finally, the court found that a review of the available *Shepard* documents does not confirm that the prior conviction qualifies as a violent felony. Although the prosecutor stated at the plea hearing that the defendant's conduct was intentional or knowing, and not reckless, the defendant "entered a best-interest plea under *North Carolina v. Alford*, 400 U.S. 25 (1970), which Tennessee allows when 'a defendant . . . wishes to enter a plea but does not wish to acknowledge guilt.'" The court held that under these circumstances, "the state's proffer of the factual basis for McMurray's best-interest plea does not demonstrate that McMurray's plea necessarily rested on facts identifying his aggravated-assault conviction as a 'violent felony.'" Judge McKeague dissented, arguing both that a Tennessee aggravated assault is categorically a violent felony and that the available *Shepard* documents establish that the defendant's conviction qualifies as a "violent felony."

In *United States v. Walker*, No. 09-6498 (Aug. 11, 2011), the court held that because the district court had sentenced the defendant to thirty six months imprisonment in order to "ensur[e] that he received 'the benefit of all that the government can offer' in terms of treatment," the court violated 18 U.S.C. § 3582(a) as interpreted in *Tapia v. United States*, No. 10-5400 (June 16, 2011). There, the Supreme Court explained that "a court may not impose or lengthen a prison sentence to . . . promote rehabilitation."

In *United States v. Judge*, No. 09-2624 (Aug. 15, 2011), the Sixth Circuit rejected the argument that the district court had "given Judge a higher sentence than he merited . . . because of the possibility of future cooperation and a future Rule 35(b) motion," which would have been error. Rather, the court explained, the district court simply "found that Judge's cooperation was not yet complete," and thus imposed only a 25% reduction in his case although his cooperation may have merited a 40% reduction "once completed."

United States v. Gardner, No. 07-4947 (Aug. 12, 2011), involved a dispute about the

application of 18 U.S.C. § 2252A(b), which imposes enhanced mandatory minimum sentences in child pornography cases in which the defendant has previously been convicted of an offense involving the sexual abuse of a minor. Initially, the court confirmed that the framework laid out in *Shepard v. United States*, 544 U.S. 13 (2005), and *Taylor v. United States*, 495 U.S. 575 (1990), applies to Section 2252A(b) enhancements, and thus that the first question is "'whether the statute of conviction falls within the four corners of the federal statute,'" and "'[i]f that process is not conclusive," to "examine the available documents permissible under *Shepard* and *Taylor*.'" Here, the defendant had previously been indicted in state court for sexually abusing "a child under the age of eighteen," but the "judicial order" in the case stated only that he was found guilty of "sexual battery," a more generic crime that does not require that the victim be a minor. Further, the plea colloquy was not available to clarify the precise nature of the plea. The court held that although the indictment (a permissible *Shepard* document) unambiguously alleged the sexual abuse of a minor, the review of that document was "restricted" based on the less specific crime to which the defendant actually pled guilty. The court explained, "Because [the defendant] pled only to 'sexual battery,' and because the victim need not be a minor to support a conviction for sexual battery, the references in the indictment suggesting the victim was a minor are not 'essential to the offense to which [he] entered his plea' . . . [and] must be disregarded." The court further held that it was not proper to rely on the state court presentence report to confirm the nature of the defendant's prior conviction, in spite of the Government's argument that the defendant had assented to its factual description of the offense. The court affirmed the district court's decision not to impose the sentence enhancement under this record.

In *United States v. Richards*, Nos. 08-6465/6503 (Oct. 24, 2011), the court rejected the Government's challenge to a sixteen year prison sentence where the sentencing guidelines recommended life imprisonment. "The sentencing record shows that . . . the court thoroughly addressed and weighed the parties' arguments for and against a variance . . . , considered the relevant sentencing factors, and clearly understood its sentencing options."

In *United States v. Smith*, No. 09-2575 (Sept. 27, 2011), the court remanded based on the district court's erroneous finding that the defendant was not eligible for a reduction in his sentence pursuant to the retroactive crack cocaine sentencing guideline amendments and 18 U.S.C. § 3582(c)(2). The defendant's Rule 11(c)(1)(C) plea agreement anticipated a sentencing guidelines range of 168-210 months, and called for a sentence of 180 months. Although the probation department calculated the guidelines to be 210-262 months based on a two-point offense level enhancement not anticipated by the parties, the district court nevertheless accepted the plea agreement and imposed a sentence of 180 months. When the crack cocaine sentencing guidelines were later amended, they called for a two-point reduction in the defendant's offense level and a corresponding guidelines range of 168-210 months—the same range to which the parties had originally bargained before sentencing. The district court declined to reduce the defendant's sentence because it fell "within the Amended Guideline Range and is the exact sentence agreed upon by the parties in the Rule 11 Plea Agreement." The Sixth Circuit, however, noted that in *Freeman v. United States*, 131 S.Ct. 2685 (2011), the

Supreme Court abrogated prior Sixth Circuit law forbidding a sentence reduction under Section 3582(c)(2) in a case in which the defendant was sentenced pursuant to a Rule 11(c)(1)(C) plea, and therefore that the defendant was not categorically ineligible for a sentence reduction. Next, the court expressed "little hesitation in concluding that the plea agreement in this case is 'based on' the Sentencing Guidelines" such that Section 3582(c)(2) relief is warranted. The court further found that "the district court erred to the extent it concluded that Smith's 'Previous Guideline Range' was 210 to 262 months . . . . [T]his was the . . . range as determined by the presentence report. The district court's Guidelines calculation, however, became irrelevant once it accepted the plea agreement. . . . [T]he applicable Sentencing Guidelines range for purposes of Smith's motion for a reduction in sentence is 168-210 months."

SORNA

United States v. Trent, No. 08-4482 (Aug. 5, 2011), addressed the applicability of the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901, to a defendant who was convicted of a sex offense after the enactment of SORNA on July 27, 2006, but whose interstate travel occurred in November 2007—before the Attorney General promulgated rules regarding how to apply SORNA retroactively on August 1, 2008. The Sixth Circuit had previously held in *United States v. Utesch*, 596 F.3d 302 (6th Cir. 2010), that "SORNA's registration requirements did not apply to Utesch, who was convicted of a sex offense before SORNA was enacted . . . because his failure to register occurred before the Attorney General's guidelines on retroactive application of SORNA became effective." The court applied *Utesch* to a post-SORNA but pre-implementation sex offense conviction. The court explained, "In this Circuit, for pre-enactment and pre-implementation sex offenders alike, August 1, 2008 is the effective date of SORNA."

Habeas Corpus

In *Rice v. White*, No. 10-1583 (Oct. 24, 2011), the court ordered habeas relief based on the Michigan Supreme Court's unreasonable interpretation of the facts pertaining to the petitioner's *Batson* claim. During jury selection, defense counsel raised a *Batson* challenge to the prosecutor's dismissal of African-American jurors. When the prosecutor offered reasons for the dismissals, the trial judge rejected those reasons but nevertheless allowed the jury selection and trial to proceed because the improperly challenged jurors had already left the courthouse, and because of the court's apparent belief that the violation had been "'cured' by . . . the ultimate racial composition of the panel . . . ." On this record, the Michigan Supreme Court held that "the trial judge neither explicitly nor implicitly" found a *Batson* violation, but merely "implied" that it would have preferred to keep the challenged jurors on the panel. The Sixth Circuit found that although "[t]he trial judge appears to have misunderstood the nature of the court's duty under *Batson* . . . , the record makes clear that the trial judge rejected the prosecutor's proffered race-neutral reasons . . . ." Indeed, the court observed, the fact that the Michigan Supreme Court had reached the opposite conclusion only two years earlier based on the exact same record "raises a red flag to possible 'extreme malfunctions in the state criminal justice system[].'"

In *Stumpf v. Houk*, No. 01-3613 (Aug. 11, 2011), a case on remand after the Supreme Court found that the petitioner's conviction

was not improper due to inconsistent prosecution theories, the court found that the death sentence was nevertheless impermissible for the same reason. The case involved two separate prosecutions of codefendants charged with robbery and murder. In the petitioner's sentencing hearing, the prosecution argued that he had personally shot and killed the decedent. In his codefendant's later trial, however, the same prosecution team relied on new evidence to argue that the codefendant was the shooter. The Sixth Circuit refused to "allow the prosecution to play so fast and loose with the facts and with its theories. To allow a prosecutor to advance irreconcilable theories without adequate explanation undermines confidence in the fairness and reliability of the trial and the punishment imposed and thus infringes upon the petitioner's right to due process." Judge Boggs dissented, arguing that the majority had "invent[ed]" the Fourteenth Amendment right upon which it decided this case, and pointing out that because the discovery of new mitigating evidence did not itself give rise to a constitutional claim, the use of that evidence in a different case against a different defendant should not change matters.

In *Foust v. Houk*, No. 08-4100 (Aug. 25, 2011), the court found that trial counsel were ineffective for failing to investigate and present adequate mitigation evidence about the petitioner's childhood. Trial counsel "did not interview any potential witnesses," "did not gather any records from Children's Services, despite . . . repeated reminders" from defense psychologist Dr. James Karpawich, "did not prepare Foust's parents or Karpawich in advance of their testimony at the mitigation hearing," and "hired Karpawich in lieu of a trained mitigation specialist, even though Karpawich informed the attorneys that he was not a trained mitigation specialist." If counsel had performed adequately, the court explained, they would have learned of the "horrific accounts detailed in records from Children's Services and in affidavits from Foust's siblings," including descriptions of "the squalor of Foust's home," which had feces on the walls and vomit on the floors, was infested with insects and pests, was full of garbage, lacked adequate food, and generally exhibited "conditions so vile that a cleaning crew called the residence an 'uninhabitable' 'pig sty' and refused to return." Available records also showed that both of the petitioner's parents abused him physically and emotionally and that rape and incest occurred among the petitioner's siblings. Lastly, they showed that the petitioner tried to help "reshape the family's trajectory," and that he had tried to impress his mother with a new job and good grades, in response to which she called him a "worthless piece of shit." The court determined that the failure to present this evidence or retain a trained mitigation specialist amounted to constitutionally ineffective performance, that this prejudiced the petitioner, and the Ohio Court of Appeals's contrary conclusion rested on an unreasonable application of federal law. Judge Batchelder dissented. While she agreed that trial counsel "performed deficiently for failing to conduct further investigation during the mitigation phase," she did not agree "that the Ohio Court of Appeals's conclusion that Foust was not prejudiced as a result of his counsel's performance was *unreasonable*."

In *Walker v. McQuiggan*, No. 10-1198 (Sept. 2, 2011), the court ordered a writ of habeas corpus on the ground that trial counsel was ineffective for failing to investigate and present an insanity defense. Although trial counsel was aware that the petitioner had a "long and well-documented history of severe mental illness," and although the petitioner

was entitled under Michigan law to an independent forensic evaluation, trial counsel elected not to investigate this potential defense, and instead to pursue a "mixed accident/self-defense/intoxication theory" that "he knew was contradicted by every piece of physical, circumstantial, and eyewitness testimonial evidence." This amounted to unreasonable trial strategy. The court also found that the Michigan Court of Appeals was unreasonable to find the absence of prejudice. "The state appeals court's determination, based on its own assessment that the 'evidence that defendant had the consciousness of guilt' outweighed all evidence regarding Walker's mental illness, is a thinly veiled and unsupportable conclusion that it simply did not believe that Walker was legally insane. The factual determination of whether Walker was insane is not the question that the court was required to answer, or should have endeavored to answer, in order to determine prejudice under *Strickland*." In dissent, Judge Cook argued that "reasonable jurists could disagree as to the correctness of the state appellate court's decision" on the issue of prejudice, and thus that habeas relief was therefore not warranted.

In *Crump v. Lafler*, No. 09-1073 (Sept. 20, 2011), the court held that "[a]lthough Michigan may categorize a parole-eligible prisoner as having a 'high probability' of release, . . . an actual release determination remains uncertain and subject to a broad grant of discretion to the Parole Board to decide otherwise," and thus that "[a] prisoner in the high-probability class . . . has no enforceable claim of entitlement to release. . . . Though he has identified a basis for his *hope* of parole, Petitioner has failed to identify a protectable liberty interest to which he is *entitled* under the Fourteenth Amendment." Judge Cole argued in dissent that where an inmate is designated as having a "high probability of parole," the Parole Board can only deny parole "for substantial and compelling reasons stated in writing," and thus that "under controlling Supreme Court precedent . . . , Michigan's parole system 'creates a presumption that parole release will be granted' . . . and . . . establishes a liberty interest[] for prisoners classified with a 'high probability of parole.'"

In *D'Ambrosio v. Bagley*, No. 10-3247 (Aug. 29 2011), the Sixth Circuit rejected a jurisdictional challenge to the district court's issuance of an unconditional writ of habeas corpus barring the reprosecution of a death row inmate. The district court found that the prosecution had wrongfully withheld exculpatory evidence, "engaged in substantial inequitable conduct," and failed to comply with a prior conditional writ of habeas corpus. For these reasons, and because of the death of a critical witness during the delay, the district court found that an unconditional writ was appropriate. The Sixth Circuit affirmed, finding that "because the state failed to comply with the district court's conditional writ, because the district court was acting pursuant to a Federal Rule of Civil Procedure 60(b) motion, and because this clearly presents a case or controversy, the district court had both subject-matter and Article III jurisdiction."

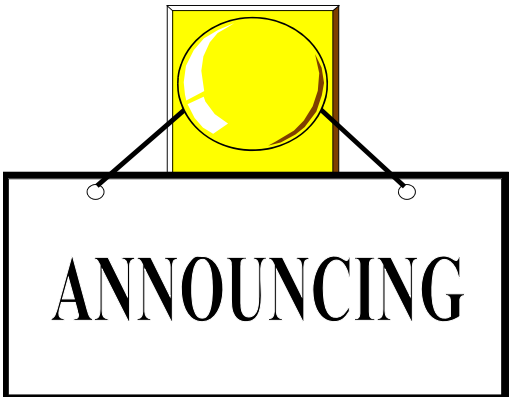
In *Davis v. Lafler*, No. 08-1291 (Oct. 3, 2011), an en banc decision, the court rejected the petitioner's arguments that the evidence was legally insufficient and that defense counsel was ineffective. As to the first issue, the court found that there was "strong circumstantial evidence implicating the petitioner, and that "when this case is given 'double deference' through the lense of AEDPA," habeas relief is not warranted. As to the second issue, the

court declined to address a disputed standard of review question and instead found that even under a de novo standard, defense counsel's decision not to pursue a particular witness was not unreasonable in light of his simultaneous statements on the record as to his considered and strategic reason not to pursues the witness.

PRACTICE POINTERS

☞ *Tapia* and Supervised Release

A circuit split has developed regarding whether *Tapia v. United States*, No. 10–5400 (June 16, 2011), in which the Supreme Court held that 19 U.S.C. § 3582(a) prohibits a sentencing court from imposing or lengthening a defendant's prison term in order to foster his rehabilitation, applies in the supervised release setting. In *United States v. Molignaro*, No. 10-1320 (July 6, 2011), the First Circuit held that *Tapia* applies in the supervised release context, whereas in *United States v. Breland*, No. 10-60610 (July 19, 2011), the Fifth Circuit reached the opposite conclusion. The Sixth Circuit has not addressed this issue in a published opinion, but after initially arguing that *Breland* was correctly decided, the Government has recently reversed course and conceded that *Tapia* applies at sentencing for a violation of the terms of a defendant's supervised release. *See United States v. Tyler*, 6th Cir. Case Nos. 11-1646/11-1647 (Gov't Letter filed Sept. 22, 2011). The Government noted that in *Olds v. United States*, Supreme Court Case No. 10-612, the Solicitor General has filed a Brief conceding that *Tapia* applies in the supervised release context.



Immigration Law Seminar for Criminal Practitioners— *Presented by the National Immigration Justice Center, Chicago, Illinois*

When: Friday, January 27, 2011
10:00 a.m. - noon

Where: Federal Defender Office
613 Abbott
Lower Level Auditorium

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