

# Hot Issues

## Trends And Cases To Be Aware Of, Where We Are And Where We May Be Going

### BEFORE YOU BEGIN A CAPITAL CASE

Have you read the ABA Guidelines for the Defense of Capital Cases?

- *Wiggins v. Smith*, 123 S.Ct. 2527 (2003)
- *Rompilla v. Beard* 125 S. Ct. 2456, 73 USLW 4522 (6-20-05)
- *Hamblin v. Mitchell*, 354 F3d 482 (6<sup>th</sup>. Cir 2003)

### TRIAL PHASE

#### Pre-Trial

Is your Client mentally Retarded?

- *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002)
- *State v. Lott*, 97 Ohio St. 3d 303, 779 N.E.2d 1011 (2002)
- *State v. Gumm*, Hamilton Cty Case # Case No. B-925608, (Aug. 9, 2005) Trial court finding of MR on PC
- *Bies v. Bagley*, OHSD Case # 1:00cv682 (11-23-05 R & R adopted by D.Crt. Judge on 3-1-06)(double jeopardy bars re-litigation of MR claim which was conclusively found in state court)
- *State v. Burke*, Franklin App. No. 04AP-1234, 2005-Ohio 7020(Dec. 30, 2005), reconsideration denied (Mar. 7, 2006)2006-Ohio-1026 (Defendant entitled to 2 attorneys for PC Atkins determination)

Is your client Mentally Ill?

- *State v. Christopher Newton*, 108 Ohio St.3d 13, 2006-Ohio-81
- *State v. Timothy Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160

## Is your Client a Foreign National?

- *Bustillo v. Johnson*, 05-51 (cert. granted November 7, 2005) Questions presented: Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individually enforceable rights.
- *Sanchez-Llamas v. Oregon*, 04-10566 (cert. granted November 7, 2005) (case below: 108 P.3d 573 (Or.)) Questions presented: (1) Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States? (2) Does the state's failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statements to police?
- *Medellín v. Dretke*, 125 S. Ct. 2088 (2005)

Is there some challenge to the DP you can make specifically based upon your client's status?

## Have you filed a challenge to lethal injection?

- *Hill v. Crosby*, 04-1324 (cert granted 09/27/05) Questions presented: (1) Whether a complaint brought under 42 USC Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 USC Sec. 2254. (2) Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 USC Sec. 1983.

Do you have a course of conduct spec? Is it really a course of conduct?

- *State v. William Sapp*, 105 Ohio St.3d 104, 822 N.E.2d 1239, 2004-Ohio-7008

Are there any Booker/Apprendi issues that you can raise?

- *Apprendi v New Jersey*, 420 U.S 466 (2000)
- *United States v. Booker* 125 S. Ct. 738, 73 USLW 4056 (1-12-05)

Have you made your requests for the experts you need? Have you made your record?

Is there a choice of counsel issue?

- *United States v. Gonzalez-Lopez*, 05-352 (cert granted Jan. 6, 2006)  
Questions presented: Whether a district court's denial of a criminal defendant's qualified right to be represented by counsel of choice requires automatic reversal of his conviction.

Is this a case in which the victim's family can be made an ally?

Voir Dire

Are there race issue?

- *Johnson v. California* 125 S. Ct. 2410, 73 USLW 4460 (6-13-05)
- *Miller-El v. Dretke* 125 S. Ct. 2317, 73 USLW 4479 (6-13-05)
- *State v. James Conway*, 108 Ohio St.3d 214, 2006-Ohio-791

Are there publicity issues?

Are there jurors who have issues you need to expose?

- *White v. Mitchell*, 431 F3d 517 (6th Cir. 2005)
- *Franklin v. Anderson*, 434 F3d 412 (6th Cir. 2006)

## Trial

Are they trying to shackle your client?

- *Deck v. Missouri* 125 S. Ct. 2007, 73 USLW 4370 (5-23-05)

Is there an affirmative defense? Who has burden?

- *Dixon v. United States*, 05-7053 (cert granted Jan. 13, 2006)  
Questions presented: Where a criminal defendant raises a duress defense, whether the burden of persuasion should be on the government to prove beyond a reasonable doubt the defendant was not under duress, or upon the defendant to prove duress by a preponderance of the evidence.

Do you have Crawford Issues in your case?

- *Hammon v. Indiana*, 05-5705 (cert. granted October 31, 2005) (case below: 829 N.E.2d 444 (Ind.)) Questions presented: Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).
- *Davis v. Washington*, 05-5224 (cert. granted October 31, 2005) (case below: 111 P.3d 844 (Wash.)) Questions presented: Whether an alleged victim's statements to a 911 operator naming her assailant-- admitted as "excited utterances" under a jurisdiction's hearsay law -- constitute "testimonial" statements subject to Confrontation Clause restrictions enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004).
- *Madrigal v. Bagley*, 413 F3d 548 (6th Cir 2005)

## Penalty Phase

Do you have more than one aggravating circumstance, can they merge?

- See CD Rom for Merger document

Are there Crawford issues that conflict with your client's 8th Amendment rights?

Have you examined the evidence to determine if anything should not go to the jury in this phase?

- *State v. Timothy Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160

Does your client want to control what is presented?

- *Rompilla v. Beard* 125 S. Ct. 2456, 73 USLW 4522 (6-20-05)
- *State v. Monroe*, 105 Ohio St3d 384, 2005-Ohio-2282, at ¶ 74.

What if you have residual doubt issues? Can you do anything?

- *Oregon v. Guzek*, 126 S. Ct 1226, 74 USLW 4142 (2-22-06)

Is there Prosecutorial Misconduct- -you need to preserve it

- *Bates v. Bell*, 402 F3d 635 (6th Cir. 2005)
- *DePew v. Anderson*, 311 F3d 742 (6th Cir. 2002)

Have you reviewed the jury instructions?

- *Davis v. Mitchell*, 318 F3d 682 (6th Cir. 2003)

*Resources:*

<http://www.capdefnet.org/>

<http://legallaaffairs.org/howappealing/>

<http://www.scotusblog.com/movabletype/>

<http://confrontationright.blogspot.com/>

NACDL Listserve, see <http://www.nacdl.org/>

OACDL Listserve, see <http://www.oacdl.org/>

<http://www.supremecourtus.gov/>

<http://www.sconet.state.oh.us/>