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UNITED STATES SUPREME COURT GRANTS OF CERTIORARI ON THE RETROACTIVITY OF *PADILLA*

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Chaidez v. United States, 11-820. At issue is whether the rule announced in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), applies retroactively to cases on collateral review. In *Padilla*, the Court held that an attorney must inform his or her client whether a guilty plea "carries a risk of deportation.: Petitioner Roselva Chaidez, a native of Mexico, was a lawful permanent resident in 2003 when she was indicted in federal district court on three counts of mail fraud. With the advice of counsel, Chaidez pleaded guilty to two counts in December 2003 and was sentenced to probation. Chaidez did not file a direct appeal. Under federal law, an alien who is "convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The government initiated removal proceedings against Chaidez in 2009 because her guilty plea to a fraud in excess of $10,000 made her eligible for removal as an aggravated felon. To avoid removal, Chaidez sought to have her conviction overturned by moving for a writ of *coram nobis*, alleging ineffective assistance of counsel because her attorney failed to inform her that her guilty plea could lead to removal. She claimed that she would not have pleaded guilty had she known of the immigration consequences. While Chaidez's motion was pending, the Court issued *Padilla*.

The district court ruled that *Padilla* did not announce a new rule under *Teague v. Lane*, 489 U.S. 288 (1989), but rather was an application of *Strickland v. Washington*, 466 U.S. 668 (1984). The court then considered the merits of Chaidez's *coram nobis* motion and vacated her conviction. The Seventh Circuit reversed in a 2-1 opinion. 655 F.3d 684. The court held that *Padilla* announced a new rule for retroactivity purposes because before *Padilla* many state and federal courts had concluded that deportation consequences were not direct consequences that an attorney was required to discuss with the defendant to render effective assistance under the Sixth Amendment. Rather, most courts had ruled that deportation was a collateral consequence about which advice was not required. The Seventh Circuit also noted that in *Padilla* itself the two-Justice concurrence found *Padilla's* requirement that a criminal attorney provide specific advice on immigration law to be unprecedented, and the two-Justice dissent stated that the requirement lacked any "basis in text or principle." The Seventh Circuit also noted that the *Padilla* majority itself acknowledged that *Hill v. Lockhart*, 474 U.S. 52 (1985), which extended *Strickland* to guilty pleas, "does not control the question before us." All told, held the Seventh Circuit, a reasonable jurist prior to *Padilla* could have reached a conclusion contrary to *Padilla*, *Padilla* thus announced a new rule.

Chaidez argues *Padilla* was merely an application of *Strickland*, and that "applying *Stickland* to a new set of facts does not create a new rule." She purports to find support in cases in which the Court has held that 28 U.S.C. § 2254(d)(1) did not bar the grant of habeas relief based on ineffective assistance of counsel claims, and lower court rulings that *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), did not create new rules. Chaidez further asserts (quoting Supreme Court precedent) that "the mere existence of conflicting authority does not necessarily mean a rule is new" and that, "at least since IIRIRA's dramatic changes to immigration law went into effect, there has been no dispute that professional norms require advice on deportation consequences. " The United State disagrees with Chaidez on the merits, but agreed that certiorari should be granted because the lower courts are divided on the issue.

SEARCH & SEIZURE: No basis for no-knock provision *State v. Cash*, Case No. A12A0404 (June 21, 2012)

The Court of Appeals affirms the trial court's grant of Cash's motion to suppress, agreeing that the information in the affidavit supporting the search warrant request was

insufficient to justify the no-knock provision in the warrant.

The police had information from an anonymous that drugs sales were happening at a particular residence. They did surveillance there, but saw no drug activity. They looked in the trash can on the curb in front of the residence and found marijuana.

A no-knock warrant must be justified by the particular circumstances of the situation; there is no "blanket exception" for felony drug investigations. The affidavit gave no information about whether anyone in the residence actually might have a gun, and gave no information suggesting that the drugs in the residence were packaged or located for quick disposal. The Court says, "In sum, the affidavit and evidence … failed to present any particular facts and circumstances justifying a 'no-knock' provision, and instead, was based entirely upon generalizations. Consequently, the 'no-knock' provision was invalid, which rendered the execution of the warrant without knocking and announcing illegal …[T]he information … failed to present a reasonable ground to authorize the 'no-knock' provision ..."

The Court rejects the State's reliance on Felix, 241 Ga. App. 323 (1999) for the proposition that guns are tools of the drug trade. Again, such a proposition is a generalization insufficient to support a no-knock provision, and Felix did not involve a no-knock warrant, anyway. *Richards v. Wisconsin*, 520 US 385 (1997); *State v. Barnett*, 314 Ga. App. 17 (2012); *Clark*, 245 Ga. App. 267 (2000).

SEARCH & SEIZURE: No basis for no-knock provision *State v. Barnett*, Case No. A11A1755 (February 7, 2012)

The Court of Appeals affirms the trial court's grant of the motion to suppress filed by Barnett and his co-defendants on the basis that the "no-knock' provision in the search warrant was unsupported by particular facts and circumstances justifying its need and that no exigent circumstances were shown.

The search warrant was sought because a trash pull had discovered marijuana, "blunt" wrappers, and rolling papers with marijuana residue in the trash on the curb in front of the house.

The trial court found that the information about the firearm was stale, that the presence of drugs alone was insufficient to support a no-knock warrant, and no exigent circumstances had justified the no-knock search. The Court points out that no evidence as to exigent circumstances was presented at the hearing.

Nor did the record show whether, in fact, the officers did actually knock and announce their presence; the legality of a no-knock provision is moot if it's not used during the execution of the search warrant.

An officer's general assertions about the ease of destroying drugs and the use of guns by drug suspects is insufficient to authorize a no-knock warrant in a felony drug investigation.

HABEAS CORPUS:

Defense counsel's failure to investigate information for mitigating phase of murder conviction constituted deficient performance. *Evans v. Secretary, Dept. of Corrections* 681 F.3d 124, 11 Cir., May 23, 2012. Appellant received the death penalty after being convicted of murdering brother's girlfriend for cheating on his brother. During penalty phase of trial, defense counsel presented several character witnesses but no mental health mitigation. It was learned during the post-conviction relief hearing that the defense counsel had failed to investigate and present evidence that the Appellant had sustained brain damage from a head injury sustained at the age of three. He subsequently had difficulties with his behavior and learning in school which progressed to juvenile delinquency and adult criminality. The Eleventh Circuit held that the defense counsel's performance was deficient because he terminated his investigation too early, before having completed the kind of thorough investigation contemplated by *Wiggins v. Smith*, 539 U.S. 510 (2003) and then-prevailing professional norms. As a result of the deficient performance, defense counsel was unaware of the Appellant's childhood injury, brain damage, impulse control disorder, and learning disability. There was ample nonstatutory mitigating evidence that counsel could have presented which would have painted a remarkably different picture of the Appellant, but that the jury never heard. The case was reversed and remanded so that writ of habeas corpus can be granted as to ineffective counsel claims.

SENTENCING: Gun possession sentence consecutive only to underlying felony sentence. INNEFFECTIVE ASSISTANCE OF COUNSEL: Possible failure to fully present issue *Lewis v. State*, Case No. S12A0400 (June 25, 2012)

The Supreme Court affirms Lewis' convictions for murder and other offenses arising out of a four-day crime

spree, but vacates his sentence as to one of his possession-of-a-firearmduring-a-felony convictions. The Court also remands for the trial court to further consider an issue as to ineffective assistance of counsel.

Sentencing: OCGA§16-11-106(b) provides that a five-year prison term be imposed for having a gun while committing a felony, and that the five years run consecutive to any other sentence the defendant gets. In Busch, 271 Ga. 591 (1999), the Court construed that to mean "to be served consecutively only to the underlying felony for that offense."

Count 23 charged Lewis with possessing a gun while armed robbing, as charged in Counts 17 and 18, victims Williams and Perdue. On Count 23, the trial court imposed a sentence of five years in prison to follow the prison terms imposed on Count 18 *and Count 22*. Count 22 was an aggravated assault on victim Givens. The sentence on Count 22 was twenty years in prison "to follow" the twenty years in prison imposed on Count 18. Count 18 was specified as an underlying felony of Count 23, but Count 22 was not.

The Court says, "[A]s entered, the … sentence would require that … Lewis … serve the sentence for the underlying felony of armed robbery from Count 18, *and then* the sentence for the aggravated assault of Givens, which was not set forth as an underlying felony in Count 23. This is contrary to … Busch … [and] the sentence imposed for possession of a firearm during the commission of a felony as set forth in Count 23 must be vacated and the case remanded … for resentencing."

IAC: The Court finds that several of Lewis' claims of ineffective assistance of trial counsel were procedurally barred, and could not be resuscitated simply by "bootstrapping" them to a claim of ineffective assistance of appellate counsel. As to one of the claims, though, the Court says it needs some clarification.

At the hearing on Lewis' motion for new trial, his first appellate counsel raised issues as to the effective assistance of trial counsel. One of them concerned how the decision was made that Lewis not testify at trial. Lewis now asserts, through new appellate counsel, that his first appellate counsel was ineffective for not asking Lewis at the motion for new trial hearing what the content of his testimony would have been. The Court says, "This Court cannot determine from the record before it whether Lewis is unable to meet the standard for ineffective assistance of first appellate counsel. Assuming that the issue of trial counsel's ineffective assistance on the ground of failing to call Lewis to testify was properly raised in the trial court, if first appellate counsel had questioned Lewis about what his trial testimony would have been, it might have helped establish that claim. The trial court's order does not specifically address the issue …" The Court remands for a hearing on the issue of the effectiveness of first appellate counsel. *Wilson*, 286 Ga. 141 (2009).

SEXUAL EXPLOITATION OF CHILDREN: Facts may allow sentencing discretion
SENTENCING: Failure to use discretion
STATUTORY CONSTRUCTION: Strictly construe against State
STATUTORY CONSTRUCTION: Avoid construction making language surplusage
Hedden v. State, Case No. S10G0806 (March 18, 2011)

Hedden and another defendant in another case before the same trial court each pled guilty to sexual exploitation of children for knowingly having images in their computers of children engaged in sexually explicit conduct, and they were sentenced under the mandatory sentencing provisions of OCGA§17-10-6.2 as applied to sexual exploitation of children under OCGA§16-12-100.

The Court of Appeals consolidated their appeals, and affirmed their sentences, finding that possessing a photo of a victim who was being restrained precludes deviation from the mandatory minimum sentencing provisions. Hedden, 301 Ga. App. 854 (2010).

On cert., the Supreme Court finds that under the factual circumstances of the cases the trial court was not so precluded, and reverses.

The provisions at issue prohibit a trial court from probating, suspending, staying, deferring or withholding of any of the mandatory term of imprisonment for specified offenses, unless certain factors are present; the question was whether simply having the photos in their computers foreclosed the possibility of a less stringent sentence.

At issue was the critical factor of whether the "victim was not physically restrained during the commission of the offense." (OCGA§17-10-6.2(c)(1)(F))

Because the defendants had pictures of children being physically restrained during sexually explicit conduct, the trial court concluded that the defendants were not eligible

to be considered for deviation from the mandatory prison sentence, and so sentenced each of them to multiple concurrent 15-year sentences, with five of those years to be served in prison, without considering any lesser period of confinement.

The Court says, "The opinion of the Court of Appeals looked at the factors authorizing deviation from the minimum prison sentences as set forth in OCGA §17-10-6.2(c)(1)(A)–(F), and noted that factors (A) through (C) concerned the status and behavior of the defendant, while factors (D) through (F) were phrased in a manner that 'focused entirely on the victim.' … From this circumstance, the Court of Appeals concluded that, as children were depicted while physically restrained in materials held by the defendants, factor (F) was not met, and the trial court was correct that it had no discretion to deviate from the mandatory minimum sentencing set forth in OCGA §17-10-6.2(b). However, [that] analysis … does not give sufficient regard to all the statutory language; factor (F) precludes the trial court from exercising sentencing discretion when the victim was "physically restrained *during the commission of the offense.*"

Applying the rules of statutory construction which require that courts avoid construction of a statute that makes some language mere surplusage, and that criminal statutes be strictly construed against the State, the Court finds that, to give effect to the phrase "during the commission of the offense," it could not be applied under the circumstances here.

"The appellants were charged with possession of material in violation of OCGA §16-12-100(b)(8). **Therefore, it would have to be shown that the child victims in the images were physically restrained at the same time that the appellants possessed the offending material in order for OCGA §17-10-6.2(c)(1)(F) to exclude the trial court from having the sentencing discretion set forth in OCGA §17-10-6.2(c)(1). …[N]o such evidence exists.** Accordingly, the trial court erred in determining that it was without discretion to deviate from the minimum sentencing requirements of OCGA §17-10-6.2(b), and the Court of Appeals erred in affirming that ruling. … The comment of the Court of Appeals that 'it is irrelevant whether [the defendants] personally restrained the children whose photographs they possessed' … is thus misplaced. Were they … charged with creating such a photograph by operating a camera … they may not have personally restrained the children, but nonetheless the victims would have been physically restrained during the commission of their crime, within the meaning of OCGA §17-10-6.2(c)(1)(F)." Harris, 286 Ga. 245 (2009); Davis, 273 Ga. 14 (2000).

IMPEACHMENT: Testifying defendant subject to impeachment with prior convictions
EVIDENCE: OCGA §24-9-4.1 mirrors Federal Rule 609
APPEAL: Adverse pre-trial impeachment ruling waived if defendant doesn't testify
Warbington v. State, Case No. A12A0242 (July 5, 2012)

In affirming Warbington's convictions for aggravated assault, cruelty to children, battery, and terroristic threats, the Court of Appeals gives us a preview of what's coming our way with the new evidence code. The Court addresses an issue of first impression – whether, by not testifying, a defendant renders unreviewable a trial court's pre-trial ruling that his prior crimes are admissible to impeach him.

Warbington, before trial, moved to preclude the State from using any of his many prior convictions to impeach him if he testified. He did not commit to testifying if the motion were granted, nor did he proffer what his testimony would be.

The trial court ruled that two of his prior felony convictions, a 2009 drug conviction and a 2000 aggravated assault conviction, would be admissible under OCGA§24-9-84.1 to impeach him.

On appeal, Warbington argued that the trial court had erred in ruling the aggravated assault conviction admissible under OCGA§24-9-84.1(b) because it had improperly balanced the conviction's probative value and prejudicial effect. He asserted that the ruling had contributed to his decision not to testify and effectively deprived him of his constitutional right to testify. He did not appeal.

Citing Clay, 290 Ga. 822 (2012), the Court says that the language of OCGA§24-9-84.1(b) mirrors that of Federal Rule of Evidence 609(b) and the statutes of several other states modeled on Rule 609(b).

Looking to cases which have construed that Rule and such statutes, the Court finds that a defendant's failure to testify waives the issue of whether the trial erred in its pre-trial ruling that the State would be allowed to impeach him with prior convictions. Luce v. United States, 469 US 38 (1984); Linares, 266 Ga. 812 (1996).

INSUFFICIENT EVIDENCE: Attempt to entice child, asportation element CRIMINAL ATTEMPT: Committing one crime is not an attempt to commit another *Heard v. State*, Case No. A12A1534 (August 16, 2012)

Heard initiated an exchange of text messages with the 12-year-old girl who lived next door. She declined his request that she send him a naked picture, saying, "You're old and that is just wrong." She testified that she'd never had problems with Heard, but had thought it odd that whenever she was outside with a friend, he would come out and sit on his porch or mow the lawn even though it didn't need mowing.

Heard was indicted, and convicted at a bench trial, for criminal attempt to entice a child for indecent purposes. On appeal, Heard admitted that his conduct might have been some other crime, such as *exploitation* of children under OCGA§16-12-100(b), but argued that the State had failed to prove an essential element – asportation – of the crime with which it had charged him – attempted *enticing*. The Court of Appeals agrees and reverses his conviction.

INSUFFICIENT EVIDENCE: Gang activity *In the Interest of A.G.*, Case No. A12A0005 (July 11, 2012)

The Street Gang Act defines a criminal street gang as a "group of three or more persons associated in fact, whether formal or informal, which engages in criminal gang activity."

The Court says, "The statute clearly contemplates that the existence of such an organization, and that its members are 'associated in fact,' **'may be "established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, attire, or other distinguishing characteristics. However, such evidence, without more, is insufficient to prove that the juveniles are members of a criminal street gang."**

The Court notes that the trial judge clearly chose to believe Jones' explanations, and that it is not the reviewing court's function to second-guess such credibility determinations. But, even "[g]iving credence to Sergeant Jones' testimony, as we must," it was insufficient to prove beyond a reasonable doubt that the four juveniles were members of a gang.

INSUFFICIENT EVIDENCE: Drug trafficking, mere spatial proximity CIRCUMSTANTIAL EVIDENCE: Must exclude everything but guilt *Garcia v. State*, Case No. A12A0662 (July 11, 2012)

The Court of Appeals reverses Garcia's convictions for trafficking in meth and cocaine, and for possessing a gun during a felony.

The FBI, on the trail of a cocaine shipment from Mexico, were led to a house on Dowry Drive, where they did a knock-and-talk; they did not have a search warrant. After the agents knocked for three minutes, a guy named Alejandro came to the door; he said he neither lived there nor owned the place. Four more people were in the house, including Garcia, and a guy named Efrain. Efrain and Alejandro said they'd been living at the house for several days after arriving from Mexico. Another guy, Asuel, said he'd been living there for two weeks, and he consented to a search.

When the agents did a protective sweep of the house, they found guns and marijuana, and they arrested the five guys. Asuel then refused to sign a consent to search, so the agents got a warrant.

Hidden in the attic were guns; hidden in the chimney, meth; hidden in the clothes dryer, a money counter; hidden in the wall of one bathroom, more meth; hidden in the wall of another bathroom, cocaine and $46,000 in cash and drug transaction notes; on the fireplace mantle was a drug transaction ledger; in a corner of the living room was a "shrine" to drug trafficking; in a bedroom guns were found under the bed and under the mattress and in a suitcase; in a another bedroom, identified as room "E," was a gun under a pillow and two guns in the bed.

Also in room "E" was a pair of plaid shorts and a dark t-shirt with a light logo across it.

Witnesses testified that they'd seen Garcia wearing those clothes while mowing the grass at the house earlier that day, and seen him walk into bedroom "E," and, on occasions over the prior weeks, seen him at the house, and seen him playing cards with the other defendants.

Garcia testified that the first time he'd ever been to the house was that day. He said he was there to cut the grass for $50, that he'd borrowed clothes to wear while he mowed, and that he'd left the clothes in room "E." No one had the money to pay him, and he was told to come back that night. When he did, he said he'd stood by the door

because he didn't know Alejandro or Efrain, and didn't feel comfortable sitting on the couch with them.

The Court finds that the State did not prove an essential element of trafficking: knowing possession. Possession can be actual or constructive and joint or exclusive, "but mere spatial proximity is not sufficient to prove joint constructive possession." Especially when the drugs are hidden. It was undisputed that Garcia did not live there, so there was no presumption that he had control of the drugs.

The Court rejects the State's arguments purporting to connect Garcia to the drugs. The arguments were that no one is going to be in a stash house containing $750,000 at 10:30 at night unless they have a vested interest in what's there; that the drug "shrine" and the ledger were visible; that the occupants had time to hide stuff while the FBI was knocking at the door; and that Garcia's clothes were found in room "E."

The Court points out that no drugs were found in room "E," and says that while the evidence is circumstantial as to Garcia's constructive possession of the drugs, for a conviction to be based on circumstantial evidence, that evidence must exclude every reasonable hypothesis save that of guilt. And while the conflict between Garcia and other witnesses as to whether he'd been at the house before might create a "grave suspicion" about him, suspicions can't support convictions.

The Court says, "No drugs were found on [Garcia] and he was not seen in proximity to the well-hidden drugs [and] the evidence did not exclude the hypothesis that the drugs belonged to the other residing in the home." Since the firearm conviction hinged on the drug convictions, it also had to be reversed. OCGA§24-4-6; *Aquino*, 308 Ga. App. 163 (2011).

Improper bolstering, not proper for showing state of mind
Gaston v. State, Case No. A12A0962
(August 7, 2012)

The Court of Appeals reverses Gaston's child molestation convictions, finding that the trial court improperly allowed the child's father to bolster the child's testimony.

At trial, the State, on direct examination, had the following exchange with R.C.'s father:

> "**Q:** … [W]hen [R.C.] told you that she had been sexually molested by Melvin Gaston in 2006, did you believe her? **A:** Yes. … **Q:** What was the answer[?] **A:** Yes. **Q:** You believed her, but then you sent her back in 2007 and 2008? **A:** Yes. **Q:** And why did you do that? **A:** I was told to. … **Q:** Do you regret that decision? **A:** I regret it. … **Q:** When [R.C.] told you that she had been molested by Melvin Gaston twice in 2008, did you believe her? **A:** Yes.

The Court holds that the trial court's error in allowing this testimony was not harmless and required reversal of Gaston's convictions. The Court says, "R.C.'s credibility was central to the case against Gaston, in that the primary evidence that the crimes occurred was the testimony of R.C. and of the people to whom she described the incidents … There was no physical evidence corroborating R.C.'s various accounts [which] contained inconsistencies … Moreover the court did not issue a curative instruction or take other corrective action to mitigate the impact of the bolstering testimony." OCGA§24-9-80; *Bly*, 283 Ga. 453 (2008); *Orr*, 262 Ga. App. 125 (2003); *Buice*, 239 Ga. App. 52 (1999); *Griffin*, 267 Ga. 586 (1997); *Lagana*, 219 Ga. App. 220 (1995).

TERRORISTIC THREATS: Must be corroborated
INSUFFICIENT EVIDENCE: Terroristic threats, lack of corroboration
SIMILAR TRANSACTIONS: Threat not corroborated by another uncorroborated threat
Murrell v. State, Case No. A12A0225
(July 16, 2012)

The terroristic threat charge was based on the testimony of R.C. She testified that she had had a friendly, but not romantic, relationship with Murrell, but that he'd begun stalking her. One night, she was in a hotel room with her children; they were asleep on the beds, and she was sleeping at the foot of one of the beds. Murrell came in, got on top of her, threatened to kill her children if she made any noise, and then raped her.

The Court reverses the terroristic threat conviction, finding that the threat had been uncorroborated. Under OCGA§16-11-37, a terroristic threat conviction cannot be based on the uncorroborated testimony of the person to whom the threat was communicated.

The Court says, "While only slight evidence may be sufficient for corroboration, in this case, R.C.'s testimony is completely uncorroborated."

JURY INSTRUCTIONS: Error to say "Should have known" what crime being committed PARTY TO A CRIME: Must have knowledge of intended crime TRAFFICKING: Whether knowledge of amount of drug is required is in question *McGee v. State*, Case No. A12A0564 (July 6, 2012)

The Court of Appeals reverses McGee's conviction as a party to the crime of trafficking in cocaine, finding that the trial court harmfully erred in responding to the jury's question about what a defendant has to know to be criminally responsible.

The Court says, "The trial court's response to the jury's question was an incorrect statement of the knowledge requirement imposed by the trafficking statute. … [T]o convict a defendant of trafficking … the State must prove 'that the defendant knew that he possessed a substance and knew that the substance contained some amount of cocaine.' … Furthermore, the conviction of a defendant as … a party … requires proof that he 'had knowledge of the intended crime and shared in the criminal intent of the principal actor.' … The trial court's response, however, erroneously informed the jury that McGee could be found guilty of trafficking in cocaine upon a showing of mere criminal negligence rather than proof of guilty knowledge."

The Court says, "[W]e conclude that there is a reasonable probability that the erroneous response may have misled or confused the jury regarding what the State was required to prove." There was sufficient evidence on which a jury could conclude that McGee knew what was going on, but it was not overwhelming. "Given the evidence … the jury could have found that McGee knew that Mike was involved in some type of dangerous transaction and agreed to protect him from being robbed, but did not specifically know that Mike possessed cocaine … or share in his criminal intent to possess it. It follows that the jury could have convicted McGee on the erroneous theory that he should have known that Mike possessed cocaine in agreeing to protect him … [W]e cannot say that the trial court's erroneous response to the jury regarding the knowledge requirement was harmless." *Harrison*, 309 Ga. App. 454 (2011); *Dunagan*, 269 Ga. 590 (1998); *Ratana*, 297 Ga. App. 747 (2009); Coney, 290 Ga. App. 364 (2008); *Cadle*, 271 Ga. App. 595 (2005).

JUVENILES: Specific findings (not boilerplate) required under Designated Felony Act *In the Interest of J.X.B.*, Case No. A12A1559 (August 27, 2012)

After adjudicating J.X.B. delinquent for having a weapon in a school safety zone (he'd hit people with a baseball bat), the trial court ordered that he be placed in the custody of the Dept. of Juvenile Justice for 60 months, including 12 months detention.

This disposition was authorized under the Designated Felony Act, but the trial court failed to enter, as required by the Act, specific written findings of fact related to the child.

To determine if restrictive custody is required, the juvenile court must consider and make written findings as to 1) the needs and best interests of the child, 2) the kid's record and background, 3) the nature of the offense, 4) the need to protect the community from the kid, and 5) the age and physical condition of the victim. The Court of Appeals says, "[These] findings as to each essential element benefits the lower court in its balancing process, and assists this court in determining whether an abuse of discretion has occurred …"

Here, the trial court had used a "boilerplate" form which contained fill-in-the-blank sections for entering the required findings, but the trial court had entered nothing of substance except saying that the child had brought a bat to school with the intent to assault.

The Court rejects the State's argument that the pre-printed form addressed the required findings, and that the trial court was not prohibited from using the language of the form. "[T]he objective of the juvenile code is to seek nonconfinement, rehabilitation, and restoration to parental care wherever possible … The … requirement [of] specific written findings … in connection with … a particular juvenile … is consistent with that objective." "For the most part, the court's order contained [only] very general statements and conclusions." The form was insufficient without details specific to J.X.B. and his offense.

The Court vacates the judgment, and remands for the trial court to consider each element as it pertains to J. X. B., and to enter appropriate written findings. OCGA§§15-11-63(b), 16-11- 127.1; In the Interest of E.D.F., 243 Ga. App. 68 (2000); In the Interest of Y.E., 229 Ga. App. 506 (1997).

SUCCESSIVE 2255 PETITIONS

Synopsis: **Defendant made a prima facie showing that the Supreme Court's decision in *Graham v. Florida*-the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide-applies retroactively.**

In 2001, defendant was sentenced to life without parole for aiding and abetting a carjacking resulting in a death, an offense committed when he was sixteen years old. Defendant filed a 28 U.S.C.A. § 2255 motion, and that motion was denied. Years later, defendant sought the Fifth Circuit's permission to file a second § 2255 motion, arguing that the Supreme Court's decision in *Graham v. Florida*, 130 S.Ct. 2011 (2010) ("[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide"), rendered his sentence unconstitutional. Defendant argued that a successive motion was authorized by § 2255(h)(2), which permits successive motions based on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court.

The Fifth Circuit held that defendant established a prima facie showing that the requirements of § 2255(h)(2) were satisfied. First, *Graham* clearly stated a new rule of constitutional law that was not previously available. Second, *Graham* had been made retroactive to cases on collateral review by the Supreme Court. The Fifth Circuit stated that *Graham,* when taken together with one of the two exceptions to the presumption of non-retroactivity articulated in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), necessarily dictated the retroactivity of *Graham's* holding. The Fifth Circuit reasoned (1) under the first *Teague* exception, a rule is deemed retroactive if it places certain kinds of primary, private individual conduct beyond the power of criminal law-making authority to proscribe; and (2) the Supreme Court may make a new rule retroactive through *multiple* holdings that logically dictate the retroactivity of the new rule (citing *Tyler v. Cain*, 533 U.S. 656, 668-69, 121.Ct. 2478, 150 L.Ed.2d 632 (2001) (O'Connor, J., concurring)). The Fifth Circuit concluded: "By the combined effect of the holding of *Graham* itself and the first *Teague* exception, *Graham* was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity under *Tyler*." *In re Sparks*, 657 F.3d 258, 260-62 (5th Cir. 2011) (per curiam).

FEDERAL HABEAS 2254 REVIEW STANDARDS

Synopsis: **Where the state court gives alternative grounds for denying relief, a federal court must address each of the grounds before it may grant a writ of habeas corpus.**

The state court rejected the prisoner's suppression-of-the-evidence claim on the ground that the evidence was not "material" – there was no reasonable probability that the result of the prisoner's trial would have been different had the evidence been disclosed. The state court also concluded that the evidence would not have materially furthered the impeachment of certain witness because the witness had been extensively impeached at trial. The Third Circuit held that prisoner was entitled to habeas relief because the state court was unreasonable in presuming that whenever a witness impeached in one manner, any other impeachment evidence is immaterial.

The Supreme Court vacated and remanded, stating that the Third Circuit had overlooked the alternative holding of the state court that the subjective evidence was not exculpatory or impeaching but instead entirely ambiguous. The Court ruled that habeas relief was not warranted "unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA." *Wetzel v. Lambert*, 132 S.Ct. 1195 (2012) (per curiam) (emphasis in original).

Sources: ***Federal Post Conviction Remedies and Relief Handbook with forms, 2012 edition, Wilkes, Jr., by West What's the Decision:*** XXVIII, June/July 2012, XXVII, August 2012