

Amicus Briefs Update: NDAA in the Supreme Court

BY ALBERT LOCHER, ASSISTANT DISTRICT ATTORNEY, COUNTY OF SACRAMENTO,
CALIFORNIA

NDAA HAS HISTORICALLY taken an active interest in cases before the U.S. Supreme Court that will have an impact on prosecutors, and this year has been no exception. In a number of cases, the association has brought its voice to bear on behalf of all prosecutors by filing or joining in amicus curiae briefs.

Star Wars fans will remember a scene from *The Empire Strikes Back*, when Han Solo is about to take the Millennium Falcon to light speed, the hyperdrive fails, and Han protests, “It’s not my fault!” Looking at some of the issues before the Supreme Court for this term, prosecutors might feel a little like Han—the defendant is seeking reversal for things that are not the prosecutor’s fault.

Two linked cases that highlight this phenomenon are *Lafler v. Cooper* and *Missouri v. Frye*. Both involve a problem with plea bargaining, and the failing was by the defense attorney, not the prosecutor.

In *Lafler*, the defendant was charged with assault with intent to commit murder. The prosecutor made a plea offer for a favorable sentence. Defense counsel mistakenly believed the prosecution could not prove its case and advised Lafler to reject the deal. The case went to trial, Lafler was convicted, and received a greater sentence. He complains his attorney was incompetent in evaluating the prosecution case.

Frye also involved a plea bargain offer. Frye was

charged with DUI with three priors, a felony. The prosecutor offered a misdemeanor, with a deadline for accepting the deal. The defense attorney failed to communicate the offer to his client, the deadline passed, and the defendant wound up pleading guilty to a felony and receiving a three-year prison sentence.

In both *Lafler* and *Frye*, the failing of the defense attorney, not the prosecutor, is the claimed basis for relief. NDAA has joined in an amicus brief prepared by the Criminal Justice Legal Foundation, asserting that neither defendant should have his conviction reversed. The argument has two related components. First, while defense counsel may have fallen short in the plea bargaining process, there is no constitutional right to a plea bargain, so there can be no due process violation. Second, each defendant was found guilty through an admittedly reliable and constitutional process—Lafler through a jury trial and Frye through his guilty plea. A defendant found guilty in a constitutional, reliable manner should not be allowed to set that aside because of some shortcoming in plea bargaining.

New Hampshire v. Perry is another case where neither prosecutor nor police action is the basis for the claimed error. The immediate issue in *Perry* is the reliability of eyewitness testimony, but the case has potential for a far greater impact. See the letter from Michael Delaney, the New Hampshire attorney general, thanking

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-8800

MICHAEL A. DELANEY
BY CONCORD 10/20/11



ALAN M. BICE
DEPUTY ATTORNEY GENERAL

November 18, 2011

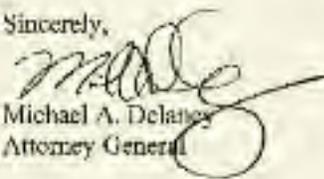
James M. Reams, Esquire
Rockingham County Attorney
PO Box 1258
Kingston, NH 03848-1258

Re: *Barion Perry v. New Hampshire*

Dear Jim:

It was a privilege for me to represent that State's interests in this appeal before the United States Supreme Court. Thank you very much for your efforts in connection with the amicus brief filed by the National District Attorney's Association in support of our position. The legal support of the NDAA was most helpful, and I enjoyed working closely with your retained counsel, Thomas McCarthy and William Consovoy, as well as the George Mason University School of Law Supreme Court Clinic. Tom McCarthy attended one of my moots at the National Association of Attorneys General, along with students from George Mason law. Tom also joined us for the post-argument reception in DC. We anxiously await a decision. I enclose a copy of the State's brief with appreciation.

Sincerely,


Michael A. Delaney
Attorney General

MAD/p
Enc.

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NDAA for its amicus brief supporting the state's position.

Perry involves an auto burglary. Witness Blandon saw a tall black man wandering around her apartment parking lot, baseball bat in hand, looking into car windows, then opening the trunk of a neighbor's car and removing some items. Blandon's husband called police. Officer Clay arrived, heard a bat hitting the pavement, then saw Perry carrying two car stereo amplifiers. Perry said he found them, and that he had seen two other people in the area. Officer Clay left Perry with

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another officer, and went to talk with witnesses. Ms. Blandon told Officer Clay what she had seen earlier. When asked for a further description, Blandon said she had looked out the window and had seen the person (Perry) standing next to the other officer, and that he was the man she had seen tampering with cars earlier. Later, she could not pick Perry from a photo lineup.

At trial, the defense sought to suppress the identification, arguing the circumstance was unduly suggestive (Perry standing alone next to an officer), and therefore the identification should not be admitted. While the (claimed) unduly suggestive circumstance had not been arranged by the prosecution or the police, the defense still argued the identification should be suppressed.

In its amicus brief, NDAA argues there should be no federal constitutional rule providing for the suppression of an eyewitness identification when neither the police nor the prosecution create what is argued to be an unduly suggestive procedure. If adopted, such a rule would amount to a due process standard on the reliability of evidence, allowing a defendant to challenge any type of evidence as being unreliable and therefore inadmissible under the constitution. On January 11, 2012, the Supreme Court ruled in favor of the prosecution (affirming the New Hampshire

Supreme Court), holding that unless the undue suggestion was orchestrated by the police, there is no due process violation.

Aside from the "It's not my fault" cases, at this writing NDAA has taken an active role in two other cases for October Term 2011. *Smith v. Cain* from Louisiana involves *Brady* violations alleged in a murder prosecution. As is often the case, the specific *Brady* matters are very case/fact specific; they are not what drew NDAA to the case. Rather, NDAA became concerned about an amicus brief filed on behalf of the defendant by the American Bar Association. The ABA brief asks the Supreme Court to recognize an ethical standard binding on prosecutors above and beyond *Brady*. Under the ABA's view, in some circumstances a prosecutor who scrupulously follows both *Brady* and local discovery rules would still be guilty of an ethical violation. The NDAA amicus brief served as a rebuttal to the ABA's position on this issue. On January 10, 2012, the Supreme Court reversed the conviction on *Brady* grounds (failure to turn over conflicting statements by the only eyewitness linking the defendant to the crime), but did not adopt the ABA's suggested standard.

Finally, *Williams v. Illinois* is the latest vehicle for the Supreme Court to examine the effect of *Crawford v. Washington* and the Confrontation Clause on forensic evidence. *Williams* involves testimony by a DNA analyst, who testified to her opinion that a rape sample contained the defendant's DNA. The analyst who testified relied on the work of other analysts who processed the rape sample, but did not testify. The NDAA amicus brief took the position that the testifying analyst could reach her own opinion and testify to it without the need for the underlying analysts to testify. The forthcoming opinion could affect many types of forensic evidence, including potentially old murder cases where DNA technology has solved the crime, but the original autopsy pathologist is no longer available to testify.

Other cases developing this term may also warrant NDAA participation, including two addressing whether life without parole is constitutional for juveniles convicted of murder at the age of 14 (*Jackson v. Hobbs* and *Miller v. Alabama*). In these and other cases, NDAA ensures that the voice of American prosecutors continues to be heard in the Supreme Court.