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REFERENCE MATERIALS FOR

THE DEATH PENALTY SEMINAR

Cleveland, Ohio

March 23 - 24, 2006

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UNITED STATES SUPREME COURT DECISIONS
And Selected Sixth Circuit Decisions

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Key to Abbreviations
A = Affirmed Conviction
R = Reversed Conviction
PR = Penalty of Death Reversed

CrL is cite to BNA Criminal Law Reporter

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I. GENERAL NEWS RESPECTING CAPITAL PUNISHMENT

Following up on its Moratorium report in 1997, the ABA Individual Rights and Responsibilities Section published "Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States" in March 2001. Two subsequent reports are available at the ABA website.

The ABA is now conducting a death penalty study in Ohio along with several other states.

The Constitution Project's Report, "Mandatory Justice: Eighteen Reforms to the Death Penalty", is available at their website.

The Illinois Commission on Capital Punishment Report is complete, and available at http://www.idoc.state.il.us./ccp. On January 11, 2003, Illinois Governor George Ryan emptied Illinois death row, pardoning 4 inmates, commuting to LWOP or lesser sentences 156 inmates, and granting clemency to 11 inmates awaiting sentencing or resentencing. Gov. Ryan's reactions were upheld against court challenge.

The Ohio House passed a death penalty study bill near the end of the 2004 session [Am. HB 190], with an unexpected coalition of Republicans joining with Democrats to pass it. The bill [originally HB 172}, sponsored by Rep. Shirley Smith, a Cincinnati Democrat, would have created an 18-member committee to conduct an exhaustive review of capital punishment in Ohio since lawmakers re-imposed the death penalty in 1981. The bill would have required the committee study all trials of offenders charged with crimes that carry the death penalty since 1981, examining all aspects of each case, including the race, gender, religious preference and economic status of the killers and their victims. The bill failed to pass the Senate before the legislative session ended.

Prof. Jim Ellis' report on behalf of the ARC's "Mental Retardation and the Death Penalty: A Guide to Legislative Issues" for implementing the *Atkins v. Virginia* decision, is available at the ARC website. Ohio Death Row Inmate Darryl Gumm was found to be mentally retarded on August 9, 2005, and was resentenced to a lengthy life term.

Ohio Inmate Derrick Jamison was the 119th Innocent Person Freed from Death Row.
On February 28, 2005, Ohio Common Pleas Judge Richard Niehaus dismissed all charges against Derrick Jamison for the death of a Cincinnati bartender after prosecutors elected not to retry him in the case. The prosecution had withheld critical eyewitness statements and other evidence from the defense resulting in the overturning of Jamison's conviction in 2002. Jamison was convicted and sentenced to death in 1985 based in part on the testimony of Charles Howell, a co-defendant who had his own sentence reduced in exchange for his testimony against Jamison. The prosecution withheld statements that contradicted Howell's testimony and that would have undermined the prosecution's theory of how the victim died, and would have pointed to other possible suspects for the murder. Two federal courts ruled that the prosecution's actions denied Jamison of a fair trial. See 291 F.3d 380 (6th Cir. 2002). One of the withheld statements involved James Suggs, an eyewitness to the robbery. Suggs testified at trial that he had been unable to make a positive identification when the police showed him a photo array of suspects. In fact, police records show that Suggs identified two suspects, neither of which was Derrick Jamison. Additional withheld evidence consisted of a series of discrepancies between Jamison's physical characteristics and the descriptions of the perpetrators given to police investigators by eyewitnesses. The co-defendant Howell recently testified that he could not remember anything about the crime, and state prosecutors decided not to proceed against Jamison. He remains incarcerated on other unrelated charges. (See also, K. Perry, "'85 Murder Conviction Dismissed," Cincinnati Post, Mar. 1, 2005).

Justice Dept. Report – Executions and Death Sentences Decline Nationally in 2004

The Associated Press reported that the number of executions and new death sentences was lower in 2004 than in the previous year, according to the Justice Department's Bureau of Justice Statistics. Fifty-nine prisoners were executed last year, six fewer than in 2003. Juries handed down 125 death sentences, the smallest number since 1973.

The total number of people on death row dropped to 3,315 on December 31, 2004, from 3, 378 at the end of 2003. The reduction was the result of 107 commutations, reversals, other sentence revisions, and 22 natural deaths.

Death penalty and law-and-order advocates attribute the decline to the threat of tougher punishment. On the opposite side, Richard Dieter, of the Death Penalty Information Center, asserts that the reductions are due to an increasing reluctance among jurors to impose the death penalty. He cites the number of exonerations as the reason for the increased hesitancy, and the greater availability of the alternative sentence of life without possibility of parole: LWOPP became available in Texas on September 1, 2005, leaving only one death penalty state with no LWOPP sentencing alternative.

The Justice Department report also provides the following statistical information:

- The 59 inmates executed in 2004 had spent an average of 11 years on death row.
- Of those executed, 36 were white, 19 were black, and three were Hispanic. One was Asian. All but one of the executions was by lethal injection; one person was killed by electrocution.
- Ten federal prisoners were sentenced to death in 2004, or twice as many in any year since 1973.
- Fifty-two women were on death row, five more than the year before.
- The oldest death row inmate in 2004 was 89; the youngest was 18.
- Preliminary date show that 13 states had executed 49 inmates in 2005 as of November 9. This is seven fewer than during the same period a year later.

II. OHIO AND FEDERAL STATUTES POST-1995 AFFECTING CAPITAL LITIGATION

State Legislation

Sentencing Options altered by SB 2 and SB 269, eff. July 1, 1996: Added Life Without Parole [LWOP] to sentencing options at penalty phase, removed life with mandatory 20 years and replaced this with life with mandatory 25 years, to R.C. 2929.03.

Sentencing Options limited by HB 180, eff. January 1, 1997: If the trier found the sexual motivation specification and a sexually violent predator specification as well as aggravated murder, sentencing options are LWOP or death, amending R.C. 2929.03. [Community registration and notification provisions respecting sex offenders are effective July 1, 1997).

Aggravated murder was expanded to include the unlawful termination of another's pregnancy by S.1 effective for crimes committed after September 9, 1996.

An additional form of capital murder and a capital specification respecting purposely causing the death of a child under the age of 13 were added for crimes committed after September 16, 1997 by Am. S.B. 32.

Another two forms of capital murder were added to R.C. 2903.01 by Sub. SB 193, effective for crimes committed on or after December 29, 1998: (D) "No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another," and (E) "No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer, when

either of the following applies: (1) The victim, at the time of the commission of the offense, is engaged in the victim's duties. (2) It is the offender's specific purpose to kill a law enforcement officer." Each of these is nearly replicated by existing aggravating circumstances found in R.C. 2929.04(A)(4) and (6).

Sub.H.B. 162, effective Aug. 25, 1999, expanded the offense of simple murder to also prohibit causing the death of another as a proximate result of committing a specified child-abuse offense.

Terrorism was added to the list of felonies in the aggravated felony-murder list of 2903.01(B), and an aggravating circumstance of committing the aggravated murder while committing, attempting to commit, or fleeing after committing terrorism was added to R.C. 2929.04(A), by S.B. 184, effective May 15, 2002.

HB 184, permitting death on resentencing for persons who were tried by jury and later had their death sentences reversed (undoing the victory in State v. Williams) and specifically making the October 1996 amendments to R.C. 2929.06 retroactive, became effective March 23, 2005.

HB 184 also changed the sentencing for aggravated murder without specifications to life with parole eligibility after serving 20 years, or serving 25 or 30 full years, or life without parole, effective for crimes committed on or after March 23, 2005.

Federal Legislation

Justice for All Act of 2004 (HR 5107; PL 108-405), signed October 30, 2004. The Office for Victims of Crime describes the bill: “[The] purpose of the bill is to protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of federal, state, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in state capital cases, and for other purposes.” A significant portion of the bill addresses post-conviction DNA testing. Pursuant to this section of the law, DNA testing must be ordered for a federal prisoner where (1) the applicant can demonstrate that there is no adequate remedy under state law to permit DNA testing; (2) State remedies have been exhausted (with additional provisions defining exhaustion); (3) the evidence was not previously subjected to DNA testing; (4) the evidence is in the custody of the Government; (5)”[t]he proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices;” (6) the applicant’s defense theory is not inconsistent with the affirmative defense presented at trial, and would establish actual innocence; (7) identity was an issue at trial (if applicant was convicted); (8) applicant will provide a DNA sample; and (9) the motion is timely (as defined and with many conditions). Federal grants to states to assist with the cost of DNA testing are limited to states which have comparable (or more expansive) provisions allowing state prisoners to request post-conviction DNA testing.

Another provision authorizes a grant program, to be administered by the federal Attorney General, to improve the quality of prosecution and defense representation in capital cases. The grants may not be used to pay for lawyers in specific cases, but instead are to be used to establish, implement, or improve an effective system for providing competent legal representation to indigents charged with capital offenses or sentenced to death and seeking appellate review in state court. The statute defines an “effective system” as one in which the responsibility for appointing qualified attorneys to represent indigents in capital cases is invested in: (1) a public defender program that relies on staff attorneys, members of the private bar, or both, to provide representation in

capital cases; or (2) an entity established by statute or the highest state court, composed of individuals with demonstrated knowledge and expertise in capital cases; or (3)a system in which a trial judge appoints qualified attorneys from a roster maintained by a state or regional selection committee pursuant to a state statutory procedure existing before enactment of this Act.

An "effective system" must:

- establish qualifications for defense attorneys in capital cases;
- maintain a roster of qualified attorneys to represent capital defendants;
- assign 2 attorneys in capital cases;
- train and monitor the performance of capital defense attorneys; and
- ensure funding of competent legal representation by the defense team and outside experts.

The program provides equal funds to:

- design and implement training programs for capital prosecutors;
- develop and enforce standards and qualifications for prosecutors;
- establish programs for prosecutors to review capital cases in order to identify cases in which post-conviction DNA testing is appropriate; and
- provide support and assistance to the families of murder victims.

A state desiring a grant must submit an application to the federal Justice Department describing the existing capital defender services and capital prosecution programs. The application must set out a long-term statewide strategy with a detailed implementation plan. The strategy must reflect consultation with the judiciary, the organized bar, and state and local prosecutor and defender organizations and must establish as a priority an improvement in the quality of trial-level representation in capital cases. For the capital representation grants, $75 million a year is authorized for five years, and states receiving funds must allocate them equally between prosecution and defense, submit reports to the Attorney General, and be evaluated for compliance with the terms and conditions of the grant.

III. INTERNATIONAL COURT OF JUSTICE RULING ON CONSULAR RELATIONS

Avena and Other Mexican Nationals (Mexico v. United States of America), International Court of Justice of the UN, 2004 I.C.J. 128 (The Hague, Mar. 31, 2004).

Binding and final judgment that the U.S. breached the obligations incumbent upon it under Article 36, paragraph 1 (b) and (c), of the Vienna Convention on Consular Relations of 24 April 1963, by (1) not informing, without delay upon their detention, the 51 Mexican nationals of their rights (2) not notifying the appropriate Mexican consular post without delay of the detention so they may render the assistance provided for by the Vienna Convention, (3) depriving the Mexican States of the right, in a timely fashion, to communicate with and have access to those nationals and to visit them in detention, (4) depriving the United Mexican States of the right, in a timely fashion, to arrange for legal representation of those nationals, and (5) not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences of 4 persons after the violations had been established. The ICJ further finds the commitment undertaken by the U.S. to ensure implementation of the specific measures adopted in performance of its obligations must be regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition, and that the U.S. shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence of the 51 nationals, so as to allow full weight to be given to the violation of the rights set forth in the Convention.

Follow-up: Executive Order On March 2, 2005 President Bush issued an executive order requiring state courts to enforce the World Court's judgment in Avena. The President's executive order states as follows: "I have determined, pursuant to the

authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 128 (Mar. 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." A government brief filed in the case states that although the petitioners are not entitled to this habeas relief, that the President has decided to order it, and that the President, not the Courts or Congress, is to decide how and to what extent the ICJ judgment is to be implemented. On March 7, in bad news for other incarcerated foreign nationals, the State Department announced the U. S. is withdrawing from the side agreement/optional protocol that gives the ICJ jurisdiction over disputes arising under the Vienna Convention. See 76 CrL 515 (March 16, 2005).

IV. UNITED STATES SUPREME COURT OPINIONS AFFECTING CAPITAL LITIGATION

A. SELECTED DECISIONS ANNOUNCED [2002 TO MARCH 3, 2006]

ICJ RULING FOLLOWUP – FEDERAL HABEAS CERT DISMISSAL

Medellin v. Dretke, 544 U.S. 660, 125 S.Ct. 2088 (May 23, 2005).

Supreme Court (5-4) dismisses as improvidently granted a capital habeas cert petition, due to extraordinary out-of-court events. In 2004, the International Court of Justice (ICJ) granted the petition of Mexico, on behalf of 51 Mexican nationals on state death rows in the United States, including Medellín. The ICJ directed the U.S. courts to reopen their claims that their rights under the Vienna Convention were violated because they were denied access to Mexican consular representatives. When Medellín sought to enforce the ICJ judgment on federal habeas corpus, the Fifth Circuit denied a COA. It held that the Vienna Convention conferred no individually enforceable rights. It also held that Medellín's Vienna Convention claim was procedurally defaulted because it was never raised at trial. Medellín's petition for certiorari was granted.

Following the Bush administration's direction (above), Medellín filed a new state habeas petition shortly before oral argument in the USSC and moved to stay proceedings in the USSC until the Texas state courts ruled. Four justices (Breyer, Ginsburg, Souter, and Stevens) voted to grant this motion.

The USSC majority believes that it would be preferable for the USSC to consider the issues concerning the effect of the ICJ decision by reviewing the final decision on the new state habeas petition rather than reviewing a federal habeas case. The *per curiam* opinion identifies five issues of federal habeas law that "are not free from doubt" and that might preclude granting relief to Medellín on federal habeas, including: whether his claimed treaty right is like a federal statutory claim found insufficient to warrant habeas relief;, the "clearly established federal law" standard of 2254(d)(1); the "new rule" doctrine of Teague v. Lane; the question whether 2254 should be read literally to allow a COA to be issued only on a constitutional claim, not a treaty claim; and whether his claim was exhausted in state court.

Justice Ginsburg joined the *per curiam* opinion. In a separate concurrence, speaking for herself alone, she says she would have preferred to keep the case on the USSC docket but postpone a decision until the Texas courts have ruled. In the absence of a majority for that position, she prefers dismissal of the petition to the remand proposed by the dissenters. In another section of the concurrence, which Justice Scalia joins, she strongly implies that the ICJ judgment is binding on domestic courts (both federal and state) and must be enforced even by a court that disagrees with the ICJ.

Justice O'Connor with three others in dissent would remand to the Fifth Circuit. She concluded that Texas forfeited the argument that a COA is never available for non-constitutional claims by waiting too long to raise it. The state courts "neither asked nor answered the right question," so the merits of Medellín's Vienna Convention claim are open for de novo review by the Fifth Circuit without applying the § 2254(d) standard. She would leave the Teague issue for the Fifth Circuit on remand, along with others to be decided *de novo*: whether the duty to follow the ICJ judgment rests on the courts, or only on the political branches of government; whether the Vienna Convention confers judicially enforceable rights on private individuals; and if so, whether those rights can be procedurally defaulted? Finally, were her position to prevail, she would urge the Fifth Circuit to stay its reconsideration of the case until after the state courts ruled on Medellín's new petition. Other separate dissents express a preference for holding the present case in the USSC until the state courts rule. Justice Breyer's dissent added "Medellín's legal argument that "American courts are now bound to follow the ICJ's decision in Avena" is substantial, and the Fifth Circuit erred in holding the contrary. . . . By vacating its judgment and remanding the case, we would remove from the books an erroneous legal determination that we granted certiorari to review."

Cert Denial of Interest

Torres v. Mullin, 540 U.S. 1035, 124 S.Ct. 562 (November 18, 2003). Petitioner sought review of the district court's ruling that he had procedurally defaulted his claim that he was never advised of his right to speak to Mexican consular officials, and that petitioner failed to show that he was prejudiced by this violation of the Vienna Convention on Consular Relations. The Tenth Circuit refused to grant a COA on the issue, and the USSC denied certiorari. Justice Breyer dissented from the cert denial, advising that he would defer consideration of the petition, as requested by Mexico, until the ICJ rules on the subject. Justice Stevens dissented as well, arguing that applying procedural default to a claim of denial of consular rights is a violation of the Convention and manifestly unfair. He argued as well that it is the duty of the USSC under Article 6, Clause 2 of the Constitution, requiring that the Court uphold the laws of the United States, including treaties.

CONSTITUTIONAL LIMITS ON DEFINING CRIMES

Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003).
Texas statute making it a crime for a person to engage "in deviate sexual intercourse with another individual of the same sex" furthers no legitimate state interests that can justify its intrusion into the private sexual conduct of consenting adults and therefore violated a liberty interest protected by the Fourteenth Amendment's due process clause; the decision in Bowers v. Hardwick 478 U.S. 186 (1986) is overruled.

Gonzales v. Raich, ___ U.S.___, 125 S.Ct. 2195 (June 26, 2005).
Criminalizing the manufacturing, distribution or possession of marijuana to intrastate growers and users of marijuana for medical purposes did not violate the Commerce Clause.

Gonzales v. Oregon, ___ U.S.___, 126 S.Ct. 904 (Jan. 17, 2006).
The interpretive rule issued by Former AG Ashcroft that declares that physician-assisted suicide violates the Controlled Substances Act and its implementing regulations is not entitled to judicial deference because in finding that assisted suicide is not a "legitimate medical purpose" for issuing a prescription under CSA regulations and threatening to revoke a physician's registration, Ashcrost merely paraphrased provisions of the CSA rather than issuing an amplifying regulation, acted beyond his limited express powers under the CSA and contravened the CSA's presumption of a "functioning medical

profession regulated under the State's police powers". Thus, Oregon's Death with Dignity Act is no longer blocked by the CSA.

PRETRIAL ISSUES – POLICE INVESTIGATIVE PRACTICES

Search and Seizure

Kirk v. Louisiana, 536 U.S. 635, 122 S.Ct. 2458 (2002) (per curiam).
R in noncapital case (9-0, on cert petition) as Louisiana court of appeals improperly ruled that it was irrelevant whether there were exigent circumstances to make a warrantless entry into defendant's home to arrest and search him. That decision was contrary to *Payton v. New York*, and a remand is required for the court to determine if exigent circumstances were present.

Groh v. Ramirez, 540 U.S. 551, 124 S.Ct.1284 (Feb. 24, 2004).
Law enforcement officer violated clearly established law, and was personally liable in damages and not entitled to qualified immunity, when he conducted a search pursuant to a warrant that on its face failed to comply with the Fourth Amendments requirement of particularity. An affidavit the officer prepared did particularly describe the items to be seized, but the warrant itself did not incorporate the affidavit by reference or by attachment, so the warrant was facially invalid (entirely omitting the items to be seized), and no reasonable officer would rely on it. Unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit.

United States v. Banks, 540 U.S. 31, 124 S.Ct. 521 (Dec. 2, 2003).
Unanimous decision that a 15-to-20-second wait before forcible entry satisfied the Fourth Amendment, reasonable execution is determined on a case-by-case basis; obligation to knock and announce before entering gives way when officers have reasonable grounds to expect futility or to suspect that an exigency, such as evidence destruction, will arise instantly upon knocking. Since most people keep their doors locked, a no-knock entry will normally do some damage, a fact too common to require a heightened justification when a reasonable suspicion of exigency already justifies an unwarned entry. Here, after 15 to 20 seconds without a response, officers could fairly have suspected that Banks would flush away the cocaine if they remained reticent. Each of Banks's counterarguments--that he was in the shower and did not hear the officers, and that it might have taken him longer than 20 seconds to reach the door--rests on a mistake about the relevant enquiry. The facts known to the police are what count in judging a reasonable waiting time, and there is no indication that they knew that Banks was in the shower and thus unaware of an impending search. Second, the crucial fact is not the time it would take Banks to reach the door but the time it would take him to destroy the cocaine. It is not unreasonable to think that someone could get in a position to destroy the drugs within 15 to 20 seconds. Once the exigency had matured, the officers were not bound to learn anything more or wait any longer before entering, even though the entry entailed some harm to the building. The need to damage property is part of the analysis of whether the entry itself was reasonable. The entry here also satisfied 18 U.S.C. sect. 3109 which permits entry by force "if, after notice of his authority and purpose, [an officer] is refused admittance." Because sect. 3109 implicates the exceptions to the common law knock-and-announce requirement that inform the Fourth Amendment itself, sect. 3109 is also subject to an exigent circumstances exception, which qualifies the requirement of refusal after notice, just as it qualifies the obligation to announce in the first place.

Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465 (March 22, 2005).
In a 9-0 opinion, the Court finds that Respondent Iris Mena who was detained in handcuffs during a search of the premises that she and several others occupied, was lawfully seized. Petitioners were lead members of a police detachment executing a search warrant of these premises. She sued the officers under 42 U. S. C. §1983,and the District Court found in her favor. The Court of Appeals affirmed the judgment, holding that the use of handcuffs to detain Mena during the search violated the Fourth Amendment and that the officers questioning of Mena about her immigration status during the detention constituted an independent Fourth Amendment violation. (Mena v. Simi Valley, 332 F. 3d 1255 (9th Cir. 2003).) Supreme Court holds that Mena's detention in handcuffs for the length of the search was consistent with our opinion in Michigan v. Summers, 452 U. S. 692 (1981), and that the officers questioning during that detention did not violate her Fourth Amendment rights.

Brousseau v. Haugen, 543 U.S. 194, 125 S.Ct. 596 (Dec. 13, 2004).
Qualified immunity was established, as at the time the officer acted the law was not clearly established regarding whether the Fourth Amendment allowed an officer to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.

Devenpeck v. Alford, 543 U.S. 146, 125 S.Ct. 588 (Dec. 13, 2004).
An arrest is valid even if probable cause exists only for a crime other than that the officer cited. The Fourth Amendment does not require that an officer's subjective reason for making an arrest be the offense as to which the known facts provide probable cause. Probable cause is objectively justified by facts. Subjective intent is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest. Court remands as lower court had not considered the objective evidence of probable cause to arrest in this 42 USC 1983 action.

Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795 (Dec. 15, 2003).
Conviction affirmed, probable cause found where a police officer stopped a car for speeding at 3:16 a.m.; searched the car, seizing $763 from the glove compartment and cocaine from behind the back-seat armrest; and arrested the car's three occupants after they denied ownership of the drugs and money, including Pringle, the front-seat passenger, who was convicted of possession with intent to distribute cocaine and possession of cocaine. The State Court of Appeals had reversed, holding that, absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, the mere finding of cocaine in the back armrest when Pringle was a front-seat passenger in a car being driven by its owner was insufficient to establish probable cause for an arrest for possession. The U.S. Supreme Court reverses, finding the officer had probable cause. A court must examine the events leading up to the arrest, and then decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause. It is an entirely reasonable inference from the facts here that any or all of the car's occupants had knowledge of, and exercised dominion and control over, the cocaine; a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly. Pringle's attempt to characterize this as a guilt-by-association case is unavailing.

Thornton v. United States, 541 U. S. 615, 124 S.Ct. 2127 (2004).
Court (5-4) rejects modification of bright-line Belton rule that would have required, for search of a passenger compartment of an automobile as a contemporaneous incident to the lawful custodial arrest, that the arrestee was an occupant of the vehicle at the time the police initiated contact. "In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle", and there is simply no basis to

conclude that the span of the area generally within the arrestee's immediate control may be determined by the timing of the officer's first contact with him. Officers should be free to make the judgment as to whether it would be safer and more effective for them not to initiate contact until a suspect has exited his vehicle. While an arrestee's status my turn on his temporal and spatial relationship at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him. Justices Scalia and Ginsburg would limit Belton searches to whether there was "reason to believe that evidence relevant to the crime of arrest might be found in the vehicle", and affirm the conviction under that test, having concluded the handcuffed defendant did not have the drugs in his immediate control. Concurring Justice O'Connor agreed that Belton had a "shaky foundation," and thought Scalia's approach was "on firmer ground", but would not adopt it because the issue was neither briefed nor argued. Justices Stevens and Souter would limit Belton to persons still within their vehicles or within the immediate area when police first initiated contact.

Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885 (January 13, 2004).
Where the police traffic checkpoint was for the general law-enforcement purpose of gathering information about a hit-and-run fatality accident that had occurred a week earlier, to ask the occupants of passing cars for information about that crime, the USSC's decision in Indianapolis v. Edmond, 531 U.S. 32 (2000), does not control. Despite language in that opinion suggesting that the purpose of the traffic checkpoint there found impermissible was a "general interest in crime control," the case is distinguishable on its facts: In Edmond, the checkpoint was put in place to search every passing car for evidence of drug crimes committed by the occupants of those vehicles. Nor did the checkpoint violate the Fourth Amendment: Traffic stops are sometimes justified without individualized suspicion especially where individualized suspicion is irrelevant to the purpose of the stop. Additionally, an information-seeking traffic stop is unlikely to be intrusive or anxiety causing. Law enforcement officers are permitted to approach citizens to seek information, and it is unlikely that traffic checkpoints of this kind will proliferate without a court-imposed limitation. The checkpoint stop was constitutional, and the Illinois Supreme Court's decision to the contrary is reversed. Justice Stevens, joined by Justices Souter and Ginsburg, agrees with the majority's conclusion that Edmond does not control in this instance, but would prefer to remand the matter to the Illinois courts for additional consideration of the "valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier." These three justices wonder whether the police had enough information to justify this method of gathering information, in contrast to less intrusive methods. "In short, the outcome of the multifactor test prescribed in Brown v. Texas, 443 U.S. 47 (1979), is by no means clear on the facts of this case."

Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834 (Jan. 24, 2005).
Denying relief on a Fourth Amendment claim, 5-3 decision. In response to the question, "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop," the Court majority holds no. [Factual background: Caballes was stopped for speeding slightly over the limit. The state trooper radioed in to the dispatcher to report the stop, and another trooper, who had a narcotics-detection dog, overheard the transmission. The second trooper drove to the scene and walked the dog around the car within the time it took for the first trooper to do the usual record checks and other tasks routinely performed in a traffic stop. The dog alerted at the trunk. Based on the dog's reaction, the troopers searched the trunk, found marijuana, and arrested Caballes. Caballes moved to suppress the seized evidence, but the trial court denied the motion. The Illinois Supreme Court reversed, holding that without any "specific and articulable facts" suggesting Caballes was involved in drug activity, employing the dog unreasonably enlarged the scope of the routine traffic stop.] "[T]he use of a well-trained narcotics-detection dog – one that 'does

not expose noncontraband items that otherwise would remain hidden from public view' – during a lawful traffic stop, generally does not implicate legitimate privacy interests." The Court accepts as accurate the trial court's determination that the length of the stop was not increased by the dog's search, which was performed on the exterior of the car. "Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement." Justice Stevens concurs as the dog sniff will only reveal the presence of narcotics, in which there is no legitimate expectation of privacy.

Dissenting Justice Souter challenged the majority's assumption that drug-sniffing dogs are always accurate, citing statistics that suggests the dogs alert erroneously ten percent of the time, or more. Adding to the possible confusion is the contamination of a significant percentage of currency in circulation by enough cocaine to cause a dog to alert. "In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times." Without infallible dog noses, the distinction between this case and Kyllo disappears. Justice Souter recommends applying the principles developed in "the body of our Fourth Amendment cases" to dog sniff searches. Justice Ginsburg's dissent argued that the limitation on a Terry stop is not time, but *scope*, and use of the drug-detection dog dramatically increased the scope of the stop from a mere traffic stop to a drug investigation, without reasonable suspicion.

U. S. v. Flores-Montano, 541 U.S. 149, 124 S.Ct. 1582 (March 30, 2004).
Customs Service officers at the international border are not required to have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband. A motorist attempting to enter the US at an international border port of entry does not have a privacy interest in his fuel tank as the privacy expectation is less at the border than it is in the interior and the Court has long recognized that automobiles seeking entry into the country may be searched. The interference with a possessory interest in the gas tank is justified by the Government's paramount interest in protecting the border. Thus the Court holds 9-0 that suspicionless inspections at the border may include the authority to remove, disassemble, and reassemble a vehicle's fuel tank. Concurring Justice Breyer notes that Customs keeps track of the searches and reasons for the searches, and this administrative process should minimize concerns that gas tank searches might be undertaken in an abusive manner.

Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S.Ct. 2739 (June 29, 2004).
Whatever liability the United States allegedly had for alien's arrest by Mexican nationals, allegedly at instigation of the DEA, so that he could be transported across the border and lawfully arrested by federal officers, rested on events that occurred in Mexico, so as to fall within the "foreign country" exception to waiver of government's immunity under the Federal Tort Claims Act; "foreign country" exception to waiver of government's immunity bars all claims against government based on any injury suffered in foreign country, regardless of where the tortious act or omission giving rise to that injury occurred; and single illegal detention, of less than one day, of Mexican national, custody of whom was then transferred to lawful authorities in the United States for prompt arraignment, violated no norm of customary international law so well defined as to support creation of cause of action that district court could hear under the ATS.

Stop and Question

Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177, 124 S.Ct. 2451 (2004).
Fourth and Fifth Amendments do not bar state from compelling people to identify themselves by giving their name during a lawful Terry stop so long as it is reasonably related in scope to the circumstances which justify the stop. On the Fourth, the Nevada stop and identify statute required the individual to answer only a request for identification, "to state his name" and required no other answers be provided to the police and did not change the nature of the stop or its duration; "the officer's request was a commonplace

inquiry, not an effort to obtain an arrest for failure to identify after a Terry stop yielded insufficient evidence." The dissent argued strong Fourth Amendment dicta in earlier cases should not be discarded. The Court majority found no Fifth Amendment violation as the disclosure of name presented no reasonable danger of incrimination; he had no real and appreciable fear that his name would be used tot incriminate him, rather he apparently refused only because he thought his name was none of the officer's business. "Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances", leaving open the possibility that furnishing identify at the time of the stop would give police a link in the chain of evidence needed to prosecute. The dissent urged the issue was whether this was testimonial not whether it was incriminating.

Cert Grants on Search and Seizure

Georgia v. Randolph, No. 04-1067, cert. granted ___U.S. ___, 125 S.Ct. 1840 (April 18, 2005), ruling below 604 S.E.2d 835 (2004). Question Presented: Is one occupant's consent for police to conduct warrantless search of premises valid despite another occupant's refusal, while present at scene, to permit warrantless search?

Hudson v. Michigan, No. 04-1360, cert. granted ___U.S. ___, 125 S.Ct. 2964 (June 27, 2005), ruling below 472 Mich. 862 (Mich. Appl. 2004). Question Presented: Whether evidence found in a home after a 4th Amendment and statutory knock-and-announce violation should be suppressed or whether it should come in under the theory that the police would have "inevitably discovered" the same evidence if they had knocked and announced?

U.S. v. Grubbs, No. 04-1414, cert. granted ___ U.S. ___, 126 S.Ct. 34 (Sept. 27, 2005), ruling below, 389 F.3d 1306 (9th Cir. 2004). Question Presented: Does Fourth Amendment require suppression of evidence when officers conduct search under anticipatory warrant after warrant's triggering condition is satisfied, but triggering condition is not set forth either in warrant itself or in affiidavit that is both incorporated into warrant and shown to person whose property is being searched?

Samson v. California, No. 04-9728, cert. granted ___U.S. ___, 126 S.Ct. 34 (Sept. 27, 2005), ruling below 2004 WL 2307111 (Cal.Ct. App., Oct. 14, 2005 unpublished). Question Presented: Does Fourth Amendment prohibit police from conducting warrantless search of person who is subject of parole search condition when there is no suspicion of criminal wrongdoing and sole reason for search is that person is on parole?

Brigham City, Utah v. Stuart, No. 05-502, cert. granted ___ U.S. ___, 126 S.Ct. 979 (Jan. 6, 2006), ruling below 2005 UT 13 (2005). Questions presented: Does "emergency aid exception" to warrant requirement recognized in Mincey v. Arizona turn on officer's subjective motivation for entering home? Was gravity of "emergency" or "exigency" sufficient to justify, under Fourth Amendment, officers' entry into home to stop fight?

Interrogation

Yarborough v. Alvarado, 541 U.S. 652, 124 S.Ct. 2140 (2004).
Court rules (5-4) that in applying the test for "custody" determination under *Miranda* [whether a reasonable person would feel he or she was not at liberty to terminate the interrogation and leave, and ultimately, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest] no clearly established Miranda cases required that age and experience of the person be considered if he or she is a juvenile. The Miranda test is objective furthering the clarity of Miranda's rule; this test could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect where the court would consider age and

experience. Reliance on prior history with law enforcement was improper also as in most cases police officers will not know a suspect's interrogation history and even if they do, the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave is often speculative. The state court adjudication here was "objectively reasonable " for purposes of 28 USC 2254(d), because it reasonably declined to "extend" rule of Supreme Court precedent on subjective states to this differing context. Even without the deference of 2254(d), fair-minded jurists could disagree over whether Alvarado was in custody. Facts suggesting he was not included that the police did not transport him or require him to appear at a particular time, they did not threaten him or suggest he would be placed under arrest, his parents remained in the lobby, suggesting the interview would be brief, the interviewer appealed to his interest in telling the truth rather than threatening him with arrest and prosecution, and at the end he went home. Factors supporting custody included he was interviewed at the police station for two hours and was brought in by his legal guardians rather than by his own control, his parents asked to be present but were rebuffed (a fact he did not know). Justice O'Connor concurs in the opinion and writes separately that there may be cases in which a suspect's age will be relevant to the Miranda custody inquiry, but here Alvarado was almost 18 and 171/2 year olds vary widely in their reactions to police questioning and it is difficult to ascertain what bearing this age would have on the likelihood that the suspect would feel free to leave.

Chavez v. Martinez, 538 U.S. 760, 123 S.Ct. 1994 (2003).
The petitioner was questioned without *Miranda* warnings by a police officer while he received treatment for gunshot wounds. The petitioner brought a Federal civil rights suit under 42 U.S.C. §1983. The Court, per Justice Thomas, held that the police officer did not violate the petitioner's Fifth Amendment right against compelled self-incrimination because his statements were not used in a subsequent criminal proceeding. Furthermore, the Court held that the police officer's failure to give the petitioner his *Miranda* warnings was not a valid basis for the §1983 suit, as there was no Constitutional violation. Finally, the Court, per Justice Souter, held that the issue of damages for a substantive due process violation based solely on the conduct of the officer's egregious behavior is one for the courts upon remand.

Iowa v. Tovar, 541 U.S. 77, 124 S.Ct. 1379 (March 8, 2004).
A. Sixth Amendment does not require court to give rigid and detailed admonishment to pro se defendant pleading guilty of usefulness of attorney, that attorney may provide independent opinion whether it is wise to plead guilty, and that without attorney defendant risks overlooking defense. Waiver was sufficient where the court informed defendant of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon entry of a guilty plea. Defendant never claimed he did not fully understand the charge or the range of that punishment for that crime before pleading guilty, nor did he articulate with precision the additional information counsel could have provided, given the simplicity of the DUI charge; nor did he assert he was unaware of his right to be counseled prior and at his arraignment. In a case so straightforward the two admonitions at issue might confuse or mislead a defendant more than they would inform him. The plea was valid, and the conviction was usable to enhance sentence.

Fellers v. United States, 540 U.S. 519, 124 S.Ct. 1019 (Jan. 26, 2004).
Indicted defendant's Sixth Amendment right to counsel under Massiah v. U.S. (1964) was violated when defendant was 'interrogated' by government agents. Proper standard under Supreme Court precedent for Sixth Amendment violation is whether government agents 'deliberately elicited' information from defendant after he had been indicted and in the absence of his counsel. Officers who came to defendant's home to execute an arrest warrant informed defendant he had been indicted and they were to there to "discuss" his involvement in the drug distribution conspiracy, they mentioned names of others who

were referred to in the indictment and he responded he had used drugs with them. No Miranda warnings were given nor waiver obtained. Supreme Court unanimously reaffirms the deliberate elicitation standard, and finds it was met here. The Eighth Circuit below improperly used a Rhode Island v. Innis (1980) - Miranda interrogation standard, and then improperly conducted a fruits analysis under the Fifth Amendment and applied the standard in Oregon v. Elstad (1985), when it should have asked whether the Sixth Amendment requires suppression of the defendant's post-warning statements as fruits of the previous questioning conducted in violation of the Sixth Amendment. Court remands to consider the latter, whether the second statements - preceded by Miranda warnings – should have been suppressed as fruit of the illegal post-indictment interview without presence of counsel, under Nix v. Williams (1984) and Brown v. Illinois (1975).

United States v. Patane, 542 U.S. 630, 124 S.Ct. 2620 (2004).
Court (5-4) rules that failure to give a suspect full Miranda warnings (the agent stopped when defendant said he knew his rights) did not require suppression of physical evidence (a gun) derived from the suspect's unwarned but voluntary statement. A plurality of three justices (per Thomas) finds there is no justification for extending the Miranda rule to this context; a mere failure to give the warnings did not, by itself, violate a suspect's constitutional rights protected by the 5th Amendment - though a coerced confession would require suppression of physical evidence. Nothing in Dickerson v. United States (2000), including its characterization of Miranda as announcing a constitutional rule, changed any of the Court's prior law in Quarles and Elstad on this subject. Justices Kennedy and O'Connor reaffirm those older cases and agree Dickerson did not change this; they find it unnecessary to decide whether the failure should be characterized as a Miranda violation itself or whether there is anything to deter so long as the unwarned statements are not later introduced at trial. Justices Souter, Stevens and Ginsburg dissent as Miranda's logic of a presumption of coercion should be followed and extend to the exclusion of derivative evidence; they fear the majority's view will lead to an unjustifiable invitation to law enforcement to flaunt Miranda. Justice Breyer dissents urging that courts should exclude physical evidence derived from unwarned questioning unless the failure to provide Miranda warning was in good faith, relying on Seibert below, and no such finding was made here.

Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601 (2004).
Court (5-4) finds a police protocol for custodial interrogation that called for giving no Miranda warnings until interrogation had produced a confession was a deliberate violation of Miranda that could not effectively comply with Miranda's constitutional requirement, and that a statement repeated after a Miranda warning in such circumstances is inadmissible. The failure to give Miranda warnings was intentional - a supervising officer instructed the arresting officer not to advise the murder suspect of her rights; she confessed, the Miranda warnings were given 20 minutes later and when she waived her rights, she was confronted with the incriminating statement she had made at the prewarning questioning session, her ultimate statement was largely a repeat of information obtained prior. The record showed the practice was promoted not only by the officer's own dept, but also a national police training organization and other depts in which the officer worked.

Justices Souter, Stevens, Ginsburg and Breyer, find the warnings could not function effectively as Miranda requires, that they will be ineffective in preparing the suspect for a successive interrogation that was close in time and similar in content; that the question-first practice's manifest purpose is to get a confession the suspect would not make if he understood his rights at the outset. Hearing the warnings only in the aftermath would be perplexing and bewildering rather than convincing her she had a right to remain silent, particularly when the officers did not advise that her prior statement would not be used, did not dispel the oddity, and the impression that the later questioning was a mere continuation of the earlier was fostered by references back to the confession already given. Oregon v. Elstad's holding that a suspect who has once responded to unwarned

yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given requisite Miranda warnings is distinguished for there the warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission. Justice Breyer concurs, he would exclude the fruits of the initial unwarned questioning unless the failure to warn was in good faith, suggesting this is a simple and workable approach. He sees the plurality as using a fruits approach that looks to other intervening circumstances as well (time lapse, change in location or interrogating officer, or a shift in the focus of the questioning), he would focus on good-faith.
Justice Kennedy concurs in judgment finding this to be a deliberate violation of Miranda that distorted the meaning of Miranda and furthered no legitimate countervailing interest as other limitations on fruits doctrine have (like Patane, Elstad, Quarles). If the deliberate two-step interrogation strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made; curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the Miranda warning and of the Miranda waiver (these could include a substantial break in time and circumstances, or an additional warning that explains the likely inadmissibility of the prewarning statement). .

The four remaining Justices dissent suggesting Justice Kennedy's approach requires a difficult, state-of-mind inquiry; they would adhere to Elstad and suppress if the defendant showed her first statement was involuntary and this tainted the second, or if the second statement was involuntary despite the Miranda warnings.

Cert Grants on Interrogation

Sanchez-Llamas v. Oregon, ___ U.S. ___, 126 S.Ct. 620 (Nov. 7, 2005), Nos. 04-10566 (consolidated with Bustillo below), ruling below: 108 P.3d 573 (Or. Mar. 10, 2005 unpublished). Questions Presented: Does Vienna Convention convey individual rights of consular notification and access to foreign detainee enforceable in courts of United States? Does state's failure to notify foreign detainee of his rights under Vienna Convention on Consular Relations (VCCR) result in suppression of his statements to police?

Bustillo v. Johnson, ___ U.S. ___, 2005 WL 2922485 (Nov. 7, 2005), No. 05-51 (consolidated with Sanchez-Llamas above), ruling below: 65 Va. Cir. 69, 2004 WL 1318885 (Va. May 4, 2004, unpublished). Question Presented: May state courts, contrary to International Court of Justice's interpretation of Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, refuse to consider violations of Article 36 of that treaty because of procedural bar or because treaty does not create individually enforceable rights?

Cert Granted Then Dismissed on Interrogations

Maryland v. Blake, No. 04-373, cert. granted ___ U.S. ___, 125 S.Ct.1823 (April 18, 2005), ruling below 849 A.2d 410 (2004). Question Presented: When police officer improperly communicates with suspect after suspect invokes his right to counsel, do curative measures by police, or other intervening circumstances, dissipate coercive effect of violation by police of suspect's rights and permit suspect to validly initiate communication with police under Edwards v. Arizona, which held that once accused has invoked his right to counsel, he is not subject to further interrogation until counsel has been made available, unless accused himself initiates further communication with police? The case was argued Nov. 1, 2004, and dismissed as improvidently granted 546 U.S. ___, 126 S.Ct. 602 (Nov. 14, 2005). Under a since repealed state law, the defendant could no longer be prosecuted for the murder he admitted involvement with in his statements.

Detention and Removal of Aliens

Clark v. Martinez, 543 U.S. 371, 125 S.Ct. 716 (Jan. 12, 2005).
Section 1231(a)(6) and Zavydas v. Davis (2001) compel release of arriving alien who was apprehended at border of United States, denied admission, and ordered removed from U.S.; six months is presumptive period reasonably necessary to remove them].

Leocal v. Ashcroft, 543 U.S. 1, 125 S.Ct. 377 (2005). Alien's previous Florida's DUI with serious bodily injury offense is not a "crime of violence" under 18 USC 16 that constitutes an "aggravated felony" under Section 101 of INA for purposes of deportation.

Cert Grant on Challenging Trying Enemy Combatants in Military Tribunals

Hamdan v. Rumsfeld, ___U.S. ___, 126 S.Ct. 622 (Nov. 7, 2005), No. 05-184, ruling below 415 F.3d 33 (U.S. App. D.C. 2005). Questions Presented: Is military commission established by president to try petitioner and others similarly situated for alleged war crimes in "war on terror" duly authorized under Congress's Authorization for the Use of Military Force, Uniform Code of Military Justice, or inherent powers of president? Can petitioner and others similarly situated obtain judicial enforcement from Article III court of rights protected under 1949 Geneva Convention in action for writ of habeas corpus challenging legality of their detention by executive branch? [In further detail: Whether an enemy combatant detained at Guantanamo Bay is protected by the articles of the Geneva Convention as a prisoner of war, enjoining the Secretary of Defense from conducting further military commission proceedings against him, and whether the establishment of the military commission violates the separation of powers?]

CHALLENGING CHARGING DECISION

U.S. v. Bass, 536 U.S 862, 122 S.Ct. 2389 (2002) (per curiam).
Court (9-0, per curiam and on cert petition) summarily reverses Sixth Circuit's order that DOJ provide discovery regarding its charging practices or be forbidden from seeking the death penalty. The Sixth Circuit had relied on nationwide statistics compiled by DOJ that showed it charged African-Americans with death-eligible offenses more than twice as often as it charged whites and plea bargained with whites more frequently than with blacks, and on then AG's comments acknowledging possible implications of these disparities. Supreme Court finds defendant failed to make a credible showing that similarly situated individuals of a different race were not prosecuted. Even assuming this requirement can be satisfied by nationwide statistics (as opposed to a showing regarding the record of the decision-makers in the respondent's case), raw statistics regarding overall charges say nothing about charges brought against similarly situated defendants.

Cert Grant on Challenging the Decision to Charge

Hartman v. Moore, ___ U.S. ___, 125 S.Ct. 2977 (June 27, 2005), No. 04-1495, ruling below 388 Fed.3d 871 (DC Cir. 2004). Questions Presented: May law enforcement agents be liable under *Bivens* for retaliatory prosecution in violation of First Amendment when prosecution was supported by probable cause? If so, was law to that effect clearly established at time that criminal charges were filed against plaintiffs, such that defendants are not entitled to qualified immunity?

COMPETENCY

Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174 (2003) [non-capital].
"[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that

defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary to further important governmental trial-related interests." Id. at 2184. The instances where a defendant may be involuntarily medicated for purposes of regaining competence to stand trial will be rare. First, important governmental interests must be at stake. Id. Crimes against the person and against property may both be serious, but circumstances may ameliorate the importance of bringing the defendant to trial, such as the lengthy involuntary commitment the defendant may face by refusing the medications, and where a defendant has already been confined for a long period of time, for which he or she would get credit for time served, if convicted. Id. Second, the court must determine that involuntary medications will significantly further state interests. Id. at 2184. The medication must be substantially likely to render the defendant competent, and must do so without side effects that will interfere with the defendant's ability to assist counsel. Third, the medication must be necessary to further the state interests, i.e., less intrusive means will not produce the same results. Id. at 2185. Fourth, the drugs must be medically appropriate. Id.

Where involuntary medication is necessary for other purposes, such as to reduce a defendant's dangerousness, that the medication may also render the defendant competent to stand trial is a side benefit, and the analysis described in this case need not be undertaken. Medical experts are likely to feel more comfortable predicting whether a treatment is medically appropriate and necessary to control a patient's dangerous behavior than predicting whether the patient will be competent to stand trial. Id. And courts are more accustomed to dealing with involuntary medical treatment as a civil matter, with appointment of a guardian to make decisions in the best interests of the patient. Id. Moreover, evaluation of a defendant's need for medication for purposes other than trial competence are likely to inform the decision if it is determined that the only reason for involuntarily medicating the individual is competence. Id. "[A] court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on other Harper-type grounds; and, if not, why not." Id. at 2186.

Assuming as correct the lower courts' determination that defendant was not dangerous, the record developed below did not address issues necessary to the determination whether to involuntarily medicate defendant for purposes of rendering him competent to stand trial. The experts conceded that there would be significant side-effects from the drugs proposed, but did not explore whether these side-effects would interfere with defendant's ability to assist counsel. They did not evaluate the state's interest in bringing defendant to trial against the costs of involuntary medication, nor consider that defendant has been confined for a long period of time, which is likely to be extended as long as he continues to refuse medication. The order permitting involuntary medication is vacated, and the is case remanded for further consideration.

Justice Scalia dissenting with O'Connor and Thomas, disagrees with the Court's determination of jurisdiction; in his opinion, the district court never entered a final order, and the Court of Appeals had no jurisdiction to hear Sell's appeal. Id. at 2187. The majority's concern that waiting until after trial will force Sell to suffer the harm he is seeking to avoid is "a breathtaking expansion of appellate jurisdiction over interlocutory orders. If it is applied faithfully (and some appellate panels will be eager to apply it faithfully), any criminal defendant who asserts that a trial court order will, if implemented, cause an immediate violation of his constitutional (or perhaps even statutory?) rights may immediately appeal." Id. at 2190.

CONFRONTATION CLAUSE

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (March 8, 2004).

The Confrontation Clause of the Sixth Amendment bars the admission at trial of a prior testimonial statement of a witness who does not appear at trial unless the witness is both

unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness. The tape-recorded custodial statement by a potential accomplice at issue here was not admissible, as the only indicia of reliability sufficient to satisfy constitutional demands is confrontation, and an opportunity for that was not provided. Court reevaluates the Confrontation Clause framework established in Ohio v. Roberts, 448 U.S. 56 (1980), and overrules that case because it admits statements consisting of ex parte testimony upon a mere reliability finding. That a judicial determination of a witness' ex parte testimony bears "particularized guarantees of trustworthiness" per Roberts may not serve as a substitute for the opportunity for cross-examination. "Testimonial statement" applies at a miminum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations as these are the modern practices with closes kinship to the abuses at which the Confrontation clause was directed.

Cert Grants

Davis v. Washington, No. 05-5224, cert granted ___ U.S. ___, 126 S.Ct. 547 (Oct. 31, 2005), ruling below 111 P.3d 844 (2005). Question 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).

Hammon v. Indiana, No. 05-5705, cert granted ___ U.S. ___, 126 S.Ct. 552 (Oct. 31, 2005), ruling below 829 N.E.2d 444 (2005). Question presented: Are a putative victim's statements to a 911 operator naming her assailant, which were admitted at a criminal trial under a state's "excited utterances" hearsay exception, "testimonial" statements subject to the confrontation clause restrictions enunciated in Crawford v. Washington, 541 U.S. 36, 72?

RIGHT TO JURY DETERMINATION OF AGGRAVATING OR SENTENCING FACTORS

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002).
PR in Arizona capital case (7-2) that overrules *Walton v. Arizona*, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609. The Court reached this conclusion after finding that the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "is irreconcilable with *Walton*'s holding in this regard," and declaring that "[c]apital defendants, no less than non-capital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. The label given the facts is unimportant. The dispositive question is not one of form but of effect. The Court expressly declined to reach the state's "assertion that any error was harmless because a [death-eligibility] finding was implicit in the jury's guilty verdict," thereby leaving this question to be resolved by the lower courts. 536 U.S. at 609 n. 7.

At footnote 4, the Court lists the arguments Ring did not make. He did not challenge *Alamendarez-Torres v. U.S.*, 523 U.S. 224 (1998) permitting a judge-made finding of the fact of a prior conviction to increase the statutory maximum sentence. He did not object to judge-made findings of mitigating facts, or argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty, or challenge the authority of the Arizona Supreme Court to reweigh the mitigating and aggravating factors after the court struck one aggravator. Nor did he claim he had a Fifth Amendment right to a grand jury indictment. [Editor's Note: All but the last of these arguments are suitably addressed as second-generation *Apprendi-Ring* claims.]

Justice Scalia (joined by Thomas, J.), finds himself in a quandary but concurs, in favor of preserving the right to jury trial as to facts necessary to make the defendant eligible for punishment. Justice Kennedy concurs though he believes *Apprendi* was wrongly decided. Justice Breyer concurs in the result only, as he disagrees with *Apprendi*

but agrees that death is different and that the Eighth Amendment requires the sentencing determination be made by a jury in capital cases because jurors are more in tune with the community and more able to reflect the community's desires. [But Justice Scalia disputes this, saying this is not about jury sentencing, but about jury determination of facts necessary for eligibility, and comments that judge sentencing based on jury-determined eligibility criteria would be permissible.] Justice O'Connor (joined by Rehnquist, C.J.) dissented, contending that *Apprendi*, rather than *Walton*, should have been overruled.

Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519 (June 24, 2004).
Overturning the grant of relief by the Ninth Circuit, the Court 5-4 holds *Ring v. Arizona* (2002) was not retroactive under Teague v. Lane, and denies new sentencing hearings for dozens of death row inmates in Arizona, Idaho, Montana and Nebraska whose sentences were originally handed down by judges, but whose cases are older and had become final (direct appeal completed) before Ring was announced. In *Ring*, the Court required a jury determination of eligibility for the death penalty. The Ninth Circuit had held that the new rule announced in Ring applies retroactively to cases on collateral review under Teague's exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings. Another argument ws that the rule was not procedural, but substantive in nature and not subject to Teague. The bare Court majority finds this was not a substantive rule "which alters the range of conduct or the class of persons that the law punishes", but instead a procedural rule that "regulates only the manner of determining the defendant's culpability". As a procedural rule, it would not be retroactively applied unless it seriously diminished the fairness and accuracy of the criminal proceeding. "The question is whether judicial factfinding so seriously diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach. The evidence [of whether jury factfinding is more accurate than judicial factfinding] is simply too equivocal to support that conclusion." So Ring was not retroactively applied. [Dissenting Justice Breyer stated: "Certainly the ordinary citizen will not understand the difference [between those who had finished the direct appeal process and those who had not]. That citizen will simply witness two individuals, both sentenced through the use of unconstitutional procedures, one individual going to his death, the other saved, all through an accident of timing. How can the Court square this spectacle with what it has called the 'vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason'?"]

Harris v. U.S., 536 U.S. 545, 122 S.Ct. 2406 (2002).
The Court (5-4) rules that in the federal firearms statute [18 USC 934(c)(10)(A)] which carries three minimum prison terms, depending on whether the person is merely armed, brandishing a weapon, or discharged the firearm, the fact of brandishing is a sentencing factor that can be found by the judge. This sentencing factor determination is arrived at by statutory construction, by the fact there is no tradition of treating this as an element, and because it affects the minimum sentence only incrementally. Four justices suggest *McMillan v. Pa.*, 477 U.S. 79 (1986) (rejecting the proposition that any fact that increases the statutory minimum sentence for a crime must be treated as an element) is irreconcilable with *Apprendi*. But five agree the statute is constitutional and that the judge is permitted to make a finding of brandishing that will increase the mandatory minimum sentence. [Editor's Note: Harris contains good language describing *Apprendi*'s reach and what constitutes an element that will be helpful in capital cases.]

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000)
"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt" (and stated in the indictment).

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (June 24, 2004).
Ruling 5-4, a fact, other than prior conviction, that is necessary for upward departure from statutory sentencing range must be proved according to procedures mandated by Apprendi v. New Jersey. A judge cannot constitutionally increase a defendant's sentence beyond that authorized by the legislature and the jury's findings. A judge's authority to sentence derives wholly from the jury's verdict. "The statutory maximum [referred to in Apprendi] is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Dissent urges that all criminal sentences imposed under federal and state guidelines since Apprendi are now vulnerable to collateral attack.

U.S. v. Booker/Fanfan, 543 U.S. 220, 125 S.Ct. 738 (Jan. 12, 2005).
Reversal of federal sentences, with two bare majority opinions. Justice Stevens delivered the opinion of the Court in part, concluding that the Sixth Amendment as construed in Apprendi/Blakely applies to the Federal Sentencing Guidelines. "The 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." There is no constitutionally significant distinction between the Guidelines and the Washington procedure at issue in Blakely. This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges. Were the Guidelines merely advisory--recommending, but not requiring, the selection of particular sentences in response to differing sets of facts--their use would not implicate the Sixth Amendment. However, that is not the case. Because they are binding on all on judges, this Court has consistently held that the Guidelines have the force and effect of laws. Further, the availability of a departure where the judge "finds ...an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described," sect. 3553(b)(1), does not avoid the constitutional issue. Departures are unavailable in most cases because the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is legally bound to impose a sentence within the Guidelines range…. To reach Booker's actual sentence--which was almost 10 years longer--the judge found that he possessed an additional 566 grams of crack. Although, the jury never heard any such evidence, the judge found it to be true by a preponderance of the evidence. Thus, as in Blakely, "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." 542 U.S., at 305. Finally, because there were no factors the Sentencing Commission failed to adequately consider, the judge was required to impose a sentence within the higher Guidelines range. The Government's arguments for its position that Blakely's reasoning should not be applied to the Federal Sentencing Guidelines are unpersuasive. The fact that the Guidelines are promulgated by the Sentencing Commission, rather than Congress, is constitutionally irrelevant. Finally, separation of powers concerns are not present here, and were rejected in Mistretta. In Mistretta the Court concluded that even though the Commission performed political rather than adjudicatory functions, Congress did not exceed constitutional limitations in creating the Commission. 488 U.S., at 393, 388. That conclusion remains true regardless of whether the facts relevant to sentencing are labeled "sentencing factors" or "elements" of crimes.

Justice Breyer delivered the opinion of the Court in part, concluding that 18 U.S.C. A. sect. 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with today's Sixth Amendment "jury trial" holding and therefore must be severed and excised from the Sentencing Reform Act of 1984 (Act). Section 3742(e), which depends upon the Guidelines' mandatory nature, also must be severed and excised. So modified, the Act makes the Guidelines effectively advisory, requiring a

sentencing court to consider Guidelines ranges, see sect. 3553(a)(4), but permitting it to tailor the sentence in light of other statutory concerns, see sect. 3553 (a). Several considerations demonstrate that adding the Court's constitutional requirement onto the Act as currently written would so transform the statutory scheme that Congress likely would not have intended the Act as so modified to stand. First is statutory language.… Second, Congress' basic statutory goal of diminishing sentencing disparity depends for its success upon judicial efforts to determine, and to base punishment upon, the real conduct underlying the crime of conviction. In looking to real conduct, federal sentencing judges have long relied upon a probation officer's presentence report, which is often unavailable until after the trial. To engraft the Court's constitutional requirement onto the Act would destroy the system by preventing a sentencing judge from relying upon a presentence report for relevant factual information uncovered after the trial. Third, the Act, read to include today's constitutional requirement, would create a system far more complex than Congress could have intended, thereby greatly complicating the tasks of the prosecution, defense, judge, and jury. Fourth, plea bargaining would not significantly diminish the consequences of the Court's constitutional holding for the operation of the Guidelines, but would make matters worse, leading to sentences that gave greater weight not to real conduct, but rather to counsel's skill, the prosecutor's policies, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime. Fifth, Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences upward than to adjust them downward, yet that is what the engrafted system would create. For all these reasons, the Act cannot remain valid in its entirety. Severance and excision are necessary. Only sect. 3553(b)(1), which requires sentencing courts to impose a sentence within the applicable Guidelines range (absent circumstances justifying a departure), and sect. 3742(e), which provides for de novo review on appeal of departures, must be severed and excised. With these two sections severed (and statutory cross-references to the two sections consequently invalidated), the rest of the Act satisfies the Court's constitutional requirement and falls outside the scope of Apprendi v. New Jersey, 530 U.S. 466. The Act still requires judges to take account of the Guidelines together with other sentencing goals, see sect. 3553(a)(4); to consider the Guidelines "sentencing range established for ... the applicable category of offense committed by the applicable category of defendant," pertinent Sentencing Commission policy statements, and the need to avoid unwarranted sentencing disparities and to restitute victims, sects.3553(a)(1), (3)-(7); and to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed training and medical care, sect. 3553(a)(2). Moreover, despite sect. 3553(b)(1)'s absence, the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range). See sects. 3742(a) and (b). Excision of sect. 3742(e), which sets forth appellate review standards, does not pose a critical problem. …Here, these factors and the past two decades of appellate practice in cases involving departures from the Guidelines imply a familiar and practical standard of review: review for "unreasonable[ness]." Finally, the Act without its mandatory provision and related language remains consistent with Congress' intent to avoid "unwarranted sentencing disparities ... [and] maintai[n] sufficient flexibility to permit individualized sentences when warranted," 28 U.S.C. sect. 991(b)(1)(B), in that the Sentencing Commission remains in place to perform its statutory duties, see sect. 994, the district courts must consult the Guidelines and take them into account when sentencing, see 18 U.S.C. sect. 3553(a)(4), and the courts of appeals review sentencing decisions for unreasonableness. Thus, it is more consistent with Congress' likely intent (1) to preserve the Act's important pre-existing elements while severing and excising sects.3553(b) and 3742(e) than (2) to maintain all of the Act's provisions and engraft today's constitutional requirement onto the statutory scheme.

Other possible remedies--including, e.g., the parties' proposals that the Guidelines remain binding in cases other than those in which the Constitution prohibits judicial factfinding and that the Act's provisions requiring such factfinding at sentencing

be excised—are rejected. Today's Sixth Amendment holding and the Court's remedial interpretation of the Sentencing Act must be applied to all cases on direct review. That does not mean that every sentence will give rise to a Sixth Amendment violation or that every appeal will lead to a new sentencing hearing. That is because reviewing courts are expected to apply ordinary prudential doctrines, determining, e.g., whether the issue was raised below and whether it fails the "plain-error" test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.

Shepard v. U.S., 544 U.S. 13, 125 S.Ct. 1254 (March 7, 2005).
After petitioner Shepard pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), the Government sought to increase his sentence from a 37-month maximum to the 15-year minimum that §924(e), popularly known as the Armed Career Criminal Act (ACCA), mandates for such felons who have three prior convictions for violent felonies or drug offenses. Shepard's predicate felonies were Massachusetts burglary convictions entered upon guilty pleas. The Court has held that only "generic burglary"–meaning, among other things, that it was committed in a building or enclosed space–is a violent crime under the ACCA, Taylor v. United States, 495 U.S. 575, 599, and that a court sentencing under the ACCA can look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after a jury trial was for generic burglary in States (like Massachusetts) with broader burglary definitions, id., at 602. The Supreme Court held that enquiry under the ACCA to determine whether a guilty plea to burglary under a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, to the terms of a plea agreement or transcript of colloquy between judge and defendant in which the defendant confirmed the factual basis for the plea, or to some comparable judicial record of this information. Guilty pleas may establish ACCA predicate offenses, and Taylor's reasoning controls the identification of generic convictions following pleas, as well as convictions on verdicts, in States with nongeneric offenses. In cases tried without a jury, the closest analogs to jury instructions would be a bench-trial judge's formal ruling of law and finding of fact; in pleaded cases, they would be the statement of factual basis for the charge shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea. A later court could generally tell from such material whether the prior plea had "necessarily" rested on the fact identifying the burglary as generic. Taylor, supra, at 602. The Government's arguments for a wider evidentiary cast that includes documents submitted to lower courts even prior to charges is rejected.

Justice Souter, joined by Justice Stevens, Justice Scalia, and Justice Ginsburg, concluded in Part III that the rule in the Jones v. United States, 526 U.S. 227, 243, n. 6, and Apprendi v. New Jersey, 530 U.S. 466, 490, line of cases–that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, absent a waiver by the defendant–is also relevant to ACCA sentencing. In a nongeneric State, the fact necessary to show a generic crime is not established by the record of conviction as it would be in a generic State when a judicial finding of a disputed prior conviction is made on the authority of Almendarez-Torres v. United States, 523 U.S. 224. Instead, the sentencing judge considering the ACCA enhancement would (on the Government's view) make a disputed finding of fact about what the defendant and state judge must have understood as the prior plea's factual basis, and the dispute raises the concern underlying Jones and Apprendi: the Sixth and Fourteenth Amendments guarantee a jury's standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase a potential sentence's ceiling. The disputed fact here is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones and Apprendi, to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute. The rule of

reading statutes to avoid serious risks of unconstitutionality therefore counsels the Court to limit the scope of judicial factfinding on the disputed generic character of a prior plea.

Justice Thomas agreed that the Court should not broaden the scope of the evidence judges may consider because it would give rise to constitutional error, not constitutional doubt. Both Almendarez-Torres and Taylor v. U.S., which permit judicial factfinding that concerns prior convictions, have been eroded by this Court's subsequent Sixth Amendment jurisprudence.

Per Curiam Decision on Jury Determination of Mental Retardation

Schriro v. Smith, 546 U.S. ___, 126 S.Ct. 7 (October 17, 2005).
Per Curiam reversal of 9th Cir.'s sua sponte imposition of jury trial on mental retardation claim, Court leaves it to the states to determine mental retardation claim procedures. In 1982, an Arizona jury convicted Smith and sentenced him to death. In none of the prior proceedings did Smith argue that he was mentally retarded or that his mental retardation made him ineligible for the death penalty. Smith had, however, presented evidence in mitigation during the sentencing phase of his trial showing that he had low intelligence. The District Court denied Smith's petition for habeas corpus in 1996, and after the Court issued its 2002 decision in Atkins, the case was returned to the Ninth Circuit. Shortly thereafter, Smith asserted in briefing that he is mentally retarded and cannot, under Atkins, be executed. The Ninth Circuit ordered suspension of all federal habeas proceedings and directed Smith to "institute proceedings in the proper trial court of Arizona to determine whether the state is prohibited from executing [Smith] in accordance with Atkins." The court further ordered that the issue whether Smith is mentally retarded must "be determined . . . by a jury trial unless the right to a jury is waived by the parties." The Court finds: "The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim. Atkins stated in clear terms that "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition. Because the Court of Appeals exceeded its limited authority on habeas review, the judgment below is vacated, and the case is remanded for further proceedings consistent with this opinion."

Cert Grant on Whether Blakely Error Can Be Harmless

Washington v. Recuenco, No. 05-83, cert. granted ___ U.S. ___, 126 S.Ct. 478 (Oct. 17, 2005), ruling below 110 P.2d 188 (2005) (*non-capital*). Question Presented: Should error as to definition of sentencing enhancement be subject to harmless error analysis when it is shown beyond reasonable doubt that error did not contribute to verdict on enhancement? [The state supreme court held that imposing a three year firearm enhancement instead of the one year enhancement returned by the jury violated the Sixth Amendment because the jury did not specifically find that Recuenco committed an assault with a firearm. Further, the court held that errors of this type could never be considered harmless error, because a court must not make assumptions without specific jury findings.]

Cert grant on Weighing of Aggravating and Mitigating Circumstances, Burden of Proof

Kansas v. Marsh, No. 04-1170, cert. granted ___ U.S. ___, 125 S.Ct. 2517 (May 31, 2005), ruling below 102 P.3d 445 (Kan. 2004). Question presented: Does it violate the Constitution for a state capital sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating

evidence is in equipoise? The USSC added the following two additional questions: (1) Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 USC 1257, as construed by Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) ? (2) Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?

Some Possible Future Implications of Ring on the Capital Litigation Process

- Pre-Trial Notice of Aggravating Circumstances and/or Determinations of Aggravating Circumstances Made in the Trial Phase (as in Ohio)

- Mandates That The Jury Make Findings About Culpable Intent, Mitigating Facts, and the Ultimate Determination Whether to Impose the Death Penalty, Particularly in Weighing States

- Bars on Appellate Courts "Curing" Errors by Applying a Narrowing Construction of Aggravating Circumstances, and/or Reweighing of Aggravating and Mitigating Circumstances

- Barring of Jury Override Practices, and More Attention to Jury Decision-Making as a Reflection of Community Values and Evolving Standards.

CONSIDERATION OF INVALID AGGRAVATING CIRCUMSTANCES

Bell v. Cone, 543 U.S. 447, 125 S.Ct. 847 (Jan. 24, 2005).
Per curiam; with Ginsburg, concurring, joined by Souter & Breyer). [Background: Gary Cone was convicted of first-degree murder for killing an elderly couple in 1980. The couple had been beaten to death, and the jury found four aggravating factors in the penalty phase, including that the killings had been "especially heinous, atrocious, or cruel." The jury also found that the aggravating factors outweighed mitigating factors, and Cone was sentenced to death. The Tennessee Supreme Court affirmed Cone's conviction and sentence on direct appeal, finding that three of the aggravating factors – prior convictions for violent felonies and murder to avoid arrest, in addition to HAC – "were clearly shown by the evidence." The fourth aggravating factor, knowingly creating a risk of death to two or more persons other than the person murdered, based on Cone's threatening actions toward others earlier in the day, was dismissed by the state court, but the error was determined to be harmless in view of the other three aggravating factors. Cone pursued postconviction relief in the state courts as well, raising a vagueness claim as to the HAC aggravator among many other claims. The state trial court found the claim to be procedurally barred under state law because it was a restatement of a claim already reviewed and denied by the state supreme court on direct appeal. The Tennessee Court of Criminal Appeals affirmed the trial court's denial of relief, and the state supreme court denied Cone permission to appeal. The federal district court denied relief as well, finding specifically that his claim that the HAC aggravator was vague was procedurally barred for failure to raise it on direct appeal. The Sixth Circuit did not reach this claim initially, finding that Cone was entitled to relief on a different claim of IAC. The USSC reversed, however, and remanded for further proceedings in Bell v. Cone, 535 U.S. 685 (2002). On remand, the Sixth Circuit panel reached the HAC claim. With one judge dissenting, the circuit court found that the HAC aggravator was unconstitutionally vague. It got past the procedural bar found by the district court by noting that Tennessee law required the state supreme court to review every death sentence. This would necessarily include consideration of the constitutionality of the aggravating factors found by the jurors; thus, the HAC claim was fairly presented to the Tennessee courts on direct appeal even though Cone had not raised it. The USSC does not address this ruling, but observes in footnote 3 that "as a general matter, the burden is on the petitioner to raise his federal

claim in the state courts at a time when state procedural law permits its consideration on the merits, even if the state court could have identified and addressed the federal question without its having been raised."] On the merits, the Sixth Circuit found no USSC case directly on point, but concluded nevertheless that the Tennessee Supreme Court's approval of the HAC aggravator was contrary to clear principles established by the USSC in Godfrey v. Georgia, and expounded upon in later decisions.

The USSC finds that the Sixth Circuit did not give deference to the state court's application of state law in granting relief to petitioner on his claim that the heinous, atrocious and cruel aggravator found by the jury was unconstitutionally vague. The Tennessee Supreme Court has construed this aggravator narrowly and has followed the precedent numerous times; "absent an affirmative indication to the contrary, we must presume that it did the same thing here," even though the state court did not explicitly cite its prior decisions. Moreover, even without this assumption, the state supreme court's rationale for determining that the aggravator was supported by the evidence "closely tracked" the rationale for affirming death sentences in prior decisions in which the narrowed HAC aggravator was explicitly applied, i.e., the elderly, helpless victims had attempted to resist, they did not die instantaneously but endured "terror, fright and horror" before being killed, and the manner of killing was brutal. The Sixth Circuit "erred in presuming that the State Supreme Court failed to cure this [facial] vagueness by applying a narrowing construction on direct appeal. The state court did apply such a narrowing construction, and that construction satisfied constitutional demands by ensuring that respondent was not sentenced to death in an arbitrary or capricious manner."

In an interesting footnote, the USSC observes that, because Ring does not apply retroactively, this case *does not* present the question "whether an appellate court may, consistently with Ring, cure the finding of a vague aggravating circumstance by applying a narrower construction."

Justice Ginsburg concurred, joined by Justices Breyer and Souter, expressing agreement with the proposition that once a state supreme court has dispositively decided a point of law, it need not always cite that decision in order to demonstrate that it is applying that precedent. But, she notes, the facts of this case do not permit addressing whether a state court can be assumed to have applied its precedent in the following scenario: "A state prisoner petitions for federal habeas review after exhausting his state remedies. In the anterior state proceeding, the prisoner raised multiple issues. The state court, in disposing of the case, left one or more of the issues unaddressed. There would be no warrant, in such a case, for an assumption that the state court, *sub silentio*, considered the issue and resolved it on the merits in accord with the State's relevant law. Nothing in the record would discount the possibility that the issue was simply overlooked. A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point."

Brown v. Sanders, ___ U.S.___, 126 S.Ct. 884 (Jan. 11, 2006) (pre-AEDPA).

Reversing Ninth Circuit Grant of Penalty Relief (5-4 decision)

Background

Ronald Sanders was convicted of first-degree murder and attempted murder, and of robbery, burglary and attempted robbery. (For a more detailed account of the facts, see RECAP 190.) The jury also found to be true four special circumstances: felony-murder (robbery), felony-murder (burglary), witness-killing, and that the murder was especially heinous, atrocious, or cruel. The CSC later set aside the burglary-murder special circumstance because the instructions permitted the jury to find that Sanders had committed burglary based on his intent to commit assault; because assault is an element of homicide, the burglary would merge into the homicide. The CSC also invalidated the heinous, atrocious and cruel special circumstance because the court had previously

found it to be unconstitutionally vague. Despite holding two special circumstance findings invalid, the CSC did not grant relief, reasoning that the jury had considered two valid special circumstances, either one of which would have been sufficient to make Sanders eligible for the death penalty. The USSC denied certiorari. The district court also denied relief, but the Ninth Circuit reversed. The circuit court found that the CSC's application of the USSC's opinion in Zant v. Stephens was incorrect, because it applied only to non-weighing states, whereas California is a weighing state. Instead, the Ninth Circuit applied the rule of Stringer v. Black, concluding that the CSC could have affirmed Sanders' sentence only by either 1) finding that the impact of the two invalid special circumstances was harmless, or 2) independently reweighing the sentencing factors. Because the CSC did neither, reversal was necessary to give Sanders an opportunity to receive a constitutionally sound individualized sentencing. The Attorney General filed a petition for writ of certiorari, which the USSC granted.

Weighing/Non-weighing Distinction Replaced

Justice Scalia's majority opinion provides an explanation of the distinction between weighing states and non-weighing states, and then points out weaknesses in that analysis. He points out that in one respect, all states are weighing states, because the USSC requires that the sentencer in all capital cases must be permitted to weigh the aggravating evidence against the defendant's mitigating evidence. More technically, however, a weighing state is one in which "the only aggravating factors permitted to be considered by the sentencer were the specified eligibility factors." Florida and Arizona are cited as examples of weighing state schemes. Because each eligibility factor identified "distinct and particular" aggravating facts, if one factor was later deemed invalid, the sentencer could not have considered the facts and circumstances offered to support it as relevant to some other factor, and the sentencer's deliberations would necessarily have been "skewed" by consideration of the invalid factor in its weighing process. [In footnote 2, Justice Scalia assists the reader by endorsing a consistent terminology, where "eligibility factor" will denote a factor that performs the constitutional narrowing function (i.e., a special circumstance in California). He explains that the aggravating circumstance "play[s] a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty."] Justice Scalia defines a non-weighing state as one in which the law permits the sentencer to consider aggravating factors that are not necessarily identical to the eligibility factors. If evidence relevant to an eligibility factor that is later invalidated could have been considered under another aggravating factor, such as a "circumstances of the crime" factor, those facts and circumstances would have been considered under a different "rubric." Under this system of analysis, California is a non-weighing state, thanks to the "circumstances of the crime" factor. Justice Scalia criticizes the weighing/non-weighing state scheme as "needlessly complex and incapable of providing for the full range of possible variations."

The Majority Endorses a New Analytical Scheme

To replace the weighing/non-weighing scheme, the USSC announces a new rule:

"An invalidated sentencing factor (whether an eligibility factor or not) will render the [death] sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." This test is not a test of admissibility of evidence; rather, it will prevent "skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have been weighed in favor of the death penalty." [Emphasis in original.]

Justice Scalia scoffs at the Ninth Circuit's reasoning that led to its finding California to be a weighing state: Far from being limited to "discrete" statutorily-defined factors in

determining penalty after making the eligibility determination, the statutory factors include "circumstances of the crime," which "can hardly be called 'discrete.'" Indeed, as Justice Scalia interprets it, it "render[s] all the specified factors non-exclusive." The Court deflects Sanders' and the dissenters' arguments that the invalid special circumstances might have had other detrimental effects on the jury's deliberation. The argument that the jury might double-count the nature of the crime was rejected in Zant, as was the concern that jurors might give greater weight to the underlying facts of eligibility factors. The argument that a separate sentencing factor permitted the jury to take into account the existence of any special circumstances found to be true was very similar to an instruction given in Zant, and the defendant's reasoning was rejected there, too. While acknowledging that the erroneous instruction might have caused the jury to give some extra emphasis to the facts relevant to the invalidated eligibility factor, the Zant court called it "merely a consequence of the statutory label 'aggravating circumstance,'" and the impact was considered inconsequential. The same applies in Sanders' case, according to the Court. The Ninth Circuit's decision is reversed, and Sanders' case is remanded for further proceedings consistent with the Court's opinion.

Justice Stevens' Dissent

Justice Stevens, joined by Justice Souter, predicts that the majority's new approach will complicate rather than clarify the law on capital sentencing. "[T]he Court has chosen to modify our settled law, ignoring the dual role played by aggravating circumstances in California's death penalty regime." Justice Stevens explains the weighing/non-weighing distinction more simply than does Justice Scalia: In a non-weighing state, "the sole function of an aggravating circumstance finding is to make the defendant eligible for the death penalty." A weighing state, by contrast, permits the jury to consider the aggravating circumstance not only as an eligibility factor, but also in deciding whether to impose the death penalty. The majority dismisses the possibility that an invalid aggravating factor might impact the penalty verdict in ways other than permitting consideration of otherwise admissible evidence, but Justice Stevens explains that in effect, the invalid aggravating circumstance *is* improperly considered evidence: The jury, following instructions as it is assumed to do, may consider its conclusion that the killing was heinous, atrocious and cruel *and* consider the circumstances of the crime, individually. Or, the jury may treat the aggravating factor as a sign of the legislature's (and thus society's) opinion that a murder that they decide is heinous, atrocious and cruel is especially worthy of the ultimate punishment, thus giving it and the evidence relied upon to reach it greater emphasis than merely considering the facts of the crime – without the vituperative label – under the omnibus factor.

Justice Breyer's Dissent

Joined by Justice Ginsburg, Justice Breyer leans in the same direction as the majority – toward abandoning the weighing/non-weighing state distinction (and in fact argues that it was never as firmly established in the USSC as lower courts treated it) – but emphasizes the need for harmless error review, whether the state's scheme is deemed a weighing or a non-weighing state. "The upshot is that I would require a reviewing court to examine whether the jury's consideration of an unconstitutional aggravating factor was harmful, regardless of whether the State is a weighing State or a nonweighing State. I would hold that the fact that a State is a nonweighing State may make the possibility of harmful error less likely, but it does not excuse a reviewing court from ensuring that the error was in fact harmless." Justice Breyer repeatedly explains that the error is not one of admissibility of evidence, but "about the importance a jury might attach to certain admissible evidence," that might result in a bias in favor of death. In the present case, Justice Breyer would remand the case to the Ninth Circuit, to reconsider in light of the considerations he described, instead of relying on the weighing/non-weighing distinction.

INDICTMENT

Mitchell v. Esparza, 540 U.S. 12, 124 S.Ct. 7 (Nov. 3, 2003) (per curiam).

The Supreme Court granted the state's petition for writ of certiorari and reversed the Sixth Circuit's judgment affirming the grant of habeas relief in Gregory Esparza's Ohio capital case. Respondent (the habeas petitioner below) contended that the state violated the Eighth Amendment mandate to "narrow the class of death eligible defendants" by sentencing him to death following a conviction on an indictment which failed to charge him as a "principal offender" as required by state capital sentencing law. The state courts implicitly found this error harmless in light of the absence of any evidence that anyone other than respondent took part in the robbery and homicide. The district court and Sixth Circuit disagreed, "holding that the Eighth Amendment precluded respondent's death sentence and that harmless-error review was inappropriate." In so doing, the Sixth Circuit "failed to cite, much less apply," §2254(d).

In finding the Eighth Amendment violation, the Sixth Circuit reasoned that "Ohio's failure to charge in the indictment that respondent was a 'principal' was the functional equivalent of 'dispensing with the reasonable doubt requirement,'" and therefore not subject to harmless error analysis. The Supreme Court rejected this conclusion, explaining that it has "often held" in non-capital cases "that the trial court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis," and that "[w]e cannot say that because the violation occurred in the context of a capital sentencing proceeding that our precedent requires the opposite result." Underscoring the point that its decisions do not support the Sixth Circuit's refusal to apply harmless error analysis in these circumstances, the Court further noted that "we left a question similar to the one presented here open in another capital case, Ring v. Arizona, 536 U.S. 584, 609, n. 7 (2002)." The Court went on to conclude that, "[i]n relying on the absence of precedent to distinguish our noncapital cases, and to hold that harmless-error review is not available for this type of Eighth Amendment claim, the Sixth Circuit exceeded its authority under § 2254(d)(1). A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous. As the Ohio Court of Appeals' decision does not conflict with the reasoning or the holdings of our precedent, it is not 'contrary to ... clearly established Federal law.'"

Finally, turning to the remaining question whether the state court's decision involved an unreasonable application of clearly established federal law, the Court did not mention Brecht v. Abrahamson, but looked instead to the state court's application of Chapman v. California: "We may not grant respondent's habeas petition . . . if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the Ohio Court of Appeals applied harmless-error review in an "objectively unreasonable" manner. Lockyer v. Andrade, 538 U.S. 63, 75-77 (2003); see also Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam); [(additional citations omitted)]."

After briefly reviewing the jury instructions and noting that, "[a]fter all, [respondent] was the only defendant charged in the indictment," the Court concluded that, "[u]nder these circumstances, we cannot say that the state court's conclusion that respondent was convicted of a capital offense [requiring a finding of "principal offender" status] was objectively unreasonable. That being the case, we may not set aside its decision on habeas review." The Court therefore reversed the Sixth Circuit's judgment and remanded for further proceedings.

[Note: In footnote 3, the Court acknowledges the Sixth Circuit had noted evidence brought to light for the first time in the federal habeas proceeding indicated that there may have been another involved in the crime. However, the Court finds that the jury was not presented with this evidence at trial and thus it had no bearing on the correctness of the Ohio Court of Appeals' decision that the State need not charge a

defendant as a principal offender if the failure to so charge is harmless error. In footnote 4, the Court states its decision is limited to the issue presented here, and expresses no view whether habeas relief would be available on other grounds. The district court had found other errors as well.]

U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002)
A (9-0) in non-capital case. Indictment failed to specify drug quantity pre-*Apprendi*, and on appeal post-*Apprendi* it was argued the trial court had no jurisdiction to impose a sentence for an offense not charged in the indictment. Court finds a defective indictment does not deprive a federal court of subject-matter jurisdiction; a grand jury right can be waived and indictment defects do not deprive a court of its power to adjudicate a case, overruling *Ex Parte Bain*. The omission from a federal indictment of a fact that enhances the statutory maximum sentence does not justify a vacating of the sentence where defendant did not object. Government conceded failure was plain error in some respects, but Court finds even assuming it affected substantial rights of the defendant, it did not seriously affect the fairness, integrity or public reputation of judicial proceedings because the evidence of quantity was "overwhelming" and "essentially uncontroverted" in this case. Just as Sixth Amendment violation is subject to plain error analysis if right is not timely asserted, so is this.]

General Indictment Requirements:

Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005).
R due to inadequate notice in indictment. An Ohio jury convicted Michael Valentine of 40 counts of sexual abuse, for which he was sentenced to 40 consecutive life sentences. He contends that the Ohio indictment violated his constitutional right to due process. Valentine was convicted of 20 “carbon-copy” counts of child rape, each of which was identically worded so that there was no differentiation among the charges and 20 counts of felonious sexual penetration, each of which was also identically worded. The prosecution did not distinguish the factual bases of these charges in the indictment, in the bill of particulars, or even at trial. The only evidence as to the number of offenses was provided by the testimony of the child victim, who described typical abuse scenarios and estimated the number of times the abusive offenses occurred, e.g., “about 20,” “about 15” or “about 10” times. The District Court issued the writ of habeas corpus with respect to all counts on the ground that the indictment and conviction violated Valentine’s federal due process rights to notice of the crime charged with sufficient specificity so that he would not again be put in jeopardy of the same crime. Court concludes that in view of the testimony and the indictment language, one of the child rape and one of the penetration counts can be sustained but that the others must be set aside. “Valentine had notice that he was charged with the two separate crimes during the period of time specified in the indictment. But he had no way to otherwise identify what he was to defend against in the repetitive counts and no way to determine what charges of a similar nature could be brought against him in the future if he were re-indicted. Thus, we regard the 20 child rape counts as charging one crime and the 20 penetration counts as charging another single crime. Our ruling means that Valentine cannot be subsequently charged with the same crimes against the stepdaughter during the stated period.” [The State’s offer to stipulate that it would not charge him with other offenses during the period is rejected as it came too late, in federal habeas, and would be tantamount to a ruling that a defendant may be placed at risk of double jeopardy so long as the prosecution wins and is pleased with the verdict and sentence.]

DISCOVERY AND GUILTY PLEAS

United States v. Ruiz, 536 U.S. 622, 122 S.Ct. 2450 (2002).
A., in federal guilty plea non-capital case (8-1). “The Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea

agreement with a criminal defendant." 536 U.S. at 633. Nor must the government disclose information about affirmative defenses before entering into plea agreements. The Court preserves the Brady right to disclosure of factual innocence. Court upholds fast-track plea practice as disclosure of impeachment information could reveal identities of informants and force government to expend more resources on trial preparation prior to plea-bargaining.

Bradshaw v. Stumpf, ___ U.S. ___, 125 S.Ct. 2398 (June 13, 2005).

Unanimous court affirms Ohio capital defendant's conviction, remands penalty to Sixth Circuit.

Background

John Stumpf and Clyde Wesley talked their way into the home of Norman and Mary Jane Stout, intent on robbing the couple; Norman Edmonds waited in a car stopped about 100 yards away from the home. Stumpf and Wesley concealed their guns until inside the house, then Stumpf held the Stouts at gunpoint while Wesley ransacked the house. Mr. Stout moved toward Stumpf, who responded by shooting him twice in the head. Mr. Stout blacked out. When he regained consciousness, Mr. Stout heard two male voices coming from another room, and then heard four gunshots. These shots killed Mrs. Stout. Edmonds was arrested shortly after the crime, and his statements to police led to the arrest of Stumpf. Wesley was arrested later in Texas. While Wesley was fighting extradition, Stumpf entered a plea of guilty to aggravated murder and attempted murder, and admitted one of three charged capital specifications. Before a panel of three judges, he affirmed that his counsel had explained the elements of the aggravated murder charge. The panel satisfied itself as to the factual foundation of the plea, and accepted it. The capital specification made Stumpf subject to a possible death sentence. The contested penalty hearing took place before the same panel that had accepted his plea. Stumpf presented evidence in mitigation, including his difficult childhood, limited education, youth, dependable work history, and lack of prior serious offenses. His primary argument against death, however, was that he was *not* the one who shot Mrs. Stout, although he admitted being involved in the robbery and admitted shooting Mr. Stout. He reasoned that he should not be sentenced to death because of his limited role in the crime.

The prosecutor argued that Stumpf *was* the shooter or, alternatively, he did not shoot Mrs. Stout, but the evidence of his involvement in the armed robbery and shooting Mr. Stout was sufficient to prove his intent to kill. Under Ohio law, an accomplice to a capital murder with intent to kill can be sentenced to death. The three-judge panel did so.

In the meanwhile, Wesley was extradited to Ohio and was tried before a jury. The prosecutor presented new evidence in his proceeding, a cellmate who testified that Wesley had confessed to being the one who shot Mrs. Stout. Accordingly, the prosecutor argued that Wesley was the principal offender and urged the death penalty. Wesley testified in his own defense, accusing Stumpf of being the only shooter. The jury sentenced Wesley to life in prison with the possibility of parole in 20 years.

Following Wesley's trial, Stumpf brought a motion to withdraw his plea or vacate his death sentence, even while his direct appeal was still pending in the Ohio Court of Appeals. He argued that the prosecutor's adoption of a position in Wesley's trial inconsistent with the position taken in proceedings against Stumpf required relief. The Court of Common Pleas denied Stumpf's motion; the order was appealed together with the original judgment. The Ohio Court of Appeals and the Ohio Supreme Court both denied Stumpf's appeal and his later post-conviction petition for relief.

In federal district court, Stumpf's habeas petition was again denied, but the Sixth Circuit reversed. The circuit court found that Stumpf's guilty plea was invalid because he had not been adequately informed that intent to kill is a necessary element of aggravated murder in Ohio. Additionally, the circuit court found that Stumpf's right to due process was

violated by the prosecutor's taking inconsistent positions in connection with Stumpf's sentencing and in Wesley's trial.
The USSC granted certiorari to review the Sixth Circuit's holdings. Applying a pre-AEDPA standard of review, the Court reverses the circuit court in part, remanding for further proceedings on sentencing.

Stumpf's Guilty Plea was not Invalid

The USSC finds it "has never held that the judge must himself explain the elements of each charge to the defendant on the record" for a guilty plea to be valid. "Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." This prerequisite was satisfied in defendant's case where counsel stated on the record that the charges had been explained to defendant, and defendant affirmed this representation. The Court rejects defendant's argument that entering a guilty plea was so inconsistent with his steadfast denial of responsibility for the fatal shooting that it demonstrates he did not understand that one element of aggravated murder is intent to kill. Denying that he pulled the trigger is not inconsistent with having an intent to kill; intent to kill can be inferred from defendant's admitted involvement in the robbery, the fact that he and his accomplice entered armed, and defendant's admitted responsibility for the non-fatal shooting. Under Ohio law, an accomplice can be sentenced to death if he had an intent to kill.

The Court notes that Stumpf brought an independent ineffective assistance of counsel claim, but that claim is not under consideration here.

Prosecutorial Inconsistencies Did Not Invalidate the Guilty Plea, But May Affect Penalty

Stumpf argued that the inconsistent positions taken by the prosecutor require granting him relief, but the Court disagrees. The Sixth Circuit erred in holding that inconsistent positions taken by the prosecutor in the sentencing and withdrawal-of-plea hearings in defendant's case, and the trial of his accomplice, require reversal of defendant's conviction. The prosecutor argued in the alternative as to defendant, that he was the principal offender or that he acted as an accomplice with the intent to kill, thus making him subject to a death sentence; in the accomplice's trial, the prosecutor argued that the accomplice was the principal offender, based on the testimony of a jailhouse informant."[T]he precise identity of the triggerman was immaterial to [defendant's] conviction for aggravated murder." Additionally, defendant did not explain how the prosecutor's post-plea change of position could have affected whether defendant's plea was knowing and voluntary. The prosecutor's change of position may have had an effect, however, on the panel's decision to sentence defendant to death, and it is not clear whether the Sixth Circuit would have reversed the sentence if it had not also reversed defendant's conviction. Accordingly, the case is remanded to the circuit court for further proceedings.

Justice Souter (with Justice Ginsburg) concurs in the opinion but writes separately to clarify his understanding of the scope of the remand: "As I see it, Stumpf's argument is simply that a death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant." This question remains to be decided by the Sixth Circuit, and if that court decides a violation has occurred, "there will be remedial questions. May the death sentence stand if the State declines to repudiate its inconsistent position in the codefendant's case? Would it be sufficient simply to reexamine the original sentence and if so, which party should have the burden of persuasion? If more would be required, would a *de novo* sentencing hearing suffice?"

[Editor's note: Were the prosecutor to take contradictory positions on the same evidence (without new evidence interjected), the due process argument is likely stronger.]

Justice Thomas (with Justice Scalia) concurs in the opinion, but expresses a concern diametrically opposite that of Justices Souter and Ginsburg: He observes that "[t]his Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories." Even though not raised prior to his concurring opinion, Justice Thomas suggests the State will still be able to raise Teague and procedural default as defenses on remand. He also urges another challenge to Stumpf's prejudice argument, asking how Stumpf's sentencing could have been affected by the prosecutor's use of an inconsistent position in *post*-sentencing proceedings.

BRADY VIOLATIONS AND SUCCESSOR PETITIONS - GOOD CAUSE, PREJUDICE

Banks v. Dretke, 540 U.S. 668, 124 S. Ct. 1256 (February 24, 2004).

(Justice Ginsburg for a unanimous Court as to Parts I and III. Thomas, dissenting as to Part II, joined by Justice Scalia). Court grants Brady relief from the penalty phase, and a COA to determine whether trial phase relief should have been granted.

Background

Delma Banks was the last person seen with Richard Whitehead, whose body was found three days later. Whitehead had been shot three times. A confidential informant called the lead investigator on the Whitehead case to report that Banks was traveling to Dallas to meet with someone and to get a weapon. The investigator followed Banks to a residence, and stopped Banks after he left. The police also went to the residence, where they found Charles Cook and a gun later identified as the murder weapon. Cook told the police that Banks had left the gun with him some days earlier.

When Banks' trial counsel sought discovery regarding the confidential informant, the prosecution objected on the ground that the informant's identity was privileged. The trial court sustained the objection. The prosecution later assured counsel that Banks would receive all the discovery to which he was entitled, without having to make motions.

Banks' guilt trial lasted two days. Charles Cook was a key witness, conveying to the jury that Banks had appeared at Cook's residence with blood on his pants, saying he'd "got into it" with a white boy, and later that he'd killed the victim "for the hell of it" and taken his car. Later, Banks left on a bus and Cook abandoned the Mustang in which Banks had arrived. He told the jury that Banks left him with a gun, which he in turn sold to a neighbor, but retrieved shortly before the police arrived.

On cross-examination, Cook asserted repeatedly that he had not talked to anyone about his testimony; in fact, the lead investigator and the prosecutors had coached him on at least one occasion. But the prosecution took no steps to correct Cook's false statement.

Another important prosecution witness was Robert Farr, who related being with Banks when he returned to Dallas to attempt to retrieve his gun. He, too, assured the jurors that he had not talked to anyone about the case until a few days before trial, had never taken money from the police, and had not been promised anything by the prosecution. These denials were false, but the prosecution did nothing to correct them. In fact, Farr had been the paid informant who first reported to the authorities that Banks was traveling to Dallas to get a gun. Farr received about $200 total from the police, and believed that had he not given the information to police, he would have been arrested on drug charges.

Banks' trial counsel presented no evidence, and Banks was convicted of murder in the course of committing a robbery. The penalty trial lasted one day. The prosecution presented two witnesses: One testified that Banks had hit him with a gun and threatened to kill him. The other was Robert Farr, whose testimony supported the future dangerousness aggravator, because he reported that Banks said he wanted a gun to commit more robberies, and that he would "take care of it" if the victims resisted. Farr again testified falsely regarding contacts with police about this testimony, and denied that he had any concerns that he might be prosecuted if he did not testify. Two defense witnesses impeached Farr, but they were impeached as well.

The defense presented family and friends who testified to Banks' general good character, and Banks testified on his own behalf. He admitted striking the man the prosecution had called as a witness, and that he had cooperated with Farr in supplying a gun and possible murder weapon for an armed robbery. Banks stressed that he had no prior felony record. The jury answered the three special issues presented to them affirmatively, including future dangerousness. Banks was sentenced to death.

Banks' direct appeal and first two state post-conviction petitions did not raise Brady issues, and were denied. In his third post-conviction petition, Banks first asserted on information and belief that the prosecution had failed to disclose the nature and extent of the connections prosecution witnesses Farr and Cook had with police. The prosecution replied that nothing had been kept from the defense. The state specifically denied any connection to Cook, remaining silent regarding Farr. The state court rejected Banks' claims, specifically finding that the state made no agreement with Cook, without making any findings regarding Farr.

Banks filed his first federal habeas petition on March 7, 1996, raising the Brady claims. He filed affidavits from Farr and Cook supporting his assertions that the prosecution had withheld material exculpatory evidence. In the course of discovery in the district court, the prosecution disclosed a 74-page transcript of an interrogation of Cook, revealing that the prosecution had carefully rehearsed Cook for his testimony in Banks' trial. During an evidentiary hearing in district court, a detective revealed for the first time that Farr was a paid informant and had been paid $200 for his role in Banks' case.

The District Court granted penalty relief based on the Farr Brady claim and ineffective assistance of counsel, but denied Banks' habeas petition as to guilt. The Fifth Circuit, in a 2003 *per curiam* opinion, reversed the order on penalty, holding that Banks' failure to develop information as to Farr in 1992, while still in state court, made the district court's evidentiary hearing unwarranted. The Fifth Circuit reasoned that Banks should have tried to locate Farr and interview investigating officers. Moreover, the circuit court concluded that the fact that Farr was an informant was immaterial because other evidence corroborated his testimony. Also, the district court had based its decision on the cumulative weight of the Brady claim and ineffective assistance of counsel, but Banks had not pled cumulative error. The Fifth Circuit also rejected Banks' argument that the Cook transcript should be considered as if it had been raised in the pleadings, under FRCP Rule 15(b).

Banks filed a petition for writ of certiorari just prior to the date set for his execution. The USSC granted a stay on the execution date, and granted the petition six weeks later.

The Farr Brady Claim

In order to overcome his failure to present additional evidence in state court to support his Brady claim, petitioner must demonstrate cause and prejudice. Petitioner demonstrates cause by establishing the second prong of his Brady claim – that the reason for his failure was the State's withholding of exculpatory evidence – and he

demonstrates prejudice by demonstrating that the evidence withheld was material. The first Brady prong is satisfied: The paid informant status of a key prosecution witness is evidence that is "advantageous" to petitioner. The second prong, and "cause" are established: (1) The State was aware of the witness' status but did not disclose it; (2) the state assured petitioner that it would disclose all Brady material; (3) in response to petitioner's assertion that the witness was an informant, the State denied any such relationship; and (4) when, during his trial testimony, the witness denied any relationship with the prosecution, the prosecution did nothing to correct the misrepresentations. The State's assertion that Banks did not exercise due diligence in discovering the witness' status is unavailing, where the prosecution actively represented that it had disclosed all exculpatory information to the defense; petitioner was entitled to treat the prosecution's representations as truthful. As to penalty, the witness' testimony was material, because he was the only source of testimony suggesting that petitioner planned to commit robberies in the future, especially because petitioner had no prior criminal record. And without awareness of the witness' informant status, petitioner did not have the same latitude normally permitted during cross-examination of an informant to impeach this testimony.

Regarding the State's continued contention that Banks should have looked more closely for the truth about Farr, Justice Ginsburg writes, "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."

The Cook Brady Claim

The USSC's ruling as to the Cook claim is limited to whether a COA should have issued, which rests on the applicability of Rule 15(b) to an evidentiary hearing. The rule provides that when an issue is "tried" by express or implied consent of the parties, it shall be treated as if it had been raised in the pleadings. Banks argued that the issue of the prosecution's suppression of the interrogation transcript, revealing that Cook had been coached (contradicting his testimony in trial) was "tried" in the evidentiary hearing in district court.

The district court and Fifth Circuit rejected this argument, but the USSC points to precedent that lead to a contrary conclusion.

A COA should have issued as to petitioner's Brady claim where the prosecution's suppression of evidence indicating that a key prosecution witness had been prepared for his testimony against petitioner (contrary to the witness' representations at trial) was "indeed aired" before a magistrate judge during an evidentiary hearing in federal court and the transcript was admitted into evidence without objection. The USSC has previously held that FRCP Rule 15(b) applies in federal habeas proceedings, in Harris v. Nelson, 394 U.S. 286, 294, n. 5 (1969), and Withrow v. Williams, 507 U.S. 680, 696 (1993). The USSC rejects the Fifth Circuit's reasoning that applying Rule 15(b) would undermine the State's exhaustion and procedural default defenses, observing though that there was no inconsistency between Rule 15(b) and those defenses pre-AEDPA; AEDPA now requires an express waiver of exhaustion. Petitioner's Brady claim arose prior to the enactment of AEDPA.

Justice Thomas' Dissenting Opinion, Joined by Justice Scalia

Justices Thomas and Scalia join the majority in holding that a COA should have issued as to the Cook Brady issue, but dissent as to the majority's holding that the Farr Brady issue warranted relief. Justice Thomas minimizes the impact of Farr's testimony, arguing that the jury was confronted with evidence that Banks had, on a whim, killed a 16-year-old, and a week earlier had pistol-whipped and threatened to kill his brother-in-law. There

was also evidence that Banks was ready and willing to help others commit robberies by providing a weapon. Additionally, Justice Thomas questions whether Banks really demonstrated cause for failing to develop this Brady claim in state court, and offers his view that Banks' showing on his ineffective assistance of counsel claim (which was not considered by the majority) came "nowhere close" to meeting the requirements of Strickland.

Stay Granted then Cert Denied

Lovitt v. True, No. ____, stay granted pending consideration of certiorari ___ U.S. ___, 126 S.Ct. 10 (July 11, 2005), ruling below 403 F.3d 171 (4th Cir. 2005); certiorari ultimately denied ___ U.S.___ (October 5, 2005). Questions Presented were: 1. Whether the Court of Appeals for the Fourth Circuit should be reversed for repeating its error in Wiggins v. Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), of upholding a death sentence where defense counsel conducted little investigation of their client's background and failed to uncover and present to the jury extensive evidence of childhood abuse. 2. Whether, in light of the fact that DNA evidence has exonerated more than a dozen individuals on death row, the Court of Appeals erred in holding that Youngblood v. Arizona, 488 U.S. 51 (1988), permits a Commonwealth employee to destroy DNA evidence deliberately, unlawfully, and in reckless disregard for the petitioner's rights before post-conviction proceedings have commenced? 3. Whether the Court of Appeals correctly held, in agreement with five circuits but in conflict with three others, that the prosecution had no duty under Brady v. Maryland, 373 U.S. 83 (1963), to disclose the medical examiner's exculpatory opinion because defense counsel purportedly could have discovered the examiner's opinion on cross-examination? Defendant was represented by Ken Starr.

Sixth Circuit Brady Decisions

Jamison v. Collins, 291 F.3d 380 (6th Cir. 2002). R due to Brady violations in failing to disclose any exculpatory evidence because the police practice (which has since been discontinued) was to carefully prepare the homicide book to contain only inculpatory evidence. The undisclosed evidence - of a positive identification of different suspects by an eyewitness, evidence that could have been used to impeach petitioners' accomplice who testified for the prosecution, inconsistencies tin the description of the suspects given by eyewitnesses to the crime, and evidence linking other suspects to a series of crimes the prosecution theorized were related to the murder for which petitioner was convicted - was material and petitioner was prejudiced by its suppression. Petitioner's failure to raise Brady claim by failing to present it to a state court for review is excused for cause and prejudice; the factual basis for the claim, that police had kept if out of the homicide book turned over to prosecutors - was not reasonably available to counsel earlier. Ohio affirmatively represented tot the defense that no favorable evidence existed. Ohio cannot now argue that it was unreasonable for defense counsel not to have caught it suppressing evidence.

Castleberry v. Brigano, 349 F.3d 286 (6th Cir. Nov. 12, 2003). R due to *Brady* claim in Ohio non-capital aggravated murder and aggravated robbery case. Petitioner was convicted on the basis of testimony from a witness who claimed to have seen petitioner cross the street from the bar where the two had been and commit the crime, and to have talked to petitioner about the crime afterward. This witness, whose testimony was generally corroborated by several other men from the bar, secured early release from prison on another offense as a result his testimony. No other evidence linked petitioner to the crime. In state post-conviction proceedings, the following evidence – all of which had been in the hands of law enforcement, and none of which was turned over to trial counsel – came to light: a description of the assailant given by the victim prior to his death which clearly differed from petitioner's appearance and stature in several important

respects; a statement by another witness indicating that the state's primary witness had himself been overheard plotting to rob the victim before the crime; and statements from three of the victim's neighbors who described seeing two men whose descriptions did not match petitioner near the scene of crime, hearing heated words exchanged, hearing a gunshot, and seeing a car leave immediately thereafter. The state appellate court upheld the denial of post-conviction relief on petitioner's *Brady* claim "because it found that no single item of withheld evidence was material: 'The process which this appellate court must follow is to evaluate the individual bits of information withheld to determine if the information was beneficial to the defense and material to the guilt or innocence such that the information should have been provided.'" 2003 WL 22663236 at *5. The Sixth Circuit found this reasoning both contrary to and an unreasonable application of federal law. The state court decision was "contrary to" *Kyles v. Whitley*, which expressly rejected the item-by-item approach followed by the state court in favor of a collective review of all withheld evidence. The decision involved an unreasonable application of federal law because, "even if the state court had identified the correct legal standard and had evaluated the evidence collectively, . . . it could not have reasonably believed that the outcome of Castleberry's trial was worthy of confidence under Brady." 2003 WL 22663236 at *6.

In Re Lott, 366 F.3d 431 (6th Cir. Apr. 22, 2004). The Sixth Circuit grants petitioner's application for an order directing the district court to consider petitioner's second habeas petition and a stay of execution. Petitioner asserts an actual innocence claim, based on improperly withheld evidence at trial. The Brady claim petitioner asserts was presented to the federal court previously, but the court did not reach the constitutional merits, deciding that the claim was procedurally barred. Nor did the court reach the merits of petitioner's "actual innocence" claim because it was pending in state court. The state courts later reached a decision on the merits based on a second petition for post-conviction relief. Additionally, while the factual predicate was discovered prior to adoption of AEDPA, this is the first opportunity since the AEDPA restrictions were imposed for the claim to be considered by the federal court. The Sixth Circuit concludes that the second petition should be authorized because petitioner can make a prima facie showing that, if proven, the facts underlying the claim would be sufficient to establish by clear and convincing evidence that no reasonable trier of fact would have found petitioner guilty: Petitioner has made a prima facie showing that the prosecutor did not reveal the victim's dying statement that his attacker had a skin color different than petitioner's and that the attacker was known to the victim, nor did the prosecutor reveal that the victim had kerosene (used in the murder) in his house, contrary to the prosecutor's representation that the attacker had to bring the kerosene to the victim's house, showing that the act was premeditated. Moreover, the petitioner showed by citation to prior Ohio opinions that the prosecutor was guilty of similar misconduct in ten or more other cases. The Sixth Circuit states firmly, "[T]he egregious prosecutorial misconduct alleged here, if proved, must be deterred. So long as we value the rule of law, such conduct, if it occurred, cannot be tolerated in any kind of case – much less in death penalty cases."

PRESERVATION OF EVIDENCE

Illinois v. Fisher, 540 U.S. 544, 124 S.Ct. 1200 (Feb. 23, 2004) (per curiam)
Reversing grant of relief by state court to defendant charged with possession of cocaine. Defense had filed discovery motion prior to trial, defendant failed to appear and was then arrested 10 years later. Counsel renewed his production request when learning that the police acting in accord with established procedures had destroyed the substance The Illinois appeals court dismissed the indictment without a showing of bad faith as required by *Arizona v. Youngblood*, 488 U.S. 51 (1988), as the evidence was defendant's 'only hope for exoneration'. The Supreme Court reverses, finding it difficult to distinguish Youngblood, where the evidence also could have eliminated the defendant. "In any event, Youngblood depended not on the centrality of the contested evidence to the

prosecutor's case or the defendant's defense, but on the distinction between 'material exculpatory evidence' (controlled by Brady), and 'potentially useful' evidence". The substance here (tested four times already) was at best potentially useful, so the bad-faith requirement applies. Justice Stevens' concurrence invites a state constitutional decision on remand giving relief to Fisher, citing cases from other states that have done away with the bad-faith requirement.

Stay Granted then Cert Denied

Lovitt v. True, No. ____, stay granted pending consideration of certiorari ___ U.S. ___, 126 S.Ct. 10 (July 11, 2005), ruling below 403 F.3d 171 (4th Cir. 2005); certiorari ultimately denied ___ U.S.___ (October 5, 2005). Questions Presented were: 1. Whether the Court of Appeals for the Fourth Circuit should be reversed for repeating its error in Wiggins v. Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), of upholding a death sentence where defense counsel conducted little investigation of their client's background and failed to uncover and present to the jury extensive evidence of childhood abuse. 2. Whether, in light of the fact that DNA evidence has exonerated more than a dozen individuals on death row, the Court of Appeals erred in holding that Youngblood v. Arizona, 488 U.S. 51 (1988), permits a Commonwealth employee to destroy DNA evidence deliberately, unlawfully, and in reckless disregard for the petitioner's rights before post-conviction proceedings have commenced? 3. Whether the Court of Appeals correctly held, in agreement with five circuits but in conflict with three others, that the prosecution had no duty under Brady v. Maryland, 373 U.S. 83 (1963), to disclose the medical examiner's exculpatory opinion because defense counsel purportedly could have discovered the examiner's opinion on cross-examination? Defendant was represented by Ken Starr.

JURY SELECTION

Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029 (2003).
Court (7-2) reverses the Fifth Circuit's denial of a COA of petitoner's Batson v. Kentucky claim, and remands for further proceedings. In the course of discussing petitioner's entitlement to a COA, the Court addressed the evidence supporting petitioner's Batson claim, and the ways in which that evidence was relevant to the merits of the claim, in some detail. Disagreeing with the lower courts rejection of petitioner's "comparative analysis" evidence, the Court found that, "[t]o the extent a divergence in responses [by prospective jurors to voir dire questions] can be attributed to the racially disparate mode of examination, it is relevant to our inquiry."123 S.Ct. at 1037; see also id. at 1043("We question the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning"). The Court went on to find that "a fair interpretation of the record on this threshold examination in the COA analysis is that the prosecutors designed their questions to elicit responses that would justify the removal of African- Americans from the venire." 123 S.Ct. at 1044. The Court also agreed with petitioner that the prosecution's conduct in connection with its use of a jury shuffle "raise[s] a suspicion that the State sought to exclude African-Americans." Id. Finally, the Court accorded "some weight to petitioner's historical evidence of racial discrimination by the District Attorney's Office" in other cases, observing that this evidence "reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection," and stating that "[t]his evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case." Id. at 1045.

Justice Scalia concurred in the judgment, but wrote separately to (1) "explain why [he] believe[s] the Court's willingness to consider the [AEDPA] limits on habeas relief in deciding whether to issue a [COA] is in accord with the text of 28 U.S.C. § 2253(c)," and (2) "to discuss some of the evidence on the State's side of the case - which, though

inadequate (as the Court holds) to make the absence of a claimed violation of Batson v. Kentucky . . ., undebatable, still makes this, in [his] view, a very close case." Id.

Justice Thomas dissented alone, contending that "[b]ecause petitioner has not shown, by clear and convincing evidence [as required by §2254(e)(1)], that any peremptory strikes of black veniremen were exercised because of race, he does not merit a [COA]" Id. at 1048.

Miller-El v. Dretke, ___ U. S. ___, 125 S.Ct. 2317 (June 13, 2005).

R on Batson grounds, 6-3 decision. In 2003, Miller-El's case was remanded to the Fifth Circuit (see above), which then rejected his Batson claim on the merits. The USSC again granted certiorari, and reverses. Using statistics and comparative analysis the court finds discriminatory purpose in the exercise of peremptory challenges. During the course of jury selection, the prosecution peremptorily excused ten of the twenty black members of the venire panel, or 91 percent of the eleven eligible black venire persons; nine others were excused for cause or by agreement, and one served on the jury. "More powerful than these bare statistics," however, is the evidence of discrimination to be drawn from a comparison of the *voir dire* of non-black venire members who were not excused by the prosecution with the black members who were. Justice Souter's analysis is detailed and in-depth, looking carefully at the jurors' written and oral responses as well as the soundness of the prosecution's proffered race-neutral reasons for excusing individual jurors; no comparative analysis had been conducted in the state court. He finds the timing of the prosecution's proffers telling: Where a prosecutor made a misrepresentation of the potential juror's responses to a *voir dire* question and was called on it by defense counsel, the prosecutor did not defend his misstatement or withdraw the strike. Instead, he offered a new explanation for the strike. Justice Souter refers to this as "pretextual timing." Another significant factor is the degree of interrogation engaged in by the prosecution on those issues later offered as a race-neutral reason.

In response to the dissent's complaint that the majority should limit itself to the facts and theories presented to the trial court, Justice Souter warns against "conflat[ing] the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." The majority expresses some concern regarding juror questionnaires and information cards that were added to the habeas record after Miller-El's petition was filed with the district court, pondering whether AEDPA's deferential standard can be waived by the state's failure to object to a federal court considering evidence that was not put before the state courts. But the majority does not reach this issue, noting instead that the prosecution has actually relied on information in the questionnaires in its argument before the USSC, and that the prosecution's arguments in support of the race-neutrality of the jury selection process "would fare even worse than they do" without the questionnaires. The majority dismisses the dissenters' assertion that a comparison of excused jurors to those who were not excused must match on *all* points. "None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one." The Court is also unwilling to accept that the instinctual nature of peremptory challenges warrants greater leeway for reviewing courts to find rationalizations: Even though it may at times be difficult to enunciate one's reasons, "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives…. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."

In addition, broader patterns of practice in jury selection supported a finding of discriminatory purpose. Looking beyond the bare statistics and a direct comparison of

characteristics of struck jurors with those of jurors accepted by the prosecution, the Court finds additional reasons to find a Batson violation in this case. First, the prosecution twice used and once unsuccessfully requested a jury shuffle, and each time, the request was made when black venire persons were seated near the front and thus more likely to be examined on *voir dire*. The majority is unimpressed by the prosecution's suggestion that there might be race-neutral reasons for requesting a shuffle; there might be, but none were offered in this case "and nothing stops the suspicion of discriminatory intent from rising to an inference." Miller-El requested shuffles on several occasions as well, but this is irrelevant to whether the prosecution used the technique for an improper purpose.

The majority also notes that the prosecution employed different scripts for describing the death penalty before asking a prospective juror his or her beliefs regarding the punishment. Ninety-four percent of the white jurors were read a bland description of the process; 53 percent of the black jurors were read a more detailed account that included mention of being placed on a gurney and injected with lethal chemicals. The prosecution asserted that the latter was used where the prospective juror demonstrated some ambivalence, regardless of the race of the juror. But the Court finds that the prosecution's justification fails as to four of the eight black venire persons to whom it was given.

Another kind of disparate questioning the majority labels "trickery;" the state concedes that it was purposeful manipulation to create cause to strike jurors, but claims it did so to eliminate from the pool venire members who expressed opposition to or ambivalence toward the death penalty. Potential jurors were asked how low a sentence they would consider imposing for murder; most were first informed that the minimum term in Texas is five years. Others were not so informed, and if the individual responded with a minimum term above five years, the prosecutor would move to strike for cause, even though this seems contrary to the normal prosecutorial desire for tough jurors. The prosecution's explanation does not hold up under analysis, because most white jurors who expressed doubt about the death penalty were not asked the minimum term question, but *all* black panel members who expressed opposition or ambivalence were asked.

Finally, the Court looks to the history of discriminatory jury selection practice in the Dallas County prosecutor's office for confirmation of its conclusion that the observed practices were improperly motivated. Miller-El presented witnesses, including two Dallas County district court judges who had been assistant district attorneys, who testified that for decades the office had a systematic policy of excluding blacks from juries. In addition, a jury selection manual written in 1968, but still in circulation in 1976 and available to at least one of the two prosecutors in this case, outlined the reasons for excluding minorities from juries. And the prosecutors marked the race of each prospective juror on the juror cards.

The USSC reverses the Fifth Circuit's denial of relief on petitioner's Batson claim, finding that the state court unreasonably applied clearly established federal law in concluding that the peremptory strikes of at least two black venire members who were otherwise "ostensibly acceptable to prosecutors seeking a death verdict" were not racially motivated. "The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny." In support of this finding, the USSC notes: (1) the raw statistics indicate discrimination, in that 91 percent of qualified black panel members were removed, and only twelve percent of the non-black jurors were removed; (2) the prosecutors' use of the jury shuffle on two occasions can only be explained by a desire to move black venire persons to the end of the line to reduce the chance that they would be questioned; (3) disparate questioning was employed, confronting 53 percent of black panelists and only 3 percent of non-black panelists with a graphic description of the death penalty before questioning the panelists on their feelings toward the punishment, and subjecting all black panelists – but only 27 percent of non-

black panelists – who expressed some ambivalence with a trick question regarding the minimum term acceptable for murder, in order to create cause for challenge; and finally, the district attorney's office in question had a history of discrimination in jury selection and the prosecutors in this case followed a 20-year-old manual on jury selection that recommended removing all black jurors. As to each practice, the prosecution explained that the actions taken were based on the individual jurors' expressions of doubt as to the death penalty, but the comparison of black panel members who were excused to non-black panel members who were not excused belies that explanation.

Justice Breyer joins the majority opinion, and concurs specially, suggesting the case demonstrates the need to re-think the peremptory challenge system as a whole. As Justice Thurgood Marshall predicted in Batson, "[t]he only way to 'end the racial discrimination that peremptories inject into the jury-selection process' … was to 'eliminat[e] peremptory challenges entirely.'" Proof of discriminatory purpose is notoriously difficult to establish and, Justice Breyer argues, "peremptory challenges seem increasingly anomalous in our judicial system." The science of jury selection is based largely on demographics, with special attention to stereotypes based on race, national origin, and sex. "These examples reflect a professional effort to fulfill the lawyer's obligation to help his or her client. Nevertheless, the outcome in terms of jury selection is the same as it would be were the motive less benign." [Cite omitted.]

Justice Thomas dissented with Scalia and Rehnquist, objecting first to the majority's consideration of evidence that was not before the state courts, namely, the juror questionnaires and juror cards. "Worse still, the majority marshals those documents in support of theories that Miller-El never argued to the state courts." This violates the deference standard of AEDPA, he argues. Finally, even taking the evidence presented on its face, the dissenting justices disagree with the majority that it is sufficient to prove intentional discrimination in selecting the jury.

Johnson v. California, ___ U.S. ___, 125 S.Ct. 2410 (June 13, 2005).

Reversal of conviction in 8-1 decision on *Batson* grounds. The USSC reverses the California Supreme Court's (CSC) reinstatement of petitioner's murder conviction, finding that the Wheeler standard applied by the CSC, which requires that a defendant must establish by a "strong likelihood" that the prosecution exercised peremptory challenges with a discriminatory purpose in order to require that the prosecutor offer race-neutral explanations, is "at odds with the prima facie inquiry mandated by *Batson*." *Batson* requires only that the challenger present enough evidence initially from which the trial court can make a reasonable inference that the prosecution has acted with improper racial motivation. If the challenger makes this showing, the party exercising the peremptory challenges must provide race-neutral explanations, and the trial court then determines whether the explanations are persuasive.

During jury selection, after prospective jurors were excused for cause, the remaining venire included just three blacks. The prosecutor used three of his twelve peremptory challenges to remove them, leaving an all-white jury to try the black defendant. Defense counsel objected to the second and third strike, but the trial judge rejected both, finding that the defendant had failed to establish a *prima facie* case of discriminatory intent under *Ca. v. Wheeler*'s "strong likelihood" standard. The Cal. Sup. Ct. (CSC) upheld this finding the Batson "reasonable inference" standard was equivalent, and that the standard requires the objecting party to present "strong evidence" that makes it more likely than not that there is a discriminatory intent if no race-neutral reasons were to be offered. The CSC acknowledged that removing all black jurors in a case where the victim was white and the defendant is black "looks suspicious," and that the statistical disparity of the exercise of peremptory challenges against the black jurors as compared to with regard to

white jurors was "troubling," but the state court nevertheless deferred to the trial court's "carefully considered ruling." The USSC granted certiorari, but dismissed the case for lack of jurisdiction until the CCA decided the remaining issues and the appeal became final. The USSC then granted certiorari a second time.

The USSC, per Justice Stevens, finds that "strong likelihood" is not the same as "reasonable inference" and so the state courts used the wrong legal standard under *Batson*. This was a "narrow but important" issue: "whether Batson permits California to require at step one that 'the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.'" On its face, Batson does not support California's rule. The trial judge there rejected the defendant's challenge without requiring any explanation from the prosecutor for having excused all black persons on the jury venire, so the USSC remanded the case for further proceedings. "Thus, in describing the burden-shifting framework, we assumed in Batson that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated." It was *not* assumed that the defendant would have to persuade the judge at the outset, when some of the facts may not be known, that the prosecutor was acting with an improper motive.

The state argued that limiting the scope of the first step to evidence sufficient to permit the trial judge to draw an inference of discrimination effects a reduction in the standard of review: If a prosecutor did not offer race-neutral explanations, the defendant would prevail based on nothing more than an inference. "Respondent's argument is misguided." The Court reiterates that the burden of persuasion rests with the challenger and never shifts, but that burden does not become relevant until the *third* step in the Batson analysis.

That a *prima facie* case should be established by a reasonable inference rather than the higher "strong likelihood" is consistent with the high purposes of Batson, to eradicate discrimination in civic institutions which in turn tends to undermine public confidence in the fairness of the justice system. "The three step process thus simultaneously serves the public purposes Batson is designed to vindicate and encourages 'prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.'"

Justice Thomas dissented, stating "California's procedure falls comfortably within its broad discretion [under Batson] to craft its own rules of criminal procedure…."

Rice v. Collins, ___U.S.___, 126 S.Ct. 969 (Jan. 18, 2006) (non-capital).
Reversing Ninth Circuit Batson decision under 2254(d)(2)

Background

During *voir dire* in Steven Collins' trial on drug charges, his attorney raised a Batson/Wheeler challenge after the prosecutor exercised a peremptory strike against a young African-American woman. When asked to provide race-neutral reasons for the strike, the prosecutor remarked that the prospective juror had rolled her eyes in response to a question from the court, was young and might be too tolerant of the drug crime with which Collins was charged, and was single and did not have ties to the community. She also made a reference to trying to obtain gender balance, but the trial court disallowed reliance on gender. The trial court accepted the prosecutor's race-neutral reasons, noting that while the judge had not observed the eye rolling, the excused juror was young; the prosecutor had peremptorily challenged a young white male juror as well. The CCA affirmed Collins' conviction, finding that the prospective juror's youth was a sufficient

basis for excusing her and, moreover, the behavior witnessed by the prosecutor was an adequate and neutral reason. The CSC denied review. At the district court level, Collins was again unsuccessful, but a divided panel of the Ninth Circuit reversed. The panel majority concluded the prosecutor was not credible – and thus her race-neutral reasons could not be trusted – because (1) she referenced another African-American female juror as young, when she was actually a grandmother; (2) she offered gender as an acceptable basis for striking the juror; and (3) she reasoned that a single person with no community ties would be too tolerant of the drug possession crime charged, even though the excused juror had stated during *voir dire* that she believed the crime should be illegal and denied any other reason that she could not be impartial. The USSC granted certiorari "[c]oncerned that … a federal court set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record.…"

The State Court's Determination of the Facts was Not Unreasonable

Justice Kennedy's opinion is concise, dispatching minor issues quickly. Whether the petitioner has the burden of rebutting by clear and convincing evidence the presumption that the trial court's factual findings are correct, under 28 USC 2254 (e)(1), the Court need not decide: "Even assuming, *arguendo*, that only § 2254(d)(2) applied in this proceeding, the state-court decision was not an unreasonable determination of the facts in light of the evidence presented in the state court." [Ed. Note: The interaction between subsections (d)(2) and (e)(1) of § 2254 is a question of some complexity, not yet authoritatively resolved. The leading case is Judge Kozinski's opinion in Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004).] The Court has an answer to each one of the reasons given by the Ninth Circuit for not crediting the prosecutor's race-neutral reasons.

First, when considered in context, the prosecutor's statement regarding the "young" juror who was actually a grandmother could easily have been an innocent misstatement. The discussion at that point in the record involved three jurors, and they were being referenced by number; the prosecutor may simply have stated the wrong number.

Second, given that the trial court refused to rely on the prosecutor's improper proffer of gender as a basis for excusing the juror, "[t]he panel majority assigned the gender justification more weight than it can bear." There were other reasons offered, such as the eye-rolling incident, and the Court finds nothing in Collins' argument to explain why the improper suggestion that the juror was excused because of gender should undermine the prosecutor's credibility as to the other reasons.

Finally, Collins did not convince the Court that the prosecutor's skepticism as to the juror's ability to apply the law, despite her assurances that she believed drug possession should be a crime, undermines the prosecutor's credibility that her non-racial explanations for excusing the juror were merely pretextual. Justice Kennedy explained that it was not unreasonable to believe the prosecutor was sincere in not trusting a younger person with few community ties to be as tough on a drug crime as someone who is more established. As a further indication that this reason was race-neutral, the Court notes that the prosecutor also dismissed a young white male with similar characteristics.

Inferences drawn by the Ninth Circuit from the record were not a sufficient basis for concluding that the prosecutor's race-neutral reasons were merely pretext and to find that the defendant had demonstrated a Batson violation. Nor was the Ninth Circuit's analysis sufficient to reach the conclusion that the state courts had unreasonably determined the facts in affirming petitioner's conviction. The circuit court found that the trial court was unreasonable in believing the prosecutor's race-neutral explanations for excusing an African American woman, including a behavioral observation offered by the prosecutor that the trial court did not see. The Ninth Circuit concluded that the prosecutor should not have been believed in this because she also cited gender as a reason for excusing the

woman, misspoke in identifying a different juror as young when she was actually a grandmother, and explained that the juror's lack of ties to the community made the prosecutor suspect the truth of the juror's voir dire responses that she would be an impartial juror in a drug possession case. "The [Ninth Circuit] panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus."

Justice Breyer's Concurring Opinion

Justice Breyer, joined by Justice Souter, offers this case as another example of the inherent weaknesses in the Batson test as a tool to eradicate unconstitutional discrimination in jury selection. Given that jury selection is to some extent instinctual, Justice Breyer asks, "Insofar as Batson asks prosecutors to explain the unexplainable, how can it succeed?" And, given that some discriminatory biases may not even be known to the prosecutor exercising peremptory challenges, "How can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor? Justice Breyer raised these same questions in a separate concurrence in Miller-El II. The problem boils down to the capriciousness of peremptory challenges themselves, as Justice Breyer sees it. "I have argued that legal life without peremptories is no longer unthinkable. [Cites omitted.] I continue to believe that we should reconsider Batson's test and the peremptory challenge system as a whole. Nonetheless, because the Court correctly applies the present legal framework, I concur in its opinion."

Sixth Circuit Decisions on Impartial Jury

White v. Mitchell, 431 F.3d 517 (6th Cir. Dec. 7, 2005)
Petitioner's death verdict is reversed and the case is remanded for a new trial. The trial court's denial of petitioner's challenge for cause to Juror S. was an unreasonable application of clearly established federal law. The juror strongly expressed her opinion, based on facts garnered from the media, that petitioner was guilty, but ultimately stated unequivocally that she could set aside any previously formed opinions as to guilt and decide the case based solely on the evidence presented at trial. Thus, there was no error as to the guilt phase. On *voir dire* regarding penalty, however, the same juror made "a series of highly troubling and contradictory statements … with regard to her ability to be a fair and impartial juror for the penalty phase of sentencing," even to the point of saying that she did not think it would be fair to petitioner for her to sit on the jury. The prosecution's repeated suggestions that she only need "try to the best of her ability" to apply the law was "an impermissibly lax statement of the duty of a juror …." The Sixth Circuit finds that the most troubling of the juror's statements were those indicating that (1) she had already decided the appropriate punishment and believed the rest of the jury would feel similarly; (2) she believed that it was likely the jury would find petitioner guilty and if so, she believed he should be punished for that and "I'd like to be a part of that;" and (3) she believed that her view of the probable outcome was the true and honest one. In light of the *voir dire* as a whole, the circuit court cannot be assured Juror S. was able to set aside her own opinion as to penalty, and has no difficulty concluding that petitioner was prejudiced thereby.

Franklin v. Anderson, 434 F.3d 412 (6th Cir. Jan. 9, 2006).
The Sixth Circuit affirms the district court's judgment that a juror was biased and a new trial is warranted. The juror was not biased because of a preexisting idea about the defendant, however, but because she could not understand the law. "Although we normally defer to the assessment of the trial judge, who hears and sees the prospective juror's tone of voice and sees her demeanor, in this case, the cold record alone is so extensive and so persuasive that it outweighs our presumptive deference." At least five times during voir dire, the juror's responses demonstrated that she did not understand the

presumption of innocence. Even after the trial judge attempted to explain the presumption, to which the juror responded, "I guess so, if that's the law," the juror stated at the end of voir dire, "If he's proven guilty, then justice is done. If he's proven not guilty, then justice is done." The circuit court reaches this conclusion despite the juror's assurances that she would consider all of the evidence, which "does not remove the fact that she also seemed to expect some of that evidence to come from [defendant] by way of proof of his innocence."

Sixth Circuit Decision on Dual Juries

United States v. Young, 424 F.3d 499 (6th Cir 2005). Court overturns order granting defendant Donnell Young's motion to empanel separate juries to hear the guilt and penalty phases of his federal trial on capital and noncapital offenses. The district court found it had authority under 18 U.S.C. § 3593(b)(2)(C), on a showing of "good cause," to decide to empanel a non-death-qualified jury to determine the question of guilt and then, if convicted of a capital offense, to empanel a second death-qualified jury to decide whether to impose the death penalty. The Circuit Court found the dual-jury procedure violates the Federal Death Penalty Act, specifically, 18 U.S.C. § 3593(b).

District Court Decision of Interest

U.S. v. Angela Johnson, 366 F.Supp.2d 822 (N.D. Iowa, Mar. 31, 2005). District Judge Mark W. Bennett's thorough and thoughtful opinion concludes that asking case-specific questions of prospective jurors during voir dire was permissible, appropriate, and necessary to allow the parties to determine the ability of jurors to be fair and impartial in the case actually before them, not merely in some "abstract" death penalty case. "After all, if the jury selected in this case imposes the death penalty on Angela Johnson, there will be nothing "abstract" about that determination or the penalty imposed." The facts included in any case-specific questions, to have any probative value as to a juror's views, should be facts that are likely to be shown by the trial evidence or genuinely in dispute in the case. To avoid stake-out questions, questions must be in the form of whether or not the prospective juror "could fairly consider" a life sentence, a death sentence, or both, not whether the prospective juror would vote for life or death in light of particular facts.

Ohio Supreme Court on Inadequate Voir Dire

Ohio v. Jackson, 107 Ohio St. 3d 53, 836 N.E.2d 1173 (Nov. 23, 2005).
PR of one of two death sentences imposed on defendant Jackson. Jackson's attorneys should have been able to tell prospective jurors about the 3 year old victim's age during questioning to find out if that would make them more likely to impose the death penalty. Some jurors wrote in their questionnaires that they don't think penalties are strong enough for people who hurt children.
"The trial court here was on notice that some prospective jurors harbored a strong bias in favor of imposing death for murderers of children," Moyer wrote for seven justices. "If an issue of bias surfaces before trial, it is the trial court's responsibility to conduct an adequate inquiry."

ADMISSIBILITY OF DEFENSE EVIDENCE OF INNOCENCE

Cert Grant

Holmes v. South Carolina**,** No. 04-1327, cert. granted ___ U.S. ___, 126 S.Ct. 34 (Sept. 27, 2005), ruling below 605 S.E.2d 19 (SC 2004). Question Presented: Whether the state's rule limiting admissibility of third-party guilt evidence violates defendant's constitutional right to present a complete defense, grounded in due process,

confrontation, and compulsory process clauses? [The state court held "The evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." The state court also held that the strength of the evidence of Holmes' own guilt (including physical evidence "which may have been compromised by the unprofessional manner in which the evidence was collected") made any inference of third-party guilt unreasonable and so rendered the third-party guilt evidence inadmissible.]

Clark v. Arizona, No. 05-5966, cert granted ___ U.S. ___, 126 S.Ct. 797 (Dec. 5, 2005), ruling below ___ P.3d___ (Ariz. Ct. App., Nos. 1 CA-CR 03-0851 and 1 CA-CR 030985, Jan. 25, 2005 unpublished). Questions Presented: Does Arizona's insanity law, as set forth in ARS 13-502 (1996) and applied in this case, violate defendant's right to due process under Fourteenth Amendment? Does Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut state's evidence on element of mens rea violate defendant's right to due process under Fourteenth Amendment?

Sixth Circuit Decision

Davis v. Straub, 430 F.3d 281 (6th Cir. Dec. 1, 2005).
Sixth Circuit panel vacates prior opinion granting relief, issuing instead an opinion holding that state court's action was not contrary to or an unreasonable application of clearly established federal law. The state appellate court held that the trial court did not commit prejudicial error by allowing a defense witness to make a blanket invocation of his Fifth Amendment privilege without taking the stand and responding to individual questions. "Our review of these cases … convinces us that Hoffman v. U.S., 341 U.S. 470 (1951) and Washington v. Texas, 388 U.S. 14 (1967) did not clearly establish how to resolve the conflict between a witness's Fifth Amendment privilege and a defendant's right to present his defense. Because these cases do not resolve the issue, the state courts necessarily could not have acted contrary to clearly established Supreme Court precedent." One judge dissented, remarking, "There seems little doubt that prior to the enactment of … AEDPA, and my colleagues' interpretation of it, the writ of habeas corpus would have issued in this case to require a new trial in which Davis would be allowed to put before the jury [the witness'] exculpatory testimony." The dissenting judge also concluded that the majority's excessively deferential interpretation of the AEDPA standard of decision violated Article III of the Constitution and also unconstitutionally suspended the writ of habeas corpus. A petition for rehearing *en banc* is pending in Davis. [In the first opinion, Davis v. Straub, 421 F.3d 365 (6th Cir. Mich. 2005), the Court held petitioner's right to a fair trial and to present a defense was violated by the trial court's decision to permit a crucial defense witness to invoke his Fifth Amendment right such that the witness did not testify at all, even though the witness had given three statements to police prior to trial that would have been admissible against him if he were to be prosecuted based on his presence at the scene of the murder. The trial court's procedure was improper: "The proper procedure would have been to put the witness on the stand and rule on the questions one at a time." Only by following this process can the defendant's right to present a defense be balanced against the witness' privilege against self-incrimination. Here, if the witness had testified consistent with his earlier statements, he would have provided powerful exculpatory evidence for petitioner that did not additionally incriminate the witness. Moreover, defense counsel's failure to offer the witness' out-of-court statements "surely constituted ineffective assistance of counsel." The state court's ruling to the contrary, that petitioner was not prejudiced, is incorrect.]

JURY INSTRUCTIONS AT TRIAL PHASE

Fiore v. White, 531 U.S. 225, 121 S.Ct. 721 (2001).
A state supreme court's decision interpreting the elements of a criminal statute after a federal habeas corpus petitioner's conviction under the statute has become final must be applied on habeas review of the state conviction. State court ruling did not announce a new rule but merely clarified the law, and the ruling established that the state had failed to prove one of the elements of the crime for which petitioner was charged and convicted, so petitioner's conviction was inconsistent with the due process clause.

Howell v. Mississippi, 543 U.S. 440, 125 S.Ct. 856 (Jan. 24, 2005).
Per curiam. Failure to constitutionalize claim of failure to instruct on lesser included offenses leads to dismissal for cert improvidently granted. [Background: Marlon Howell was convicted in Mississippi of murder in the course of an attempted robbery. He was sentenced to death. At trial, he presented an alibi defense, arguing that he was in another city at the time of the shooting. He also argued that the evidence was insufficient to prove that the murder occurred in the course of an attempted robbery, and proposed jury instructions on manslaughter and simple murder in addition to capital murder. The trial court refused the additional instructions. On appeal to the Mississippi Supreme Court, Howell argued that the instructional ruling was erroneous under state law, citing three state court decisions. The state supreme court, in rejecting the claim, cited two other state court opinions. Howell did not cite the Eighth and Fourteenth Amendments as the basis for his claim until he filed his petition for writ of certiorari in the USSC. The USSC granted certiorari, but directed the parties to brief whether Howell's constitutional claim had been properly raised in state court.]

The Supreme Court finds Howell did not federalize his claims. The USSC dismisses the writ of certiorari as improvidently granted after considering the parties' briefing on whether petitioner properly raised his Beck v. Alabama claim in state court. In state court proceedings, petitioner did not cite the federal Constitution or any cases directly construing it, nor even any cases decided by the USSC. Petitioner's argument that he cited a state case that cited another state case that in turn cited Beck is not sufficient. "Assuming it constituted adequate briefing of the federal question under state-law standards, petitioner's daisy chain – which depended upon a case that was cited by one of the cases that was cited by one of the cases that petitioner cited – is too lengthy to meet this Court's standards for proper presentation of a federal claim." The USSC also rejects petitioner's argument that he adequately raised the federal claim because the state-law rule on which he relied is identical to it: The Court does not decide whether identical standards might overcome a petitioner's failure to identify the federal bases for his claim, but rejects petitioner's argument in this case because the standards are not identical.

Middleton v. McNeil, 541 U.S. 433, 124 S.Ct. 1830 (May 3, 2004) (*non-capital*).
(*Per curiam.*) (reversing grant of relief by Ninth Circuit). Sally McNeil appealed on the basis of an erroneous jury instruction. The trial court gave CALJIC 5.17 on imperfect self-defense, but added "as a reasonable person" to the last clause, defining imminent peril. McNeil argued on appeal that the added clause decimated her imperfect self-defense theory. The Cal. CA agreed that the additional phrase was an error, but did not grant her relief, reasoning that the instructions as a whole, plus the prosecutor's correct statement of the law, properly outweighed the single, erroneous phrase. Contrary to the Ninth Circuit's description, the state court did not 'ignor[e]' the faulty instruction [which added "as a reasonable person" to CALJIC 5.17]. It merely held that the instruction was not reasonably likely to have misled the jury given the multiple other instances … where the charge correctly stated that respondent's belief could be unreasonable." Further, the state court's reliance on the prosecutor's closing argument was not contrary to Boyde v. California. "Nothing in Boyde precludes a state court from assuming that counsel's

arguments clarified an ambiguous jury charge," particularly when it is the prosecutor's argument that resolves an ambiguity in favor of the defendant.

SUFFICIENCY OF EVIDENCE AT TRIAL

Bradshaw v. Richey, 126 S.Ct. 602 (Nov. 28, 2005) (per curiam).

Background

Kenneth Richey was convicted of aggravated murder committed in the course of a felony, and sentenced to death. The prosecution theorized that Richey set fire to an apartment building with the intent of killing his ex-girlfriend and her new boyfriend. They were not injured, but a 2-year-old child died in the fire.

Richey's conviction and sentence were affirmed on direct appeal, and he was denied postconviction relief in the state courts. The federal district court also denied all of Richey's claims, but the Sixth Circuit granted relief on two alternative grounds. First, the circuit court found that transferred intent is not a valid theory of aggravated murder under Ohio law, and the evidence of direct intent was not sufficient to sustain the verdict. Second, Richey's trial counsel had rendered ineffective assistance. (The Sixth Circuit opinion appeared at 395 F.3d 660.)

Transferred Intent is an Applicable Theory

The USSC rejects the Sixth Circuit's reasons for concluding that transferred intent is not an accepted theory under Ohio law. First, in its decision in Richey's direct appeal, the Ohio Supreme Court clearly stated, "The doctrine of transferred intent is firmly rooted in Ohio law." The statement was dictum, but the state court's interpretation of its own law is binding on federal courts sitting in habeas corpus.

Second, the USSC is not persuaded that an interpretation of the state supreme court's opinion as accepting transferred intent would constitute an "unforeseeable and retroactive expansion of narrow and precise statutory language." There was sufficient notice in Ohio law at the time of Richey's crime of the applicability of the doctrine of transferred intent. A separate clause of the 1986 version of the statute precluded transferred intent where intent to kill was sought to be proved from the inherent dangerousness of the relevant felony. In Richey's case, though, intent to kill (albeit someone other than the actual victim) was proved directly.

"Because the Sixth Circuit disregarded the Ohio Supreme Court's authoritative interpretation of Ohio law [regarding the applicability of transferred intent], its ruling on sufficiency of the evidence was erroneous." The USSC has "repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."

The Sixth Circuit is Directed to Reconsider its IAC Ruling

The USSC notes several shortcomings in the Sixth Circuit analysis of Richey's IAC claim. First, the circuit court relied on evidence that had not been presented to the state court without first determining (1) whether Richey was at fault for not developing the facts in the state court, or (2) whether Richey satisfies the applicable AEDPA criteria: No evidentiary hearing may be held in federal court on a claim left undeveloped in state court unless the claim relies on a new rule of constitutional law, or the factual predicate could not have been discovered earlier through exercise of due diligence, and the facts are sufficient to establish that no reasonable factfinder would have found the petitioner guilty but for the constitutional error.

Also, the Sixth Circuit disregarded the state habeas court's finding that the defense forensic expert was qualified without weighing whether that finding had been rebutted by clear and convincing evidence. The circuit court further failed to analyze whether Richey had overcome the default of several grounds for claims that were apparent from the record but not raised on direct appeal; could he show cause and prejudice for not raising

on direct appeal his trial counsel's failure to adequately cross-examine prosecution experts, trial counsel's premature disclosure of the defense forensic expert on the witness list, and trial counsel's failure to present competent scientific evidence to challenge the prosecution experts? Could Richey show that the default must be disregarded because adherence would result in a miscarriage of justice?

Richey contends Ohio failed to preserve its objection to the Sixth's Circuit's reliance on evidence that was not previously presented to the state court by failing to raise the argument in its briefing before the circuit court. The Sixth Circuit has not addressed this argument, and the USSC advises the circuit court is "better situated to address this argument in the first instance."

PENALTY PHASE JURY INSTRUCTIONS

Penry v. Johnson, 532 U.S. 782, 121 S.Ct. 1910 (2001) ("Penry II").
In this Texas capital habeas case, the Supreme Court (O'Connor, J., joined by Stevens, Kennedy, Souter, Ginsburg and Breyer, JJ.) granted sentencing phase relief, holding that the state courts' determination that the instructions provided to the jury at petitioner's trial complied with the Supreme Court's earlier decision in this case (Penry v. Lynaugh, 492 U.S. 302 (1989) (Penry I)) was "objectively unreasonable." In Penry I, the Court granted relief because the Texas "special issues" sentencing scheme under which petitioner was tried did not afford the jury a mechanism by which to consider and give effect to his mitigating evidence, including mental retardation and a history of abuse. At his retrial, the same three special issues - whether the murder was intentional, whether petitioner would be a danger in the future, and whether the homicide was a reasonable response to provocation - were submitted to the jury. In an effort to comply with Penry I, the trial court also gave a "supplemental instruction," which invited the jurors to nullify one or more of the special issues if they believed petitioner's mitigating evidence warranted a life sentence.

On direct appeal from the retrial, the Texas Court of Criminal Appeals upheld petitioner's second death sentence, explaining that "'a nullification instruction such as this one is sufficient to meet the constitutional requirements of [Penry I].'"

Reviewing this determination in the context of petitioner's §2254 petition, the Supreme Court disagreed. The Court found that the supplemental instruction "made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation" by telling them to answer "no" to a special issue even when the correct answer to the question posed was "yes." "In other words," the Court explained, "the jury could change one or more truthful 'yes' answers to an untruthful 'no' answer in order to avoid a death sentence." This "mechanism," the Court continued, "inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependent on their willingness' to elevate the supplemental instruction over the verdict form instructions. . . . The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to [petitioner's] mitigating evidence." Having identified the defect in Texas' response to the problem condemned in Penry I, the Court applied §2254(d) and concluded that, "to the extent the Texas Court of Criminal Appeals concluded that the substance of the jury instructions given at [petitioner's] second sentencing hearing satisfied our mandate in Penry I, that determination was objectively unreasonable."

Justice Thomas (joined by Rehnquist, C.J., and Scalia, J.) dissented from the grant of sentencing phase relief, contending that the Texas courts' supplemental instruction adequately remedied the problem identified in Penry I.

LaRoyce Lathair Smith v. Texas, 543 U.S. 37 (Nov. 15, 2004) (*per curiam*).
Court (7-2) reverses death sentence for the 1991 murder of a former co-worker, relying on prior Court precedents in Penry (II) and Tennard v. Dretke (see below in mental retardation cases) that required instructions to jurors that allow them to give meaningful consideration to mitigating evidence offered at the sentencing phase of capital cases.

Smith had presented mitigating evidence of his IQ of 78, his participation in special education classes, and his troubled childhood. The jury was given a nullification instruction of the type given in Penry II and the prosecutor made similar arguments that the jury was required to follow its oath, creating the same risk of failure to consider constitutionally relevant mitigating evidence.

Brown v. Payton, 544 U.S. 133, 125 S.Ct. 1432 (March 22, 2005).
Court denies relief by a 5-3 vote. Payton's jury was instructed with the so-called "unadorned factor (k)" instruction which limited the jury to considering only mitigating factors which were related to the crime. Relying on this instruction, the prosecutor repeatedly argued that the jury could not consider the evidence Payton had presented of his post-crime religious conversion, his remorse, and his positive behavior and positive influence on others while in jail awaiting trial. Boyde v. California then upheld the constitutionality of the unadorned factor (k) instruction in the abstract, but left open the possibility that prosecutorial argument based on the instruction might be prejudicial in some cases. During the oral argument of Boyde in the Supreme Court, the Deputy Attorney General referred to Payton's case by name and distinguished it as a case in which the prosecutor "misled the jurors." Nevertheless, the Calif. Sup. Ct. (CSC) affirmed Payton's death sentence by a 5-2 vote, finding no reasonable likelihood that Payton's jury believed it was required to disregard his mitigating evidence. The Ninth Circuit en banc, by a 6-5 vote, found the CSC's decision to be an unreasonable application of Boyde and granted relief under the AEDPA standard. The USSC granted the state's certiorari petition and reversed.

The majority held that the Ninth Circuit had been insufficiently deferential to the CSC, and that the CSC's conclusion that the jury was not misled into ignoring Payton's mitigation evidence was a reasonable application of Boyde. Justice Breyer, whose vote was necessary to the decision, wrote a short concurring opinion stating that, for him, the lowered standard of review dictated by AEDPA changed the outcome. If he were a state judge, he said, he would likely find an Eighth Amendment violation and grant relief to Payton. Justice Souter, joined by Justices Stevens and Ginsburg, dissented, emphasizing substantial differences between this case and Boyde with respect to both the evidence and the prosecutor's argument, and concluding that the CSC's denial of relief to Payton was an unreasonable application of Boyde.

Cert Granted Then Dismissed Regarding Consideration of Mitigation:

Smith v. Dretke, No. 02-11309, cert. dismissed, 541 U.S. 913, 124 S.Ct. 1652 (March 18, 2004), ruling below 311 F.3d 661 (5th Cir. 2003). Question Presented: Did the Court of Appeals misapply Penry v. Johnson, by imposing a requirement that evidence demonstrate a 'uniquely severe permanent handicap" in order for a Texas capital murder defendant to claims that a 'nullification' instruction was improper? [Case of Tennard v. Dretke was decided, see mental retardation.]

Cert grant, issue not reached in final decision:

Rompilla v. Beard, No. 04-5462, cert granted 542 U.S. 966, 125 S.Ct. 27 (Sept. 28, 2004), ruling below Rompilla v. Horn, 355 F.3 233 (3rd Cir. 2004). Questions Presented: 1.) Does Simmons require a life-without-parole instruction where: the only alternative to a death sentence under state law is life without possibility of parole; the jury asks the court three questions about parole and rehabilitation during eleven hours of penalty-phase deliberations; the prosecution's evidence is that the defendant is a violent recidivist who functions poorly outside prison and who killed someone three months after being paroled from a lengthy prison term; and the prosecutor argues that the defendant is a frightening repeat offender and cold-blooded killer who learned from prior convictions that he should kill anyone who might identify him? 2.) Is the state court decision denying the Simmons claim "contrary to" and/or an "unreasonable application" of clearly established

Supreme Court law where the state court held that a history of violent convictions is irrelevant to the jury's assessment of future dangerousness, while ignoring the jury's questions about parole-eligibility and rehabilitation and the prosecution's actual evidence and argument?

Residual Doubt

Oregon v. Guzek, ___ U.S. ___, 126 S.Ct. 1226 (Feb. 22, 2006).

The Eighth and Fourteenth Amendments to the United States Constitution do not prohibit a State from limiting the innocence-related evidence a capital defendant can introduce at a sentencing proceeding to the evidence introduced at the original trial. Even if such a right existed, it would not extend so far as to provide Guzek with a right to introduce the evidence at issue (his mother's alibi testimony in his third resentencing proceeding after she had testified at the initial trial). The Eighth Amendment insists upon reliability and that a sentencing jury be able to consider and give effect to mitigating evidence about the defendant's character or record or the circumstances of the offense, but it does not deprive the State of its authority to set reasonable limits on the evidence a defendant can submit, and to control the manner in which it is submitted. Three circumstances, taken together, show that the State has the authority to to regulate Guzek's evidence through exclusion. First, sentencing traditionally concerns how, not whether, a defendant committed the crime, but alibi evidence concerns only whether, now how, he did so. Second , the parties previously litigated the issue to which this evidence is relevant, and the law typically discourages collateral attacks. Third, the negative impact of a rule restricting Guzek's ability to introduce new alibi is minimized by the fact that Oregon law gives the defendant the right to present to the sentencing jury all the innocence evidence from the original trial (albeit through transcripts). The Oregon courts are free to consider on remand whether Guzek is entitled to introduce his mother's testimony to impeach other witnesses whose earlier testimony the government intends to introduce at resentencing. [The Court also found that while Oregon law might give him a right to introduce witnesses who testified at the guilt phase, but found the possible adequate and independent state ground for a decision did not bar reaching the federal question where the the state court's decision quite clearly rested solely on the federal constitution.]

Cert grant on Weighing of Aggravating and Mitigating Circumstances, Burden of Proof

Kansas v. Marsh, No. 04-1170, cert. granted ___ U.S. ___, 125 S.Ct. 2517 (May 31, 2005), ruling below 102 P.3d 445 (Kan. 2004). Question presented: Does it violate the Constitution for a state capital sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise? The USSC added the following two additional questions: (1) Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 USC 1257, as construed by Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) ? (2) Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?

Ohio Capital Cases in the Federal Courts on Jury Instructions at Penalty:

Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003). Penalty Reversed. A majority of the Sixth Circuit panel granted sentencing phase relief in this post-AEDPA Ohio capital case, finding that the state court's denial of relief on petitioner's Mills / McKoy claim was contrary to clearly established federal law. Petitioner based his claim on the combination of an "acquittal first" instruction, under the which the jury was required to unanimously reject the death penalty before considering imposition of a life sentence, and a general unanimity instruction telling jurors that "the law requires that in order for you to reach a

decision all 12 of you must be in agreement." After considering these instructions, as well as the verdict form which required twelve signatures for a life sentence, the majority concluded that "there is a reasonable likelihood that the jury believed that it could not render a verdict in favor of life imprisonment rather than death unless the jury was unanimous with respect to its reasoning on the presence of mitigating factors and unless the jury was unanimous in rejecting the death penalty."

Lawson v. Warden, Mansfield Correctional Inst., 197 F.Supp.2d 1072 (S.D. Ohio 2002). Writ granted due to failure to adequately instruct jury on how to consider additional evidence of mental illness that was submitted in the penalty phase as mitigation, when the jury had rejected NGRI in the trial phase.

NON- DEATH-ELIGIBILITY OF THE MENTALLY RETARDED

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002).
PR (6-3). Execution of the mentally retarded "is excessive" under the Eighth Amendment, and "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." The constitution requires proportionality under evolving standards which should be informed objective factors to the maximum possible extent. Legislative action is the clearest and most reliable objective evidence of contemporary values, and Court must ask whether there is reason to disagree with the judgment reached by the citizenry and its legislators. Other objective evidence, referenced in a footnote, includes official positions adopted by professional organizations and religious communities, world attitudes as reflected in amicus briefs of the EU. *Penry v. Lynaugh* (1989) is overruled because much has changed since then, when only two states prohibited executing the mentally retarded, now 18 do (and one passed but not signed by the Governor, and two passed in one house; and all the legislation passed was by overwhelming votes). It is not so much the number of states adopting such legislation that is important, but the consistency of the direction of the change, particularly when anticrime legislation is far more popular. In those states without statutes, the practice is 'uncommon' which reduces the incentive to seek and pass legislation. These actions represent a widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between MR and the penological purposes served by the death penalty. Retribution and deterrence do not apply to MR. Their behavioral tendencies make it more likely to result in imposing the death penalty in less aggravated cases because of the increased likelihood of false confessions, the reduced abilities of a MR defendant to help prepare and present a case in mitigation, and the risk that future dangerousness will be found. Court leaves to the states the chore of determining who will receive protections of this decision and who will not.

Chief Justice Rehnquist dissents as legislative action and jury determinations are the only relevant factors and the evidence is insufficient here. Scalia dissents discrediting much of the public sentiment indicia, suggesting a third penological purpose of incapacitating dangerous criminals to prevent future violence, and drawing the line at the profoundly retarded idiots who would have been exempted from execution at the nation's founding.

Per Curiam Decision on Jury Determination of Mental Retardation

Schriro v. Smith, 546 U.S. ___, 126 S.Ct. 7 (October 17, 2005).
Per Curiam reversal of 9th Cir.'s sua sponte imposition of jury trial on mental retardation claim, Court leaves it to the states to determine mental retardation claim procedures. In 1982, an Arizona jury convicted Smith and sentenced him to death. In none of the prior proceedings did Smith argue that he was mentally retarded or that his mental retardation made him ineligible for the death penalty. Smith had, however, presented evidence in mitigation during the sentencing phase of his trial showing that he had low intelligence.

The District Court denied Smith's petition for habeas corpus in 1996, and after the Court issued its 2002 decision in Atkins, the case was returned to the Ninth Circuit. Shortly thereafter, Smith asserted in briefing that he is mentally retarded and cannot, under Atkins, be executed. The Ninth Circuit ordered suspension of all federal habeas proceedings and directed Smith to "institute proceedings in the proper trial court of Arizona to determine whether the state is prohibited from executing [Smith] in accordance with Atkins." The court further ordered that the issue whether Smith is mentally retarded must "be determined . . . by a jury trial unless the right to a jury is waived by the parties." The Court finds: "The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim. Atkins stated in clear terms that "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition. Because the Court of Appeals exceeded its limited authority on habeas review, the judgment below is vacated, and the case is remanded for further proceedings consistent with this opinion."

Sixth Circuit Decision of Note:

Hill v. Anderson, 300 F.3d 679, 2002 WL 1836589 (6th Cir. 2002). Atkins is retroactively applied. Case involved "mixed petition" in that petitioner had not exhausted Atkins claim, court holds that execution of mentally retarded was cruel and unusual punishment, AEDPA thus precluded granting relief in a mixed petition. But the issue of petitioner's mental retardation raised serious question regarding voluntariness of his confession, so instead of denying petition court would remand case to district court with instructions to dismiss unexhausted Atkins claim and to stay exhausted claim, with stay conditioned on petitioner promptly seeking relief in the state courts on the Atkins claim.

Ohio Appellate Decision on Right to Two Counsel and Dealing With Measurement Error

State v. Burke, ___ Ohio App. 3d___, 2005 WL 3557641 (Ohio CA, Dec. 20, 2005).
The trial court's judgment, after an evidentiary hearing on a successor state post-conviction petition, that petitioner is not mentally retarded and thus eligible for the death penalty is reversed because petitioner was not afforded two certified attorneys in the Atkins hearing. The appellate court concludes that a first-time Atkins petition is "akin to a direct appeal of the issue," or to a capital trial, and a capital defendant is entitled to two attorneys at trial and in a direct appeal. The court holds in addition that on rehearing, the trial court *may* consider evidence on the Flynn effect, but is not required to do so. The trial court *must* "adjust, however nominally, an IQ score for measurement error and consider an expert's testimony regarding size or degree of the measurement error applicable to the particular intelligence test."

ADEQUATE CONSIDERATION OF MITIGATING EVIDENCE

Tennard v. Dretke, 542 U.S. 274, 124 S.Ct. 2562 (June 24, 2004).
[PR] In a 6-3 decision [in a case initially consolidated with *Smith v. Dretke* (No. 02-11309) which was later dismissed as moot when Smith received clemency] interpreting *Penry v. Johnson,* the Court held that the Fifth Circuit used an improper legal standard when it denied a certificate of appealability to appeal the District Court's decision denying him a writ of habeas corpus. Reasonable jurists could conclude that Tennard's low IQ of 67 was relevant mitigating evidence and that the Texas Court of Criminal Appeals' application of law was unreasonable, justifying a COA by the Fifth Circuit. The 5th Circuit had ruled that to make out a claim of an unconstitutional denial of consideration of

mitigating evidence, the evidence had to be constitutionally relevant mitigating evidence, and that was defined as "evidence of a uniquely severe permanent handicap" that bore a "nexus" to the crime. The 5th Circuit found his mental impairment was not mental retardation and even if his evidence was mental retardation evidence, he did not show that the crime he committed was attributable to his low IQ, so there was no error. The Supreme Court finds this threshold constitutional relevance screening test had no foundation in the Court's prior decisions. Relevance was not an issue in Penry, and the Court has spoken of it in the most expansive terms in other cases, applying the general evidentiary standard of whether the evidence had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". "The question is simply whether the evidence is of such a character that it 'might serve as a basis for a sentence less than death'." "Once this low threshold for relevance is met, the Eighth Amendment requires the jury must be able to consider and give effect to a capital defendant's mitigating evidence." "Impaired intellectual functioning is inherently mitigating." The relationship between the Texas special issues and Tennard's low IQ evidence had the same essential features as that between those issues and Penry's mental retardation evidence. Impaired intellectual functioning has mitigating dimension beyond the impact it has on the ability to act deliberately. ["Nothing in our Atkins opinion suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered. Equally, we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence – and thus that the Penry question need not even be asked - unless the defendant also establishes a nexus to the crime".] A reasonable jurist could conclude here that due to the narrow special issues, the jury might have given the low IQ evidence aggravating effect in considering Tennard's future dangerousness, as the prosecutor had argued, and not considered its mitigating effect.

Residual Doubt

Oregon v. Guzek, ___ U.S. ___, 126 S.Ct. 1226 (Feb. 22, 2006)

The Eighth and Fourteenth Amendments to the United States Constitution do not prohibit a State from limiting the innocence-related evidence a capital defendant can introduce at a sentencing proceeding to the evidence introduced at the original trial. Even if such a right existed, it would not extend so far as to provide Guzek with a right to introduce the evidence at issue (his mother's alibi testimony in his third resentencing proceeding after she had testified at the initial trial). The Eighth Amendment insists upon reliability and that a sentencing jury be able to consider and give effect to mitigating evidence about the defendant's character or record or the circumstances of the offense, but it does not deprive the State of its authority to set reasonable limits on the evidence a defendant can submit, and to control the manner in which it is submitted. Three circumstances, taken together, show that the State has the authority to regulate Guzek's evidence through exclusion. First, sentencing traditionally concerns how, not whether, a defendant committed the crime, but alibi evidence concerns only whether, now how, he did so. Second , the parties previously litigated the issue to which this evidence is relevant, and the law typically discourages collateral attacks. Third, the negative impact of a rule restricting Guzek's ability to introduce new alibi is minimized by the fact that Oregon law gives the defendant the right to present to the sentencing jury all the innocence evidence from the original trial (albeit through transcripts). The Oregon courts are free to consider on remand whether Guzek is entitled to introduce his mother's testimony to impeach other witnesses whose earlier testimony the government intends to introduce at resentencing. [The Court also found that while Oregon law might give him a right to introduce witnesses who testified at the guilt phase, but found the possible adequate and independent state ground for a decision did not bar reaching the federal question where the the state court's decision quite clearly rested solely on the federal constitution.]

NON-DEATH ELIGIBILITY OF JUVENILES

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (March 1, 2005).
Court holds 5-4 that under the Eighth and Fourteenth Amendments it is unconstitutional to execute a juvenile offender who is older than 15 but younger than 18 when he committed a capital crime. (At the age of 17, Christopher Simmons (Simmons) committed a murder. Simmons filed a successor petition for state post-conviction relief to the state supreme court, arguing that it is unconstitutional to execute a juvenile who was under the age of 18 when the crime was committed. The state supreme court held that the execution of a juvenile who commits a capital crime when he is under the age of 18 is prohibited by the Eighth Amendment, therefore setting aside Simmons' death sentence. The US Supreme Court affirms.) The Court holds that the Eighth and Fourteenth Amendments prohibit the execution of a juvenile who commits a crime when he is under the age of 18. The Court reasoned that the punishment of death is "cruel and unusual" as applied to juveniles because there is a national consensus against sentencing juveniles to death. The Court looks to the rejection of the juvenile death penalty in the majority of states, the infrequency of its use even where it remains on the books, and the consistency in the trend toward abolition of the practice – these provide sufficient evidence that today our society views juveniles as categorically less culpable than the average criminal. (Of the 38 death penalty states, 19 forbid the death penalty for juveniles. The federal government also forbids the practice. Twelve additional states do not allow the death penalty at all.) Though the changes in state stances was less dramatic than with the mentally retarded, this "shows if anything that the impropriety of executing juveniles gained wide recognition earlier than the impropriety of executing the mentally retarded". These changes also occurred when anti-crime legislation cracking down on juvenile crime in other respects was popular. The Court also looked to the international community and found that the US was the only government left on the planet that sanctioned the execution of juvenile offenders. The Court also used its "own independent judgment" when evaluating the Eighth Amendment claim and found that "three general differences demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders". The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult. Thus, juveniles have a greater claim than adults to forgiveness for character deficiencies that are a product of negative influences in their whole environment. Juveniles are also more vulnerable or susceptible to negative influences and outside pressures. Lastly, the character and personality traits of juveniles are more transitory and less well-formed. The diminished culpability of juvenile offenders also takes force away from the deterrence and retributive goals of capital punishment. The Court rejects a case by case approach, as the general differences in culpability "are too marked and too well understood" to subject juvenile offenders to the risk that the brutality of the crimes will distract jurors from the mitigating aspects of the offenders' youth.

PROSECUTORIAL MISCONDUCT

Brown v. Payton, 544 U.S. 133, 125 S.Ct. 1432 (March 22, 2005).
Court denies relief by a 5-3 vote. Payton's jury was instructed with the so-called "unadorned factor (k)" instruction which limited the jury to considering only mitigating factors which were related to the crime. Relying on this instruction, the prosecutor repeatedly argued that the jury could not consider the evidence Payton had presented of his post-crime religious conversion, his remorse, and his positive behavior and positive influence on others while in jail awaiting trial. Boyde v. California then upheld the constitutionality of the unadorned factor (k) instruction in the abstract, but left open the possibility that prosecutorial argument based on the instruction might be prejudicial in some cases. During the oral argument of Boyde in the Supreme Court, the Deputy Attorney General referred to Payton's case by name and distinguished it as a case in

which the prosecutor "misled the jurors." Nevertheless, the Calif. Sup. Ct. (CSC) affirmed Payton's death sentence by a 5-2 vote, finding no reasonable likelihood that Payton's jury believed it was required to disregard his mitigating evidence. The Ninth Circuit en banc, by a 6-5 vote, found the CSC's decision to be an unreasonable application of Boyde and granted relief under the AEDPA standard. The USSC granted the state's certiorari petition and reversed.

The majority held that the Ninth Circuit had been insufficiently deferential to the CSC, and that the CSC's conclusion that the jury was not misled into ignoring Payton's mitigation evidence was a reasonable application of Boyde. Justice Breyer, whose vote was necessary to the decision, wrote a short concurring opinion stating that, for him, the lowered standard of review dictated by AEDPA changed the outcome. If he were a state judge, he said, he would likely find an Eighth Amendment violation and grant relief to Payton. Justice Souter, joined by Justices Stevens and Ginsburg, dissented, emphasizing substantial differences between this case and Boyde with respect to both the evidence and the prosecutor's argument, and concluding that the CSC's denial of relief to Payton was an unreasonable application of Boyde.

Bradshaw v. Stumpf, ___ U.S. ___, 125 S.Ct. 2398 (June 13, 2005).

Unanimous court affirms Ohio capital defendant's conviction, remands penalty to Sixth Circuit.

Background

John Stumpf and Clyde Wesley talked their way into the home of Norman and ary Jane Stout, intent on robbing the couple; Norman Edmonds waited in a car stopped about 100 yards away from the home. Stumpf and Wesley concealed their guns until inside the house, then Stumpf held the Stouts at gunpoint while Wesley ransacked the house. Mr. Stout moved toward Stumpf, who responded by shooting him twice in the head. Mr. Stout blacked out. When he regained consciousness, Mr. Stout heard two male voices coming from another room, and then heard four gunshots. These shots killed Mrs. Stout. Edmonds was arrested shortly after the crime, and his statements to police led to the arrest of Stumpf. Wesley was arrested later in Texas. While Wesley was fighting extradition, Stumpf entered a plea of guilty to aggravated murder and attempted murder, and admitted one of three charged capital specifications. Before a panel of three judges, he affirmed that his counsel had explained the elements of the aggravated murder charge. The panel satisfied itself as to the factual foundation of the plea, and accepted it. The capital specification made Stumpf subject to a possible death sentence. The contested penalty hearing took place before the same panel that had accepted his plea. Stumpf presented evidence in mitigation, including his difficult childhood, limited education, youth, dependable work history, and lack of prior serious offenses. His primary argument against death, however, was that he was *not* the one who shot Mrs. Stout, although he admitted being involved in the robbery and admitted shooting Mr. Stout. He reasoned that he should not be sentenced to death because of his limited role in the crime.

The prosecutor argued that Stumpf *was* the shooter or, alternatively, he did not shoot Mrs. Stout, but the evidence of his involvement in the armed robbery and shooting Mr. Stout was sufficient to prove his intent to kill. Under Ohio law, an accomplice to a capital murder with intent to kill can be sentenced to death. The three-judge panel did so.

In the meanwhile, Wesley was extradited to Ohio and was tried before a jury. The prosecutor presented new evidence in his proceeding, a cellmate who testified that Wesley had confessed to being the one who shot Mrs. Stout. Accordingly, the prosecutor argued that Wesley was the principal offender and urged the death penalty. Wesley testified in his own defense, accusing Stumpf of being the only shooter. The jury sentenced Wesley to life in prison with the possibility of parole in 20 years.

Following Wesley's trial, Stumpf brought a motion to withdraw his plea or vacate his death sentence, even while his direct appeal was still pending in the Ohio Court of Appeals. He argued that the prosecutor's adoption of a position in Wesley's trial inconsistent with the position taken in proceedings against Stumpf required relief. The Court of Common Pleas denied Stumpf's motion; the order was appealed together with the original judgment. The Ohio Court of Appeals and the Ohio Supreme Court both denied Stumpf's appeal and his later post-conviction petition for relief.
In federal district court, Stumpf's habeas petition was again denied, but the Sixth Circuit reversed. The circuit court found that Stumpf's guilty plea was invalid because he had not been adequately informed that intent to kill is a necessary element of aggravated murder in Ohio. Additionally, the circuit court found that Stumpf's right to due process was violated by the prosecutor's taking inconsistent positions in connection with Stumpf's sentencing and in Wesley's trial.
The USSC granted certiorari to review the Sixth Circuit's holdings. Applying a pre-AEDPA standard of review, the Court reverses the circuit court in part, remanding for further proceedings on sentencing.

Stumpf's Guilty Plea was not Invalid

The USSC finds it "has never held that the judge must himself explain the elements of each charge to the defendant on the record" for a guilty plea to be valid. "Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." This prerequisite was satisfied in defendant's case where counsel stated on the record that the charges had been explained to defendant, and defendant affirmed this representation. The Court rejects defendant's argument that entering a guilty plea was so inconsistent with his steadfast denial of responsibility for the fatal shooting that it demonstrates he did not understand that one element of aggravated murder is intent to kill. Denying that he pulled the trigger is not inconsistent with having an intent to kill; intent to kill can be inferred from defendant's admitted involvement in the robbery, the fact that he and his accomplice entered armed, and defendant's admitted responsibility for the non-fatal shooting. Under Ohio law, an accomplice can be sentenced to death if he had an intent to kill.

The Court notes that Stumpf brought an independent ineffective assistance of counsel claim, but that claim is not under consideration here.

Prosecutorial Inconsistencies did not Invalidate the Guilty Plea, but may affect Penalty

Stumpf argued that the inconsistent positions taken by the prosecutor require granting him relief, but the Court disagrees. The Sixth Circuit erred in holding that inconsistent positions taken by the prosecutor in the sentencing and withdrawal-of-plea hearings in defendant's case, and the trial of his accomplice, require reversal of defendant's conviction. The prosecutor argued in the alternative as to defendant, that he was the principal offender or that he acted as an accomplice with the intent to kill, thus making him subject to a death sentence; in the accomplice's trial, the prosecutor argued that the accomplice was the principal offender, based on the testimony of a jailhouse informant."[T]he precise identity of the triggerman was immaterial to [defendant's] conviction for aggravated murder." Additionally, defendant did not explain how the prosecutor's post-plea change of position could have affected whether defendant's plea was knowing and voluntary. The prosecutor's change of position may have had an effect, however, on the panel's decision to sentence defendant to death, and it is not clear whether the Sixth Circuit would have reversed the sentence if it had not also reversed defendant's conviction. Accordingly, the case is remanded to the circuit court for further proceedings.

Justice Souter (with Justice Ginsburg) concurs in the opinion but writes separately to clarify his understanding of the scope of the remand: "As I see it, Stumpf's argument is simply that a death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant." This question remains to be decided by the Sixth Circuit, and if that court decides a violation has occurred, "there will be remedial questions. May the death sentence stand if the State declines to repudiate its inconsistent position in the codefendant's case? Would it be sufficient simply to reexamine the original sentence and if so, which party should have the burden of persuasion? If more would be required, would a *de novo* sentencing hearing suffice?"

[Editor's note: Were the prosecutor to take contradictory positions on the same evidence (without new evidence interjected), the due process argument is likely stronger.]

Justice Thomas (with Justice Scalia) concurs in the opinion, but expresses a concern diametrically opposite that of Justices Souter and Ginsburg: He observes that "[t]his Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories." Even though not raised prior to his concurring opinion, Justice Thomas suggests the State will still be able to raise Teague and procedural default as defenses on remand. He also urges another challenge to Stumpf's prejudice argument, asking how Stumpf's sentencing could have been affected by the prosecutor's use of an inconsistent position in *post*-sentencing proceedings.

Sixth Circuit Decisions on Prosecutorial Misconduct

Hicks v. Collins, 384 F.3d 204 (6th Cir. 2004) [A. Prosecutorial misconduct did not require new trial or new penalty phase. Arguments that "it is time you sent a message to the community' and 'the people in the community have the right to expect that you will do your duty' were arguably proper references to the societal need to punish guilty people rather than an improper 'attempt to compare or to associate the defendant with a feared and highly publicized group.' The argument "only referred to the general community need to convict guilty people…. More importantly,.. these remarks were not misleading, inflammatory or prejudicial. Assuming arguendo, however, that there was error, it is only harmless since the evidence of Hicks' guilt was overwhelming."

Towns v. Smith, 395 F.3d 251 (6th Cir. 2005) (*non-capital*). The Sixth Circuit affirms the district court's grant of habeas relief to petitioner based on his claim of ineffective assistance of trial counsel for failure to interview a witness who was in police custody and made two statements to police indicating that petitioner's brothers, but not petitioner, were responsible for the murder with which petitioner was charged, and for not calling the witness to testify at trial. The circuit court dismisses as speculation the Warden's suggestion that petitioner must have told trial counsel that the witness had damaging information about petitioner: Even if this were true, "counsel could not have evaluated or weighed the risks and benefits of calling [the witness] as a defense witness without so much as asking [him] what he would say if called." Petitioner was prejudiced by trial counsel's failure, because the prosecution's case against petitioner was weak, and there is a reasonable possibility that but for counsel's deficient performance, petitioner would have been acquitted.] [Note: The panel expresses dismay over the state's methods and practices in this case: "To our knowledge, the state has never justified its continued refusal to grant any sort of immunity to Richard [the witness] for his role in the Steward murder. The state has known for over twenty years now that Richard possessed the gun that was used to shoot Steward and that Richard admitted to driving the get-away car. Yet, despite this evidence, the state has never prosecuted Richard and it appears that it never will. Under these circumstances, the state's refusal to grant Richard immunity is inexplicable. Not only did this refusal significantly undermine the district court's ability to

determine whether Parrish was actually innocent, it compounded the danger that a murderer will remain free."

Bates v. Bell, 402 F.3d 635, 2005 WL 659069 (6th Cir. Mar. 23, 2005) (unreported). PR on prosecutorial misconduct, on 3 errors in closing argument. Throughout the summation, the prosecutors appealed to the fears of individual jurors and to emotion. They repeatedly argued that the jurors would be responsible for the murders that Bates would inevitably commit unless sentenced to death. The prosecutors suggested that failing to support the death penalty for Bates would make them "accomplices" to his crime and to future crimes. Their conduct was clearly improper. Also, again and again, the prosecutors explicitly expressed their personal opinions, denigrating the mitigating evidence presented by Bates's mother and Dr. Griffin. To be certain, prosecutors can argue the record, highlight the inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence. But, they cannot put forth their opinions as to credibility of a witness, guilt of a defendant, or appropriateness of capital punishment. "[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." United States v. Young,470 U.S. 1, 18-19 (1985). Lastly, and more troubling conduct occurred during summation when both Generals Shelton and Ramsey argued before the jury that Bates's lawyers were objecting as a diversionary tactic. After an improper argument objection was overruled by the court, Shelton addressed Bates's lawyer directly, "It's just getting too close for you." As he resumed his argument, he repeated, "[i]t is just getting too close." Id. Later in the closing argument, counsel for Bates again objected to the prosecution's improper argument. After that objection was overruled, Shelton addressed the jury: "You see, when it gets next to them, they stand up and object. Watch them." Following defense counsel's objection, the court directed the jury to disregard this improper comment and specifically instructed the prosecutor not to make further comments on objections. Yet, the prosecution continued, improperly responding to two subsequent objections. After an objection to the prosecutor's use of personal opinion, General Ramsey addressed Bates's counsel directly: "I don't think this jury is going to take my opinion. They are going to take the facts, Mr. Bean." Also after an objection, Ramsey tells the jury, "Of course, they are going to object. They don't want you to hear it again because-" The Court finds all of the remarks in question criticize defense counsel for protecting their client through objections. Such conduct, aimed at prejudicing the defendant's right to object, is clearly improper. If permitted, this type of intimidation tactic can operate to the detriment of a defendant's quality of representation, calling the fairness of the trial into question.

PREJUDICIAL INFLUENCES (SHACKLING, INADMISSIBLE EVIDENCE) IN PENALTY PHASE

Deck v. Missouri, ___ U.S. ___, 125 S.Ct. 2007 (May 23, 2005).

Court reverses death penalty (7-2) due to visible shackling.

Background

Throughout his second penalty trial following conviction for a double capital murder, Carman Deck was required to wear leg braces and a belly chain. His defense counsel objected, but the objection was overruled. The trial court pointed out that Deck had already been convicted. When Deck's counsel again objected to the restraints at the end of *voir dire*, the trial court again overruled the objection, reasoning that the jury seeing Deck shackled "takes any fear out of their minds." After this second penalty hearing, the jury recommended the death penalty, and Deck was sentenced accordingly.

Deck appealed to the Missouri Supreme Court, arguing that the shackling violated Missouri law and the federal Constitution. The state supreme court rejected his appeal, finding no record of the jury's awareness of the restraints, and noting that Deck did not complain that he was prevented from participating in his defense. That court also gave credence to the trial court's concern that Deck might try to escape based on the facts that he was a repeat offender and may have killed his victims because he believed they would recognize him and cause him to be returned to custody. Moreover, the Missouri high court found that Deck made no showing of actual prejudice as a result of either being viewed in shackles during *voir dire* or as restrained during trial.

Visible Shackling may not be used Routinely during Guilt Trials

Despite the dissent's assertion that the cited precedent is merely dicta, the majority declares that it is abundantly clear that the law "has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." In support of this statement, Justice Breyer reaches back to Blackstone and 18th Century English law where use of shackles or bonds at trial was disallowed "unless there be evident danger of an escape." American law has followed this basic rule quite closely, with some disagreement over the scope of the trial court's discretion in ordering shackles.

More modern statements of the general prohibition "suggested that a version of this rule forms part of the Fifth and Fourteenth Amendments' due process guarantee." Justice Breyer cites *Illinois v. Allen, Holbrook v. Flynn*, and *Estelle v. Williams* as the applicable precedent. He notes that lower courts have treated these as announcing a "constitutional standard embod[ying] Blackstone's rule," and that both courts and commentators have reached a near-consensus that, "during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum."

The question presented to the Court by Deck, however, is whether his constitutional rights were equally violated by visible shackling during the penalty phase of his capital trial. Justice Breyer reviews the three fundamental legal principles implicated by visible shackling. First, shackling tends to undermine the presumption of innocence that is basic in American jurisprudence. Second, shackling can interfere with an accused's ability to assist in his or her own defense. And third, shackling during trial may hamper the trial court's efforts to maintain the dignity of the judicial process, in which defendants are to be treated with dignity and the procedures should reflect "the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment."

The majority concludes that these three legal principles apply equally to the penalty phase to militate against the routine use of visible shackles.

The USSC holds that "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest' – such as the interest in courtroom security – specific to the defendant on trial." (Emphasis in original.) The three fundamental legal principles that require restrictions on the use of visible shackles in guilt trials apply with equal force in capital penalty trials: First, while the jury has already decided the issue of guilt, the choice between life and death is "no less important than the decision about guilt." Shackling during the penalty phase suggests to a jury that the court authorities consider this individual a danger to the community, and "almost inevitably affects adversely the jury's perception of the character of the defendant." This has an effect on the jury's ability to accurately weigh the considerations "that are often unquantifiable and elusive" that bear

on the sentencing decision. Second, shackling may interfere with a defendant's ability to assist in his own defense. Third, shackling impedes the trial court's exercise of its duty to maintain a dignified procedure in which the defendant is treated with respect. The error is inherently prejudicial.

The majority reject the State's assertion that the Missouri Supreme Court's findings that (1) the record does not indicate that the jury saw the shackles, (2) the trial court acted within its discretion, and (3) the defendant was not prejudiced, met the requirements of the federal Constitution. The USSC finds that the record in fact suggests that the shackles were visible, given defense counsel's comment that Mr. Deck was "shackled *in front of the jury,*" (emphasis in opinion), and the trial court's observation that the shackles would operate to ease the fear of the jury.

On the second point, the USSC finds no actual exercise of discretion, given the lack of formal or informal findings on the need for shackling. The only reasons given for shackling were that Deck had been convicted, and that the shackling would relieve the jurors of their fear of him. Moreover, there were no other facts in the record that supported the trial court's decision.

Finally, the majority emphasizes its previous holding in Holbrook that shackling is inherently prejudicial. "Thus, where a court, without adequate justification, orders the defendant wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." Instead, the burden is on the State to prove beyond a reasonable doubt that the shackling error did not contribute to the verdict adverse to Mr. Deck.

Justice Thomas' Dissent

Writing in dissent and joined by Justice Scalia, Justice Thomas undertakes an analysis of the history of shackling to make his point that the concerns that made shackling problematic in the time of Blackstone and the American founders are all but eliminated in these modern times. It should be noted that Justice Thomas does not limit his discussion to shackling during the penalty phase, but addresses more broadly shackling during any stage of trial. The dissenters assert that limitations on shackling are not based on deeply rooted principles, but rest instead on "a series of ill-considered dicta in *Illinois v. Allen, Estelle v. Williams*, and *Holbrook v. Flynn*." (Cites omitted.)

He draws the conclusion that, "although the English common law had a rule against trying a defendant in irons, the basis for the rule makes clear that it should not be extended by rote to modern restraints, which are dissimilar in certain essential respects to the irons that gave rise to the rule." In particular, the irons used in the 18th Century were heavy and painful, and defendants were frequently forced to wear them during pretrial confinement. Also, because defendants (except those accused of treason) did not have the assistance of counsel, the defendant had to be able to respond to witnesses. Justice Thomas also notes that most States did not address the use of restraints during trial until the 20th Century, undermining the majority's argument that the restrictions are supported by a deeply rooted tradition.

By contrast, modern restraints are lighter in weight, and generally not worn during pretrial confinement. They can be manipulated to allow a defendant to interact fully with trial counsel and to assist in his or her own defense. And to restrict use of shackles during the penalty phase has even less support in tradition or modern practice: "Treating shackling at sentencing as inherently prejudicial ignores the commonsense distinction between a defendant who stands accused and a defendant who stands convicted." Jurors become used to seeing convicted defendants outside the courtroom wearing restraints; to have a defendant in shackles in the courtroom will not offend the sensibilities of our courts. "The

courts of this Nation do not have such delicate constitutions." Instead, the need for security outweighs generalized concerns over decorum and dignity.

Sixth Circuit Decision

Ruimveld v. Birkett, 404 F.3d 1006, 2005 WL 911350 (6th Cir. April 21, 2005). A majority of the Sixth Circuit panel affirmed the district court's grant of relief on petitioner's claim that his due process rights were violated when he was required to wear leg shackles, handcuffs and belly chains throughout his jury trial – which was conducted in a courtroom within prison walls – on a charge that he poisoned a prison guard. After agreeing with the state appellate court's determination that constitutional error had occurred, the Sixth Circuit majority examined whether the state court's conclusion that the error was harmless was contrary to, or involved an unreasonable application of, clearly established federal law. The majority observed that "[w]hile the burden of persuasion on harmless error review falls on a petitioner, he need not prove that the error was outcome-determinative; instead he must merely remove any assurances that the error did not affect the outcome." "Accordingly, we must review the state appellate court's decision to determine if it properly considered whether Ruimveld successfully countered any assurances that the jury's verdict was not harmed by his shackling." *Id.* After discerning that "[t]he only mitigating factor discussed by the state appellate court was the fact that the trial took place in a prison; hardly a factor that would be likely to nullify completely the prejudice resulting from Ruimveld's shackling," the majority concluded that "the state court's cursory harmless error analysis unreasonably discounted the prejudicial effects of shackling noted by the Supreme Court . . ." Finally, the majority held that "the state court's failure to recognize the likelihood of substantially injurious effects resulting from Ruimveld's unnecessary shackling was, as the district court noted, an unreasonable application of the harmless error standard clearly stated by the Supreme Court in *Brecht*."

Ohio v. Hancock, 108 Ohio St.3d 57, 840 N.E.2d 1032 (Feb.1, 2006). PR due to jury's improper consideration of inadmissible evidence in penalty phase deliberations. Evidence admitted in trial phase was ruled inadmissible in penalty but was inadvertently sent to the jury room and considered by the jury who recommended death; trial judge granted a mistrial of the penalty phase without conducting his own independent review. State appealed and 12th Dist. Court of Appeals ruled this was an abuse of discretion and reinstated the jury's recommendation of a death sentence, trial judge conducted own review and sentenced defendant to death. Ohio Supreme Court 4-3 grants reversal of penalty and remand, finding the trial judge's action was not an abuse of discretion though a reasonable judge might have held the evidence was admissible. The trial judge did not act arbitrarily, unreasonably or unconscionably in his ruling on the evidence. The jury's recommendation of death was tainted by its exposure during penalty phase deliberations to evidence that the trial court had reasonably excluded, therefore the recommendation cannot serve as the basis for a death sentence, and the court remands for a resentencing possibly to death or life without parole under former RC 2929.06(B). Dissenting Justice Resnick holds the evidence was admissible at penalty to support the finding that aggravating circumstances outweigh the mitigating factors.

RIGHT TO COUNSEL, PRO SE REPRESENTATION, CONFLICT OF INTEREST AND INEFFECTIVE ASSISTANCE AT TRIAL AND ON APPEAL

Right to Self-Representation

Kane v. Espitia, __U.S.__, 126 S.Ct. 407 (Oct. 31, 2005).
Per curiam Court rules that there is no clearly established rule that an individual accused of crime who acts as his or her own lawyer has no constitutional right of access to a law

library before the trial, to aid in preparing a defense. The decision overturned a Ninth Circuit ruling finding such a right in the Court's 1975 decision on self-representation, Faretta v. California. "Faretta says nothing about any specific legal aid that the state owes a pro se criminal defendant." The habeas court erred under 2254(d).

Right to Counsel of Choice – Cert Grant

United States v. Gonzalez-Lopez, No. 05-352, cert granted ___ U.S. ___, 126 S.Ct. 979, (Jan. 6, 2006), ruling below 399 F.3d 924 (8th Cir. 2005). Question Presented: Does district court's denial of criminal defendant's qualified right to be represented by counsel of choice require automatic reversal of his conviction?

Right to Counsel on Appeal

Kowalski v. Tesmer, 543 U.S. 125, 125 S.Ct. 564 (Dec. 13, 2004).
Two attorneys lacked third party standing to assert the rights of Michigan indigent defendants who may be denied appellate counsel (under a Michigan constitutional provision making an appeal by an accused pleading guilty or nolo contendere only by leave of court, where state judges denied appointed appellate counsel to indigents pleading guilty). Counsel's claim of standing based on a future attorney-client relationship with as yet unascertained Michigan criminal defendants who will request, but be denied, appellate counsel under the statute is not a sufficiently close relationship nor is there a hindrance to the possessor's ability to protect his own interests. Pro se indigents have pursued relief in state court, and they had ample opportunities to raise their constitutional challenge in their ongoing state proceedings. Court remands to the en banc Sixth Circuit which had found the attorneys had standing and the state provision was unconstitutional.

Halbert v. Michigan, ___ U.S. ___, 125 S.Ct.2582 (June 23, 2005).
Court holds 6-3 that the Due Process and Equal Protection Clauses require appointment of counsel for defendants who have plead nolo contendere and who seek access to first-tier review. Michigan state judges began denying appointment of counsel to indigents following a 1994 amendment to Michigan's State Constitution, which provided that an appeal by an accused who pleads guilty or nolo contender must be by leave of the court. Several Michigan judges have interpreted this to give the court discretion in appointing counsel to indigent defendants who have pled guilty or nolo contendere. Antonio Dwayne Halbert (Halbert) pled nolo contendere for two counts of criminal sexual conduct but later wished to withdraw his plea. He repeatedly sought, and was denied, appointment of counsel to assist him in applying for leave to appeal to the Michigan Court of Appeals (the appellate court). The Michigan Supreme Court declined to hear Halbert's appeal. The United States Supreme Court (the Court) held that Halbert was entitled to counsel under Douglas v. California, 372 U.S. 353 (1963). The Court held that Douglas controlled because the appellate court sits to correct errors at trial and is required to evaluate every claim that comes before it, thereby bestowing a right to review on every criminal defendant. Further, the appellate court is the first tier in Michigan's appellate court system. As Michigan has created a system that gives everyone convicted of a crime a right to have the conviction reviewed, Michigan is also constitutionally required to provide counsel for indigent defendants, regardless of their plea in the trial court. The Court also held that Halbert's nolo contendere plea did not constitute a waiver of his right to first tier appellate counsel.

Right to Counsel for Mental Retardation Atkins Hearings

State v. Burke, ___ Ohio App. 3d___, 2005 WL 3557641 (Ohio CA, Dec. 20, 2005).
The trial court's judgment, after an evidentiary hearing on a successor state post-conviction petition, that petitioner is not mentally retarded and thus eligible for the death

penalty is reversed because petitioner was not afforded two certified attorneys in the Atkins hearing. The appellate court concludes that a first-time Atkins petition is "akin to a direct appeal of the issue," or to a capital trial, and a capital defendant is entitled to two attorneys at trial and in a direct appeal. The court holds in addition that on rehearing, the trial court *may* consider evidence on the Flynn effect, but is not required to do so. The trial court *must* "adjust, however nominally, an IQ score for measurement error and consider an expert's testimony regarding size or degree of the measurement error applicable to the particular intelligence test."

Right to Counsel for State Clemency Proceedings

Hain v. Mullin, 436 F.3d 1168 (10th Cir. Jan. 23, 2006) (en banc). Creating a conflict in the Circuits, the Tenth Circuit rules that the federal statutory scheme that gives state death row inmates a right to federally appointed counsel in their pursuit of habeas relief extends to state clemency proceedings. The court relied on the plain language of 21 USC 848.

Conflict of Interest

Mickens v. Taylor, 535 U.S.162, 122 S.Ct. 1237 (2002).
Petitioner in capital murder case failed to prove he was denied effective assistance of counsel because one of his court-appointed attorneys had a conflict of interest at trial. Lead counsel had represented the victim on assault and concealed-weapons charges at the time of the murder. The same juvenile court judge who dismissed the charges against the victim later appointed Saunders to represent petitioner. Counsel did not disclose to the court, his co-counsel, or petitioner that he had previously represented the victim. Supreme Court holds that in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must establish that a conflict of interest adversely affected his counsel's performance. It rejects the argument that Wood v. Georgia, 450 U.S. 261 (which had remanded for the trial court to determine whether a conflict of interest that the record strongly suggested actually existed), had changed the requirement of showing adverse affect.. The Court rejects petitioner's argument that the remand instruction in Wood established that where the trial judge neglects a duty to inquire into a potential conflict, the defendant, to obtain reversal, need only show that his lawyer was subject to a conflict of interest, not that the conflict adversely affected counsel's performance. As used in the remand instruction, "an actual conflict of interest" meant precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties. It was shorthand for Cuyler v. Sullivan's statement that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." The Court finds the notion that Wood created a new rule sub silentio implausible. Thus, to void the conviction petitioner had to establish, at a minimum, that the conflict of interest adversely affected his counsel's performance. The Fourth Circuit having found no such effect, the denial of habeas relief must be affirmed. The Court declines to rule on the correctness of the assumption that Sullivan would be applicable to a conflict rooted in counsel's obligations to former clients.

Ineffective Assistance of Trial Counsel Claims

Yarborough v. Gentry, 540 U.S. 1, 124 S.Ct. 1 (Oct. 20, 2003) (per curiam).
The Supreme Court summarily reversed the Ninth Circuit's grant of relief on petitioner's ineffective assistance of counsel claim in this California assault case. Id. at *3. The Ninth Circuit "rejected the state court's conclusion [denying relief] in large part because counsel did not highlight various . . . potentially exculpatory pieces of evidence [during closing argument]." Id. Disagreeing with this approach, the Supreme Court observed that "deference to counsel's tactical decisions in his closing presentation is particularly

important because of the broad range of legitimate defense strategy at that stage," and that "[j]udicial review of a defense attorney's summation is therefore highly deferential - and doubly deferential when it is conducted through the lens of federal habeas." Id. at *2. After identifying the points that counsel could have made during closing argument, the Supreme Court noted that "[e]ven if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them." Id. at *4. The Court continued: "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. . . . That presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court "may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive." Id. * * * Based on the record in this case, a state court could reasonably conclude that Gentry had failed to rebut the presumption of adequate assistance." After additional discussion of the Ninth Circuit's overly critical evaluation of trial counsel's argument, the Supreme Court concluded as follows: "To be sure, Gentry' lawyer was no Aristotle or even Clarence Darrow. But the Ninth Circuit' conclusion - not only that his performance was deficient, but that any disagreement with that conclusion would be objectively unreasonable - gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials." Id. at *6.

Holland v. Jackson, 542 U.S. 934, 124 S.Ct. 2736 (June 28, 2004) (non-capital) *(Per curiam)* (5-4). Supreme Court overturns Sixth Circuit's IAC grant of relief on AEDPA grounds. [Jackson's conviction rested largely on the testimony of one individual, who claimed to have been at the scene of the murder with his girlfriend. The girlfriend was not called to testify at trial, but Jackson proffered her testimony seven years later, after the state court had denied Jackson's claim of ineffective assistance of counsel following an evidentiary hearing on the ground that Jackson had not demonstrated prejudice. Jackson represented that the girlfriend would testify that she and the purported eyewitness were *not* present when the murder was committed. The Sixth Circuit disregarded the state court's alternate ground for its denial of defendant's petition for post-conviction relief, that defendant's proffered new evidence was not properly before it. Instead, the Sixth Circuit reviewed only the state court's declaration that it would deny relief on the merits even taking the new evidence into consideration.] Supreme Court finds neither the district court nor the Sixth Circuit made a determination that defendant had been diligent in seeking the newly discovered evidence, or that the AEDPA limitations requirements were met. Under these circumstances, the Sixth Circuit's finding that the state courts had unreasonably applied federal law was in error. Further, the Sixth Circuit's conclusion that the state court had applied an improper standard of review in applying Strickland, requiring proof of prejudice by a preponderance of the evidence instead of applying a reasonable probability standard, was in error. The circuit court's conclusion is unfounded, based on statements in the state court's opinion that either did not mean what the circuit court read them to mean or were outweighed by other correct statements of the standard.

Sixth Circuit IAC at Trial and Insufficiency of Evidence at Trial Holding, Later Reversed and Remanded by United States Supreme Court

Sixth Circuit Opinion

Richey v. Mitchell, 395 F.3d 660 (6th Cir. 2005). The Sixth Circuit reverses petitioner's conviction for aggravated felony murder due to insufficient evidence that he had the specific intent to kill the victim and on IAC at trial.

Insufficiency of the evidence holding that was not defaulted, due to IAC and IAAC: Under Ohio law at the time of the fire in which a child died, transferred intent did not apply in aggravated felony murder. The prosecution presented *no* evidence that petitioner intended to kill the child, but argued that he set a fire to bring harm to his ex-

girlfriend and her new lover, who were in the apartment below where the fire started and the child died. The circuit court rejects the state's argument that the Ohio Supreme Court interpreted the aggravated felony murder statute to include transferred intent in its opinion in petitioner's case; even if the brief passage relied upon by the state constitutes an interpretation of the law, applying the broader interpretation to petitioner's case would have been a violation of due process under Bouie v. City of Columbia. The Ohio law is clear on its face that the prosecution is required to prove that "the person specifically intended to cause the death of the person killed." The state's argument that petitioner defaulted this claim by failing to raise it on direct appeal is also rejected: Both his trial and appellate counsel were constitutionally ineffective because they failed to grasp the significance of the erroneous application of transferred intent in petitioner's case where an element of the crime is intent to kill a specific person. Petitioner was also able to show prejudice: By failing to challenge the sufficiency of the evidence, trial and appellate counsel permitted petitioner to be convicted of a crime despite the prosecution's failure to prove one of the elements.

IAAC procedural default issue holding: Petitioner was not barred from asserting ineffective assistance of counsel as cause for failure to raise a due process claim on direct appeal, even though the ineffective assistance claim was itself dismissed by the Ohio Supreme Court as untimely. At the time petitioner filed his motion to reopen his appeal in the Ohio courts, in which he first asserted ineffective assistance of counsel, the law permitted filing such a motion within 90 days of the journalization of the appellate judgment "unless the applicant shows good cause for filing at a later time." The Sixth Circuit finds that the Ohio courts had not clearly established what constitutes "good cause" and therefore, the procedural bar was not an adequate state ground to prevent review by the federal courts.

IAC at trial holding: The Sixth Circuit grants relief based on petitioner's claim of ineffective assistance of counsel for deficient preparation of an expert and failure to challenge the scientific evidence. Acknowledging that there may be no constitutional right to a competent expert, the panel majority holds that "the deficiencies of an expert can be imputed to counsel when counsel has *failed* to adequately research and screen an expert witness." Counsel hired the expert based solely on a promotional flier and did not check his qualifications as an arson expert. He arbitrarily limited the expert's investigation to just ten hours, and did not monitor what the expert did in those ten hours. Counsel failed to inform the expert of a critical problem with the prosecution's arson testing, namely, that the rug tested for accelerant had been taken to a garbage dump and then left lying on a parking lot near gasoline pumps. Counsel also failed to ask the expert any questions about his testing (there was none) or the prosecution's methods, and did not present any competing scientific evidence, after deciding not to call his expert (who came to the conclusion that the state's tests were accurate, and was eventually called to testify by the prosecution). "Even though trial counsel was not a scientist, this should not relieve him of his responsibility to understand the evidence being used to convict and execute his client." Trial counsel instead chose to defend petitioner on the theory that someone else had set the fire, which was unreasonable given the testimony of witnesses that petitioner had been upset with his ex-girlfriend during the evening before the fire occurred, and given that trial counsel had not conducted a sufficient investigation into alternative defenses. Petitioner has demonstrated prejudice: A carefully chosen, qualified expert would have been able to challenge the scientific methods used by the government arson investigators and undermined the supposition that the fire was caused by arson. Trial counsel did not supervise his expert's preparation, leaving him unaware that the expert relied entirely on the government's experts. Finally, trial counsel failed to share critical information with his expert about the weaknesses in the prosecution's investigation. There is a reasonable probability that, but for counsel's failures, the outcome would have been more favorable for petitioner.]

United States Supreme Court Opinion

Bradshaw v. Richey, 126 S.Ct. 602 (Nov. 28, 2005) (per curiam).

Background

Kenneth Richey was convicted of aggravated murder committed in the course of a felony, and sentenced to death. The prosecution theorized that Richey set fire to an apartment building with the intent of killing his ex-girlfriend and her new boyfriend. They were not injured, but a 2-year-old child died in the fire.

Richey's conviction and sentence were affirmed on direct appeal, and he was denied postconviction relief in the state courts. The federal district court also denied all of Richey's claims, but the Sixth Circuit granted relief on two alternative grounds. First, the circuit court found that transferred intent is not a valid theory of aggravated murder under Ohio law, and the evidence of direct intent was not sufficient to sustain the verdict. Second, Richey's trial counsel had rendered ineffective assistance. (The Sixth Circuit opinion appeared at 395 F.3d 660.)

Transferred Intent is an Applicable Theory

The USSC rejects the Sixth Circuit's reasons for concluding that transferred intent is not an accepted theory under Ohio law. First, in its decision in Richey's direct appeal, the Ohio Supreme Court clearly stated, "The doctrine of transferred intent is firmly rooted in Ohio law." The statement was dictum, but the state court's interpretation of its own law is binding on federal courts sitting in habeas corpus.

Second, the USSC is not persuaded that an interpretation of the state supreme court's opinion as accepting transferred intent would constitute an "unforeseeable and retroactive expansion of narrow and precise statutory language." There was sufficient notice in Ohio law at the time of Richey's crime of the applicability of the doctrine of transferred intent. A separate clause of the 1986 version of the statute precluded transferred intent where intent to kill was sought to be proved from the inherent dangerousness of the relevant felony. In Richey's case, though, intent to kill (albeit someone other than the actual victim) was proved directly.

"Because the Sixth Circuit disregarded the Ohio Supreme Court's authoritative interpretation of Ohio law [regarding the applicability of transferred intent], its ruling on sufficiency of the evidence was erroneous." The USSC has "repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."

The Sixth Circuit is Directed to Reconsider its IAC Ruling

The USSC notes several shortcomings in the Sixth Circuit analysis of Richey's IAC claim. First, the circuit court relied on evidence that had not been presented to the state court without first determining (1) whether Richey was at fault for not developing the facts in the state court, or (2) whether Richey satisfies the applicable AEDPA criteria: No evidentiary hearing may be held in federal court on a claim left undeveloped in state court unless the claim relies on a new rule of constitutional law, or the factual predicate could not have been discovered earlier through exercise of due diligence, and the facts are sufficient to establish that no reasonable factfinder would have found the petitioner guilty but for the constitutional error.

Also, the Sixth Circuit disregarded the state habeas court's finding that the defense forensic expert was qualified without weighing whether that finding had been rebutted by clear and convincing evidence. The circuit court further failed to analyze whether Richey had overcome the default of several grounds for claims that were apparent from the record but not raised on direct appeal; could he show cause and prejudice for not raising on direct appeal his trial counsel's failure to adequately cross-examine prosecution experts, trial counsel's premature disclosure of the defense forensic expert on the witness list, and trial counsel's failure to present competent scientific

evidence to challenge the prosecution experts? Could Richey show that the default must be disregarded because adherence would result in a miscarriage of justice?

Richey contends Ohio failed to preserve its objection to the Sixth's Circuit's reliance on evidence that was not previously presented to the state court by failing to raise the argument in its briefing before the circuit court. The Sixth Circuit has not addressed this argument, and the USSC advises the circuit court is "better situated to address this argument in the first instance."

Sixth Circuit Counsel /Conflict / IAC at Trial Decisions

McFarland v. Yukins, 356 F.3d 688 (6th Cir. Jan. 23, 2004). Grant of relief in this Michigan drug case, finding 4 interrelated 6th Am violations.. Petitioner and her daughter were both charged with drug offenses based on the results of a search of the house they shared. The drugs were found in a locked bedroom, which also contained various items identified as belonging to petitioner and her daughter. Thus, a key factor in assessing possession of the drugs was to determine which woman actually used the room as her own. Petitioner and her daughter retained one lawyer to represent them both. On the day trial was set to begin, counsel and petitioner advised the judge of a possible conflict of interest; petitioner further told the judge that she had sought to retain separate counsel, but could not afford it. In response to the conflict, the judge severed the cases and ordered them to be tried -- by the same lawyer -- before separate judges (both defendants had waived jury trials). The cases proceeded to trial and both defendants were convicted. On appeal, petitioner and her daughter again shared an attorney, who did not raise any claims relating to the conflict of interest issues apparent on the face of the record. Appellate counsel was IAC in failing to raise a conflict claim on direct appeal as it was "the prototypic *Holloway* [*Arkansas*, 435 U.S. 475 (1978),] situation:…[Both defendants] indicated that they would defend themselves on the theory that 'someone else' owned the drugs and that they did not want to be represented by the same lawyer at trial. This is clear notice to the court of a concrete conflict of interest, sufficient to bring the case within the *Holloway* rule." 356 F.3d at 703. If appellate counsel had raised the claim, petitioner's "conviction would have been reversed under the *Holloway* automatic reversal rule." *Id.* at 705. Petitioner also would have been entitled to relief on direct appeal under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), because counsel labored under an actual conflict that adversely affected petitioner's defense. Among other things, the court noted that although there was strong evidence indicating the petitioner's daughter controlled the drugs found in the bedroom, counsel at petitioner's trial "not only failed to argue that [the daughter] was guilty, but he affirmatively argued that she was innocent." 2004 WL 103013 at *17. In fact, counsel "failed to adduce any evidence that [the daughter] even lived at the house . . ."356 F.3d at 709. "This case . . . presents an actual choice by [petitioner's] counsel to forego an obvious and strong defense to avoid inculpating another client," and that, if appellate counsel had raised a *Cuyler* claim on appeal, petitioner "should have prevailed." *Id.* Trial counsel was also ineffective under *Strickland v. Washington*, as the trial judge had indicated "misgivings about the sufficiency of the evidence connecting [petitioner] to the drugs", and counsel could have presented evidence connecting petitioner's daughter, rather than petitioner, to the drugs that "was strong enough to raise a reasonable probability that [petitioner's] trial would have had a different outcome." Having concluded that petitioner had viable direct appeal claims, appellate counsel had been ineffective for failing to raise them, and this ineffectiveness "was the cause for McFarland's failure to raise ineffectiveness of trial counsel on appeal." *Id.* at 712. As to §2254(d), petitioner's actual conflict and ineffective assistance claims had not "matured" at the time the trial court required her to proceed with the lawyer she shared with her daughter, and so the claims had not been adjudicated on the merits in state court. *Id.* at 713.. With regard to the *Holloway* claim, however, §2254(d) would apply to the trial court's handling of petitioner's objection to

going forward at trial, and requiring her to do so "with conflicted counsel contradicts the clearly established precedent of *Holloway v. Arkansas*." *Id.* at 714.

Sixth Circuit IAC and Defense Witness Immunity Concerns

Towns v. Smith, 395 F.3d 251 (6th Cir. 2005) (*non-capital*) [The Sixth Circuit affirms the district court's grant of habeas relief to petitioner based on his claim of ineffective assistance of trial counsel for failure to interview a witness who was in police custody and made two statements to police indicating that petitioner's brothers, but not petitioner, were responsible for the murder with which petitioner was charged, and for not calling the witness to testify at trial. The circuit court dismisses as speculation the Warden's suggestion that petitioner must have told trial counsel that the witness had damaging information about petitioner: Even if this were true, "counsel could not have evaluated or weighed the risks and benefits of calling [the witness] as a defense witness without so much as asking [him] what he would say if called." Petitioner was prejudiced by trial counsel's failure, because the prosecution's case against petitioner was weak, and there is a reasonable possibility that but for counsel's deficient performance, petitioner would have been acquitted.] [Note:The panel expresses dismay over the state's methods and practices in this case: "To our knowledge, the state has never justified its continued refusal to grant any sort of immunity to Richard [the witness] for his role in the Steward murder. The state has known for over twenty years now that Richard possessed the gun that was used to shoot Steward and that Richard admitted to driving the get-away car. Yet, despite this evidence, the state has never prosecuted Richard and it appears that it never will. Under these circumstances, the state's refusal to grant Richard immunity is inexplicable. Not only did this refusal significantly undermine the district court's ability to determine whether Parrish was actually innocent, it compounded the danger that a murderer will remain free."]

Sixth Circuit IAC in Failing to Object to Prosecutorial Misconduct

Hodge v. Hurley, 426 F.3d 368 (6th Cir. 2005) (non-capital). A majority of the Sixth Circuit panel granted relief in this Ohio child rape case, finding that trial counsel was ineffective for "s[i]t[ting] idly by" "[d]uring [the prosecutor's] egregiously improper closing argument," 426 F.3d at 371, and that the state court's rejection of petitioner's claim was an unreasonable application of *Strickland*. After a detailed discussion of the prosecutor's misconduct, the majority summarized the improprieties as follows: "[T]he prosecutor accused the Hodge of "lying"; stated that the complaining witness was "absolutely believable"; accused [the defense expert] of testifying "wrongfully" and "unethically," and telling "a lie"; stated that defense counsel was telling "a lie"; severely misrepresented the testimony of . . . the examining physician; stated (incorrectly) that a finding in favor of Hodge required a finding that [the complaining witness'] great-grandmother and great-aunt were "absolute liars"; suggested (without any evidence) that Hodge was a frequent underage drinker; insinuated (without any evidence) that Hodge wanted to get part of the prosecutor's family's Social Security checks; suggested that Hodge was the type of person the jury should fear running into at night; and generally argued that the jury should convict Hodge on the basis of his bad character." *Id.* at 386.. Finding itself "unable to articulate a sound professional reason why defense counsel did not object to this pattern of repeated misconduct," the majority concluded that counsel's performance had been deficient. *Id.*. Additionally, noting that "[t]he lack of physical evidence confirming sexual activity meant that this was necessarily a close case at the trial level," and that "[t]he result depended primarily on the jury's determination of whether Hodge – who took the stand in his own defense – was more or less credible than his ex-girlfriend, . . . who testified against him," the majority quickly concluded that petitioner had been prejudiced. *Id.* at 386-87. Explaining that the state court "failed to address" the prosecutor's statements of personal beliefs about the credibility of the witnesses, and "failed to explain

why two Supreme Court precedents which preclude prosecutorial comment on witness credibility did not apply in this case," the majority held that the state court's denial of relief was objectively unreasonable under 2254(d). *Id.* at 387-88. "Taken together," the majority concluded, "in a trial where the result depended almost entirely on the jury's determination as to whether Hodge or [his ex-girlfriend] was more credible, the failure to object to these comments was highly prejudicial," and it was unreasonable for the state court to conclude that petitioner had not been prejudiced by trial counsel's omissions.

Sixth Circuit IAC on Appeal

Mapes v. Tate, 388 F.3d 187 (6th Cir. 2004). [Sixth Circuit affirms the district court's grant of relief on grounds of ineffective assistance of appellate counsel and remands for a new appeal. Counsel had failed to raise on appeal (1) an Eddings claim, (2) a claim of an erroneous instruction to the jury that it had to unanimously reject the death penalty before considering life, and (3) a claim based on a juror's equivocal response when polled after the verdict was read. The Sixth Circuit finds the failure to raise the Eddings claim was ineffective, and does not reach the other two claims. In concluding that appellate counsel was ineffective, the Sixth Circuit considers that the claim was significant and obvious; it was stronger than the claims that were presented; trial counsel had objected to it, putting appellate counsel on notice; it was an error of law and review would be *de novo*; neither of the appellate counsel had death penalty experience; and failure to raise the claim was not reasonable nor part of a strategy. Where habeas petitioner wins relief on grounds of ineffective assistance of appellate counsel, the appropriate relief is granting the writ conditioned upon the state courts granting petitioner an opportunity to pursue a new direct appeal with effective assistance of counsel. The Sixth Circuit rejects petitioner's argument that his death sentence should be vacated and the federal court should direct the state court to resentence him. While it is true that the claim appellate counsel failed to raise would, if established, merit the relief petitioner asks for, the Sixth Circuit does not have to decide the underlying issue to determine that petitioner was deprived of effective assistance. By permitting petitioner to pursue a new appeal, Ohio will have an opportunity to correct its own errors.]

Franklin v. Anderson, 434 F.3d 412 (6th Cir. Jan. 9, 2005).
Appellate counsels' performance was deficient. Counsel failed to raise the issue of a biased juror on direct appeal, even though defendant suggested the issue. (The issue is not procedurally barred because the state procedural law was not adequate and established, and because of appellate counsel's ineffective representation.) Counsel did not advise defendant that he could file a *pro se* supplementary brief raising issues they refused to include. In fact, counsels' overall communication with defendant was inadequate, given that lead appellate counsel only corresponded by letter, and second counsel did not communicate with defendant at all. Neither one ever met him or spoke to him over the telephone. Defendant's requests to lead counsel that she withdraw were rebuffed. At oral argument before the state court of appeals, second counsel did not appear because of a family emergency. The court refused to postpone the argument, and lead counsel refused to discuss or answer questions about any issues in the part of the brief that had been prepared by the absent lawyer. Before the state supreme court, counsel were unprofessional, laughing inappropriately and displaying insufficient knowledge of the facts of the case.

INEFFECTIVE ASSISTANCE AT SENTENCING

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (June 26, 2003).

Penalty Reversed due to IAC at penalty phase.

Background: Kevin Wiggins was convicted by a Maryland judge of first-degree murder. Wiggins asked for a jury to hear the penalty phase. Wiggins was represented by

two Baltimore County public defenders. They sought a bifurcated penalty phase to present evidence that Wiggins was not a "principal in the first degree" in the killing in the first phase, and then, if necessary, to present mitigating evidence in a second phase. Counsel filed the motion a month before trial was scheduled to start. A day after the scheduled commencement, the trial court denied the motion. The penalty trial began immediately thereafter. In opening statement, counsel told the jurors that they would hear evidence demonstrating that Wiggins was not directly responsible for the murder, and that they would hear of his difficult life. In fact, the jury heard nothing of Wiggins' life history. They heard that he had no prior criminal record, but no other details of the hard life counsel spoke of in the opening statement. Instead, counsel made a proffer to the court prior to sentencing, for the purpose of preserving the bifurcation issue for appeal. In the proffer, counsel asserted that had the sentencing phase been bifurcated, they would have introduced psychological reports and testimony regarding Wiggins' limited intellectual capacities and emotional development, his capacity for empathy, and his desire to function in the world. After closing arguments and instructions, the case was submitted to the jury, which returned a death verdict. 123 S.Ct. at 2532. Wiggins sought postconviction relief in Maryland state courts, on the ground of inadequate assistance of counsel. Id. He presented testimony from a licensed social worker, detailing Wiggins' childhood experiences of severe physical and sexual abuse. One of Wiggins' trial counsel testified, saying he did not recall hiring a forensic social worker during preparation for trial, even though there was money available for this purpose. He explained that he and his cocounsel had decided early on that they would concentrate on the question of direct responsibility for the murder as the main defense. The state appellate court concluded that counsel had made a tactical decision to prepare and present what they believed was the best defense. Id. at 2533. The federal district court disagreed, but the Fourth Circuit reversed. The federal appellate court compared the complete lack of preparation warranting relief in Williams v. Taylor, 529 U.S. 362 (2000), with the fact that Wiggins' counsel had learned some details of his life history from the presentence report and social services records, and determined that it was enough to permit them to make an informed strategic choice. Id. at 2534.

Wiggins' Counsel Were Ineffective.

Justice O'Connor focuses the inquiry, as required under AEDPA and the Court's prior decisions, on whether the investigation conducted by counsel was reasonable to support their decision to present an incomplete mitigation case while concentrating on proving that Wiggins was not personally responsible for the murder. Id. at 2534-36. Whether trial counsel *should* have presented a mitigation case is *not* the Court's primary concern. Id. at 2536. The majority identifies just three sources from which trial counsel gathered information on Wiggins' background: a psychologist who conducted tests on Wiggins, the written presentence report (PSI), and records kept by the Baltimore City Department of Social Services (DSS records). Id. Justice O'Connor pointedly notes that the state court and the Fourth Circuit referenced *only* the PSI and the DSS records as counsel's sources of information (setting up the majority's refutation of Justice Scalia's dissent). Id.

Trial counsel's reliance on just a presentence report and social service records to investigate petitioner's background for preparation of mitigating evidence for a penalty phase did not meet the professional standards of practice in Maryland in 1989. Standard practice at that time included preparing a social history report, and trial counsel had funds available to retain a forensic social worker to prepare such a report. Id. An additional source of prevailing standards is the ABA Guidelines, which provide that an investigation for mitigating evidence should "comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Id. at 2537.

In the DSS records, there was information about Wiggins' childhood, including his mother's alcoholism, his emotional difficulties when in foster care, school absences, and a report of an instance where Wiggins and his siblings were left alone for days without food. This should have alerted trial counsel to the need for more investigation. Id.

at 2537. Nothing they uncovered suggested that further investigation would be either harmful or fruitless. Id.

While Justice Scalia, in dissent, argues that AEDPA requires that the federal courts defer to the state court's factual findings that Wiggins' counsel *did* investigate and *did* learn about his social history, id. at 2545,The majority seems to have no quarrel with the state court's factual findings, but identifies error in the state court's narrow definition of the *scope* of an attorney's duty. The narrow definition constituted an unreasonable application of Strickland. Id. at 2538. Justice O'Connor also explains that the dissent has misread the trial court's findings: "In its assessment of the Maryland Court of Appeals' opinion, the dissent apparently does not dispute that if counsel's investigation in this case had consisted exclusively of the PSI and the DSS records, the court's decision would have constituted an unreasonable application of Strickland. Of necessity, then, the dissent's primary contention is that the Maryland Court of Appeals *did* decide that Wiggins' counsel looked beyond the PSI and the DSS records and that we must therefore defer to that finding under § 2254(e)(1). *Had* the court found that court found that counsel's investigation extended beyond the PSI and DSS records, the dissent, of course, would be correct that § 2254(e) would require that we defer to that finding. But the state court made no such finding." (Citations omitted.) Id. at 2538-40. The Maryland Court of Appeals apparently assumed that because trial counsel had *some* information about Wiggins' background, counsel were in a position to make a reasonable tactical decision about further investigation and how to present the penalty defense. Id. at 2538.

"In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.…[A] reviewing court must consider the reasonableness of the investigation said to support that strategy." Trial counsel's cursory investigation, in which only a presentence report, social services records, and a psychologist's report were reviewed, was not sufficient to support counsel's approach in the penalty phase, concentrating on proving that defendant was not personally responsible for the killing, with scant presentation of defendant's life history. The Court concludes that the deficient penalty phase presentation was the result of "inattention, not reasoned strategic judgment." Id. at 2542.[The Court was able in this case to define what counsel knew and didn't know at trial more readily than can be done in most cases: Following denial of trial counsels' motion to bifurcate the penalty trial, they made a proffer of what would have been introduced in mitigation had the court granted the motion. In this proffer, counsel referred to the psychologist's report but did not present anything about Wiggins' childhood. Justice O'Connor reasons that had counsel known more, as one of them claimed in an evidentiary hearing in district court, they would have been motivated to present it, because they were attempting to make a record for appeal of the denial.] Id. at 2541.

"Petitioner was prejudiced by his trial counsel's failure to discover and present evidence of petitioner's childhood. The mitigating evidence not presented was strong: petitioner's mother was abusive and deprived petitioner of necessities during his first six years. In later years he was sexually molested, tormented, and raped while in foster care. Id. at 2542. He was homeless for a time and has diminished mental capacities. This is "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Had the jury heard petitioner's life history, in addition to the one significant mitigating fact presented, that he had no prior criminal record, there is a reasonable probability that at least one juror would have voted for a life sentence." Id. at 2543. The Court also considered the absence of a "double edge" in Wiggins' case when evaluating prejudice. The prosecution would not have been able to present a history of violence to weaken the effect of the mitigation evidence, as often happens. Id.

Justice Scalia's dissent stated: "Today's decision is extraordinary – even for our 'death is different' jurisprudence. It fails to give effect to §2254(e)(1)'s requirement that state court factual determinations be presumed correct, and disbelieves a member of the bar while treating hearsay accounts of statements of a convicted murderer as established fact. I dissent." Id. at 2554.

Rompilla v. Beard, ___ U.S. ___, 125 S.Ct. 2456 (June 20, 2005).

Reversal of death sentence on grounds of IAC, 5 (Breyer majority) to 4 (Kennedy dissent) opinion. "We hold that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." Failure to obtain and examine the court file of a prior conviction that counsel is on notice will be at the heart of the prosecution's case in aggravation is representation that falls below the professional standard, where the court file is readily available and the prosecution's intended use of evidence of the prior crime is likely to have a severely negative impact on one of counsel's chosen defense strategies, residual doubt. The Court finds that petitioner was prejudiced by counsel's failure to obtain the court file, because counsel would have found "a range of mitigation leads that no other source had opened up," which in turn would have triggered additional investigation into petitioner's life history and mental health. Post-conviction counsel presented evidence that trial counsel could have obtained that would have contradicted petitioner's own representations of his family life and childhood.

Background

Rompilla was convicted of murder with three aggravating factors: (1) that the murder was committed in the course of committing another felony; (2) that the murder was committed by torture; and (3) that Rompilla had a history of felony convictions indicating the use or threat of violence. Mitigating evidence was testimony from five family members declaring their belief in his innocence and their continued love for him. Rompilla was sentenced to death.

Counsel was Ineffective

The Court majority finds counsel's failure to examine the court file on Rompilla's prior conviction is deficient performance. Noting counsel's failure to examine school records, records of his incarcerations, and medical records, the Court focuses on a single oversight as dispositive: Rompilla's trial counsel did not examine the court file on Rompilla's prior conviction for rape and assault, even though the prosecutor had given notice that one of the aggravating factors would be Rompilla's history of felony convictions, and more specifically, that the transcript of the rape victim's testimony would be introduced at trial to emphasize his violent character. Only when the issue was raised again the day before the sentencing hearing was to begin did counsel show an interest in obtaining the file; in the postconviction evidentiary hearing, counsel confirmed that she had not obtained the file previously and, even though she finally got a copy just before the sentencing hearing, she still did not examine it.

The Court is distressed by this lapse: "With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation." The justices stress that the information on this particular prior was especially important because it was similar to the capital crime of which Rompilla had been convicted. Additionally, awareness of the

similarity should have led trial counsel to rethink their penalty phase strategy of stressing residual doubt as a reason for voting for life. Respondent argued that obtaining and reviewing the file would have been fruitless, because it established incontrovertibly that Rompilla had committed a violent felony, and studying the file would not have changed that fact. "That analysis ignores the fact that the sentencing jury was required to weigh aggravating factors against mitigating factors. We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest."

Justice Souter also cites to the 1982 edition of the ABA Standards for Criminal Justice, in circulation at the time of Rompilla's trial, saying its provisions "describe[] the obligation in terms no one could misunderstand in the circumstances of a case like this one." In addition to quoting 1 ABA Standards for Criminal Justice 4-4.1, he observes in a footnote that shortly after Rompilla's trial, the ABA issued guidelines specifically addressing the duties of defense counsel in capital cases, which also identify the duty to obtain information in the possession of prosecution or law enforcement authorities, and that the current guidelines are even more explicit, directing counsel to investigate "prior convictions … that could be used as aggravating circumstances or otherwise come into evidence."

In response to the dissenting justices (see below), Justice Souter denies that this decision creates a rigid, *per se* rule. The Court is imposing a duty to review the court file in this specific circumstance where counsel failed to make reasonable efforts to review the prior conviction file, "despite knowing that the prosecution intended to introduce Rompilla's prior conviction not merely by entering a notice of conviction into evidence but by quoting damaging testimony of the rape victim in that case." Additionally, the file was readily available, and the prosecution's intended use of the prior conviction evidence was likely to "hamstring" counsel's residual doubt defense strategy.

In her concurring opinion, Justice O'Connor even more explicitly rejects the *per se* rule accusation by the dissenting justices. "[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient…." She cites three particular factors that make the attorneys' failure to obtain and review the prior conviction file ineffective assistance: (1) Trial counsel knew that the core of the prosecution's case for death would be Rompilla's record of prior convictions; (2) the prosecution's planned use of the victim's testimony from the prior conviction was extremely detrimental to a primary defense strategy of emphasizing lingering doubt; and (3) counsel's failure to look at the file was not a strategic decision, but the result of inattention.

Turning to prejudice, the Court decides the question *de novo*, because the state courts found counsel's representation adequate and did not reach the prejudice question. There is no doubt among the majority justices that Rompilla was indeed prejudiced by counsel's failure to examine the prior conviction court file, and Justice Souter notes that even Pennsylvania does not contest the prejudice claim. Included in the file were records from a prior imprisonment, which "pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard." Poverty, a long history of suspected alcoholism, possible schizophrenia, and low cognitive abilities are noted in this report, as compared to Rompilla's own representation that his childhood was unremarkable. This report would have triggered a duty to do additional investigation, and more mitigating evidence would have been discovered, as was presented in post-conviction proceedings. Interviews with other family members would have revealed the severe abuse Rompilla suffered at his father's hand, terrible poverty, the violence he witnessed between his parents, and more. This information would have prompted seeking Rompilla's school and juvenile records, which would have revealed his mother's

alcohol abuse and consequent neglect of her children, and test results that would support an Atkins claim.

Dissenting Opinion

Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, dissented, decrying the imposition of "a rigid requirement to review all documents in what it calls the 'case file' of any prior conviction that the prosecution might rely on at trial" on overworked, underfunded, dedicated public defenders. He is concerned that this ruling will force defense attorneys to put effort into reviewing such files when the energy could be much better spent elsewhere, and will ultimately result in less effective representation. The dissenters also complain that the majority has disregarded the AEDPA deference standard in rejecting the state court's finding that Rompilla received adequate representation.

And finally, assuming for the sake of argument that the representation he received was below the professional standard, Rompilla has not demonstrated that he was prejudiced to the satisfaction of the dissenters. They note that the document from which the majority finds the most useful information is a single, ten-page document prepared by the Pennsylvania Department of Corrections. Justice Kennedy argues that Rompilla has not demonstrated that his attorneys were likely to actually look at this document, even if they had obtained the court file. If counsel were looking for information useful in rebutting the prosecution's case in aggravation, the document in question does not appear to contain anything useful. "If counsel's alleged deficiency lies in the failure to review the file for the purposes the majority has identified, then there is no prejudice: for there is no reasonable probability that review of the file for those purposes would have led counsel to accord the transfer petition enough attention to discover the leads the majority cites." And, "[t]he Constitution does not mandate that defense attorneys perform busy work."

[Editor's Note: Reading between the lines of the majority opinion, it appears that the failure to gather additional life history records alone probably would not have been found to be ineffective assistance, were it not for the life history leads in the court file on Rompilla's prior conviction. On the other hand, Judge Sloviter's dissent in the Third Circuit, which Justice Souter refers to more than once with obvious approval, found counsel's inadequate life history investigation to be ineffective without even mentioning the court file on the prior conviction. Rompilla v. Horn, 355 F.3d 233, 274-284 (3d Cir. 2004). Judge Alito was in the majority in the Third Circuit and would have denied relief.]

Walker v. True, 540 U.S. 1013, 124 S.Ct. 567 (Mem.) (Nov. 17, 2003). The USSC granted certiorari in this Fourth Circuit case, where petitioner's claim that his counsel's failure to discover and present evidence of mental retardation from school records and mental health history was rejected by the lower courts. The USSC vacated the judgment and remanded the case for further consideration in light of Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003).

(Terry) Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000).
PR due to IAC, granted under the new AEDPA 2254(d) standard, Strickland relief is granted as this is clearly established law, as adjudication was "contrary to" Strickland as it relied on Fretwell to undermine that case and Fretwell is limited to its unique facts, and application of Strickland was unreasonable as the state court opinion did not expressly acknowledge significant portion of the mitigating evidence and "state court decision reveals an obvious failure to consider the totality of the omitted mitigation evidence." Counsel failed: to prepare for sentencing until a week beforehand, to uncover extensive records of nightmarish childhood, to introduce available evidence of borderline MR, to seek prison records showing commendations for helping to crack a prison drug ring and

for returning a guard's missing wallet, and to uncover evidence of peaceful life in prison and among the inmates least likely to act dangerously and from a minister that he thrived in regimented environment; court syllabus states "although not all of the additional evidence was favorable to Williams, the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of Williams' background." [Ed. note. The Good News, says LDF habeas attorneys: Strickland has life again as there was a lot of aggravation and the mitigating evidence not investigated is common type to many of our cases, so use it for Strickland claims.

Glover v. U.S., 531 U.S. 198, 121 S.Ct. 696 (2001).
Deficient performance by counsel that leads to an increase in a prison sentence imposed under the US Sentencing Guidelines is "prejudicial" under the Sixth Amendment test for counsel effectiveness regardless of the amount of the increase. The Seventh Circuit erred in engrafting onto the prejudice brand of the Strickland test the requirement that any increase in sentence must meet a standard of significance.

Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843 (2002).
The Court (8-1) rejects the Sixth Circuit's conclusion that IAC claim had warranted a presumption of prejudice pursuant to *United States v. Cronic*. Claim was governed by *Strickland v. Washington*, and state court's denial of relief was not contrary to, and did not involve an unreasonable application of, clearly established federal law under §2254(d). The Sixth Circuit's decision granting relief had been based on counsel's "not asking for mercy after the prosecutor's final argument, not subjecting the State's call for the death penalty to meaningful adversarial testing," and the state court's erroneous reliance on *Strickland*, rather than *Cronic*, as amounting to an unreasonable application of federal law. But "[w]hen we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. . . Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind." In this case, the Court continued, the challenged "aspects of counsel's performance" "are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components."

The state court's decision to apply *Strickland* was not "contrary to our clearly established law." "For respondent to succeed, . . . he must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. . . . Rather, he must show that the Tennessee Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner. This, we conclude, he cannot do". After discussing the merits of the ineffective assistance of counsel claim, the Court concluded that, "at the very least . . . the state court's [denial of relief] was not 'unreasonable.'"

Dissenting Justice Stevens contended that the circumstances of this case, including counsel's shortcomings in preparation and advocacy, as well as the "diagnosed mental illness that rendered him unqualified to practice law, and . . . apparently led to his suicide," justified a presumption of prejudice under *Cronic*. When complaints concern points that encompass all of counsel's fundamental duties at a capital sentencing proceeding - performing a mitigation investigation, putting on available mitigation evidence, and making a plea for the defendant's life after the State has asked for death - counsel has failed 'entirely'.

Woodford v. Visciotti, 537 U.S 19, 123 S.Ct. 515, (2002) (per curiam).
A., by 9-0 on cert petition, the Court reverses the 9th Circuit's IAC relief at 288 F.3d 1097 (2002), on grounds it exceeds the limits imposed on federal habeas review by 28 U.S.C. § 2254(d). The California Supreme Court assumed that respondent's trial counsel provided constitutionally inadequate representation during the penalty phase, but concluded that this did not prejudice the jury's sentencing decision. The Court of Appeals found that the California Supreme Court decision ran afoul of both the "contrary to" and the "unreasonable application" conditions of § 2254(d)(1) by imposing on the defendant a more likely than not standard. On the "contrary to" analysis, the Supreme Court finds this a mischaracterization of the state-court opinion which expressed and applied the proper standard for evaluating prejudice. Despite citations of, and quotations from, *Strickland*, the Ninth Circuit had concluded that the California Supreme Court had held respondent to a standard of proof higher than what that case prescribes for one reason: in three places (there was in fact a fourth) the opinion used the term "probable" without the modifier "reasonably." The Supreme Court finds this was error because the California Supreme Court's opinion painstakingly describes the *Strickland* standard at several points -- "its occasional shorthand reference to that standard by use of the term "probable" without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision. See *Mickens v. Taylor*, 535 U.S. 162 (2002) (slip op., at 3) ("probable effect upon the outcome"); *Williams v. Taylor*, 529 U.S. 362, 393 (2000) ("probably affected the outcome")." The Circuit Court's readiness to attribute error is inconsistent with the presumption that state courts know and follow the law, and with § 2254(d)'s "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), which demands that state court decisions be given the benefit of the doubt. On the "unreasonable application analysis", the Ninth Circuit did not observe the distinction between incorrect and unreasonable judgments, but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d). The Ninth Circuit based its conclusion of "objective unreasonableness" upon its perception (1) that the California Supreme Court failed to "take into account" the totality of the available mitigating evidence, and "to consider" the prejudicial impact of certain of counsel's actions. There was no support for this, as "all of this was in fact described in the California Supreme Court's lengthy and careful opinion". The Ninth Circuit also found the California Supreme Court determination that the aggravating factors to be so severe that it concluded respondent suffered no prejudice from trial counsel's (assumed) inadequacy was objectively unreasonable, suggesting that the fact that the jury deliberated for a full day and requested additional guidance on the meaning of "moral justification" and "extreme duress," meant that the "aggravating factors were not overwhelming." The Supreme Court responds: "Perhaps so. However, under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly. Whether or not we would reach the same conclusion as the California Supreme Court, we think at the very least that the state court's contrary assessment was not 'unreasonable'."

Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551 (Dec. 13, 2004).
Affirming denial of relief where defendant argued IAAC at penalty, a unanimous court (8-0), discusses “defense counsel’s strategic decision to concede, at the guilt phase of the trial, the defendant’s commission of murder, and to concentrate the defense on establishing, at the penalty phase, cause for sparing the defendant’s life.” [Factual background: Joe Elton Nixon faced trial in Florida for the murder of a woman who had offered him a ride after he asked her to help jumpstart his car. Once in her car, Nixon directed her to a remote area, overpowered her, and stopped the car. He put her in the trunk of the car and drove to a wooded area. There, he tied her to a tree and killed her by setting fire to her. After her body was discovered, Nixon set fire to her car. He told his brother and girlfriend that he had killed a woman; his brother turned him in. His assistant public defender filed a plea of not guilty and then conducted an investigation, including

depositions of the prosecution witnesses. He became convinced the evidence against Nixon was overwhelming, and that the only hope was to preserve his credibility for the penalty phase by conceding guilt at the guilt phase. (He attempted to negotiate a plea, but the prosecution would settle for nothing less than a death sentence.) Counsel attempted to discuss his strategy with Nixon, but Nixon did not respond, neither approving nor disapproving. Counsel conceded Nixon's guilt in his opening statement, and again in the closing argument. In between, he conducted cross-examination to clarify points, objected to the admission of crime-scene photos as unduly prejudicial, and argued aspects of the jury instructions. Nixon became disruptive early in the proceedings and was deemed to have waived his right to be present at the trial. The jury found Nixon guilty on all counts. In the penalty phase, counsel called eight witnesses to relate Nixon's emotional troubles as a child, and his erratic behavior in the days preceding the murder. Mental health experts testified regarding his antisocial personality, history of emotional instability, low IQ, and the possibility that he had suffered brain damage. The prosecution added little to its case beyond the evidence produced in the guilt phase, except to add that Nixon had removed the victim's underwear to frighten her. In his closing, counsel emphasized that Nixon was not an "intact human being." after deliberating for three hours, the jury recommended death. On direct appeal, the Florida Supreme Court remanded Nixon's case for an evidentiary hearing on whether Nixon had consented to counsel's strategy, calling it the "functional equivalent of a guilty plea," and stated that a guilty plea may not be inferred from a defendant's silence. On remand, counsel testified that he explained his strategy to Nixon on several occasions, but never received a clear response from Nixon. He decided to proceed anyway, because in his professional judgment it was the only chance he would have to save Nixon's life. Nixon did not testify on remand. The Florida Supreme Court reversed Nixon's conviction and sentence and remanded for a new trial. The State filed a petition for writ of certiorari.]

The US Supreme Court stated the issue as "[W]hether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's performance deficient, and whether counsel's effectiveness should be evaluated under Cronic or Strickland." Initially, the Court finds this strategy was not the equivalent of a guilty plea: Even though counsel conceded guilt, the State still had to prove its case, and counsel subjected witnesses to cross-examination. He also sought to exclude evidence he deemed prejudicial. By comparing counsel's strategy to a guilty plea, the Florida Supreme Court evaluated the ineffective assistance claim under the wrong standard. The state court presumed deficient performance, and then applied Cronic's presumption of prejudice standard, which is reserved for circumstances where counsel has totally failed to subject the State's case to meaningful adversarial testing. But trial counsel's strategic decision to concede petitioner's guilt, even though petitioner never explicitly consented, in order to preserve credibility to present a penalty phase defense, should be evaluated under the Strickland standard of reasonableness, not the Cronic presumption of prejudice standard applied by the Florida Supreme Court. "Although such a concession in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus." The Court reverses, stressing the importance of considering both the guilt and penalty phases in deciding strategy. And, "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the Strickland standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." [Note: The Court's recognition of the necessity to consider both phases of a capital trial when deciding overall strategy, is an important, positive step in developing standards for capital representation.]

Stay Granted then Cert Denied

Lovitt v. True, No. ____, stay granted pending consideration of certiorari ___ U.S. ___, 126 S.Ct. 10 (July 11, 2005), ruling below 403 F.3d 171 (4th Cir. 2005); certiorari ultimately denied ___ U.S.___ (October 5, 2005). Questions Presented were: 1. Whether the Court of Appeals for the Fourth Circuit should be reversed for repeating its error in Wiggins v. Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), of upholding a death sentence where defense counsel conducted little investigation of their client's background and failed to uncover and present to the jury extensive evidence of childhood abuse. 2. Whether, in light of the fact that DNA evidence has exonerated more than a dozen individuals on death row, the Court of Appeals erred in holding that Youngblood v. Arizona, 488 U.S. 51 (1988), permits a Commonwealth employee to destroy DNA evidence deliberately, unlawfully, and in reckless disregard for the petitioner's rights before post-conviction proceedings have commenced? 3. Whether the Court of Appeals correctly held, in agreement with five circuits but in conflict with three others, that the prosecution had no duty under Brady v. Maryland, 373 U.S. 83 (1963), to disclose the medical examiner's exculpatory opinion because defense counsel purportedly could have discovered the examiner's opinion on cross-examination? Defendant was represented by Ken Starr.

Recent 6th Cir. And Dist. Ct. Ohio Decisions On IAC At Penalty Phase:

Lundgren v. Mitchell, ___ F.3d __, No. 02-3001 (6th Cir., Mar. 13, 2006)

A divided Sixth Circuit affirms the denial of habeas relief to Ohio death row inmate Jeffrey Lundgren, a Manson-like Mormon cult leader who ordered his followers to kill a family of five. In dissent, Judge Merritt focuses on Lundgren's claim that he was denied effective assistance of counsel because his attorneys did not present an insanity defense, surprising even the prosecution. Tracing the history of the "deific decree" defense * i.e., God told me to kill * Judge Merritt explains why Lundgren's defense attorneys were deficient in failing to research this defense, and why their failure was prejudicial. Writing for the majority, Judge Clay notes that the deific decree defense has never succeeded in Ohio, and there is no reason to believe that Lundgren's case would somehow be the exception.

Harries v. Bell, 417 F.3d 631 (6th Cir. 2005). The Sixth Circuit affirmed the district court's grant of sentencing phase relief in this pre-AEDPA Tennessee capital case, finding that trial counsel had been ineffective in failing to investigate and present available mitigating evidence at petitioner's 1981 trial. Trial counsel had been deficient in limiting their investigation to telephone contacts with petitioner's mother and brother, requests for information from some of the institutions in which petitioner had been confined, and interviews of petitioner, a codefendant, and two prosecution witnesses. Although counsel had been made aware of the possibility of mental illness, they did not investigate or consult an expert; likewise, although they had "indications" that petitioner had a troubled childhood, counsel did not investigate his background. The Sixth Circuit rejected counsel's claims that they did not investigate because petitioner opposed it, and because they did not believe evidence about his background would be persuasive to the jury, explaining that "our prior decisions foreclose such arguments here." With regard to prejudice, the court catalogued the array of mitigating evidence that went undeveloped, including: "significant physical abuse Harries suffered at the hands of his mother, stepfather, and grandmother," including a blow to the head with a frying pan, and choking so severe that petitioner's "eyes hemorrhaged"; "Harries's father and stepfather beat his mother, and his stepfather raped his sister"; "[b]oth Harries's father and stepfather were ultimately murdered themselves"; "[s]ince age eleven, Harries has spent all but a combined total of 36 months confined in institutions, some of which were violent or unsanitary"; carbon monoxide poisoning resulting from a suicide attempt at age 20;

frontal lobe damage; and some form of mental illness on which experts had been unable to agree. The court went on to reject the state's arguments that petitioner had not been prejudiced by the failure to introduce this evidence because doing so would have opened the door to unfavorable evidence from the prosecution, explaining that Tennessee law likely would have prohibited the prosecution's evidence and that, even if the state had been permitted to present such evidence, the balance would still have tipped in petitioner's favor. After noting further that under Tennessee law petitioner needed only to convince a single juror not to vote for death, the Sixth Circuit concluded that petitioner had established the prejudice necessary to prevail on his claim.

Mason v. Mitchell, 320 F.3d 604 (6th Cir. 2003). Remand for Evidentiary Hearing. A majority of the Sixth Circuit panel remanded this Ohio capital case for an evidentiary hearing on petitioner's claim that trial counsel was ineffective for failing to adequately investigate available evidence of petitioner's background which, had it been developed, could have been presented at the sentencing phase of his trial. With regard to §2254(e)(2), the majority stated that "Mason requested (and was denied) a hearing in state court and has actively sought to expand the record. We see no lack of diligence, so we do not apply §2254(e)(2)." 320 F.3d at 621 n.6. As to the substance of petitioner's claim, the majority found the record "inadequate for a meaningful review," but observed nevertheless that "[t]here is a significant likelihood that defense counsel acted unreasonably in failing to conduct an independent and thorough investigation of Mason's background." *Id.* at 620. While acknowledging that defense counsel did receive substantial documentation relating to petitioner's background from the prosecution, the majority found that those documents "could not have contained anything close to the amount of mitigating evidence that could have been and later was obtained in an independent and thorough investigation," *Id.* at 624, including "substantial evidence about how drug use and violence pervaded Mason's background and life history," *Id.* at 622. The majority also observed that "[t]rial counsel's failure to conduct an independent and thorough investigation may have hampered their ability to make strategic decisions at sentencing; it may also have affected their ability to give competent advice to Mason about the meaning of mitigation evidence and the availability of possible mitigation strategies." *Id.* at 624.

Lawson v. Warden, Mansfield Correc. Inst., 197 F.Supp.2d 1072 (S.D. Ohio. Mar. 29, 2002) PR for IAC in failing to request that jury be instructed "concerning his mental disease or defect as a mitigating factor"; trial phase case had been insanity defense and more evidence was introduced at penalty, so decision not to request a jury instruction addressing the [B3] mitigator was not trial strategy; prejudice was present as "in the absence of an instruction it is quite likely that the jury failed to consider this evidence at all"; state court's denial of relief was unreasonable application of Strickland.

Frazier v. Huffman, 343 F.3d 780 (6th Cir. Sept. 8, 2003). A majority of the Sixth Circuit panel granted relief on petitioner's sentencing phase ineffective assistance of counsel claim. Before reaching the merits, the court noted the district judge's policy of granting blanket certificates of appealability in all capital cases and declared it "contrary to our decision in Porterfield v. Bell, 258 F.3d 484 (6th Cir. 2001)." 343 F.3d at 788. The court went on to "excuse the procedural error of the district court" in this case, but took the opportunity to reiterate that COAs should only be issued pursuant to the requirements of §2253(c)(2) and (3). 343 F.3d at 789. As to the IAC claim, the majority began by noting that "the sum total of the evidence presented on Frazier's behalf during the penalty phase . . . was the following unsworn statement: 'Ladies and gentlemen, I know you found me guilty, and in the past I have done things that were wrong, but I am not guilty of this crime and I am asking you to spare my life.'" *Id.* at 793-94. The majority next noted that the post-conviction evidence indicated petitioner "suffers from a functional brain impairment" affecting his frontal lobe, and that "[t]he state has not challenged the contention that Frazier's trial counsel could have developed this same information had they conducted a

reasonable investigation." *Id.* at 794. With regard to deficient performance under Strickland, the majority stated: "We can conceive of no rational trial strategy that would justify the failure . . . to investigate and present evidence of [petitioner's] brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any 'residual doubt' about his guilt. . . . [T]rial counsel were actually aware of Frazier's brain impairment because they saw his medical records, yet counsel failed to investigate the matter or present any evidence regarding the same." *Id.* The majority went on to conclude that the state court's attribution of counsel's omission to trial strategy involved an unreasonable application of federal law, explaining as follows: "We do not believe that it is reasonable to infer that a trial strategy, which is on its face irrational and for which no justification has ever been produced, becomes reasonable simply because of 'the thorough and professional manner' in which trial counsel otherwise performed." *Id.* at 796. Turning to the question of prejudice, the majority first noted that petitioner had failed to develop the facts relating to much of his prejudice argument in state court, and those facts therefore could not be considered. As to brain damage, however, the majority found that "sufficient facts were presented [in state post-conviction proceedings] to indicate the existence of evidence concerning Frazier's brain injury that could have been developed and presented to the jury during the penalty phase." *Id.* at 797.. Assessing these facts, the majority concluded that, "[h]ad the jurors been confronted with the mitigating evidence of Frazier's brain injury, the probability that at least one juror would not have decided that the aggravating circumstances of the case outweighed the mitigating circumstances beyond a reasonable doubt 'is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 798.

Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. Dec. 29, 2003). A majority of the Sixth Circuit panel granted sentencing phase relief in this pre-AEDPA Ohio capital case, finding trial counsel ineffective for failing to develop and present a wealth of mitigating evidence. The majority looked to *Wiggins v. Smith* and the role of the ABA Guidelines in assessing ineffective assistance claims. *See Hamblin*, 354 F.3d at 486 ("the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases"). Counsel's performance was "obviously" deficient in light of the following facts: trial counsel, who was later disbarred, had never tried a capital case and "was 'unaware' of the special preparation that was needed for the penalty phase"; counsel did not begin preparing for sentencing until after petitioner was convicted at the guilt phase; the only witness counsel called at sentencing was the mother of petitioner's daughter, who had not been prepared prior to taking the stand and told the jury she did not want to testify on petitioner's behalf. In concluding that petitioner had satisfied the first prong of *Strickland*, the majority rejected the "two justifications" relied upon by the district court to deny relief. The first, that the failure to investigate was "strategic," had never been claimed by trial counsel and "does not make sense." The second, that counsel was honoring petitioner's wishes, was insufficient under the ABA Guidelines and Sixth Circuit precedent. *Id.* at 492. With regard to prejudice, the majority concluded that "at least one juror would have voted against the death penalty" if presented with the previously undeveloped mitigating evidence that petitioner grew up in an impoverished household in Appalachian Kentucky, was regularly beaten by his abusive, moonshine-brewing father, had never been educated, and showed signs of a "mental disorder," possibly resulting from "a severe blow to the head at about age 8, inflicted by his father with a dog chain," or "from a severe infection his mother suffered while pregnant with him, the result of a stabbing inflicted on her by [petitioner]'s father." *Id.* at 490. Judge Batchelder dissented, disagreeing with the majority's determination that petitioner had shown prejudice.

APPEALS - RAISING CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Massaro v. United States, 538 U.S. 500, 123 S.Ct. 1690 (2003) [non-capital].
Requiring a criminal defendant to raise ineffective assistance of counsel claims on direct appeal does not promote the objectives of the procedural default rule, namely, to conserve judicial resources and to preserve the law's interest in the finality of judgments. This applies whether or not petitioner is represented by new counsel on direct appeal or could have raised the issue on direct appeal based on the evidence of ineffective assistance found in the trial record. The Second Circuit rule that is reversed had motivated appellants to raise IAC issues on direct appeal, where the kind of evidence usually necessary to demonstrate ineffective assistance usually has not been developed, and where it may be impossible to demonstrate prejudice. Several inefficiencies are created by a rule procedurally defaulting IAC claims not raised on direct appeal: 1) It may harm the working relationship between appellate counsel, who must get to know the trial record in a short time, and the trial counsel, who can assist in this task; 2) counsel would feel they must raise IAC claims on direct appeal, regardless of the merits of the claim; 3) meritorious claims would fail if raised before a defendant had a chance to develop the supporting evidence; 4) appellate courts would waste time and effort sifting the meritorious claims from those without merit; 5) determining whether the counsel representing defendant is new may complicate the appellate proceedings; and 6) the habeas court would expend a great deal of time reviewing the trial court record to determine whether there was enough evidence in the record to support bringing the IAC claim on direct appeal, resulting in default of the claim on habeas. This ruling does not foreclose bringing an IAC claim on direct appeal, a rule urged by the Government in previous cases. In some cases, trial counsel's ineffectiveness may be fully apparent from the trial record alone, and [t]here may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court sua sponte.

HABEAS CORPUS PRACTICE

Teague and Retroactivity Issues – New Rules of Criminal Procedure

Beard v. Banks, No. 02-1603, 542 U.S. 406, 124 S.Ct. 2504 (June 24, 2004).

[A] The Court (5-4) overturned the grant of penalty phase relief that had found the sentencing phase instructions violated the 1988 Supreme Court Mills v. Maryland ruling that jurors did not have to agree unanimously on the existence of mitigating circumstances when determining the appropriate sentence. The Court majority held the *Mills* holding constituted a new rule of constitutional criminal procedure and that it did not fit any of the exceptions allowing a new rule to be applied retroactively. The rule was new because it “broke new ground” and was not “mandated” by precedent. Pointing out that four justices dissented in Mills, at least one of whom protested that the decision was “stretching” precedent beyond proper bounds, the Banks majority concluded that “reasonable jurists differed” as to whether the rule the petitioner asked to be applied to him was “compelled” by existing precedent. Beard could not benefit from the *Mills* decision because it was a new rule that fit no exception. [Justice Stevens, writing for the dissenting justices, found nothing novel about the *Mills* rule and stated , "the kind of arbitrariness that would enable 1 vote in favor of death to outweigh 11 in favor of forbearance would violate the bedrock fairness principles that have governed our trial proceedings for centuries. Rejecting such a manifestly unfair procedural innovation does not announce a "new rule" ... but simply affirms that our fairness principles do not permit blatant exceptions."]

Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519 (June 24, 2004).

Overturning the grant of relief by the Ninth Circuit, the Court 5-4 holds *Ring v. Arizona* (2002) was not retroactive under Teague v. Lane, and denies new sentencing hearings for dozens of death row inmates in Arizona, Idaho, Montana and Nebraska whose sentences were originally handed down by judges, but whose cases are older and had become final (direct appeal completed) before Ring was announced. In *Ring*, the Court required a jury determination of eligibility for the death penalty. The Ninth Circuit had held that the new rule announced in Ring applies retroactively to cases on collateral review under Teague's exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings. Another argument ws that the rule was not procedural, but substantive in nature and not subject to Teague. The bare Court majority finds this was not a substantive rule "which alters the range of conduct or the class of persons that the law punishes", but instead a procedural rule that "regulates only the manner of determining the defendant's culpability". As a procedural rule, it would not be retroactively applied unless it seriously diminished the fairness and accuracy of the criminal proceeding. "The question is whether judicial factfinding so seriously diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach. The evidence [of whether jury factfinding is more accurate than judicial factfinding] is simply too equivocal to support that conclusion." So Ring was not retroactively applied. [Dissenting Justice Breyer stated: "Certainly the ordinary citizen will not understand the difference [between those who had finished the direct appeal process and those who had not]. That citizen will simply witness two individuals, both sentenced through the use of unconstitutional procedures, one individual going to his death, the other saved, all through an accident of timing. How can the Court square this spectacle with what it has called the 'vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason'?"]

2254(d) AND RIGHT TO RELIEF

Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843 (2002).
The Court (8-1) rejects the Sixth Circuit's conclusion that an IAC claim had warranted a presumption of prejudice pursuant to *United States v. Cronic*. It instead was governed by *Strickland v. Washington*, and state court's denial of relief was not contrary to, and did not involve an unreasonable application of, clearly established federal law under §2254(d). The Sixth Circuit's decision granting relief had been based on counsel's "not asking for mercy after the prosecutor's final argument, [and thus he] did not subject the State's call for the death penalty to meaningful adversarial testing," and the state court's erroneous reliance on *Strickland*, rather than *Cronic*, as amounting to an unreasonable application of federal law. The Court rejected petitioner's contentions that *Cronic*, as opposed to *Strickland*, supplies the governing rule, and that the state court acted "contrary to" federal law by applying the latter rather than the former. The Court explained that "[w]hen we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete". "For respondent to succeed, . . . he must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. . . . Rather, he must show that the Tennessee Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner. This, we conclude, he cannot do." After discussing the merits of the ineffective assistance of counsel claim, the Court concluded that, "at the very least . . . the state court's [denial of relief] was not 'unreasonable.'".

Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166 (2003).

A divided Supreme Court reverses the Ninth Circuit's grant of relief on the habeas petitioner's Eighth Amendment proportionality claim arising from California 'three-strikes' legislation, and in so doing, touched on several issues relating to the meaning and application of §2254(d). Petitioner contended that the imposition under California's "three strikes" law of two consecutive 25 year to life sentences for two shoplifting offenses violated the Eighth Amendment's prohibition on grossly disproportionate sentences, and that the state courts' rejection of that claim involved an unreasonable application of clearly established federal law.

Justice O'Connor (with four others) established that "the issue" in this case was whether the state court's decision was contrary to, or involved an unreasonable application of, federal law "within the meaning of 28 U.S.C. §2254(d)(1)." 123 S.Ct. at 1172. "The Ninth Circuit requires federal habeas courts to review the state court decision de novo before applying the AEDPA standard of review. See, e.g., Van Tran v. Lindsey, [212 F.3d 1143,] 1154-1155 [(C.A.9 2000)] . . .. We disagree with this approach. AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under §2254(d)(1) - whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law. See Weeks v. Angelone, 528 U.S. 225 . . . (2000). In this case, we do not reach the question whether the state court erred and instead focus solely on whether §2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim. *Id.*

Turning to its own analysis of §2254(d)(1) as applied to this case, the Court started with the "threshold matter [of] what constitutes 'clearly established Federal law . . .,'" which it further defined as "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Id. "The difficulty with Andrade's position," the Court observed, "is that our precedents in this area [Eighth Amendment proportionality] have not been a model of clarity," and in fact give rise to only "one governing legal principle . . .: A gross disproportionality principle is applicable to sentences for terms of years." *Id.*

Having identified this "disproportionality principle" as "the only relevant clearly established law amendable" to evaluation under §2254(d)(1), the Court moved on to the "final question" - "whether the [state court's] decision affirming Andrade's sentence is 'contrary to, or involved an unreasonable application of,' this clearly established gross disproportionality principle." *Id.* The Court first found that the state court's decision to rely on Rummel v. Estelle was not "contrary to" governing law, since Harmelin v. Michigan "allows a state court to reasonably rely on Rummel," and because "Andrade's sentence . . . was not materially indistinguishable from the facts in Solem [v. Helm]," the case on which Andrade primarily relied. *Id.* at 1175.

Before assessing the impact of §2254(d)(1)'s "unreasonable application" clause on Andrade's claim, the Court paused to correct the "error" in the Ninth Circuit's decision in Van Tran v. Lindsey to "define[] 'objectively unreasonable' to mean 'clear error.'" Id. at 1175. The Court explained: "These two standards . . . are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even when clear) with unreasonableness. It is not enough that a federal habeas court, in its "independent review of the legal question" is left with a "firm conviction" "that the state court was erroneous." [citations and additional quotation marks omitted]. We have held precisely the opposite[.]" *Id.* Acknowledging that §2254(d)(1) "permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Id.* "Here, however," the Court explained, "the governing legal principle gives legislatures broad discretion to fashion a sentence that fits within . . . the proportionality principle - the 'precise contours' of which 'are unclear.' . . . And it was not objectively unreasonable for the [state court] to conclude that these 'contours' permitted an affirmance of Andrade's sentence." *Id.*

Justice Souter (joined by Stevens, Ginsburg and Breyer, JJ.) dissented, contending that there were "two independent reasons for holding that the disproportionality review by the state court was not only erroneous but unreasonable . . ." - first, because "[t]he facts here are on all fours with those of Solem and point to the same result," *Id.* at 1176, and second, because "the argument that repeating a trivial crime justifies doubling a 25-year minimum incapacitation sentence based on a threat to the public does not raise a seriously debatable point on which judgments might reasonably differ. The argument is irrational, and the state court's acceptance of it in response to a facially gross disproportion between triggering offense and penalty was unreasonable within the meaning of § 2254(d)." *Id.* at 1178.

Holland v. Jackson, 542 U.S. 934, 124 S.Ct. 2736 (June 28, 2004) (non-capital)
(Per curiam) (5-4). Supreme Court overturns Sixth Circuit's IAC grant of relief on AEDPA grounds. [Jackson's conviction rested largely on the testimony of one individual, who claimed to have been at the scene of the murder with his girlfriend. The girlfriend was not called to testify at trial, but Jackson proffered her testimony seven years later, after the state court had denied Jackson's claim of ineffective assistance of counsel following an evidentiary hearing on the ground that Jackson had not demonstrated prejudice. Jackson represented that the girlfriend would testify that she and the purported eyewitness were *not* present when the murder was committed. The Sixth Circuit disregarded the state court's alternate ground for its denial of defendant's petition for post-conviction relief, that defendant's proffered new evidence was not properly before it. Instead, the Sixth Circuit reviewed only the state court's declaration that it would deny relief on the merits even taking the new evidence into consideration.] Supreme Court finds neither the district court nor the Sixth Circuit made a determination that defendant had been diligent in seeking the newly discovered evidence, or that the AEDPA limitations requirements were met. Under these circumstances, the Sixth Circuit's finding that the state courts had unreasonably applied federal law was in error. Further, the Sixth Circuit's conclusion that the state court had applied an improper standard of review in applying Strickland, requiring proof of prejudice by a preponderance of the evidence instead of applying a reasonable probability standard, was in error. The circuit court's conclusion is unfounded, based on statements in the state court's opinion that either did not mean what the circuit court read them to mean or were outweighed by other correct statements of the standard.

Middleton v. McNeil, 541 U.S. 433, 124 S.Ct. 1830 (May 3, 2004) (*non-capital*)
(*Per curiam.*) (reversing grant of relief by Ninth Circuit). Sally McNeil appealed on the basis of an erroneous jury instruction. The trial court gave CALJIC 5.17 on imperfect self-defense, but added "as a reasonable person" to the last clause, defining imminent peril. McNeil argued on appeal that the added clause decimated her imperfect self-defense theory. The Cal. CA agreed that the additional phrase was an error, but did not grant her relief, reasoning that the instructions as a whole, plus the prosecutor's correct statement of the law, properly outweighed the single, erroneous phrase. Contrary to the Ninth Circuit's description, the state court did not 'ignor[e]' the faulty instruction [which added "as a reasonable person" to CALJIC 5.17]. It merely held that the instruction was not reasonably likely to have misled the jury given the multiple other instances … where the charge correctly stated that respondent's belief could be unreasonable." Further, the state court's reliance on the prosecutor's closing argument was not contrary to Boyde v. California. "Nothing in Boyde precludes a state court from assuming that counsel's arguments clarified an ambiguous jury charge," particularly when it is the prosecutor's argument that resolves an ambiguity in favor of the defendant.

Bell v. Cone (II), 543 U.S. 447, 125 S.Ct. 847 (Jan. 24, 2005).
Per curiam; with Ginsburg, concurring, joined by Souter & Breyer). [Background: Gary Cone was convicted of first-degree murder for killing an elderly couple in 1980. The couple had been beaten to death, and the jury found four aggravating factors in the penalty phase, including that the killings had been "especially heinous, atrocious, or

cruel." The jury also found that the aggravating factors outweighed mitigating factors, and Cone was sentenced to death. The Tennessee Supreme Court affirmed Cone's conviction and sentence on direct appeal, finding that three of the aggravating factors – prior convictions for violent felonies and murder to avoid arrest, in addition to HAC – "were clearly shown by the evidence." The fourth aggravating factor, knowingly creating a risk of death to two or more persons other than the person murdered, based on Cone's threatening actions toward others earlier in the day, was dismissed by the state court, but the error was determined to be harmless in view of the other three aggravating factors.

Cone pursued postconviction relief in the state courts as well, raising a vagueness claim as to the HAC aggravator among many other claims. The state trial court found the claim to be procedurally barred under state law because it was a restatement of a claim already reviewed and denied by the state supreme court on direct appeal. The Tennessee Court of Criminal Appeals affirmed the trial court's denial of relief, and the state supreme court denied Cone permission to appeal. The federal district court denied relief as well, finding specifically that his claim that the HAC aggravator was vague was procedurally barred for failure to raise it on direct appeal. The Sixth Circuit did not reach this claim initially, finding that Cone was entitled to relief on a different claim. The USSC reversed, however, and remanded for further proceedings in Bell v. Cone, 535 U.S. 685 (2002). On remand, the Sixth Circuit panel reached the HAC claim. With one judge dissenting, the circuit court found that the HAC aggravator was unconstitutionally vague. It got past the procedural bar found by the district court by noting that Tennessee law required the state supreme court to review every death sentence. This would necessarily include consideration of the constitutionality of the aggravating factors found by the jurors; thus, the HAC claim was fairly presented to the Tennessee courts on direct appeal even though Cone had not raised it. The USSC does not address this ruling, but observes in footnote 3 that "as a general matter, the burden is on the petitioner to raise his federal claim in the state courts at a time when state procedural law permits its consideration on the merits, even if the state court could have identified and addressed the federal question without its having been raised."] On the merits, the Sixth Circuit found no USSC case directly on point, but concluded nevertheless that the Tennessee Supreme Court's approval of the HAC aggravator was contrary to clear principles established by the USSC in Godfrey v. Georgia, and expounded upon in later decisions.

The USSC finds that the Sixth Circuit did not give deference to the state court's application of state law in granting relief to petitioner on his claim that the heinous, atrocious and cruel aggravator found by the jury was unconstitutionally vague. The Tennessee Supreme Court has construed this aggravator narrowly and has followed the precedent numerous times; "absent an affirmative indication to the contrary, we must presume that it did the same thing here," even though the state court did not explicitly cite its prior decisions. Moreover, even without this assumption, the state supreme court's rationale for determining that the aggravator was supported by the evidence "closely tracked" the rationale for affirming death sentences in prior decisions in which the narrowed HAC aggravator was explicitly applied, i.e., the elderly, helpless victims had attempted to resist, they did not die instantaneously but endured "terror, fright and horror" before being killed, and the manner of killing was brutal. The Sixth Circuit "erred in presuming that the State Supreme Court failed to cure this [facial] vagueness by applying a narrowing construction on direct appeal. The state court did apply such a narrowing construction, and that construction satisfied constitutional demands by ensuring that respondent was not sentenced to death in an arbitrary or capricious manner."

In an interesting footnote, the USSC observes that, because Ring does not apply retroactively, this case *does not* present the question "whether an appellate court may, consistently with Ring, cure the finding of a vague aggravating circumstance by applying a narrower construction."

Justice Ginsburg concurred, joined by Justices Breyer and Souter, expressing agreement with the proposition that once a state supreme court has dispositively decided a point of law, it need not always cite that decision in order to demonstrate that it is applying that precedent. But, she notes, the facts of this case do not permit addressing whether a state

court can be assumed to have applied its precedent in the following scenario: "A state prisoner petitions for federal habeas review after exhausting his state remedies. In the anterior state proceeding, the prisoner raised multiple issues. The state court, in disposing of the case, left one or more of the issues unaddressed. There would be no warrant, in such a case, for an assumption that the state court, *sub silentio*, considered the issue and resolved it on the merits in accord with the State's relevant law. Nothing in the record would discount the possibility that the issue was simply overlooked. A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point."

Kane v. Espitia, __U.S.__, 126 S.Ct. 407 (Oct. 31, 2005).
Per curiam Court rules that there is no clearly established rule that an individual accused of crime who acts as his or her own lawyer has no constitutional right of access to a law library before the trial, to aid in preparing a defense. The decision overturned a Ninth Circuit ruling finding such a right in the Court's 1975 decision on self-representation, Faretta v. California. "Faretta says nothing about any specific legal aid that the state owes a pro se criminal defendant." The habeas court erred under 2254(d).

Rice v. Collins, ___U.S.___, 126 S.Ct. 969 (Jan. 18, 2006) (non-capital).
Reversing Ninth Circuit Batson decision under 2254(d)(2)

Background

During *voir dire* in Steven Collins' trial on drug charges, his attorney raised a Batson/Wheeler challenge after the prosecutor exercised a peremptory strike against a young African-American woman. When asked to provide race-neutral reasons for the strike, the prosecutor remarked that the prospective juror had rolled her eyes in response to a question from the court, was young and might be too tolerant of the drug crime with which Collins was charged, and was single and did not have ties to the community. She also made a reference to trying to obtain gender balance, but the trial court disallowed reliance on gender. The trial court accepted the prosecutor's race-neutral reasons, noting that while the judge had not observed the eye rolling, the excused juror was young; the prosecutor had peremptorily challenged a young white male juror as well. The CCA affirmed Collins' conviction, finding that the prospective juror's youth was a sufficient basis for excusing her and, moreover, the behavior witnessed by the prosecutor was an adequate and neutral reason. The CSC denied review. At the district court level, Collins was again unsuccessful, but a divided panel of the Ninth Circuit reversed. The panel majority concluded the prosecutor was not credible – and thus her race-neutral reasons could not be trusted – because (1) she referenced another African-American female juror as young, when she was actually a grandmother; (2) she offered gender as an acceptable basis for striking the juror; and (3) she reasoned that a single person with no community ties would be too tolerant of the drug possession crime charged, even though the excused juror had stated during *voir dire* that she believed the crime should be illegal and denied any other reason that she could not be impartial. The USSC granted certiorari "[c]oncerned that … a federal court set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record…."

The State Court's Determination of the Facts was Not Unreasonable

Justice Kennedy's opinion is concise, dispatching minor issues quickly. Whether the petitioner has the burden of rebutting by clear and convincing evidence the presumption that the trial court's factual findings are correct, under 28 USC 2254 (e)(1), the Court need not decide: "Even assuming, *arguendo*, that only § 2254(d)(2) applied in this proceeding, the state-court decision was not an unreasonable determination of the facts

in light of the evidence presented in the state court." [Ed. Note: The interaction between subsections (d)(2) and (e)(1) of § 2254 is a question of some complexity, not yet authoritatively resolved. The leading case is Judge Kozinski's opinion in Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004).] The Court has an answer to each one of the reasons given by the Ninth Circuit for not crediting the prosecutor's race-neutral reasons.

First, when considered in context, the prosecutor's statement regarding the "young" juror who was actually a grandmother could easily have been an innocent misstatement. The discussion at that point in the record involved three jurors, and they were being referenced by number; the prosecutor may simply have stated the wrong number.

Second, given that the trial court refused to rely on the prosecutor's improper proffer of gender as a basis for excusing the juror, "[t]he panel majority assigned the gender justification more weight than it can bear." There were other reasons offered, such as the eye-rolling incident, and the Court finds nothing in Collins' argument to explain why the improper suggestion that the juror was excused because of gender should undermine the prosecutor's credibility as to the other reasons.

Finally, Collins did not convince the Court that the prosecutor's skepticism as to the juror's ability to apply the law, despite her assurances that she believed drug possession should be a crime, undermines the prosecutor's credibility that her non-racial explanations for excusing the juror were merely pretextual. Justice Kennedy explained that it was not unreasonable to believe the prosecutor was sincere in not trusting a younger person with few community ties to be as tough on a drug crime as someone who is more established. As a further indication that this reason was race-neutral, the Court notes that the prosecutor also dismissed a young white male with similar characteristics.

Inferences drawn by the Ninth Circuit from the record were not a sufficient basis for concluding that the prosecutor's race-neutral reasons were merely pretext and to find that the defendant had demonstrated a Batson violation. Nor was the Ninth Circuit's analysis sufficient to reach the conclusion that the state courts had unreasonably determined the facts in affirming petitioner's conviction. The circuit court found that the trial court was unreasonable in believing the prosecutor's race-neutral explanations for excusing an African American woman, including a behavioral observation offered by the prosecutor that the trial court did not see. The Ninth Circuit concluded that the prosecutor should not have been believed in this because she also cited gender as a reason for excusing the woman, misspoke in identifying a different juror as young when she was actually a grandmother, and explained that the juror's lack of ties to the community made the prosecutor suspect the truth of the juror's voir dire responses that she would be an impartial juror in a drug possession case. "The [Ninth Circuit] panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus."

Justice Breyer's Concurring Opinion

Justice Breyer, joined by Justice Souter, offers this case as another example of the inherent weaknesses in the Batson test as a tool to eradicate unconstitutional discrimination in jury selection. Given that jury selection is to some extent instinctual, Justice Breyer asks, "Insofar as Batson asks prosecutors to explain the unexplainable, how can it succeed?" And, given that some discriminatory biases may not even be known to the prosecutor exercising peremptory challenges, "How can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor? Justice Breyer raised these same questions in a separate concurrence in Miller-El II. The problem boils down to the capriciousness of peremptory challenges themselves, as Justice Breyer sees it. "I have argued that legal life without peremptories is no longer unthinkable. [Cites omitted.] I continue to believe

that we should reconsider Batson's test and the peremptory challenge system as a whole. Nonetheless, because the Court correctly applies the present legal framework, I concur in its opinion."

Sixth Circuit Decisions on 2254(d)

Davis v. Straub, 430 F.3d 281 (6th Cir. Dec. 1, 2005).
Sixth Circuit panel vacates prior opinion granting relief, issuing instead an opinion holding that state court's action was not contrary to or an unreasonable application of clearly established federal law. The state appellate court held that the trial court did not commit prejudicial error by allowing a defense witness to make a blanket invocation of his Fifth Amendment privilege without taking the stand and responding to individual questions. "Our review of these cases … convinces us that Hoffman v. U.S., 341 U.S. 470 (1951) and Washington v. Texas, 388 U.S. 14 (1967) did not clearly establish how to resolve the conflict between a witness's Fifth Amendment privilege and a defendant's right to present his defense. Because these cases do not resolve the issue, the state courts necessarily could not have acted contrary to clearly established Supreme Court precedent." One judge dissented, remarking, "There seems little doubt that prior to the enactment of … AEDPA, and my colleagues' interpretation of it, the writ of habeas corpus would have issued in this case to require a new trial in which Davis would be allowed to put before the jury [the witness'] exculpatory testimony." The dissenting judge also concluded that the majority's excessively deferential interpretation of the AEDPA standard of decision violated Article III of the Constitution and also unconstitutionally suspended the writ of habeas corpus. A petition for rehearing *en banc* is pending in Davis.

Ruimveld v. Birkett, 404 F.3d 1006 (6th Cir. 2005). A majority of the Sixth Circuit panel affirmed the district court's grant of relief on petitioner's claim that his due process rights were violated when he was required to wear leg shackles, handcuffs and belly chains throughout his jury trial – which was conducted in a courtroom within prison walls – on a charge that he poisoned a prison guard. After agreeing with the state appellate court's determination that constitutional error had occurred, the Sixth Circuit majority examined whether the state court's conclusion that the error was harmless was contrary to, or involved an unreasonable application of, clearly established federal law. The majority observed that "[w]hile the burden of persuasion on harmless error review falls on a petitioner, he need not prove that the error was outcome-determinative; instead he must merely remove any assurances that the error did not affect the outcome." "Accordingly, we must review the state appellate court's decision to determine if it properly considered whether Ruimveld successfully countered any assurances that the jury's verdict was not harmed by his shackling." *Id.* After discerning that "[t]he only mitigating factor discussed by the state appellate court was the fact that the trial took place in a prison; hardly a factor that would be likely to nullify completely the prejudice resulting from Ruimveld's shackling," the majority concluded that "the state court's cursory harmless error analysis unreasonably discounted the prejudicial effects of shackling noted by the Supreme Court . . ." Finally, the majority held that "the state court's failure to recognize the likelihood of substantially injurious effects resulting from Ruimveld's unnecessary shackling was, as the district court noted, an unreasonable application of the harmless error standard clearly stated by the Supreme Court in *Brecht*."

Sixth Circuit Decision on IAC of Reopening Appeal Counsel and 2254(d)

Lopez v. Wilson, 426 F.3d 339 (6th Cir. Oct. 7, 2005) (*en banc*). The *en banc* Sixth Circuit held that the procedure for reopening an appeal prescribed by Ohio Rule of Appellate Procedure 26(B) "is a collateral matter rather than part of direct review." Applying this determination to petitioner's challenge to the state's refusal to supply him with appointed counsel to prepare his Rule 26(B) application, the court held that because

there is no constitutional right to counsel in such a proceeding, the state court's decision could not have run afoul of any clearly established federal law within the meaning of §2254(d)(1). The court also took the opportunity to overrule *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000), a pre-AEDPA case in which a Sixth Circuit panel had held that Rule 26(B) proceedings were best characterized as part of the direct appeal process, and that prisoners were entitled to appointed counsel during those proceedings.

PROCEDURAL DEFAULT

Lee v. Kemna, 534 U.S. 362, 122 S.Ct. 877 (2002).
Court (6-3) holds that alleged procedural default did not bar relief as it was not worthy of federal court's respect. Trial counsel's alleged failure to adhere to Missouri procedural rules governing continuance motions did not bar federal habeas review of due process claim. Petitioner's defense to murder charge was alibi; and three witnesses traveled voluntarily from California to Missouri for the purpose of testifying that petitioner had been in California at the time of the crime; when at some point during the third day of trial, the witnesses left the courthouse without notifying defense counsel. Upon learning of their absence, counsel orally requested a continuance until the next morning to afford him time to find the missing witnesses; the trial court denied the request, stating that it appeared as if the witnesses had abandoned petitioner, and that a continuance could not be granted because the judge had a personal appointment the next day, and another trial set to begin on the following business day. The trial went forward without petitioner's alibi witnesses, and he was convicted. On appeal, petitioner contended that the trial court's denial of a continuance violated his due process rights, to which the state responded by asserting, for the first time, that petitioner's request for a continuance failed to satisfy a state procedural rule requiring a showing of the materiality of the missing witnesses' testimony, grounds for believing the witnesses could be found, and testimony from petitioner himself affirming that he had not procured the witnesses' absence. The state appellate court denied petitioner's appeal, referring generally to the rule invoked by the state, and finding additionally that petitioner's oral motion did not comply with another procedural rule requiring that continuance motions be submitted in writing. Federal habeas corpus relief was denied by the district court and Eighth Circuit, each of which found his due process claim procedurally barred for the reasons set forth in the state appellate court's decision.

The Court acknowledged that violation of a firmly established and regularly followed state rule will bar federal review, but stated "[t]here are . . . exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question," and this is one, (*8), citing Osborne v. Ohio, 495 U.S. 103 (1990). The "general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.'" With that principle in mind, the Court went on to explain that "[t]hree considerations, in combination, lead us to conclude that this case falls within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim[:]" "First, when the trial judge denied [petitioner]'s motion, he stated a reason that could not have been countered by a perfect motion for continuance"; "Second, no published Missouri decision directs flawless compliance with [the rules relied upon by the state appellate court] in the unique circumstances this case presents - the sudden, unanticipated, and at the time unexplained disappearance of critical, subpoenaed witnesses on what became the trial's last day"; and "Third and most important, given 'the realities of trial,' [citation omitted], [petitioner] substantially complied with Missouri's key Rule," having placed on the record argument establishing the materiality of missing witnesses' testimony, and facts indicating a well-founded belief that the witnesses were still in the area, and having stated that he had no knowledge of why the witnesses left.

The Court went on to observe that the state rule at issue, "like other state and federal rules of its genre, serves a governmental interest of undoubted legitimacy. . . . The Rule's essential requirements, however, were substantially met in this case. . . . 'Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be more evident than it is here.'" From there, the Court concluded that, "[u]nder the special circumstances so combined, we conclude that no adequate state-law ground hinders consideration of [petitioner]'s federal claim."

Dretke v. Haley, 541 U.S. 386, 124 S.Ct. 1847 (2004).
Ruling 6-3 that district court should have first addressed all non-defaulted alternate grounds for relief rather than extending "actual innocence" exception to procedural default rule concerning federal habeas corpus claims to noncapital sentencing error; court reserves question of whether actual innocence exception may apply in this setting.

Bradshaw v. Richey, 126 S.Ct. 602, (Nov. 28, 2005) (per curiam).
The USSC notes several shortcomings in the Sixth Circuit analysis of Richey's IAC claim. First, the circuit court relied on evidence that had not been presented to the state court without first determining (1) whether Richey was at fault for not developing the facts in the state court, or (2) whether Richey satisfies the applicable AEDPA criteria: No evidentiary hearing may be held in federal court on a claim left undeveloped in state court unless the claim relies on a new rule of constitutional law, or the factual predicate could not have been discovered earlier through exercise of due diligence, and the facts are sufficient to establish that no reasonable factfinder would have found the petitioner guilty but for the constitutional error.

Also, the Sixth Circuit disregarded the state habeas court's finding that the defense forensic expert was qualified without weighing whether that finding had been rebutted by clear and convincing evidence. The circuit court further failed to analyze whether Richey had overcome the default of several grounds for claims that were apparent from the record but not raised on direct appeal; could he show cause and prejudice for not raising on direct appeal his trial counsel's failure to adequately cross-examine prosecution experts, trial counsel's premature disclosure of the defense forensic expert on the witness list, and trial counsel's failure to present competent scientific evidence to challenge the prosecution experts? Could Richey show that the default must be disregarded because adherence would result in a miscarriage of justice?

Richey contends Ohio failed to preserve its objection to the Sixth's Circuit's reliance on evidence that was not previously presented to the state court by failing to raise the argument in its briefing before the circuit court. The Sixth Circuit has not addressed this argument, and the USSC advises the circuit court is "better situated to address this argument in the first instance."

Cert grant on Procedural Default and Freestanding Innocence Claim:

House v. Bell, No. 04-8990, cert. granted ___ U.S. ___, 125 S.Ct. 2991 (June 28, 2005), ruling below 386 F.3d 668 (6th Cir. en banc 2004). Questions presented: 1. Did the majority below err by applying the Court's decision in Schlup v. Delo to hold that the petitioner's compelling new [DNA] evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present the evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial? 2. What constitutes a "truly persuasive showing of actual innocence" pursuant to Herrera v. Collins sufficient to warrant freestanding habeas relief? [Note: The Sixth Circuit denied relief by a vote of 8-7, with 6 of the 7 dissenters finding the evidence of innocence strong enough to justify immediate and unconditional release, in House v. Bell, 386 F.3d 668 (6th Cir. Tenn. October 6, 2004). [By a vote of 8-7, the court rejected the petitioner's claim that his actual innocence required the federal courts to overlook a

procedural default under Schlup. Six judges filed a strong dissent, contending that this is the "rare or extraordinary case" in which the petitioner has established actual innocence through newly discovered evidence and is entitled to unconditional discharge. They cite four key pieces of evidence: (1) Newly discovered DNA evidence proved that semen found on the victim's nightgown was her husband's, undermining the sexual assault motive offered by the State. (2) At the federal habeas hearing, the State's medical examiner testified that the victim's blood was spilled onto petitioner's pants while the evidence was in police custody; there is no other explanation for one of four vials of blood taken from the victim being nearly empty. (3) Five new witnesses offered testimony implicating the victim's husband in the murder, including two who heard him confess to the killing. (4) Finally, new evidence undermines the credibility of a witness who testified that he saw petitioner in the area in which the body was later found. The seventh dissenter believed that the petitioner was entitled to a new trial, but not to an unconditional discharge.]

Per Curiam Ruling and Cert Grant on State's Procedural Default

Eberhart v. U.S., __U.S.__, 126 S.Ct. 403 (Oct. 31, 2005)
Per curiam ruling that prosecutors lose the right to challenge a defendant's tardy motion for a new trial if the prosecution does not object at the time. Federal Rule of Criminal Procedure 33(a) requiring a motion for a new trial within seven days after a verdict, imposes a "rigid deadline," but does not define a federal court's jurisdiction. Thus, if a defendant fails to make such a motion in time, but a District Court goes ahead and rules on the merits, the government cannot claim a lack of jurisdiction. Rule 33(a), the Court said, is a claim-processing rule, not a jurisdictional one. It conceded that its prior rulings on the issue had been confusing.

Day v. Crosby, No. 04-1324, cert. granted ___ U.S. ___, 126 S.Ct. 34 (Sept. 27, 2005), ruling below 391 F.3d 1192 (11th Cir. 2004). Questions Presented: Does the state waive a limitations defense by failing to plead or otherwise raise the defense, and explicitly concedes that petition was timely? And, does Habeas Rule 4 permit the district court to dismiss habeas petition *sua sponte* after the state has filed an answer based on a ground not raised in the answer?

Sixth Circuit Decisions

Abela v. Martin, 380 F.3d 915 (6th Cir. Aug. 27, 2004). The Sixth Circuit granted relief in this Michigan manslaughter case, finding that a statement admitted against him at trial was taken in violation of his Fifth Amendment right to counsel. Before reaching the merits, the court rejected the state's contention that petitioner's claim was procedurally barred because it could have been, but was not, raised on direct appeal. The court explained that the state supreme court's reliance upon M.C.R. 6.508(D) in finding that petitioner had "failed to meet the burden of establishing entitlement to [state post-conviction] relief," when combined with the fact that the two lower state courts both rejected petitioner's claims on the merits, did not amount to clear reliance upon a procedural bar. The court further remarked that, "[i]f a state court is slurring its words, our job is not to guess what it might be saying, but rather to demand that it enunciate more clearly."

Carpenter v. Edwards, 113 Fed. Appx. 672, 2004 WL 2452546 (not for publication) (6th Cir. Oct. 28, 2004). On remand from the U.S. Supreme Court years before, the Circuit panel rules that relief is not granted, but in the process finds that claims of ineffective assistance of appellate counsel under Rule 26 were not defaulted, because the rule was not firmly established and regularly followed in 1994 when petitioner sought to reopen his appeal. Panel suggests rule was regularized by the Ohio Supreme Court's 1995 State v. Reddick decision. Judge Merritt concurs stating that "time-wise and justice-wise" it would

be better if the federal courts could just get to the merits, that the case would have been over years ago if they simply had.

Richey v. Mitchell, 395 F.3d 660 (6th Cir. 2005) [later per curiam reversal and remand on other grounds by the U.S. Supreme Court (see above)]. The Sixth Circuit had reversed petitioner's conviction for aggravated felony murder due to insufficient evidence that he had the specific intent to kill the victim and on IAC at trial (see above for merits concerns). Petitioner was not barred from asserting ineffective assistance of counsel as cause for failure to raise a due process insufficiency claim on direct appeal, even though the ineffective assistance claim was itself dismissed by the Ohio Supreme Court as untimely. At the time petitioner filed his motion to reopen his appeal in the Ohio courts, in which he first asserted ineffective assistance of counsel, the law permitted filing such a motion within 90 days of the journalization of the appellate judgment "unless the applicant shows good cause for filing at a later time." The Sixth Circuit finds that the Ohio courts had not clearly established what constitutes "good cause" and therefore, the procedural bar was not an adequate state ground to prevent review by the federal courts.

Franklin v. Anderson, 434 F.3d 412 (6th Cir. Jan. 9, 2005).
Appellate counsels' performance was deficient. Counsel failed to raise the issue of a biased juror on direct appeal, even though defendant suggested the issue. (The issue is not procedurally barred because the state procedural law was not adequate and established, and because of appellate counsel's ineffective representation.) Counsel did not advise defendant that he could file a *pro se* supplementary brief raising issues they refused to include. In fact, counsels' overall communication with defendant was inadequate, given that lead appellate counsel only corresponded by letter, and second counsel did not communicate with defendant at all. Neither one ever met him or spoke to him over the telephone. Defendant's requests to lead counsel that she withdraw were rebuffed. At oral argument before the state court of appeals, second counsel did not appear because of a family emergency. The court refused to postpone the argument, and lead counsel refused to discuss or answer questions about any issues in the part of the brief that had been prepared by the absent lawyer. Before the state supreme court, counsel were unprofessional, laughing inappropriately and displaying insufficient knowledge of the facts of the case.

Dietz v. Money, 391 F.3d 804 (6th Cir. 2004). Ohio court's denial of Dietz' Motion for Delayed Appeal pursuant to App. R. 5(A) was grounded solely in the court's discretion and "A rule that grants such discretion to the courts is not "firmly established and regularly followed" so as to be adequate within the meaning of Maupin." Therefore the denial of the Motion for Delayed Appeal was not adequate to bar consideration of Dietz's underlying ineffective assistance of counsel claim.

House v. Bell, 386 F.3d 668 (6th Cir. Tenn. October 6, 2004). By a vote of 8-7, the court rejected the petitioner's claim that his actual innocence required the federal courts to overlook a procedural default under Schlup. Six judges filed a strong dissent, contending that this is the "rare or extraordinary case" in which the petitioner has established actual innocence through newly discovered evidence and is entitled to unconditional discharge. They cite four key pieces of evidence: (1) Newly discovered DNA evidence proved that semen found on the victim's nightgown was her husband's, undermining the sexual assault motive offered by the State. (2) At the federal habeas hearing, the State's medical examiner testified that the victim's blood was spilled onto petitioner's pants while the evidence was in police custody; there is no other explanation for one of four vials of blood taken from the victim being nearly empty. (3) Five new witnesses offered testimony implicating the victim's husband in the murder, including two who heard him confess to the killing. (4) Finally, new evidence undermines the credibility of a witness who testified that he saw petitioner in the area in which the body was later found. The seventh

dissenter believed that the petitioner was entitled to a new trial, but not to an unconditional discharge.

Bowles v. Russell, 432 F.3d 668, 2005 WL 3533548 (6th Cir. Dec. 28, 2005) (*non-capital*). [The Sixth Circuit dismisses petitioner's appeal as untimely filed: Petitioner moved to reopen the appeal period pursuant to Federal Rule of Appellate Procedure 4(a)(6), on grounds that he had not received notice of the district court's denial of his motion for a new trial or to amend the judgment. The district court granted the motion to reopen, but miscalculated the period within which petitioner could file his notice of appeal. Rule 4(a)(6) states clearly that a district court may "reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered," but the final date calculated by the court was 17 days later. Petitioner filed his notice of appeal prior to the final date calculated by the court, but beyond the 14-day limit set in Rule 4(a)(6). The circuit court observes that Rule 4(a) has been interpreted as "mandatory and jurisdictional" by the USSC and the Sixth Circuit, and finds no basis for leniency in this case.

EXHAUSTION OF STATE REMEDIES

Baldwin v. Reese, 541 U.S. 27, 124 S.Ct. 1347 (March 2, 2004).
A state prisoner ordinarily does not "fairly present" a federal claim to a state court if that court must read beyond a petition, a brief, or similar papers to find material that will alert it to the presence of such a claim. Assuming that Reese's petition by itself did not properly alert the State Supreme Court to the federal nature of his claim, Reese failed to meet the "fair presentation" standard. To say that a petitioner "fairly presents" a federal claim when an appellate judge can discover that claim only by reading the lower court opinions is to say that those judges must read those opinions--for otherwise they would forfeit the State's opportunity to decide the claim in the first instance. Federal habeas law does not impose such a requirement. That requirement would force state appellate judges to alter their ordinary review practices, since they do not necessarily read lower court opinions.

Rhines v. Weber, 544 U.S. 269, 125 S.Ct. 1528 (March 30, 2005) (non-capital).
Court holds 9-0 (opinion by O'Connor; concurrences by Stevens and Souter) that a district court has the discretion to stay a mixed habeas petition to allow unexhausted state claims to be presented and then return the perfected petition to federal court for review. [Background: Charles Rhines (Rhines) was convicted in state court on charges of first-degree murder and third-degree burglary, for which he received the death penalty. Rhines filed a petition for state habeas corpus, and the petition was denied; the Supreme Court of South Dakota affirmed the denial. Rhines followed by filing a petition for federal habeas corpus, and the United States District Court for the District of South Dakota (District Court) held that eight of Rhines' thirty-five claims had not been exhausted. Rhines moved the District Court to stay his pending federal petition while he presented the unexhausted claims to the South Dakota state courts. The District Court granted Rhines' request and the state appealed. The United States Court of Appeals for the Eighth Circuit vacated the stay, holding that District Courts have no authority to hold a habeas petition in abeyance absent exceptional circumstances.] The Court considered the District Court's authority to issue stays and the potential to undermine the streamlining of federal habeas proceedings by employing stay and abeyance too frequently. The Court held that a District Court has the power to grant stay and abeyance for good cause as long as there is no abuse of discretion. Vacated and remanded for determination of whether the District Court's granting of Rhines' stay was an abuse of discretion.

Dye v. Hofbauer, 546 U. S. ___, 126 S.Ct. 5 (Oct. 11, 2005).
Per curiam reversal of Sixth Circuit's decision that had denied relief on grounds of failure to exhaust. "The 6th Cir. was incorrect in Dye II to conclude that, when seeking review in

the state appellate court, the petitioner failed to raise the federal claim based on prosecutorial misconduct. The Court of Appeals examined the opinion of the state appellate court and noted that it made no mention of a federal claim. That, however, is not dispositive. Failure of a state appellate court to mention a federal claim does not mean the claim was not presented to it. "It is too obvious to merit extended discussion that whether the exhaustion requirement . . . has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court . . . ." Smith v. Digmon, 434 U.S. 332, 333 (1978) (per curiam). Contrary to the holding of the Court of Appeals, the District Court record contains the brief petitioner filed in state court, and the brief sets out the federal claim […in the caption]. Outlining specific allegations of prosecutorial misconduct, the text of the brief under this argument heading cites the Fifth and Fourteenth Amendments to the Constitution of the United States. It further cites … federal cases, all of which concern alleged violations of federal due process rights in the context of prosecutorial misconduct. This is not an instance where the habeas petitioner failed to "apprise the state court of his claim that the . . . ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." Duncan v. Henry, 513 U.S. 364, 366 (1995) (per curiam). Nor is this a case where a state court needed to look beyond "a petition or a brief (or a similar document)" to be aware of the federal claim. Baldwin v. Reese, 541 U.S. 27, 32 (2004). The state-court brief was clear that the prosecutorial misconduct claim was based, at least in part, on a federal right. It was error for the Court of Appeals to conclude otherwise. A second reason the Dye II panel denied relief was that the habeas petition filed in the United States District Court presented the prosecutorial misconduct claim in too vague and general a form. This alternative holding cannot rescue the Dye II judgment, for it, too, is incorrect. The habeas corpus petition made clear and repeated references to an appended supporting brief, which presented Dye's federal claim with more than sufficient particularity. See Fed Rules Civ. Proc. 81(a)(2), 10(c). As the prosecutorial misconduct claim was presented properly, it, and any other federal claims properly presented, should be addressed by the Court of Appeals on remand."

JURISDICTION FOR HABEAS; 'ENEMY COMBATANTS' ACCESS TO COURTS

Rumsfeld v. Padilla, 542 U.S. 426, 124 S.Ct. 2711 (June 28, 2004).
Ruling 5-4, a U.S. citizen detained as an enemy combatant in a South Carolina military brig improperly filed his habeas corpus petition in New York, where he was originally detained in federal criminal custody on a material witness warrant for the 9-11 terrorist attacks. The only proper respondent to the habeas corpus petition is the commander in charge of the military facility where he was being held, i.e. in South Carolina. The secretary of defense was not the appropriate respondent. Court majority rejects argument of exceptional circumstances and that jurisdiction is proper in any district where the respondent is amenable to service. Concurring justices acknowledge an exception to permit jurisdiction in the district from whose territory a petitioner "had been moved if the government was not forthcoming with respect to the identity of the custodian and the place of detention", but these circumstances did not arise here. Court does not resolve here whether the President has authority as commander in chief and in light of Congress' Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, to seize and detain US citizen in US based on determination by President that he is enemy combatant who is closely associated with Al Qaeda and has engaged in hostile and war-like acts, or whether 18 USC 4001(a) precluded that exercise of presidential authority. [In later litigation, the Fourth Circuit upheld his detention by military authorities, Padilla sought cert, the US sought to transfer him from military custody to federal court and this was granted by the U.S. Supreme Court while it considers the pending petition for certiorari. Hanft v. Padilla, ___ U.S. ___, 126 S.Ct. 978, No. 05A578 (Jan. 4, 2006).]

Rasul v. Bush, 542 U.S. 466, 124 S.Ct. 2686 (June 28, 2004).
Ruling 5-4, the Court finds that foreign nationals who were seized abroad as part of the U.S. military's response to 9-11 are entitled to bring their challenges in federal court under the federal habeas statute. Guantanamo Bay is territory over which the U.S. exercises exclusive jurisdiction and control, pursuant to a treaty with Cuba, and the habeas suit that was filed in Washington DC should have gone forward.

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633 (June 28, 2004).
Ruling 8-1, a U.S. citizen who is detained as an enemy combatant in the war on terror has a Fifth Amendment due process right to a hearing to contest the lawfulness of his confession. Court rejects government's contention that courts must defer to the executive branch's war powers by upholding a detention when the government offers any evidence in support of it. Per 6 justices, a citizen is entitled to meaningful and timely notice of the factual basis for his designation as an enemy combatant and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker. Per plurality (O'Connnor) "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." Two justices (Scalia and Stevens) urged that the detention was unlawful because the writ of habeas corpus had not been suspended by Congress and the detainee had not been charged with treason. A plurality and one dissent combined to conclude that the requisite act of Congress permitting detention was a joint resolution authorizing the president to use all necessary and appropriate force against persons aiding the terrorists.

STATUTE OF LIMITATIONS

Pliler v. Ford, 542 U.S. 225, 124 S.Ct. 2442 (June 21, 2004).
Ruling 7-2, a federal habeas court was not required to warn a pro se prisoner about consequences prior to dismissal of habeas petition containing both exhausted and unexhausted claims. A federal court has obligation to act as counsel or paralegal for a petitioner, and the Ninth Circuit's suggested advice could be misleading. Court remands for consideration of whether the petitioner was possibly affirmatively misled.

Johnson v. U. S., 544 U.S. 295, 125 S.Ct. 1571 (April 4, 2005) (non-capital).
In a 5-4 opinion, the Court holds that where a prisoner collaterally attacked his federal sentence on the ground that a state conviction used to enhance his sentence has been vacated, the one-year statute of limitations under 28 USC 2255 begins to run when the prisoner receives notice of the order vacating his state conviction, *provided* the prisoner acted with due diligence in seeking the state court order after entry of judgment in the federal case. Here, prisoner waited more than three years to seek the order vacating his state conviction after judgment was entered in federal court. Prisoner offered no explanation for the delay, other than his pro se status and lack of sophistication in the law; the Court has never accepted these reasons for delay where the statute's clear policy calls for prompt action.

Dissenting justices agreed that notice of the order triggers a new statute of limitations, but dissented from the majority's imposition of a "new rule of prevacatur diligence." The dissent argued it is "inconsistent with the statutory language; is unnecessary since States are quite capable of protecting themselves against undue delay in commencing state proceedings to vacate prior judgments; introduces an imprecise and incongruous deadline into the federal criminal process; is of sufficient uncertainty that it will require further litigation before its operation is understood; and, last but not least, drains scarce defense resources away from the prisoner's federal criminal case in some of its most crucial stages." [Editor's note: The statute of limitations for federal habeas corpus by state prisoners under 2254 is similarly worded to the 2255 statute of limitations at issue in Johnson.]

Pace v. DiGuglielmo, ___ U.S. ___, 125 S.Ct. 1807 (April 27, 2005) (non-capital).
In a 5-4 opinion, the Court finds the federal petition time-barred.

Background

In 1986, John Pace entered a guilty plea in a Pennsylvania state court on charges of second-degree murder and possession of an instrument of crime. He was sentenced to life without possibility of parole. He did not seek to withdraw his plea, nor did he file a direct appeal. Instead, he filed a petition for post-conviction relief in 1986. In September 1992, the Pennsylvania Supreme Court denied Pace's untimely request for discretionary review of his conviction.

In 1996, Pace filed a second petition for state post-conviction relief, under a new state law, the Pennsylvania Post Conviction Relief Act (PCRA). This law imposed for the first time a statute of limitations on filing such petitions in Pennsylvania's courts. It provided three specific exceptions: if governmental interference prevented timely filing; if a new constitutional rule is made retroactive; or if new facts are discovered that could not have been found earlier through due diligence, a late filing will be deemed timely. As pointed out by Justice Stevens in dissent, when Pace filed the second petition, he still had several months left in which he could file a timely habeas petition in federal court; the State did not raise the question of the timeliness of Pace's PCRA petition until the federal limitations period had expired. The Superior Court dismissed his petition as untimely in December 1998, and the Pennsylvania Supreme Court denied review in 1999.

Pace filed a federal habeas petition within six months of the state supreme court's denial. The district court observed that the petition would be untimely unless statutory and/or equitable tolling applied. The district court found that the federal limitations period had been tolled while Pace's PCRA petition was pending, despite the state courts' having ultimately declared it untimely under Pennsylvania law. Because the state statute allowed exceptions to its filing deadline, the district court held that the PCRA timeliness provision was not a "condition of filing," but a "condition of obtaining relief," using the USSC's terminology from Artuz v. Bennett. Alternatively, the district court found extraordinary circumstances justifying equitable tolling.

The Third Circuit reversed, finding that timeliness was a "condition of filing," and that a petition ultimately deemed to be untimely by the state court was not "properly filed" as required by AEDPA for statutory tolling. The circuit court also found that no circumstances existed extraordinary enough to warrant equitable tolling. Because other circuits, notably the Ninth Circuit in Dictado v. Ducharme, 244 F.3d 724 (2001) reached a contrary conclusion regarding the meaning of "properly filed," the USSC granted certiorari.

A Petition Deemed Untimely by the State Court is not "Properly Filed"

Noting that it had left the question open in Artuz v. Bennett, the USSC here addresses whether a state court petition that is deemed untimely by state courts under a statute that permits certain exceptions to its deadline might still be considered "properly filed" for purposes of tolling the AEDPA statute of limitations.

"[W]e hold that time limits, no matter their form, are 'filing' conditions [rather than a condition to obtaining relief]. Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2244(d)(2)." Nor is petitioner entitled to equitable tolling: Even if he were able to demonstrate that the uncertain state of Third Circuit law was an extraordinary circumstance preventing timely filing in federal court (because he believed he had to

exhaust his claims in state court and it appeared the state courts would consider the merits of his claims despite the untimeliness of his petition), petitioner cannot establish the other requirement for equitable relief, that he diligently pursued his rights. "Because petitioner filed his federal habeas petition beyond the deadline, and because he was not entitled to statutory or equitable tolling for any of that period, his federal petition is barred by the statute of limitations."

The USSC rejects Pace's three arguments in favor of state timeliness findings as conditions to obtaining relief: First, "conditions to filing" are not just those conditions necessary to make the petition facially acceptable to the clerk for filing. Justice Rehnquist notes that this may be an "empty set," as there are very few, if any, rules that actually authorize a clerk to refuse to accept a petition.

Second, Pace argued that the federal statute refers to a "properly filed *application*," referring to the entire petition, whereas Pennsylvania's timeliness rule is applied claim-by-claim. The Chief Justice parses the language in the statute to demonstrate that the term *application* as used does not only refer to the whole petition, but also to each claim.

Finally, the majority dismisses Pace's concern with the fairness of allowing a state petitioner to litigate in state court for years, only to get caught later in a timeliness bind that was there at the outset, but was unknown. The Court offers some friendly advice, too late for Pace: "A prisoner seeking state postconviction relief might avoid this predicament, however, by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted," citing the recent decision in Rhines v. Weber. And the federal courts are warned that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court."

As for equitable tolling, Justice Rehnquist faults Pace for waiting years before filing the PCRA petition, and for waiting another five months after those proceedings became final before seeking federal relief. "Under long-established principles, petitioner's lack of diligence precludes equity's operation."

Dissenting Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, would treat state timeliness findings as conditions of obtaining relief. So characterized, Pace's PCRA petition would have tolled the AEDPA statute of limitations even though it was ultimately dismissed by the state courts as untimely. The dissenters foresee confusion and difficulty implementing the majority's interpretation:

> Under the interpretation of that statutory provision adopted by the Court today, a petition for state postconviction relief does not constitute a "properly filed application for … collateral review," even if the application has been accepted, filed, and reviewed in full by the state court. The Court's chosen rule means that a state application will not be deemed properly filed – no matter how long the state court has held the petition, how carefully it has reviewed the merits of the petition's claims, or how it has justified its decision – if the court ultimately determines that particular claims contained in the application fail to comply with the applicable state statute of limitations.
>
> Unfortunately, the most likely consequence of the Court's new rule will be to increase, not reduce, delays in the federal system. The inevitable result of today's decision will be a flood of protective filings in the federal district courts…. Because a state court's timeliness ruling cannot be predicted with certainty, prisoners who would otherwise run the risk of having the federal statute of limitations expire while they are exhausting

> their state remedies will have no choice but to file premature federal petitions accompanied by a request to stay federal proceedings pending the exhaustion of their state remedies.

Justice Stevens faults the majority's holding for undermining the purposes of AEDPA. The statute was intended to provide an incentive for prisoners to seek relief in the state courts first, but this ruling will force litigants into the federal courts prematurely. He predicts a decrease in the incentive to proceed first in state court, and a resulting increase in piecemeal litigation of claims.

[Editor's Note: This case may well lead to state postconviction counsel requesting appointment of federal counsel at an earlier point, and federal counsel should then consider establishing due diligence by promptly filing a first federal petition that includes all state claims, pending and exhausted, with an explanation of why the petition is being filed at that time, a request that the federal court stay the federal proceedings and hold the federal petition in abeyance while the state court is considering the state petition, and a motion for permission to file an amended petition once the state court has ruled on the pending state petition. Alternatively, federal counsel might consider asking the federal court for permission to file an abbreviated petition that simply identifies the state exhausted and pending claims, with the understanding that a full petition will be filed after the state court has ruled on the state petition.]

Dodd v. United States, ___U.S.___, 125 S.Ct. 2478 (June 20, 2005) (non-capital).

Court holds (5-4) that the Section 2255 one year statute of limitations (for federal prisoners and identically worded to 2244(d)(1)(c) for state prisoners) runs from the date a newly recognized right is announced. It does not begin to run when a court decides that the new rule applies retroactively, even though the result is that prisoners seeking to file a second or successive motions may be prevented from doing so because such a motion cannot be brought until the Court has declared that the newly recognized right applies retroactively.

Background

Michael Dodd was convicted on federal charges, and his conviction became final on August 6, 1997. On April 4, 2001, Dodd filed a *pro se* motion under § 2255, seeking to set aside his conviction based on the USSC's decision in *Richardson v. United States*, holding that a jury must unanimously find that a defendant is guilty of each predicate violation. He argued that the jury deciding his guilt was not so instructed. *Richardson* was decided in 1999, but it was not until 2002 that the Eleventh Circuit held that *Richardson* must be applied retroactively. The Government argued that Dodd's one-year statute of limitations under 28 USC 2255 ¶ 6(3) was triggered by the USSC's decision in *Richardson*; Dodd argued that did not begin to run until a court decided that it applied retroactively.

The district court dismissed Dodd's motion as untimely. The Eleventh Circuit affirmed, and the USSC granted certiorari to resolve a conflict on this issue: The Fifth and Eleventh Circuits had held that the limitations period begins when a new constitutional right is recognized, but the Sixth and Ninth Circuits held that the limitations period is triggered by a finding that the new right applies retroactively.

Despite Harsh Results, The SOL is Triggered by Recognition of a New Right

Writing for the majority, Justice O'Connor states that the only natural reading of the language of § 2255, ¶ 6(3) establishes clearly that the statute of limitations begins to run as of the date on which the newly recognized right is announced by the USSC. The

statute "unequivocally identifies one, and only one, date from which the 1-year limitation period is measured." The second clause in the sentence – "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" – does not refer to the triggering event, but imposes a two-fold limit on the application of the provision. "As long as the conditions in the second clause are satisfied so that ¶ 6(3) applies in the first place, that clause has no impact whatsoever on the date from which the 1-year limitation period in ¶ 6(3) begins to run."

The majority is not troubled that this reading of ¶ 6(3) "makes it difficult for applicants filing second or successive § 2255 motions to obtain relief." A second or successive motion may be filed only when the newly recognized right has been made retroactive. Dodd pointed out, and the majority does not dispute the assertion, that the USSC rarely decides retroactivity within a year of recognizing a new constitutional right, so the new claim will usually not come into being until after the statute of limitations has already expired. "Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted." Rather, if Congress decides the "interplay" of these provisions is too restrictive, Congress can amend the statutes.

Justice Stevens' Dissenting Opinion

Justice Stevens, joined by Justices Souter, Ginsburg and Breyer as to Part II, suggests that it is not necessary to read ¶ 6(3) in a way that deprives a prisoner of the opportunity to bring a second or successive motion. "To avoid this result, I would interpret ¶ 6(3) to begin to run only when the Supreme Court has initially recognized the new right *and* when that right has been held to be retroactive." He is confounded by the majority's reasoning: "It is a strange principle that requires strict adherence to the text of one provision while allowing another to have virtually no real world application. It would seem far wiser to give *both* sections the meaning that Congress obviously intended."

Justice Ginsburg's Dissenting Opinion

Justice Ginsburg, joined by Justice Breyer, agrees with Justice Stevens' critique, and adds a factual analysis of *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson,* decided by the Court on the same day, June 20, 2005, and involving similar question of a triggering event, but with a six-year statute of limitations period. Even though the limitation period encountered in *Graham County* could also be "triggered by an event that may precede the accrual dates of a claim," the claimant is unlikely to be foreclosed from action because of the much longer limitation period.

Justice Ginsburg and Justice Stevens disagree on an interesting, although not central point that the majority does not address at all: In his footnote 4, Justice Stevens declares that only the USSC's decision on retroactivity counts. Justice Ginsburg takes a more cautious approach, also in a footnote, noting that both parties assumed that a decision on retroactivity by a court of appeals can be controlling for this analysis. "We have no cause in this case to question that assumption. I therefore do not subscribe to Justice Stevens' statements that only this Court has the prerogative to make the retroactivity determination. I would await full adversarial presentation before expressing an opinion on that issue." (Cites omitted.)

Mayle v. Felix, __U.S.__, 125 S.Ct. 2562 (June 23, 2005) (non-capital).

Court (7-2) rejects the Ninth Circuit's broad definition of "relation back": "An amended habeas petition … does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." The Court reverses the Ninth Circuit's ruling that defendant's amended petition related back because it arose out of the same

conduct, transaction or occurrence, i.e., the same trial and conviction as the claims in the original petition. The narrower application, adopted by a majority of the circuit courts, advances the AEDPA goals of finality of criminal convictions and comity.

Jacoby Felix filed a timely initial federal habeas petition, acting *pro se*, alleging among other matters that his rights under the Confrontation Clause were violated by admission of videotaped testimony of a prosecution witness in his CA trial. Five months after the AEDPA statute of limitations expired, and eight months after counsel had been appointed to represent Felix, he filed an amended petition that included a new claim for relief, asserting that his Fifth Amendment rights had been violated by admission of his incriminating statements obtained by coercive tactics used by the police. The Ninth Circuit held that the new claim related back to the original petition, holding that the FECivilP 15(c)(2) requirement that the amended pleading arise "out of the conduct, transaction or occurrence" as the original pleading was satisfied because the amendment arose out of the same trial and conviction.

The Court notes that Felix raised the claim regarding violation of his right of confrontation in his state direct appeal, and in his initial federal habeas petition. In neither, however, did he raise the Fifth Amendment violation. The AG asserted that the latter claim was time-barred because it was raised for the first time after the AEDPA limitations period had expired. The district court, following the recommendation of a magistrate judge, agreed with the AG, finding that it was not sufficient that the new claim arose out of the same criminal conviction as that challenged in the initial, timely petition.

The Ninth Circuit affirmed the district court's dismissal on the merits of Felix's Confrontation Clause claims, but reversed the dismissal of the new Fifth Amendment claim and remanded for further proceedings. The panel majority reasoned that the relevant "transaction" for determining relation back was the state court trial and conviction. The USSC granted certiorari to resolve a split in the circuits: The Seventh Circuit has taken the same position as that adopted by the Ninth Circuit, but the majority of the circuit courts have adopted a narrower interpretation. These circuits have allowed relation back "only when the claims added by amendment arise from the same core facts as the timely filed claims, not when the new claims depend upon events separate in 'both time and type' from the originally raised episodes." Justice Ginsburg compares the usual reading of "conduct, transaction, or occurrence" in civil proceedings, and finds that it is not "as capacious" as the construction applied by the Ninth and Seventh Circuits. She warns that a broad reading would put no limits on adding new claims as long as they came from the trial the petitioner is challenging.

Dissenting Justice Souter, joined by Justice Stevens, defends the Ninth and Seventh Circuits' reading of "conduct, transaction, or occurrence." "I see nothing in habeas law or practice that calls for the Court's narrow construction of the rule, and good reasons to go the other way, including the unfortunate consequence that the Court's view creates an unfair disparity between indigent habeas petitioners and those able to afford their own counsel." Justice Souter is less concerned about abuse than is the majority: Amendment is under the control of the district court, and a district court may disallow amendment when there has been unjustifiable delay or prejudice to the State.

Evans v. Chavis, 546 U.S. ___, 126 S.Ct. 846 (Jan. 10, 2006) (non-capital).

Reversing Ninth Circuit SOL grant of relief

Background

Reginald Chavis filed a state habeas petition on May 14, 1993. The CCA issued its decision on September 29, 1994. Chavis then waited more than three years to file a

petition for review in the CSC. The CSC's order denying review stated simply, "Petition for writ of habeas corpus is DENIED." (The USSC calls it a petition for review, but it appears to have been a new petition for habeas corpus in the CSC.) Chavis filed another unsuccessful round of habeas petitions in the state courts, which terminated on August 28, 2000. On August 30, Chavis filed a habeas petition in the federal district court. The magistrate judge recommended dismissal of the petition as untimely. The district court adopted the recommendation and dismissed the petition. Chavis appealed to the Ninth Circuit. The circuit court reversed. The Ninth Circuit held that Chavis' state action for relief was pending the entire time between the CCA's denial and the date on which Chavis filed a petition for review in the CSC, thus tolling the AEDPA statute of limitations enough to render the federal petition timely.

The Ninth Circuit Misapplied the USSC's Precedent

The USSC's discussion begins with a recap of Carey v. Saffold; in particular, the Court emphasizes the advice it gave to the Ninth Circuit on remand of the Carey case, setting "boundaries within which the Ninth Circuit must answer the question." First, if the CSC had clearly held that the period of delay considered in Carey (4½ months) had been deemed unreasonable by the CSC, the Ninth Circuit would have nothing to review. Second, the CSC order denying review in the Carey case indicated that the denial was "on the merits and for lack of diligence," but this phrase does not end the question of timeliness. Instead, the Court warned the Ninth Circuit that it must not treat "such words" as "an absolute bellwether" on the issue of timeliness.

In view of these warnings, the Court expresses bafflement at the Ninth Circuit's decision in Chavis' case: "If the appearance of the words 'on the merits' does not automatically warrant a holding that the filing was timely, the *absence* of those words could not automatically warrant a holding that the filing was timely." [Emphasis in original.] Indeed, the CSC's failure to use the phrase would suggest it is less likely that the CSC had concluded the petition was timely.

Given that the CSC's order is not conclusive as to timeliness, it is the circuit court's task to decide what the state courts would have held with regard to timeliness. In other words, the circuit court had to decide whether the CSC would have considered 3-plus years between levels of the review to be a "reasonable time." And the USSC disagrees with the Ninth Circuit's conclusion that it was reasonable.

The USSC concludes petitioner's more than three year delay between a decision by the CCA and filing a habeas petition in the CSC would not be deemed a "reasonable time" under California law, even though the CSC did not cite any timeliness ground in denying the petition. Petitioner's argument that the delay was occasioned by lack of access to the law library is contradicted by his concession that there was at least a six-month period during which petitioner did have access to the law library, a longer period of time than is afforded by most states for filing an appeal to the state supreme court. The USSC finds nothing in California law suggesting that a six-month delay would be "reasonable." The AEDPA statute of limitations was tolled for only a small part of the entire delay, making the federal petition untimely.

[The Court softens its criticism of the Ninth Circuit in this opinion, raising the possibility that the circuit court's evaluation of reasonableness was influenced by its workload: Because there may be hundreds of prisoner appeals from California each year, requiring the circuit court to determine in each case whether the prisoner's delay was "reasonable" under California law may be a daunting task. The Court finds it understandable that the Ninth Circuit would look for signals in the CSC's denial orders that would make these determinations easier. The Court suggests the California courts could clarify the scope of

"reasonable time," or the Ninth Circuit could certify a question to the CSC, or the state legislature could adopt more determinate time limits, similar to most other states.]

Justice Stevens' Concurring Opinion

Justice Stevens writes of his "profound disagreement" with the Court's reasoning, but reaches the same result. He argues that placing on the circuit court the duty to discern what the CSC would have ruled as to timeliness in each case is unworkable and contrary to the Court's decision in Saffold v. Carey. There, the circuit court was ordered to determine what the CSC *had* decided as to timeliness, as indicated by its notation that its denial was "on the merits and for lack of diligence," rather than requiring that the Ninth Circuit decide what the CSC *would have* ruled on the issue of reasonable delay.

Instead of tasking the circuit court with imposing its own determination on the state courts, Justice Stevens would employ a set of presumptions by which to interpret the CSC's orders. Where the order is clear as to timeliness, no further inquiry is needed. Where the CSC states that its decision is on the merits, but does not address timeliness, Justice Stevens endorses the approach taken by the Ninth Circuit in Chavis' case, presuming that a ruling on the merits alone indicates that the state court has concluded that the petition is timely. Finally, where the CSC denies a petition without any explanation, Justice Stevens suggests imposing a six-month limit – "the only specific time period mentioned in California's postconviction jurisprudence" (referring to Cal. Rules of Court Policy Statement 3, std. 1-1.1, setting at 180 days the period within which a capital habeas petition is presumed timely) – as a cut-off.

Applying these presumptions, Justice Stevens concludes, as does the rest of the Court, that Chavis' filing was untimely, because he waited more than six months. He would also reach this decision through consideration of the CSC's order denying review in Chavis' second round of state habeas petitions, because there, the CSC cited three CSC precedents, two of which involved holdings as to timeliness. Justice Stevens would treat this as a clear ruling from the CSC that it denied the petition as untimely.

Cert Grants

Day v. Crosby, No. 04-1324, cert. granted ___ U.S. ___, 126 S.Ct. 34 (Oct. 3, 2005), ruling below 391 F.3d 1192 (11th Cir. 2004). Questions Presented: Does the state waive a limitations defense by failing to plead or otherwise raise the defense, and explicitly concedes that petition was timely? And, does Habeas Rule 4 permit the district court to dismiss habeas petition *sua sponte* after the state has filed an answer based on a ground not raised in the answer?

Select Sixth Circuit Statute of Limitations Decisions

Souter v. Jones, 395 F.3d 577 (6th Cir. 2005) (*non-capital*). Habeas petition was untimely filed (the new affidavit relied on by petitioner as the last-obtained new evidence in support of the petition did not contain new evidence, but was merely cumulative of evidence adduced at trial), but the Sixth Circuit finds the limitations period equitably tolled to permit petitioner to present his actual innocence claim. The applicable innocence standard is the Schlup gateway, because Congress did not intend, by adopting the narrower innocence standard in AEDPA in the successive-petition and evidentiary-hearing provisions, to alter the actual innocence standard beyond those specific applications. Petitioner's meets the Schlup standard with the new evidence he presented to the district court, including affidavits from two prosecution experts who now repudiate their trial testimony and question the factual predicate communicated to them by the only prosecution expert still standing behind his testimony; affidavits from a forensic scientist, a police laboratory technician, and Hiram Walker executives denouncing the prosecution expert's testimony

that the whiskey bottle found near the victim's body, which petitioner admits was his, had a sharp edge on the bottom that likely caused the fatal wounds on the victim's head; and previously unavailable photos of the victim's body showing large blood stains that undermined the prosecution's argument that the lack of blood stains on petitioner was consistent with the small amount of blood lost by the victim. Joining the majority of circuit courts that have addressed this issue, the Sixth Circuit holds that there is an actual innocence exception to AEDPA's statute of limitations. "[W]e conclude that against the backdrop of the existing jurisprudence and in the absence of evidence to the contrary, Congress enacted this new procedural limitation consistent with the Schlup actual innocence exception. Therefore, equitable tolling of the one-year limitations period based on a credible showing of actual innocence is appropriate."] [Note: The circuit court distinguishes between the definition of new evidence under Michigan law governing new trials, which is evidence "that must have been discovered after the trial," and the Schlup standard, which requires only evidence that was not *presented* at trial. The prosecution had argued that the photos of bloodstains on the victim's clothes had been in existence at the time of trial, and thus were not new evidence. But because the photos had not been presented to the jury, for purposes of establishing a threshold showing of actual innocence, the photos were new evidence.

Keenan v Bagley, 400 F.3d 417 (6th Cir. 2005). Remand for evidentiary hearing on equitable tolling. Judge Gilman says that regardless of whether timeliness of the state PCR is a matter of state law, whether the decision to file a PCR rather than a habeas (which would then have been timely) should equitably toll is a matter of federal law and, "If Keenan indeed relied on the literal language of the Ohio Supreme Court's Glenn order in structuring his legal strategy [pursuing an otherwise untimely PCR rather than a timely habeas], then his argument for equitable tolling might be very strong." Judge Merritt thinks it's evident that either the Supremes made the PCR timely or that Ohio law on the subject is so muddled that nobody can be expected to understand it and equitable tolling must apply - either way, he'd skip the evidentiary hearing on tolling and go straight to the merits.)

Towns v. Smith, 395 F.3d 251 (6th Cir. 2005) (*non-capital*). Assuming, without deciding, that a petition timely filed under AEDPA's limitations provisions could be dismissed on laches grounds, the Warden did not meet the heavy burden required to show that delay prejudiced the prosecution's defense against petitioner's ineffective assistance of counsel claim. The Warden did not make a particularized showing of prejudice, and did not show that prejudice was due to petitioner's delay in bringing the claim nor that petitioner did not act with reasonable diligence as a matter of law.

Cowherd v. Million, 380 F.3d 909, 2004 WL 1845554 (6th Cir. Aug. 19, 2004) (*en banc*). The *en banc* Sixth Circuit unanimously overruled *Austin v. Mitchell*, 200 F.3d 391 (6th Cir. 1999), which had held that post-conviction applications were required to raise a federal claim in order to trigger statutory tolling under §2244(d)(2). Noting that "at least four other circuits" have rejected the approach taken in *Austin*, the court went on to conclude that "*Austin* does not adequately consider the difference between 'judgment' and 'claim' in §2244(d)(2)." Having concluded that petitioner's second state post-conviction application satisfied §2244(d)(2) even though it contained only state law claims, the Sixth Circuit reversed the district court's determination that his federal petition was untimely and remanded for further proceedings.

King v. Bell, 378 F.3d 550, 2004 WL 1724551 (6th Cir. Aug. 3, 2004). Relying on a combination of statutory and equitable tolling, the Sixth Circuit reversed the district court's determination that petitioner's §2254 petition in this capital case was untimely, and remanded for consideration of his claims. First, the court found that the initial filing date for the petition, which had been agreed upon by the parties and set forth in a scheduling order, fell within the limitations period once statutory tolling for the period during which

petitioner's petition for certiorari seeking Supreme Court review of the state courts' denial of post-conviction relief was applied as required by *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (*en banc*). However, because the petition was not filed by the originally agreed upon date, but was instead filed well after the limitations period ended, the court examined petitioner's request for equitable tolling. The court explained that petitioner's delay in filing was solely a result of the state's failure to timely produce transcripts of the *voir dire* proceedings at his trial, and that petitioner did comply with a modified scheduling order giving him 15 days to file following receipt of the transcripts. Based on these facts, the court concluded that this case represented "one of the rare occasions in which equitable tolling under AEDPA is warranted".

Granger v. Hunt, 90 Fed. Appx. 97, 2004 WL 162549 (6th Cir. Jan. 23, 2004) (unpublished). Reversing the district court's dismissal of petitioner's §2254 petition as untimely, court finds that under §2244(d)(1)(D), the statute of limitations on his claim that trial counsel was ineffective for failing to file his direct appeal did not begin to run until petitioner learned of counsel's failure, and that it was not unreasonable for petitioner to have waited for two months after the filing date for the appeal before checking with counsel about its status.

Walker v. Smith, 360 F.3d 561 (6th Cir. 2004). The Sixth Circuit reversed the district court's dismissal of the *pro se* petitioner's §2254 petition as untimely, finding that petitioner had a properly filed application for state post-conviction relief on file for a time sufficient to render his federal petition timely. "Although the motion does not appear on the state court docket sheet, the record demonstrates that Walker did properly file a motion for post-conviction relief in 1995, because the state court decided the merits of that motion on March 28, 2003. The district court found that the state court's March 28, 2003, order must have addressed the merits of 'some motion other that [Walker's] motions to correct [his] sentence,' because it was titled a 'motion for relief for judgment.' We conclude otherwise."360 F.3d at 564. Although there may have been some confusion over precisely how petitioner's state court filing was labeled, it was clear that the document to which the prosecution eventually responded pursuant to a state court order was the motion to correct his sentence filed in 1995. *Id.* "Indeed, it would be dubious to suggest that Walker never properly filed a motion for post-conviction relief when the state court actually decided, albeit belatedly, the merits of that motion." *Id.*

SUCCESSIVE PETITIONS – RECHARACTERIZING MOTIONS

[See Banks v. Dretke re. Successive Petitions, with Brady Violations, above.]

Castro v. United States, 540 U.S. 375, 124 S.Ct.786 (Dec. 15, 2003).
Supreme Court unanimously addressed the dangers associated with a federal district court's recharacterization of a *pro se* litigant's submission of something other than a §2255 motion as a §2255 motion, thereby triggering the bar to second or successive challenges if and when the prisoner later seeks to file what he considers to be his first §2255 motion. Before reaching this issue, it resolved the "jurisdictional matter" of whether it could consider this case in light of 28 U.S.C. §2244(b)(3)(E), holding that "this provision does not bar our review here." Reading the statutory language strictly, the Court explained that to be barred from certiorari review as a "denial of an authorization by a court of appeals to file a second or successive application," "the 'denial' must be the '*subject*' of the certiorari petition." Here, "[t]he 'subject' of Castro's petition is not the Court of Appeals' 'denial of an authorization.' It is the lower courts' refusal to recognize that this §2255 motion is his first, not his second. That is a very different question." Having concluded that this case was properly before it, the Court went on to "hold, as almost every Court of Appeals has already held, that the lower courts' recharacterization powers are limited in the following way: "The limitation applies when a court recharacterizes a *pro se* litigant's motion as a first §2255 motion. In such circumstances

the district court must notify the *pro se* litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent §2255 motion will be subject to the restrictions on 'second or successive' motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the §2255 claims he believes he has. If the court fails to do so, the motion cannot be considered to have become a §2255 motion for purposes of applying to later motions the law's 'second or successive' restrictions. §2255, & para. 8." Applying this limitation to petitioner's case, the Court concluded that his 1997 §2255 motion could not be treated as second or successive, notwithstanding the fact that his 1994 Rule 33 motion had been recharacterized and denied as a §2255 motion. The Court further held that this result was reinforced, rather than undermined, by the fact that petitioner had not challenged the recharacterization of his 1994 pleading during his appeal of the denial of relief on that submission. Justice Scalia, joined by Justice Thomas, concurred in the portions of the opinion resolving the jurisdictional question, and in the judgment of the Court, but wrote separately to express his disapproval of the Court's casual acceptance of the practice of recharacterizing *pro se* submissions, and to contend instead that, "because of the risk involved, pleadings should *never* be recharacterized into first §2255 motions . . ."

HABEAS RECONSIDERATION – 60(B) MOTIONS, WITHHOLDING MANDATE

Gonzalez v. Crosby, ___ U.S. ___, 125 S.Ct. 2641 (June 23, 2005) (non-capital).

The Court (7-2) defines when a Rule 60(b) motion is not a successor petition.

Background

Aurelio Gonzalez pled guilty and was sentenced to 99 years in prison. He did not appeal. Twelve years later, Gonzalez filed two post-conviction petitions in the state court, asserting that his guilty plea was not voluntary and knowing. Both were denied. In June 1997, he filed a federal habeas petition; absent tolling, Gonzalez' deadline for filing was April 23, 1997, one year after AEDPA became effective. The district court determined that the statute was not tolled while Gonzalez' second state petition was pending, deeming it not "properly filed" because it was successive and untimely. Without that tolling, Gonzalez' federal petition was two months late. In 2000, the USSC decided *Artuz v. Bennett*, holding that an application for state postconviction relief can be "properly filed" even if the state courts dismiss it as procedurally barred. Nine months later, Gonzalez filed a *pro se* "Motion to Amend or Alter Judgment," in federal district court, invoking Fed, R. Civ. P. 60(B)(6). The district court denied the motion. Gonzalez appealed. The Eleventh Circuit sitting *en banc* held that any Rule 60(b) motion, other than one alleging fraud, should be treated as a second or successive habeas corpus petition and must meet stringent AEDPA requirements. Because Gonzalez' petition did not meet these requirements, the Eleventh Circuit affirmed the district court's denial. The USSC granted certiorari.

A Rule 60(b) Motion is not Necessarily a Habeas Corpus Petition

The Court first considers whether the Eleventh Circuit's blanket decision that nearly any Rule 60(b) motion is the equivalent of a second or successive habeas petition. Under 28 USC 2244(b), a court is required to determine whether a claim presented in a second or successive petition was presented previously. A petition for habeas relief is a filing that contains one or more *claims*, and a *claim* as used in § 2244(b) is "an asserted basis federal basis for relief from a state court's judgment of conviction."

Gonzalez' Rule 60(b) motion was not, however, attacking the merits of his state conviction. Instead, he argued that a defect in the federal habeas proceeding had to be

corrected. The USSC concludes that "[w]hen no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application."

"We hold that a Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction. A motion that, like petitioner's, challenges only the District Court's failure to reach the merits does not warrant such treatment, and can therefore be ruled upon by the District Court without precertification by the Court of Appeals pursuant to § 2244(b)(3)."

Gonzalez' Rule 60(b) Motion Must be Denied

The USSC concludes that Gonzalez' motion must be denied, however, because a change in the interpretation of the AEDPA statute of limitations does not constitute an extraordinary circumstance as is required under Rule 60(b)(6) to warrant relief. (In a footnote, the Court acknowledges that a change in the interpretation of a *substantive* statute might have consequences for a case in which the judgment has become final.) Moreover, Gonzalez' lack of diligence in pursuing review renders the change in the law "all the less extraordinary," because before *Artuz*, he had abandoned all attempts to seek review of the district court's order dismissing his petition as untimely.

Justice Breyer's Concurring Opinion

Justice Breyer agrees with Justice Scalia's analysis, with one qualification: He is concerned that the discussion of the meaning of the word *claim* might be interpreted by some to suggest a different standard, inferentially less favorable to petitioners.

Justice Stevens' Dissenting Opinion

Justice Stevens, joined by Justice Souter, agrees with the majority's conclusion that Gonzalez' Rule 60(b)(6) motion should not be treated as a second or successive habeas petition, but would remand the case to the district court for further proceedings on the merits of Gonzalez' motion. "In light of the equitable, often fact-intensive nature of the Rule 60(b) inquiry, it is inappropriate for an appellate court to undertake it in the first instance." He chides the Court for "underestimating the significance of the fact that petitioner was effectively shut out of federal court – without any adjudication of the merits of his claims – because of a procedural ruling that was later shown to be flatly mistaken."

Bell v. Thompson, ___ U.S. ___, 125 S.Ct. 2825 (June 27, 2005).

Reversing Sixth Circuit order withholding mandate in a 5-4 decision.

Background

Gregory Thompson was convicted and sentenced to death in Tennessee. He offered no defense at the guilt phase. At the penalty phase, his counsel presented evidence of Thompson's good qualities and predictions that he would adjust well to prison life. Prior to trial, his attorneys had explored Thompson's mental condition, including a thirty-day evaluation in a state-run mental health facility. In a report based on this evaluation, Thompson was deemed competent at the time of the crime and competent to stand trial. Thompson presented the testimony of a psychologist at the penalty trial who reported to the jury that Thompson was remorseful and would be able to work and contribute while in prison. The prosecution presented in rebuttal the testimony of the psychologist who had led the thirty-day evaluation. He stated that his examination revealed no significant

mental illness. Thompson sought post-conviction relief in the state courts, alleging ineffective assistance for counsel's failure to adequately investigate his mental condition. In particular, Thompson argued that his head injuries diminished his mental capacity. He urged that this evidence should have been presented to the jury in mitigation, but lost. Thompson raised the IAC claim in his federal habeas petition. A different psychologist, Dr. Sultan, was retained to investigate the issue and diagnosed him as suffering from schizoaffective disorder, bipolar type, and opined that at the time of the crime, Thompson was suffering serious mental illness at the time of his crime, and the condition would have impaired his ability to conform his behavior to the requirements of the law.

Sultan's report was inadvertently not included in the record in the district court, which granted the State's motion for summary judgment, finding that Thompson failed to demonstrate that the state courts' denial of relief was an unreasonable application of established federal law or an unreasonable determination of facts. The district court noted that Thompson had not presented any significant probative evidence of mental illness impairing his ability at the time of the crime.

While his appeal to the Sixth Circuit was pending, Thompson filed a Rule 60(b) motion seeking to supplement the record by adding Dr. Sultan's report, and asked for a stay of the appeal in order to return to the district court with the supplemented record. His counsel explained that its omission was due to an oversight. The district court denied the motion to supplement and the Sixth Circuit denied a stay of the appeal. Judge Suhrheinrich wrote the opinion affirming the denial of habeas, reasoning that Thompson's attorneys were not IAC because his attorneys had been aware of his head injuries and had made an appropriate investigation, observing that none of Thompson's experts had offered an opinion as to his mental condition at the time of the crime.

Thompson filed a petition for rehearing, emphasizing the Sultan report and her deposition testimony. The Sixth Circuit denied the petition, but stayed the mandate pending disposition of Thompson's petition for writ of certiorari. The USSC denied certiorari on December 1, 2003. Thompson sought, and obtained, an extension of the order staying the mandate while he filed a petition for rehearing in the USSC. The Court denied rehearing and sent a copy of the order to the circuit court, but it still did not issue its mandate. The State filed a motion in the Tennessee Supreme Court requesting that an execution date be set. Proceedings followed on Thompson's competence to be executed. A Ford claim was still pending in the federal district court when the Sixth Circuit panel issued an amended opinion, seven months after the USSC denied certiorari. In the amended opinion, the circuit court vacated the district court's grant of summary judgment in favor of the State. It remanded the case to the district court for an evidentiary hearing on Thompson's IAC claim, and supplemented the record with Dr. Sultan's deposition, finding that it had been "negligently omitted" and was probative on the question of Thompson's mental state at the time of the crime. The panel relied on its inherent power to reconsider its opinion prior to issuance of the mandate.

Judge Suhrheinrich issued a separate opinion, explaining in detail that his chambers initiated the reconsideration. He, too, felt the Sultan deposition was probative, but would have justified the change of position based on a fraud upon the court, finding "implausible" counsel's explanation that this deposition had been left out inadvertently. Instead, he suggested counsel's plan was to unveil Dr. Sultan's report on the eve of Thompson's execution.

The Sixth Circuit Abused its Discretion

The USSC holds that, "even assuming a court may withhold its mandate after the denial of certiorari in some cases, the Court of Appeals' decision to do so here was an abuse of discretion." The Sixth Circuit waited seven months after the USSC denied certiorari

before issuing an amended opinion, without ever issuing its mandate, during which time the State took steps to prepare for petitioner's execution, in reliance on the Court of Appeal's prior orders and the USSC's denial of certiorari and rehearing. The majority notes the relevance of the psychologist's report and deposition regarding petitioner's mental condition at the time of the crime, but "it is not of such a character as to warrant the Court of Appeals' extraordinary departure from standard appellate procedure." Finality and comity concerns are implicated here, where "Tennessee expended considerable time and resources in seeking to enforce a capital sentence rendered 20 years ago…. [T]he Court of Appeals did not accord the appropriate level of respect to that judgment."

The majority notes also that the stay did not result from a request by Thompson, nor did the Sixth Circuit issue an order; instead, time to issue the mandate was extended by mere inaction. By contrast, Fed.R. App. P. 41(d)(2)(D) states that a court of appeals "must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Normally, denial of certiorari "signals the end of litigation"; the Federal Rules of Appellate Procedure provide a mechanism (petition for rehearing) for correcting errors by courts of appeals *before* USSC review is requested.

Here, the deposition in question was placed before the Sixth Circuit before Thompson petitioned for certiorari. The majority argues that if the deposition is as crucial as the dissenters say it is, it would not have been easily overlooked by the circuit court at that stage. Justice Kennedy remarks, "[t]here are ample grounds to conclude the evidence was unlikely to have altered the District Court's resolution of Thompson's ineffective-assistance-of-counsel claim," including the fact that the psychologist's opinion was based on an evaluation conducted thirteen years after Thompson's crime and conviction, and her opinion differs from that of two experts who examined him at the time of trial. The majority also attributes trial counsel's decision to proceed with character witnesses instead of a mental condition defense at penalty to a "strategic calculation." Given the conclusions of two experts that Thompson was not suffering from any significant mental illness, it was reasonable for trial counsel to make this choice.

Justice Breyer's Dissenting Opinion

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, is not offended by the Sixth Circuit's extraordinary efforts to correct an oversight, nor is he concerned that this unusual circumstance, "of a kind that I have not previously experienced in the 25 years I have served on the federal bench," will damage the doctrines of finality or comity. He notes the efforts expended by Judge Suhrheinrich to correct what he became convinced was an error, and that the other two judges on the panel also agreed that the previous decision should be vacated, even though they did not agree with everything in Judge Suhrheinrich's long opinion.

Cert Grant, Vacate and Remand

Bell v. Abdur-Rahman, No. 04-1247, 125 S.Ct.2825 cert granted, vacating and remanding Sixth Circuit's en banc decision at 392 F.3d 174 **(**June 28, 2005), for reconsideration in light of Gonzalez v. Crosby, summarized above. The Sixth Circuit again granted Rule 60(B) relief on remand (see below).

Sixth Circuit Decisions

Alley v. Bell, 405 F.3d 371 (6th Cir. April 11, 2005) (*en banc*). Without explaining its reasoning, the Sixth Circuit granted rehearing *en banc*, vacated the earlier panel decision lifting the district court's stay of execution in this Tennessee capital case (*Alley v. Bell*, 392 F.3d 822 (6th Cir. 2004)), and remanded for consideration in light of *In re Abdur' Rahman*, 392 F.3d 174 (6th Cir. April 11, 2005) (*en banc*). The district court had originally entered the stay in order to await the Sixth Circuit's decision in *Abdur' Rahman* before taking action on petitioner's Rule 60(b) motion. In a concurring opinion, Judge Cole (joined by Martin, Daughtrey, Moore and Clay, JJ.) indicated that the basis for petitioner's Rule 60(b) motion was an allegation that the state's post-conviction attorneys perpetrated a fraud upon the district court by filing an affidavit stating that they had disclosed all exculpatory evidence, when in fact they were aware significant exculpatory evidence that had not been revealed to petitioner.

Post v. Bradshaw, 422 F.3d 419 (6th Cir. July 29, 2005). The Sixth Circuit denies petitioner's motion for remand after the district court issued a provisional order granting petitioner's Rule 60(b) motion to vacate the judgment based on federal habeas counsel's failure to obtain additional discovery after the district court had granted petitioner's motion to obtain discovery. Applying the USSC's decision in Gonzalez v. Crosby, the circuit court concludes that petitioner's motion is precluded under 28 USC 2254(d) which expressly bars relief predicated on ineffective assistance of counsel in federal post-conviction proceedings. Gonzalez "makes it clear that when the AEDPA-amended habeas statutes conflict with Rule 60(b), AEDPA controls." Moreover, petitioner's motion is a second or successive habeas petition that is prohibited under 28 USC 2244(b). It makes no difference that the motion itself does not attack the district court's substantive analysis of those claims but, instead, purports to raise a defect in the integrity of the habeas proceedings.…". *Post v. Bradshaw*, 422 F.3d 424, (6th Cir. July 29, 2005). In this Ohio capital case, a majority of the Sixth Circuit panel denied petitioner's motion for remand to permit the district court to act on his Rule 60(b)(6) motion, which the lower court had already indicated a willingness to grant. In the Rule 60(b) motion, petitioner contended that his previous federal habeas attorneys had acted with "inexcusable neglect" in failing to conduct discovery that the district court had previously approved; this omission was discovered and pursued by new counsel handling petitioner's appeal of the district court's denial of habeas relief in the Sixth Circuit.

Relying on the Supreme Court's recent decision in *Gonzalez v. Crosby*, 125 S.Ct. 261 (2005), and the seldom-referenced §2254(i), the Sixth Circuit majority held that petitioner's Rule 60(b) motion was prohibited. First, the majority found it "clear that . . . the ground on which Post seeks relief in this Rule 60(b) motion is the incompetent and ineffective representation he received during that federal post-conviction collateral review. But relief on that ground is not permitted under AEDPA." Post, 422 F.3d at 423. The majority went on to explain that, in its view, the "expansive" language of §2254(i) "bars 'relief,' not simply particular kinds of relief, such as a writ of habeas corpus. We conclude, therefore, that the relief Post seeks is explicitly barred by the provisions of §2254(i)." *Id* Having found that §2254(i) precludes the type of "relief" petitioner sought, the majority went on to conclude that "[t]he bringing of such a claim is therefore not a valid role for Rule 60(b), and AEDPA denies the federal courts the power to entertain Post's motion in the instant case." *Id.* at 424.

The majority also held – again relying on *Gonzalez* – that petitioner's Rule 60(b) motion "is clearly a second or successive habeas petition that is forbidden by . . . §2244(b)," explaining as follows:

> Post's Rule 60(b) motion seeks to advance, through new discovery, claims that the district court previously considered and dismissed on substantive, constitutional grounds: *i.e.*, on the merits. The motion is therefore a second or successive habeas petition. It makes no difference that the motion itself does not attack the district court's substantive analysis of those claims but, instead, purports to raise a defect in the integrity of the

> habeas proceedings, namely his counsel's failure – after obtaining leave to pursue discovery – actually to undertake that discovery; all that matters is that Post is "seek[ing] vindication of" or "advanc[ing]" a claim by taking steps that lead inexorably to a merits-based attack on the prior dismissal of his habeas petition. *Id.* at 424-25.

Finally, the majority commented on the "egregious conduct of the Ohio Public Defenders Office," which represented petitioner before the district court, expressing "curious[ity] as to the justification for the public funds paid to the Ohio Public Defenders office and the outside counsel for Mr. Post's habeas proceeding." The majority concluded as follows: "We understand that Mr. Post was failed by his attorneys. However, because there is no constitutional right to counsel in habeas proceedings; because Congress has forbidden relief for ineffective or incompetent representation in post-conviction collateral review; and because Congress has barred relief for claims adjudicated in a previous habeas petition, the district court cannot grant Post's Rule 60(b) motion, and we therefore have no basis upon which to remand the case." *Id.* at 425. One judge dissented relying on Gonzalez, and defending the fees paid to the OPD. [Editor's note: Much in the majority's decision can be challenged.]

Cooey v. Bradshaw, 2005 WL 1965966 (N.D.Ohio Aug. 11, 2005). In this Ohio capital case, the district court – relying on *Post v. Bradshaw*, 422 F.3d 419, 2005 WL 1796223 (6th Cir. July 29, 2005), which held that "a Rule 60(b) Motion is a proceeding 'arising under' §2254, [and] any allegations raised in such a motion pertaining to habeas counsel's inadequate performance [are] barred from review pursuant to §2254(i)" – held that it lacked authority to hear petitioner's Rule 60(b) motion seeking relief on the basis of several letters issued by the Sixth Circuit criticizing the quality of his habeas representation. 2005 WL 1965966 at *7. Petitioner conceded that the district court had no authority to remedy alleged misconduct by habeas counsel that arose in the Sixth Circuit; therefore, the district court left open for the appellate court whether petitioner could use Rule 60(b) to challenge habeas counsel's conduct. In the alternative, the district court held that *Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005), prevented petitioner from obtaining relief regarding allegations of previous habeas counsel's inadequate performance because the remedy petitioner sought was re-litigation of the habeas claims he initially raised in the petition, which related exclusively to the constitutionality of his conviction and sentence. Therefore, petitioner's claims are properly construed as a second or successive petition. However, the district court determined that it was for the Sixth Circuit to decide whether appellate habeas counsel's conduct gave rise to a Rule 60(b). [Editor's note: The 6th Circuit later denied a motion to reopen under the F.R.App.P.]

In Re Lott, 366 F.3d 431 (6th Cir. April 22, 2004). The Sixth Circuit grants petitioner's application for an order directing the district court to consider petitioner's second habeas petition and a stay of execution. Petitioner asserts an actual innocence claim, based on improperly withheld evidence at trial. The Brady claim petitioner asserts was presented to the federal court previously, but the court did not reach the constitutional merits, deciding that the claim was procedurally barred. Nor did the court reach the merits of petitioner's "actual innocence" claim because it was pending in state court. The state courts later reached a decision on the merits based on a second petition for post-conviction relief. Additionally, while the factual predicate was discovered prior to adoption of AEDPA, this is the first opportunity since the AEDPA restrictions were imposed for the claim to be considered by the federal court. The Sixth Circuit concludes that the second petition should be authorized because petitioner can make a prima facie showing that, if proven, the facts underlying the claim would be sufficient to establish by clear and convincing evidence that no reasonable trier of fact would have found petitioner guilty: Petitioner has made a prima facie showing that the prosecutor did not reveal the victim's dying statement that his attacker had a skin color different than petitioner's and that the attacker was known to the victim, nor did the prosecutor reveal that the victim had

kerosene (used in the murder) in his house, contrary to the prosecutor's representation that the attacker had to bring the kerosene to the victim's house, showing that the act was premeditated. Moreover, the petitioner showed by citation to prior Ohio opinions that the prosecutor was guilty of similar misconduct in ten or more other cases. The Sixth Circuit states firmly, "[T]he egregious prosecutorial misconduct alleged here, if proved, must be deterred. So long as we value the rule of law, such conduct, if it occurred, cannot be tolerated in any kind of case – much less in death penalty cases."

In Re Lott, 424 F.3d 446 (6th Cir. Sept. 9, 2005). Sixth Circuit grants mandamus relief in petitioner's favor, setting aside portions of the district court's discovery order holding that petitioner's assertion of actual innocence effects an implied waiver of the attorney-client privilege, and ordering discovery accordingly. Mandamus is appropriate here because if the discovery order is enforced, "there is no way to cure the harm done to [petitioner] or to the privilege itself, even if some of the disclosure's consequences could be remedied on direct appeal." Moreover, the circuit court finds that the district court's order is clear error as a matter of law: The parties agree that petitioner has not put his attorney's performance or the content of their confidential communications before the court. "The District Court's order would require that the privilege yield to reveal whether [petitioner] ever made any statement inconsistent with that of an innocent man. Permitting this order to stand would place in jeopardy not only the attorney-client privilege, but also other important privileges ….".

COA PRACTICE

Bradley v. Birkett, 156 Fed. Appx, 771, 2005 WL 2660427 (6th Cir. Oct. 18, 2005). (unpublished). After merits briefing had been completed, the Sixth Circuit vacated the district court's order granting a COA on all twelve issues petitioner had sought to appeal and remanded with instructions that the district court "make an individualized assessment as to each of Bradley's claims according to the standard set forth in 28 U.S.C. §2253(c), *Slack* [*v. McDaniel*], and *Miller-El* [*v. Cockrell*]." 2005 WL 2660427 at *1. The court explained that the district court's order showed that it had based its COA decision "not on an analysis of whether Bradley had made his required substantial showing of the denial of a constitutional right as to each of his various claims, but rather on the [district] court's sense of its own fallibility, and its belief that 'its decision should [not] be insulated from further review.'" 2005 WL 2660427 at *2. The Sixth Circuit went on to acknowledge that the post-briefing timing of its remand gave rise to "significant considerations of judicial economy," but went ahead with that course, explaining, in part, that "we have found it necessary on a number of occasions to point out that this district court had improperly granted a COA." 2005 WL 2660427 at *4.

METHOD OF EXECUTION; RECHARACTERIZATION OF 1983 ACTIONS AS HABEAS

Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117 (May 24, 2004).

Unanimous ruling that Alabama death row inmate David Nelson could pursue his claim that the lethal injection procedures in his case constitute cruel and unusual punishment. Nelson was less than three hours away from his scheduled execution last fall when the Supreme Court gave him a temporary reprieve. He had filed a 1983 action three days before he was to be executed stating that his damaged veins would make it impossible to insert an intravenous line without cutting deep into flesh and muscle, a cut-down procedure. Nelson claimed that such a procedure was a violation of his rights under the Eighth Amendment. Alabama maintained that this claim was a successor habeas petition, simply part of Nelson's death penalty appeals, and should be dismissed because he had not obtained prior authorization pursuant to 28 USC 2244(b)'s gatekeeping provision. The

Justices ruled that the lower courts were wrong to block appeals by Nelson, and agreed that Nelson's claim was separate from any challenge to his sentence or conviction. Actions seeking injunctive relief challenging the fact of one's conviction or the duration of his sentence are properly characterized as habeas petitions, but constitutional claims challenging confinement conditions and medical treatment concerns would properly be filed as 1983 actions. The court "need not reach here the difficult question of how method-of-execution claims should be classified generally", but the government had conceded that if this cut-down procedure were used to gain venous access for medical treatment, a deliberate indifference challenge to the cut-down procedure's constitutionality would be appropriate under 1983, and the court finds no reason to treat his claims differently solely because he has been condemned to die. If the district court finds the cut-down necessary, then it will need to address the broader method-of-execution question. The temporary stay sought here, by fair reading, was directed against the cut-down procedure and not an enjoining of the execution by lethal injection; but if the state reschedules his execution and he seeks a similarly broad stay, the district court will need to address the question of whether a request to enjoin the execution, rather than merely to enjoin an allegedly unnecessary precursor medical procedure, properly sounds in habeas. This ruling will not open the floodgates, as the court's holding is extremely limited and merely stating a cognizable claim under 1983 does not warrant a stay as a matter of right, the last-minute nature of the stay is properly considered. The ability to bring a 1983 action does not free inmates from the substantive or procedural requirements of the PLRA.

Brown v. Crawford, __ U.S.___, 125 S.Ct. 2289 (May 18, 2005).
Stay granted then lifted, 5-4, to consider whether lethal injection mixture of drugs that including pancuronium bromide inflicted cruel and unusual punishment. Justices Stevens, Ginsburg and Breyer, dissenting from the lifting of the stay, were disturbed by Missouri's failure to respond to the claim that the execution would be painful. "The state has not disputed the merits of (Brown's) challenge to the chemical protocol used by Missouri to carry out lethal injections." Justice Souter sided with them but did not sign on to their dissent. The three justices also cited an opinion by Judge Kermit Bye on the 8th U.S. Circuit Court of Appeals in St. Louis. Bye, who supported delaying Brown's execution, relied on an article last month in The Lancet medical journal that questions the pain caused by the chemical combination generally used in lethal injections. The study involved 49 executions in Arizona, Georgia, North Carolina and South Carolina. In 21 of the deaths, the study found, inmates were likely conscious when they received the final drug that causes heart attacks. "No one will be able to tell whether Brown is conscious and therefore experiencing gratuitous pain because his entire body will be paralyzed so that he cannot express himself in any way," Bye said. [Editor's Note: There is some controversy over the reliability of this study and reliance on additional materials is recommended.] Justice Clarence Thomas, who handles appeals from Missouri, briefly stopped Brown's execution, apparently to give his colleagues time to handle the multiple rounds of appeals in the case. Brown's lawyers submitted hundreds of pages of documents to the court. Missouri lawyers argued that courts were right to allow the execution although the subject "may be a topic for additional scientific research."

Cert Grant on Lethal Injection Protocol/Cognizability in 1983 Action

Hill v. Crosby (Florida), cert granted ___ U.S. ___, 126 S.Ct. 1084, No. 05-8794 (Jan. 25, 2006). Ruling below 437 F.3d 1084, 2006 WL 163607 (11th Cir. Jan. 24, 2006). USSC granted Clarence E. Hill's application for stay of execution and his petition for certiorari. Hill was scheduled to be executed that day. Questions Presented: 1. Whether a complaint brought under 42 USC 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 2254? Whether, under this Court's decision in Nelson v. Campbell, a challenge to a

particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 USC 1983?
[On the previous day, the Court had denied Hill's application for stay of execution, following the Florida Supreme Court's denial of Hill's successive motion for postconviction relief, in which he sought an evidentiary hearing on the lethal injection protocol, citing the 2005 Lancet article, "Inadequate Anaesthesia in Lethal Injection for Execution." The Florida Supreme Court concluded the article's findings did not raise sufficient questions to warrant an evidentiary hearing. The USSC denied certiorari in the state-court case (No. 05-8731) on February 27. Lyle Denniston writes in SCOTUSblog, "Since the first of this year, the Supreme Court has repeatedly refused to hear challenges based on the Lancet study. Those appeals were last-minute challenges to execution. A clearer view of the Court's reaction to complaints about lethal injection protocol will come when the Justices act on the appeal in Abdur'Rahman v. Bredesen (05-1036), which does not involve a final-hour challenge. A response in that case is due on March 20."]

Wilkinson v. Dotson, 544 U.S. 74, 125 S.Ct. 1242 (March 7, 2005) (non-capital).
State prisoners may bring a §1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures; they need not seek relief exclusively under the federal habeas corpus statutes. Ohio's argument that respondents' claims may only be brought in federal habeas (or similar state) proceedings because a state prisoner cannot use a §1983 action to challenge "the fact or duration of his confinement," e.g., Preiser v. Rodriguez, 411 U.S. 475, 489, and respondents' lawsuits, in effect, collaterally attack their confinements' duration, jumps from a true premise (that in all likelihood the prisoners hope their suits will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief). The connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous to achieve Ohio's legal door-closing objective. Section 1983 remains available for procedural challenges where success would not necessarily spell immediate or speedier release for the prisoner, e.g., Wolff v. McDonnell, 418 U.S. 539, but the prisoner cannot use §1983 to obtain relief where success would necessarily demonstrate the invalidity of confinement or its duration, e.g., Heck v. Humphrey, 512 U.S. 477. Here, respondents' claims are cognizable under §1983, they seek relief that will render invalid the state procedures used to deny parole eligibility (Dotson) and parole suitability (Johnson). Neither prisoner seeks an injunction ordering his immediate or speedier release into the community. And as in Wolff, a favorable judgment will not "necessarily imply the invalidity of [their] conviction[s] or sentence[s]." Success for Dotson does not mean immediate release or a shorter stay in prison; it means at most new eligibility review, which may speed consideration of a new parole application. Success for Johnson means at most a new parole hearing at which parole authorities may, in their discretion, decline to shorten his prison term. Because neither prisoner's claim would necessarily spell speedier release, neither lies at "the core of habeas corpus." Finally, the prisoners' claims for future relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration) are yet more distant from that core. Ohio's additional arguments are not persuasive.

STAYS OF EXECUTION

Some Recent U.S. Supreme Court Cert/Stay Rulings – Method of Execution, Competency, Age and Infirmity, Possible 60(B) Relief

Nelson v. Campbell and Brown v. Crawford, Hill v. Crosby *cert grant* [See above.]

Charles Singleton v. Norris, 540 U.S. 832, 124 S.Ct. 74 (Oct. 6, 2003). Court denies review of whether defendant was forced to take antipsychotic drugs that made him mentally incompetent to be executed. Circuit court had ruled there was no constitutional

violation in executing an inmate who has regained competency through forced medication that is part of appropriate medical care.

Allen v. Ornoski (California), Nos. 05-8639, 05-8658, 126 S.Ct. 1139, and In re Allen, No. 05-8659, ___U.S.___, 126 S.Ct. 1140. The USSC denied these applications for stay of execution, and declined to grant a writ of certiorari. Justice Breyer, however, dissented (No. 05-8639): “Petitioner is 76 years old, blind, suffers from diabetes, is confined to a wheelchair, and has been on death row for 23 years. I believe that in the circumstances he raises a significant question as to whether his execution would constitute "cruel and unusual punishment."… I would grant the application for stay of execution.” [citing among others, Justice Stevens opinion in Lackey.]

Cooey v. Bradshaw, 539 U.S. 973 (July 24, 2003), denying state’s motion to vacate stay originating in 216 F.R.D. 408 (N.D.Ohio, July 23, 2003). In a highly unusual case, the district court stayed the petitioner's execution pending the Sixth Circuit's en banc rehearing of Abdur'Rahman v. Bell, or until the Sixth Circuit clarifies the meaning of letters the Court sent to Cooey's former federal appellate habeas counsel. The petitioner filed a motion for relief pursuant to F.R.C.P. Rule 60(b) arguing that the ineffective assistance of counsel he received impugned the integrity of the habeas proceedings. The district court noted that whether a Rule 60(b) motion must always be treated as a successive or second habeas petition was an unsettled question in light of the rehearing en banc ordered for Abdur'Rahman. The district court determined that if a Rule 60(b) was cognizable, then Cooey may have a legitimate ineffective assistance of counsel claim based upon the Sixth Circuit's explicit dissatisfaction with Cooey's appellate habeas counsel and the Court's removal of the two attorneys from future CJA cases. The stay held in the Sixth Circuit which also granted en banc review by a divided vote, see 338 F.3d 615 (July 31, 2003 second amended order, and Judge Clay's and Bogg's opinions therein).

DOUBLE JEOPARDY AND/OR DUE PROCESS VIOLATIONS IN PENALTY RETRIALS

Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732 (2003).
The Court (5-4) affirms the death sentence imposed on retrial, against arguments of double jeopardy or due process violations. Under Pennsylvania law, the verdict in the penalty phase of capital proceedings must be death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance or one or more aggravating circumstances outweighing any mitigating circumstances, but it must be life imprisonment in all other instances; and the court may discharge a jury if it determines that the jury will not unanimously agree on the sentence, but the court must then enter a life sentence. When petitioner's penalty-phase jury reported to the trial judge that it was hopelessly deadlocked 9-to-3 for life imprisonment, the court discharged the jury and entered a life sentence. On appeal, the Pennsylvania Superior Court reversed petitioner's first-degree murder conviction and remanded for a new trial. At the second trial, Pennsylvania again sought the death penalty and the jury again convicted petitioner, but this time the jury imposed a death sentence. In affirming, the Pennsylvania Supreme Court found that neither the Fifth Amendment's Double Jeopardy Clause nor the Fourteenth Amendment's Due Process Clause barred Pennsylvania from seeking the death penalty at the retrial.

Justice Scalia writes that a defendant who is convicted of murder and sentenced to life imprisonment succeeds in having the conviction set aside on appeal, jeopardy has not terminated, so that a life sentence imposed in connection with the initial conviction raises no double-jeopardy bar to a death sentence on retrial. Stroud v. United States, 251 U.S. 15. While, in the line of cases commencing with Bullington v. Missouri, 451 U.S. 430, the Court found that the Double Jeopardy Clause applies to capital-sentencing proceedings that "have the hallmarks of the trial on guilt or innocence," id., at 439, the

relevant inquiry in that context is not whether the defendant received a life sentence the first time around, but whether a first life sentence was an "acquittal" based on findings sufficient to establish legal entitlement to the life sentence--i.e., findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt, Arizona v. Rumsey, 467 U.S. 203, 211. Double jeopardy protections were not triggered when the jury deadlocked at petitioner's first sentencing proceeding and the court prescribed a life sentence pursuant to Pennsylvania law. The jury in that first proceeding was deadlocked and made no findings with respect to the alleged aggravating circumstance. That result, or nonresult, cannot fairly be called an acquittal, based on findings sufficient to establish legal entitlement to a life sentence. Neither was the entry of a life sentence by the judge an "acquittal." Under Pennsylvania's scheme, a judge has no discretion to fashion a sentence once he finds the jury is deadlocked, and he makes no findings and resolves no factual matters. The Pennsylvania Supreme Court also made no finding that the Pennsylvania Legislature intended the statutorily required entry of a life sentence to create an entitlement" even without an "acquittal." Dictum in United States v. Scott, 437 U.S. 82, 92, does not support the proposition that double jeopardy bars retrial when a defendant's case has been fully tried and the court on its own motion enters a life sentence. The mere prospect of a second capital-sentencing proceeding does not implicate the perils against which the Double Jeopardy Clause seeks to protect.

The Due Process Clause also did not bar Pennsylvania from seeking the death penalty at the retrial. Nothing in sect.1 of the Fourteenth Amendment indicates that any "life" or "liberty" interest that Pennsylvania law may have given petitioner in the first proceeding's life sentence was somehow immutable, and he was "deprived" of any such interest only by operation of the "process" he invoked to invalidate the underlying first-degree murder conviction. Court declines to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause.

Justice Ginsburg wrote for the dissenters that a defendant's interest in not being forced to defend his life in a second proceeding following an initial proceeding in which the prosecution was given a complete opportunity to obtain a death sentence is worthy of double jeopardy protection.

Smith v. Massachusetts, 543 U.S. 462, 125 S.Ct. 1129 (Feb. 22, 2005) (*non-capital*).
The Court 5-4 grants relief on double jeopardy grounds. [Background: At the end of the prosecution case in chief on charges stemming from shooting his girlfriend's cousin, Melvin Smith moved for a not-guilty finding on one of the counts with which he was charged, on the ground that the prosecution had not presented evidence as to the barrel length of the firearm Smith was accused of wielding; the crime charged required a finding that the barrel was less than 16 inches long. The trial judge granted the motion, the prosecution rested, and Smith presented his defense case. His girlfriend, who was charged as an accessory after the fact and not charged with unlawful possession of a firearm, presented a single witness and rested. In a short recess just prior to closing arguments (later on the same day as the mid-trial ruling, the dissent points out), the prosecutor pointed out a Massachusetts precedent that he argued held that the victim's testimony about the type of gun Smith used – a .32 or .38 caliber "pistol" or "revolver" – would be sufficient to establish that the barrel was less than 16 inches long. The trial judge agreed and orally "reversed" her prior decision. The jury was instructed on unlawful possession of a firearm, and returned a guilty verdict on that and the other two counts as to Smith. His girlfriend was acquitted. The Appeals Court rejected Smith's appeal, reasoning that Double Jeopardy did not apply because the trial judge's "reversal" did not subject Smith to a second prosecution, and found that the ruling was not final but could be reconsidered, despite a Massachusetts law requiring the judge to rule on a motion when made, without reserving decision. The Massachusetts Supreme Judicial Court denied review.]

The USSC finds that submitting the firearm count to the jury for deliberations after the trial court had granted petitioner's motion for a not-guilty finding due to

insufficiency of the evidence "plainly subjected petitioner to further 'factfinding proceedings going to guilt or innocence,'" which is prohibited following an acquittal; it does not make a difference that the determination was made by the trial judge rather than by the jury. "[E]ven when the jury is the primary factfinder, the trial judge still resolves elements of the offense in granting a [motion for a not-guilty finding for insufficiency of the evidence] in the absence of a jury verdict." Moreover, once the trial judge has granted an acquittal, the Double Jeopardy Clause does not permit the judge to reconsider the ruling after the parties have rested. At the time of petitioner's trial, Massachusetts had no law that preserved the possibility of reconsideration after a mid-trial determination of sufficiency of the evidence. In the absence of such a law, the possibility of prejudice to the defendant arises where the defense puts on its evidence after the ruling, for an apparent dismissal may induce the defendant to present evidence that could strengthen the prosecution's case as to that count.

Justice Scalia makes several interesting comments in addition to the central holding. First, the Court "think[s], and petitioner does not dispute," that a state law could permit the trial judge to reconsider after making a mid-trial determination of insufficiency, a concession the dissenting justices find important. Second, the majority does not share the prosecution's concern that the Court's ruling may prevent correction of even an inadvertent, mistaken grant of acquittal. "Double-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal, even one rendered by a jury." And finally, Justice Scalia expresses concern for the effect of a mid-trial acquittal on a codefendant, as well as a defendant, noting that an apparent dismissal of a count against the defendant might similarly serve to lure the codefendant into presenting evidence that would not have been presented if the count was still pending against the defendant. "They would, for example, proceed under the mistaken belief that they need no longer fear the acquitted defendant's assertion of a defense antagonistic to their own, and might assume that the acquitted defendant would become available as a defense witness."

Justice Ginsburg dissents, disagreeing with the majority's insistence on an explicit state law or precedent permitting reconsideration of a mid-trial ruling before the case is submitted to the jury. The issue here is a due process question, whether Smith had a full and fair opportunity to present his defense, rather than double jeopardy. Analyzed in this way, Smith was not prejudiced by the trial court's correction of her earlier ruling. Moreover, the case relied on by the majority, Smalis v. Pa. (1986), does not apply here, because it involved an appellate court reviewing a mid-trial acquittal. Reversal there would have meant a remand for further proceedings *after* the case has moved from the trial court to the appellate court, which "necessarily signals that the trial court has ruled with finality on the appealed issue or issues."

EX POST FACTO LAWS

Stogner v. California, 539 U.S. 607, 123 S.Ct. 2446 (2003) [non-capital].
Statute that "authorized criminal prosecutions that the passage of time had previously barred … that was enacted after prior limitations periods for Stogner's alleged offenses had expired" violated the second categorical description of violations set out by Justice Chase in Calder v. Bull, 3 Dall. 386 (1798): "Every law that aggravates a crime, or makes it greater than it was, when committed." Justice Chase offered an alternative description as well: "[A]t other times they inflicted punishments, where the party was not, by law, liable to any punishment." 123 S.Ct. at 2447. The majority expanded on this, explaining that after the original limitations period had expired, Stogner was no longer "liable to any punishment." The statute "aggravated" the crime, therefore, making it "greater than it was, when committed." Id. at 2450. After a rather detailed analysis of the history inspiring Justice Chase, the majority notes that §803 might violate other of the Justice's categories as well. A legislative act extending an unexpired statute of limitations is not affected by the majority's decision. Justice Kennedy (with Rehnquist, Scalia and Thomas) disagrees with the majority's broad interpretation of Justice Chase's second category. "These

[Justice Chase's] words … do not permit the Court's holding, but indeed foreclose it. A law which does not alter the definition of the crime but only revives prosecution does not make the crime 'greater than it was, when committed.'

Rogers v. Tennessee, 532 U.S. 451, 121 S.Ct. 1693 (2001).
No violation of due process occurred when the state supreme court abrogated the "year and a day rule" to homicide in a case where the crime was committed five years prior to the change. A judicial interpretation of a common-law doctrine or criminal statute may be given retroactive effect unless the interpretation is "unexpected and indefensible" when read in light of the law as expressed prior to the conduct in issue. Focus of inquiry when court interpretation (as opposed to a statutory enactment) is presented is the due process inquiry of notice, foreseeability, and the right to fair warning. The year and a day rule had been so undermined by advances in medical and related sciences as to render it without question obsolete, and it had only the most tenuous foothold as part of Tennessee's criminal law at the time of the crime, so its abrogation was not unexpected.

PRISON CONDITIONS

Johnson v. California, 543 U.S. 499, 125 S.Ct. 1141 (Feb. 23, 2005) (*non-capital*).
Court grants injunctive relief to prisoners in a 5-3 opinion. [Background: Garrison Johnson has been incarcerated in California prisons since 1987. He filed this *pro se* action to challenge the CDC's unwritten policy of making housing assignments during an inmate's first 60 days at an institution according to race. Counsel was appointed to assist with the Fourth Amended Complaint, in which Johnson alleged that the racially segregated housing practice violated his rights under the Equal Protection Clause. The CDC asserted that the practice is necessary to control violence in the prisons, particularly gang violence. Justice O'Connor majority opinion notes, however, that other than the housing assignments in the reception centers, the rest of the prison facilities are fully integrated. The District Court granted the defendant's motion for summary judgment. The Ninth Circuit, applying the deferential standard of Turner v. Safley, affirmed, and denied Johnson's petition for rehearing *en banc*.] The USSC finds that strict scrutiny is the required standard of review and reverses as it was not applied. An express racial policy is "immediately suspect," because of the possibility that it is motivated by a discriminatory purpose. The majority rejects the CDC's argument that its policy should be considered differently because the policy is applied equally, to all races. "[W]e rejected the notion that separate can ever be equal – or 'neutral' – 50 years ago in Brown v. Board of Education." Nor does the Court accept the CDC's assertion that its policy should be considered differently because of the special challenges presented in prisons, noting that the Court has imposed strict scrutiny to racial segregation policies in prisons before. The large majority of prisons in the United States do not use similar racially-based housing policies, undercutting the CDC's argument of necessity. "In the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination." The USSC holds that strict scrutiny is the correct standard of review to apply to the CDC's policy of racial segregation in reception-center housing, and remands appellant's case to the Ninth Circuit or the District Court to apply this standard "in the first instance." Responding to the CDC's protest that this ruling will "handcuff" prison administrators, Justice O'Connor assures that strict scrutiny does not "preclude the ability of prison officials to address the compelling interest in prison safety. Prison administrators, however, will have to demonstrate that any race-based policies are narrowly tailored to that end." She adds, "Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts." Accordingly, the Court remands the matter to the Ninth Circuit or the district court, to conduct a review of the housing policy under the correct standard of strict scrutiny.

Joined by Justices Souter and Breyer, Justice Ginsburg concurs in the majority opinion, but writes separately to emphasize that not *all* racial classifications should be

"immediately suspect," such as racial classifications intended to correct inequalities through affirmative action.

Justice Stevens dissents as enough evidence has been presented for the Court to invalidate the CDC policy outright, without remand. Justice Thomas dissents and would affirm the Ninth Circuit's application of the deferential standard of Turner v. Safley, because of the potential for racial violence in prisons. (Justice O'Connor, in the majority opinion, counters that in our racially-charged society, there is potential for racial violence in virtually any integrated event, and charges that Justice Thomas offers no reasoned basis for limiting segregation policies in prisons.)

Cutter v. Wilkinson, __ U.S. ___, 125 S.Ct. 2113 (May 31, 2005) (non-capital).

The Court rules 9-0 that section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1)-(2) does not, on its face, violate the Establishment clause, but serves as a "permissible legislative accommodation of religion that is not barred by the Establishment Clause".

The USSC reverses the Sixth Circuit's ruling that the institutionalized persons provisions of the Religious Land Use and Institutionalized Persons Act violates the Establishment Clause of the First Amendment. The USSC finds this portion of the statute "compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise," permitting people who are incarcerated or whose freedom is otherwise restricted by the government to seek to meet their religious needs. The provision does not require that safety and order be compromised in order to permit religious practices. It does not discriminate between bona fide faiths nor does it grant privileges or disadvantages to any particular group.

The Court notes, however, that it is ruling only on the facial challenge to the law; it leaves open the possibility that Ohio will demonstrate that it is *factually* impossible to follow the RLUIPA provisions without impinging on interests of safety or negatively affecting the services provided to other inmates.

Justice Thomas concurs, writing separately "to explain why a proper historical understanding of the Clause as a federalism provision" leads to the same conclusion as that arrived at by Justice Ginsburg. Under this historical analysis, Justice Thomas argues that the real purpose of the Establishment Clause is to keep the federal government from interfering with the state governments. "For example, Congress presumably could not require a State to establish a religion any more than it could preclude a State from establishing a religion." (He later adds that, by virtue of the Fourteenth Amendment, States are also precluded from establishing a religion.) The upshot is that Congress does not need to completely avoid the subject of religion or maintain a strict separation of church and state, so long as it does not interfere with the States' actions vis-à-vis religion.

Wilkinson v. Austin, ___U.S.___, 125 S.Ct. 2384 (June 13, 2005).
The Ohio State Prison's informal, nonadversarial classification process provided inmates with adequate information or opportunity to state their case against placement at the supermax prison, and they did possess a liberty interest.

Cert Grants

U.S. v. Georgia and Goodman v. Georgia, Nos. 04-1203, 04-1236, cert. granted ___ U.S. ___, 125 S.Ct. 2256 (May 16, 2005), ruling below 120 Fed. Appx 7850. Question Presented: Does Title II of Americans with Disabilities Act, which bars discrimination against disabled persons by governmental entities in operation of public services, programs, and activities, validly abrogate state sovereign immunity from suits for damages by prisoners alleging disability-based discrimination by state prisons?

Cert Grants on Prison Conditions

Woodford v. Ngo, 546 U.S. ___, 126 S.Ct. 647 (Nov. 14, 2005), No. 05-416, ruling below, 403 F.3d 620 (9th Cir. 2005). Question Presented (paraphrased): What administrative remedies prison inmates must take before they may file a federal court lawsuit challenging prison conditions under the Prison Litigation Reform Act, and particularly, whether the exhaustion requirement is satisfied if the inmate files an administrative complaint too late, after a filing deadline has passed, or is otherwise flawed procedurally?

Beard v. Banks, 546 U.S. ___, 126 S.Ct. 650 (Nov. 14, 2005), No. 04-1739, ruling below 399 F.3d 134 (3rd Cir. 2005). Question Presented (paraphrased): Whether prison officials have a duty to allow dangerous inmates access to newspapers, magazines and photos?

INTERPRETING FEDERAL STATUTES

Small v. U.S., ___ U.S.___, 125 S.Ct. 1752 (April 26, 2005).
18 U. S. C. §922(g)(1), which forbids "any person . . . convicted in any court . . . of a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm," encompasses only domestic, not foreign, convictions.

Scheidler et al. v. National Organization for Women, Inc., et al., __ U.S. ___, 126 S.Ct. 1264, Nos. 04-1244, 4-1352, Feb. 28, 2006).
Congress did not intend the Hobbs Act to create or include a cause of action for violent offenses unrelated to extortion or robbery. Scheidler represents a class of pro-life protesters; National Organization for Women (NOW) is a non-profit organization supporting abortion availability. NOW brought suit, contending Scheidler's protest techniques violated the Racketeering Influenced and Corrupt Organizations Act (RICO) by using extortion illegal under the Hobbs Act. The Supreme Court reversed and remanded in Scheidler II, holding Hobbs Act (Act) extortion requires the obtaining of property, and a right to un-protested abortions is not property. On remand, the Court of Appeals maintained the injunction, noting the District Court decision may have rested on violence independent of extortion or robbery, and remanded to the District Court to consider this issue. The Supreme Court held that the Hobbs Act does not include a cause of action for violence unrelated to robbery or extortion and remanded for judgment. They noted that the Act's history did not discuss such independent violence, and declined to include such acts as falling under the Hobbs Act, noting this could criminalize activities not considered by Congress.

V. SELECTED OHIO CAPITAL CASES IN THE FEDERAL COURTS – VARYING ISSUES

INSUFFICIENCY OF EVIDENCE OF PRIOR CALCULATION AND DESIGN

Taylor v. Mitchell, 296 F. Supp. 2d 784, 2003 WL 1477010 (N.D. Oh. March 3, 2003).
R of aggravated murder conviction due to insufficiency of the evidence regarding prior calculation and design. The jury could not rationally have found that the encounter earlier resulted in prior calculation and design where there was an intervening period of five to twenty minutes without any contact, conversation, or confrontation between the petitioner and the victim, and even if there had been an initial incident in which the victim had flashed a large roll of money and belittled the petitioner, there is no evidentiary basis for believing that incident, standing alone, gave rise to any homicidal thoughts on petitioner's part, or otherwise would have led to the shooting in the bar. The only rational inference that can be drawn from this evidence is that, if there had been no jukebox incident, there would have been no shooting. Though there was a period in which the petitioner might

have reflected and planned, there is no evidentiary basis for concluding that he did so: the shooting can only be viewed as having been provoked by the later events, which occurred after. The Ohio Court of Appeals and the Ohio supreme Court misread the record when it stated that the petitioner ordered another to go outside to the car, and there is no evidence that the petitioner strategically positioned a third person behind the victim as part of a plan to kill him. There is therefore no evidence of any "conscious" decision on the petitioner's part. That he emptied his weapon into the victim's prostrate body is not, evidence of prior calculation and design; it is, rather evidence of petitioner's purpose –to kill the victim. There is no evidence appellant made a scheme or design to kill (the victim), either during the few minutes between the gunshots, or at any other time. There is no evidence appellant engaged in a studied analysis of the means by which to kill. The facts here show an instantaneous eruption of events; not prior calculation and design. The fight was one continuous course of events and though there was sufficient evidence to show an intent to kill, there was no evidence that such intent was the result of prior calculation and design.

[See also Richey case above re insufficient evidence of specific intent to kill victim killed.]

SUFFICIENCY, BRADY, PREJUDICAL WITNESS STATEMENTS ABOUT PRIOR MURDER, JUROR EXPOSURE TO PUBLICITY

Zuern v. Tate, 336 F.3d 478 (6th Cir. July 17, 2003).
Reversing grant of writ on Brady grounds, the Court finds sufficient evidence supports the jury finding of aggravated murder with prior calculation and design when he stabbed a corrections officer during a search of his prison cell, and evidence was presented that 11 days before the murder, defendant expressed general hostility toward corrections officers, that defendant engaged in deliberate and prolonged creation of a shank to use as weapon, that defendant had advance notice of cell search, that instead of hiding the shank or getting rid of it, defendant kept it ready in preparation for the search, and that when officers opened the cell door, he lunged at one officer and stabbed him. On the Brady claim ground on which relief was granted below, the Court finds had the prison deputy Schweinefuss' memorandum been disclosed to the defense, there is not a reasonable probability that the result of the proceeding would have been different. The prison deputy's memorandum stated that an inmate notified him that defendant had made a threat to kill another inmate; even assuming the memorandum would have assisted defendant in proving that he planned to kill another inmate, it would not have established that he did not plan on killing the corrections officer too, since the two theories were not mutually exclusive, and thus, memorandum was not material. Further, the failure to grant a mistrial after witness' prejudicial statement that defendant had prior murder conviction did not render the trial fundamentally unfair. Although the comment was prejudicial, the remark was unsolicited, it was made in response to a proper line of questioning by the prosecutor, there was no evidence of the prosecution's bad faith, and the trial court immediately admonished the jury that it could not consider such testimony. Lastly, the failure to excuse Juror Taylor after she saw a television broadcast about Zuern's case did not constitute a denial of fundamental fairness, as she advised the court of the information that she obtained from the broadcast, and indicated that she could be fair and impartial.

CONFRONTATION, HARMLESS ERROR ANALYSIS, 2254 REVIEW

Madrigal v. Bagley, 413 F.3d 548 (6th Cir. 2005). Affirming the district court's grant of habeas relief on the grounds that the Ohio Supreme Court unreasonably held that the admission of co-defendant Cathcart's statements, which implicated Madrigal as the murderer, was harmless error. Identification was the primary issue at trial and a lack of physical or forensic evidence gave Cathcart's statement added significance. Invoking his Fifth Amendment rights, Cathcart refused to testify at Madrigal's trial. Instead, the

prosecutors read Cathcart's statements into the record and this reading extends over 79 pages of the trial transcript. Both the Ohio Supreme Court and the district court found that the admission of these statements violated Madrigal's constitutional right to confront witnesses against him. The state court, however, concluded that the error was harmless in light of the strength of two eyewitnesses' testimony. The district court reasoned that the state court erroneously considered whether there was enough evidence to support the verdict, rather than inquiring whether the error was a substantial or injurious effect upon the jury. After systematically analyzing the harmless error factors set forth in Delaware v. Van Arsdall, 475 U.S. 673 at 684 (1986), the district court concluded that the state court decision was an unreasonable application of federal law and granted habeas relief. The Sixth Circuit affirms the district court's grant of relief as the error was prejudicial: The prosecution had no forensic or physical evidence tying petitioner to the robbery-murder; eyewitness descriptions of the perpetrator were inconsistent, leaving open doubt as to identity; the codefendant's statements were central to the prosecution's case; and petitioner had no opportunity to cross-examine the declarant.

PROSECUTORIAL MISCONDUCT IN PRESENTING PENALTY PHASE EVIDENCE AND ARGUMENT, INADEQUATE HARMLESS ERROR ANALYSIS BY OHIO SUPREME COURT, PRE-AEDPA CASE (ALSO JUDGE BIAS, PROCEDURAL DEFAULT)

DePew v. Anderson, 311 F.3d 742 (6th Cir. 2002).
Penalty Reversed in pre-AEDPA case. Prosecutorial misconduct required grant of relief. The prosecutor asked defense witness whether he was aware of petitioner's involvement in a knife fight, a question that had no basis in fact, and placed into evidence an irrelevant photograph purportedly showing petitioner standing next to a marijuana plant. The prosecutor's actions were deliberate, calculated to mislead the jury and prejudice the defendant, extensive and not isolated, and undermined the jury's ability to make a fair determination of sentence where petitioner's only mitigating factor was his law-abiding past and reputation for being a peaceful person. "When a prosecutor's actions are so egregious that they effectively 'foreclose the jury's consideration of … mitigating evidence,' the jury is unable to make a fair, individualized determination as required by the Eighth Amendment." Petitioner's Fifth Amendment rights were violated by the prosecutor's comments during the sentencing phase closing argument to effect that if petitioner had testified under oath and subjected himself to cross-examination, the prosecutor would have asked him whether he had been convicted of any crime subsequent to the murders for which he was being sentenced. The state court had found that the remark constituted a violation but concluded it was harmless. The Ohio Supreme Court did not actually find that the multiple prosecutorial errors in this case were harmless; rather, the court found that the crime was 'brutal' and that 'in the interest of the public, which has every right to expect is criminal justice system to work effectively', the court could not grant reversal. The Sixth Circuit chastises the Ohio Supreme Court for applying an improper definition of harmless error: "The public's or the voter's feelings in favor of capital punishment for brutal crimes are a well-known part of our political tradition, but these feelings cannot rise above or displace constitutional provisions insuring a fair trial."
[Note, the Court disregards counsel's waiver of the Fifth Amendment argument, where the state court reached the issue on direct appeal and the issue was raised in his amended petition, which alleged the death sentence was "unreliable because the government so infected the trial with unfairness as to deny Petitioner a fair trial guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments". In passing, the Court finds the record reveals no evidence of actual judicial bias in judge's comments, quoted in the press and made specifically with regard to petitioner's case, that if he has a doubt, he will give the benefit of the doubt to the law enforcement officers. But the comment was troubling and unfortunate. The court is less troubled by comment placing

blame on legislature for perceived deficiencies in death penalty sentencing as this was not in reference to defendant's case, and was merely a political response by a judge facing an election. At the same time, federal courts must be conscious of the political pressures its state colleagues face and remain vigilant in enforcing procedural rights of accused.]

ATTORNEY CLIENT AND OTHER PRIVILEGES, INNOCENCE ISSUES

In Re Lott, 424 F.3d 446 (6th Cir. Sept. 9, 2005). Sixth Circuit grants mandamus relief in petitioner's favor, setting aside portions of the district court's discovery order holding that petitioner's assertion of actual innocence effects an implied waiver of the attorney-client privilege, and ordering discovery accordingly. Mandamus is appropriate here because if the discovery order is enforced, "there is no way to cure the harm done to [petitioner] or to the privilege itself, even if some of the disclosure's consequences could be remedied on direct appeal." Moreover, the circuit court finds that the district court's order is clear error as a matter of law: The parties agree that petitioner has not put his attorney's performance or the content of their confidential communications before the court. "The District Court's order would require that the privilege yield to reveal whether [petitioner] ever made any statement inconsistent with that of an innocent man. Permitting this order to stand would place in jeopardy not only the attorney-client privilege, but also other important privileges ….".

JURY SELECTION

White v. Mitchell, 431 F.3d 517, 2005 WL 3299378 (6th Cir. Dec. 7, 2005). The Sixth Circuit granted sentencing phase relief in this Ohio capital case, finding that the trial judge's failure to excuse a juror for cause and the Ohio Supreme Court's finding that the trial court did not abuse its discretion in so ruling "were contrary to or an unreasonable application of Supreme Court precedent." 431 F.3d at 542. The juror in question (Juror Sheppard) was examined at length during *voir dire*, and gave a series of vacillating, equivocal responses concerning her ability to set aside the strong beliefs she had formed about the case before coming to court. After describing these responses, the Sixth Circuit explained as follows: "The most problematic of Sheppard's comments are those about being a part of the Ashland community and feeling a duty to serve on the jury: her statements strongly indicate that (1) she had already decided what punishment was appropriate and believed that the rest of the jurors would feel similarly: "And if we come to the truth *that I feel we are going to,* and I hate to see one man's life taken, but in fair honesty, in him taking another life, *I think that he should be punished for that,*" (2) she relished taking part in the imposition of the death penalty in this particular case: "*and I'd like to be a part of that,*" and (3) she believed that her anticipated outcome of the case was the true and honest one, thus reflecting an inherent bias: "people out there want people on that jury that's going to listen and find the *real truth;*" "And if we come to the *truth* that I feel we are going to;" "I hate to see one man's life taken, but in *fair honesty,* in him taking another life, I think he should be punished for that." *Id.* at 541. The court went on to acknowledge that the juror subsequently said "she could follow the law and not let her personal feelings interfere," but found that these statements "were far more cursory and, given the frequency with which her statements shifted back and forth on her ability to be fair, such subsequent statements are insufficient to alleviate the grave concerns raised by her previous comments." *Id.* at 542. Relying on *Irvin v. Dowd,* 366 U.S. 717 (1961), and *Patton v. Yount,* 467 U.S. 1025 (1984), the court concluded that, "[w]ith a transcript reflecting statements as internally inconsistent and vacillating as these, including numerous statements of strong doubt regarding impartiality and merely a few tentative or cursory statements that she would be fair, Sheppard was simply unbelievable as an impartial juror." *White*, 431 F.3d at 542. Before concluding that relief was required, the court paused to consider "whether the error resulting from Juror Sheppard's

placement on the jury for the penalty phase of the trial resulted in ‘actual prejudice,’ in that it had ‘substantial and injurious effect or influence in determining the jury’s verdict,’" under *Brecht*. *Id.* Finding that "this standard is easily met on the facts of this case," the court remanded with instructions to issue the writ as to petitioner’s death sentence. *Id.*