

BLOCKBUSTERS FROM THE BENCH!

Crawford! Blakely! and much more!

The U.S. Supreme Court's 2003-2004 Term

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CONFRONTATION CLAUSE & HEARSAY

- *Crawford v. Washington* (2004) ___ U.S. ___, 124 S.Ct. 1354. Supreme Court scraps *Ohio v. Roberts* "indicia of reliability" test for confrontation clause analysis of out-of-court "testimonial" statements not coming within a "firmly rooted" hearsay exception. At least for "testimonial" statements, the opportunity for cross-examination is the constitutionally-prescribed method of assuring the reliability of the fact-finding process. The majority (led by Justice Scalia) eschews *Roberts*' emphasis on "amorphous notions of 'reliability'" and laments that some lower courts have admitted "untested testimonial statements" by basing findings of reliability on "the very factors that make the statements testimonial," such as a witness making the statement "to the police while in custody on pending charges" (supposedly making the statement contrary to his "penal interest"). The Court returns to "the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."

The Court “leave[s] for another day any effort to spell out a comprehensive definition of ‘testimonial.’” But the concept is not limited to sworn testimony in court. The Court finds that the accusatory statements made during a police interrogation (“knowingly given in response to structured police questioning”) in *Crawford* itself “fall squarely within that class.” Other examples of “testimonial” statements include affidavits and “similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” plea allocutions showing the existence of a conspiracy, and grand jury testimony, ex parte testimony, or other testimony which the current defendant had no opportunity to cross-examine.

As a number of California opinions have already found, *Crawford* almost certainly invalidates a number of recently-minted hearsay exceptions which had allowed admission of various out-of-court statements to investigators (sometimes conditioned upon *Roberts*-like findings of “reliability”). (E.g., Evid. Code §§ 1350 [witness’ taped or written statement to law enforcement official where defendant caused that witness’ unavailability at trial], 1360 [hearsay statement of child victim of abuse or neglect], 1370 [hearsay statement of unavailable witness describing infliction or threat of physical injury], 1380 [videotaped statement of unavailable victim of elder abuse]; see, e.g., *People v. Pirwani* (2004) 119 Cal.App.4th 717 [finding elderly victim’s statement to police was “testimonial” and its admission under § 1380 violated confrontation clause].)

Although the primary effect of *Crawford* is a significant expansion of confrontation rights, the opinion does not bode well for confrontation clause analysis of out-of-court statements which are not deemed “testimonial” (such as putative “spontaneous statements,” co-conspirator statements in furtherance of the conspiracy, or other extrajudicial statements not made to investigators or as part of judicial process) The opinion raises the possibility that “non-testimonial” extrajudicial statements may not be subject to the confrontation clause at all and that whatever reliability concerns they pose should be left to hearsay law. (“An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.”) However, since *Crawford* involved “testimonial” statements and did not resolve the fate of “non-testimonial” ones, at least for the time being the latter statements should still be reviewed under the *Ohio v. Roberts* framework – that is, if the statement is “testimonial” and does not come within a firmly established hearsay exception, it should only be admissible if accompanied by particularized guarantees of trustworthiness. (See *People v. Cervantes* (2004) 118 Cal.App.4th 162.)

APPRENDI & RIGHT TO JURY TRIAL

- *Blakely v. Washington* (2004) ___ U.S. ___, 124 S.Ct. 2531. Landmark extension of *Apprendi v. New Jersey* to judicial finding of “aggravating” facts necessary to support sentence above “standard range” for offense under Washington’s sentencing guidelines. Although Blakely’s sentence of 90 months was below the absolute maximum of 10 years for a “class B felony,” it was above the presumptive “standard range” of 49-53 months. In order to impose a sentence greater than the standard range, the judge was required to find one or more aggravating factors (in this case, “deliberate cruelty”) beyond the minimum statutory elements of the crime. Under Supreme Court’s opinion, where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth Amendment entitles the defendant to jury determination of those additional facts by proof beyond a reasonable doubt. {These materials on the Supreme Court term will not provide any extended discussion of *Blakely*, since *Blakely*’s application to California’s Determinate Sentencing Law will be the subject of a separate talk and separate materials during the Oct. 2004 CACJ seminar.}
- See also *Schiro v. Summerlin* (2004) ___ U.S. ___, 124 S.Ct. 2519 (*Ring v. Arizona* not retroactive on federal habeas review), discussed under “HABEAS CORPUS.”

SEARCH AND SEIZURE

Investigation & detentions

- *Hiibel v. Sixth Judicial Dist. Court of Nevada* (2004) ___ U.S. ___, 124 S.Ct. 2451. Supreme Court upholds a “stop and identify” statute, requiring a suspect who has been validly detained to identify himself. “The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop.” Majority emphasizes that the statute only required an individual to respond to a request for identification and did not require him to answer any *other* police questions. Majority also rejects a 5th Amendment self-incrimination challenge because, under circumstances of the case, disclosure of the suspect’s name would have no incriminating effect. But court leaves open possibility that, under some other circumstances, disclosure of one’s name could provide “a link in the chain of evidence” incriminating someone in an offense and run afoul of the 5th Amendment.
- *Illinois v. Lidster* (2003) ___ U.S. ___, 124 S.Ct. 885. Supreme Court upholds an “information seeking roadblock,” set up to ask motorists for any information about

a fatal hit-and-run accident. Court distinguishes this roadblock, which was tailored to obtain information about a specific recent crime at that location, from the more general drug interdiction roadblocks found unconstitutional in *City of Indianapolis v. Edmond* (2000) 531 U.S. 32.

- *United States v. Flores-Montano* (2004) ___ U.S. ___, 124 S.Ct. 1582. Building upon earlier rulings that no particularized suspicion is required for a *border search* of a vehicle, Supreme Court holds that border agents may disassemble portions of a vehicle in the course of such a search. (In *Flores-Montano*, the agents removed and disassembled the fuel tank of a truck.)

Arrests

- *Maryland v. Pringle* (2003) ___ U.S. ___, 124 S.Ct. 795. Where evidence of a crime is found in a car and each occupant denies any connection to it, probable cause may exist to arrest *all the occupants*. Under “totality of circumstances” test, the quantity of drugs found in rear seat armrest and cash found in glove compartment suggested a “common enterprise” and were sufficient to support probable cause to arrest all 3 occupants.
- *Thornton v. United States* (2004) ___ U.S. ___, 124 S.Ct. 2127. Legality of a *Belton* search of a vehicle incident to custodial arrest of an occupant or “recent occupant” doesn’t depend on whether the suspect was still in the vehicle at the moment the police “initiated contact.” *Belton* concerns of police safety and potential destruction of evidence apply whenever police arrest someone in or next to a vehicle, regardless of exact timing of “contact initiation.” Interestingly, in addition to the dissenters (Stevens & Souter), several of the concurring justices (Scalia, Ginsburg & O’Connor) expressed a willingness to reconsider *Belton*’s “bright line” rule. In particular, Justice Scalia would return *Belton*’s safety and evidence destruction rationale to its roots in *Chimel v. California* and focus on whether the interior of the car was truly within the arrestee’s reach (which is rarely the case if the arrestee has already been handcuffed and restrained in a police car). But Scalia would also expand incident-to-arrest auto searches in other instances by allowing a search where there was a reasonable expectation evidence relevant to the arrest offense would be found in the car (such as where drugs had already been found on the defendant’s person during a patdown search). (“If *Belton* searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested.”)

Warrants

- *Groh v. Ramirez* (2004) ___ U.S. ___, 124 S.Ct. 1284. The one noteworthy 4th Amendment victory this Term concerned the particularity requirement. A warrant which completely omitted a list of the items to be seized was “facially invalid. The warrant affidavit did list the items sought, but that listing couldn’t cure th”e defect because the warrant itself neither attached the affidavit nor incorporated it by reference. The requirement that the *warrant* identify the items to be seized reflects the principle that the *issuing magistrate* must authorize the scope of the search; it cannot simply be left to police discretion. Also, “the mere fact that the Magistrate issued a warrant does not necessarily establish that he agreed that the scope of the search should be as broad as the affiant's request.” (Note that the issue here arose in a civil rights suit, rather than on a suppression motion.)
- *United States v. Banks* (2003) ___ U.S. ___, 124 S.Ct. 521. No knock-notice violation where police waited 15-20 seconds after knocking and announcing their presence before forcibly entering the house. (*Banks* is unlikely to have much significant effect upon California knock-notice practice because several California decisions have upheld entries after even shorter waits.)

CONFESSIONS

5th Amen./Miranda

- *Missouri v. Seibert* (2004) ___ U.S. ___, 124 S.Ct. 2601. Supreme Court condemns “question first, warn later” police tactic of first questioning an arrestee without *Miranda* warnings, obtaining a confession, and then, shortly later, giving *Miranda* advisements and eliciting a new confession covering the same ground as the earlier illegally-obtained one. Under the circumstances, the intervening delivery of *Miranda* warnings was not sufficient to render the second confession admissible under *Oregon v. Elstad* (1985) 470 U.S. 298: There was only a short interval between the interrogations, there was “continuity” of police personnel, and police exploited the earlier illegality throughout the second interrogation by making “references back” to the details of the first confession. In effect, police treated the second round of interrogation as a continuation of the first. Although the precise issues were different, *Seibert* is similar to the California Supreme Court’s decision last year in *People v. Neal* (2003) 31 Cal.4th 63, which also involved intentional *Miranda* violations sanctioned by police department policies and training, which encouraged officers to conduct interrogations “outside *Miranda*.”

- *United States v. Patane* (2004) ___ U.S. ___, 124 S.Ct. 2620. *Miranda* violation (failure to provide warnings) does not require suppression of non-testimonial physical evidence derived from the illegally obtained (but “voluntary”) confession.
- *Yarborough v. Alvarado* (2004) ___ U.S. ___, 124 S.Ct. 2140. Reversal of a Ninth Circuit decision granting habeas relief to a California defendant. Ninth Circuit had found California courts unreasonable in failing to weigh a 17-year-old suspect’s “age and inexperience” in determining whether he was in “custody” for *Miranda* purposes. Supreme Court holds that Ninth Circuit failed to give sufficient deference to California courts under AEDPA standard of review. There was no “clearly established” rule that age and inexperience are relevant to *Miranda* custody. Majority goes on to hold that consideration of a suspect’s “inexperience” with law enforcement was inconsistent with “objective” test for *Miranda* custody and therefore was “improper not only under the deferential standard of [AEDPA], but also as a de novo matter.” Majority does not rule out possible propriety of considering suspect’s age, but the state court’s failure to do so could not support habeas relief under the AEDPA standard. “Our opinions ... have not mentioned the suspect’s age, much less mandated its consideration.”

6th Amen./Massiah

- *Fellers v. United States* (2004) ___ U.S. ___, 124 S.Ct. 1019. Supreme Court emphasizes that the 6th Amendment/*Massiah* limitations on eliciting information from a charged defendant, after attachment of the right to counsel, are more strict than the 5th Amendment/*Miranda* rules. Any “deliberate elicitation” of incriminating statements from a charged suspect violates *Massiah* even if the police conduct does not qualify as “interrogation” for *Miranda* purposes. (Police arrested indicted defendant at his home and told him they were there to “discuss” his involvement in drug distribution. Without giving *Miranda* advisements, police mentioned names of other people listed in the indictment, and defendant admitted using drugs with them. Even though police statements didn’t take form of questions likely to eliciting incriminating response under *Miranda* “interrogation” test (*Rhode Island v. Innis*), they clearly met the *Massiah* “deliberate elicitation” standard.)

BRADY & DISCOVERY

- *Banks v. Dretke* (2004) ___ U.S. ___, 124 S.Ct. 1256. Reversal of Texas death penalty due to *Brady* error involving one of the prosecution’s key penalty phase witnesses (Farr). (District court had granted habeas relief as to the death sentence, but Fifth Circuit had reversed that decision in an unpublished per curiam opinion.)

The prosecution had suppressed evidence that Farr was a paid police informant and had agreed to assist with the murder investigation out of fear the detective would arrest him on drug charges. But “the State remained silent” as Farr twice “perjured himself” at trial and denied giving previous statements to the detective. The suppressed evidence of Farr’s informant status was “material” for *Brady* purposes. Farr’s testimony about Banks’ alleged trip to obtain a gun and plans to commit burglaries and robberies was the “centerpiece” of prosecution’s penalty phase theory that Banks (who had no prior criminal record) had “propensity” to commit violent offenses. (See “HABEAS CORPUS,” *infra*, for discussion of *Banks*’ holding that state’s continuing post-conviction suppression of the information excused the failure to present this evidence in the state post-conviction petition.)

- *Illinois v. Fisher* (2004) ___ U.S. ___, 124 S.Ct. 1200. Summary reversal of an Illinois appellate decision, which had ordered dismissal of criminal charges “because the police, acting in good faith and according to normal police procedures, destroyed evidence that [Fisher] had requested more than 10 years earlier in a discovery motion.” Four police lab tests indicated the substance seized from Fisher was cocaine; Fisher jumped bail and was a fugitive for 10 years; in the meantime (just a few months before his re-arrest) police had destroyed the evidence. Supreme Court holds that, despite the request for access to the substance in a discovery motion before Fisher absconded, the circumstances do not satisfy the “bad faith” requirement of *Arizona v. Youngblood* (1988) 488 U.S. 51. Because the tests indicated the substance was cocaine and there was no reason to believe that it was “material exculpatory evidence,” the failure to preserve the evidence did not reflect bad faith.

BATSON

- *Johnson v. California* (2004) ___ U.S. ___, 124 S.Ct. 1833. To paraphrase Sherlock Holmes, *Johnson* proved to be “the dog that didn’t bark” this Term. *Johnson* was supposed to resolve whether California’s “strong likelihood” formulation of a prima facie case under *Wheeler* (requiring the prosecutor to offer race-neutral explanations for the contested peremptory challenges) was inconsistent with *Batson*’s “reasonable inference” standard for a prima facie case. But instead the Supreme Court dismisses certiorari on jurisdictional ground that there is no “final judgment.” It was possible that, on remand from California Supreme Court, the California appellate court might reverse *Johnson*’s conviction on other grounds (not reached in its original opinion), eliminating necessity for resolution of the *Batson* claim. (U.S. Supreme Court notes that, if California appellate court affirms on remand and California Supreme Court denies review, *Johnson* can again seek certiorari. In Aug. 2004, the California appellate court did affirm on remand, and a petition for review is currently pending.)

JURY INSTRUCTIONS

- See *Middleton v. McNeil* (2004) ___ U.S. ___, 124 S.Ct. 1830 (state court not “unreasonable” in finding instructional error cured by other instructions), discussed under “HABEAS CORPUS”.

PLEAS

- *Iowa v. Tovar* (2004) ___ U.S. ___, 124 S.Ct. 1379. In taking a plea from an unrepresented defendant, a court is not required to expressly advise him that, in waiving his right to assistance of counsel in connection with his decision to plead, he may be overlooking “a viable defense” to the charge and will “lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.” A waiver of right to counsel must be knowing and voluntary. The opinion indicates that, in addition to the right to counsel, the court should advise a defendant of the nature of the charges and the range of allowable punishments. (Of course, most of those advisements are required anyway under *Boykin*, even if a defendant does have counsel). States are free to adopt additional advisement requirements as a matter of state law, but the Sixth Amendment does not mandate the specific advisements prescribed by the Iowa Supreme Court.

CAPITAL PUNISHMENT

- See “HABEAS CORPUS,” *infra*, for discussions of the following cases:
 - *Tennard v. Dretke* (2004) ___ U.S. ___, 124 S.Ct. 2562 (re standards for review of restrictions on jurors’ consideration of “low intelligence” or mental retardation evidence under *Penry v. Lynaugh*).
 - *Schiro v. Summerlin* (2004) ___ U.S. ___, 124 S.Ct. 2519 (*Ring v. Arizona* not retroactive on federal habeas review).
 - *Beard v. Banks* (2004) ___ U.S. ___, 124 S.Ct. 2504 (*Mills v. Maryland* not retroactive on federal habeas review).

HABEAS CORPUS

Exhaustion

- *Baldwin v. Reese* (2004) ___ U.S. ___, 124 S.Ct. 1347. Supreme Court reinforces necessity of *explicit “federalization” of claims* throughout the state appeal or habeas process (especially in any petition to the state’s highest court) in order to preserve and “exhaust” those claims for later federal habeas review. The brief or petition to the

state supreme court must make the federal basis for the claim explicit; *it is not enough that the lower court opinion (which was presumably before the higher court) explicitly framed the issue as a federal one.* References to “ineffective assistance of counsel” in petition to Oregon Supreme Court were not sufficient to alert state court that petitioner was raising claim under Sixth Amendment (rather than under comparable provisions of Oregon Constitution). (Majority opinion does not address whether reference to a state standard which was, in all respects, *identical to the federal standard* might be considered “adequate to present the corresponding federal claim,” because that issue was not raised in lower courts. But, obviously, in absence of more guidance on that issue, it would be foolhardy for counsel to assume that references to California authorities employing the same standard as a federal doctrine will be sufficient to exhaust the federal claim. Briefs and petitions should explicitly cite to federal constitutional provisions and, wherever possible, U.S. Supreme Court and other federal cases applying those provisions.)

Procedural Default

- *Banks v. Dretke* (2004) ___ U.S. ___, 124 S.Ct. 1256. See “BRADY & DISCOVERY,” *supra*, for *Banks*’ substantive holding finding *Brady* violation. In reaching the merits of the *Brady* claim, Supreme Court underscores relationship between prosecutorial misconduct and “cause” excusing a state “procedural default.” Fifth Circuit had found procedural default because, though *Banks* had attempted to raise a *Brady* claim in his state post-conviction petition, he did not present the crucial evidence supporting that claim (the state’s suppression of key witness’ role as paid police informant) in state court. Supreme Court finds “cause” excusing that default *because the state had continued to stonewall and suppress that information over the course of the state post-conviction proceedings.* In particular, in its answer to *Banks*’ state post-conviction, the state had made a generic denial of the petition’s allegations that the witness was an informant and had falsely asserted that the state had already disclosed all exculpatory evidence. “*Banks* was entitled to treat the prosecutor’s submissions as truthful” and could not be faulted for failing to discover and present this evidence during the state proceeding.
- *Dretke v. Haley* (2004) ___ U.S. ___, 124 S.Ct. 1847. Supreme Court declines to decide whether “actual innocence” exception to “procedural default” bar applies to “constitutional claims challenging non-capital sentencing error” (a conceded lack of a factual basis for *Haley*’s “habitual offender” sentence) and remands to Fifth Circuit. Before reaching unresolved issue of availability of “actual innocence” exception, federal court must first consider all “alternative grounds for relief” (such as ineffective assistance claim which, if successful, would excuse the default) “that

might obviate need to reach the actual innocence question.”

Treatment of Pro Se Petitions

- *Pliler v. Ford* (2004) ___ U.S. ___, 124 S.Ct. 2441. Federal habeas court has no duty to advise a pro se petitioner of the complicated mechanism for curing a “mixed petition” (containing both exhausted and unexhausted claims) without running afoul of the AEDPA statute of limitations. If a petitioner dismisses his timely mixed petition while he exhausts his remaining claims, AEDPA deadline is likely to have run by time he returns to federal court with a fully exhausted petition. Ninth Circuit had required district court to advise petitioner of option of: (1) filing an amended petition limited to the exhausted claims; (2) asking the district court to “stay” that petition pending exhaustion of the remaining claims; (3) going back to state court and filing an exhaustion petition; and (4) after exhaustion, filing a new amended petition in federal court, adding back in the previously exhausted claims. But Supreme Court holds that federal courts are not required to give such detailed procedural advice to pro se petitioners. “Requiring district courts to advise a pro se litigant in such a manner would undermine district judges’ role as impartial decisionmakers.” Also, Court refuses to force upon judges “the potentially burdensome, time-consuming, and fact-intensive task of making a case-specific investigation” of whether AEDPA limitations period has run or is likely to run by time petitioner returns to federal court.
- *Castro v. United States* (2003) ___ U.S. ___, 124 S.Ct. 786. In contrast to *Pliler*, Supreme Court does require a federal court to take special care – and to give the pro se petitioner specific advisements – before recharacterizing a pleading filed under the wrong procedure as a 28 U.S.C. § 2255 petition (the counterpart to § 2254 for federal prisoners). The court “must notify the petitioner 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.”

Certificates of Appealability

Echoing last Term’s *Miller-El v. Cockrell* (2003) 537 U.S. 222, there were two reversals of Fifth Circuit decisions denying Certificates of Appealability (COA’s) to habeas petitioners challenging Texas capital convictions.

- *Tennard v. Dretke* (2004) ___ U.S. ___, 124 S.Ct. 2562. Petitioner entitled to COA on claim that Texas capital sentencing scheme provided “constitutionally inadequate

vehicle ... for jurors to give effect to his evidence of low intelligence.” Supreme Court finds Fifth Circuit’s “threshold” test for “screening” claims under *Penry v. Lynaugh* (1989) 492 U.S. 302 (“its own restrictive gloss on *Penry I*”) is erroneous. “A reasonable jurist could conclude that the jury might well have given Tennard’s low IQ aggravating effect,” rather than mitigating effect, in light of instructions and prosecutor’s argument. Hence, Tennard was entitled to COA.

- *Banks v. Dretke* (2004) ___ U.S. ___, 124 S.Ct. 1256. In addition to its holdings excusing procedural default and reversing death penalty for *Brady* violation (see “BRADY & DISCOVERY” and “HABEAS CORPUS: Procedural Default,” *supra*), Court also holds that Fifth Circuit should have granted COA regarding a separate guilt-phase *Brady* claim involving a different witness. (Specific issue for COA is whether evidence developed during habeas evidentiary hearing should be treated as within scope of original habeas pleading under Rule 15(b) of Federal Rules of Civil Procedure.)

Teague/Retroactivity

- *Schiro v. Summerlin* (2004) ___ U.S. ___, 124 S.Ct. 2519. *Ring v. Arizona* – requiring jury determination of aggravating factors necessity for imposition of death penalty – does not represent a “watershed” rule of criminal procedure. Therefore, this new rule cannot be applied retroactively on federal habeas.
- *Beard v. Banks* (2004) ___ U.S. ___, 124 S.Ct. 2504. *Mills v. Maryland* (1988) 486 U.S. 367 – holding that state may not require penalty phase jurors to disregard mitigating evidence which they don’t find unanimously – was not “dictated” by prior precedent and consequently constituted a “new rule” for *Teague* purposes. Majority also holds that *Mills* does not come within *Teague*’s exception for “watershed” rules of criminal procedures. Consequently, *Teague* barred retroactive application of *Mills* to a case which became final on direct review prior to that decision.

AEDPA Standard of Review

Again this Term, the Court summarily reversed several federal circuit decisions (two from the Ninth Circuit & two from the Sixth) which had granted habeas relief to state prisoners. Each of these per curiam decisions held that the federal court had granted insufficient deference to the state courts under the AEDPA standard of review (28 U.S.C. § 2254(d)):

- *Middleton v. McNeil* (2004) ___ U.S. ___, 124 S.Ct. 1830. Ninth Circuit “failed to

give appropriate deference to the [California] court’s decision” that an error in the imperfect self-defense instructions was cured by other instructions and by prosecutor’s argument. Trial court had defined “imminent peril” in terms of how matters would appear to a “reasonable person.” Contrary to Ninth Circuit view, California appellate court “did not unreasonably apply federal law” in concluding that there was no “reasonable likelihood” jurors were misled, because other instructions correctly referred to “actual but unreasonable belief in the necessity to defend against imminent peril.” Perhaps most disturbingly, Supreme Court finds nothing “unreasonable” in California’s court reliance on prosecutor’s argument as helping cure defect in instructions. Supreme Court characterizes the instructions as “at worst ambiguous because they were internally inconsistent” and asserts that “a *prosecutor’s* argument that resolves an ambiguity in favor of the *defendant*” can be properly considered as “clarif[ying] an ambiguous jury charge.”

- *Yarborough v. Gentry* (2003) ___ U.S. ___, 124 S.Ct. 1. Another reversal of Ninth Circuit habeas relief to a California defendant. Ninth Circuit had found ineffective assistance of counsel on the ground that defense counsel’s “perfunctory” and “ineffectual” closing argument failed to highlight what the federal court viewed as key defects in prosecution case. Supreme Court holds that California appellate court wasn’t unreasonable in finding no constitutional deficiency in counsel’s argument. “The issues counsel omitted were not so clearly more persuasive than those he discussed that their omission can only be attributed to an professional error of constitutional magnitude.” Again, AEDPA standard drives Supreme Court opinion. “Judicial review of a defense attorney’s summation is therefore highly deferential – *and doubly deferential when it is conducted through the lens of federal habeas.*” (Emphasis added.)
- *Mitchell v. Esparza* (2003) ___ U.S. ___, 124 S.Ct. 7. Reversal of a Sixth Circuit decision overturning an Ohio death sentence. Sixth Circuit had held that the indictment’s failure to charge explicitly that Esparza was the “principal offender” in the murder (as required for capital murder under Ohio law) and the failure to instruct jury on that definition were not susceptible to harmless error analysis. Esparza was the only person charged in the murder, and “there was no evidence ... that anyone other than [Esparza] was involved in the crime.” Supreme Court concludes that, in view of its decisions applying harmless error analysis to various other constitutional errors (e.g., omission of element from instructions (*Neder*)), Ohio court was not “objectively unreasonable” in finding no reversible error. “A federal court may not overrule a state court for simply holding a different view from its own when the precedent from this Court is, at best, ambiguous.”

- *Holland v. Jackson* (2004) ___ U.S. ___, 124 S.Ct. 2736. Tennessee courts' rejection of ineffective assistance claim was not "contrary to" or "unreasonable" application of *Strickland v. Washington*. "The Sixth Circuit erred in finding the state court's application of *Strickland* unreasonable on the basis of evidence not properly before the state court." The Tennessee post-conviction courts had found "no satisfactory reason given for the defendant's failure to locate this witness" during the 7 years since the conviction. District court and Sixth Circuit, nonetheless, had improperly relied on that evidence without conducting any inquiry into the petitioner's lack of diligence in presenting it. Sixth Circuit also incorrectly read Tennessee court's opinion as applying a preponderance test to *Strickland* prejudice prong. Supreme Court finds that the Tennessee court properly recited *Strickland* "reasonable probability" prejudice standard and that its "preponderance" references concerned distinct question of petitioner's burden of proof of allegations.
- See also *Yarborough v. Alvarado* (2004) ___ U.S. ___, 124 S.Ct. 2140 (state court not "unreasonable" in failing to consider "age and inexperience" in determining *Miranda* custody), discussed under "CONFESSIONS." (*Yarborough* was not a summary reversal, but was decided after full briefing and argument.)

The Terror Trilogy (Enemy Combatants, etc.)

- *Rasul v. Bush* (2004) ___ U.S. ___, 124 S.Ct. 2686. Foreign nationals, held as alleged "enemy combatants," at U.S. base at Guantanamo Bay, Cuba, detainees, held may obtain federal habeas review of legality of their detentions.
- *Hamdi v. Rumsfeld* (2004) ___ U.S. ___, 124 S.Ct. 2633. A U.S. citizen seized abroad (allegedly captured on Afghan battlefield) and being held in U.S., without criminal charges, as an allegedly "enemy combatant" could seek federal habeas review to challenge the basis of that detention. Plurality does find Congressional authorization for "enemy combatant" detentions, even of citizens, in the post-Sept. 11 legislation authorizing President to use "all necessary force" against those associated with the terrorist attacks. But, in Justice O'Connor's memorable phrase, the Court cautions "that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." [Citing *Youngstown Sheet & Tube Co.*, the 1952 "steel seizure" case.] Fourth Circuit applied too lenient a standard in accepting a short conclusory declaration by a Defense Dept. official as dispositive proof of the legality of the detention without affording Hamdi an opportunity to contest the government's showing. Due process requires that a citizen detained as an enemy combatant must be given access to counsel, notice of the factual basis for that classification, a meaningful opportunity to contest the asserted factual basis before a

neutral decisionmaker. (Justices Souter and Ginsburg find no statutory authority for the detention, but concur in the disposition remanding the case to the Fourth Circuit. Justices Scalia and Stevens would go further: They maintain that the government may not detain a citizen as a putative “enemy combatant”; absent an explicit Congressional suspension of habeas corpus, the government must either charge him with treason or some other crime or release him.)

- *Rumsfeld v. Padilla* (2004) (2004) ___ U.S. ___, 124 S.Ct. 2711. Court does not reach merits of legality of “enemy combatant” detention of U.S. citizen *arrested on U.S. soil* (O’Hare Airport), because Padilla’s habeas petition was filed in the wrong district (New York, rather than South Carolina where he was being held in a Navy brig). The New York federal court had no jurisdiction over the commander of that brig, who (as the official having immediate physical custody over Padilla) was the only proper respondent.

SEQUELS & OTHER COMING ATTRACTIONS....

- **“Sons of *Blakely*.”** *United States v. Booker & United States v. Fanfan*, Nos. 04-104 & 04-105. Applicability of *Blakely* to the federal sentencing guidelines, including the appropriate remedy if the guidelines are found unconstitutional.
- **“The Return of *Miller-El*” (*Batson*).** *Miller-El v. Dretke*, No. 03-9659. In *Miller-El v. Cockrell* (2003) 537 U.S. 222, the Supreme Court held that the Fifth Circuit had erred in denying a Certificate of Appealability to pursue a *Batson* claim. Though the Court’s discussed the underlying claim within the context of the relatively low “threshold showing” for a COA, the opinion implied that the *Batson* claim appeared strong on the merits. On remand, the Fifth Circuit granted a COA as ordered. But the Circuit didn’t take the hint (if there was one) and ultimately denied the *Batson* claim on the merits. The Supreme Court has now granted cert. on the merits.
- **Habeas – “Stays” of Mixed Petitions.** *Rhines v. Weber*, No. 03-9046. Authority of a federal habeas corpus court to “stay” proceedings on a “mixed” (i.e., partially exhausted) habeas petition, while the petitioner exhausts the remaining claims in state court, in order to ensure that, when he returns to federal court, his petition will not be time-barred under AEDPA statute of limitations. (The availability of a “stay” procedure of some sort in “mixed petition” situations was also the underlying problem in *Pliler v. Ford* (discussed in “HABEAS CORPUS” above). But the issue in *Pliler* was whether a court must advise a petitioner of the “stay” option, and the majority

opinion did not address “the propriety of this stay-and-abeyance procedure.”)

- **Habeas–AEDPA Standard of Review/Death Penalty.** *Brown v. Payton*, No. 03-1039. Ninth Circuit held “catchall” mitigation instruction in California capital trial failed to clearly inform jurors of relevance of post-offense mitigating factors. prevented consideration of post-offense mitigating evidence. The state has framed question on certiorari as whether the Ninth Circuit decision misapplied the § 2254(d) standard of review (i.e., whether the California Supreme Court’s decision was “objectively unreasonable”).
- **Death penalty–juveniles.** *Roper v. Simmons*, No. 03-633. Constitutionality of executing minors under the Eighth Amendment.
- **Death penalty–lesser offense instructions. Waiver & procedural default.** *Howell v. Mississippi*, No. 03-9560. Original cert. petition raised *Beck v. Alabama* claim re refusal of lesser included offense instructions in a capital murder trial. But Supreme Court has ordered briefing on whether the federal constitutional claim was properly raised in the Mississippi Supreme Court.
- **Searches.** *Illinois v. Caballes*, No. 03-923. Whether use of a drug-sniffing dog during a traffic stop require a “reasonable, articulable suspicion.”
- **Ineffective assistance of counsel.** *Florida v. Nixon*, No. 03-931. Whether defense counsel’s concession of guilt during guilt phase of capital trial necessarily constituted ineffective assistance, despite the concession’s putative role as part of strategy for avoiding death penalty.
- **Appellate process–right to counsel.** *Kowalski v. Tesmer*, No. 03-407. Constitutionality of denying appointed counsel to indigent defendants for “discretionary” appeal following a guilty plea. (In Michigan, there is no appeal as of right following a guilty plea. Subject to certain exceptions, Michigan law does not provide appointed counsel on a “discretionary” post-plea appeal.)