

HIGHLIGHTS FROM THE HIGH COURT

The U.S. Supreme Court's 2002-2003 Term

And Special Bonus Feature: Selected Ninth Circuit Cases!

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Sept. 12, 2003

U.S. SUPREME COURT TERM

First, in local news.....

Revival of prosecution of time-barred sex offenses violates ex post facto clause.

- *Stogner v. California* (2003) __ U.S. __, 123 S.Ct.. 2446. Cal. Pen. Code § 803(g), allowing revival of time-barred sex offenses, violates ex post facto clause. A law enacted after the expiration of the previously applicable statute of limitations violates ex post facto. Although some courts have previously upheld *extensions* of statutes of limitations that had not yet expired, until Cal.'s *Frazier* decision upholding § 803(g) there was "apparent unanimity" that "resurrection" of an expired statute would be unconstitutional. It comes within the 2nd of the 4 ex post facto categories described in *Calder v. Bull* by imposing punishment on someone who, prior to the enactment, was "not liable to any punishment" by virtue of the expiration of the statute. It also may implicate the 4th *Calder* category (altering the rules of evidence "to supply a deficiency of legal proof") by removing a "conclusive presumption" that otherwise would have precluded conviction.
 - Note: § 803(g) was enacted in 1993 & became effective Jan. 1, 1994. Therefore, cases in which the previously applicable statute of limitations had expired prior to 1994 come squarely within *Stogner's* ex post facto holding.
 - California courts have been willing to grant relief on an expedited basis where the *Stogner* violation is clear. For example, the First District has granted "motions for summary reversal" within just a few days of filing.

But Supreme Court sees nothing wrong with life sentences for petty thieves.

- *Ewing v. California* (2003) __ U.S. __, 123 S.Ct. 1179. By 5-4 vote, Supreme Ct holds that 25-to-life “third strike” sentence for felony grand theft did not constitute “cruel and unusual punishment.” 3-justice plurality opn (O’Connor, Rehnquist & Kennedy) acknowledges that 8th Amen. has a “narrow proportionality principle” that “applies to noncapital sentences,” but finds Ewing’s sentence was not “grossly disproportionate” in light of Ewing’s own “long serious criminal record” including his “strikes” (robbery & residential burglary), 9 prior prison terms, and his commission of most of his offenses while on parole or probation. Meanwhile, Justices Scalia and Thomas maintain that the 8th Amen. doesn’t include a “proportionality” test in the first place.
- *Lockyer v. Andrade* (2003) __ U.S. __, 123 S.Ct. 1166. Also by a 5-4 vote, Supreme Ct overturns the 9th Cir.’s grant of habeas relief, where defendant received 50 to life for 2 counts of petty theft w/ a prior (based on his thefts of videos from K-Mart). Though Andrade’s sentence was the more egregious of the two (in light of both sentence length and the *de minimis* nature of his current crimes), sadly it arose on federal habeas, rather than direct review (as in *Ewing*). Supreme Ct majority holds that the state court’s affirmance of Andrade’s sentence wasn’t an unreasonable application of clearly established U.S. Supreme Ct standards, as required for habeas relief under AEDPA. Because “legislatures [have] broad discretion to fashion a sentence that fits within the scope of the proportionality principle” and the “precise contours” of that principle are “unclear,” the state court’s decision couldn’t be deemed objectively unreasonable.
 - See further discussion of *Andrade*’s AEDPA analysis below.

FEDERAL HABEAS – AEDPA RULES

AEDPA Standard of Review

In 4 cases (3 from 9th Cir.) covering a variety of constitutional claims, the Supreme Ct reversed federal courts’ grants of habeas relief on the grounds that the cases did not satisfy the AEDPA standard of review – i.e., that the *state* decisions rejecting the claims were not “contrary to” or an “unreasonable application” of clearly established U.S. Supreme Ct case law (28 U.S.C. § 2254(d)):

Multiple denials of habeas relief, based on AEDPA standard.

- *Lockyer v. Andrade* (2003) __ U.S. __, 123 S.Ct. 1166. Reversal of 9th Cir.’s holding that “third strike” sentence for petty theft w/ a prior was cruel and unusual punishment. Unlike *Andrade*’s companion case, *Ewing v. California* (which came up on direct review from state courts), *Andrade* opinion is framed almost entirely in terms of the AEDPA standard of review, rather than the ultimate merits of Andrade’s 8th Amen. claim.
 - Noteworthy AEDPA lessons: Habeas petitioner pay the price for any uncertainties

or inconsistencies in Supreme Court case law on a subject. Under *Andrade*'s analysis, the very fact that the Supreme Court's non-capital "cruel and unusual" case law was such a muddle (*Rummel*, *Solem*, *Harmelin*, etc.) precluded federal habeas relief, because the Supreme Court's own standards on the subject weren't clearly established in the first place.

- Ironically, majority opn turns the *Riggs v. California* cert denial comments (in which 4 justices previously questioned constitutionality of "third strike" sentences for petty theft) against the defense because those justices had noted the "uncertainty" of the Supreme Ct cases on recidivist punishment.
- Supreme Ct specifically disapproves 9th Cir.'s formulation of the AEDPA standard of review as comparable to "clear error" review in the federal system. "The gloss of clear error review fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." Federal ct's "firm conviction" that the state court was "erroneous" isn't enough for AEDPA. "Rather that application must be objectively unreasonable."
- *Woodford v. Visciotti* (2003) __ U.S. __, 123 S.Ct. 357. Summary reversal of a 9th Cir. opn which had granted habeas relief to a California death penalty inmate based on penalty phase IAC. Cal. Supreme Ct had ordered an habeas evidentiary hearing (a factor that may distinguish *Visciotti* from most Cal. death penalty cases), but had ultimately "denied the petition in a length opinion," finding that, even if there was IAC, it did not satisfy the prejudice prong of *Strickland*. Supreme Ct chides 9th Cir. for giving insufficient respect to the Cal. Supreme Ct opinion. 9th Cir. seized upon Cal. passages saying that a different result wasn't "probable" as a misstatement of *Strickland*'s "reasonable probability" standard. But elsewhere the Cal. opn had set out the full "reasonable probability" formulation. U.S. Supreme Ct says that the 9th's "readiness to attribute error is inconsistent with the presumption that state courts know & follow the law." On merits, Ct also (1) rejects 9th Cir. contention that Cal. opn hadn't considered totality of available mitigating evidence, & (2) holds that Cal. finding of no prejudice due to severity of aggravating factors wasn't objectively unreasonable &, under AEDPA, federal ct couldn't substitute its independent judgment for that of state court.
- *Early v. Packer* (2003) __ U.S. __, 123 S.Ct. 362. Another summary reversal (issued the same day as *Visciotti*) of a 9th Cir. decision granting habeas relief to a California defendant on ground that judge's mid-deliberations comments to deadlocked jury (comparable to an "Allen charge") had coerced verdict. Again, Supreme Ct criticizes 9th Cir. for nitpicking passages in the Cal. appellate opinion & rejects 9th Cir. view that state opn failed to consider certain factors. Again, Supreme Ct finds Cal. decision wasn't contrary to clearly established U.S. Supreme Ct precedents.
 - Noteworthy AEDPA lessons. Sometimes reliance on U.S. Supreme Ct cases finding error under analogous circumstances still isn't enough to satisfy AEDPA *if those cases weren't decided on federal constitutional grounds.* On that ground, Supreme Ct finds that 2 of its own cases arising on *direct review of federal convictions* didn't

justify relief under AEDPA because those decisions were “based on our supervisory power over the federal courts, and not on constitutional grounds.”

- *Price v. Vincent* (2003) __ U.S. __, 123 S.Ct. 1848. 6th Cir. had viewed state trial judge’s comments as a granting of a defense motion for a directed verdict (the equivalent of Cal. Pen. Code § 1118.1) and had found that judge’s reconsideration of issue & denial of directed verdict the following day was a violation of double jeopardy. Per Supreme Ct, 6th Cir. erred in “evaluat[ing] ... claim de novo rather than through the lens of § 2254(d)” (the AEDPA standard). The state supreme ct’s finding that the judge’s initial comments did not amount to a final ruling on the directed verdict motion wasn’t objectively unreasonable, as required to grant relief under AEDPA.

One defense victory under the AEDPA standard:

- *Wiggins v. Smith* (2003) __ U.S. __, 123 S.Ct. 2527. State courts’ rejection of penalty phase IAC claim was objectively unreasonable and entitled capital defendant to federal habeas. Defense counsel had conducted no investigation into mitigating evidence in defendant’s background other than reviewing a pre-sentence rpt and Dept. of Social Services records. Reasonable investigation (following up on leads in the social service records) would have uncovered “powerful” mitigating evidence of his “unfortunate life history,” including “severe privation and abuse” while in custody of alcoholic absentee mother and “physical torment, sexual molestation and repeated rape during his subsequent years in foster care.”
 - Note that, like the Supreme Ct’s original opn articulating the AEDPA standard of review & finding IAC under that standard (*Williams v. Taylor*(2000)), *Wiggins* was a capital case from the 4th Cir., which is currently regarded as the most conservative of the circuits, especially on habeas matters. (In a similar vein, the other habeas victory this term, *Miller-El v. Cockrell* (discussed below) was a Texas capital case which 5th Cir. had given short shrift (refusing even to hear the appeal by denying a COA).)

Certificates of Appealabilty

- *Miller-El v. Cockrell* (2003) __ U.S. __, 123 S.Ct. 1029. Supreme Ct holds that 5th Cir. applied too demanding a standard for a Certificate of Appealability to raise *Batson* claims in a Texas death penalty case. Supreme Ct emphasizes that COA determination is simply a “threshold inquiry” into whether a habeas appeal may proceed and requires only that “reasonable jurists could debate” the issue “or that the issues were adequate to deserve encouragement to proceed further.” A Circuit court should not turn the “threshold” or “gateway test” of the COA into a determination of the ultimate merits of the appeal. It “should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief.”

BATSON (more on *Miller-El*)

- *Miller-El v. Cockrell* (2003) __ U.S. __, 123 S.Ct. 1029. Because *Miller-El* arose in the context of a Certificate of Appealability application, the Supreme Ct's opn did not decide the ultimate merits of the *Batson* issue. (In fact, as discussed above, the principal theme of the opn is that a COA requires only a "threshold" inquiry and should not become the occasion for a Circuit's resolution of the ultimate merits of a case which jurists could find debatable.) But, in explaining why it had "no difficulty concluding that a COA should have issued," the Ct made several welcome points about the substance of *Batson* analysis:
 - Contrary to the California Supreme Ct's rejection of "juror comparisons," ***Miller-El* makes clear that a prosecutor's disparate treatment of excluded minority jurors and seated white jurors is a vital part of the *Batson* inquiry into the bona fides of the prosecutor's explanations.** In addition to comparison of the characteristics of the excluded and seated jurors ("**comparative juror analysis**"), the Supreme Ct also looked at the prosecutor's "**disparate questioning**" during *voir dire*. For example, the prosecutor asked 53% of African-American jurors about their views on capital punishment, while questioning only 6% of white jurors on that topic.
 - Supreme Ct also found "**historical evidence of racial discrimination by the District Attorney's Office**" relevant to the *Batson* inquiry.
 - Note, however, that Cal Supreme Ct has now come up with a new reason not to engage in juror comparisons. Its post-*Miller-El* opn in *People v. Johnson* (2003) 30 Cal.4th 1302, says that appellate courts are not required to engage in juror comparisons *for the first time on appeal* – i.e., the prosecutor's disparate treatment of white and minority jurors (or male & female jurors) is waived if not raised in the trial court. (Of course, prior Cal. Supreme Ct case law had roundly condemned juror comparisons as meaningless, so, until now, trial attys had no incentive to make that seemingly futile argument.)

SEARCH AND SEIZURE & CONFESSIONS

- *Knapp v. Texas* (2003) __ U.S. __, 123 S.Ct. 1843. Here's a surprise. Supreme Ct's only major 4th Amendment opn this term was a summary reversal, with resounding defense victories on several fronts:
 - (1) Police handcuffing a 17-year-old murder suspect in his home at 3:00 am & transporting him to the police station (clad only in his boxer shorts & T-shirt) amounted to a de facto arrest requiring probable cause. [Reversing Texas courts' finding that the minor's "okay" in response to the officers' statement that they "needed to talk" to him render the whole thing consensual.] Because there concededly was no probable cause, taking the minor into custody was a patent 4th Amen. violation.
 - (2) At station, police gave *Miranda* warnings, interrogated defendant, and ultimately obtained confession. Supreme Court orders confession suppressed as fruit of the illegal arrest. Applying the mulit-factor test of *Brown v. Illinois* and other cases, Ct

finds that the Miranda warnings and waivers were not sufficient to purge the taint of the illegality.

SEX OFFENDERS - REGISTRATION AND “MEGAN’S LAWS”

- *Smith v. Doe* (2003) __ U.S. __, 123 S.Ct. 1140. Rejects ex post facto challenge to Alaska’s sex offender registration law. Supreme Ct upholds retroactive application of the registration statute (which also involves publication of registry information on Internet) to offenders whose crimes were committed before its enactment. Supreme Court finds that sex offender registration is a non-punitive regulatory regimen and does not implicate the ex post facto clause.
- *Connecticut Dept. Of Public Safety v. Doe* (2003) __ U.S. __, 123 S.Ct. 1160. Rejects due process challenge to Conn.’s Megan’s law, which required registration by all convicted sex offenders and publication of their names. Litigant contended that the law violated due process because it did not provide an offender any mechanism to prove that he wasn’t dangerous. The Supreme Court held that, because the triggering factor for the registration requirement was a *conviction* of an enumerated sex offense rather than a finding of current dangerous, the absence of an opportunity to disprove dangerousness didn’t violate due process.

DOUBLE JEOPARDY/DEATH PENALTY

- *Sattazhan v. Pennsylvania* (2003) __ U.S. __, 123 S.Ct. 732. After penalty phase jury hung, defendant received an LWOP sentence by operation of Penn. law. After an appellate court reversed the underlying murder conviction, the state retried both the murder charge and the penalty phase and this time obtained a death penalty verdict. Supreme Ct holds that imposition of death sentence on second trial, after first had resulted in a life sentence, did not violate double jeopardy. Ct finds that the life sentence imposed after the initial mistrial wasn’t equivalent to acquittal for jeopardy purposes because (in contrast to *Bullington v. Missouri*) it wasn’t the result of an actual jury verdict determining life to be the appropriate penalty.
 - Important limits to the *Sattazhan* holding: This shouldn’t affect California capital cases (at least under current Cal. standards). Cal. jeopardy clause provides broader protections than federal one. Except where the initial sentence is “unauthorized,” Cal. case law squarely prohibits imposition of a more severe sentence on retrial following a successful post-trial appeal. (*People v. Henderson* (1963) 60 Cal.2d 482; see *People v. Hanson* (2000) 23 Cal.4th 355 [reaffirming principles of *Henderson*].)
 - *Sattazhan* only determined the double jeopardy claim and didn’t address other potential federal constitutional challenges, such as due process. In particular, it didn’t address whether the decision to retry penalty phase after the successful murder appeal could give rise to a vindictive prosecution claim.

SOME INTERESTING ITEMS FROM OTHER HIGH PROFILE CASES

Cross-burning & inferences and presumptions in jury instructions.

- *Virginia v. Black* (2003) __ U.S. __, 123 S.Ct. 1536. Supreme Ct upholds most aspects of a Virginia cross burning statute against 1st Amen. challenges because the statute punished only cross burnings with “intent to intimidate.” But the Supreme Ct reverses one defendant’s conviction because (pursuant to another provision of the statute) the court instructed the jury that burning of a cross in public view “shall be prima facie evidence of an intent to intimidate.” “As construed by the jury instruction, the prima facie evidence provision strips away the very reason why a State may ban cross burning with intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense.” Even when there is defense evidence, the ‘provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case.’ Though the plurality opn doesn’t mention it, this sounds like a 1st Amen. equivalent of *Sandstrom* error, an unlawful presumption or inference instruction. However, the Supreme Ct reverses that defendant’s conviction on the basis of the unconstitutional “prima facie” instruction without any discussion of harmless error and prejudice. (What about *Yates v. Evatt*, *Neder v. U.S.*, etc.?)
 - Though the Ct doesn’t elaborate on it, the disposition may be attributable to the fact that the instruction (which is described as Virginia’s construction of the statute itself) renders *the statute facially unconstitutional*.

Sodomy & international law

- *Lawrence v. Texas* (2003) __ U.S. __, 123 S.Ct. 2472. As in last year’s opinion barring execution of the mentally retarded (*Atkins v. Virginia*), Supreme Ct considers evolving international law, especially European human rights decisions, in striking down Texas sodomy statute.

COMING ATTRACTIONS

While the 2002-2003 Term was heavy on applications of the AEDPA standard of review, 2003-2004 promises a return to a subject largely missing from the just-concluded term – the legality of police conduct in searches and confessions & the scope of the exclusionary rule.

Search & seizure:¹

- *Maryland v. Pringle*, No. 02-809. Probable cause to arrest when all occupants of car deny ownership of drugs found in vehicle.

¹ Note these descriptions on pending cases are based on review of blurbs in various secondary sources (e.g., West’s Supreme Ct reporter), rather than review of the underlying lower cases or the actual cert. petitions.

- *United States v. Banks*, No. 02-473. Knock-notice issues (15-20 seconds delay before forced entry).
- *Arizona v. Gant*, No. 02-1019. *Belton* auto search issues – search of car incident to arrest of recent occupant.
- *Illinois v. Lidster*, No. 02-1060. Legality of investigative roadblock/checkpoint seeking information on a week-old accident. (A follow-up to *City of Indianapolis v. Edmond* (2000) which barred use of such a checkpoint as a tool for detecting drug traffickers.)

Confessions

- *Missouri v. Siebert*, No. 02-1731. In two-stage interrogation, police deliberately failed to give *Miranda* warnings and obtained an “off the record” confession. Then they administered *Miranda* advisements and obtained another confession for the record (to the same effect as the illegally obtained one). Do subsequent *Miranda* warnings purge the taint of an earlier *Miranda* violation and allow admission of the second confession (pursuant to *Oregon v. Elstad*) where the initial *Miranda* violation was a deliberate police tactic?
 - Though the cases aren’t necessarily identical, *Siebert* poses issues similar to those recently addressed (very favorably) by Cal. Supreme Ct in *People v. Neal* (2003) 31 Cal.4th 63. *Neal* found the defendant’s confessions *involuntary* under the totality of circumstances in that case (including the defendant’s youth and inexperience, the officer’s “badgering” and disregard of repeated invocations of the right to silence, “a promise and a threat made by the officer,” “the deprivation and isolation imposed on defendant during his confinement,” and the intentional character of the *Miranda* violation. Consequently, the confessions in that case were inadmissible for any purpose, including impeachment.
- *Fellers v. United States*, No. 02-6320. 6th Amen. *Massiah*-type issues concerning a *Mirandized* statement obtained from an arrested defendant who had just been indictment (triggering right to counsel).
- *United States v. Patane*, No. 02-1183. Suppression of physical evidence obtained as fruit of a *Miranda* violation.

Confrontation clause

- *Crawford v. Washington*, No. 02-9410. Admissibility of a nontestifying co-defendant’s “interlocking” statement.

HABEAS EXHAUSTION

- *Baldwin v. Reese*, No. 02-694 {review of 9th Cir.’s opn in *Reese v. Baldwin* (9th Cir. 2002) 282 F.3d 1184}. Sufficiency of presentation of federal nature of claim to state’s highest court. Although body of petition didn’t explicitly federalize claim, 9th Cir. found the federal constitutional claim adequately presented because *the lower court opinion* which was before the state supreme court explicitly addressed it as a federal constitutional issue.

DEATH PENALTY HABEAS – IAC & OTHER ISSUES

- *Banks v. Cockrell*, No. 02-8286. Penalty phase IAC & *Brady* issues on federal habeas review. Note that, like last term’s *Miller-El v. Cockrell*, *Banks* is a Texas death penalty case in which the 5th Cir. denied habeas relief.

SELECTED NUGGETS FROM THE NINTH CIRCUIT

JURY INSTRUCTIONS

Constitutional right to instructions on defense

- *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091. Habeas relief granted based on state trial ct’s refusal of entrapment instructions. *Bradley* opn confirms that, where there is sufficient evidence to support a defense recognized by state law, **a refusal of instructions on that defense theory is federal constitutional error.** “The failure to instruct the jury on Bradley’s defense theory of entrapment was not simply a state law error. It also effected a violation of Bradley’s due process rights.”
 - 9th Cir. finds that the principle that defense is “entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor” is well established for AEDPA purposes in light of *Mathews v. United States*. **Hence, both *Mathews v. U.S.* & *Bradley v. Duncan* are valuable authorities for “federalizing” any argument on refusal of instructions on a defense.**
 - 9th Cir. also finds that state appellate ct’s holding that evidence wasn’t sufficient to support entrapment instructions was “an unreasonable determination of the facts in light of the evidence presented,” warranting habeas relief under AEDPA.
 - Though opn does not put it in quite these terms, import is that, while requirements for a defense may be defined by state law, whether evidence is sufficient to support a defense under those state-defined standards is a federal constitutional question. (Just as state law defines elements of an offense, but sufficiency of evidence to support a conviction under reasonable doubt standard is a due process question.)

- **Caveat: Cert. pet. is pending.** One possible vulnerability is that *Mathews v. United States* was an appeal of a federal criminal conviction. It's not entirely clear whether the opinion rested on due process or simply criminal law principles governing the federal system. (See earlier discussion of *Early v. Packer*.)

Judge's comment equivalent to directed verdict

- *Powell v. Galaza* (9th Cir. 2003) 328 F.3d 558. Powell received 3rd strike 25-to-life sentence for failure to appear (Cal. Pen. Code § 1320.5) for sentencing on a drug possession count (after he had reluctantly testified for prosecution in a murder trial). Defendant claimed he didn't appear because he was afraid he'd be killed in prison. But **ct specifically commented to jury that, by his testimony, Powell had admitted the intent element** of the failure-to-appear charge – “that he intended to evade the court process.” Because the judge's statement effectively removed a contested element from the jury's consideration, 9th Cir. finds that Cal. appellate ct's “cursory” rejection of the claim was “contrary to” controlling U.S. Supreme Ct precedents (*Sandstrom v. Montana & Carella v. California*), and Powell was entitled to habeas relief under AEDPA. By telling the jurors that Powell had admitted he intended to evade the process of the court, the judge “in effect instructed the jury that the intent element had been satisfied.” Moreover, 9th Cir. views the judge's statement to jurors as **tantamount to a directed verdict on a contested element of the charge and not subject to harmless error analysis.**
 - The 9th Cir. had ruled much the same way in this case the previous year, but the Supreme Ct had remanded it for reconsideration in light of *Early v. Packer* (one of its summary reversals of another 9th Cir. habeas grant). But, on remand, the 9th Cir. stuck to its guns and granted relief under the AEDPA standard.

Effect of erroneous intent instruction

- *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587. Trial ct mistakenly instructed that its general intent instruction (CALJIC 3.30) applied to 2nd degree murder based on implied malice. 9th Cir. finds Cal. appellate ct's analysis of the defective instructions “an unreasonable application of clearly established federal law” in several respects.
 - Cal. ct analyzed the instructions under the “**reasonable likelihood**” standard, but **that test applies only to ambiguous instructions.** The statement applying the general intent instruction to implied malice “was flatly erroneous,” not ambiguous.
 - Cal. appellate ct also relied on the attorneys' closing arguments, which correctly described the implied malice standard. But juries are presumed to follow the ct's instructions, not arguments of counsel.

DEATH PENALTY HABEAS REVIEW – RETROACTIVITY OF *RING*

- *Summerlin v. Stewart* (9th Cir. Sept. 2, 2003) __ F.3d __, 2003 WL 220388399 (en banc).

9th Cir. holds that *Ring v. Arizona*, requiring jury determination of choice btwn death penalty & life imprisonment, is retroactively applicable, even to cases which became final on direct review prior to *Ring*. *Teague v. Lane* does not bar retroactivity of *Ring* for two reasons:

- Unlike *Apprendi v. New Jersey* (which 9th Cir. has found non-retroactive), 9th Cir. finds that *Ring* is a decision of substantive rather than only procedural law because *Ring* effectively redefines the substantive offense of “capital murder” in Arizona.
- Second, even if it’s considered procedural, *Ring* qualifies as a “watershed rule” that altered “bedrock procedural elements essential to the fairness of the proceeding.” 9th Cir. also notes that *Ring*’s requirement of jury determinations of penalty will enhance the accuracy of the fact-finding process.
- Also, note Judge Reinhardt’s concurring opinion, which makes several more sweeping statements about administration of the death penalty in general: “Few seriously doubt that the death penalty is generally imposed in an arbitrary manner in this nation.”

HABEAS EXHAUSTION & PROCEDURAL DEFAULT

Exhaustion–Necessity of Presenting Federal Basis of Claim to State’s Highest Court.

- *Peterson v. Lampert* (9th Cir. 2003) 319 F.3d 1153 (en banc). Petition (filed by counsel) to Oregon Supreme Court did not fairly present federal constitutional basis for IAC claim, where that petition expressly cited to Oregon Constitution, rather than 6th & 14th Amens of U.S. Constitution, did not refer to *Strickland* or any other federal cases, and framed claim as “inadequate assistance of counsel” (the term customarily used for IAC-type claims under the state constitution) rather than “ineffective assistance of counsel” (the usual federal constitutional term). In view of the petition’s express invocation of state constitution, without reference to federal constitution, its citation of state cases which referred to both constitutional provisions wasn’t enough to put state court on notice that petition was asserting a federal claim. (Because this was a “counseled petition,” 9th Cir. does not employ liberal construction principles applicable to pro se pleadings. 9th Cir. views the focus on Oregon constit right as a “strategic choice ... not to present the federal issue in the hope of convincing the Oregon Supreme Ct ... to grant review.”)
- **But compare** *Sanders v. Ryder* (9th Cir. Sept. 4, 2003) __ F.3d __, 2003 WL 22053440. A pro se petition to Washington Supreme Court was sufficient to exhaust federal IAC, even though petition included one cite to Washington constitutional right to counsel and didn’t explicitly cite *Strickland* or 6th Amen.. In contrast to *Peterson*, *Sanders*’ petition was pro se rather than “counseled” and consistently framed issue as “ineffective assistance of counsel” (the customary federal constitutional term). Moreover, Washington cases have treated effective assistance of counsel right under state constitution as “coextensive” w/ 6th Amend/*Strickland* and typically analyze IAC claims under a *Strickland* test without distinguishing between state and federal claims. Also, though his petition didn’t do so, *Sanders* did expressly cite *Strickland* in his reply brief to Washington Supreme Court.

Procedural Default – Consistency of California’s Application of *Clark/Robbins* Habeas Timeliness Rules.

- *Bennett v. Mueller* (9th Cir. 2003) 322 F.3d 573, *cert. pet. pending*. 9th Cir. finds that California’s procedural default rules for timeliness of habeas petitions are “independent” but may not be “adequate.” As of Aug. 3, 1998, date of Cal. Supreme Ct. opn, *In re Robbins* (1998) 18 Cal.4th 770, the *Clark/Robbins* timeliness rules are “independent”, i.e., “free of entanglement with federal law” because Cal. courts look solely to state law in applying timeliness standards and exceptions. *But* there is a “genuine question” whether those rules are regularly and consistently applied.
 - 9th Cir. concludes that the petitioner must “place in issue” the adequacy of the state procedural bar “by asserting specific factual allegations ... demonstrating inconsistent application of the rule.” But when he does so, **“the ultimate burden is the state’s”** to show that the state timeliness rule has been regularly and consistently applied. **9th Cir. remands to district court to determine consistency issue** w/ state bearing burden of proof (but no remand proceedings have occurred yet since state is seeking cert.).
 - 9th Cir. also notes that, even if timeliness rules are consistently applied in capital cases, that doesn’t resolve consistency of practice in non-capital cases because the state standards are different.

Procedural Default – Pending En Banc Consideration of Adequacy of California’s Waiver Rules re Failure to Federalize Objections at Trial Level.

- *Chein v. Shumsky* (9th Cir. 2003) 323 F.3d 748 (panel opn), *rehearing en banc granted, panel opn vacated*, 2003 WL 21962483 (Aug. 13, 2003). Like *Bennett v. Mueller*, *Chein* involves a “adequate and independent”/consistent application issue, but it also presents (in a procedural default, rather than an exhaustion context) issues of the adequacy of “federalization” of claims at the trial level, similar to the appellate federalization issues in *Peterson v. Lampert* and *Sanders v. Ryder*. During Cal. perjury trial, Chein objected on “relevance” grounds to (1) testimony of civil trial judge as a witness, and (2) DA’s statements referring to facts of the civil trial. Cal. appellate court found those “relevance” objections inadequate to preserve due process challenges to the same testimony and DA statements and refused to consider the federal constitutional claims. Panel opn viewed this as just another application of Cal. “contemporaneous objection” rule and cited earlier cases treating it as “adequate and independent.” En banc review should provide 9th Cir. opportunity to consider whether California appellate courts apply that waiver rule consistently in situations where trial counsel *does* object but doesn’t explicitly federalize the objection.