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Surprise Symphony: The Supreme Court's Major Criminal Law Rulings of the 2002 Term

William E. Hellerstein
Brooklyn Law School

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SURPRISE SYMPHONY: THE SUPREME COURT'S MAJOR CRIMINAL LAW RULINGS OF THE 2002 TERM

*William E. Hellerstein*¹

INTRODUCTION

By now you are well aware that this term of the Supreme Court was something special, especially as it concluded. In musical terminology, one might think of the Court's term as containing a surprise symphony with an interesting fourth movement. Several of the Court's major criminal law decisions are part of that symphony, especially the fourth, or last, movement since they came down at the end of the term. So let me begin with those. In addition to *Lawrence v. Texas*,² which has already been discussed, the Court ended its term with a very important Sixth Amendment decision regarding the meaning of "effective assistance of counsel" and an equally important ruling addressing the meaning of the Ex Post Facto Clause.

¹ Professor of Law, Brooklyn Law School; B.A., Brooklyn College; J.D., Harvard Law School. Professor Hellerstein teaches Constitutional Law, Civil Rights Law, and Criminal Procedure. He is an expert in criminal law and constitutional litigation; and he has argued numerous appeals before the United States Supreme Court, the Second Circuit, and the New York Court of Appeals.

² 123 S. Ct. 2472 (2003).

EFFECTIVE ASSISTANCE OF COUNSEL***Wiggins v. Smith***³

Let me first address *Wiggins v. Smith*, in which the Court, in a seven-to-two decision written by Justice O'Connor, held that the attorneys whose client faced the death penalty violated his Sixth Amendment right to effective assistance of counsel by failing to conduct a reasonable investigation of his childhood history before deciding not to present a mitigation case at the sentencing phase of his trial.⁴ The case is very fact specific, but I believe it has great significance in a number of ways. The defendant was convicted of murdering an elderly woman. His attorneys, who were experienced litigators, moved to bifurcate the sentencing hearing. Their strategy in the first part of the hearing was to prove that the defendant did not kill the woman. If that failed, only then would they introduce mitigating evidence. However, the judge denied the motion to bifurcate.⁵

Consequently, during their opening statement, counsel said the jury would hear about the defendant's difficult life. However, they never introduced evidence to that effect and concentrated, instead, on what they believed were weaknesses in the

³ 123 S. Ct. 2527 (2003).

⁴ *Id.* at 2531.

⁵ *Id.* at 2532.

prosecution's case.⁶ Prior to summations, counsel made a proffer to the court setting forth the mitigation case that would have been presented if the motion to bifurcate had been granted. Nonetheless, the proffer did not include any evidence as to the defendant's life history or background, and he was sentenced to death.⁷

Wiggins's post-conviction counsel raised the ineffective assistance claim in the Maryland courts and supported it with a social worker's testimony that the defendant suffered severe childhood deprivation and abuse.⁸ The Maryland Court of Appeals held that trial counsels' decision not to argue mitigation was a strategic choice. The court emphasized that counsel were aware of the defendant's background because they possessed the presentence investigation report and records of the city's social services department.⁹ Unsurprisingly, the Fourth Circuit, on federal habeas corpus review, arrived at the same conclusion.¹⁰

In the Supreme Court, things took an interesting turn. Justice O'Connor, writing for the majority, said the issue was *not* whether defense counsel should have presented a mitigation defense, but *whether they had undertaken a reasonable*

⁶ *Id.*

⁷ *Id.*

⁸ *Wiggins v. State*, 724 A.2d 1, 4 (Md. 1999).

⁹ *Id.* at 16.

¹⁰ *Wiggins v. Corcoran*, 288 F.3d 629, 641 (4th Cir. 2002).

*investigation of the mitigating facts before making their decision.*¹¹ She concluded that under *Strickland v. Washington*,¹² the attorneys' performance was deficient because they did not conduct a reasonable investigation. She pointed out that they were in possession of a presentence investigation report that described the defendant's early life as "miser[able]," and "disgusting."¹³ They also possessed DSS records that documented the defendant's various placements in the state's foster care system. The DSS records revealed that the defendant's mother was a chronic alcoholic who left him and his siblings alone for days without food on at least one occasion, that he had frequent lengthy absences from school, and that he was shuffled from one foster home to another.¹⁴

Justice O'Connor concluded that in deciding not to expand their investigation beyond the PSI and DSS records, the attorneys' conduct fell short of prevailing professional standards, stating that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses. . . ."¹⁵ The significance of the Court's decision is contained in the conclusion that because counsel uncovered no evidence to suggest a mitigation case would have been counterproductive or further investigation fruitless, the case

¹¹ *Wiggins*, 123 S. Ct. at 2536.

¹² 466 U.S. 668, 690 (1984) ("Petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.").

¹³ *Wiggins*, 123 S. Ct. at 2536.

¹⁴ *Id.* at 2537.

¹⁵ *Id.*

was distinguishable from prior decisions, including *Strickland* itself, in which the Court found limited investigations into mitigating evidence to be reasonable.¹⁶

Turning to *Strickland*'s prejudice prong, the Court concluded that "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there [was] a reasonable probability that at least one juror would have struck a different balance."¹⁷ Here, too, the decision is highly significant due to the habeas corpus restrictions of AEDPA,¹⁸ in that the Court held that the Maryland court's assumption that the investigation was adequate was an unreasonable application of *Strickland*.¹⁹ Also, the state court's decision was deemed defective because it was based, in part, on a clear factual error — the assumption that the DSS report recorded incidents of sexual abuse.²⁰ Justice Scalia, joined by Justice Thomas, dissented, disputing the majority's conclusions that the state court's decision was unreasonable. He argued that defense counsel had been well aware of the mitigating factors in the defendant's life and family background, and that they made a strategic choice not to emphasize them.²¹

¹⁶ *Id.* at 2436.

¹⁷ *Id.* at 2543.

¹⁸ 28 U.S.C. § 2254(d)(1) (2003) provides in pertinent part: "An application for a writ of habeas corpus . . . shall not be granted . . . unless the adjudication of the claim . . . involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. . . ."

¹⁹ *Wiggins*, 123 S. Ct. at 2538.

²⁰ *Id.* at 2539.

²¹ *Id.* at 2544 (Scalia, J., dissenting).

There are several other reasons why *Wiggins* is so important. First, it is only the second case in nearly twenty years in which the Court has found that a death row inmate had received ineffective assistance of counsel under *Strickland* standards.²² Second, the case did not involve extraordinarily egregious representation. Thus, it weakens the sacrosanctity of the “tactical” decision rubric that courts all too often utilize to defeat ineffective assistance claims. Third, the Court reversed the Fourth Circuit, among the most hostile of courts to the ineffective assistance claims of death row inmates.²³ Finally, the Court relied on American Bar Association guidelines which require the use of mitigation specialists in capital cases.²⁴

²² In the other case, *Williams v. Taylor*, 529 U.S. 362, 398 (2000), the Court held that the defendant’s constitutional right to effective assistance of counsel was violated because counsel failed to present all of the mitigating evidence available.

²³ See, e.g., *Yeatts v. Angelone*, No. 95-0638-R, 1998 U.S. Dist. LEXIS 5884 (4th Cir. Mar. 31, 1998) (holding that failure to include mitigating evidence was merely a strategic decision under *Strickland*); *Gillam v. Simms*, No. 97-14, 1998 U.S. App. LEXIS 548 (4th Cir. Jan. 13, 1998) (stating that counsel’s failure to introduce mitigating evidence did not prejudice the defendant because that evidence was duplicative of the evidence presented at trial).

²⁴ *Wiggins*, 123 S. Ct. at 2536-37. See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Guideline 11.8.6 addresses the defense case at the sentencing phase and encourages the presentation of all reasonably available mitigating evidence. Guideline 4.1 governs the selection of counsel and suggests the appointment of attorneys who are competent to represent indigent capital defendants. See also ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (“The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions.”).

Available at <http://abanet.org/crimjust/rtsb4.html> (last visited 3/2/04).

*Massaro v. United States*²⁵

The Court decided a second ineffective assistance case in the defendant's favor, and its significance lies not so much in its substance, but in its pragmatic importance, especially to criminal appellate practitioners. Massaro was indicted on federal racketeering charges in connection with a murder. The day before his trial began, prosecutors learned of a bullet allegedly recovered from the car in which the victim's body was found but they did not inform defense counsel until the trial was underway. Defense counsel repeatedly declined the judge's offer of a continuance to permit examination of the bullet. Massaro was convicted and received a life sentence.²⁶

On direct appeal, his new counsel argued that the trial court had erred in admitting the bullet into evidence, but he did not raise an ineffective assistance of trial counsel claim.²⁷ Massaro later moved to vacate his conviction collaterally under 28 U.S.C. § 2255,²⁸ raising an ineffective assistance claim based on trial counsel's failure to accept the court's offer of a continuance.²⁹ The Second Circuit affirmed the denial of the motion on the ground, based on prior precedent, that when the defendant is represented on appeal by new counsel and the ineffective assistance claim is based

²⁵ 538 U.S. 500 (2003).

²⁶ *Id.* at 502.

²⁷ *Id.*

²⁸ 28 U.S.C. § 2255 (2003) provides in pertinent part: "A prisoner in custody under sentence of a court . . . claiming the right to be released upon . . . [any ground] subject to collateral attack, may move the court . . . to vacate, set aside, or correct the sentence."

²⁹ *Massaro*, 538 U.S. at 502.

solely on the trial record, the claim must be raised on direct appeal and failure to do so is a procedural default unless the petitioner shows cause and prejudice.³⁰

In an unanimous opinion by Justice Kennedy, the Court reversed, holding “that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.”³¹ The Court perceptively realized what experienced practitioners and, indeed, appellate courts have long known. Requiring a defendant to raise on direct appeal an ineffective assistance claim would create a risk that defendants would feel compelled to raise the issue before there has even been an opportunity to fully develop the factual predicate of the claim and would raise the issue for the first time in a forum not best suited to assess those facts, even if the trial record contains some indication of deficiencies in trial counsel’s performance.³² The Court got this one right.

The New York Court of Appeals has stated repeatedly that ineffective assistance of trial counsel claims should be brought collaterally.³³ The case is rare, indeed, in which the incompetence

³⁰ *Massaro v. United States*, 27 Fed. Appx. 26, 29-30 (2d. Cir. 2001). The court cited *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1992), which declared that “failure to raise ineffective assistance claims on direct appeal will be excused only if the defendant can demonstrate cause for the failure to raise the issue and actual prejudice resulting therefrom.” *Massaro*, 27 Fed. Appx. at 29.

³¹ *Massaro*, 538 U.S. at 504.

³² *Id.* (“When an ineffective-assistance claim is brought on direct appeal . . . the court must proceed on a trial record not developed . . . [for] preserving the claim and thus often incomplete or inadequate for this purpose.”).

³³ *See, e.g., People v. Brown*, 382 N.E.2d 1149, 1149-50 (1978) (“[I]n the typical case it would be better, and in some cases essential, that an appellate

of trial counsel is apparent on the face of the trial record. Since counsel's commissions or omissions are almost always claimed by the prosecution to be strategically based, exploration of the issue generally requires factual evidence. Frequently, that evidence consists of testimony from the defendant and/or his trial attorney as to what transpired between them or what was in the attorney's mind when he made a decision either to act or not to act on a discrete issue. The *Massaro* case may itself be a good example. While it is possible to argue on direct appeal that there was no reason whatsoever for counsel to refuse the court's offer of a continuance, it is also conceivable, from the government's perspective, that trial counsel reasonably believed that the continuance would not help the defendant and that it would interfere with some other aspect of his strategy.

It should be noted that the Court did not hold that ineffective assistance claims must always be reserved for collateral review, and it recognized that there may be cases in which trial counsel's incompetence is so apparent from the trial record that it would be appropriate for a defendant to raise it on direct appeal.³⁴ However, if an appellate attorney chooses that path, he or she must realize that any possible justification for trial counsel's actions must be posited and negated; if the prosecution can suggest even

attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding. . . .").

³⁴ *Massaro*, 538 U.S. at 508 ("There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal.").

one such justification, there is a great risk that the ineffectiveness claim will be defeated.

EX POST FACTO CLAUSE

*Stogner v. California*³⁵

To appreciate the importance of this case interpreting the Ex Post Facto Clause,³⁶ which applies to both the states and federal government, it is necessary to first place it in context. With the advent of DNA evidence and the intense concern with sexual predators, especially where children are involved, state legislatures have either passed or are contemplating passage of laws that remove the statute of limitations on offenses in which DNA evidence is found at the crime scene.³⁷ In *Stogner*, a California statute was before the Court that created an exception to the otherwise applicable statute of limitations for certain child sex

³⁵ 123 S. Ct. 2446 (2003).

³⁶ U.S. CONST. art. 1, § 10, cl. 1 provides in pertinent part: "No state shall . . . pass any . . . ex post facto law. . . ."

³⁷ See, e.g., 2001 Ark. Adv. Legis. Serv. 1780 (Michie 2004) (providing for the prosecution of unknown sex offenders at any time so long as the indictment contains the genetic information of the unknown person); 72 Del. Laws 320 (1999) (extending the statutory time limit for up to ten years from the date of the assault as long as the prosecution is based upon DNA testing); 2001 Idaho Sess. Laws 142 (setting no time limit at all for the prosecution of rape cases); 2003 N.M. Laws 257 (tolling the statute for prosecution of an unknown offender until a DNA profile is matched with a suspect); 2003 Utah Laws 116 (extending the statutory period to one year after the discovery of the offender's identity).

abuse offenses.³⁸ Consequently, in 1998, a California grand jury indicted Stogner for sex-related child abuse committed between 1955 and 1973.³⁹ Without the new statute, passed in 1993, the state could not have prosecuted Stogner because the crimes with which he was charged were governed by a three year statute of limitations.⁴⁰

The issue before the Court was whether a prosecution, once barred by a statute of limitations, can be reauthorized by a retroactive extension of the limitations period.⁴¹ In a five-to-four opinion written by Justice Breyer, the Court held that both the historical understanding of the Ex Post Facto Clause and principles of fairness which the Clause was designed to protect are violated by statutes such as California's.⁴² Both the majority and dissenting opinions are replete with historical analysis and interpretation far too extensive to describe in this article. What can be said about the use of history by the Court is that there is hardly ever a single correct assessment and, not being a historian, I am in no position to assess which side has the better interpretation of it in this case.

Ex Post Facto Clause analysis always begins with Justice Samuel Chase's exposition in *Calder v. Bull*,⁴³ decided in 1798, which sets forth four categories that determine whether a statute is

³⁸ CAL. PENAL CODE § 803 (Deering 2004) (provides for the revival of child sex offense claims after the expiration of the statutory period only if the complainant meets the statutory requirements).

³⁹ *Stogner*, 123 S. Ct. at 2449.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2461.

⁴³ 3 U.S. (3 Dall.) 386 (1798).

an ex post facto law and violative of the Clause. The first category is every law that makes criminal an action that was done innocently before the passing of the law but becomes punishable after the law's passage.⁴⁴ Category two is every law that aggravates a crime or makes it greater than it was when committed.⁴⁵ Category three is every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.⁴⁶ Lastly, category four is every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the defendant.⁴⁷

The issue was into which of the *Calder v. Bull* categories the California statute fit. The majority concluded that it surely fit within category two and could also possibly fit within category four. Although category two on its face might not appear to encompass laws such as the statute at issue, Justice Breyer emphasized that Justice Chase had stated that the impetus for forbidding laws in the second category was acts of Parliament that “inflicted punishments, where the party was not, by law, liable to any punishment.”⁴⁸ Applying this principle, Justice Breyer explained:

After (but not before) the original statute of limitations had expired, a party such as Stogner was not ‘liable to any punishment.’ California’s new

⁴⁴ *Id.* at 389.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Stogner*, 123 S. Ct. at 2450-51 (quoting *Calder*, 3 U.S. (3 Dall) at 389).

statute therefore 'aggravated' Stogner's alleged crime, or made it 'greater than it was, when committed,' in the sense that, and to the extent that, it 'inflicted punishment' for past criminal conduct that (when the new law was enacted) did not trigger any such liability.⁴⁹

The majority also emphasized that principles of fairness that underlie the Ex Post Facto Clause also drive the conclusion that the California statute is in violation.⁵⁰ Here Justice Breyer cited pointedly to a statement made by Judge Learned Hand in *Falter v. United States*⁵¹ that extending a limitations period after the State has assured "a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest."⁵² Justice Breyer also reiterated the Court's earlier observation that reviving a time-barred prosecution deprives a defendant of the "fair warning . . . that might have led him to preserve exculpatory evidence," and "risks both 'arbitrary and potentially vindictive legislation.'"⁵³

Justice Kennedy, joined by Justices Rehnquist, Scalia, and Thomas, rejected the idea that people rely on the expiration of a statute of limitations in a meaningful way.⁵⁴ The dissent also

⁴⁹ *Id.* at 2451.

⁵⁰ *Id.* at 2449.

⁵¹ 23 F.2d 420, 426 (2d Cir. 1928) (discussing in dicta the unfairness of "reviv[ing] a prosecution already dead. . .").

⁵² *Stogner*, 123 S. Ct. at 2449 (quoting *Falter*, 23 F.2d at 426).

⁵³ *Id.* at 2450.

⁵⁴ *Id.* at 2470 (Kennedy, J., dissenting) ("We should consider whether it is warranted to presume that criminals keep calendars so they can mark the day to discard their records or to place a gloating phone call to the victim.").

disagreed with Justice Breyer's analysis of history, precedent, and the *Calder* categories.⁵⁵

It is important to appreciate that the decision applies only to a statute that "(1) permits resurrection of otherwise time-barred criminal prosecutions, and (2) was itself enacted *after* pre-existing limitations periods had expired."⁵⁶ The Court did not rule on the constitutionality of statutes that extend limitations periods before the original limitations period has expired, although it would seem that some of the same arguments against that type of statute can be made. However, Justice Breyer did state, in answer to the dissent's reliance on the nature of child sexual abuse prosecutions and the difficulties associated with prompt discovery of such crimes, that the Court's decision "does not prevent the State from extending time limits for the prosecution of future offenses, or for prosecutions not yet time barred."⁵⁷ The narrowness of the majority's holding and statements such as these would appear to leave in tact certain provisions of the 2001 USA Patriot Act⁵⁸ and the 2003 Protect Act⁵⁹ that eliminate the limitations periods for

⁵⁵ *Id.* at 2472 (Kennedy, J., dissenting) ("[T]he Court's stretching of *Calder*'s second category contradicts the historical understanding of that category, departs from established precedent, and misapprehends the purpose of the *Ex Post Facto* clause.").

⁵⁶ *Id.* at 2448.

⁵⁷ *Stogner*, 123 S. Ct. at 2461.

⁵⁸ USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Section 809 of the Act amends 18 U.S.C. § 3286 to read: "Notwithstanding any other law, an indictment may be found . . . at anytime without limitation for any offense . . . if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person."

⁵⁹ PROTECT ACT of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003). Section 202 of the Act amends 18 U.S.C. § 3283 to read: "No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or

offenses involving terrorism and crimes against children. But the majority also pointed out that it was not directly addressing the constitutionality of statutes that extend unexpired terms.⁶⁰

Stogner should also be of considerable interest in light of the newly launched John Doe Indictment Project in New York City.⁶¹ As the New York Times reported on August 5, 2003, prosecutors, investigators, and scientists will seek to tie the most serious unsolved sex crimes to specific DNA profiles and then file charges even before they have linked a name to the DNA or have arrested a suspect.⁶² New York law has a five year statute of limitations for most felonies⁶³ and a ten year limitation if the criminal's identity is unknown.⁶⁴ The project is founded on the assumption that the filing of a John Doe indictment before the ten years has run will be constitutional.⁶⁵ That may or may not be correct in the aftermath of *Stogner*. On one hand, the Court appeared to draw a critical distinction between statutes of limitations that had expired and those that had not without deciding the issue squarely. John Doe indictments would not seem to

physical abuse, or kidnapping, of a child . . . shall preclude such prosecution during the life of the child."

⁶⁰ *Stogner*, 123 S. Ct. at 2453.

⁶¹ William K. Rashbaum, *New York Pursues Old Cases of Rape Based Just on DNA*, N.Y. TIMES, Aug. 5, 2003, at A1. This is an initiative uniting the joint efforts of law enforcement officers, prosecutors, and scientists in sexual offense cases to aid in bringing sexual offenders to justice. *Id.*

⁶² *Id.*

⁶³ N.Y. CRIM. PROC. LAW § 30.10 (McKinney 2003).

⁶⁴ See Rashbaum, *supra* note 61, at A1.

⁶⁵ See Rashbaum, *supra* note 61, at A1.

violate any of the four *Calder* principles. However, it can be argued that the lodging of a John Doe indictment which remains pending for ten more years because the defendant cannot be found is inconsistent with the principles of fairness that the Court articulated in the first part of its *Stogner* opinion.

*Smith v. Doe*⁶⁶

The Court decided a second Ex Post Facto Clause case — one that did not turn out so well for the offender. In *Smith v. Doe*, the issue was whether the retroactive application of Alaska's Sex Offender Registration Act,⁶⁷ which requires convicted sex offenders to register with law enforcement authorities, violates the clause.⁶⁸ The Court, by a vote of six-to-three, held that it did not.⁶⁹ Writing for the majority, Justice Kennedy concluded that, because the intention of the legislature was to enact a regulatory scheme that is civil and nonpunitive and the imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective, the Act is nonpunitive. Therefore, it is not within the purview of the Ex Post Facto Clause.⁷⁰

⁶⁶ 538 U.S. 84 (2003).

⁶⁷ ALASKA STAT. § 18.65.087 (Michie 2003) (requiring the Department of Public Safety to keep a central registry of sex offenders).

⁶⁸ *Smith*, 538 U.S. at 89.

⁶⁹ *Id.* at 105.

⁷⁰ *Id.* at 105-06.

Observing that the Court had not previously considered a claim that sex offender notification laws constitute retroactive punishment forbidden by the Ex Post Facto Clause, Justice Kennedy stated that, nonetheless, the framework for the Court's inquiry was well-established.⁷¹ Under *Kansas v. Hendricks*,⁷² the Court must:

ascertain whether the legislature meant the statute to establish 'civil' proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, the court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil.⁷³

Justice Kennedy pointed out that the Alaska statute's stated purpose is to promote public safety by notifying the public of the presence of a convicted sex offender.⁷⁴ Although public safety is also a goal of law enforcement, these concurrent purposes are not sufficient to render civil proceedings criminal.⁷⁵ Nor was it significant that the registration provisions are part of the state's criminal procedure code.⁷⁶ The criminal procedure code, Justice Kennedy noted, contains many provisions that do not involve criminal punishment.⁷⁷ Additionally, the registration provisions

⁷¹ *Id.* at 92.

⁷² 521 U.S. 346, 361 (1997).

⁷³ *Smith*, 538 U.S. at 92 (quoting *Hendricks*, 521 U.S. at 361).

⁷⁴ *Id.* at 93.

⁷⁵ *Id.* at 94.

⁷⁶ *Id.*

⁷⁷ *Id.* at 95.

are contained in the state's health, safety, and housing code.⁷⁸ The majority also rejected the argument that punitive intent could be inferred from the fact that sex offenders must be advised of the registration provisions when pleading guilty.⁷⁹

The majority also rejected the argument that the effect of the registration statute overrode the legislature's civil intent.⁸⁰ It repudiated the assertion that the stigma caused by the notification provisions rendered the statute punitive and analogous to colonial punishments such as shaming and banishment.⁸¹ The Court emphasized that the stigma results not from the public display of convicts for ridicule, but from the dissemination of accurate information about an already public criminal record.⁸² Nor does the fact that the registry is posted on the Internet change matters.⁸³ Although the potential for enormous dissemination is present, the essential goals of the notification scheme remain unchanged.⁸⁴ Justice Kennedy acknowledged that the public availability of registrant information may have a lasting and painful impact on the registrant but, he pointed out, that is because of the fact of conviction, which is already a matter of public record, and is not, therefore, attributable to the registration requirement.⁸⁵

⁷⁸ *Smith*, 538 U.S. at 94.

⁷⁹ *Id.* at 95.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 98.

⁸³ *Smith*, 538 U.S. at 99.

⁸⁴ *Id.* at 99.

⁸⁵ *Id.*

In dissent, Justice Stevens argued that the registration scheme implicates constitutionally protected liberty interests and imposes punishment.⁸⁶ Justice Ginsburg, in a separate dissent joined by Justice Breyer, argued that the Alaska statute is punitive because it applies to all convicted sex offenders, “without regard to their future dangerousness.”⁸⁷

The “Three Strikes and Yer Out” Cases: Ewing v. California⁸⁸ and Lockyer v. Andrade⁸⁹

California’s three strikes law⁹⁰ mandates an indeterminate life imprisonment term for a felon who has two or more prior convictions for “serious” or “violent” felonies. A defendant sentenced under this law can become eligible for parole, but only after serving a minimum term.⁹¹ In both cases before the Court, the minimum term was twenty-five years. Under the law, offenses known as “wobblers” may be classified as either felonies or misdemeanors. A wobbler is presumptively a felony, but if a prosecutor or judge exercises discretion to make the crime a

⁸⁶ *Id.* at 111 (Stevens, J., dissenting).

⁸⁷ *Id.* at 116 (Ginsburg, J., dissenting).

⁸⁸ 538 U.S. 11 (2003).

⁸⁹ 538 U.S. 63 (2003).

⁹⁰ CAL. PENAL CODE ANN. § 667(2)(A) (West 1999) states in pertinent part:

If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term calculated as the greater of (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, (ii) Imprisonment in the state prison for 25 years.

⁹¹ *Id.* § 667(2)(A)(i)-(iii).

misdemeanor, it is not a triggering offense under the three strikes law.⁹²

In *Ewing v. California*, the defendant shoplifted three golf clubs worth \$1200.⁹³ He was charged with grand theft, a “wobbler” offense, but the trial judge refused to reduce it to a misdemeanor.⁹⁴ His prior “strikes” consisted of four burglaries and one robbery.⁹⁵ A divided five member majority upheld the sentence. Justice O’Connor, joined by Chief Justice Rehnquist and Justice Kennedy, held that the sentence was not grossly disproportionate to the offense.⁹⁶ Justices Scalia and Thomas concurred in the judgment, but maintained that proportionality analysis was inappropriate.⁹⁷ Justice Scalia did not believe the proportionality test could be intelligently applied;⁹⁸ Justice Thomas did not believe there was one in the Eighth Amendment.⁹⁹

Justice O’Connor, citing Justice Kennedy’s concurring opinion in *Harmelin v. Michigan*,¹⁰⁰ stated that the Eighth Amendment contains a “narrow proportionality principle” applicable to noncapital cases.¹⁰¹ Despite much disagreement about that principle in the Court’s jurisprudence, Justice O’Connor applied it to Ewing’s sentence, but she found that the sentence was

⁹² *Ewing*, 538 U.S. at 11; *Lockyer*, 538 U.S. at 80.

⁹³ *Ewing*, 538 U.S. at 16.

⁹⁴ *Id.* at 18.

⁹⁵ *Id.* at 19.

⁹⁶ *Id.* at 20.

⁹⁷ *Id.* at 31, 32 (Scalia, J., Thomas, J., concurring).

⁹⁸ *Ewing*, 538 U.S. at 31 (Scalia, J., concurring).

⁹⁹ *Id.* at 32 (Thomas, J., concurring).

¹⁰⁰ 501 U.S. 957 (1991).

¹⁰¹ *Ewing*, 538 U.S. at 23.

not disproportionate. She noted that courts owe deference to legislative choices in dealing with individuals who engage repeatedly in serious crimes and that the Eighth Amendment did not preclude the California Legislature from determining that public safety requires incapacitation of criminals with prior serious offenses.¹⁰² Ewing's sentence was not disproportionate, Justice O'Connor concluded, because the offense against which his sentence must be measured is not "shoplifting three golf clubs," but felony grand theft after previously having been convicted of at least two "violent" or "serious" felonies.¹⁰³ It was irrelevant that grand theft was a "wobbler" because it had not been reduced to a misdemeanor.¹⁰⁴ Ewing's sentence, she concluded, was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record."¹⁰⁵

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented and argued that the Eighth Amendment includes "a broad and basic proportionality principle that takes into account all of the justifications for penal sanctions."¹⁰⁶ Justice Breyer, in a dissent joined by Justices Stevens, Souter, and Ginsburg, argued that Ewing's sentence was grossly disproportionate under the test set forth in Justice Kennedy's *Harmelin* concurrence.¹⁰⁷ He

¹⁰² *Id.* at 30.

¹⁰³ *Id.* at 29.

¹⁰⁴ *Id.* at 28.

¹⁰⁵ *Id.* at 28-29.

¹⁰⁶ *Ewing*, 538 U.S. at 29-30 (Stevens, J., dissenting).

¹⁰⁷ *Id.* at 35 (Breyer, J., dissenting).

pointed to the amount of time Ewing will have to serve and that his sentence is “one of the most severe punishments available [for] a recidivist who subsequently engaged in one of the less serious forms of criminal conduct.”¹⁰⁸

From the vantage point of the amount of time to be served, Leandro Andrade was in worse shape than Ewing. In 1995, on two separate days, he stole videotapes from K-Mart stores worth \$84.70 and \$68.84 respectively.¹⁰⁹ He had prior convictions for misdemeanor theft, residential burglary, transportation of marijuana, and escape from prison.¹¹⁰ He was a heroin addict and he admitted that he stole the videotapes to get money to support his habit.¹¹¹ He was sentenced to twenty-five years to life for each theft, the sentences to be served consecutively. Thus, he would not be eligible for parole until he had served fifty years.¹¹²

Unlike Ewing’s case, which came to the Supreme Court directly from the California courts, Andrade was a habeas corpus petitioner whose Eighth Amendment claim met with success in the Ninth Circuit.¹¹³ Because it was a habeas case, the district court, under the habeas corpus amendments of the Antiterrorism and Effective Death Penalty Act (AEDPA),¹¹⁴ was required to affirm the sentence unless it was “contrary to, or involved an

¹⁰⁸ *Id.* at 36-37.

¹⁰⁹ *Lockyer*, 538 U.S. at 66.

¹¹⁰ *Id.* at 66-67.

¹¹¹ *Id.* at 67.

¹¹² *Id.* at 68.

¹¹³ *Andrade v. AG*, 270 F.3d 743 (9th Cir. 2001), *rev’d*, 538 U.S. 63 (2003).

¹¹⁴ 28 U.S.C. § 2254(d)(1) (2003).

unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.”¹¹⁵ The Ninth Circuit ruled that the state court had disregarded the Supreme Court’s proportionality analysis in *Solem v. Helm*¹¹⁶ and, therefore, its decision involved an unreasonable application of “clearly established” Supreme Court precedent.¹¹⁷

Writing this time for a five member majority, Justice O’Connor reviewed the Court’s prior cases and concluded that there is not much about Eighth Amendment proportionality that is “clearly established.”¹¹⁸ All that emerges as “clearly established” from what she characterized as “this thicket of Eighth Amendment jurisprudence” is that “a gross disproportionality principle is applicable to sentences for terms of years.”¹¹⁹ She concluded that the facts of this case fell between those in *Solem*, which found an Eighth Amendment violation, and *Rummel v. Estelle*,¹²⁰ which did not.¹²¹ Considering the fact that subsequent cases made it clear that *Solem* had not overruled *Rummel*, under AEDPA, the state court’s

¹¹⁵ 270 F.3d at 744.

¹¹⁶ 463 U.S. 277 (1983). In *Solem*, the Court held as a matter of principle that a criminal sentence must be proportionate to the crime the defendant has been convicted of and reviewing courts must look to the factors that the Court has established: “including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” *Id.* at 292.

¹¹⁷ *Andrade*, 270 F.3d at 767.

¹¹⁸ *Lockyer*, 538 U.S. at 72.

¹¹⁹ *Id.*

¹²⁰ 445 U.S. 263 (1980) (holding that states are entitled to make their own judgments as to where lines between felony theft and petit larceny lie, subject to the Eighth Amendment).

¹²¹ *Lockyer*, 538 U.S. at 74.

conclusion that the sentence was permissible under the Eighth Amendment was not objectively unreasonable.¹²² In dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, insisted that *Solem* was virtually indistinguishable from Andrade's case.¹²³ Both cases involved a repeat offender who committed a theft of small value, their criminal records were comparable, neither had been convicted of crimes of violence, and the practical effect of Andrade's sentence, like that imposed on Solem, denied any meaningful possibility of parole.¹²⁴

For the defense side, the only good news that can be extracted from these two decisions is that seven members of the Court accept the principle that a noncapital sentence can constitute cruel and unusual punishment in violation of the Eighth Amendment if it is "grossly disproportionate" to the gravity of the crime. However, California's three strikes law, which now has been upheld in two applications, is among the harshest in the country because it permits even non-violent felonies to trigger a life sentence. Therefore, it is questionable whether any challenges to three strikes laws are sustainable. Additionally, where such a challenge is the basis of a federal habeas corpus petition, considering the *Andrade* Court's articulation of the "unreasonableness" standard of AEDPA, there would seem to be little or no chance of success.

¹²² *Id.* at 76.

¹²³ *Id.* at 78 (Souter, J., dissenting).

¹²⁴ *Id.* at 78-79.

Whether law enforcement interests should rejoice at this victory is also problematic. The ever-increasing cost to the public fisc of long-term incarceration is substantial, especially as prisoners serving life sentences have ever increasing health needs.¹²⁵ When non-violent recidivism significantly increases a cohort of aging and healthcare needy inmates, one should pause to ask whether a three strikes law such as California's is worth the candle; a recall-minded jurisdiction such as California might wisely ponder that question. Other jurisdictions may wish to do the same.

DUE PROCESS

*Sell v. United States*¹²⁶

In *Sell*, the issue before the Court was whether the Constitution permits the government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant in order to render that defendant competent to stand trial for serious but nonviolent crimes.¹²⁷ The Court, in a six-to-three decision by Justice Breyer, held that the Constitution did so permit.¹²⁸ But the

¹²⁵ See Stephanie Pfeffer, *One Strike Against the Elderly: Growing Old in Prison*, MEDILL NEWS SERVICE (Aug. 2002), available at <http://journalism.medill.northwestern.edu/docket/01-1127aging.html>; see also 'Geriatric Inmates' Costly Liability, Officials Say, THE LAFAYETTE DAILY ADVERTISER, Aug. 25, 2003, available at <http://www.acadiananow.com/news/html>.

¹²⁶ 123 S. Ct. 2174 (2003).

¹²⁷ *Id.* at 1278.

¹²⁸ *Id.*

Court set the bar sufficiently high that, as the Court itself acknowledged, the instances when drugs can be involuntarily administered should be “rare.”¹²⁹

To put this case in context, reference should be made to two earlier cases. First, in *Washington v. Harper*,¹³⁰ the Court held that the Constitution permits the state to medicate an unwilling inmate with a serious mental illness who is dangerous to himself or others when treatment is in the inmate’s best interest.¹³¹ In *Riggins v. Nevada*,¹³² the Court reaffirmed that a person has a constitutionally protected liberty interest in avoiding forced medication, and only an essential or overriding state interest can overcome it.¹³³

In *Sell*, the standard that the Court set to allow the use of drugs to render a defendant competent to stand trial is that 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 significantly to further important governmental trial-related interests.”¹³⁴ Under this standard, despite the government’s significant interest in bringing a defendant to trial, a court must

¹²⁹ *Id.* at 2184.

¹³⁰ 494 U.S. 210 (1990).

¹³¹ *Id.* at 227.

¹³² 504 U.S. 127 (1992).

¹³³ *Id.* at 135 (stating that “given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest”).

¹³⁴ *Sell*, 123 S. Ct. at 2184.

weigh “special circumstances [that] may lessen the importance of that interest.”¹³⁵

First, a court must find that “*important* governmental interests are at stake.”¹³⁶ Factored into that assessment must be the fact that a defendant’s refusal to accept medication may result, as it did for Sell, in his lengthy confinement in an institution for the mentally ill, thus diminishing the risks normally attendant on freeing a defendant without punishment.¹³⁷ This is significant because, as the Court noted, such a period of medical institutional confinement ordinarily is credited toward any sentence that might ultimately be imposed.¹³⁸

Second, a court must conclude that involuntary medication will “significantly further” the government’s interests, including its interest in assuring that the defendant’s trial is a fair one.¹³⁹ Thus, a court must find not only that the medication is substantially likely to render the defendant competent to stand trial, but also that it is substantially unlikely to interfere significantly with his ability to assist in his own defense.¹⁴⁰

Third, a court must also find that involuntary medication is “necessary” to further the government’s interests.¹⁴¹ It is necessary when any alternative, less intrusive treatments are unlikely to

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 2178.

¹³⁹ *Sell*, 123 S. Ct. at 2184.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2185

achieve substantially the same results. Furthermore, the court must attempt other judicial means, such as a court order to the defendant backed by the contempt power, to achieve compliance with a treatment program short of forcible medication.¹⁴²

A key aspect of the case was the trial court's finding that Sell was not dangerous to himself or others.¹⁴³ Because of that finding, as to which the Supreme Court expressed some reservations, the Court emphasized that the standard it was establishing did not apply when a court is considering forcible medication for reasons other than competency.¹⁴⁴ Justice Breyer pointed out that in those situations, "there are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competency question."¹⁴⁵

Justice Breyer explained that a determination of whether an individual needs to be medicated to render him nondangerous is usually an easier and more straightforward determination because it lacks the legal ramifications of trial fairness in competency determinations.¹⁴⁶ Thus, stated Breyer, a court "should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type grounds; and if not, why not."¹⁴⁷ Justice Scalia,

¹⁴² *Id.*

¹⁴³ *Id.* at 2186.

¹⁴⁴ *Sell*, 123 S. Ct. at 2185.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2186.

joined by Justices O'Connor and Thomas, dissented on the ground that the district court's ruling was not appealable as a collateral order.¹⁴⁸

A few observations and questions arise from this case. The decision will greatly increase the difficulty for involuntary medication to achieve a defendant's competence to stand trial. Because the *Sell* standard is higher than the standard applied when a defendant is dangerous to himself or others, the Court may well be correct that such involuntary medication should prove rare. Will the government expend greater effort to have the defendant found "dangerous"? That is a fair bet. Will defense attorneys utilize the high standard to avoid trial whenever it is not in the defendant's interest to go to trial — which is quite often? What about the constitutionality of involuntarily medicating a death row inmate to render him competent to be executed? The Court previously faced this issue in 1990 in *Perry v. Louisiana*,¹⁴⁹ but remanded the case for reconsideration in light of *Washington v. Harper*.¹⁵⁰

Connecticut Department of Public Safety v. Doe¹⁵¹

In this second case involving sex offender registries, the Court unanimously reversed the Second Circuit and held that persons required to register as sex offenders in Connecticut, where

¹⁴⁸ *Id.* at 2191 (Scalia, J., dissenting).

¹⁴⁹ 498 U.S. 38 (1990).

¹⁵⁰ 494 U.S. 210 (1990).

¹⁵¹ 538 U.S. 1 (2003).

registry is predicated solely on the fact of a prior conviction, have no procedural due process rights to hearings on whether they are currently dangerous.¹⁵² The Second Circuit held that the Connecticut statute violated the Due Process Clause because it authorized public dissemination of information about registrants without affording them a hearing on the “currently dangerous” issue.¹⁵³ Thus, those required to register met the “stigma plus” test of *Paul v. Davis*¹⁵⁴ for determining whether an allegation of defamation by a governmental entity triggers procedural due process protections.¹⁵⁵

Chief Justice Rehnquist, who authored the majority opinion in *Paul*, also wrote the majority opinion in this case. He emphasized that the Connecticut registry not only is based solely on the fact of previous conviction, but it expressly disavows any determination of current dangerousness.¹⁵⁶ He concluded, therefore, that “due process does not require the opportunity to prove a fact that is not material to the State’s statutory scheme.”¹⁵⁷ Nonetheless, Rehnquist also noted that sex offenders present a

¹⁵² *Id.* at 4.

¹⁵³ *Doe v. Dep’t of Pub. Safety ex rel. Lee*, 271 F.3d 38, 62 (2d. Cir. 2001).

¹⁵⁴ In *Paul v. Davis*, 424 U.S. 693, 701 (1976), the Court explained:

While we have in a number of our prior cases pointed out the frequently drastic effect of the ‘stigma’ which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either ‘liberty’ or ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause.

¹⁵⁵ *Doe*, 271 F.3d at 57.

¹⁵⁶ *Smith*, 123 S. Ct. at 1164.

¹⁵⁷ *Id.* at 1162.

serious threat to society, especially children.¹⁵⁸ Justice Scalia joined the majority opinion and wrote a separate concurrence, stating that even if registration implicates a liberty interest, the categorical abrogation of that interest by a validly enacted statute provides all the process that is “due.”¹⁵⁹ Justice Souter, also concurring and joined by Justice Ginsburg, pointed out that registrants are not foreclosed from challenging registration laws under substantive due process or equal protection principles.¹⁶⁰

At least one court is not as sanguine about the relationship between sex offender registration and due process. Two months after the decision in *Doe*, the Iowa Supreme Court held that public dissemination of information about a sex offender registrant satisfied the “stigma plus” test and held that sex offenders are entitled to a hearing.¹⁶¹

¹⁵⁸ *Id.* at 1163.

¹⁵⁹ *Id.* at 1165 (Scalia, J., concurring).

¹⁶⁰ *Id.* at 1166 (Souter, J., concurring).

¹⁶¹ *Brummer v. Iowa Dep’t of Corr.*, 661 N.W.2d 167, 175 (2003). The defendant was convicted of indecent contact with a minor and sentenced to two years of probation. In addition, he was required to comply with Iowa’s registration and notification law. His risk to the community was also assessed by the Iowa Department of Corrections. The court held:

[T]he sex offender risk assessment and the resulting public notification go far beyond the mere redisclosure of an offender’s conviction. Instead, a Correction’s agent takes the additional step of assessing an offender based on a limited documentary record that may or may not provide the best evidence of the factors indicative of an offender’s likelihood to reoffend. . . . This entire process clearly implicates a liberty interest. . . . In our view, that interest, when combined with the obvious reputational interest that is at stake, qualifies as a ‘liberty’ interest within the meaning of the Due Process Clause.

COERCIVE INTERROGATIONS

The Court decided two cases involving coercive police interrogations. The first was a *per curiam* decision and the second arose, not in the context of a criminal prosecution, but in a damage suit under 42 U.S.C. § 1983.¹⁶² In *Kaupp v. Texas*,¹⁶³ the *per curiam* decision, the body of a 14-year-old girl was found in a drainage ditch and police suspicion fell on 17-year-old Robert Kaupp.¹⁶⁴ Lacking probable cause to arrest him, three detectives and three uniformed officers went to Kaupp's house at 3 a.m., and his father let them in.¹⁶⁵ One of the detectives, accompanied by at least two other officers, went to Kaupp's bedroom, awakened him with a flashlight, and the detective said, "We need to go and talk." Kaupp said, "Okay." The two officers then handcuffed Kaupp and led him, shoeless and dressed only in boxer shorts and a T-shirt, out of his house and into a patrol car.¹⁶⁶ They stopped for five or

Id. at 174. The court, although it cited both the Iowa Constitution and the U.S. Constitution, *id.* at 172, did not specify that its ruling rested only on the state constitution's due process clause. After *Doe*, it would have to.

¹⁶² 42 U.S.C. § 1983 (2003) states in pertinent part:

Any person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

¹⁶³ 538 U.S. 626 (2003) (*per curiam*).

¹⁶⁴ *Id.* at 1845.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

ten minutes where the victim's body had been found in anticipation of confronting Kaupp with the girl's brother's confession implicating Kaupp, and then went to the sheriff's headquarters. Kaupp was taken to an interview room where his handcuffs were removed and he was advised of his *Miranda* rights.¹⁶⁷ Ten or fifteen minutes into the interrogation, Kaupp admitted complicity in the crime.¹⁶⁸

The Texas Court of Appeals upheld the denial of suppression of Kaupp's confession on the ground that he consented to accompany the officers when he said, "Okay"; and, therefore, no arrest had occurred until after the confession.¹⁶⁹ The court observed that "a reasonable person in Kaupp's position would not believe that being put in handcuffs was a significant restriction on his freedom of movement."¹⁷⁰ That conclusion, which should meet anyone's "giggle test," found no favor with any member of the Supreme Court. Emphasizing the facts, the Court stated that "this evidence points to arrest even more starkly than the facts in *Dunaway v. New York*^[171]. . . where the petitioner 'was taken from a neighbor's home to a police car, transported to a police station,

¹⁶⁷ *Id.*

¹⁶⁸ *Kaupp*, 538 U.S. at 629.

¹⁶⁹ *Kaupp v. Texas*, No. 14-00-00128-CR, 2001 WL 619119 (Tex. App. June 7, 2001).

¹⁷⁰ *Id.* at *4.

¹⁷¹ 442 U.S. 200 (1975). In *Dunaway*, the Court held that the treatment of the defendant was indistinguishable from a traditional arrest and must be supported by probable cause. It emphasized that detention for custodial interrogation — regardless of its label — intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the safeguards against illegal arrest.

Id. at 214-16.

and placed in an interrogation room,” and the Court held that the detention was “indistinguishable from a traditional arrest.”¹⁷²

The Court then observed that the record contained no indication that “any substantial time passed between Kaupp’s removal from his home in handcuffs and his confession after only ten to fifteen minutes of interrogation.”¹⁷³ Because giving *Miranda* warnings alone is not sufficient to dissipate the taint of an illegal seizure of the person, the confession must be suppressed, the Court held, unless on remand the state can point to some fact in the record that there had been an intervening event sufficient to dissipate the taint of Kaupp’s unlawful seizure.¹⁷⁴ One can find comfort, despite the egregious nature of the crime, in the Court’s unanimous disapproval of the transparent result-oriented decision of the Texas Court of Appeals. Although I have previously commented negatively on some of the Court’s applications of the “reasonable person” standard in determining that a person has consented to police requests to search or answer questions, it was good to see the Court apply *Dunaway* sensibly.

*Chavez v. Martinez*¹⁷⁵

The case of *Chavez v. Martinez*, although not a criminal prosecution, is a very important “criminal” case because of what it has to say about the Court’s perception of *Miranda v. Arizona*.¹⁷⁶

¹⁷² *Kaupp*, 538 U.S. at 631.

¹⁷³ *Id.* at 633.

¹⁷⁴ *Id.*

¹⁷⁵ 538 U.S. 760 (2003).

¹⁷⁶ 384 U.S. 436 (1966).

Suing under §1983 of the Civil Rights Act, Martinez sought damages for some pretty troublesome treatment at the hands of the police.¹⁷⁷ For the Court, necessarily or not, this case was a mind-bender and, as Professor Schwartz observed in his New York Law Journal column, “it is one of those unfortunate cases in which higher mathematics is necessary to figure out the number of votes for particular issues.”¹⁷⁸ The issue was upon what constitutional provision a person may, or as it turned out, must rely when alleging that the police used coercion to elicit an involuntary confession from him when his incriminating statements were not used against him in a criminal prosecution, and in fact, he was never prosecuted, and the relief he seeks is monetary damages against the police.¹⁷⁹

Justice Thomas wrote the “lead” opinion in which he “announced the judgment of the Court” and delivered an opinion. The Chief Justice joined Thomas’ opinion in its entirety. Justice O’Connor joined Parts I and II-A of Thomas’ opinion. Justice Scalia joined Parts I and II of Thomas’ opinion. Justice Souter delivered an opinion, Part II of which is the opinion of the Court, and Part I of which is an opinion concurring in the judgment. Justice Breyer joined Souter’s opinion in its entirety. Justices Stevens, Kennedy and Ginsburg joined Part II of Souter’s opinion. Justice Stevens dissented, but for the reasons articulated by Justice

¹⁷⁷ *Chavez*, 538 U.S. at 763.

¹⁷⁸ Martin A. Schwartz, *Challenging Coercive Police Interrogations Under § 1983*, 230 N.Y.L.J. 3 (2003).

¹⁷⁹ *Chavez*, 538 U.S. at 772.

Kennedy, he concurred in Part II of Souter's opinion. Justice Kennedy concurred in part and dissented in part, joined by Justice Stevens and by Justice Ginsburg as to Parts II and III of Kennedy's opinion. Some imbroglio!

The bottom line of all of this is that a majority of the Justices agreed that the privilege against self-incrimination does not apply and that substantive due process principles should govern.¹⁸⁰ But, consider this — *the only text joined by a majority of the Court is a single sentence remanding the case for a substantive due process analysis.*¹⁸¹ That being the case, it is not surprising that little guidance as to how that analysis should proceed was provided by the Court.

Martinez was shot five times by police officers during a struggle.¹⁸² As he was being treated in the emergency room, Chavez, a supervisory officer, questioned him about what had precipitated the shooting. Chavez's questioning persisted despite Martinez's repeated pleas that he did not want to answer questions until he received treatment and despite repeated requests by medical personnel that Chavez leave the emergency room.¹⁸³ Martinez made statements indicating that he had taken an officer's gun and aimed it at the police. He was not given *Miranda* warnings before Chavez interrogated him.¹⁸⁴

¹⁸⁰ *Id.* at 773-76.

¹⁸¹ *Id.* at 779.

¹⁸² *Id.* at 764.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 776-77.

Six Justices concluded that the police failure to Mirandize Martinez does not give rise to a § 1983 claim.¹⁸⁵ In a plurality opinion announcing the Court's decision to reverse the Ninth Circuit, Justice Thomas, joined on this issue by Justices Rehnquist, Scalia, and O'Connor, emphasized that the text of the Fifth Amendment privilege against self-incrimination refers to a person being compelled to be a "witness" against himself "in a criminal case."¹⁸⁶ He likened the immunity rule for compelled testimony in civil cases to *Miranda* warnings in that both sets of rules are judge-made prophylactic protections outside the "core" protection of the privilege and that such rules do not extend the scope of the constitutional right they are designed to protect.¹⁸⁷

There are some very troubling aspects to this analysis. First, in *Dickerson v. United States*,¹⁸⁸ decided four years ago, the Court, in an opinion written by Chief Justice Rehnquist, held that the *Miranda* warnings were indeed constitutional requirements in themselves.¹⁸⁹ Yet here, a plurality including the Chief Justice reverts back to "prophylactics" with respect to the privilege. Second, will one other Justice join this plurality to invigorate the "prophylactics" *Miranda* jurisprudence interred in *Dickerson* in deciding the issue of the admissibility of the derivative fruits of *Miranda* violations in cases that will be before the Court in the coming term?

¹⁸⁵ *Id.* at 776.

¹⁸⁶ *Id.* at 772.

¹⁸⁷ *Id.*

¹⁸⁸ 530 U.S. 428 (2000).

¹⁸⁹ *Id.* at 438, 440.

DOUBLE JEOPARDY

*Sattazahn v. Pennsylvania*¹⁹⁰

In *Sattazahn v. Pennsylvania*, by a five-to-four vote, the Court held that neither double jeopardy nor due process principles prevent the imposition of a death sentence on a person who had successfully appealed his first murder conviction for which he had received a life sentence after the initial sentencing jury deadlocked on whether to impose the death sentence.¹⁹¹ After Sattazahn was convicted for murder and other crimes, the jury was deadlocked nine-to-three, with a majority favoring a sentence of life imprisonment.¹⁹² Under Pennsylvania law, the judge was required to sentence Sattazahn to life imprisonment once the jury failed to agree on the appropriate sentence.¹⁹³ Sattazahn appealed and succeeded in getting a reversal because of errors in jury instructions. Pennsylvania retried him and again sought the death penalty.¹⁹⁴ At the second trial, he was again convicted, and this time the jury sentenced him to death.¹⁹⁵

In *Bullington v. Missouri*,¹⁹⁶ the Supreme Court held that a penalty phase jury's rejection of the death penalty in trial-like sentencing proceedings is tantamount to an acquittal of a death

¹⁹⁰ 537 U.S. 101 (2003).

¹⁹¹ *Id.* at 106.

¹⁹² *Id.* at 104-05.

¹⁹³ *Id.* at 104.

¹⁹⁴ *Id.* at 105.

¹⁹⁵ *Sattazahn*, 537 U.S. at 105.

¹⁹⁶ 451 U.S. 430 (1981).

sentence, thus barring the State from again seeking the death penalty. In *Sattazahn*, Justice Scalia, writing for the majority, held that unlike in *Bullington*, a penalty phase jury's inability to reach a unanimous verdict does not constitute an "acquittal on the merits."¹⁹⁷ For double jeopardy purposes, what matters are the findings underlying the judgment.¹⁹⁸ Since the jury was deadlocked on the death penalty in the first trial, it had made no findings.¹⁹⁹ Therefore, reasoned Justice Scalia, the jury has not found that the state failed "to establish legal entitlement to the death sentence."²⁰⁰ Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, argued in dissent 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.²⁰¹

The Court's ruling raises a dilemma for a capital defendant and certainly for his attorney. A person convicted of murder who avoids the death penalty because of a jury deadlock on the issue and a judge's statutorily required imposition of a sentence other than death may be sentenced to death after a second trial. As counsel for such a defendant, do you advise going forward with a possibly meritorious appeal of the conviction and face the possible imposition of a death sentence if there is a conviction at the second

¹⁹⁷ *Sattazahn*, 537 U.S. at 109.

¹⁹⁸ *Id.* at 108.

¹⁹⁹ *Id.* at 109.

²⁰⁰ *Id.* at 108-09.

²⁰¹ *Id.* at 118 (Ginsburg, J. dissenting).

trial? Or do you advise that the appeal should be dropped so that the state never gets a second shot at the death penalty?

In my personal experience as an appellate attorney, prosecutors who have knowingly engaged in egregious trial conduct to secure a conviction have occasionally said to me that by the time I could obtain a reversal, the defendant would have already served a substantial part of his sentence, and that was fine with them. If that is a mind frame held by prosecutors in capital cases under statutes such as Pennsylvania's, just think of the safe harbor that the Court's decision in *Sattazahn* has created for prosecutors who with gusto push the envelope to secure a conviction.

*Price v. Vincent*²⁰²

In *Price v. Vincent*, the stringent requirements of AEDPA defeated the habeas petitioner's claim that his first-degree murder conviction was barred by the Double Jeopardy Clause, a claim that the Sixth Circuit had credited.²⁰³ At the close of the prosecution's case-in-chief, Vincent's lawyer moved for a directed verdict of acquittal as to first-degree murder, arguing that there was insufficient evidence of premeditation and deliberation.²⁰⁴ The trial judge stated that he agreed and "[t]hat what we have at the very best is Second Degree Murder." Before court adjourned, the

²⁰² 538 U.S. 634 (2003).

²⁰³ *Id.* at 636.

²⁰⁴ *Id.* at 637.

prosecutor asked to make a brief statement regarding first-degree murder the following morning, and the judge agreed to hear it.²⁰⁵

When the prosecution made the statement, however, defense counsel objected and argued that the court had granted his motion for a directed verdict as to first-degree murder the previous day and that further prosecution on that charge would constitute double jeopardy.²⁰⁶ The judge responded, “Oh, I granted the motion but I have not directed a verdict.”²⁰⁷ He pointed out that the jury had not been informed of his statements, and subsequently he decided to permit the charge of first-degree murder to be submitted to the jury, which found Vincent guilty of that crime.²⁰⁸

Although the Michigan Court of Appeals held that the judge’s statement constituted a directed verdict and upheld Vincent’s double jeopardy claim,²⁰⁹ the Michigan Supreme Court reversed, noting that “a judge’s characterization of a ruling and the form of the ruling may not be controlling” for purposes of determining whether jeopardy was terminated.²¹⁰ The Sixth Circuit, on habeas review, did not accord any deference to the Michigan Supreme Court’s ruling as to the nature of the judge’s comments.²¹¹ Instead, it concluded that the state trial judge’s actions “constituted a grant of an acquittal on the first-degree

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Price*, 538 U.S. at 637.

²⁰⁸ *Id.*

²⁰⁹ *People v. Vincent*, 546 N.W.2d 662, 667 (Mich. Ct. App. 1996).

²¹⁰ *People v. Vincent*, 565 N.W.2d 629, 630 (Mich. 1997).

²¹¹ *Vincent v. Jones*, 292 F.3d 506 (6th Cir. 2002).

murder charge such that jeopardy attached.”²¹² Writing for a unanimous Court, Chief Justice Rehnquist held that the Sixth Circuit erred in not following the requirement of § 2254(d)(1), as amended by AEDPA, that habeas relief may be granted only if a state court’s decision was “contrary to” or involved “an unreasonable application” of clearly established federal law as determined by the Supreme Court.²¹³

In regard to the “contrary to” prong, Chief Justice Rehnquist observed that the state court had identified and correctly applied the relevant Supreme Court precedents of *United States v. Martin Linen Supply Co.*²¹⁴ and *Smalis v. Pennsylvania*.²¹⁵ Under those decisions, the trial judge’s characterization of his own ruling is not controlling.²¹⁶ The reviewing court must inquire whether his ruling actually represents a resolution of one or more of the factual elements of the charged offense.²¹⁷

As to the “unreasonable application” standard, Rehnquist concluded that the state court had not violated it.²¹⁸ He pointed out that the state court’s examination of the substance of the trial judge’s actions led him to conclude that his statements amounted to thinking aloud, not the rendering of a final decision.²¹⁹ Thus, the

²¹² *Id.* at 512.

²¹³ *Price*, 538 U.S. at 638-39.

²¹⁴ 430 U.S. 564 (1977) (holding that the Double Jeopardy Clause bars a retrial of a case decided by a directed verdict in the court below).

²¹⁵ 467 U.S. 140 (1986) (holding when a trial court grants a demurrer further proceedings on the same issue are barred by the Double Jeopardy Clause).

²¹⁶ *Price*, 538 U.S. at 641-42.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

state court said that even when the docket entry was considered, the comments at issue did not demonstrate “sufficient indicia of finality. . . and they also lacked the ‘requisite degree of clarity and specificity.’”²²⁰ Most importantly, they were never discussed in the jury’s presence; the jury was not discharged; and no trial proceedings took place during the short time that Vincent might have believed he was no longer facing a first-degree murder charge.²²¹

The Chief Justice thus concluded that the state court’s determination that the trial judge’s comments were not sufficiently final to terminate jeopardy “was not an objectively unreasonable application of clearly established law as defined by this Court.”²²² He cited numerous lower court decisions that refused to find a double jeopardy violation on similar facts and stated that “[e]ven if we agreed with the Court of Appeals that the Double Jeopardy Clause should be read to prevent continued prosecution of a defendant under these circumstances, it was at least reasonable for the state court to conclude otherwise.”²²³

The correctness of the Court’s ruling does not seem questionable. As a matter of double jeopardy jurisprudence, the Michigan Supreme Court’s ruling is consistent with Supreme Court precedent. There had been no true acquittal as to the first-degree murder count. The jury had not been involved at all and the

²²⁰ *Id.* (citing *Vincent*, 565 N.W.2d at 636).

²²¹ *Price*, 538 U.S. at 643 (citing *Vincent*, 565 N.W.2d at 663).

²²² *Id.*

²²³ *Id.*

trial judge's reversal of his own statements was not terribly prejudicial to the defendant. That the Supreme Court was unanimous in this application of the AEDPA requirements signifies that it took the case to correct a very errant course embarked upon by the Sixth Circuit.

LEAVING THE GATEWAY AJAR

*Miller-El v. Cockrell*²²⁴

Let me end with a description of a very important ruling involving the manner in which federal courts of appeal must consider applications for certificates of appealability (COAS) by habeas petitioners who have lost in the district courts. In *Miller-El v. Cockrell*, a capital case, Justice Kennedy, in an opinion joined by all members of the Court except Justice Thomas, held that AEDPA's stringent standards for granting habeas merits relief do not apply when a federal court of appeals is considering whether to grant a COA under 28 U.S.C. § 2253.²²⁵ Justice Kennedy also held that AEDPA's standard of clear and convincing evidence for rebutting the presumption of correctness of state court findings of fact applies to COA decisions.²²⁶ Consequently, Justice Kennedy

²²⁴ 537 U.S. 322 (2003).

²²⁵ *Id.* at 335-36. 28 U.S.C. § 2253(a) (2003) states in pertinent part: "In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held."

²²⁶ *Miller-El*, 537 U.S. at 358.

said, the Fifth Circuit erred by denying a COA to a habeas petitioner who claimed that prosecutors had engaged in racial discrimination when they exercised their peremptory challenges in violation of *Batson v. Kentucky*.²²⁷

Under 28 U.S.C. § 2253(c)(2), a petitioner seeking a COA must make “a substantial showing of the denial of a constitutional right.”²²⁸ Justice Kennedy pointed out that in *Slack v. McDaniel*,²²⁹ the Court had said that this standard is met if the petitioner shows that the correctness of the district court’s resolution of the constitutional claim is debatable among jurists of reason.²³⁰ However, he made it clear that the decision to issue a COA calls for “an overview of the claims in the habeas petition and a general assessment of their merits,” but that it does not allow for a “full consideration of the factual or legal bases” of the claims.²³¹ In other words, a petitioner does not have to demonstrate that some judges would ultimately grant the petition.

The Fifth Circuit’s error in this case was that it took too close a look at the merits of the case, as a result of which the petitioner was held to an overly demanding standard.²³² The circuit deferred too much to the state court and thus gave insufficient

²²⁷ *Id.* at 353; *Batson v. Kentucky*, 476 U.S. 79 (1986) (“[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial.”).

²²⁸ § 2253(c)(2).

²²⁹ 529 U.S. 473 (2000).

²³⁰ *Id.* at 478.

²³¹ *Miller-El*, 537 U.S. at 336.

²³² *Id.* at 336-38.

consideration to the petitioner's evidence with regard to his *Batson* claim.²³³ Justice Kennedy stated that the petitioner had introduced considerable evidence on the discrimination claim and pointed out that the prosecution had used peremptories to exclude 91% of the African Americans on the venire, that some of the prosecution's facially race-neutral justifications for its strikes were not applied to white venire members who were not struck, and that there were differences in the ways white and black venire persons were questioned about their views on capital punishment.²³⁴

Although this decision may not have a great impact on habeas litigation, it should be welcomed by anyone who questions the fairness of AEDPA's restrictions on habeas corpus generally or who simply believes that a creditable claim should be considered by more than a single district court judge. The reason that this decision may not be momentous is that the lesser standard for crossing the appellate court's threshold may have little effect on the ultimate decision on the merits. A court, such as the Fifth Circuit in this case, that was disposed to denial of the COA by its application of AEDPA's more stringent merits standard may view the *Miller-El* ruling as requiring nothing more than a postponement of a decision on the merits rejecting the habeas petitioner's claims. On the other hand, the decision allows for a foot in the appellate door, an opening that able counsel can occasionally pry open. In fact, the Court's *Batson* discussion in *Miller-El* itself carries a

²³³ *Id.* at 338.

²³⁴ *Id.* at 326.

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strong suggestion that there is substance to the merits of Miller-El's claim.

CONCLUSION

Every Supreme Court term has its fascinations, some more than others. No term, however, is unimportant, but some have greater impact than others. In both respects, this past term falls on the plus side of the ledger. Although many of the Court's criminal law rulings were fairly predictable, some were not. And, as the term drew to a close, the "surprise" cases, for me, made the term a memorable one. *Lawrence v. Texas*, to paraphrase celebrity chef Emeril LaGasse, certainly "took it up a notch." But cases such as *Wiggins v. Smith* and *Stogner v. California* also were surprising and contributed significantly to the term's intriguing aspects. On the other hand, though not surprising, the Court's rulings upholding the constitutionality of California's three-strikes laws and two sexual registration regimes were very important. The 2003-2004 term, as best I can tell, holds a promise for even greater excitement and, I submit, a few surprises.

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