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*Advanced Criminal Law Course 2005*

*Corpus Christi, Texas*

# Supreme Court Update

## Materials

- Paul M. Rashkind, *United States Supreme Court: Preview—Review—Overview* (May 9, 2005)

*Presented by:*

Henry J. Bemporad  
Deputy Federal Public Defender  
Appellate Chief  
Western District of Texas

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## **HENRY J. BEMPORAD**

Deputy Federal Public Defender, Western District of Texas (chief of appellate section). B.A., University of Texas at Austin; J.D., Stanford University. Former briefing attorney to U.S. District Judge Edward C. Prado (now serving on the U.S. Court of Appeals for the Fifth Circuit). Licensed in Texas, in the U.S. District Court for the Western District of Texas, in the U.S. Court of Appeals for the Fifth Circuit, and in the U.S. Supreme Court. Appellate representative, Training Expert Panel, Defender Services Division, Administrative Office of the U.S. Courts.

Board of Directors, Texas Criminal Defense Lawyers Association. Co-chair, Amicus Committee, National Association of Federal Defenders. Co-author, *An Introduction to Federal Guideline Sentencing* (8th ed. 2004)(with Lucien B. Campbell); *Novel Issues, Futile Issues, and Appellate Advocacy: the Troubling Lessons of Bousley v. United States*, 35 ST. MARY'S L.J. 93 (2003) (with Sarah P. Kelly).



**UNITED STATES SUPREME COURT  
REVIEW - PREVIEW - OVERVIEW**

**CRIMINAL CASES DECIDED DURING THE  
OCTOBER 2004 TERM  
THRU MAY 9, 2005**

**PAUL M. RASHKIND  
CHIEF, APPELLATE DIVISION  
OFFICE OF THE FEDERAL PUBLIC DEFENDER, S.D. FLA.**

**I. *MIRANDA*, THE SIXTH AMENDMENT, AND THE EXCLUSIONARY RULE**

- A. Deliberate Evasion of *Miranda*'s Requirements.** *Missouri v. Seibert*, 124 S. Ct. 2601 (2004). A common law enforcement technique is to interrogate a suspect before *Miranda* warnings are given, obtain the information sought, then *Mirandize* the suspect, and take a full confession. An officer admitted that he questioned Patrice Seibert for 20 minutes, without any *Miranda* warning, about her role in an alleged arson-homicide. He then gave her a 20-minute break for a cigarette and coffee, provided *Miranda* warnings, and resumed the questioning. The Supreme Court held that the *Miranda* two-step violates the Fifth Amendment. Not only is the first statement inadmissible under *Miranda*, but so is the second statement.
- B. Physical Fruits of *Miranda* Violations.** *United States v. Patane*, 124 S. Ct. 2620 (2004). A suspect interrupted police as they advised him of his *Miranda* rights, then complained that a gun discovered as a result of his un-*Mirandized*, yet otherwise voluntary, statement should be suppressed. The Supreme Court held that the "fruit of the poisonous tree" doctrine does not bar the admission of physical evidence discovered based on an un-*Mirandized* interrogation. A three-justice plurality concluded that a failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements; the "core" protection of the Fifth Amendment involves protection against compelled testimony at trial. The plurality noted that it requires the closest possible fit between the Self-Incrimination Clause of the Fifth Amendment and any rule designed to protect it; the failure to give *Miranda* warnings does not by itself violate the Fifth Amendment, which is a fundamental "trial" right. Potential violations occur, if at all, only upon the admission of unwarned statements, and the exclusion of these statements is a sufficient remedy for a *Miranda* violation. The "fruit of the poisonous tree" doctrine, therefore, did not apply. Two other concurring justices, who formed the majority decision, wrote that concerns underlying *Miranda* had to be balanced against other objectives of the criminal justice system. On the facts of this case and in light of the pistol's important probative value, its exclusion could not be justified by a deterrence rationale. Unlike the plurality, however, the concurring justices find it unnecessary to decide whether the detective's failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is "[any]thing to deter" so long as the unwarned statements are not

later introduced at trial. Justice Kennedy was the swing vote in this 5–4 decision and his concurring opinions in *Patane* and *Seibert*, issued the same day, can be read to signify that he (and thus the Court, in light of the 5–4 split in this case) is leaving open the possibility that a deterrence rationale might justify exclusion of some physical evidence in a case of severe, deliberate violation of *Miranda*.

- C. **Interrogation After Right to Counsel Invoked.** *Maryland v. Blake*, 125 S. Ct. \_\_\_ (cert. granted Apr. 18, 2005); decision below at 849 A.2d 410 (Md. 2004). When a police officer communicates with a suspect after invocation of the suspect’s right to counsel, does *Edwards v. Arizona* permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police?

## II. SEARCH & SEIZURE

### A. Residences.

1. **Detaining Occupant Pending Search.** *Muehler v. Mena*, 125 S. Ct. 1465 (2005). Police executing a search warrant at the house of a gang member did not violate the rights of an occupant by detaining her in handcuffs while they searched. Nor did police violate her rights by interrogating her about her immigration status.
2. **Third Party Consent to Search.** *Georgia v. Randolph*, 125 S. Ct. \_\_\_ (cert. granted Apr. 18, 2003); decision below at 604 S.E. 2d 835 (Ga. 2004). Whether an occupant may give law enforcement officers valid consent to search the common areas of the premises shared with another, even though the other occupant is present and objects to the search?

### B. Vehicles.

1. **Vehicle Search Incident to Arrest.** *Thornton v. United States*, 124 S. Ct. 2127 (2004). In an opinion which only four justices joined in its entirety and as to which five justices suggested that a different rule of decision might obtain if additional arguments had been briefed and preserved below, the Supreme Court held that the Fourth Amendment allows a police officer to search the passenger compartment of a vehicle when a recent occupant of the vehicle is approached, after he has left the vehicle, and arrested in proximity to the vehicle. “In all relevant respects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.” The Court noted that *New York v. Belton*, 453 U.S. 454 (1981), held that when a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest. Here, unlike *Belton*, the driver of a vehicle had parked the vehicle and was walking

away from it when he was stopped by police; he was then arrested after a pat-down of his pockets yielded marijuana and crack cocaine. The ensuing search of the vehicle – undertaken while Thornton was handcuffed in the back of the patrol car – uncovered a .9 millimeter handgun under the driver’s seat. The Court rejected the argument that the warrantless search of the vehicle violated the Fourth Amendment under *Belton* because the suspect was not still an occupant of the vehicle when police initiated contact with him. The Court held that the Fourth Amendment should not turn on whether a person “was inside or outside the vehicle at the moment that the officer first initiated contact with him.” The Court recognized that the contraband in a vehicle is not “readily accessible” to a “recent occupant,” but noted the “need for a clear rule, readily understood by police officers.” NOTE: Justice Scalia, in a concurring opinion joined by Justice Ginsburg (and as to which Justice O’Connor – who otherwise concurred in the Court’s opinion – noted she likely would have supported had the issue been more fully briefed and argued), contended that due to the regular fishing-expedition use of the *Belton* exception by police officers, the *Belton* rule should be abandoned in favor of an approach focusing on whether it was “reasonable” for law enforcement to “believe that evidence relevant to the crime of arrest might be found in the vehicle.” Justice Stevens, joined by Justice Souter, dissented, observing that *Thornton*’s expansion of *Belton* risks a “massive broadening of the automobile exception” to the warrant requirement. Justice Stevens further observed that in allowing car searches for “recent” occupants, the Court has left open, and subject to potential litigation, just “how recent is recent, or how close is close” proximity to the vehicle. In total, the five justices who did not join the main opinion in its entirety manifested a willingness to reconsider *Belton* if other arguments going beyond *Thornton*’s point-of-initiation claim were raised.

2. **Sniff During Traffic Stop.** *Illinois v. Caballes*, 125 S. Ct. 834 (2005). Driver was stopped for speeding (6 mph over the limit of 65) on I-80. Trooper called in the license number and registration at a snail’s pace, allowing a canine unit to arrive. The dog alerted on the car’s trunk, which led to a conviction for cannabis trafficking. Illinois Supreme Court overturned the conviction, holding that a permissible canine sniff requires “specific and articulable facts.” The U.S. Supreme Court reversed, holding that police do not violate the Fourth Amendment when they use a drug-detecting dog to locate *illegal* drugs during a concededly legal traffic stop. The majority opinion stresses that its ruling is narrow, in a situation where a dog was used only to check out the exterior of a car stopped for speeding. The narrowness of the holding may leave open the constitutionality of conducting a dog-sniff investigation outside of a home, if that is capable of detecting *legal* activity going on inside the residence.

- C. **Refusing to Disclose Name to Police.** *Hiibel v. Sixth Judicial District Court of Nevada*, 124 S. Ct. 2451 (2004). Nevada statute requires a person to disclose his or

her name in response to a police inquiry based on reasonable suspicion, but it does not require a suspect to give the officer a driver's license or any other document. The defendant refused to identify himself when a police officer approached him in response to a report about a man assaulting a woman. He was convicted of refusing to identify himself. The Supreme Court held that refusing to identify oneself to a police officer during an investigation of a reported assault is not protected from prosecution by the Fourth or Fifth Amendments. The Nevada law was not vague and did not give unfettered discretion to police. Questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops, particularly in domestic disputes. The Court added that an officer may not arrest suspects for failure to identify themselves if the request for identification is not reasonably related to the circumstances justifying the stop. The Court also rejected a Fifth Amendment challenge to the conviction, holding that the disclosure of a name was not incriminating. But the Court acknowledged that a different rule might apply in a case in which furnishing identity at the time of a stop would give police a link in the chain of evidence needed to convict the individual of a separate offense.

- D. Basis for Arrest.** *Devenpeck v. Alford*, 125 S. Ct. 588 (2004). After being pulled over by police, Devenpeck tape recorded the traffic stop, for which he was arrested without a warrant for allegedly violating the state's Privacy Act. There is no such crime and he later filed a § 1983 civil rights action. In defense of the civil claim, the officers claimed that they actually had probable cause to arrest for a separate offense, impersonating an officer, so the traffic stop and subsequent arrest were reasonable. The Supreme Court held that a warrantless arrest by a police officer is reasonable even if the offense establishing probable cause is not "closely related" to the conduct the arresting officer gives the defendant as the reason for the arrest at the time of arrest. Under *Whren v. United States*, 517 U.S. 806 (1996), an arresting officer's subjective reason for making an arrest is irrelevant to probable cause. What matters is whether, given the facts known to the officer, there is probable cause to believe that a crime has been or is being committed. The Court noted that a "closely related offense" test for probable cause would have the perverse effect of causing officers to cease giving reasons for arrest, or to cite every conceivable reason for the arrest.

### III. CRIMES

- A. Firearms Offenses Based on Foreign Convictions.** *Small v. United States*, 125 S. Ct. \_\_\_ (Apr. 26, 2005). Title 18 U.S.C. § 922(g)(1) makes it unlawful "... for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year: ... to possess in or affecting commerce, any firearm." Petitioner's only conviction occurred in Okinawa, Japan, and it was this Japanese conviction that served as the predicate felony in this § 922(g)(1) prosecution. Petitioner filed a motion to dismiss the indictment arguing that foreign felonies were not intended to count as the term "in any court" means any court in the United States. The motion was denied and the Third Circuit affirmed. The Supreme Court reversed, holding that a foreign conviction, unlike a domestic conviction, does not disqualify a person from possessing a firearm under federal law.

- B. Wire Fraud and Foreign Tax Evasion.** *Pasquantino v. United States*, 125 S. Ct. \_\_\_ (Apr. 26, 2005). Defendants smuggled liquor from the U.S. to Canada to avoid higher taxes in Canada. They were subsequently convicted in U.S. court under the federal wire fraud statute. The Fourth Circuit initially reversed the convictions under the common law “revenue rule” (U.S. courts are not bound to enforce foreign judgments for taxes, fines or penalties) but the *en banc* court of appeals affirmed the convictions. Supreme Court affirmed, holding that a plot by persons in the United States to defraud a foreign government of tax revenue may be prosecuted under the federal wire fraud law.
- C. Overt Acts in Money Laundering Conspiracies.** *Whitfield v. United States*, 125 S. Ct. \_\_\_ (Jan 11, 2005). Conspiracy to engage in money laundering, in violation of 18 U.S.C. § 1956(h), does not require proof of an overt act in furtherance of the illegal agreement.
- D. Child Online Protection Act.** *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004). The Court affirmed a five-year-old temporary injunction against enforcement of the Child Online Protection Act, 47 U.S.C. § 231, which, among other things, imposes a fine and imprisonment for knowingly posting, for “commercial purposes,” World Wide Web content that is “harmful to minors.” The temporary injunction is appropriate because the law likely violates the First Amendment and is not the least restrictive alternative to control the offending conduct. The Court remanded the case for continuing proceedings on the merits of the case, including developments in Internet technology and less restrictive legal alternatives.
- E. Medicinal Marijuana and Federalism.** *Ashcroft v. Raich*, 124 S. Ct. 2909 (cert. granted June 28, 2004); decision below at 352 F.3d 1222 (9th Cir. 2003). Does the federal Controlled Substances Act, insofar as it applies to intrastate cultivation, free distribution, and possession of marijuana for personal medicinal use, exceed Congress’s authority under the Commerce Clause?
- F. Assisted Suicide as Federal Crimes.** *Gonzales v. Oregon*, 125 S. Ct. \_\_\_ (cert. granted Feb. 22, 2005); decision below at 368 F.3d 1118 (9th Cir. 2004). The Court will review whether physicians who prescribe or administer drugs that accelerate the death of terminally ill patients in conformity with Oregon’s physician assisted suicide law may nevertheless be prosecuted federally under the federal Controlled Substances Act.

#### IV. TRIAL

- A. Vacating Plea Due to Inadequate Guilty Plea Colloquy.** *United States v. Dominguez Benitez*, 125 S. Ct. 2333 (2004). Defendant pleaded guilty to a mandatory minimum drug offense in accordance with a written plea agreement, which provided for significant prosecution sentencing recommendations, including safety valve,

acceptance of responsibility, and low end of the guideline range. The written plea agreement stated that the defendant could not withdraw the guilty plea if the district court did not accept the recommended sentence. Once probation worked its magic with a PSI, two previously unknown prior convictions appeared, disqualifying the defendant from the benefit of the safety valve and a sentence below the mandatory minimum. He was sentenced to the higher sentence, but never sought to withdraw his plea. On appeal, he argued as plain error that the district judge never orally advised him that he could not withdraw his plea (as the written plea agreement recited). The Ninth Circuit found the trial judge's omission to be plain error and reversed the sentence. The Supreme Court reversed, holding that to obtain appellate relief for an unpreserved, nonconstitutional violation of a Federal Rule of Criminal Procedure 11 plea colloquy requirement, a defendant must show a reasonable probability that he or she would not have pleaded guilty in the absence of the Rule 11 violation. In the event of a constitutional error in the guilty plea context, however, a conviction will not be "saved even by overwhelming evidence that the defendant would have pleaded guilty regardless."

**B. *Batson* Challenges**

1. **Burden of Proof for *Batson* Challenges.** *Johnson v. California*, 125 S. Ct. 824 (cert. granted Jan. 7, 2005); decision below unreported. In order to establish a *prima facie* case under *Batson v. Kentucky*, 476 U.S. 79 (1986), must the objector show that it is more likely than not the other party's unexplained peremptory challenges were based on impermissible group bias?
2. **Long Term Invidious Discrimination.** *Miller-El v. Dretke*, 124 S. Ct. 2908 (cert. granted June 28, 2004); decision below at 361 F.3d 849 (5th Cir. 2004). The Fifth Circuit reinstated its rejection of claims that the prosecution had purposely excluded African Americans from a capital jury in violation of *Batson v. Kentucky*, after the Supreme Court had already reversed and remanded that decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Supreme Court again granted certiorari to determine if the court of appeals' remand decision contravenes the Court's decision and its analysis of evidence of invidious discrimination in jury selection.

- C. Shackling Defendant During Trial.** *Deck v. Missouri*, 125 S. Ct. 360 (cert. granted, Oct. 18, 2004); decision below at 136 S.W. 3d 481 (Mo. 2004). Are the Fifth, Sixth, Eighth, and Fourteenth Amendments violated by forcing a capital defendant to proceed through penalty phase while shackled and handcuffed to a belly chain in full view of the jury, and if so, doesn't the burden fall on the state to show that the error was harmless beyond a reasonable doubt, rather than on the defendant to show that he was prejudiced?

- D. Jury Instructions in Federal Witness Tampering Prosecution.** *Arthur Andersen LLP v. United States*, 125 S. Ct. 823 (cert. granted Jan. 7, 2005); decision below at 374 F.3d 281 (5th Cir. 2004). The accounting firm Arthur Andersen was convicted

of witness tampering under 18 U.S.C. § 1512(b), based on mass destruction of records by its employees, with intent to impair an SEC investigation. The trial court's jury instructions on the meaning of the elements "corruptly," "official proceeding," and requisite knowledge were challenged on appeal in the Fifth Circuit, which upheld the instructions or, alternately, found harmless error. The Supreme Court granted cert to determine if the conviction must be reversed because the jury instructions upheld by the court of appeals misinterpreted the elements of the offense, in conflict with decisions of the Supreme Court and the courts of appeals for the First, Third, and D.C. Circuits.

## V. DOUBLE JEOPARDY

- A. **Vacillating Judicial Acquittals.** *Smith v. Massachusetts*, 125 S. Ct. 1536 (2005). Double Jeopardy principles bar a trial judge, after granting a motion finding insufficient evidence supported a gun count against a defendant when the prosecution rested its case, to change his mind and reconsider the issue after the defense rested. The Court noted that the trial judge's ruling on the defense motion regarding the insufficiency of the evidence was in effect an acquittal. The ruling resolved some of the factual elements of the offense charged. And even if the jury was the primary factfinder in the case, the trial judge still resolves factual issues when ruling on a motion for judgment of acquittal. The Court found that the acquittal triggered Double Jeopardy protection. First, the prosecution, after the ruling, did not make or reserve a motion for reconsideration, or seek a continuance. Further, the Massachusetts rules of procedure did not authorize the trial court to defer ruling on the motion. In addition, a defendant is prejudiced when the trial continues and he labors under the mistaken impression that he does not face a risk of conviction as to a certain count. This mistaken impression could lead the defendant to present inadvisable defenses, for example, admitting guilt on the acquitted count. It could also impact how co-defendants present their defense. The Court explained: "The Double Jeopardy Clause's guarantee cannot be allowed to become a potential snare for those who reasonably rely upon it. If, after a facially unqualified midtrial dismissal of one count, the trial has proceeded to the defendant's introduction of evidence, the acquittal must be treated as final, unless the availability of reconsideration has been plainly established by pre-existing rule or case authority." In an unusual alignment of the justices, the four dissenters (Ginsburg, J., joined by Rehnquist, C.J., Kennedy and Breyer, JJ.) found that the defendant suffered no prejudice in this case when the judge reconsidered his ruling, but the majority opinion (Scalia, J., joined by Stevens, O'Connor, Souther and Thomas, JJ.) responded that "requiring someone to defend against a charge of which he has already been acquitted is prejudice per se for purposes of the Double Jeopardy Clause - even when the acquittal was erroneous."

## VI. SENTENCING

- A. **Application of *Apprendi* to Sentencing Guidelines.** *Blakely v. Washington*, 124 S. Ct. 2531 (2004). The defendant pleaded guilty to kidnaping his wife and son. Based on facts admitted in his guilty plea, the crime was punishable by up to 10 years

imprisonment, but under the Washington State sentencing guidelines, the maximum sentence was 53 months. At sentencing, he received an “exceptional sentence” based on aggravating facts of deliberate cruelty and commission of a domestic violence offense before a child, which increased his sentence from a state sentencing guideline maximum of 53 months to 90 months. A 5-4 Supreme Court held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies to Washington State sentencing guidelines and, for purposes of *Apprendi*, the statutory maximum is the guidelines maximum sentence, not the general statutory maximum. Thus, the unenhanced maximum statutory sentence was exceeded by 37 months, in violation of *Apprendi*, which held “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Because the facts supporting Blakely’s exceptional sentence were neither admitted by him nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury. Although the majority decision notes that the decision does not rule on the application of *Apprendi* to the federal sentencing guidelines, efforts to distinguish the Washington state guidelines from the federal sentencing guidelines are unconvincing to many of the dissenting justices, who predict the majority’s ruling will undo the federal sentencing scheme now in place. Not discussed in *Blakely* is the Fifth Amendment indictment clause, since *Blakely* is a state case, and the constitutional entitlement to indictment does not apply to the states. Yet, it appears that in the federal context, *Apprendi* requires an indictment including the aggravating facts, not simply proof of the facts. A cautionary note for practitioners: The Court made clear that *Apprendi/Blakely* rights can be waived.

- B. Due Process Under Federal Sentencing Guidelines.** *United States v. Booker & Fanfan*, 125 S. Ct. 738 (2005). In a fragmented decision, two separate 5-4 majorities of the Court held (1) the Sixth Amendment as construed in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), applies to the federal sentencing guidelines, but (2) superimposing those constitutional rights onto the present federal sentencing guidelines scheme is contrary to the Court’s view of congressional intent in adopting the Sentencing Reform Act of 1984. The “remedies” majority therefore severed and excised two sections of the statute, the provision that makes the guidelines mandatory, 18 U.S.C. §§ 3553(b)(1), and the provision governing appellate review of sentences, including *de novo* review of departures from the applicable guideline range. Consequently, the guidelines are no longer binding on federal sentencing courts and sentences will be reviewed on appeal for “unreasonableness.”
- C. Retroactivity of *Ring*.** *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004). *Ring v. Arizona*, 536 U.S. 584 (2002) (applying *Apprendi* to capital sentencing proceedings; the existence of an aggravating factor must be proved to a jury rather than simply a judge) does not apply retroactively. Retroactive application is necessary only for new “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” A five-justice majority found that *Ring* did not involve such a rule. It did not alter the range of conduct or the class of persons subject to the death penalty, but only the method of determining whether the

defendant engaged in that conduct. Judicial fact finding, moreover, while now unconstitutional under *Ring*, did not seriously diminish the accuracy the death sentence determinations since the judge and jury used the same standard of proof for applying the enhanced sentence (beyond a reasonable doubt). This does not necessarily answer the retroactivity question as it relates to *Blakely* or to *Booker* – Justice O’Connor’s dissent in *Blakely* contends that despite *Schriro* collateral relief may be available under *Blakely* for all guideline-sentenced defendants who were sentenced after the June 2000 *Apprendi* decision. In addition, *Schriro* might not apply to *Blakely/Booker part 1* claims because in *Schriro*, the judge and jury used the same “beyond a reasonable doubt” standard of proof for applying the enhanced sentence, but under the federal sentencing guidelines, the judge enhances a sentence based on the less demanding preponderance of evidence standard. This lower standard does diminish the accuracy of the sentence, distinguishing *Schriro* as precedent as applied to *Blakely* and *Booker part 1*.

- D. Armed Career Criminal Sentencing.** *Shepard v. United States*, 125 S. Ct. 1254 (2005). The Armed Career Criminal Act, 18 U.S.C. § 924(e), imposes a mandatory minimum prison sentence of 15 years for a person convicted of being a felon in possession of a firearm where that person has previously been convicted of three violent felonies or serious drug offenses or both. In some states, statutory offenses may be generic or non-generic, as in the case the Massachusetts burglary statute, so not all violations of the statute will necessarily qualify as crimes of violence for ACCA purposes. In applying this rule to the generic crime of burglary, which is not always a violent felony, *United States v. Taylor*, 495 U.S. 575 (1990), held that a sentencing court should employ a categorical approach to determine whether a defendant’s prior convictions qualify as predicates for this sentence enhancement, looking only to the fact of conviction and the elements of the statute of conviction, or to the charging document and the jury instructions. The present case applies the *Taylor* rule in guilty plea cases, holding that a sentencing court may not resort to non-judicial records, such as police reports, to establish a predicate felony under the federal Armed Career Criminal Act. In a case in which the proposed prior predicate offense was decided by guilty plea, the government urged the district court to ascertain if it qualified as an ACCA predicate offense by relying on facts found not only in the indictment, guilty plea and plea colloquy, but also facts set forth in police reports generated at the time of the defendant’s arrest for the prior felony. The Supreme Court rejected this suggestion, in particular because police reports are written well before the guilty plea and, unless their content is admitted by the defendant during the guilty plea, they are not proof of the basis of the plea. More interesting, perhaps, is the concurrence of Justice Thomas, who repeats his concurrence in *Apprendi v. New Jersey*, 530 U.S. 466, 487-90 (2002), in which he calls into question the continuing viability of *Apprendi*’s exception for prior convictions. By his count, a majority of Supreme Court justices now reject *Almendarez-Torres v. United States*, 523 U. S. 224 (1998), on which the *Apprendi* exception relies, and, for him, this case is more properly decided by now overruling *Almendarez-Torres* and prohibiting judicial factfinding that concerns a defendant’s prior convictions.

## VII. DEATH PENALTY

- A. Juveniles: Cruel and Unusual Punishment.** *Roper v. Simmons*, 125 S. Ct. 1183 (2005). The Supreme Court re-examined the shifting history, tradition and precedent interpreting the Eighth Amendment’s prohibition of “cruel and unusual punishment” to decide if juveniles who commit murder may be subject to the death penalty. One of those shifts involved the Court’s recent decision in *Atkins v. Virginia*, 536 U. S. 304 (2002), banning imposition of the death penalty on mentally retarded persons, a reversal of prior precedent. In light of those shifting considerations, the Court receded from its previous holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989) (death penalty may be applied to juvenile murderers), and held that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.
- B. Review of Special Circumstances.** *Brown v. Sanders*, 125 S. Ct. 1700 (cert. granted Mar. 28, 2005); decision below at 373 F.3d 1054 (9th Cir. 2004). Is the California death penalty statute a “weighing statute” for which the state court is required to determine that the presence of an invalid special circumstance was harmless beyond a reasonable doubt as to the jury’s determination of penalty? If precedent dictates that the answer is “yes,” was it necessary for the state supreme court to specifically use the phrases “harmless error” or “reasonable doubt” in determining that there was no “reasonable possibility” that the invalid special circumstance affected the jury’s sentence selection?
- C. Refusal to Give Mitigation Instructions.** *Tennard v. Dretke*, 124 S. Ct. 2562 (2004). Trial court refused to give mitigation instruction on evidence that defendant was disadvantaged or has emotional or mental problems. Fifth Circuit refused to grant a certificate of appealability, holding that failure to give special instruction on such mitigating circumstances did not constitute constitutional error in death phase. Finding that the court of appeals merely paid “lip service to the principles guiding issuance of a COA,” the Supreme Court reversed the denial, holding that a certificate of appealability should have issued to a habeas petitioner who challenged Texas’s failure to properly account for his evidence of low intelligence when imposing the death penalty.
- D. Nullification Instruction.** *Smith v. Texas*, 125 S. Ct. 400 (2004) (per curiam). A supplemental “nullification” instruction at a capital sentencing which directed the jury to give effect to mitigation evidence, but allowed the jury to do so only by negating what would otherwise be affirmative responses to two special issues relating to deliberateness and future dangerousness, was invalid under the Supreme Court’s interpretation of the Eighth Amendment in *Penry v. Johnson*, 532 U.S. 782 (2001). In *Penry*, the Court had held a similar instruction constitutionally invalid because it did not allow the jury to give full consideration and full effect to mitigating circumstances. The Court noted slight differences in language between the instruction at issue in *Smith* and in *Penry* but found that these differences lacked constitutional

significance. The Court pointed out that in both cases the jury verdict form made no mention whatsoever of mitigation evidence.

- E. **Retroactivity of *Mills v. Maryland*.** *Beard v. Banks*, 124 S. Ct. 2054 (2004). *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v. North Carolina*, 494 U.S. 433 (1990), which held that a state cannot require juries to unanimously agree on mitigating factors in death sentencing proceedings, do not apply retroactively.
  
- F. **Ineffectiveness of Death Phase Counsel and Failure to Instruct Jury on Life Sentence Option.** *Rompilla v. Beard*, 125 S. Ct. 27 (cert. granted Sept. 28, 2004); reported below at 355 F.3d 233, reh'g denied, 359 F.3d 310 (3d Cir. 2004). At the defendant's state death penalty trial, counsel failed to obtain his school, medical, court and prison records as part of their investigation and, as a result, failed to present to the jury any mitigating evidence regarding his "childhood, alcoholism, mental retardation, or possible organic brain damage." Counsel also failed to communicate with two of the defendant's siblings who lived nearby and would have advised counsel of evidence that the defendant was raised by alcoholic parents in a cold, violent, frightening and abusive home. Question (1): Whether the Pennsylvania Supreme Court's determination that this was not ineffective assistance of counsel is an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984) and *Wiggins v. Smith*, 539 U.S. 510 (2003). In addition, the trial judge failed to advise the jury as to the meaning of a life sentence in Pennsylvania, notwithstanding the jury's questions on that issue on three different occasions during its sentencing deliberations. Question (2): Whether the Pennsylvania Supreme Court's rulings on the latter issue is an unreasonable application of *Simmons v. South Carolina*, 512 U.S. 154 (1994) and *Kelly v. South Carolina*, 534 U.S. 246 (2002).

## VIII. APPEALS

- A. **Standing of Lawyers to Challenge Denial of Counsel on Appeal.** *Kowalski v. Tesmer*, 125 S. Ct. 563 (2004). In a challenge to Michigan's refusal to appoint counsel for appeal in guilty-plea cases, the Supreme Court held that attorneys lack third-party standing to assert the rights of criminal defendants who have been denied appellate rights after pleading guilty. But, as indicated below, the Court quickly added to its docket a similar case without standing problems.
  
- B. **Denial of Court-Appointed Counsel on Appeal.** *Halbert v. Michigan*, 125 S. Ct. \_\_\_\_ (cert. granted Jan. 7, 2005); decision below unreported. Addressing the unanswered constitutional questions in *Kowalski*, review has been granted to determine if Michigan's law and practice of not appointing counsel to indigent defendants convicted by guilty plea violates the Fourteenth Amendment right to due process. *Halbert* presents an additional question: Is he entitled to resentencing because his counsel failed to render effective assistance by not objecting to improper scoring under Michigan's sentencing guidelines, resulting in a considerably longer sentence?

## IX. PRISONER'S AND FELON'S RIGHTS

- A. Prisoner security classifications.** *Johnson v. California*, 125 S. Ct. 1141 (2005). The California Department of Corrections has an unwritten policy of racially segregating prisoners in double cells for up to 60 days each time they enter a new correctional facility, based on the asserted rationale that it prevents violence caused by racial gangs. Johnson, an African-American inmate who has been intermittently double-celled under the policy's terms ever since his 1987 incarceration, filed suit alleging that the policy violates his Fourteenth Amendment right to equal protection. The Supreme Court decided that the "strict scrutiny" test applies to this claim because the racial classification is "immediately suspect." The Court refused to allow an exception for the uniqueness of a prison setting, in particular because the federal government and other states regulate prison violence without resort to California's policy of racial segregation. The Court did not decide the ultimate equal protection issue, remanding decision of that question to the Ninth Circuit.
- B. Immigration: DUI as an Aggravated Felony.** *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004). The court of appeals interpreted 18 U.S.C. § 16 to include DUI with serious bodily injury as a "crime of violence"— and therefore an "aggravated felony" as defined under § 101(a)(43)(F) of the Immigration and Nationality Act – although the statute under which petitioner was convicted required nothing more than negligence for conviction. The Supreme Court reversed, holding that, in the absence of a mens rea of at least recklessness with respect to the active application of force against another, DUI with serious bodily injury is not a "crime of violence" under 18 U.S.C. § 16, and is therefore not an "aggravated felony" under § 101 of the INA. Therefore, even though Leocal's DUI caused serious bodily injury, his conviction under Florida law is not a deportable offense.
- C. Removal Without Home Country's Consent.** *Jama v. ICE*, 125 S. Ct. 694 (2005). A foreign country's inability to consent in advance to an alien's removal under U.S. immigration law does not preclude removal to the alien's country of birth.
- D. Detention of Inadmissible Aliens.** *Clark v. Suarez Martinez*, 125 S. Ct. 716 (2005). The holding of *Zadvydas v. Davis*, 533 U.S. 688 (2001), that the Immigration and Nationality Act limits the time that government may detain aliens who have been found removable to that reasonably necessary to effect removal, also applies to aliens deemed inadmissible to United States. The reasonable period of time is presumptively six months for each of these two categories of aliens and, since that time period was exceeded here, the aliens were entitled to release.

## X. COLLATERAL RELIEF: HABEAS CORPUS, §§ 2254 AND 2255

### A. Enemy Combatants.

- 1. Federal Court Jurisdiction: Foreign Nationals Detained at U.S. Prison Outside the United States.** *Rasul v. Bush*, 124 S. Ct. 2686 (2004). The

federal courts have jurisdiction to entertain habeas corpus proceedings to test the legality of the detention of foreign nationals captured abroad and detained at the U.S. Navy prison at Guantanamo Bay, Cuba, as a result of the hostilities in Afghanistan.

2. **U.S. Citizens Detained in the United States.** *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). Due process requires that a U.S. citizen detained for fighting against the United States in Afghanistan be given a meaningful opportunity to contest the factual basis for his detention in a proceeding before a neutral decision maker. “[A] state of war is not a blank check for the president when it comes to the rights of the nation’s citizens.”

3. **Presidential Authority to Seize U.S. Citizen: Venue.** *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). The federal district court in New York did not have jurisdiction to entertain habeas corpus proceedings to test the legality of the terrorism-related detention of a U.S. citizen at the U.S. Naval Brig in South Carolina. The petitioner could not merely name the Secretary of Defense as respondent, since he is not the immediate custodian of his person. Padilla may refile in the proper venue against the proper custodian.

**B. Challenging Parole Procedures.** *Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005). State prisoners may bring a section 1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures; they need not seek relief exclusively under the federal habeas corpus statutes.

**C. Requisite Cautionary Advice to Pro Se Petitioners.** *Pliler v. Ford*, 124 S. Ct. 2441 (2004). The Supreme Court rejected a rule requiring district courts to warn pro se habeas litigants of the AEDPA statute-of-limitations dangers of voluntarily dismissing a timely petition. It nevertheless remanded to the court of appeals to determine whether the limitations period should be deemed equitably tolled where the petitioner claimed he was affirmatively misled by the district court’s choice of options in dealing with a partially unexhausted habeas petition.

**D. Timeliness of Filing Federal Petition.**

1. **AEDPA Statute of Limitations.** *Pace v. DiGuGlielmo*, 125 S. Ct. \_\_\_\_ (Apr. 27, 2005). The time for a state prisoner to file a federal habeas petition is not tolled while an improperly filed petition is pending in state court, which is ultimately rejected by the state court as untimely. Due to the defendant’s delay in bringing the state petition, he is not entitled to equitable tolling.

2. **Commencement of Limitations Period.** *Dodd v. United States*, 125 S. Ct. 607 (cert. granted Nov. 29, 2004); decision below at 365 F.3d 1273 (11th Cir. 2004). Does the one-year limitations period in 28 U.S.C. § 2255 ¶ 6(3) begin to run (i) when either the Court or the controlling circuit court has held that the relevant right applies retroactively to cases on collateral review (as the

Third, Fourth, Sixth, Seventh, and Ninth Circuits hold), or instead (ii) when the Court recognizes a new right, whether or not it is made retroactively applicable to cases on collateral review (as the Fifth and Eleventh Circuits hold, and the Second and Eighth Circuits have stated in dicta)? Or perhaps, as several justices suggested at oral argument, may only the Court itself determine retroactivity and the date runs from then.

**3. Timeliness of Amendment to Petition.** *Mayle v. Felix*, 125 S. Ct. 824 (cert. granted Jan 7, 2005); decision below at 379 F.3d 612 (9th Cir. 2004). Ninth Circuit held that the relation-back provision of Fed. R. Civ. P. 15(c)(2) applies in a habeas corpus proceeding, allowing amendment of a habeas petition when the new claim “arose out of the conduct, transaction, or occurrence” set out in the original pleading. To this end, the court of appeals held that an amendment filed after AEDPA’s one-year statute of limitations has expired is nevertheless timely under the relation-back doctrine so long as the new claim stems from the prisoner’s trial, conviction, or sentence -- claims resulting from the time of arrest and other claims resulting from the time of trial all stem from the same transaction, trial, since the time-of-arrest evidence is admitted at the trial. The Supreme Court granted the state’s petition for certiorari to determine if Rule 15(c)(2) can be applied in this way to avoid the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1).

**4. Petition Following Vacatur of State Conviction Used for Enhancement of Federal Sentence.** *Johnson v. United States*, 125 S. Ct. 1571 (2005). Federal defendant’s career offender sentence was based on three prior state convictions. After federal sentencing, he successfully petitioned state court to set aside a prior conviction. He then filed a § 2255 petition in federal court to have his federal sentence corrected, without an enhancement based on the vacated state conviction. The Eleventh Circuit held that the petition was untimely because vacatur is not a “fact” about which the defendant was unaware, under § 2255 ¶ 6(4), so the time for filing his petition was not tolled under AEDPA. Rather, the court of appeals held, it is “a court action obtained at the behest of the defendant.” The Supreme Court held that a federal defendant who successfully challenges an earlier conviction that served to enhance the present sentence has a year after the set-aside to file a 2255 petition to have his present federal sentence reduced commensurately, but the defendant must diligently attack the prior sentence promptly, as soon as it is clear that it might affect the federal sentence.

**E. Viability of Rule 60(b)(6) Post-AEDPA.** *Gonzalez v. Crosby*, 125 S. Ct. 961 (cert. granted Jan 14, 2005); decision below at 366 F.3d 1253 (11th Cir. 2004) (en banc). Gonzalez’s habeas corpus proceeding was erroneously dismissed as untimely due to the district court’s miscalculation of AEDPA’s statute of limitations. The Eleventh Circuit denied a certificate of appealability, but after the appeal process ended, the U.S. Supreme Court decided *Artuz v. Bennett*, 531 U.S. 4 (2004), correcting the

lower courts' erroneous computation of the limitations period. Gonzalez filed a motion under Fed. R. Civ. P. 60(b)(6) to reopen his habeas proceeding due to the intervening change in law. The district court ruled that it lacked jurisdiction to entertain the 60(b) motion, a ruling that was affirmed by the *en banc* court of appeals. The Supreme Court granted cert to decide if the court of appeals erred in holding that every Rule 60(b) motion in a habeas corpus case (other than for fraud under (b)(3)) is barred by AEDPA as constituting a prohibited "second or successive" petition.

**F. Appellate Court's Authority to Withdraw Opinion.** *Bell v. Thompson*, 125 S. Ct. 823 (cert. granted Jan. 7, 2005); decision below at 373 F.3d 688 (6th Cir. 2004). Did the Sixth Circuit abuse its discretion by withdrawing its opinion affirming the denial of habeas corpus relief six months after Fed. R. App. P. 41(d)(2)(D) made issuance of the mandate mandatory, without notice to the parties or any finding that the court's action was necessary to prevent a miscarriage of justice, particularly where state judicial proceedings to enforce the inmate's death sentence had progressed in reliance upon the finality of the judgment in the federal habeas proceedings?

**G. Procedural Default.**

- 1. Exhaustion of Remedies.** *Howell v. Mississippi*, 125 S. Ct. 856 (2005) (per curiam). Petitioner contended in federal habeas proceedings that the Mississippi courts violated his rights under the Eighth and Fourteenth Amendments by refusing to require a jury instruction about a lesser included offense in his capital case. He did not, however, raise this claim in the Supreme Court of Mississippi, and that court never addressed the issue. After oral argument, the U.S. Supreme Court dismissed cert as improvidently granted due to petitioner's failure to exhaust remedies in the state supreme court.
- 2. Stay and Abeyance Pending Exhaustion.** *Rhines v. Weber*, 125 S. Ct. 1528 (2005). To accommodate AEDPA's statute of limitations, the Court approved of limited "stay and abeyance" orders while habeas petitioners exhaust mixed petitions (receding from *Rose v. Lundy*, which required dismissal of mixed petitions). Stay and abeyance is not automatic, but is limited to cases in which (1) there is good cause for not exhausting sooner, (2) underlying grounds of facial merit exist, and (3) there have been no dilatory tactics by the petitioner.
- 3. Application of Actual Innocence Exception to Procedural Default for Noncapital Sentencing Issues.** *Dretke v. Haley*, 124 S. Ct. 1847 (2004). The defendant was sentenced under Texas's habitual offender statute requiring jury consideration of the nature, number, and timing of the priors. After sentencing, it was discovered that the jury's habitual offender verdict was unfounded; due to the timing of his prior convictions, the defendant did not qualify as a habitual offender. State courts denied efforts to correct the sentence in postconviction proceedings, finding that the claim was defaulted because it was not raised at sentencing or on direct appeal, and rejected

ineffective assistance of counsel claims. The defendant then filed a federal habeas petition, alleging that the evidence was insufficient to sustain his habitual offender sentence, and that his counsel was ineffective for failing to so argue at sentencing. The lower federal courts excused procedural default on grounds of “actual innocence” of the noncapital habitual offender sentence. Reversing, the Supreme Court held that it need not decide whether the “actual innocence” exception for procedurally defaulted habeas claims extends to noncapital sentencing error, because this exception should only be reached by federal courts where no other “cause and prejudice” can excuse a procedural default. The Supreme Court pointed out that a habeas petitioner’s alternative claims must first be considered before the actual innocence exception is invoked. Here, the defendant had a viable ineffective assistance of counsel claim and the state conceded it would not interpose a procedural claim to bar its consideration. Success on the merits of this claim would give the defendant all the relief he seeks – a resentencing – and would provide cause to excuse the procedural default. Further, the defendant would remain released from the sentence during consideration of this claim, thereby reducing the prejudice to him of the remand. The Court noted that the issue it was avoiding – whether actual innocence claims apply to noncapital sentencing issues, and whether the due process beyond-a-reasonable-doubt standard applied to recidivist enhancements (so as to trigger the constitutional violation standard of habeas law) – presented difficult questions, which further counseled restraint. [NOTE: The dissent asserted that in a clear case of manifest injustice such as this, the formality of remand to consider alternate claims was not appropriate. The three dissenters further noted (with varying degrees of emphasis) that some could question whether the Texas state authorities in this case were fulfilling their obligation to do justice, not merely seek punishment.]

## **H. Standards for Relief.**

- 1. Lawyer’s Strategy to Concede Guilt.** *Florida v. Nixon*, 125 S. Ct. 551 (2004). Defense counsel’s failure to obtain the defendant’s express consent to a strategy of conceding guilt at the guilt phase of a capital trial did not automatically render counsel’s performance deficient.
- 2. Unreasonable Application of Federal Law.**
  - a.** *Middleton v. McNeil*, 124 S. Ct. 1830 (2004). The California Supreme Court did not unreasonably apply established federal law when it declined to reverse a murder conviction on the ground that there were four erroneous words in an otherwise correct jury instruction on the definition of the “imperfect self-defense” theory of voluntary manslaughter.
  - b.** *Brown v. Payton*, 125 S. Ct. \_\_\_\_ (Mar. 22, 2005). In *Boyde v.*

*California*, 494 U.S. 370 (1990), the Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, which directs a jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The mitigating evidence at issue in *Boyde* was precrime evidence in mitigation. Relying on *Boyde*, the California Supreme Court held that California's "catch-all" mitigation instruction in this capital case is constitutional as applied to post-crime evidence in mitigation. In a 6-5 decision, the en banc Ninth Circuit held that the California Supreme Court decision was objectively unreasonable "because *Boyde* does not control this case." The Supreme Court reversed, holding that the California Supreme Court was not objectively unreasonable in holding that California's "catch-all" mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation. The Court also ruled that California reasonably applied precedent upholding the prosecutor's questionable argument.

- c. *Holland v. Jackson*, 124 S. Ct. 2736 (2004) (per curiam). The court of appeals erred by holding that the state court's application of *Strickland v. Washington* was unreasonable because the federal court considered evidence not before the state court. It also erred by incorrectly concluding that the state court had evaluated the prejudice prong under a preponderance of evidence standard instead of the reasonable probability standard. In interpreting what the state courts decided, federal court must give state courts the benefit of the doubt in accordance with the presumption that state courts follow the law.

- 3. **Deference to State Court Determinations.** *Bell v. Cone*, 125 S. Ct. 847 (2005) (per curiam). The Sixth Circuit granted a writ of habeas corpus after concluding that the "especially heinous, atrocious, or cruel" aggravating circumstance found by the jury at the sentencing phase of a state trial was unconstitutionally vague, and that the Tennessee Supreme Court failed to cure any constitutional deficiencies on appeal. The U.S. Supreme Court reversed because this result fails to accord to the state court the deference required by 28 U. S. C. § 2254(d)(1). Even if the Sixth Circuit was correct to conclude that the state's statutory aggravating circumstance was facially vague, the court of appeals erred in presuming that the state supreme court failed to cure this vagueness by applying a narrowing construction on direct appeal. In fact, the state court did apply such a narrowing construction, and that construction satisfied constitutional demands by ensuring that respondent was not sentenced to death in an arbitrary or capricious manner. The state court's affirmance of the death sentence on this ground was therefore not contrary to clearly established federal law, so the court of appeals was without power to issue a writ of habeas corpus.

#### 4. **Application of Foreign Law**

- a. **Application of International Court of Justice Rulings to U.S. Courts.** *Medellin v. Dretke*, 125 S. Ct. 686 (cert. granted Dec. 10, 2004); decision below at 371 F.3d 270 (5th Cir. 2004). Raising questions about the application of international law in American criminal cases, the Supreme Court granted a prisoner's petition to review: (1) Must a U.S. court apply the International Court of Justice's *Avena* holding that the United States courts must review and reconsider a foreign national's conviction and sentence, without resort to procedural default doctrines? (2) As a matter of international judicial comity and in the interest of uniform treaty interpretation, should a court in the United States give effect to the ICJ's *LaGrand* and *Avena* judgments in the case of a foreign national of a state signatory to the Vienna Convention?

5. **Challenging Parole Procedures.** *Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005). State prisoners may bring a section 1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures; they need not seek relief exclusively under the federal habeas corpus statutes.

#### I. **Due Process.**

1. **Inconsistent Prosecutions.** *Bradshaw v. Stumpf*, 125 S. Ct. 824 (cert. granted Jan. 7, 2005); decision below unreported. After Stumpf's aggravated murder conviction, premised on his role as the shooter, the state convicted another defendant in a separate trial, alleging (inconsistently) that the accomplice was the triggerman. The Sixth Circuit reversed Stumpf's conviction, finding that the state's inconsistent claims denied the due process right to a fair trial and also because his guilty plea was not knowing and voluntary because he was not aware that specific intent was an element of the crime to which he pleaded guilty. The Supreme Court granted cert on two questions: (1) Is a representation on the record from defendant's counsel and/or the defendant that defense counsel has explained the elements of the charge to the defendant, sufficient to show the voluntariness of the guilty plea under *Henderson v. Morgan*, 426 U.S. 637, 647 (1976)? (2) Does the Due Process Clause require vacating a defendant's guilty plea when the state subsequently prosecutes another person in connection with the crime and allegedly presents evidence at the second defendant's trial that is inconsistent with the first defendant's guilt?

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