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In criminal cases, this term of the United States Supreme Court had several important decisions, but no landmark cases. The Court continued to favor law enforcement. One significant development was the substantial impact of section 2254(d) of the Antiterrorism and Effective Death Penalty Act is having in closing the door of federal courts to state prisoners petitioning for the writ of habeas corpus. Here are several of the important criminal decisions decided this term.[1]

FOURTH AMENDMENT: ILLEGAL DETENTION AND COERCED CONFESSIONS

The Court, per curiam, in *Kaupp v. Texas*,[2] determined that a suspect's "detention" in the middle of the night by a cohort of police officers without an arrest warrant or any probable cause is sufficiently similar to an arrest to warrant suppression of his confession under the Fourth Amendment. The suspect was awoken in the middle of the night by police officers, taken from bed to the scene of the crime, and then taken to the sheriff's headquarters. There, he was given his *Miranda* warnings and questioned. He eventually confessed to participating in the crime. The detectives acted on a "pocket warrant;" they did not seek a conventional arrest warrant because they did not believe that they had sufficient evidence for probable cause. The confession was allowed into evidence at trial and the petitioner was convicted. Reversing and remanding the decision, the court stated, "Although certain seizures may be justified on something less than probable cause, . . . [the Court has] never 'sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization."

FIFTH AMENDMENT: POLICE INTERROGATION

Justice Thomas announced the judgment of the Court in *Chavez v. Martinez*.[3] Here, the court found that the petitioner failed to state a cause of action under 42 U.S.C. section 1983 for violation of his Fifth Amendment right against self-incrimination when he was coercively interrogated, but was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case. Petitioner was shot during an altercation with two police officers and was questioned, without the benefit of *Miranda*, in the emergency room of a hospital prior to and during his treatment for two gunshot wounds, which left him paralyzed and blind. The Fifth Amendment, made applicable to states through the Fourteenth Amendment, requires that "no person . . . shall be compelled *in any criminal case* to be a *witness* against himself." The court concluded that there was no Fifth Amendment violation because there was no "criminal case" to trigger the Fifth Amendment's guarantee against self-incrimination. Thomas writes that a "criminal case . . . requires the initiation of legal proceedings;" the Fifth Amendment protection is a "trial right." The Court, however, remands the case to determine whether or not petitioner has unsuccessfully stated a claim for violation of his Fourteenth Amendment substantive due process rights.

FIFTH AMENDMENT: INVOLUNTARY DRUG ADMINISTRATION TO CRIMINAL DEFENDANTS

In *Sell v. United States*,[4] a 6-3 Court, in an opinion written by Justice Breyer, held that the involuntary administration of drugs to an individual accused of a crime to make him competent to stand trial does not violate that individual's Fifth Amendment "liberty" rights provided that it is necessary to achieve important governmental trial-related interests. The Court looked to two prior cases to reach this conclusion, *Washington v. Harper*,[5] and *Riggins v. Nevada*.[6] In *Harper*, the Court held that "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." While the Court recognized "that an individual has a 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs,'" the Court determined that the state's interest was "legitimate" and "important" allowing such treatment when the inmate poses a threat to himself or others. In *Riggins*, the Court "repeated that an individual has a constitutionally protected liberty 'interest in avoiding involuntary administration of antipsychotic drugs'—an interest that only an 'essential' or 'overriding' state interest might overcome." It also "suggested that, in principle, forced medication in order to render a defendant competent to stand trial for murder was constitutionally permissible."

Footnotes

1. For a more in-depth review of the decisions of the past term, *see* CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2002-2003 TERM (Amer. Acad. of Jud. Educ. 2002).
2. 123 S. Ct. 1843 (2003).
3. 123 S. Ct. 1994 (2003).
4. 123 S. Ct. 2174 (2003).
5. 494 U.S. 210 (1990).
6. 504 U.S. 127 (1992).

The Court surmised that these two cases "indicate that the Constitution permits the Government to involuntarily administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternative, is significantly necessary to further important governmental trial-related interests." The Court enumerated a four-part test. First, there must be an "important governmental interest" at stake. Second, "the court must conclude that involuntary medication will significantly further those concomitant state interests," *i.e.*, "administration of the drugs is substantially likely to render the defendant competent to stand trial." Third, "the court must conclude that involuntary medication is *necessary* to further those interests," that "alternative, less intrusive treatments are unlikely to achieve substantially the same results." And last, "the court must conclude that administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition."

FIFTH AMENDMENT: DOUBLE JEOPARDY AND CAPITAL PUNISHMENT PROCEEDINGS

Addressing the issue of double jeopardy, the Court, in *Sattazahn v. Pennsylvania*,[7] held double jeopardy was not a bar when a defendant is sentenced to death at retrial after having been sentenced to life at the initial trial pursuant to a state law that mandates a life sentence when a jury is deadlocked on the issue of sentencing. In this case, after the guilt phase of the trial, a trial for the penalty phase was held. The jury could not reach a decision and defendant moved under Pennsylvania law that the jury be discharged and that the court enter a sentence of life imprisonment. The judge entered the required life sentence. Defendant then appealed to the Pennsylvania Superior Court, which concluded that the trial judge had incorrectly instructed the jury on several offenses, including the first-degree murder charge. The Superior Court reversed and remanded the case. On remand, Pennsylvania filed a notice of intent to seek the death penalty. In addition to the aggravating circumstance alleged at the first sentencing, the notice also alleged another aggravating circumstance—his newly acquired felony record from his various guilty pleas at the first trial. Defendant moved to prevent the state from seeking the death penalty and was denied. The Superior Court and the Pennsylvania Supreme Court affirmed the denial. At the second trial, defendant was convicted and sentenced to death.

In a 5-4 decision, delivered by Justice Scalia, the Court held that there was no double jeopardy bar to Pennsylvania's seeking the death penalty on retrial. Under the Double Jeopardy Clause of the Fifth Amendment "no person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." Along with reliance on other cases, the Court cited to *Stroud v. United States*,[8] where it recognized, as here, "[When a] defendant is convicted of murder and sentenced to life imprisonment, but appeals the conviction and succeeds in having it set aside . . . jeopardy has not terminated, so the life sentence imposed in connection with the initial conviction raises no double jeopardy bar to a death sentence on retrial." The Court rejected defendant's contention that due to the unique treatment afforded capital-sentencing proceedings under *Bullington v. Missouri*,[9] double-jeopardy protections were raised when the jury deadlocked at his first sentencing proceedings and the court prescribed a sentence of life imprisonment pursuant to Pennsylvania law. The Court maintained that the automatic life sentence pursuant to Pennsylvania law is not an acquittal, and the Court noted that the Pennsylvania Supreme Court found no statutory intent to the contrary. Finally, the Court also rejected defendant's claim Fourteenth Amendment due process violation, finding nothing indicated that any "life" or "liberty" interest that Pennsylvania law gave defendant after the first trial was "somehow immutable."

"[T]he Constitution permits the Government to involuntarily administer antipsychotic drugs to a mentally ill defendant . . . in order to render that defendant competent to stand trial . . . ."

SIXTH AMENDMENT: INEFFECTIVE ASSISTANCE OF COUNSEL

In *Wiggins v. Smith*,[10] Justice O'Connor wrote the opinion for the 7-2 Court. In this case, the Court determined that the test for ineffective assistance of counsel, under *Strickland v. Washington*,[11] requires trial counsel to fully investigate a defendant's life history when trial counsel has reason to believe those facts might lead to mitigation in a death penalty action. During the sentencing phase of a trial, petitioner's trial counsel indicated to the jury that they would hear evidence in mitigation that petitioner "has had a difficult life." However, no evidence was presented during the proceedings. Trial counsel had some knowledge of petitioner's background, but not the full picture. Petitioner sought post-conviction relief, challenging "the adequacy of his representation at sentencing, arguing that his attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background."

The Court first recognized that its consideration of Wiggins's claim was controlled by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, which limits their analysis "to the law as it was 'clearly established' by our precedents at the time of the state court's decisions." In *Strickland v. Washington*,[12] the Court established the legal rules governing an ineffective assistance of counsel claim. The petitioner must show: (1) "counsel's performance was deficient;"

7. 123 S. Ct. 732 (2003).
8. 251 U.S. 15 (1919).
9. 451 U.S. 430 (1981).
10. 123 S. Ct. 2527 (2003).
11. 466 U.S. 668 (1984).
12. 466 U.S. 668 (1984).

[A] prison sentence of 25 years to life, imposed for the offense of felony grand theft under the three-strikes law, was not . . . in violation of the Eighth Amendment's prohibition . . . .

and (2) "the deficiency prejudiced the defense." Although the Court has not specified guidelines for deficient performance, it has stated that to show deficient performance "a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" In this case, trial counsel "attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternate strategy instead." The Court concluded, however, that the trial counsel's failure to investigate more fully into petitioner's background "fell short of the professional standards that prevailed in Maryland in 1989."

EIGHTH AMENDMENT: SENTENCING AND THREE-STRIKES LEGISLATION

In *Ewing v. California*,[13] a 5-4 decision, the Court determined that a prison sentence of 25 years to life, imposed for the offense of felony grand theft under the three-strikes law, was not grossly disproportionate and in violation of the Eighth Amendment's prohibition on cruel and unusual punishments. Under California law, grand theft is considered a "wobbler," meaning it is presumptively a felony, but at the discretion of the trial court, may be reduced to a misdemeanor. In this case, although the defendant asked the court to reduce the conviction for grand theft to a misdemeanor so as to avoid a three-strikes sentence, or alternatively to exercise its discretion to dismiss the allegations of some or all of his prior serious or violent felony convictions, the trial court refused and defendant was sentenced to 25 years to life under California's three-strikes legislation.

The Court, in upholding the sentence, first considered the reasoning in Justice Kennedy's concurring opinion in *Harmelin v. Michigan*:[14] "The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" The Court also looked to *Rummel v. Estelle*,[15] where it "held that it did not violate the Eighth Amendment for a State to sentence a three-time offender to life in prison with the possibility of parole." The Court cited *Rummel* for the proposition that "'federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare.'"

Turning to its seemingly contrary decision in *Solem v. Helm*,[16] in which the Court held unconstitutional the sentence of life without the possibility of parole for the seventh in a string of nonviolent offenses, the Court noted that in applying the three factors relevant to the determination of whether a sentence is so disproportionate that it violates the Eighth Amendment, the *Solem* Court struck down the sentence, but specifically noted the contrast between that sentence and the sentence in *Rummel*, where the defendant was eligible for parole. Furthermore, the *Solem* Court specifically declined to overrule *Rummel*. Considering three-strikes legislation on a more general note, the Court concluded, "We do not sit as a 'superlegislature' to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advances the goals of [its] criminal justice system in any substantial way.'"

FEDERAL HABEAS CORPUS: ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

In *Lockyer v. Andrade*,[17] a 5-4 Court in an opinion written by Justice O'Connor, held that the Ninth Circuit erred in ruling that the lower court's affirmation of respondent's sentence for two consecutive terms of 25 years to life for two counts of theft totaling less than $200 in videotapes was contrary to, or an unreasonable application of, Supreme Court precedent under section 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act of 1996. California's three-strikes law mandates that any felony can constitute the third strike and can subject a defendant to a term of 25 years to life in prison. Respondent received such a sentence. Reviewing respondent's habeas corpus petition, the Ninth Circuit, looking to *Rummel v. Estelle*,[18] *Solem v. Helm*,[19] and *Harmelin v. Michigan*,[20] concluded that both *Rummel* and *Solem* remained "good law" and were "instructive in *Harmelin's* application." It stated that because the California Court of Appeals compared the facts of Andrade's case to the facts of *Rummel*, but not *Solem*, the state court unreasonably applied clearly established Supreme Court law. In addressing the threshold matter of what constitutes clearly established federal law, the Court noted that, according to *Williams v. Taylor*,[21] it can only be the holdings and not the dicta of Supreme Court decisions at the time of a state court's ruling. The Court conceded that this case was difficult because Supreme Court holdings on this issue had not been "a model of clarity." The Court stated, "Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly' established under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years." However, the Court concluded, "The only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case."

13. 123 S. Ct. 1179 (2003).
14. 501 U.S. 957 (1991).
15. 445 U.S. 263 (1983).
16. 463 U.S. 277 (1983).
17. 123 S. Ct. 1166 (2003).
18. 445 U.S. 263 (1980).
19. 463 U.S. 277 (1983).
20. 501 U.S. 957 (1991).
21. 529 U.S. 362 (2000).

The final question for the Court was whether the California Court of Appeals decision affirming Andrade's sentence was "contrary to, or involved an unreasonable application of," this disproportionality principle. Here, the Court made two points. First, the Court concluded that because *Harmelin* and *Solem* specifically stated that they did not overrule *Rummel*, it was not contrary to the Court's clearly established law for the California Court of Appeals to turn to *Rummel* in deciding whether a sentence was grossly disproportionate. Further, *Harmelin* allows a state court to reasonably rely on *Rummel* in determining whether a sentence is grossly disproportionate. Therefore, the Court concluded, the California Court of Appeals decision was not "contrary to" the governing legal principles set forth in these cases.

EX POST FACTO CLAUSE: STATUTE OF LIMITATIONS

Justice Breyer delivered the opinion of the 5-4 Court in *Stogner v. California*.[22] Here, the Court held that the California statute resurrecting an otherwise time-barred criminal prosecution, which was enacted after the pre-existing statute of limitation had run, violated the *Ex Post Facto* Clause of the United States Constitution. The California statute at issue permits "prosecution for those crimes where 'the limitations period specified in [prior statutes of limitations] has expired' – provided that (1) a victim has reported an allegation of abuse to the police, (2) 'there is independent evidence that clearly and convincingly corroborates the victim's allegation,' and (3) the prosecution is begun within one year of the victim's report." A related provision provides "that a prosecution satisfying these three conditions 'shall revive any cause of action barred by [prior statute of limitations].'"

The Constitution has two *Ex Post Facto* Clauses, Article I, section 9, clause 3, which applies to the federal government, and Article I, section 10, clause 1, which applies to states. Both prohibit the governments from "enacting laws with certain retroactive effects." The Court recognized three effects of the California statute: (1) it creates a "new criminal limitations period that extends the time in which prosecution is allowed;" (2) it authorizes "criminal prosecutions that the passage of time had previously barred;" and (3) it was enacted after the statute of limitations had run for the crime for which petitioner was prosecuted. The Court concluded that these three effects rendered the statute invalid under the *Ex Post Facto* Clause. First, the Court concluded that the statute "threatens the kind of harm that . . . the *Ex Post Facto* Clause seeks to avoid:" "the Clause protects liberty by preventing governments from enacting statutes with 'manifestly *unjust and oppressive*' retroactive effects." Second, the Court determined that "the kind of statute at issue falls literally within the categorical description of *ex post facto* laws set forth by Justice Chase more than 200 years before in *Calder v. Bul*.[23] The Court stated: "[A] statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict . . . . Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit prosecution on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient."

[I]ts retroactive application does not violate the *Ex Post Facto* Clause.

EX POST FACTO CLAUSE: ALASKA SEX OFFENDER REGISTRATION ACT

In *Smith v. Doe*,[24] a 6-3 Court held that the Alaska Sex Offender Registration Act of 1994 is nonpunitive and its retroactive application does not violate the *Ex Post Facto* Clause. On May 12, 1994, Alaska enacted the Alaska Sex Offender Registration Act. This law contains two components, which are both retroactive. The Act requires any "sex offender or child kidnapper who is physically present in the state" to register, either with the Department of Corrections, if the individual is incarcerated, or with the local law enforcement authorities if the individual is at liberty. He must provide name, aliases, identifying features, address, place of employment, date of birth, conviction information, information about personal transportation, post-conviction treatment history, and other such information. The second component is the public release of this information. Respondents brought actions under Rev. Stat. section 1979, 42 U.S.C. section 1983, seeking to declare the Act void under the *Ex Post Facto* Clause of Article I, section 10, clause 1, of the Constitution and the Due Process Clause of section 1 of the Fourteenth Amendment. The Court began its analysis by noting that this was the first time that it has considered a sex offender registration law against *Ex Post Facto* Clause protection, but that the framework for the Court's inquiry is well established: first, the Court must determine "whether the legislature meant the statute to establish 'civil' proceedings;'" second, "if the intention of the legislature was to impose punishment, that ends the inquiry. . . . However, [if] the intention was to enact a regulatory scheme that is civil and nonpunitive, we 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.' . . ." Furthermore, because the Court ordinarily defers to the legislature's stated intent, "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'"

Reviewing legislative history, the Court concluded that "nothing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm." Next, the Court considered whether the Act imposes an "affirmative disability or restraint" and concluded that it did not. The Court reasoned that the Act imposes no physical restraint, which is the affirmative example. Further, "[t]he Act's obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive." In rejecting the Ninth Circuit's contention that the updating of the sex offender's information

22. 123 S. Ct. 2446 (2003).
23. 3 U.S. 386 (1798).
24. 123 S. Ct. 1140 (2003).

Chief Justice Rehnquist . . . held the Hobs Act and RICO may not be applied to anti-abortion activist organizations . . . .

poses a restriction and that the Act resembles a probation scheme, the Court reasoned that the sex offender does not have to update in person, and that "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." The Court also rejected Doe's assertion that the length of the reporting time was not proportional to the severity of the offense and is retributive.

FOURTEENTH AMENDMENT DUE PROCESS: SEX OFFENDER REGISTRY

In *Connecticut Department of Public Safety, et al. v. John Doe*,[25] a unanimous Court, in an opinion written by Chief Justice Rehnquist, held that Connecticut's sex offender registry program was not a violation of the Fourteenth Amendment Due Process Clause. The Connecticut law requires all persons convicted of (a) a criminal offense against a minor, (b) violent or nonviolent sexual offenses, or (c) felonies committed for a sexual purpose, to register with the Connecticut Department of Public Safety upon their release. The registry requires names, addresses, photographs, and DNA samples, as well as updated photographs and notification of changes in address. All registry postings must include a warning that those who use the registry improperly (as in to harass) will be subject to prosecution. Reversing the lower courts, the Court determined that there was no due process violation because the Fourteenth Amendment does not require an opportunity to prove a fact not material to the statutory scheme, *i.e.*, a hearing first to determine whether or not the class members are "particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry." Citing to *Paul v. Davis,*[26] the Court stated "that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." Furthermore, the Court distinguished both *Wisconsin v. Constantineau,*[27] and *Goss v. Lopez*,[28] which cumulatively require the Government to provide hearings to prove or disprove certain facts, stating, "[h]ere, however, the fact that respondent seeks to prove—he is not currently dangerous—is of no consequence. . . . [a]s the DPS Website explains, the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest."

CRIMINAL STATUTORY INTERPRETATION: ARBITRATION AGREEMENT—RICO

In *Pacificare Health Care Systems, Inc. v. Book*,[29] Justice Scalia wrote the opinion, and all other justices joined, except for Justice Thomas, who took no part in the decision. Here, the Court held that it would be premature for the it to address the issue of whether an arbitration agreement that contains a punitive damages restriction is unenforceable with regards to a parties' claim for treble damages under RICO because it was unclear whether the provision did and would actually be applied to the RICO claims by the arbitrator. The arbitration agreements in this action contained clauses limiting the award of punitive damages. Respondent opposed arbitration because "the arbitration provisions prohibit an award of punitive damages," and "respondents could not obtain 'meaningful relief' in arbitration for their claims under the RICO statute, which authorizes treble damages." The Court wrote that neither "precedents" nor "the ambiguous terms of the contracts" necessitate that these "provisions preclude an arbitrator from awarding treble-damages under RICO." The Court noted that its prior cases "have placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards." The Court stated that if the contractual ambiguity, itself, were a "gateway" question, then there would be no question about its ability to decide the issue. However, the ambiguity as to the language and how the arbitrator will construe the remedial provisions, and whether this will render the "agreements unenforceable," is "unusually abstract." Therefore, "the proper course is to compel arbitration."

STATUTORY INTERPRETATION: HOBBS ACT AND THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

In *Scheidler v. National Organization for Women*,[30] petitioners presented an argument alleging that respondents "were members of a nationwide conspiracy to 'shut down' abortion clinics through a pattern of racketeering activity that included actions of extortion in violation of the Hobbs Act." Chief Justice Rehnquist, writing for the Court, held the Hobbs Act and RICO may not be applied to anti-abortion activist organizations or individuals because such groups or individuals do not "obtain" property in a manner necessary for a predicate act of extortion. The Court began its analysis with the assertion that it "need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's assets . . . [for] [w]hatever the outer boundaries may be, the effort to characterize petitioners' actions here as an 'obtaining of property from' respondents is well beyond them." The Court performed an analysis of the statutory language. Beginning with the common-law definition of extortion according to William Blackstone, the Court then noted that the Hobbs Act retained the requirement that statutory language that property must be "obtained." Further, "[e]liminating the requirement that property must be obtained to constitute extortion would not only conflict with the express

25. 123 S. Ct. 1160 (2003).
26. 424 U.S. 693 (1976).
27. 400 U.S. 433 (1971).
28. 419 U.S. 565 (1975).
29. 123 S.Ct. 1531 (2003).
30. 123 S. Ct. 1057 (2003).

requirement of the Hobbs Act, it would also eliminate the recognized distinction between extortion and the separate crime of coercion."

With this judicial history, the Court noted that it was significant that Congress deliberately omitted coercion in the drafting of the Hobbs Act. The Court also recognized its own decision in *United States v. Teamsters,*[31] in which the Court created an exception in the Anti-Racketeering Act that Congress decided to replace with the Hobbs Act, but still omitted coercion. The Court then resolved an apparent contradiction in its own history. Under *United States v. Culbert*,[32] the Court stated "that the words of the Hobbs Act 'do not lend themselves to restrictive interpretation,'" and under *United States v. Enmons,*[33] in which the Court stated that since the Hobbs Act was a criminal statute ambiguity must be resolved in favor of lenity. To this the Court asserts that, under *McNally v. United States*,[34] when there are two possible interpretations of a criminal statute, only with definite language from Congress can a court choose the harsher interpretation. Hence, "[i]f the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law's coverage must come from Congress, and not from the courts." Addressing the issue of state extortion charges, the Court reasons that "[b]ecause petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed." Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that the petitions violated RICO must also be reversed.

SUBSTANTIVE CRIMINAL LAW: NINTH CIRCUIT'S "AUTOMATIC TERMINATION" OF A CONSPIRACY

In *United States v. Jimenez Recio*,[35] the Court held the Ninth Circuit was incorrect in its view that a conspiracy ends through "defeat" when the Government intervenes and makes the conspiracy's goals impossible to achieve, even if the conspirators do not know that the Government has intervened. On November 18, 1997, police stopped a truck in Nevada. They found, and seized, a large stash of illegal drugs, and with the help of the truck's two drivers they set up a sting. The Government took the truck and the drivers to the truck's original destination, where the drivers engaged a contact who said he would send someone to get the truck. Three hours later, the two defendants arrived at the truck's location and drove the truck away from the location. Police arrested the two men. The Ninth Circuit agreed by a panel vote of 2 to 1 that *United States v. Cruz*[36] was binding law. In *Cruz*, the Ninth Circuit wrote that a conspiracy terminates when "there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy." The Ninth Circuit reached this conclusion after considering the conviction of an individual who had joined a conspiracy to distribute drugs after the Government had seized the drugs. The Circuit court found that the Government's seizure of the drugs guaranteed the "defeat" of the conspiracy's object, so the individual who had joined after that point could not be convicted of conspiracy.

The Court has repeatedly stated that the essence of conspiracy is "an agreement to commit an unlawful act."

The Court began its analysis by stating of the Ninth Circuit's holding that a conspiracy continues "until there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy," with the "defeat of the object" being the critical portion. The Ninth Circuit clearly intended that the government ends a conspiracy by stopping it even for conspirators who are totally unaware that the government has made the object of the conspiracy impossible to achieve. The Court stated that, in its view, this is incorrect. First, the Court said the Ninth Circuit's conclusions were inconsistent with the "proper view of the law." The Court has repeatedly stated that the essence of conspiracy is "an agreement to commit an unlawful act." Furthermore, a conspiracy agreement is "a distinct evil," which "may exist and be punished whether or not the substantive crime ensues." Last, a "conspiracy poses a 'threat to the public' over and above the threat of the commission of the relevant substantive crime—both because the 'combination in crime makes more likely the commission of [other] crimes' and because it 'decreases the probability that the individuals involved will depart from their path of criminality.'" The Court stated "[t]hat being so, the Government's defeat of the conspiracy's objective will not necessarily and automatically terminate the conspiracy." The Court noted that almost all "courts and commentators" endorse the view of the Court in its holding in this case.

FEDERAL HABEAS CORPUS: ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT AND CERTIFICATE OF APPEALABILITY

In *Miller-El v. Cockrell*,[37] the Court determined that, under the Antiterrorism and Effective Death Penalty Act when a court of appeals is considering issuing a certificate of appealability to a habeas applicant, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims, and the prisoner seeking the certificate of appealability need only demonstrate "a substantial showing of the denial of a constitutional right."[38] The Court took note of the requirements for the granting of a certificate of appealability, which is necessary for a federal court of appeals to have jurisdiction to rule on the merits of appeals from habeas petitioners: such a certificate can be issued only if the requirements of section 2253 have been met. Under section 2253(c), a petitioner must make a "substantial showing of the denial of a constitutional

31. 315 U.S. 521 (1942).
32. 435 U.S. 371 (1978).
33. 410 U.S. 396 (1973).
34. 483 U.S. 350 (1987).
35. 123 S. Ct. 819 (2003).
36. 127 F.3d 791 (9th Cir. 1997).
37. 123 S. Ct. 1029 (2003).
38. 28 U.S.C. § 2253(c)(2).

[T]he Court held that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding . . . regardless of whether the petitioner could have raised the claim on direct appeal.

right." As it did in *Barefoot v. Estelle*,[39] the Court determined that for a requisite showing, the petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement.'" The Court noted that "[t]his threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." Furthermore, the Court declared that "[w]hen a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a [certificate of appealability] based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."

FEDERAL HABEAS CORPUS: 28 U.S.C. SECTION 2254(D)

In *Price v. Vincent*,[40] a unanimous Court held a habeas petitioner whose claim was adjudicated on the merits in state court was not entitled to relief in a federal court unless he meets the requirements of 28 U.S.C. section 2254(d). Respondent filed a habeas petition under section 2254(d), which included a double jeopardy claim that rested on the same facts presented in his state court appeal. The Court concluded, therefore, he was not entitled to review unless he could demonstrate the state court's adjudication of his claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A state court's decision is only "'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of the Court and nevertheless arrives at a result different from our precedent.'" Additionally, the state court's decision is only "an unreasonable application of clearly established law" if "the state court applied [that case] to the facts of his case in an objectively unreasonable manner." In this case, the Court said neither had occurred.

HABEAS CORPUS: INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIMS

In *Massaro v. United States*,[41] Justice Kennedy delivered the opinion for a unanimous Court. Here, the Court held that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under section 2255, regardless of whether the petitioner could have raised the claim on direct appeal. The Court began its analysis by noting that under *United States v. Frady*[42] and *Bousley v. United States*,[43] "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice." However, the "procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interests in the finality of judgments." The Court reasoned that by requiring ineffectiveness-of-counsel claims be lodged on direct appeal, it would be forcing the claimant to raise the issue before there has been an opportunity to fully develop the factual predicate, and it would be a forum not best suited to asses the facts: "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose."

FEDERAL HABEAS CORPUS: INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Addressing the issue of ineffective assistance of counsel in *Woodford v. Visciotti*,[44] the Court found that the California Supreme Court did not err in its application of *Strickland v. Washington*,[45] and also correctly applied the "unreasonable application clause" of 28 U.S.C. section 2254(d). The California Supreme Court did not dispute that respondent's counsel was constitutionally inadequate during the sentencing phase, but concluded that it did not prejudice the jury's sentencing decision. In *Strickland*, the Court held that to prove prejudice the defendant must establish a "reasonable probability" that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. It also specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered.

In determining that the California Supreme Court erred in its application of *Strickland*, the Ninth Circuit read the California court's opinion as applying the latter test—requiring respondent to prove, by a preponderance of evidence, that the result of the sentencing proceeding would have been different. The Court noted that the state supreme court "painstakingly" cited and applied *Strickland*, but that the Ninth Circuit fixed on three occasions where the state court shortened the phrase "reasonably probable" to "probable" without the modifier. The Court concluded, "Its occasional shorthand reference to that standard by use of the term 'probable' without the modifier may perhaps be imprecise, but if so, it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision." The Ninth Circuit also concluded that the state court's determination that

39. 463 U.S. 880 (1983).
40. 123 S.Ct. 1848 (2003).
41. 123 S. Ct. 1690 (2003).
42. 456 U.S. 152 (1982).
43. 523 U.S. 614 (1998).
44. 123 S. Ct. 357 (2002).
45. 466 U.S. 668 (1984).

respondent suffered no prejudice *was* "objectively unreasonable." To this assertion, the Court responded that in its opinion, the Ninth Circuit ruled contrary to the standard set out in 28 U.S.C. section 2254(d). The Court concluded that the Ninth Circuit substituted its own judgment for the state court's judgment by ignoring the crucial distinction between "an unreasonable application of federal law" from an "incorrect application of federal law."

FEDERAL HABEAS CORPUS: SECTION 2254(A)

In *Early v. Packer*,[46] a per curiam decision, the Court reversed the decision of the Ninth Circuit granting a petition for a writ habeas corpus, under 28 U.S.C. section 2254(a), as incorrect on the grounds that the court of appeals wrongly concluded that the state court's decision contradicted federal law. The petitioner filed for a writ after conviction in state court, alleging the trial judge improperly instructed the jury by urging the jury to assess the facts and apply them to the law as he stated it and asking for a count of the jury, which resulted in an 11 to 1 tally. The Court first concluded that, contrary to the Ninth Circuit's opinion, it was not necessary for a state court to cite to federal precedent in its decision. Second, it also concluded that the state court did not improperly apply the totality of circumstances test set forth in *Lowenfield v. Phelps*.[47] Finally, the Court concluded that the Ninth Circuit improperly relied on *Jenkins v. United States*[48] and *United States v. United States Gypsum Co.*,[49] which the Ninth Circuit interpreted to protect a defendant from the trial court urging jurors to reach any verdict, not just protecting him from a trial court urging a particular type of verdict. The Court responded that "[n]either *Jenkins* nor *Gypsum Co.* is relevant to the § 2254(d)(1) determination, since neither case sets forth a rule applying to state-court proceedings." The Court found that both cases reversed convictions based on jury instructions given in federal prosecutions, and that "neither opinion purported to interpret any provision of the Constitution. . . . [so that] the Ninth Circuit erred by relying on those nonconstitutional decisions."

FEDERAL HABEAS CORPUS

Seeking to secure uniformity among the circuit courts, a unanimous Court, in *Clay v. United States*,[50] held that for the purpose of 28 U.S.C. section 2255's one-year limitation period, a judgment of conviction becomes final when the time expires for filing a petition for certiorari. Justice Ginsburg, writing for the Court, said, "Because 'we presume that Congress expects its statutes to be read in conformity with this Court's precedents,'[51] our unvarying understanding of finality for collateral review purposes would ordinarily determine the meaning of 'becomes final' in § 2255." According to precedent, "Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. . . ."

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46. 123 S. Ct. 362 (2002).
47. 484 U.S. 231 (1988).
48. 380 U.S. 445 (1965).
49. 438 U.S. 422 (1978).
50. 123 S. Ct. 1072 (2003).
51. *United States v. Wells*, 519 U.S. 482, 495 (1997).