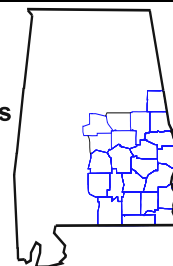




CJA News

“TOTAL CLIENT ADVOCACY”

Federal Defenders
Middle District of
Alabama



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CJA NEWS

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SUPREME COURT UPDATE

RECENT DECISIONS



CLARK v. ARIZONA, 126 S.Ct. 2709 (2006).

Justice Souter: There is no due process violation when a state narrows its insanity test or excludes as rebuttal to *mens rea*, any evidence of mental illness or evidence of incapacity due to mental illness.

The defendant shot and killed a police officer. At a bench trial, he raised the affirmative defense of insanity to rebut the element of *mens rea*. However, the trial court, in reliance on *State v. Mott*, 187 Ariz. 536 (1997) refused to allow the defendant to admit evidence of suffering from a mental illness to dispute the *mens rea* element of the charges. The trial judge found the appellant guilty of first degree murder beyond a reasonable doubt and sentenced the appellant to life imprisonment without the possibility of release for twenty-five years. On appeal, the appellant moved to vacate his conviction and sentence arguing that Arizona's insanity test and ruling in *Mott* violated due process because the test for insanity did not closely track the definition of insanity in the landmark English case, *M'Naghten*, 10 CL & Fin. 200, 8 Eng. Rep. 718 (1843). Both the Court of Appeals and the Supreme Court of Arizona affirmed the appellant's conviction and sentence.

The U.S. Supreme Court held that Arizona's insanity test did not violate due process. In reaching its holding, the Court outlined the many varied formulations of insanity tests and definitions throughout the country. The Court concluded that the formulation of an insanity test was substantially open to state choice. *Clark*, 2006 WL 1764372 at *9.

The Court also explained that although a defendant has a due process right to present relevant evidence favorable to himself on the elements of a crime, such evidence can be channeled or restricted. In this case, the appellant challenged a state case, *Mott*, that restricted evidence of mental disease offered by medical professionals to having bearing only on the issue of insanity and not on *mens rea*. The Court explained that such a restriction was permissible as long as there were good reasons requiring the restriction that did not violate the standards of fundamental fairness. Finding that Arizona's rule served to preserve the State's chosen standard for recognizing insanity as a defense and helped avoid confusion and misunderstanding on the part of jurors, the Court held that the restriction did not offend due process.

WASHINGTON v. RECUENCO, 126 S.Ct. 2546 (2006).

Justice Thomas: Failure to submit a sentencing factor to a jury is not constitutional structural error.

A jury convicted the appellant of assault in the second degree based on its factual finding that the appellant committed the assault with a “dangerous weapon.” At sentencing, the trial court applied a three year firearm enhancement based on judicial fact finding that the appellant committed the assault with a firearm. Concluding that a *Blakely* violation can never be harmless, the Supreme Court of Washington vacated the sentence on appeal.

Finding that the failure to submit a sentencing factor to a jury was identical to a failure to submit an element to a jury, the U.S. Supreme Court held that no structural error resulted from the imposition of the firearm enhancement based on the judicial found facts.

In reaching its holding, the Court relied on *Neder v. United States*, 527 U.S. 1 (1999). The Court explained that in *Neder*, “[w]e nonetheless held that harmless-error analysis applied to these errors, because ‘an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.’” (emphasis in original). The Court further explained that its previous precedent had established that the Court traditionally “treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.” *Recuenco*, 2006 WL 1725561 at *6. The judgment of the Washington Supreme Court was reversed and the case was remanded.

UNITED STATES v. GONZALEZ-LOPEZ, 126 S.Ct. 2557 (2006).

Justice Scalia: Erroneous denial of a criminal defendant’s choice of counsel is a violation of the Sixth Amendment.

The appellant was charged with drug distribution offenses in the Eastern District of Missouri. The appellant chose as trial counsel, an attorney from California. His chosen counsel’s application for admission *pro hac vice* was denied without comment by the Eastern District of Missouri Court on two occasions. Thereafter, a motion seeking sanctions against the appellant’s chosen counsel was filed due to an alleged violation of a Missouri Rule of Professional Conduct. The appellant, being left with no

other choice, hired a local attorney for trial counsel. The trial court barred appellant’s chosen counsel from participating in the trial in any fashion, including being unable to sit at counsel table, consult with trial counsel or communicate with the appellant at any time throughout the trial.

On writ of certiorari, the government argued that there could be no Sixth Amendment violation of the appellant’s right to his chosen counsel unless the appellant showed, under *Strickland v. Washington*, 466 U.S. 668 (1984), that either he was prejudiced by ineffective assistance of the substitute counsel or there was a reasonable probability he was prejudiced because the proceedings would have been different had he been allowed access to chosen counsel.

Disagreeing with the government’s argument, the Court explained that “[w]here the right to be assisted by counsel of one’s choice is wrongly denied, . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is ‘complete’ when a defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.” *Gonzalez-Lopez*, 2006 WL 1725573 at *5. The Court held that in this case, the right to counsel of choice was erroneously deprived in violation of the Sixth Amendment and that the violation was not harmless because the deprivation carried “consequences that [were] necessarily unquantifiable and indeterminate, [and thus] unquestionably qualified as a structural error.” *Id.*, at *6. The case was remanded for further proceeding consistent with the Court’s opinion.

KANSAS v. MARSH, 126 S.Ct. 2516 (2006).

Justice Thomas: A state capital sentencing statute which directs imposition of the death penalty when a jury finds that aggravating and mitigating factors are in equipoise is not unconstitutional.

Kansas statute §21-4624(e) directs juries to impose the death penalty where aggravating factors and mitigating factors are in equipoise. Pursuant to that statute, a jury sentenced the appellant to death following his capital murder conviction because the three aggravating circumstances were not outweighed by the mitigating circumstances. The appellant argued that the statute established an unconstitutional presumption in favor of the death penalty. The Kansas Supreme Court agreed and reversed and remanded the case for a new trial on the capital murder conviction.

The U.S. Supreme Court reversed the Kansas Supreme Court's judgment, holding that the Kansas death penalty statute satisfies constitutional requirements because it "rationally narrows the class of death-eligible defendants . . . permits a jury to consider any mitigating evidence relevant to the sentencing determination [and] . . . does not interfere, in a constitutionally significant way, with the jury's ability to give independent weight to evidence offered in mitigation." *Marsh*, 2006 WL 1725515 at *7.

DIXON v. UNITED STATES, 126 S.Ct. 2437 (2006).

Justice Stevens: A defendant bears the burden of proving the defense of duress by a preponderance of the evidence.

Relying on the defense of duress, the appellant admitted at trial that she knowingly and unlawfully purchased firearms for her boyfriend because he threatened to kill her and her daughters if she did not do so. On appeal, the appellant argued that the government bore the burden of disproving her duress defense beyond a reasonable doubt and that the trial court's jury instruction that the defense had the burden of proof by a preponderance of the evidence was erroneous and entitled her to a new trial. The court of appeals affirmed the appellant's conviction.

The U.S. Supreme Court explained that the government only had to prove beyond a reasonable doubt that the appellant committed the elements of the offense, that being that she knowingly made false statements to buy firearms and that she knew she was breaking the law when she did so. The government would have had to disprove the defense of duress if that defense negated any of the elements of the charged offense, such as where the defense of insanity has to be disproved in order to establish the element of *mens rea* in murder charges. Further, the Court instructed that "at common law, the burden of proving affirmative defenses - indeed, 'all circumstances of justification, excuse or alleviation' - rested on the defendant." *Dixon*, 2006 WL 1698998 at *5. The court of appeals judgment was affirmed.

SAMSON v. CALIFORNIA, 126 S.Ct. 2193 (2006).

Justice Thomas: Suspicionless searches of parolees do not violate the Fourth Amendment.

A California law requires that parolees agree in writing to be subjected to searches and seizures by law enforcement officers at any time, with or without a warrant or cause. The appellant, while on parole was

stopped and searched by a police officer without cause. The search resulted in the seizure of methamphetamine from the appellant's shirt pocket.

The U. S. Supreme Court specifically addressed "whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Samson*, 126 S. Ct. at 2196. The Court held that the Fourth Amendment did not prohibit law enforcement from conducting such searches of parolees because (1) by virtue of their status alone, probationers and parolees do not have the absolute liberties of other citizens and (2) such searches promote legitimate governmental interest of preventing recidivism and/or the commission of crime.

DAVIS v. WASHINGTON, 126 S.Ct. 2266 (2006).

Justice Scalia: Admission of statements made to a 911 operator during an emergency do not violate the Confrontation Clause.

During a domestic confrontation between the appellant and his girlfriend, the appellant's girlfriend called 911 and told the operator that she was being assaulted. She also gave the operator identifying information about the appellant. The appellant was charged with felony violation of a domestic no-contact order. The 911 tape was admitted at the appellant's trial over defense objections that the evidence violated the Confrontation Clause of the Sixth Amendment. The appellant was convicted. On appeal, the Supreme Court of Washington held that the evidence was not testimonial and thus, was not admitted in violation of the Constitution.

The U.S. Supreme Court explained that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. [Statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 126 S.Ct. at 2273 -74. Finding that the call to 911 made by the appellant's girlfriend was made primarily for help during an emergency situation, the Court held that the admission of the 911 tape did not violate the Confrontation Clause of the Sixth Amendment.

HUDSON v. MICHIGAN, 126 S.Ct. 2159 (2006).

Justice Scalia: Violation of the “knock-and-announce” rule during the execution of a search warrant does not require suppression of evidence found in the search.

While executing a search warrant on the appellant’s home, the police knocked, but only waited 3-5 seconds before entering the appellant’s home. The search of the home resulted in the seizure of drugs and firearms. The appellant moved to suppress all of the evidence on the grounds that the quick entry violated the knock-and-announce rule of the Fourth Amendment.

The U.S. Supreme Court explained that the “suppression of evidence has always been [a] last resort [and] not [a] first impulse” for rectifying constitutional violations because “ the exclusionary rule generate[s] substantial costs (citation omitted) which sometimes include setting the guilty free and the dangerous at large.” *Hudson*, 126 S.Ct. at 2163. As a result, the exclusionary rule is applicable only “where its deterrence benefits outweigh its substantial costs.” *Id.* Reasoning that the “social costs of applying the exclusionary rule to knock-and-announce violations [were] considerable, the incentive to such violations [was] minimal . . . , [and] the extant deterrence against [such violations were] substantial,” *Id.*, at 2168, the Court held that suppression of all of the evidence of the appellant’s guilt was unjustified. The court of appeals’ denial of the appellant’s suppression motion was affirmed.

HOUSE v. BELL, 126 S.Ct. 2064 (2006).

Justice Kennedy: A petitioner meets the actual innocence exception to the federal habeas courts bar to claims considered defaulted by the state court when the defendant offers new reliable evidence that raises doubts as to the petitioner’s guilt.

A jury convicted the petitioner of murder and sentenced him to death. Following the discovery of new evidence casting doubt on his guilt, the petitioner sought federal habeas relief. An evidentiary hearing to determine whether the petitioner’s claims fell within the actual innocence exception to procedural default was held in the district court. The petitioner presented direct contradiction to the DNA evidence presented at trial, specifically that the semen found on the victim’s clothes was not the petitioner’s, but was the victim’s husband’s and that the victim’s blood was spilled on

the petitioner’s jeans due to sloppy packaging and transportation of evidence by government agents. In addition, the petitioner presented testimonial evidence from various close associates of the victim’s husband who testified that they witnessed the victim’s husband confess to the murder. The district court denied relief and the Sixth Circuit affirmed.

The U.S. Supreme Court, referring to the rule adopted in *Schlup v. Delo*, 513 U.S. 298, 319-22 (1995), stated that “prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *House*, 126 S.Ct. at 2077-78. The Court found that although all of the new evidence presented by the petitioner did not equate to a conclusive exoneration, had that evidence been heard by a jury, it was more likely than not that a reasonable juror would have lacked reasonable doubt as to the petitioner’s guilt. The judgment of the court of appeals was reversed and the case was remanded for further proceedings.

HILL v. McDONOUGH, 126 S.Ct. 2096 (2006).

Justice Kennedy: An inmate’s challenge to a state’s method of execution under the Eighth Amendment can proceed pursuant to 42 U.S.C. §1983.

Pursuant to 42 U.S.C. §1983, an inmate challenged the constitutionality of the State of Florida’s method of execution by lethal injection, arguing that the procedure violated the Eighth Amendment’s prohibition against cruel and unusual punishment. The district court held that the petitioner’s §1983 challenge was equivalent to a writ of habeas corpus and since the petitioner had previously sought habeas relief, his successive petition was barred for failure to obtain leave from the court of appeals as required by 28 U.S.C. §2244(b). The Supreme Court addressed “whether [the petitioners] claim [had to] be brought by an action for writ of habeas corpus under the statute authorizing that writ, 28 U.S.C. §2244(b), or whether it [could] proceed as an action for relief under 42 U.S.C. §1983.” *Hill*, 126 S.Ct. at 2099.

The Court found that the controlling precedent was *Nelson v. Campbell*, 541 U.S. 637 (2004). In *Nelson*, the Court directly addressed whether a challenge to lethal injection procedure could proceed as a habeas corpus action. The *Nelson* Court held that since a judgment in the inmate’s favor would not have prevented the State from implementing the sentence

of execution by some other method, the suit did not have to be brought in a habeas proceeding.

Finding that the *Nelson* case was identical to the instant case, the Court held that any “delay caused by allowing [the petitioner] to file suit [did] not cast on his sentence the kind of negative legal implication that would require him to proceed in a habeas action.” *Hill*, 126 S.Ct. at 2104. The court of appeal’s judgment was reversed and the case was remanded for further proceedings.

HOLMES v. SOUTH CAROLINA, 126 S.Ct. 1727 (2006).

Justice Alito for a Unanimous Court: A defendant’s constitutional rights are violated by any rule of evidence that prevents a defendant from presenting evidence of third party guilt as rebuttal to forensic evidence introduced by the prosecution.

The appellant was convicted of murder, first degree burglary, first degree criminal sexual conduct, and robbery at his first trial. Upon state post-conviction review, the petitioner was granted a new trial. At his second trial, the appellant tried to introduce evidence that another man had killed the victim, to rebut forensic evidence introduced against him by the prosecution. The trial court excluded the appellant’s evidence citing *State v. Gregory*, 198 S.C. 98 (1941). Under *Gregory*, third party guilt evidence is not admissible unless it creates a reasonable inference of the appellant’s innocence. The South Carolina Supreme Court affirmed, finding that the appellant’s evidence could not have created a reasonable inference of his innocence because the prosecution’s forensic evidence so strongly weighed in favor of the appellant’s guilt.

The U.S. Supreme Court explained that the Constitution’s guarantee to a criminal appellant of “a meaningful opportunity to present a complete defense” is abridged by evidence rules that are arbitrary, *i.e.* “rules that exclude important defense evidence but that [do] not serve any legitimate interests.” *Holmes*, 126 S.Ct. at 1731. The Court found that the evidence rule used to prevent the appellant from introducing third party guilt evidence was arbitrary because under the rule “the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third party guilt. Instead, the critical inquiry concerns the strength of the prosecution’s case: If the prosecution’s case is strong enough, the evidence of third party guilt is excluded

even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.”*Id.*, at 1734. Finding that the state supreme court failed to identify any legitimate ends that the rule in *Gregory* served, the Court vacated the judgment and remanded the case.

DAY v. MCDONOUGH, 126 S.Ct. 1675 (2006).

Justice Ginsburg: A federal court may, on its own initiative, correct a State’s miscalculation of the AEDPA tolling period and dismiss a habeas petition as untimely.

In this case, the state’s answer to a *pro se* federal habeas petition conceded that the petition was timely filed. However, upon review of the petition, answer and attachments thereto, a federal magistrate judge discovered that the state’s calculation of the tolling period under the AEDPA was incorrect. The federal court allowed the petitioner to show cause why the habeas petition was untimely. Finding the petitioner’s responses inadequate, the federal court dismissed the petition as untimely. The Eleventh Circuit affirmed.

The U.S. Supreme Court directly addressed whether “a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the petition without contesting its timeliness.” *McDonough*, 126 S.Ct. at 1679. The Court reasoned that although the district court had no obligation to double check the state’s calculations, in the absence of any affirmative waiver of the limitations defense, the court had the authority to allow the state to amend its answer to correct its error in calculating the tolling period or dismiss the case as untimely. The Court concluded that the district court did not abuse its discretion by deciding not to overlook an obvious miscalculation in the tolling period on the part of the state.

GEORGIA v. RANDOLPH, 126 S.Ct. 1515 (2006).

Justice Souter: A physically present occupant’s stated objection to a warrantless search renders a search based on the permission of a consenting co-occupant invalid as to the objecting occupant.

The respondent’s estranged wife returned to the home she previously shared with the respondent. Upon the arrival of the police, the respondent’s wife told the police that the respondent was a drug addict and that drug paraphernalia was located inside the

house. The respondent refused the police officer's request for consent to perform a warrantless search. The respondent's wife granted her consent and led the police officer into the respondent's bedroom. There the officer found drinking straws containing a powdery substance. The officer exited the house to retrieve an evidence bag and call the district attorney, who told the officer to stop his search and get a warrant. Thereafter, the respondent's wife withdrew her consent to search. The trial court's denial of the respondent's motion to suppress was reversed by the Court of Appeals of Georgia and sustained by the Supreme Court of Georgia based on *United States v. Matlock*, 415 U.S. 164 (1974), which held that a valid warrantless search occurs where one occupant gives consent to shared premises and the non-consenting occupant is physically absent.

The U.S. Supreme Court affirmed the Supreme Court of Georgia's ruling, explaining that a "co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, [thus] his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." *Randolph*, 126 S.Ct. at 1523. The U.S. Supreme Court clarified that its holding does not prevent police from entering a home in the interest of protection where there is good reason to believe the threat of domestic violence exists. The Court further stated that the permission of the present consenting co-tenant will only validate the warrantless search in the physical absence of the objecting co-tenant "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." *Id.*, at 1527.

UNITED STATES v. GRUBBS, 126 S.Ct. 1494 (2006).

● **Justice Scalia: Anticipatory search warrants are not categorically unconstitutional; the particularity requirement of the Fourth Amendment only requires search warrants to specifically describe the place to be searched and the items to be seized.**

The respondent purchased a video tape containing child pornography from an undercover postal inspector. The postal inspector obtained an anticipatory search warrant to which was attached an affidavit detailing the "trigger conditions" of the search, *i.e.* that the search would begin after delivery and acceptance of the video tape at the respondent's

residence. Also attached to the warrant were two documents: one describing the respondent's residence and another listing the items to be seized during the search. During the execution of the warrant, the respondent was provided a copy of the warrant that did not have the supporting affidavit attached. The Ninth Circuit reversed the district court's denial of the respondent's motion to suppress, holding that the copy of the warrant provided to the respondent did not meet the Fourth Amendment's particularity requirement in absence of the affidavit detailing the triggering conditions of the search.

The Supreme Court reversed the Ninth Circuit's judgment, holding that the particularity requirements of the Fourth Amendment only require that the place to be searched and the items to be seized be described with particularity within the warrant. The Supreme Court further held that anticipatory warrants are not categorically unconstitutional. The Court explained that "a conditioned anticipatory warrant [complies] with the Fourth Amendment's requirement of probable cause, [when] two prerequisites of probability [are] satisfied." *Grubbs*, 126 S.Ct. at 1500. Thus, "if the triggering condition occurs 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id.* (citations omitted)(emphasis in original).

OREGON v. GUZEK, 126 S.Ct. 1226 (2006).

● **Justice Breyer: Neither the Eighth Amendment nor the Fourteenth Amendment grants a capital murder defendant the right to present alibi evidence at a re-sentencing hearing.**

Following three consecutive affirmations of the respondent's death sentence and three remands due to sentencing errors, the Oregon Supreme Court addressed the issue of the admissibility of alibi evidence that the respondent wanted to introduce at his re-sentencing hearing. The Oregon Supreme Court held that both the Eighth and Fourteenth Amendments provided the respondent a constitutional right to introduce the evidence.

Vacating the Oregon Supreme Court's holding, the U.S. Supreme Court stated that neither the Eighth Amendment nor the Fourteenth Amendment, nor U.S. Supreme Court precedent provided a capital defendant with a constitutional right to provide evidence of whether he committed a crime at the sentencing stage of a prosecution.

Expressly choosing not to decide whether such a right exists under any constitutional rule, the U.S. Supreme Court stated that the alibi evidence sought to

be introduced by the respondent was inadmissible because, “[f]irst, sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime...[s]econd, the parties previously litigated the issue to which the evidence [was] relevant - - whether the defendant committed the basic crime, [thus] . . . that matter [was] not at issue. . . [,and] [t]hird, the negative impact of a rule restricting defendant’s ability to introduce *new* alibi evidence is minimized by the fact that Oregon law give the defendant the right to present to the sentencing jury *all* the evidence of innocence from the original trial regardless.” 126 S.Ct at 1232-33. (emphasis in original).

RICE v. COLLINS, 126 S. Ct. 969 (2006).

● **Justice Kennedy: A federal habeas court exceeds its authority when it substitutes its own evaluation of the record for that of the state trial court.**

The respondent sought collateral review of the California Court of Appeal’s affirmation of the trial court’s denial of his *Batson* challenge. The prosecutor’s race neutral reasons for striking a black female juror was that (1) she rolled her eyes in response to one of the court’s questions, (2) she was young, single and had no ties to the community and as a result may have been too tolerant of drug crimes, and (3) the prosecutor offered the juror’s gender as a permissible reason for the strike.

The Ninth Circuit reversed, holding that no reasonable fact finder could have found the race-neutral reasons offered by the prosecutor credible because the trial court had not observed the juror roll her eyes, the prosecutor had referred to another black female juror as being young, when in fact the juror was a grandmother, the prosecutor’s use of gender as a reason for the strike was not credible, and the prosecutor’s concern over the stricken jurors youth and lack of ties to the community was unsupportable.

In particular as it related to the prosecution’s attempted use of gender as a reason to exclude the juror, the Ninth Circuit concluded that the trial court should have questioned the prosecutor’s credibility. The trial occurred in August 1996, over two years after *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), which made clear that discrimination in jury selection based on gender violates the Equal Protection Clause. The trial record contains a colloquy indicating that one of the prosecutor’s aims in striking the juror was to achieve gender balance on the jury. However, out of concern about the constitutionality of such a strike, the trial

court made clear that it would not accept gender as a race-neutral explanation.

Finding that all of the reasons upon which the Ninth Circuit based its opinion were nothing more than “debatable inferences,” the Supreme Court held that there were no reasons compelling the conclusion that the trial court had no other alternative but to reject the prosecutor’s race-neutral justifications and conclude that the respondent had shown a *Batson* violation. The Court further stated that although “reasonable minds reviewing the record might disagree about the prosecutor’s credibility, on habeas review that does not suffice to supercede the trial court’s credibility determinations.” *Collins*, 126 S. Ct. at 975-76. The Ninth Circuit’s opinion was reversed and the case was remanded.

BROWN v. SANDERS, 126 S. Ct. 884 (2006).

● **Justice Scalia: An unconstitutional death sentence does not automatically result where several of the eligibility factors considered by a jury are later found invalid.**

Subsequent to the petitioner receiving a sentence of death, two of the four special circumstances found by the jury during the penalty phase were invalidated by the California Supreme Court. However, the petitioner’s sentence was affirmed on direct appeal. The Ninth Circuit granted the petitioner habeas relief on the grounds that the death sentence could not be upheld because the state court had neither established that consideration of the invalidated circumstances was harmless beyond a reasonable doubt nor independently re-weighed the sentencing factors. The Supreme Court specifically addressed the issue of “what happens when the sentencer imposes the death penalty after at least one valid eligibility factor has been found, but under a scheme in which an eligibility factor or a specified aggravating factor is later held to be invalid.” *Sanders*, 126 S.Ct. at 889.

Reasoning that the current “weighing/non-weighing scheme” was “needlessly complex,” the Supreme Court provided a rule for guidance when a sentencing factor is invalidated, stating that “[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.” *Id.* at 892. (emphasis in the original).

Thus, “[i]f the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal.” *Id.* Therefore, “skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.” *Id.*

Finding that the jury’s consideration of facts and circumstances under the two other valid eligibility factors alone rendered the petitioner eligible for the death penalty, the Supreme Court reversed the Ninth Circuit’s grant of habeas relief and remanded the case for further proceedings.

EVANS v. CHAVIS, 126 S. Ct. 846 (2006).

● **Justice Breyer: California’s “reasonable time” standard for filing a notice of appeal to toll the AEDPA’s one year time limitation can not be substantially longer than the time limitations in states with determinate timeliness rules.**

The respondent waited more than three years after the denial of his state habeas petition on September 29, 1994, to file a petition for review in the California Supreme Court on November 5, 1997. The respondent’s explanation for the delay was that throughout the three year period, either his prison work schedule or confinement in lock down prevented him from being able to access the prison library and work on his petition.

On April 29, 1998, the California Supreme Court denied the petition without an opinion. According to the Ninth Circuit’s interpretation of its own precedent, the California Supreme Court’s denial of the respondent’s petition without an opinion or comment meant that the petition was denied on the merits and thus, was timely. Granting habeas relief, the Ninth Circuit held that the state petition for post-conviction relief was “pending” during the three year delay. Finding that the Ninth Circuit’s reasoning was contrary to the Supreme Court’s earlier ruling in *Carey v. Saffold*, 536 U.S. 214 (2002), the U.S. Supreme Court reversed the Ninth Circuit’s grant of relief and remanded the case for further proceedings.

The Court explained that in its holding in *Saffold*, it stated, among other things, that (1) when the filing of an appeal is timely, the time between the lower courts denial of the petition and the filing of an appeal is not counted against the one year AEDPA time limit, (2) that the word “on the merits” did not prove that the California Supreme Court thought the

petition was timely, and (3) that timely filings in California under its “reasonable time” standard could not differ significantly from the laws of states with determinate timeliness rules. Thus, the Ninth Circuit erred when it found that denial of the respondent’s petition without an opinion automatically meant that the filing was timely because “[i]f the appearance of the word’s ‘on the merits’ does not automatically warrant a holding that the filing was timely, absence of those words could not automatically warrant a holding that the filing was timely.” *Chavis*, 126 S. Ct. at 852.

The Court further stated that the Ninth Circuit had also violated *Saffold* because its finding that a more than three year delay before filing an appeal was reasonable, created a timeliness standard that was significantly greater than most states with determinate timeliness standards between 30 and 60 days.

CASES AWAITING DECISION

***Burton v. Waddington*, Ninth Circuit., No. 05-9222, Cert. Granted on June 5, 2006.**

Whether *Blakely v. Washington* is a new rule for purposes of retroactivity analysis or is dictated by *Apprendi v. New Jersey*.

Whether, if *Blakely* is a new rule, its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt may be applied retroactively to cases on collateral review.

***United States v. Resendiz-Ponce*, Ninth Circuit., No. 05-998, Cert. Granted on April 17, 2006.**

Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.

***Carey v. Musladin*, Ninth Circuit., No. 05-785, Cert. Granted on April 17, 2006.**

Whether the Ninth Circuit Court of Appeals exceeded its authority on habeas review when it overturned the state appellate court’s denial of habeas relief on the ground that courtroom spectators wearing buttons depicting the deceased victim unconstitutionally interfered with the defendant’s right to a fair trial by an impartial jury free from outside influences.

Cunningham v. California, Court of Appeal of California, First Appellate District., No. 05-6551, Cert. Granted on February 21, 2006.

Whether California's Determinate Sentencing Law permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

See:<http://www.supremecourtus.gov/docket/docket>.

CERTIORARI GRANTED

Schiro v. Landrigan, Ninth Circuit Court of Appeal, No. 05-1575, Cert. Granted September 26, 2006.

Respondent Jeffrey Landrigan actively thwarted his attorney's efforts to develop and present mitigation evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim in which Landrigan asserted that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, he would have cooperated in presenting that type of mitigating evidence.

In light of the highly deferential standard of review required in this case pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing"?

Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation and impedes counsel's attempts to do so, or (b) the evidence the

defendant subsequently claims should have been presented is not mitigating?

Gonzales v. Duenas-Alvarez, Ninth Circuit Court of Appeal, 05-1629, Cert. Granted September 26, 2006.

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101 (a)(43)(G), includes aiding and abetting.

Smith v. Texas, Court of Criminal Appeal of Texas, No. 05-11304, Cert. Granted October 6, 2006.

In *Smith v. Texas*, 543 U.S. 37 (2004), this Court summarily reversed the Texas Court of Criminal Appeals and found constitutional error under *Penry v. Lynaugh*, 492 U.S.302 (1989) (*Penry I*), and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*).

Is it consistent with this Court's remand in this case for the Texas Court of Criminal Appeals to deem the error in petitioner's case harmless based on its view that jurors were in fact able to give adequate consideration and effect to petitioner's mitigating evidence notwithstanding this Court's conclusion to the contrary?

Can the Texas Court of Criminal Appeals, based on a procedural determination that it declined to adopt in its original decision that this Court then summarily reversed, impose on remand a daunting standard of harm ("egregious harm") to the constitutional violation found by this Court?

See:<http://www.supremecourtus.gov/docket/docket>.

CJA Honor Roll

Congratulations to CJA Panel Attorneys John Poti, Maryanne Prince, Russell Duraski, and Tiffany McCord who obtained a dismissal in the case against Harold Thorton.

Congratulations to Don Jones on obtaining a hung jury in one of his recent capital murder cases.

Other Honor Roll Honoree

Congratulations to Attorney Anne Borelli on the publication of the book entitled, *Selected Writings of Girolamo Savanarola: Religion and Politics, 1490-1498 (Italian Literature and Thought)*. Attorney Borelli is a

contributing editor of this work and a capital habeas attorney in the Federal Defenders office.

For information regarding application to the CJA panel or regional and national CJA panel workshops please contact Lynn Colbert, CJA Panel Administrator, at the Federal Defenders office, at (334) 834-2099 or call Defender Services Division Training Branch at (800) 788-9908, or visit the website at www.fd.org.

11th Circuit Decisions

Convictions & Sentences Affirmed

***United States v. Tamari*, No. 05-10618, 2006 WL 1843007 (July 6, 2006).**

As a part of an investigation of a conspiracy to distribute drugs, law enforcement officers obtained a search warrant authorizing the search of a certain property and any vehicle owned by the occupants of property, under their care, custody or control, or located on the property to be searched. After police had begun their search, the appellant drove onto the property in a car suspected by police to be the car of one of the heads of the drug conspiracy. After the appellant was unable to produce registration for the car, the police searched the inside of the car for registration information. Thereafter, a police drug dog alerted on the car and the police seized a large sum of cash and the key to a Freightliner truck from which police had already seized 13 kilos of cocaine and over a half million dollars in cash.

At trial the appellant moved to suppress the evidence taken from the car and all statements he made to the police as being fruits of an unlawful search. His motion was denied and a jury convicted the appellant of conspiring to possess with the intent to distribute a controlled substance. On appeal, the appellant argued that the vehicle search was unlawful because it fell outside of the scope of the search warrant because (1) the warrant did not encompass vehicles “arriving” on the property after the search had begun and (2) the warrant only covered the search of vehicles owned or under the control of the property owners. The appellant also argued that the search was unlawful because the police did not have sufficient probable cause to search the vehicle in absence of a warrant.

The Eleventh Circuit, in reliance on the Fifth Circuit’s holding in *United States v. Alva*, 885 F.2d 250

(5th Cir. 1989), held that a valid search warrant authorizing the search of vehicles on a property also allows for the search of vehicles arriving on the property during the search as long as the vehicle could reasonably contain items that are the subject of the police’s search.

The Eleventh Circuit further held that even if the vehicle search did not fall within the scope of the warrant, the search was permissible pursuant to the automobile exception to the Fourth Amendment. That exception allows for the search of a vehicle in the absence of a search warrant if the vehicle is readily operational and if the police have probable cause to believe the vehicle contains contraband or evidence of a crime. The Eleventh Circuit explained that the appellant’s car was subject to search pursuant to this exception because it was apparent that the car was operational and sufficient probable cause existed for the search because the car fit the description of a vehicle being driven by one of the drug conspirators, a drug dog had alerted on the car, and the appellant’s explanation for being on the property was implausible. The conviction was affirmed.

***United States v. Gray*, No. 05-15209, 2006 WL 1752372 (June 28, 2006).**

The appellant, a 64 year old man with a heart condition, sent an undercover officer three emails containing images of child pornography. A search of his computer resulted in the seizure of 300 images of child pornography. Failing to appear at his change of plea hearing, the defendant was apprehended in Indiana after a standoff with police in which he held a firearm to his head and temporarily refused to surrender. At his sentencing, the district court correctly determined that the defendant’s guideline range was 151 to 188 months imprisonment. The defendant was sentenced to 72 months imprisonment. The government appealed, arguing that the sentence was unreasonable because the district court failed to give adequate weight to the guidelines range or the factors under 18 U.S.C. §3553.



Relying on its holding in *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2006), in which the Eleventh Circuit held that a sentence that was less than half the low end of the guidelines was reasonable where it was not imposed solely because the judge disagreed with the guidelines, the Eleventh Circuit affirmed the defendant’s sentence to 72 months imprisonment. The Eleventh Circuit explained that the sentence was reasonable because the district court

gave specific, valid reasons for imposing the lower sentence, namely the defendant's age, minor criminal record and medical condition.

United States v. Estupinan, No. 05-16279, 2006 WL 1752333 (June 28, 2006).

The appellant pled guilty to conspiracy to possess with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of the Maritime Drug Law Enforcement Act ("MDLEA") and 21 U.S.C. 960(b)(1)(B)(ii). On appeal, the defendant argued that (1) the district court erred by failing to hold *sua sponte* that Congress had exceeded its authority under the Piracies and Felonies Clause of the Constitution in enacting the MDLEA and (2) pursuant to *United States v. Gaudin*, 515 U.S. 506 (1995), the MDLEA was unconstitutional because it removed consideration of the element of jurisdiction from the jury to the judge.

In the absence of the appellant providing any case law support for his position that Congress had exceeded its authority in enacting MDLEA, the Eleventh Circuit held that the district court did not error in failing to *sua sponte* hold that Congress had exceeded its authority in enacting the MDLEA. The Eleventh Circuit further held that its previous precedent in *United States v. Tinoco*, 304 F.3d 1088 (11th Cir. 2002) had already expressly addressed and rejected the appellant's second argument based on *Gaudin*. The conviction was affirmed.

United States v. Mitsven, No. 05-12647, 2006 WL 1703628(June 22, 2006).

The appellant's probation was revoked and he was sentenced to four months imprisonment and a three year term of supervised release, pursuant to 18 U.S.C. §3565(b). The appellant challenged his sentence, arguing that the district court incorrectly concluded that it was required to impose a term of supervised release, in addition to a term of imprisonment.

The Eleventh Circuit held that the appellant could not show that the district court had erred in imposing the term of supervised release because there is nothing in 18 U.S.C. §3565(b) that restricts a court from imposing supervised release upon revocation of probation. The sentence was affirmed.

ANNOUNCEMENTS !

Criminal Justice Act Panel Attorney Rate Increase

From the United States District Court Middle District of Alabama Website, Criminal Case Information Section:

Criminal Justice Act Panel Attorney Rate Increase.

The Judiciary Appropriations Act of 2006, P.L. 109-115, includes funds to raise the hourly compensation rates for attorneys appointed to represent eligible persons under the Criminal Justice Act, 18 U.S.C. §3006A, and the death penalty provisions of 21 U.S.C. 848(q), as amended by the Antiterrorism and Effective Death Penalty Act of 1996. The non-capital hourly compensation rate has increased from \$90 to \$92, and the maximum hourly rate for federal capital prosecutions and capital post-conviction proceedings has increased from \$160 to \$163. The new hourly compensation rates apply to work performed on or after January 1, 2006.

18 U.S.C. §3006A (e) currently provides:

(e) Services other than counsel.--

(1) Upon request.--Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request.-- (A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed \$500 and expenses reasonably incurred. (C) The court, or the United States magistrate judge (if the services were rendered in a case disposed of entirely before the United States magistrate judge), may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds \$500.

(3) Maximum amounts.--Compensation to be paid to a person for services rendered by him to a person

under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed \$1,600, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

(4) Disclosure of fees.--The amounts paid under this subsection for services in any case shall be made available to the public.

Expenditures for Language Interpreter

Per the Chief Deputy Clerk of the U.S. District Court for the Middle District of Alabama:

It is permissible for CJA Panel Attorneys to use hourly rates for language interpreters, so long as they do not exceed the approved rates.

The following are the maximum rates for Non-certified Spanish interpreters set by the Judicial Conference:

Language Skilled (Non-certified) Interpreters:

Half Day: \$92

Full Day: \$171

Overtime: \$28 per hour or part thereof

Half days are not necessarily less than 4



hours. if the period crosses the noon hour, it will touch two half-days and equal a whole day
If the attorney

estimates \$50-
\$ 7 5 / h o u r ,

depending on the time, this could run to \$600/day, far exceeding the Judicial Conference approved maximums.

The following are the maximum rates for Certified Interpreters:

Certified and Professionally Qualified Interpreters:

Half Day: \$192

Full Day: \$355

Overtime: \$50 per hour or part thereof

ELEVENTH CIRCUIT COURT OF APPEAL FEE CHANGES

Effective April 9, 2006, the court of appeals fee for docketing an appeal, petition for review, or any other proceeding, is \$450.00, pursuant to the Deficit Reduction Act of 2005. (When combined with the district court fee of \$5.00 for filing a notice of appeal, the total amount payable to the district court for filing a notice of appeal is \$455.00.)

<http://www.ca11.uscourts.gov/>

The Building Blocks of the *Batson* Challenge: an Overview of the Basics

The Fundamentals of Peremptory Challenges to Jury Selection

A peremptory challenge is “the right of the plaintiff and the defendant in a jury trial to have a juror dismissed before trial without stating a reason.” *Law.com Law Dictionary* (visited April 4, 2006)<<http://dictionary.law.com/>>. Federal Rule of Criminal Procedure 24(b) provides instructions on the number of peremptory challenges available to a defendant and the prosecution.

(b) Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) Capital Case. Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) Other Felony Case. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by

imprisonment of more than one year.

(3) Misdemeanor Case. Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

Federal Rule of Criminal Procedure 24 (c)(4) provides the number of peremptory challenges available to challenge prospective alternate jurors.

(4) Peremptory Challenges. Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.

(A) One or Two Alternates. One additional peremptory challenge is permitted when one or two alternates are impaneled.

(B) Three or Four Alternates. Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(C) Five or Six Alternates. Three additional peremptory challenges are permitted when five or six alternates are impaneled.

The exclusion of jurors via peremptory strikes that are based on race and gender is clearly impermissible. Thus, although a defendant and “prosecutor ordinarily is entitled to exercise permitted peremptory challenges ‘for any reason at all, as long as that reason is related to his view concerning the outcome’ of the case to be tried, (citations omitted), the Equal Protection Clause forbids [either a defendant or a] prosecutor to challenge potential jurors solely on account of their race.” *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). “Litigants may not strike potential jurors solely on the basis of gender,” as to do so “invites cynicism respecting the jury’s neutrality and its obligation to adhere to the law.” *J.E.B. v. Alabama*, 511 U.S. 127, 141, 143 (1994).

The exclusion of jurors via peremptory strikes that are based on sexual orientation and religious beliefs or religious affiliation are not so clearly impermissible. To date, only the California Supreme Court, in *People v. Garcia*, 77 Cal.App.4th 1269, 92 Cal.Rptr.2d 339, 347-48 (2000), has held that sexual orientation qualifies as a protected class for jury

selection challenges. In *Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996), “[t]he Ninth Circuit assumed, without deciding, [that] sexual orientation qualifie[d] as a *Batson* classification.” *United States v. Blaylock*, 421 F.3d 758, 769 (8th Cir. 2005). Most recently, in two opinions filed on August 31, 2005, the Eighth Circuit held that it was “seriously doubt[ful] [that] *Batson* and its progeny extend federal constitutional protection to a venire panel member’s sexual orientation.” *Blaylock*, 421 F.3d at 769. (See also *United States v. Ehrmann*, 421 F.3d 774, 782 (8th Cir. 2005). Neither the U.S. Supreme Court nor the Eleventh Circuit has held that peremptory strikes based on sexual orientation are impermissible.

The Circuits are split on the question of whether a juror’s religious beliefs or religious affiliation may serve as a legal basis for peremptory strikes. The Third Circuit in *United States v. DeJesus*, 347 F.3d 500, 510 (3rd Cir. 2003) failed to reach the issue of whether “a peremptory strike based solely on religious affiliation would be unconstitutional” because of its finding that the government’s strikes were based on a juror’s “heightened religious involvement rather than their religious affiliation.” However, relying on the Seventh Circuit’s holding in *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) that it was proper to strike a juror based on that juror’s religious beliefs, the Third Circuit held that “[e]ven assuming that the exercise of a peremptory strike on the basis of religious affiliation is unconstitutional, the exercise of a strike based on religious beliefs is not.” *DeJesus*, 347 F.3d at 510-511. The Fifth Circuit in *Fisher v. Texas*, 169 F.3d 295, 303 (5th Cir. 1999) has held that “the interests served by the system of peremptory challenges in Texas are sufficiently great to justify State implementation of choices made by litigants to exclude persons from service on juries in individual cases on the basis of their religious affiliation.” In contrast, the Second Circuit in *United States v. Brown*, 352 F.3d 654, 669 (2nd Cir. 2003) concluded that peremptory strikes based on religious affiliation were unconstitutional because “like those [strikes] based on race and gender, [strikes based on religious affiliation] cause harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation on the judicial process.” (Citing *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994)). As with sexual orientation, neither the U.S. Supreme Court nor the Eleventh Circuit has held that peremptory strikes based on religious belief or religious affiliation are unconstitutional.

The Evolution of the Law of Batson

In *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965), the U.S. Supreme Court pronounced the standard by which a party could challenge what appeared to be a race-based exclusion of potential jurors. *Swain* required the challenger to prove that there had been systematic discrimination against the seating of jurors of a particular racial group. To establish systematic discrimination, the challenger had to show, beyond the circumstances of his own case, that “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be” a prosecutor had consistently used peremptory challenges to insure that no person of the particular race at issue would serve on a jury. *Batson* 476 U.S. at 92. Thereafter, “a number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause.” *Batson*, 476 U.S. at 92.

Twenty-one years later, the U.S. Supreme Court in *Batson* re-evaluated the standard pronounced in *Swain* and found it to be too onerous on defendants attempting to establish a prima facie case of discrimination. Reasoning that since the core issue of a challenge to a race-based peremptory strike was whether the government had discriminated in selecting the defendant’s jury, the Court decided that a challenging defendant should be able to “establish a prima facie case ‘in other ways than by evidence of long-continued unexplained absence of members of his race from many panels.’” *Id.* at 95. To that end, the Court held that a challenge to race based juror exclusion must involve **first**, the defendant raising an inference of purposeful discrimination, **second**, the state coming forward with race neutral explanations for its use of the challenged peremptory strikes, and **lastly**, a determination by the trial court as to whether the defendant established purposeful discrimination. *Id.* at 96-98.

Establishing a Prima Facie Case of Discrimination

The U.S. Supreme Court in *Batson* provided that a defendant could successfully make a prima facie case of discrimination by showing, first, . . . that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race.

Second the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits “those to discriminate who are of a mind to discriminate.” *Avery v. Georgia*, 345 U.S., at 562, 73 S.Ct., at 892. Finally, the defendant must show that these facts and any other relevant circumstances raise **an inference** that the prosecutor used that practice to exclude the veniremen from petit jury on account of their race. *Id.* at 96.(emphasis added).

Only small variances in these requirements have been pronounced by the Supreme Court since its opinion in *Batson*.

In 1990, four years after *Batson*, the Supreme Court held that a defendant did not have to be of the same racial group as the stricken juror(s) to have standing under the Sixth Amendment to challenge the use of race - based peremptory strikes. *Holland v. Illinois*, 493 U.S. 473, 477 (1990) (“Our cases hold that the Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs. See, e.g., *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979) *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); see also *Powers v. Ohio*, 499 U.S. 400 (1991)”).

More recently, in *Johnson v. California*, ___ U.S. ___, 125 S.Ct. 2410, 2416 (2005), the Supreme Court held that California’s “more likely than not” standard, that prevented a defendant from establishing a prima facie case because he did not show that it was more likely than not that the government’s peremptory strikes were based on racial bias, was contrary to its holding in *Batson* that a defendant need only show an “inference” of discriminatory purpose to make out a prima facie case.

Proffering Race Neutral Reasons for Use of Peremptory Strikes

After a defendant makes a prima facie showing that racial bias is the possible impetus for the use of peremptory strikes by the prosecution, the burden shifts to the prosecutor to show that there are race neutral reasons for the use of the challenged strikes. *Batson* at 96-98. In its most recent case addressing a



Batson challenge, the Supreme Court in *Rice v. Collins*, ___ U.S. ___, 125 S.Ct. 969, 973-74 (2006) explained that although the prosecutor must present a comprehensible reason, ‘the second step of this process does not demand an

explanation that is persuasive, or even plausible’; so long as the reason is not inherently discriminatory, it suffices.”(citing, *Purkett v. Elem*, 514 U.S. 765, 767-768 (1995)(*per curiam*)). In another recent opinion, issued in *Miller-El v. Dretke*, ___ U.S. ___, 125 S.Ct. 2317 (2005), the Supreme Court granted federal habeas relief based on its finding that the race-neutral explanations offered by a prosecutor, who struck ten of the eleven eligible black venire members, were shown to be implausible based on the evidence. In particular, the Supreme Court concluded that based on its comparison of the black venire members who were struck with those white members who were allowed to serve and the fact that of 91% of the eligible black venire panel was excluded, such a disparity could not have been the result of happenstance.

Credibility Determination to Be Made by the Trial Court

Although “the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike,” *Collins*, 126 S.Ct. at 974, the trial court must still determine “whether the defendant has carried his burden of proving purposeful discrimination” and whether the justification proffered by the prosecutor for the strike is plausible. *Id.* The trial judge must assess the plausibility of [the prosecutor’s] reason in light of all evidence with a bearing on it.”*Dretke*, 125 S.Ct. at 2332. However, it is not the trial judge’s job to come up with race neutral reasons for a strike where the prosecutor’s reasons seems implausible. Thus, “a prosecutor has simply got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for the mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not

fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.” *Id.*

***United States v. Bahamonde*, 445 F.3d 1225 (9th Cir. 2006).**

While on trial for charges that he knowingly imported and possessed marijuana in the United States in violation of 21 U.S.C. §§841(a)(1), 952, and 960, the defendant attempted to call the arresting agent from the Department of Homeland Security (“DHS”) to testify. The prosecution objected to the testimony on the sole ground that defense counsel had not previously complied with a DHS regulation requiring a litigant to state in writing the nature and relevance of information to be sought from a DHS witness. The district court sustained the prosecution’s objection. On appeal, the Ninth Circuit reversed and remanded the case, holding that the DHS regulation violated the defendant’s due process clause rights and that the district court’s exclusion of the testimony violated the defendant’s Sixth Amendment rights.

Relying on *Wardius v. Oregon*, 412 U.S. 470 (1973) holding that “[i]t was fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State,”

the Ninth Circuit held that the DHS regulation violated the defendant’s due process rights because it did not provide a reciprocal requirement on the government to “specify the nature of testimony or evidence it intend[ed] to use to rebut the demanded testimony.” *Bahamonde*, 445 F.3d at 1228.

The Ninth Circuit further held that the district court abused its discretion and violated the defendant’s Sixth Amendment rights by excluding the testimony without balancing countervailing interest such as how important the witness was to the defendant’s case, the interest in fair and efficient administration of justice, or whether defense counsel’s failure to comply with the regulation was willful and motivated by a desire to gain a tactical advantage at trial, etc. The Ninth Circuit explained that it could not hold that either error was harmless beyond a reasonable doubt and as a result, the defendant’s conviction was reversed and the case was remanded for a new trial.

***Johnson v. Pettiford*, 442 F.3d 917 (5th Cir. 2006).**

A *pro se* litigant challenged whether he was ineligible for certain sentencing credits in a petition

filed pursuant to 28 U.S.C. §2241. Relying on a local rule permitting the district court to grant a motion as unopposed if the opposing party fails to respond, the district court dismissed the *pro se* litigant’s petition after he failed to respond to the state’s motion to dismiss the petition as moot. On appeal, the Fifth Circuit reasoned that the district court had erred by dismissing the petition without first determining whether there had been deliberate delays in the *pro se* litigant’s response or whether there were less severe sanctions that could be imposed. The Fifth Circuit vacated the district court’s dismissal and remanded the case for further proceedings.

***United States v. Defonte*, 441 F.3d 92 (2nd Cir. 2006).**

The defendant was on trial for crimes he committed while employed as a prison guard. A former inmate of the prison in which the defendant worked was to be a witness for the prosecution. In the process of having the witness inmate’s possessions moved from one prison facility to another, the inmate’s journal was found and turned over to the government. The journal contained recordings of both the

defendant’s misconduct at the jail and information regarding conversations the inmate had with her attorney and government prosecutors. The defendant’s counsel sought to have the journal introduced into evidence as witness statements pursuant to 18 U.S.C. §3500 and *Giglio v. United States*, 405 U.S. 150 (1972). The witness inmate’s counsel argued that the journal was protected by attorney-client privilege. The district court ordered that the journal be admitted on the grounds that the journal was not protected by attorney-client privilege because inmates have no expectation of privacy in the contents of their jail cells.

On appeal, the Second Circuit held that any of the inmate’s journal entries concerning conversations with her attorney and/or notes made regarding information she wanted to share with her attorney later, fit squarely within the protection of attorney-client privilege. The Second Circuit further explained that an inmate does not waive the right to attorney client privilege to documents in a cell merely because there is no reasonable expectation of privacy in the cell under the Fourth Amendment. The district court’s order was vacated. The Second Circuit remanded the case

with instructions that the district court determine which of the journal entries were protected by attorney-client privilege and whether the inmate had acted in any manner to negate an intent to keep the journal confidential.

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