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I. INTRODUCTION

This paper highlights some of the significant decisions issued over the past year by the United States Supreme Court. Cases were chosen for their relevance to appellate practitioners and for their general-interest appeal. Not every case of potential interest has been included, but the following selections hopefully will offer something for everyone and provide a helpful overview of recent developments that are likely to impact your practice—or that may come up during cocktail-party conversation.¹

For a complete list of the United States Supreme Court opinions for the October Term 2003 (October 6, 2003 – October 3, 2004), consult the Court's website: <http://www.supremecourtus.gov/opinions/03slipopinion.html>. This site provides links to the opinions in each case, which can be downloaded in PDF or HTML format. Effective April 1, 2004, the Court began providing hyperlinks to questions presented in granted and noted cases: <http://www.supremecourtus.gov/orders/04grantednotedlist.html>. You can also access the granted/noted list in PDF, but it will not contain hyperlinks: <http://www.supremecourtus.gov/orders/04grantednotedlist.pdf>.

Another excellent site for locating U.S. Supreme Court decisions is the LII (Legal Information Institute) Supreme Court Collection: <http://supct.law.cornell.edu/supct/>, which typically provides a summary of the term's highlights (it should be posted at the end of the term at: <http://supct.law.cornell.edu/supct/04highlts.html>). User-friendly links with substantive commentaries on pending cases and recent certiorari grants are available through Findlaw.com at <http://supreme.lp.findlaw.com/supremecourt/resources.html>. Finally, for those looking for updates with more personality, try Howard Bashman's "How Appealing" website, <http://legallaffairs.org/howappealing/>, or Goldstein & Howe's "SCOTUSblog," <http://www.goldsteinhowe.com/blog/>. Goldstein & Howe's site compiles statistics on the number of cases granted, and the types of cases granted, each term. The site also lists questions presented in pending cases and holdings in decided cases.

II. THE FIFTH CIRCUIT SCORECARD

A. *Aetna Health, Inc. v. Davila / CIGNA Healthcare of Texas, Inc. v. Calad*

Issue: Whether ERISA completely preempts state-law claims by ERISA plan participants or beneficiaries who assert that a managed care company tortiously failed to pay for medical care.

(Pending)

¹ This paper focuses on the majority holding in each case and discusses concurrences or dissents when there is a plurality opinion or when a separate opinion is uniquely noteworthy for appellate practitioners.

B. *Banks v. Dretke*, 124 S.Ct. 1256 (2004)

Issues: (1) Whether cause and prejudice exists for a habeas petitioner's failure to exhaust a claim that the prosecution withheld exculpatory evidence; and (2) whether a claim not pleaded in a habeas petition may be tried by consent of the parties pursuant to Federal Rule of Civil Procedure 15(b).

Facts: Delma Banks was convicted of capital murder and sentenced to death. Prior to trial, the State of Texas promised to divulge exculpatory evidence but withheld evidence that one prosecution witness was a paid police informant and that another witness's testimony was coached by law-enforcement officials. After the police-informant evidence came to light in an evidentiary hearing during federal habeas proceedings, the district court granted Banks relief from the death penalty. The court denied relief based on the coached-witness evidence, however, concluding that Banks had never formally amended his habeas petition to include a claim based on the evidence introduced at the hearing. The Fifth Circuit denied a certificate of appealability on the coached-witness claim and reversed regarding nondisclosure of evidence regarding the police-informant, reasoning that the evidence uncovered in the federal habeas proceeding regarding the paid informant was procedurally barred because it was not properly raised in state post-conviction proceedings and also was not material.

Holdings: (7-2; 9-0) Writing for 7 justices, Justice Ginsburg determined that cause existed for Bank's failure to investigate the police-informant evidentiary claim during state post-conviction proceedings and that the evidence was material because there exists a reasonable probability of a different outcome had the exculpatory evidence been disclosed. All 9 justices agreed that a certificate of appealability should have issued on Banks's coached-witness claim, because reasonable jurists could disagree as to whether that claim was effectively litigated in the federal habeas proceedings pursuant to Federal Rule of Civil Procedure 15(b), which permits trial, by consent, of issues not raised in pleadings.

C. *Dretke v. Haley*, 124 S.Ct. 1847 (2004)

Issue: Whether the actual-innocence exception to procedural default applies to noncapital sentencing procedures.

Facts: Haley stole a calculator from a local Wal-Mart and attempted to exchange it for other merchandise. Because Haley already had two prior theft convictions, the calculator theft was a "state jail felony" and he also was charged as a habitual felony offender, which requires two previous felony convictions—the second of which must have occurred after the first became final. Haley's second predicate conviction actually occurred three days *before* the first became final; but no one noticed the discrepancy, and he was convicted as a habitual offender—even though Texas's habitual-offender statute could not apply under the circumstances. On federal habeas review, Haley challenged his habitual-offender status and also alleged ineffective assistance of counsel. The State argued that Haley had procedurally defaulted his evidentiary challenge, but the district court granted the writ on the improper habitual-offender enhancement. The Fifth Circuit affirmed, holding that the "actual innocence" exception to the cause requirement for overcoming procedural default applies to noncapital sentencing procedures involving a habitual felony offender.

Holding: (6-3) In an opinion by Justice O'Connor, the Court reversed and remanded. Declining to answer the actual-innocence question, the Court instead held that a federal court

faced with allegations of actual innocence must first consider all nondefaulted claims for comparable relief. Because Haley's ineffective-assistance claim would provide the same relief, resentencing, the Court vacated the Fifth Circuit's opinion and remanded for further proceedings.

D. *Frew v. Hawkins*, 124 S.Ct. 899 (2004)

Issue: Whether the Eleventh Amendment bars enforcement of a federal consent decree entered into by state officials.

Facts: Mothers of children eligible for Medicaid services sued Texas agencies and officials, alleging that Texas's program did not meet the requirements of federal law. After dismissing the state agencies on Eleventh Amendment grounds, the district court approved a consent decree between the plaintiffs and the state-official defendants. Years later, the plaintiffs moved to enforce the decree. The officials argued that they were in compliance and, regardless, the Eleventh Amendment barred the suit because the requirements of the decree exceeded those of federal law. The district court rejected the Eleventh Amendment argument; the officials appealed; and the Fifth Circuit reversed, holding that the Eleventh Amendment prohibited enforcement of the decree unless the alleged violation of the decree also was a violation of the Medicaid Act.

Holding: (9-0) In a unanimous opinion by Justice Kennedy, the Court reversed and remanded, holding that the Eleventh Amendment posed no bar to enforcing the decree, to which the state officials had agreed. The Court noted, however, that the State could move to modify the decree to ensure that its obligations under the Medicaid Act are overseen by state officials and not by a federal court.

E. *Grupo DataFlux v. Atlas Global Group*, No. 02-1689, 2004 WL 1085232 (U.S. May 17, 2004)

Issue: Whether a party's post-filing change in citizenship cures a lack of subject-matter jurisdiction that existed at the time a diversity action was filed.

Facts: Atlas filed a state-law suit in the Southern District of Texas against Grupo Dataflux, a Mexican corporation, alleging diversity jurisdiction. A jury returned a verdict for Atlas; but, before entry of judgment, Grupo moved to dismiss, arguing that the parties were not diverse at the time the suit was filed because Atlas had two Mexican partners and, therefore, the Atlas partnership was a Mexican citizen like Grupo. The district court dismissed the suit and the Fifth Circuit affirmed, holding that the failure to raise the defect until after the verdict, combined with the fact that Atlas's Mexican partners had left Atlas prior to trial, cured the jurisdictional defect that existed at the time of filing.

Holding: (5-4) Justice Scalia, writing for the majority, rejected the Fifth Circuit's exception to the time-of-filing rule, emphasizing that Atlas remained a party to the suit, despite a change in its partnership composition, and that dismissal was required due to the lack of diversity at the time of filing.

F. *Tennard v. Dretke* / *Smith v. Dretke*

Issues: (1) Whether *Penry v. Johnson*'s holding that jury instructions must permit consideration of a defendant's mental illness is limited to cases in which the defendant has a

“uniquely severe permanent handicap”; and (2) whether *Penry* is limited to circumstances in which there is a “nexus” between the crime and the defendant’s mental handicap.

(Pending)

III. HOT TOPICS

A. First Amendment

1. *Aschroft v. ACLU*

Issue: Whether the Child Online Protection Act violates the First Amendment.

(Pending)

2. *Elk Grove Unified Sch. Dist. v. Newdow*

Issues: (1) Whether a noncustodial parent has standing to challenge as unconstitutional a public-school-district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance; (2) whether the school’s policy that requires teachers to lead willing students in reciting the Pledge, which includes the words “under God,” violates the Establishment Clause of the First Amendment.

Scalia Recusal Issue: Without explanation, but apparently in response to a suggestion for recusal filed by Petitioner Newdow, Justice Scalia did not participate in the Court’s decision, on October 14, 2003, to grant the petition for writ of certiorari and will play no role in the Court’s resolution of the merits of this case. Newdow’s recusal suggestion alleged that Scalia publicly criticized the Ninth Circuit’s holding that the phrase “under God” in the Pledge violates the Establishment Clause.

(Pending)

3. *Locke v. Davey, 124 S.Ct. 1307 (2004)*

Issue: Whether the Free Exercise Clause of the First Amendment prohibits the State of Washington from excluding students who pursue a degree in devotional theology from eligibility for scholarships to cover postsecondary-education expenses.

Facts: The Washington State Legislature created the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses. Eligibility turns on academic, income, and enrollment requirements. The institution the student attends must certify that the student is enrolled at least half time and is not pursuing a degree in devotional theology. Under the Washington Constitution, the State is forbidden from even indirectly funding religious instruction in preparation for the ministry.

Joshua Davey, who was eligible to receive a scholarship, enrolled in a small, private Christian college and decided to pursue a double degree in pastoral ministries and business management. When the institution informed Davey that he could not use his scholarship to

pursue a devotional degree in pastoral ministries, he brought suit against state officials. The district court granted summary judgment for the State, but the Ninth Circuit reversed.

Holding: (7-2) In an opinion by Chief Justice Rehnquist, the Court held that the State's exclusion of students pursuing devotional degrees from the scholarship program did not offend the First Amendment. Although a State could, without violating the Establishment Clause, permit scholarship recipients to pursue degrees in devotional theology, the Free Exercise Clause does not require the States to do so. The State of Washington has merely chosen not to fund a distinct category of instruction.

B. The Political Realm

1. *Cheney v. United States Dist. Ct.*

Issues: (1) Whether the Federal Advisory Committee Act can be construed, consistent with the Constitution, separation-of-powers principles, and the Court's decisions governing judicial review of Executive Branch actions, to authorize broad discovery of the process by which the Vice President and other senior advisors gathered information to advise the President on important national policy matters, based solely on an unsupported allegation in a complaint that the advisory group was not constituted as the President expressly directed and the advisory group itself reported; and (2) whether the court of appeals had mandamus or appellate jurisdiction to review the district court's unprecedented discovery orders in this litigation.

Scalia Recusal Issue: Respondent Sierra Club moved to recuse Justice Scalia based on a duck hunting trip he took with Vice President Cheney, which had been arranged before the cert. petition in this case was filed. In a March 18, 2004 memorandum opinion, Justice Scalia declined to recuse himself, reasoning that no ground existed other than his friendship with the Vice President, which did not warrant recusal in a case in which the issue was official action, not the Vice President's personal fortune. Although there could be political consequences for the Vice President if disclosure of information revealed that he favored business interests, that possibility did not transform this official suit into a private suit.

(Pending)

2. *McConnell v. Fed. Election Comm'n*, 124 S.Ct. 619 (2003)

Issue: Whether various provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) are unconstitutional restrictions on speech.

Facts: Congress enacted BCRA to address increasing concerns about the use of soft money and issue advertising to influence federal elections. Title I regulates the use of soft money by political parties, officeholders, and candidates. Title II prohibits corporations and labor unions from using general treasury funds for communications that are intended to, or have the effect of, influencing the outcome of federal elections. Miscellaneous provisions in Title III and IV prohibit candidates from receiving the "lowest unit charge" for broadcast advertising within 45 days of a primary or 60 days before a general election unless the candidate states that she will not directly reference her opponent, increase and index for inflation certain campaign contribution limits, include "millionaire" provisions to increase contribution limits when a candidate's opponent spends a triggering amount of personal funds, requires identification of the authorizing candidate or committee, or other payor of, certain electioneering communications,

and prohibit individuals age 17 or younger from contributing to candidates or political parties. Title V requires broadcasters to keep publicly available records of politically related broadcasting requests.

Holding: Justices Stevens and O'Connor, writing together for 5 justices, upheld most of the soft-money and electioneering-communication provisions in Titles I and II, but invalidated the limits on party spending during the post-nomination, pre-election period. Chief Justice Rehnquist, writing for a range of 6-9 justices, dismissed challenges to several of the Title III and IV provisions for lack of standing (9 votes except for the dismissal of the lowest-unit-charge claim, which garnered 6 votes); upheld the electioneering-communication disclosure regime (8 votes), and struck the restriction on minors' contributions as a violation of the minors' First Amendment rights (8 votes). Justice Breyer, writing for 5 justices, upheld Title V's candidate-request, record-keeping requirements for broadcasters.²

3. *Vieth v. Jubelirer*, 124 S.Ct. 1769 (2004)

Issue: Whether, as the Court indicated in *Davis v. Bandemer*, 478 U.S. 109 (1986), political gerrymandering claims are justiciable and, if so, what standard governs such claims.

Facts: Plaintiffs challenged a congressional map drawn by the Pennsylvania General Assembly, alleging that the districts constitute an impermissible political gerrymander in violation of the Equal Protection Clause. A three-judge court dismissed the political-gerrymandering claim, and the Supreme Court noted probable jurisdiction.

Holding: (5-4 plurality) In a plurality opinion by Justice Scalia, the Court affirmed the three-judge court's dismissal of plaintiffs' political gerrymandering claims. Joined by three justices, Justice Scalia concluded that *Davis* was wrongly decided and that political gerrymandering claims present nonjusticiable political questions. Justice Kennedy concurred in the judgment but declined to join Justice Scalia's nonjusticiability opinion on the ground that a workable standard may be discerned in the future for political-gerrymandering claims. He also indicated that First Amendment principles may apply to allegations that an apportionment has the purpose and effect of burdening a group of voters' representational rights.

Justices Stevens and Souter each dissented, agreeing with Justice Scalia that, at least for the moment, statewide political gerrymandering claims should not be entertained. Justices Stevens and Souter concluded, however, that individual-district challenges are permissible, albeit under divergent standards: Justice Stevens would look to racial-gerrymandering standards and Justice Souter would look to Title VII burden-shifting analysis. Justice Breyer also dissented but, unlike Justices Stevens and Souter, determined that statewide political gerrymandering claims should be cognizable.

² Justices Scalia, Thomas, and Kennedy each filed opinions concurring in part and dissenting in part regarding various holdings in the various opinion on each of the titles; Chief Justice Rehnquist dissented regarding Titles I and V; and Justice Stevens dissented regarding the lowest-unit-charge standing aspect of the Chief's opinion on Titles III and IV.

C. Post-9/11 Cases

1. *Hamdi v. Rumsfeld*

Issue: Whether the United States military may detain an American citizen who was apprehended in Afghanistan as an enemy combatant and then held in the United States.

(Pending)

2. *Rumsfeld v. Padilla*

Issue: Whether the President may seize and detain a United States citizen in the United States based on a determination that the citizen is an enemy combatant.

(Pending)

3. *Odah v. United States*

&

4. *Rasul v. Bush*

Issue: Whether United States courts lack jurisdiction over challenges to the legality of detaining foreign nationals who were captured abroad in connection with hostilities and are incarcerated at the Guantanamo Bay Naval Base.

(Pending)

D. Eleventh Amendment

1. *Frew v. Hawkins*, 124 S.Ct. 899 (2004)

See supra Part II.D.

2. *Tenn. v. Lane*, 2004 WL 1085482 (2004)

Issue: Whether Title II of the Americans with Disabilities Act (ADA) is a proper exercise of Congress's enforcement power under §5 of the Fourteenth Amendment and, therefore, abrogates state sovereign immunity?

Facts: Two paraplegics sued the State of Tennessee and several counties under Title II of the ADA, alleging that they were denied access to the court system. Lane contended that he had to crawl up two flights of stairs in a county courthouse without an elevator to answer criminal charges. The district court denied the State's motion to dismiss based on Eleventh Amendment immunity. The Sixth Circuit determined that the Due Process Clause protects the right of access to courts and that evidence presented to Congress in connection with Title II related to this type of violation. Because the factual record was inadequate to resolve the particular claims in this case, however, the Sixth Circuit remanded for further proceedings.

Holding: (5-4) Writing for the Court, Justice Stevens affirmed, holding that Title II, as applied to cases implicating the fundamental right of access to the courts, is a valid exercise of Congress's §5 power to enforce the constitutional guarantees of the Fourteenth Amendment. Because Title II is aimed not only at irrational disability discrimination, but also is a congruent and proportional response to discrimination in services implicating fundamental rights—specifically access to courts—Congress had authority to abrogate States' immunity from suits for money damages for infringement of the right of access to courts. The Court declined to consider whether Title II is valid legislation in other contexts.

3. *Tenn. Student Assistance Corp. v. Hood*, No. 02-1606, 2004 WL 1085610 (U.S. May 17, 2004)

Issue: Whether Congress's power to enact uniform bankruptcy laws permits it to abrogate state sovereign immunity from private suits.

Facts: The Tennessee Student Assistance Corporation (TSAC) guarantees student loans made to Tennessee residents and to non-residents who are enrolled in eligible Tennessee schools or who make loans through a Tennessee lender. Pamela Hood, who signed promissory notes for student loans guaranteed by TSAC, filed a Chapter 7 bankruptcy petition. TSAC did not participate in the proceeding but Sallie Mae filed a proof of claim that it subsequently assigned to TSAC. Hood was granted a general discharge, but it did not cover the student loans. She reopened the bankruptcy for the limited purpose of discharging the loans as an undue hardship and included TSAC in her complaint. TSAC moved to dismiss based on Eleventh Amendment immunity; the bankruptcy court denied the motion; a Sixth Circuit bankruptcy panel unanimously affirmed; and the Sixth Circuit also affirmed, holding that Congress had authority to abrogate the States' immunity through 11 U.S.C. §106(a) because the States ceded their immunity to private suits in bankruptcy in the Constitutional Convention. One judge concurred on the ground that TSAC waived its immunity by accepting Sallie Mae's proof of claim.

Holding: (7-2) In an opinion by Chief Justice Rehnquist, the Court held that a proceeding initiated by a debtor to determine the dischargeability of a student-loan debt is not a suit against the State for purposes of the Eleventh Amendment. The bankruptcy court's jurisdiction is over the *res*, not person or entity to whom the debt is owed, and although Congress made it more difficult to discharge student loans by requiring a showing of undue hardship, that does not alter the bankruptcy court's jurisdiction over the *res*. Accordingly, the Court did not reach the broader abrogation question presented.

IV. INTERNATIONAL CONTROVERSIES

1. *Altmann v. Republic of Austria*

Issue: Does the Foreign Sovereign Immunities Act confer federal jurisdiction over the Republic of Austria and state-owned Austrian Gallery in a suit alleging wrongful appropriation of six Gustav Klimt paintings?

(Pending)

2. *Hoffmann-LaRoche v. Empagran*

Issues: (1) Whether, under the Foreign Trade Antitrust Improvements Act, the Sherman Act applies to foreign plaintiffs whose injuries do not arise from the effects of antitrust violations on United States commerce; and (2) whether such foreign plaintiffs lack antitrust standing under §4 of the Clayton Act.

(Pending)

3. *Sosa v. Alvarez-Machain*

Issues: (1) Whether the Alien Tort Statute creates a private cause of action for aliens to seek redress for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights of action; (2) whether DEA officials have authority to enforce a federal criminal statute that applies to acts perpetrated against a U.S. official in a foreign country by arresting, overseas, an indicted suspect; (3) whether the Federal Tort Claims Act's exclusion of torts arising in foreign countries prohibits an individual arrested overseas from suing for false arrest when the arrest was planned in the United States.

(Pending)

V. CIVIL GRAB BAG: QUICK TAKES

1. *Gen. Dynamics Land Sys. v. Cline*, 124 S.Ct. 1236 (2004)

Holding: (6-3: Souter) The Age Discrimination in Employment Act does not prohibit “reverse age discrimination” in the form of preferential treatment of employees who are older than other employees also protected by the Act. The Court rejected an EEOC regulation reaching the opposite conclusion as “clearly wrong” and undeserving of deference because traditional judicial construction yields a clear sense of congressional intent. The word “age” can have different meanings within the statute, and preferential treatment for older workers is not discrimination based on age within the meaning of the Act.

2. *Kontrick v. Ryan*, 124 S.Ct. 906 (2004)

Holding: (9-0: Ginsburg) The 60-day time limit under the Bankruptcy Rules governing Chapter 7 proceedings for a creditor to object to a debtor's discharge is not jurisdictional. Accordingly, a time-limitation objection is waived if not raised before the bankruptcy court reaches the merits of the creditor's objection to the discharge.

3. *Raytheon v. Hernandez*, 124 S.Ct. 513 (2003)

Holding: (7-0:³ Thomas) An Americans with Disabilities Act (ADA) claim by an employee who was lawfully forced to resign for drug use, but was subsequently rehabilitated and denied reemployment under a company policy prohibiting the rehiring of former employees terminated for workplace misconduct, must be analyzed under disparate treatment, not disparate impact, principles. The Court did not reach the question presented: whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct.

4. *Scarborough v. Principi*, 124 S.Ct. 1856 (2004)

Holding: (7-2: Ginsburg) Under the Equal Access to Justice Act, 28 U.S.C. §2412(d), a party who prevails against the United States and timely files an application for attorneys' fees and costs within 30 days of judgment may, in accordance with relation-back analysis, amend that application out of time to allege that the United States's position in the litigation was not "substantially justified," which is a statutory requirement for obtaining fees. The Court rejected the United States's argument that timely compliance with every requirement under the statute is a condition of Congress's waiver of the United States's immunity from liability for fees. Justice Scalia, joined by Justice Thomas, dissented, agreeing with the United States that the not-substantially-justified allegation must be made within the 30-day time limit and is a requirement of Congress's waiver of the United States's immunity.

5. *Verizon Communications v. Trinko*, 124 S.Ct. 872 (2004)

Holding: (9-0 reversal: Scalia (6); Stevens concurrence in judgment (3)) The majority held that an allegation that an incumbent local telephone company breached its duty under the Telecommunications Act of 1996 to share its network with competitors does not state an antitrust violation under §2 of the Sherman Act. The concurring justices would not reach the question, concluding instead that Respondent Trinko, a customer of one of Verizon's competitors, lacks standing.

VI. SEARCH-AND-INTERROGATION GRAB BAG: QUICK TAKES

1. *Fellers v. United States*, 124 S.Ct. 1019 (2004)

Holding: (9-0: O'Connor) When a defendant has been indicted and police deliberately elicit inculpatory statements while arresting him at his home, the Sixth Amendment applies. Subsequent, similar statements made by the defendant at jail, following *Miranda* warnings, must be suppressed as fruits of the earlier, unconstitutional questioning in the defendant's home.

³ Justices Souter and Breyer did not participate.

2. ***Groh v. Ramirez*, 124 S.Ct. 1284 (2004)**

Holding: (5-4: Stevens) An ATF agent who conducted a search pursuant to a warrant that did not describe with particularity the evidence to be seized and did not incorporate by reference the description of evidence in the warrant application violated the Fourth Amendment and was not entitled to qualified immunity from a suit, under 42 U.S.C. §1983, for money damages stemming from the unlawful search.

3. ***Hiibel v. Sixth Judicial Dist.***

Issue: Whether the Fourth Amendment prohibits police officers from requiring a person to identify herself during a *Terry* stop.

(Pending)

4. ***Ill. v. Lidster*, 124 S.Ct. 885 (2004)**

Holding: (9-0 and 6-3 in part: Breyer) The arrest of a drunk driver whom police encountered at a highway checkpoint established to obtain information about a fatal hit-and-run collision the week before, in the same area and at the same time of day, does not offend the Fourth Amendment. The checkpoint was an information-gathering device, not a means to determine whether vehicles' occupants were committing crimes. Justice Stevens, writing for three justices, agreed with the majority that information-gathering checkpoints are distinguishable from criminal-evidence gathering checkpoints but would remand the case to the Illinois Supreme Court for a determination about the reasonableness of this particular checkpoint and arrest.

5. ***Maryland v. Pringle*, 124 S.Ct. 795 (2003)**

Holding: (9-0: Rehnquist) When cash is found in the glove compartment and drugs are found in the rear passenger compartment of a vehicle, and all occupants deny ownership of the cash and drugs, police may arrest all of the vehicle's occupants.

6. ***Thornton v. United States*, No. 03-5165, 2004 WL 1144370 (U.S. May 24, 2004)**

Holding: (7-2: Rehnquist (writing for 5, except n.4)⁴) When a police officer has made a lawful custodial arrest of the driver of a vehicle, the officer may search the passenger compartment of the vehicle incident to the arrest, even if the driver has parked and stepped out of the vehicle when the officer first makes contact. Justice Scalia, joined by Justice Ginsburg, concurred only in the judgment, rejecting the majority's rationale that preventing the driver from reaching back in the vehicle for a weapon or to destroy evidence justified the search. These justices concluded, instead, that the search is justifiable because the car is likely to contain evidence of the crime for which the driver was arrested.

⁴ Justice O'Connor joined the majority opinion except for footnote 4.

7. *United States v. Banks*, 124 S.Ct. 521 (2003)

Holding: (9-0: Souter) When officers executing a search warrant for an apartment in connection with a drug offense wait 15-20-seconds after knocking and announcing their presence, forcible entry of the apartment does not violate the Fourth Amendment. The officers could reasonably suspect that after 15 or 20 seconds without a response, the drugs were being destroyed.

8. *United States v. Flores-Montano*, 124 S.Ct. 1582 (2004)

Holding: (9-0: Rehnquist) The Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank without offending the Fourth Amendment.

9. *United States v. Patane*

Issue: Does the fruit-of-the-poisonous-tree doctrine apply to physical evidence obtained as the result of a statement given voluntarily, but without *Miranda* warnings?

(Pending)

VII. GRANTS TO WATCH

A. Fifth Circuit Grants to Date

1. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, No. 02-1192

Issue: Whether a private party not subject to civil actions under CERCLA §§106 or 107 may seek contribution to recover costs spent voluntarily cleaning up properties contaminated by hazardous substances.

2. *Smith v. City of Jackson*, No. 03-1160

Issue: Whether disparate-impact claims are cognizable under the Age Discrimination in Employment Act.

B. Grants on Hot Topics

1. *Crawford v. Martinez*, No. 03-35053

Issue: Whether 8 U.S.C. §1231(a)(6) compels the release of an arriving alien who was apprehended at the United States border, denied admission, and ordered removed from the United States.

2. ***Granholm v. Mich. Beer & Wine Wholesalers Ass'n*, No. 03-1116
Mich. Beer & Wine Wholesalers Ass'n v. Heald, 03-1120
Swedenburg v. Kelly, No. 03-1274**

Issue: Whether a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of §2 of the Twenty-First Amendment.⁵

The two state schemes at issue involve Michigan and New York. Last year, the Fifth Circuit invalidated Texas's restrictions on direct wine shipping from out of state, *see Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), but Texas did not file a petition for writ of certiorari.

3. ***Roper v. Simmons*, No. 03-633**

Issues: (1) Once the Supreme Court holds that a particular punishment is not cruel and unusual, can a lower court reach a contrary decision based on its own analysis of evolving standards? (2) Whether imposing the death penalty on a seventeen-year-old who commits murder is cruel and unusual punishment.⁶

⁵ The Twenty-First Amendment prohibits "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. CONST. amend. XXI.

⁶ In *Stanford v. Kentucky*, the Court held that the minimum age for capital punishment is sixteen. 492 U.S. 361 (1989).