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UNITED STATES SUPREME COURT: 1990-91 TERM

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This article summarizes many of the U.S. Supreme Court's criminal law decisions of the last term.

SEARCH AND SEIZURE

Probable Cause Hearings

In *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991), the Supreme Court held that a 48-hour delay between the time of arrest and a hearing to determine probable cause did not violate the Fourth Amendment. In an earlier case, *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court had held that the Fourth Amendment required a "prompt" judicial determination of probable cause if a person is arrested without a warrant. *McLaughlin* involved a class action challenging the manner in which the County of Riverside implemented this requirement.

Under the County's policy the probable cause determination was combined with the arraignment. Arraignments, under state law, must be conducted within two days of arrest. Weekends and holidays, however, were excluded from the two-day computation. Consequently, a person arrested late in the week could be held for as many as five days before receiving a probable cause hearing. Over the Thanksgiving holiday, a 7-day delay was possible.

The Supreme Court wanted to provide states with some flexibility in complying with the *Gerstein* requirement, thereby permitting states to incorporate the probable cause determination into bail or initial appearance proceedings. "But flexibility has its limits; *Gerstein* is not a blank check. A State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause." *Id.* at 1669.

Because the lower courts had failed to agree on what constitutes a "prompt" hearing, the Supreme Court felt compelled to provide more specific guidance: "a jurisdiction that provides judicial determination of probable cause within 48 hours of arrest will, as general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges." *Id.* at 1670. The Court went on to state, however, that the 48-hour limit determined only the burden of proof. The burden rests on the defendant when the detention is less than 48 hours and rests on the

prosecution for detentions of more than 48 hours. The Court commented:

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. *Id.* at 1670.

A delay over 48 hours is presumptively invalid, shifting the burden to the prosecution to justify the delay. A bona fide emergency or other extraordinary circumstances might suffice; intervening weekends and delays to consolidate proceedings would not. A jurisdiction wishing to combine procedures must do so within the 48-hour period.

Seizure

California v. Hodari D., 111 S.Ct. 1547 (1991), presented the Court with the opportunity to decide whether a fleeing suspect is "seized" within the meaning of the Fourth Amendment when the police give chase. Two police officers in an unmarked car rounded a corner and began to drive toward a group youths. When the car approached, the youths began to flee. The officers became suspicious and pursued some of them, one officer in the car and the other on foot. Hodari threw away what appeared to be a small rock just before he was tackled by the officer. He was carrying a pager and \$130 in cash. The "rock" turned out to be crack cocaine.

The key issue was: *When* did the seizure occur? A California appellate court had held that Hodari had been "seized" when he saw the officer running toward him. Under this analysis, the crack would be the fruit of an illegal detention due to the lack of reasonable suspicion. The Supreme Court disagreed, holding that the seizure occurred after the crack was dropped. The majority did not believe that the text of the Fourth Amendment nor its underlying policy supported the lower court's interpretation.

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The Court wrote:

In sum, assuming that [the officer's] pursuit in the present case constituted a "show of authority" enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude it was properly denied. *Id.* at 1552.

One other aspect of *Hodari* deserves comment. The State conceded that the youths' flight did not amount to reasonable suspicion. The Supreme Court accepted this concession for purposes of deciding this case. In a footnote, however, the majority questioned this point:

That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 ("The wicked flee when no man pursueth"). We do not decide that point here, but rely entirely upon the State's concession. *Id.* at 1549 n.1.

Seizure

Florida v. Bostick, 111 S.Ct. 2382 (1991), also involved a "seizure" issue. This case involved two police officers who boarded a bus, picked out Bostick, and asked to see his ticket and identification. The officers were in uniform. They had, however, no reasonable suspicion to single out Bostick. After returning his identification, they explained that they were on the lookout for drugs and asked whether Bostick would consent to a search of his bag. The trial court found that Bostick voluntarily consented. Consequently, the critical issue before the Supreme Court was whether the initial contact between Bostick and the police was a "seizure." If this encounter amounted to a seizure, it would have been illegal due to the lack of reasonable suspicion, and thus the consent would be tainted.

The Florida Supreme Court ruled that when police mount a drug search on buses during scheduled stops and question boarded passengers without reasonable suspicion an impermissible seizure occurs. The U.S. Supreme Court rejected this analysis as inconsistent with its earlier cases. These cases had held that a seizure does not occur simply because the police approach a person and ask questions. As long as a reasonable person would feel free to leave, the encounter is consensual and reasonable suspicion is not required. Only when the police, by means of physical force or show of authority, have in some way restrained the person's liberty does a "seizure" occur.

Bostick attempted to distinguish these cases because the encounter took place "in the cramped confines of a bus." He argued that such an encounter is more intimidating in this setting because the "police tower over a seated passenger and there is little room to move around." *Id.* at 2386. The Court remained unconvinced. As long as the passenger is not led by the police's conduct to believe that he is not free to leave, no seizure has occurred. The Court took pains to make two points. First, the officers had advised Bostick of his right to refuse to consent. Second, the officers never used or threatened to use their weapons.

Significantly, the Court also pointed out that it had

"consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Id.* at 2387

Automobile Searches

The Court granted certiorari in *California v. Acevedo*, 111 S.Ct. 1982 (1991), to "reexamine the law applicable to a closed container in an automobile, a subject that has troubled courts and law enforcement officers since it was first considered in *Chadwick*." *Id.* at 1985.

The police had seized a shipment of marijuana and then let a suspect take control of it and bring it to his apartment. Shortly thereafter another man arrived and left with a blue knapsack. When he was stopped, marijuana was found in the knapsack. The defendant, Charles Acevedo, was the next person to enter the apartment. He left with a bag the size of the individually wrapped marijuana packages found in the shipment. He placed the bag in the trunk of his car and began to drive away. The police stopped the car, searched the trunk, and found marijuana when they opened the bag.

These facts raised an issue that was bound to return to the Supreme Court. The Court's prior cases, *United States v. Chadwick*, 433 U.S. 1 (1977), and *United States v. Ross*, 456 U.S. 798 (1982), had created a strange rule. If the police had probable cause to believe contraband was in an automobile, they could search the entire car without a warrant, including any container in the car. If, however, the police had probable cause that the contraband was in a *container* in a automobile, they could seize the container but could not search it without a warrant.

Not surprisingly, the Court eliminated this anomaly by dispensing with the warrant requirement for all containers found in automobiles, provided there is probable cause: "The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *Id.* at 199.

As the dissent points out, however, the new ruling still leaves an anomaly. The police must obtain a warrant if they seize a briefcase from a pedestrian, but no warrant is required if they wait until the pedestrian places the briefcase in a car and begins to drive away.

Consent

Florida v. Jimeno, 111 S.Ct. 1801 (1991), involved a defendant's consent to the search of an automobile during which the police found drugs in a closed container. A policeman was following the defendant's car because the policeman suspected drug activity. The defendant's car was stopped when he made a right turn without stopping at a red light. The officer told the defendant that he thought drugs were in the car and that he wanted to search the car. He also informed the defendant that the defendant did not have to consent. The defendant replied by saying that he had "nothing to hide" and the officer could search. During the search the officer found a folded, brown paper bag on the floorboard. He opened the bag and discovered a kilogram of cocaine.

The Florida Court of Appeals ruled the search illegal because it went beyond the scope of the defendant's consent. According to that court, consent to a general search for narcotics does not extend to sealed containers within the general area agreed to by the defendant. The

U.S. Supreme Court disagreed. The touchstone of the Court's analysis was reasonableness. The scope of the search is generally defined by its object, and the defendant consented to a search for drugs, which are typically concealed in containers. "We think that it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs." *Id.* at 1804. The Court held: "The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the car." *Id.* at 1803.

The decision nevertheless does contain limiting language. The Court stated that consent to the search of a car trunk would not extend to a locked briefcase found inside the trunk. "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag." *Id.* at 1804. In addition, a defendant can delimit the scope of the search on his own initiative.

CONFESSIONS

Miranda: Right to Counsel

In *Minnick v. Mississippi*, 111 S.Ct. 486 (1990), the defendant was apprehended in California for murder and other crimes committed in Mississippi. After his arrest, he was first interviewed by FBI agents. He received Miranda warnings, refused to sign a waiver form, and made some incriminatory statements. He told the agents to "Come back Monday when I have a lawyer present." *Id.* at 488. An attorney was appointed, and Minnick consulted with him. On the following Monday, a Mississippi sheriff sought to interview Minnick. Minnick later testified that his jailers told him he had to meet with the sheriff. Again Miranda warnings were given, and again Minnick declined to sign a rights waiver form. Nevertheless, he went on to make extensive inculpatory comments. His comments in this last interview were admitted against him at trial, and he was convicted.

The Supreme Court agreed with Minnick's Miranda argument. In *Edwards v. Arizona*, 451 U.S.477 (1981), the Court had ruled that once a suspect asserts his right to counsel under Miranda, questioning must cease and a subsequent interrogation could not commence *unless* the suspect initiated the second contact with the police. The *Edwards* rule was designed to prevent the police from badgering a suspect into waiving his previously asserted Miranda rights. It also had the advantage of providing a clear and unequivocal guideline.

The Mississippi Supreme Court had held that this requirement had been satisfied in Minnick's case because he had consulted with counsel before the reinterrogation. The Supreme Court rejected this reading of *Edwards*. The Court wrote:

In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate inter-

rogation without counsel present, whether or not the accused has consulted with his attorney. *Id.* at 491.

Miranda vs. Right to Counsel

McNeil v. Wisconsin, 111 S.Ct. 2204 (1991), turned on the distinction between the right to counsel under the Sixth Amendment and the right to counsel under *Miranda*, a Fifth Amendment self-incrimination case.

McNeil was arrested in Nebraska for a Wisconsin bank robbery. Two Milwaukee sheriffs were sent to retrieve him. After receiving Miranda warnings, McNeil refused to answer questions, but he did not request counsel. Once back in Milwaukee, McNeil was brought before a commissioner for an initial appearance on the bank robbery charge, at which time a public defender was appointed to represent him.

A detective investigating an unrelated murder and burglary visited McNeil at the jail that evening. Miranda warnings were given and waived. McNeil did not deny knowledge of these crimes but merely said that he was not involved. Two days later the detective returned, McNeil again waived his Miranda rights, and then admitted his involvement in the murder and burglary. After checking out McNeil's story, the detective returned a third time. McNeil again waived his Miranda rights and made another incriminating statement. At trial for the murder and burglary, he moved to suppress his three statements, arguing that his court appearance with an attorney on the initial bank robbery charge constituted an invocation of his Miranda right to counsel for the other crimes.

On review, the Supreme Court rejected this argument. The Court's prior Sixth Amendment cases had held that once the right to counsel has attached, a subsequent waiver at a police-initiated custodial interview is ineffective. *Michigan v. Jackson*, 475 U.S. 625 (1986). Here, the right to counsel for the bank robbery had attached at the initial appearance, and McNeil had not initiated the interview at the jail. The Court ruled, however, that the "Sixth Amendment right . . . is offense-specific. It cannot be invoked for all future prosecutions, for it does not attach until a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment'." *Id.* at 2207. Consequently, McNeil's Sixth Amendment right to counsel for the murder-burglary charges had not yet attached. In addition, he waived his Miranda Fifth Amendment right to counsel before giving each statement. McNeil's claim rested on a combination of the Sixth and Fifth Amendment rights, but the Court required a separate analysis of the two constitutional guarantees.

Involuntary Confessions: Harmless Error

In *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991), the Court reversed its long-standing rule that involuntary confessions were not subject to harmless error analysis. Under the prior cases, the admissibility of such a confession resulted in automatic reversal of the conviction.

Fulminante reported to the police that his 11-year-old stepdaughter was missing. Her body was discovered two days later. Fulminante became a suspect but charges were never filed. This occurred in 1982. He subsequently moved to New Jersey and was sent to prison for a later

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firearms violation. While detained, another inmate, an FBI informant, learned about the Arizona killing. The informant told Fulminante that he could protect Fulminante from other inmates only if Fulminante told him about the killing. Fulminante admitted his involvement in the stepdaughter's death.

The Supreme Court ruled that the confession had been coerced. There had been a credible threat of physical violence against Fulminante because the other inmates had learned that he was a "child murderer." The critical issue involved the consequence of this finding. The Court had long held that a conviction based on an involuntary confession could not stand. This rule applied even if there was ample other evidence to support the conviction. A five-Justice majority scrapped this automatic reversal rule. A conviction need not be reversed in this context if the prosecution can establish that the erroneously admitted confession was harmless error beyond a reasonable doubt.

GRAND JURY SUBPOENAS

The Court considered grand jury practice in *United States v. R. Enterprises, Inc.*, 111 S.Ct. 722 (1991). The issue involved a challenge to a subpoena duces tecum issued by a federal grand jury investigating the interstate transportation of obscene material. The subpoenas required the production of corporate records and numerous videotapes shipped by three companies owned by Martin Rothstein. All three companies moved to quash the subpoenas on relevancy grounds.

The Supreme Court focused on Federal Criminal Rule 17(c), which governs subpoenas duces tecum in federal practice. The rule authorizes the trial court to quash or modify a subpoena if "compliance would be unreasonable or oppressive." The Court determined that "reasonableness" differed according to context and the standards applicable to trial subpoenas do not apply to grand jury subpoenas. In particular the Court held that the standards of *United States v. Nixon*, 418 U.S. 683 (1974), were inapplicable. *Nixon* had held that a party seeking production of documents must make a reasonably specific request for information that would be both relevant and admissible at trial.

The prosecution need not make such a showing when a grand jury subpoena is challenged. These subpoenas are "presumed to be reasonable" and the burden to demonstrate unreasonableness rests on the challenging party. This burden is substantial:

[W]here . . . a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation. *Id.* at 728.

The Court acknowledged that this standard was especially stringent for the recipient of the subpoena because there is no requirement that the recipient be apprised of the subject matter of the investigation. The Court suggested that the trial court could require the Government to make an in camera disclosure of the subject matter of the investigation. This procedure would preserve grand jury secrecy and preclude the use of challenges as a discovery device.

Standing

In *Powers v. Ohio*, 111 S.Ct. 1364 (1991), a white defendant challenged the prosecutor's use of peremptory challenges to exclude black venirepersons from a jury in an aggravated murder prosecution. Citing *Batson v. Kentucky*, 476 U.S. 79 (1986), the defendant raised Sixth Amendment (jury trial) and Fourteenth Amendment (equal protection) challenges to this conduct.

The Court had long held that racial discrimination in the jury selection process offended the Equal Protection Clause. In *Swain v. Alabama*, 380 U.S. 202 (1965), the Court for the first time considered the use of peremptory challenges as a device to exclude jurors because of their race. The Court rejected *Swain's* challenge, but indicated that the systematic exclusion of black persons through the use of peremptories over a period of time might establish an Equal Protection violation. This burden, however, was difficult to satisfy, and the Court revisited the issue in *Batson*. In that case the Court held that a defendant could raise an Equal Protection challenge to the use of peremptories at his own trial by showing that the prosecutor had used them for the purpose of excluding members of the defendant's race. Establishing systematic exclusion over a period of time, as suggested in *Swain*, was not required. The Court rested its decision on Equal Protection grounds.

In a subsequent decision, *Holland v. Illinois*, 493 U.S. 474, 110 S.Ct. 803 (1990), the defendant made a Sixth Amendment challenge, based on the "fair cross section" guarantee of the right to trial by jury. A majority of the Court ruled that the "fair cross section" requirement applied to the jury pool and not to the petit jury chosen from that pool. Thus, peremptory challenges could not be attacked on this ground. Five Justices, however, suggested that an Equal Protection challenge might be successful. Justice Kennedy, writing a concurring opinion, indicated that he would side with the four dissenting Justices if a Fourteenth Amendment challenge had been raised: "I find it essential to make clear that if the claim here were based on the Fourteenth Amendment Equal Protection Clause, it would have merit." *Id.* at 811.

The principal problem with the Equal Protection argument raised in *Powers* concerned the issue of standing. *Swain* suggested and *Batson* held that the exclusion of jurors on a racial basis by means of peremptory challenges violated the Equal Protection Clause. *Batson* a black man, had challenged the exclusion of other blacks from the jury. *Powers*, however, was a white defendant challenging the exclusion of black jurors. The issue turned on whether a white defendant suffered any harm in this situation. The Court held that *Powers* had suffered such a harm:

The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race. 111 S.Ct. at 1372.

This analysis was also supported by a third-party standing argument, with the Court finally concluding “that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race.” *Id.* at 1373.

Civil Cases and Peremptories by the Defense

In *Edmonson v. Leesville Concrete Company, Inc.*, 111 S.Ct. 2077 (1991), the Court extended *Batson* to civil litigation. This case is important because it suggests the answer to another issue: Does *Batson* apply to the defendant’s use of peremptory challenges? Several lower courts have answered “yes.” See *United States v. De Gross*, 913 F.2d 1417, 1423-24 (9th Cir. 1990).

The principal issue is whether there is state action when the defendant strikes jurors on racial grounds, an issue also critical in analyzing whether *Batson* applies to civil litigation. The Court in *Edmonson* wrote:

Though the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body. Were it not for peremptory challenges, there would be no question that the entire process of determining who will serve on the jury constitutes state act. The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised. 111 S.Ct. at 2086.

This reasoning also would seem to apply to a criminal defendant’s use of peremptories. In dissent Justice Scalia noted that the rationale of *Edmonson* would make *Batson* applicable to criminal defendants: “The effect of today’s decision (which logically must apply to criminal prosecutions) will be to prevent the *defendant* from [race-based strikes] — so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible.” *Id.* at 2095. The Court subsequently granted certiorari on this issue. *Georgia v. McCullum*, 112 S.Ct. 370 (1991).

Standard of Review

In *Hernandez v. New York*, 111 S. Ct. 1859 (1991), the prosecutor used peremptory challenges to strike two Latinos from the jury panel. The defendant objected on *Batson* grounds. In response, the prosecutor explained that he feared that the two jurors would not be able to accept an interpreter’s version of the testimony of Spanish-speaking witnesses.

The Supreme Court, in a split decision, ruled that the prosecutor’s conduct had not violated the Equal Protection Clause. The Court set out a three-step procedure for analyzing *Batson* issues: (1) Initially, the defendant must make a prima facie showing of the racial basis for peremptory strikes. (2) Once this showing is made, the burden shifts to the prosecution who must offer a race-neutral explanation for its conduct. (3) Finally, the court must determine whether the prosecution has satisfied its burden. The issue in *Hernandez* was whether the prosecution’s explanation amounted to a valid race-neutral explanation under the second prong of the *Batson* test. The Court wrote:

A neutral explanation in the context of our analysis here means an explanation based on something other

than the race of the juror. . . . Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral. *Id.* at 1866.

The defendant argued that Spanish-language ability was closely related to ethnicity, and thus the use of peremptories on this basis violated Equal Protection guarantees. The plurality opinion side-stepped this issue by pointing out that language alone was not the basis for the strike. The prosecutor explained that the two potential jurors hesitated in responding and their demeanor also caused him to question whether they would accept the official translation. Accordingly, the explanation was race-neutral: “As explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals.” Although the prosecutor’s position “might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor’s actions into a *per se* violation of the Equal Protection Clause.” *Id.* at 1867. The trial court found no discriminatory intent, and the Supreme Court would not disturb this finding because it was not “clearly erroneous.” *Id.* at 1871.

PREJUDICIAL PUBLICITY

Voir Dire

The defendant in *Mu’min v. Virginia*, 111 S.Ct. 1899 (1991), was charged with the murder of a woman in Prince William County, Virginia. At the time of the murder Mu’min was out of prison on a work detail. The case generated substantial publicity. Eight of the twelve venirepersons eventually sworn as jurors had read or heard something about the case. They also stated that they had formed no opinion and would consider only the evidence admitted at trial.

Mu’min was convicted, sentenced to death, and appealed. He argued that his Sixth Amendment right to an impartial jury and his right to due process under the Fourteenth Amendment were violated because the trial judge refused to question the jurors about the specific content of the news reports to which they had been exposed.

The defendant had initially asked for a change of venue because of the pretrial publicity, which included numerous articles about the crime and the defendant, including the fact that he had been sentenced to prison for an earlier murder. The trial court deferred ruling on this motion until after it attempted to seat a jury. The defense next submitted 64 proposed voir dire questions and a motion for individual voir dire. The court rejected both the questions and the motion. Instead, the jurors who had indicated that they had heard of the case were asked if they could keep an open mind and wait until all the evidence had been introduced before reaching a fixed opinion.

The Supreme Court found nothing wrong with this procedure. A trial court’s failure to ask questions on voir dire violates the Constitution only if it is fundamentally unfair. Under the constitutional standard, the issue “is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.” *Patton v. Yount*, 467 U.S. 1025, 1035 (1984). The Court believed that the trial court’s conduct on voir dire

satisfied this standard. Further specific questions were not required, at least not on this record.

Gag Rules on Defense Attorneys

Gentile v. State Bar of Nevada, 111 S.Ct. 2720 (1991), involved a defense attorney who was disciplined for holding a press conference. The press conference was held the day after his client was indicted, and *Gentile* asserted that his client was a scapegoat and that the crime had been committed by police officers. Six months after the press conference, the client was tried and acquitted. Thereafter, the State Bar found that *Gentile's* conduct at the press conference violated a court rule on pretrial publicity, which is almost identical to ABA Model Rule of Professional Conduct 3.6. The Rule prohibited an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should have known that it will have a substantial likelihood of material prejudicing an adjudicative proceeding." *Gentile* argued that the rule violated his First Amendment and Due Process rights.

The case turned on the due process issue. *Gentile* argued that the rule was void for vagueness. The Rule recognized an exception; an attorney may "state without elaboration . . . the general nature of the . . . defense." According to the Court, the terms "general" and "elaboration" were "both classic terms of degree."

In the context before us, these terms have no settled usage or tradition of interpretation. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated. *Id.* at 2731.

The Rule therefore provided insufficient notice of what was proscribed, a traditional "void-for-vagueness" concern. In addition, a vague provision raises the possibility of discriminatory enforcement. The Court believed that this was a real possibility, a danger which is of "particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State." *Id.* at 2732.

The First Amendment issue produced a different majority. Justice O'Connor, who joined in the due process analysis with four other Justices, sided with a different majority on the freedom of speech issue. This majority, led by the Chief Justice, held that attorneys' First Amendment rights were limited by their participation in the judicial process. These five Justices believed that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press . . ." *Id.* at 2744. In particular, a "substantial likelihood of material prejudice" standard could be used in lieu of the more exacting "clear and present danger" standard.

Because *Gentile's* statement was made six months before trial and the jury was to be selected from a population in excess of 600,000 persons, the Court found that the press conference could not have prejudiced the jury selection process. Indeed, the record showed that police and prosecutor comments on the investigation leading

up to the indictment were far more pervasive.

DEFENSE EVIDENCE: RAPE SHIELD LAWS

The defendant in *Michigan v. Lucas*, 111 S.Ct. 1743 (1991), was charged with rape. A "rape shield" statute required a rape defendant to give the prosecution 10-day notice of his intention to present evidence of an alleged rape victim's past sexual conduct. *Lucas* failed to comply with the notice requirement, and the trial court refused to allow such evidence at trial. On appeal, a Michigan appellate court ruled that the exclusion of defense evidence was a per se violation of the accused's Sixth Amendment right to present a defense. The Supreme Court reversed.

Any statute that operates to prevent an accused from presenting relevant evidence implicates the Sixth Amendment. The right to present a defense, however, is not without limit. Indeed, in *Taylor v. Illinois*, 484 U.S. 400 (1988), the Court had ruled that under some circumstances a trial court could exclude defense evidence as a sanction for the defendant's failure to comply with prosecution discovery requests. *Taylor* did not hold that preclusion of defense evidence could always be justified, only that preclusion was not per se unconstitutional.

The Court applied the same reasoning in *Lucas*: "The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion." *Id.* at 1748. Consequently, the Court rejected the view that preclusion of defense evidence was a per se violation of the Sixth Amendment. The Court refused to decide whether preclusion could be justified on the facts of this case. Instead, the Court remanded the case to the lower court to determine this issue.

CRUEL AND UNUSUAL PUNISHMENT

The defendant in *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991), was sentenced to mandatory life imprisonment without possibility of parole for possessing over 1.5 pounds of cocaine. A first-time offender, *Harmelin* challenged his sentence as violative of the Eighth Amendment's proscription against cruel and unusual punishment. He argued that the sentence was significantly disproportionate to the crime committed and that its mandatory imposition precluded the sentencing court from considering the circumstances of the crime or of the criminal. The Supreme Court rejected these contentions.

The Court's most recent decision on the application of the Eighth Amendment in noncapital cases was *Solem v. Helm*, 463 U.S. 277 (1983). The Court in *Solem* struck down a sentence of life imprisonment without possibility of parole because it was grossly disproportionate to the crime charged and underlying recidivism statute upon which the sentence was based.

In *Harmelin* a plurality of the Court took the position that "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "'grossly disproportionate' to the crime." 111 S.Ct. at 2705. Like *Solem*, *Harmelin* received the second most severe penalty permitted by law. His crime, however, was far more serious than the relatively minor nonviolent offenses committed by *Solem*.