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U.S. Supreme Court: The 1986-87 Term (Part I)

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The 1986-1987 Term of the United States Supreme Court ended in June. This is the first of two articles reviewing the major decisions involving criminal procedure decided this Term.

SEARCH AND SEIZURE

Curtilage

United States v. Dunn, 107 S.Ct. 1134 (1987), presented the Court with the opportunity to examine the “curtilage” rule. An investigation led D.E.A. agents to believe that Dunn was manufacturing phenylacetone and amphetamine on his ranch. Traversing several fences, agents entered his property and peered into a barn where they discovered a laboratory. Based on this information, the agents obtained a warrant, arrested Dunn, and seized chemicals and equipment. The barn was located approximately 50 yards from a fence that encircled the residence. Dunn challenged the initial warrantless entry onto his property, and a federal appellate court held that the barn was within the curtilage and thus subject to Fourth Amendment protection.

The Supreme Court reversed. In earlier cases, the Court had held that the Fourth Amendment did not protect “open fields.” Oliver v. United States, 466 U.S. 170 (1984); Hester v. United States, 265 U.S. 57 (1924). The Amendment’s protection, however, did encompass the residence and curtilage — the area immediately surrounding the dwelling house. In Dunn the Court identified four factors which defined the curtilage:

- the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. 107 S.Ct. at 1139.

Applying these factors, the Court concluded that the barn did not fall within the curtilage. It was located 50 yards from the house, was not within the residence fence, was not used for the intimate activities of the home, and the traversed fences were designed to corral livestock, not to prevent observation.

The Court also ruled that while Dunn had a reasonable expectation of privacy in the barn, he had no such expectation in the open fields from which the agents peered into the barn. To support its position, the Court quoted from Oliver:

[The term “open fields” may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither “open” nor a “field” as those terms are used in common speech. 466 U.S. at 180 n.11. Since the agents did not enter the barn, but stood in an open field to observe into the barn, there was no search within the meaning of the Fourth Amendment.]

Searches of Government Employees

O’Connor v. Ortega, 107 S.Ct. 1492 (1987), involved a search of a state hospital employee’s office by hospital officials who were investigating alleged improprieties. The employee, Dr. Ortega, instituted a § 1983 suit challenging the search. A plurality of the Court reached several conclusions. First, public employees may have a reasonable expectation of privacy in their place of work. Because of the great variety of work environments in the public sector, however, this expectation of privacy must be addressed on a case-by-case basis. In this case, Dr. Ortega had a reasonable expectation of privacy in his desk and file cabinets because he did not share them with other employees. Second, neither a warrant nor probable cause is required in this context:

We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Id. at 1502.

The case was then remanded to the District Court to determine whether the search in question satisfied the standard of reasonableness, both in its inception and scope.

The deciding vote was cast by Justice Scalia, who wrote a concurring opinion. He objected to the plurality opinion on several grounds. The case-by-case approach
adopted by the plurality is "so devoid of content that it produces rather than eliminates uncertainty in this field." *Id.* at 1505. Instead of this approach, Justice Scalia would hold that offices of government employees, including drawers and files within those offices, are covered by the Fourth Amendment as a general matter. In addition, however, he believed that searches to retrieve work-related materials or to investigate violations of workplace rules are reasonable and thus do not violate the Fourth Amendment.

**Particularity Requirement**

In *Maryland v. Garrison*, 107 S.Ct. 1013 (1987), the police obtained a warrant to search Lawrence McWebb and the "premises known as 2036 Park Avenue third floor." When the police applied for the warrant and when they executed it, they reasonably believed that only one apartment was on the third floor. In fact, there were two apartments — one occupied by McWebb and the other by Garrison, the defendant. Before the police realized that there were separate apartments, they discovered heroin in Garrison's apartment. He challenged the search as unconstitutional.

The Supreme Court rejected this challenge. According to the Court, the case raised two issues—the validity of the warrant and the reasonableness of its execution. The Fourth Amendment explicitly prohibits the issuance of a warrant except one "particularly describing the place to be searched and the persons or things to be seized." This "requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Id.* at 1017. If the police had known or should have known that there were separate apartments, the warrant would have been defective. The constitutionality of their conduct, however, must be judged in light of the information available at the time they sought the warrant. Under this standard, their conduct was constitutional.

The execution of the warrant presented a different issue. Here, again, the Court found the police's conduct reasonable under the facts. Nevertheless, the Court remarked:

If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor. . . .*Id.* at 1018.

**Automobile Inventory Searches**

In *Colorado v. Bertine*, 107 S.Ct. 738 (1987), the police arrested the defendant for driving while intoxicated. Before a tow truck arrived to take Bertine's van to an impoundment lot, a backup officer inventoried its contents in accordance with local police procedures. The officer found drugs and cash in a closed backpack. Bertine argued that the search of the backpack violated the Fourth Amendment.

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Court had held that inventory searches of automobiles were consistent with the Fourth Amendment. *See also* Illinois v. Lafayette, 462 U.S. 640 (1983) (upholding an inventory search of personal effects of an arrestee at the police station). *Opperman*, however, did not involve the opening of a closed container. Moreover, in other cases the Court had held that searches of closed containers generally required a warrant. See *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977). These cases led the Colorado Supreme Court to rule that the drugs should have been suppressed.

The U.S. Supreme Court, however, disagreed. According to the Court, inventory searches differ from law enforcement searches, which are intended to enforce penal laws. In contrast, inventory searches "serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." 107 S.Ct. at 741. These governmental interests outweigh the individual's interest in privacy and apply to closed containers. In addition, "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." *Id.* at 742. The Court found it irrelevant that the van could have been parked and locked at the scene or that Bertine was not afforded an opportunity to make alternative arrangements for the safekeeping of his property.

**Plain View Seizures**

*Arizona v. Hicks*, 107 S.Ct. 1149 (1987), involved the application of the plain view doctrine. A bullet fired through the floor of Hicks' apartment struck a man in the apartment below. The police entered Hicks' apartment looking for the shooter and for weapons. They seized a number of weapons. During the course of this search, an officer noticed two sets of expensive stereo components, which seemed out of place in the squalid apartment. Suspecting that they were stolen, he moved some components to read the serial numbers. After learning that they had been taken in a robbery, he seized them. Although the validity of the initial entry was conceded due to exigent circumstances created by the shooting, Hicks challenged the seizure of the stereo components.

On review, the Supreme Court agreed with Hicks' position. According to the Court, moving the equipment constituted a separate search: "But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstances that validated the entry." *Id.* at 1152. The Court found the officer's conduct "much more than trivial." "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.* at 1153.

The Court next considered whether this search could be justified under the plain view doctrine. "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). The issue in *Hicks* was whether such a seizure could be based on reasonable suspicion rather than probable cause. The Court held that the higher probable cause standard applied. It reached this conclusion by consider-
ing the underlying purpose of the plain view rule. That rule permits a warrantless seizure. Thus, only the warrant requirement is waived, not the quantum of proof needed to justify the seizure:

Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, i.e., the standard of probable cause. Id. at 1153-54.

**Administrative Searches**

New York v. Burger, 107 S.Ct. 2636 (1987), involved a warrantless search of an automobile junkyard. Police officers from the Auto Crimes Division entered Burger's junkyard to conduct an inspection pursuant to a New York statute. After checking Vehicle Identification Numbers, they determined that several stolen cars were in the yard. Burger was charged with possession of stolen property and challenged the inspection on Fourth Amendment grounds. The New York Court of Appeals agreed with Burger, because the searches were undertaken for law enforcement, not regulatory, purposes.

The U.S. Supreme Court reversed. The Court long had recognized the applicability of the Fourth Amendment to administrative inspections of commercial premises for the purposes of enforcing regulatory statutes. See v. City of Seattle, 387 U.S. 541 (1967). The Court, however, also had recognized a special rule for pervasively regulated industries. Donovan v. Dewey, 452 U.S. 594 (1981).

Because the owner or operator of commercial premises in a "closely regulated" industry has a reduced expectation of privacy, the warrant and probable-cause requirements... have lessened application in this context. Rather, we conclude that... where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment. 107 S.Ct. at 2643.

Statutory schemes fall within this exception if they advise owners that the search is being conducted pursuant to the law, the search is limited in scope, and the discretion of those conducting the search is circumscribed. The Court concluded that the statute satisfied this criteria.

In reaching its conclusion, the Court rejected the argument that the statutory scheme was designed to enforce penal laws. Rather, the Court found the statute to be intended principally to further administrative purposes: "Nor do we think that this administrative scheme is unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself." Id. at 2651. Finally, the Court found no constitutional significance in the fact that the statute was enforced by police officers rather than "administrative" agents.

**Probation Searches**

Joseph Griffin, who was on probation, had his home searched by probation officers. They had no warrant. A gun was found, and Griffin was convicted of a weapons violation. These facts became the subject of the Court's decision in Griffin v. Wisconsin, 107 S.Ct. 3164 (1987).

The Supreme Court upheld the search "because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well established principles." Id. at 3167. The Court found a "special need" for probation supervision, which permitted "a degree of impingement upon privacy that would not be constitutional if applied to the public at large." Id. at 3168. This special need justified dispensing with the warrant requirement, which the Court found to be "impracticable" in this context:

A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires. Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct... and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create... Id. at 3169.

Similarly, the Court believed that the application of the probable cause requirement would undermine probation supervision. Instead, such searches are permissible if the information indicates "only the likelihood ('had or might have guns') of facts justifying the search." Id. at 3171.

**Good Faith Exception**

The good faith exception to the exclusionary rule was first announced in United States v. Leon, 468 U.S. 897 (1984). In Leon the Court ruled that the exclusionary rule did not apply to evidence obtained by police officers who acted in objectively reasonable reliance upon a search warrant issued by a neutral magistrate, even when the warrant was later found to be unsupported by probable cause. Illinois v. Krull, 107 S.Ct. 1160 (1987), involved the extension of Leon to a search pursuant to a statute authorizing warrantless administrative searches, which was later declared unconstitutional.

The defendants operated an automobile wrecking yard, which was subject to periodic inspections pursuant to a state statute. During one inspection, the police seized several cars which had been stolen, and the defendants were charged with violating several motor vehicle statutes. The day after the search, a federal court in an unrelated case ruled the statute unconstitutional.

The Supreme Court found the good faith exception applicable:

The approach used in Leon is equally applicable to the present case. The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. Id. at 1167.
Applying this reasoning to the facts, the Court concluded that the police reliance on the statute was objectively reasonable.

CONFESSIONS

Voluntariness — Governmental Involvement

The defendant in Colorado v. Connelly, 107 S.Ct. 515 (1986), approached a policeman and stated that he had murdered someone and wanted to talk about it. The officer advised Connelly of his Miranda rights. After the arrival of a homicide detective, Connelly again received Miranda warnings, after which he stated that he had killed Mary Ann Junta during November 1982. He subsequently led the police to the location of the crime. The next morning Connally became visibly disoriented during an interview with a public defender. He stated that “voices” had told him to confess. He was sent to a state hospital for a mental evaluation. Although he was initially found incompetent to stand trial, later evaluations concluded that he was competent.

At trial Connelly filed a motion to suppress. A state psychiatrist testified that he was suffering from chronic schizophrenia at least as of the day before his confession. He told the psychiatrist that he was following the “voice of God.” According to the psychiatrist, Connelly was experiencing “command hallucinations,” which interfered with his volitional abilities — his ability to make free and rational choices. His cognitive abilities, however, were not significantly impaired; that is, he understood his right to remain silent. The trial court suppressed the statements, and the Colorado Supreme Court affirmed. The court found that the confession was not the product of Connelly’s free will, and thus was involuntary under the Due Process Clause, even though the police had done nothing wrong or coercive in securing the confession. The court also found that his mental condition precluded him from waiving his Fifth Amendment privilege.

The U.S. Supreme Court reversed. The Court first addressed the Due Process issue. Under this analysis, “certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.” Miller v. Fenton, 106 S.Ct. 445, 449 (1985). Nevertheless, the Court’s consideration of involuntary confessions under the Due Process Clause has “focused upon the crucial element of police overreaching.” 107 S.Ct. at 520. For example, in Blackburn v. Alabama, 361 U.S. 199 (1960), the defendant was “probably insane at the time of his confession.” Yet, the crucial aspect of the case was that the police knew this and “exploited this weakness with coercive tactics.” 107 S.Ct. at 521. The Court wrote: “The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.” Id. Accordingly, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause . . . .” Id. at 522.

The Court next addressed the Miranda issues. The Colorado Supreme Court had held that the prosecution must establish a waiver of Miranda rights by “clear and convincing evidence.” The U.S. Supreme Court found this standard to be inconsistent with Lego v. Twomey, 404 U.S. 477 (1972), which required the prosecution to establish the voluntariness of a confession by only a preponderance of evidence.

We now reaffirm our holding in Lego: Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our Miranda doctrine, the State need prove waiver by only a preponderance of evidence. 107 S.Ct. at 523.

Analyzing Connelly’s waiver, the Court found his perception of coercion stemming from the “voice of God” irrelevant: Like the Due Process issue, the privilege against compelled self-incrimination requires governmental involvement: “The sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion.” Id. at 523.

Miranda — Interrogation

Arizona v. Mauro, 107 S.Ct. 1931 (1987), involved the meaning of “interrogation” under Miranda. Responding to a telephone call from a store, the police arrived at the scene, at which time Mauro said that he had killed his son. He directed the police to the body, was arrested, and advised of his Miranda rights. He was again read his rights at the police station, but at this point he requested an attorney. Mauro’s wife then requested to speak with him. The police granted the request on the condition that an officer be present. The officer placed a tape recording machine in plain sight. Mauro told his wife not to answer questions until a lawyer was present. At trial Mauro raised an insanity defense. In rebuttal the prosecution played the taped interview between Mauro and his wife, arguing that it demonstrated his sanity on the day of the killing. Mauro sought to suppress the tape recording on the grounds that it constituted interrogation under Miranda.

On review, the Supreme Court rejected Mauro’s argument. Miranda is triggered only by custodial interrogation. In Rhode Island v. Innis, 446 U.S. 291 (1980), the Court had ruled that the Miranda safeguards extended not only to express questioning but also to its “functional equivalent,” which the Court defined as “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” Id. at 301. During the conversation with his wife, the police asked no questions. Moreover, their conduct did not amount to the type of psychological ploy that would be the functional equivalent of questioning. The police did not send her to speak with her husband. Indeed, they attempted to discourage her, and only relented when she insisted.

Miranda - Warnings

Colorado v. Spring, 107 S.Ct. 851 (1987), presented the question whether a suspect’s awareness of all the crimes about which he may be questioned is relevant to determining the validity of his decision to waive the Fifth Amendment. An informant told agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) that Spring was involved with the interstate transportation of firearms. He also mentioned that Spring participated in the killing of John Walker. At the time, Walker’s body had not been
found, and the police had received no report of his disappearance. The ATF agents arrested Spring after an undercover purchase of firearms. They read him *Miranda* warnings on two occasions, and he signed a written waiver. After questioning him about firearms transactions, the agents asked whether Spring had ever shot anyone. He mumbled, "I shot another guy once." Several months later state police officers questioned him about the homicide. He waived his rights and confessed.

Spring argued that his first statement was invalid because he was not informed that he would be questioned about the murder. The Supreme Court rejected this argument: "Spring's argument strains the meaning of compulsion beyond the breaking point." *Id.* at 857. The validity of a waiver has two aspects. First, the relinquishment of the right must be voluntary, i.e., not the result of intimidation, coercion, or deception. The trial court found no evidence of coercion. Second, the waiver must be made with a full awareness of both the nature of the right being abandoned and the consequences of that decision. Here, the Court found that Spring understood that he could remain silent and that anything he said could be used against him. This was all that was required: "The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Id.*

The Court also rejected an alternative argument offered by Spring — that failure to inform him about the homicide constituted police trickery. The Court wrote: "Once *Miranda* warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional right — 'his right to refuse to answer any question which might incriminate him.'" *Id.* at 858-59 (quoting United States v. Washington, 431 U.S. 181, 188 (1977)).

**Miranda - Waiver**

After his arrest for sexual assault, William Barrett was read the *Miranda* warnings. He signed and dated an acknowledgment that he had been warned of his constitutional rights. He then stated that "he would not give the police any written statements but he had no problem in talking about the incident." Connecticut v. Barrett, 107 S.Ct. 828, 830 (1987). Thirty minutes later he again stated that he would not give a written statement without his attorney but had "no problem" talking about the incident. He then orally admitted his involvement in the crime. The Connecticut Supreme Court held that Barrett had invoked his right to counsel by refusing to make written statements without the presence of his attorney.

On review, the U.S. Supreme Court reversed. According to the Court, the police could not have obtained a written statement from Barrett once he had invoked his right to counsel. His assertion of the right to counsel, however, involved only written statements:

Barrett's limited requests for counsel ... were accompanied by affirmative announcements of his willingness to speak with the authorities. The fact that officials took the opportunity provided by Barrett to obtain an oral confession is quite consistent with the Fifth Amendment. *Miranda* gives the defendant a right to choose between speech and silence, and Barrett chose to speak. *Id.* at 832.

Nor did the Court believe that his limited request for counsel evidenced a failure to understand the consequences of his waiver, because Barrett had testified that he understood his *Miranda* rights.

**Impeachment by Silence**

Greer v. Miller, 107 S.Ct. 3102 (1987), involved the impeachment of a defendant with his postarrest silence. Miller was charged with kidnapping, robbery, and murder. At trial he testified in his own defense, denying any direct involvement in the crimes. The prosecutor began his cross-examination as follows:

Q: Mr. Miller, how old are you?
A: 23.

Q: Why didn't you tell this story to anybody when you got arrested?

The defense counsel objected and asked for a mistrial. The trial court sustained the objection and instructed the jury to ignore the question "for the time being." The prosecutor did not pursue this line of questioning, nor did he mention it in closing argument. Miller was convicted. In a subsequent habeas corpus proceeding, a federal court of appeals ruled that the prosecutor's conduct required reversal.

The Supreme Court disagreed. In Doyle v. Ohio, 426 U.S. 610 (1976), the Court held that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619. Unlike Doyle, however, the prosecution was not permitted to use Miller's postarrest silence for impeachment:

[T]he trial court in this case did not permit the inquiry that Doyle forbids. Instead, the court explicitly sustained an objection to the only question that touched upon Miller's postarrest silence. No further questioning or argument with respect to Miller's silence occurred, and the court specifically advised the jury that it should disregard any questions to which an objection was sustained. 107 S.Ct. at 3108.

Thus, there was no Doyle violation because there was no improper use of postarrest silence. In addition, the Court found no due process violation due to the prosecutor's attempt to violate Doyle. "The sequence of events in this case — a single question, an immediate objection, and two curative instructions — clearly indicates that the prosecutor's improper question did not violate Miller's due process rights." *Id.* at 3109.

**RIGHT OF CONFRONTATION**

**Exclusion from Competency Hearing**

In Kentucky v. Stincer, 107 S.Ct. 2658 (1987), the defendant, who was charged with sexual child abuse, was excluded from a hearing held to determine the competency of two child witnesses. Stincer argued his exclusion violated the right of confrontation and due process. At the hearing, the children, ages 7 and 8, were questioned by the prosecutor and defense counsel, and were found to be competent by the trial court.

On review, the Supreme Court rejected the confronta-
tion argument. Two factors influenced the Court's decision. First, the competency hearing had a limited function. It was intended to determine whether the child was capable of observing and recollecting facts, whether the child was capable of narrating those facts to the jury, and whether the child has a moral sense of the obligation to tell the truth. Accordingly, the children were asked background questions such as their names, where they went to school, and how old they were. They were also asked whether they knew what a lie is and whether they knew what happens when one tells a lie. Thus, the issues raised at the hearing were unrelated to the basic issues of the trial.

Second, the primary function of the Confrontation Clause is the right of cross-examination. Stincer was provided with the opportunity to cross-examine both children at trial. Some of the same questions that were asked at the hearing were again asked at trial. Moreover, the defense had the opportunity to ask whatever questions it wished on the competency issue because that issue remained open throughout the trial. In light of these two factors, the Court found against Stincer.

Stincer's due process argument fared no better. The Court acknowledged that "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Id. at 2667. Given the particular nature of the competency hearing, however, the Court could find no reason "that his presence . . . would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify." Id. at 2668.

Bruton — Redacted Confessions

Richardson v. Marsh, 107 S.Ct. 1702 (1987), was one of two cases dealing with Bruton issues. In Bruton v. United States, 391 U.S. 123 (1968), the Court found a confrontation violation where a non-testifying codefendant's confession, which implicated Bruton, was admitted at a joint trial. The Court believed that an instruction limiting admissibility to the confessing defendant would be ineffective, and thus the jury would use the confession against Bruton, who had no opportunity to confront his codefendant. One way to avoid a Bruton situation is to redact or eliminate any reference about the codefendant. The prosecutor followed this procedure in Marsh.

Marsh was present during a robbery and murder incident. A witness testified about her conduct during the crime, indicating that Marsh, along with two others, was an active participant. The confession of her codefendant, Williams, was then admitted in evidence. This confession was redacted to omit all reference to Marsh. Indeed, it omitted all reference to anyone other than Williams and Martin, the third alleged accomplice, who was a fugitive at the time of the trial. Marsh testified in her own defense. She admitted being present at the scene but denied any prior knowledge that the crime would occur. Her testimony, however, placed her in a car with Williams and Martin just prior to the crime, and Williams' confession indicated that the crime was discussed at that time. The court instructed the jury that Williams' confession could be considered only when determining Williams' guilt. The jury convicted both. Marsh appealed, citing Bruton.

The Supreme Court ruled that Bruton did not cover Marsh's case. In Bruton the codefendant's confession expressly implicated Bruton as the accomplice. In contrast, Williams' confession on its face did not implicate Marsh. Marsh was linked to the confession only through other evidence admitted at trial, i.e., her own testimony. The Court held that "evidentiary linkage" or "contextual implication" did not present the potential for jury disregard of the limiting instruction that underlie the Bruton decision:

In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of Bruton's exception to the general rule. 107 S.Ct. at 1708.

In addition, the Court cited the practical difficulties of adopting a different rule. A redacted confession can be reviewed prior to trial, but assessing "evidentiary linkage" prior to trial is often impossible. Moreover, the use of separate trials or complete exclusion of the confession were alternatives that the Court found unacceptable.

Bruton — Interlocking Confessions

Cruz v. New York, 107 S.Ct. 1714 (1987), also involved a Bruton issue. In an earlier case, Parker v. Randolph, 442 U.S. 62 (1979), the Court was unable to resolve authoritatively whether Bruton applied to interlocking confessions — situations where the defendant's own confession corroborates the codefendant's confession. Eulogio Cruz was tried along with his brother, Benjamin, for the death of a gas station attendant. Benjamin's confession, which implicated Eulogio, was admitted at trial. Since Eulogio had also confessed, the New York Court of Appeals affirmed his conviction. It based its decision on Parker, in which a plurality of the Court had held Bruton applicable to interlocking confessions. The plurality reasoned that Bruton applied only when the non-testifying codefendant's confession was "devastating" to the defendant's case, which was not the situation when the defendant has himself confessed to essentially the same facts. Four Justices disagreed with this reasoning, but one found against Parker on harmless error grounds. Thus, Parker lost his appeal, even though the Court was evenly divided on the issue of interlocking confessions.

With this background, the Court returned to the issue of interlocking confessions in Cruz. This time a majority of the Court rejected the reasoning of the Parker plurality and found a Bruton violation:

This case is indistinguishable from Bruton with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded, . . . the probability that such disregard will have a devastating effect, . . . and the determinability of these facts in advance of trial. . . . 107 S.Ct. at 17:9.

Hearsay

Bourjaily v. United States, 107 S.Ct. 2775 (1987), raised evidentiary and constitutional issues about the coconspirator exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(E). The evidentiary questions concerned the procedural aspects governing admissibility. First, the Court
ruled that the trial court in determining the admissibility of coconspirator statements must use the "preponderance of evidence" standard of proof. Second, the Court held that preliminary proof of the conspiracy as well as the defendant's and declarant's participation in the conspiracy need not be established by independent evidence. In other words, the hearsay statement itself may be considered in determining admissibility. Compare Ohio R. Evid. 801(D)(2)(e) (requiring "independent proof").

More importantly, the Court ruled that statements falling within the coconspirator exception automatically satisfy confrontation requirements. The Court stated that two factors were important in deciding confrontation questions in this context: "[T]he Court has, as a general matter only, required the prosecution to demonstrate both the unavailability of the declarant and the "indicia of reliability" surrounding the out-of-court declaration." Id. at 2782. In United States v. Inadi, 106 S.Ct. 1121 (1986), the Court addressed the first factor, holding that unavailability need not be established when the prosecution offers coconspirator statements. As for the second (reliability) factor, the Court quoted from Ohio v. Roberts, 448 U.S. 56, 66 (1980), which stated that reliability could be presumed in the case of a "firmly rooted hearsay exception." Tracing the judicial history of the coconspirator exception back over a century and a half, the Court found the exception "firmly rooted."

EX POST FACTO LAWS

Miller v. Florida, 107 S.Ct. 2446 (1987), presented the Court with an ex post facto issue. Miller was convicted of sexual battery. At the time the crime was committed, Florida's sentencing guidelines would have resulted in a presumptive sentence of three and one-half to four and one-half years imprisonment. Revised guidelines in effect at the time of sentencing called for a presumptive sentence of five and one-half to seven years imprisonment. The trial court used the revised guidelines and imposed a seven-year sentence. The Florida Supreme Court upheld the sentence because the revised guidelines represented a procedural change, which did not require the application of the ex post facto doctrine.

The Supreme Court reversed. Article I of the U.S. Constitution provides that neither Congress nor any State shall pass any "ex post facto Law." In Calder v. Bull, 3 Dall. 386 (1798), the Court set forth the contours of this prohibition:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; andpunishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. Id. at 390 (emphasis omitted).

Subsequent cases set out further principles. The law "must be retrospective, that is, it must apply to events occurring before its enactment," and the law "must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1981). In addition, there is no ex post facto violation if the change does not alter "substantial personal rights," and mere changes of "modes of procedure" do not affect matters of substance. Dobbert v. Florida, 432 U.S. 282, 293 (1977).

Applying these principles, the Court in Miller found the use of the revised sentencing guidelines constitutionally defective. The guidelines were imposed retrospectively, they disadvantaged the defendant by subjecting him to the possibility of increased punishment, and they could not be characterized as "procedural."

EXTRADITION

Richard Smolin was charged with parental kidnapping in Louisiana. Louisiana then asked for his extradition from California. A California court, however, issued a writ of habeas corpus precluding extradition. The court found that since Smolin had custody under California custody decrees, he was not "substantially charged" with a crime in Louisiana. The California Supreme Court upheld the writ.

The U.S. Supreme Court reversed in California v. Superior Court, 107 S.Ct. 2433 (1987). The Extradition Clause is found in Article IV of the Constitution:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

This Clause is implemented through the Extradition Act of 1793. Under the Act, extradition is a summary procedure. Determining guilt or innocence, or considering the availability of defenses, is not appropriate. Such issues are to be litigated in the courts of the demanding State. Only four issues are properly considered in an extradition proceeding:

(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. Michigan v. Doran, 439 U.S. 282, 289 (1978).

Since these requirements were satisfied, California had to extradite. The breadth of the Court's decision is captured in the concluding paragraph:

We are not informed by the record why it is that the States of California and Louisiana are so eager to force the Smolins halfway across the continent to face criminal charges that, at least to a majority of the California Supreme Court, appear meritless. If the Smolins are correct, they are not only innocent of the charges against them, but also victims of a possible abuse of the criminal process. But, under the Extradition Act, it is for the Louisiana courts to do justice in this case, not the California courts: "surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place." 107 S.Ct. at 2441.

In a second extradition case, Puerto Rico v. Branstad, 107 S.Ct. 2802 (1987), the Court overruled Kentucky v. Dennison, 24 How. 66 (1861), and held that a federal
court can issue a writ of mandamus to compel the governor of a state to perform the mandatory, ministerial duty of delivering a fugitive upon proper demand by another state.

**RETOACTIVITY**

In *Griffin v. Kentucky*, 107 S.Ct. 708 (1987), the Court announced a new retroactivity rule. *Griffin* involved the retroactive application of *Batson v. Kentucky*, 106 S.Ct. 1712 (1986), which the Court decided in the prior Term. *Batson* challenged the prosecution's use of peremptory challenges to exclude blacks from a jury. The Court ruled that a defendant could establish a prima facie case of racial discrimination violative of the Fourteenth Amendment based on the prosecution's use of peremptory challenges to strike members of the defendant's race. Once the defendant had made the prima facie showing, the burden shifted to the prosecution to come forward with a neutral explanation for those decisions. In *Allen v. Hardy*, 106 S.Ct. 2878 (1986), the Court had held that *Batson* was not to be applied retroactively to a case on federal habeas review. In that case the Court determined that *Batson* "is an explicit and substantial break with prior precedent" because it overruled a portion of *Swain v. Alabama*, 380 U.S. 202 (1965).

*Griffin* presented the retroactivity issue as applied to litigation pending on direct state or federal review. Under the Court's prior cases, retroactivity in this context was determined by a three-pronged analysis: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall v. Denno*, 388 U.S. 293 (1967).

The Court in *Griffin* held that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 107 S.Ct. at 713. First, the integrity of judicial review requires the application of a new rule to all similar cases pending on direct review; announcing new, prospective-only rules smacks more of a legislative, rather than an adjudicative, function. Second, "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* Given these principles, the Court refused to continue to recognize a "clear break" exception to retroactivity for cases pending on direct review:

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, . . . with no exception for cases in which the new rule constitutes a "clear break" with the past. *Id.* at 716.