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United States Supreme Court 1990-1991 Term: Criminal Procedure Highlights

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UNITED STATES SUPREME COURT 1990-1991 TERM: CRIMINAL PROCEDURE HIGHLIGHTS

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I. INTRODUCTION

The 1990-1991 Term of the Supreme Court was marked by the resignation of Justice Thurgood Marshall, the last member of the truly liberal component of the Court.[1] He was replaced the following Term by Justice Clarence Thomas, after corrosive confirmation proceedings. The newly constituted Court will likely produce significant changes in long-standing precedents in many important areas of both civil and criminal constitutional law, such as abortion[2] and separation of church and state.[3] For the most part, however, the decisions of the Term under discussion simply confirmed and carried forward policies already established by the conservative majority of the Rehnquist Court. In fact, few, if any, of these decisions were monumental—at least on the topics discussed in the pages that follow.

This article follows a rather long line of articles going back some years.[4] To avoid duplicative descriptions of the Court's earlier activities,

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1. Justices Blackmun and Stevens generally have aligned themselves on the liberal side of most issues, but nonetheless are not as prototypically liberal as were, for example, Justices Brennan and Marshall.

2. *Cf.* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (plurality opinion) (upholding four out of five provisions of a Pennsylvania statute restricting a woman's right to an abortion).

3. *Cf.* Weisman v. Lee, 112 S. Ct. 2649 (1992) (holding that a clergy member's invocation of deity in a public school commencement address is forbidden by the Establishment Clause of the First Amendment).

4. *See* B.J. George, Jr., *United States Supreme Court 1989-1990 Term: Criminal Law Decisions*, 35 N.Y.L. SCH. L. REV. 479 (1990) [hereinafter George, *1989-1990 Term*]; B.J. George, Jr., *United States Supreme Court 1988-1989 Term: Criminal Law Decisions*, 34 N.Y.L. SCH. L. REV. 573 (1989) [hereinafter George, *1988-1989 Term*]; B.J. George, Jr., *United States Supreme Court 1986-1987 Term: Criminal Law and Procedure Decisions*, 33 N.Y.L. SCH. L. REV. 193 (1988) [hereinafter George, *1986-1987 Term*]; B.J. George, Jr., *United States Supreme Court 1985-1986 Term: Criminal Law Decisions*, 31 N.Y.L. SCH. L. REV. 427 (1986) [hereinafter George, *1985-1986 Term*]; B.J. George, Jr., *United States Supreme Court 1984-1985 Term: Highlights of Criminal Law and Procedure Decisions*, 16 CAP. U. L. REV. 159 (1986) [hereinafter George, *1984-1985 Term*]; B.J. George, Jr., *United States Supreme Court 1983-1984 Term: Highlights of Criminal Procedure*, 31 N.Y.L. SCH. L. REV. 61 (1986) [hereinafter George, *1983-1984 Term*]; B.J.

cross references appear in the footnotes to which the reader may wish to refer. This article addresses matters of constitutional criminal procedure in the approximate sequence in which they would likely be encountered in practice. It then surveys remedies for constitutional violations and substantive penal law developments. Because this article addresses only constitutional highlights, a number of narrow or technical decisions of the Court are omitted.

II. INVESTIGATION

A. *Search and Seizure*

1. Police Investigative Activities

In *California v. Hodari D.*,[5] the Supreme Court addressed the constitutional status of police activities that do not amount to a physical seizure of an individual's person.[6] In *Hodari D.*, patrol officers in an unmarked police vehicle[7] encountered several youths clustered around a

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George, Jr., *United States Supreme Court 1982-1983 Term: Criminal Law Decisions*, 30 N.Y.L. SCH. L. REV. 229 (1985) [hereinafter George, *1982-1983 Term*]; B.J. George, Jr., *United States Supreme Court 1981-1982 Term: Criminal Law Decisions*, 29 N.Y.L. SCH. L. REV. 551 (1985) [hereinafter George, *1981-1982 Term*]; B.J. George, Jr., *United States Supreme Court 1980-1981 Term: Criminal Law Decisions*, 27 N.Y.L. SCH. L. REV. 1 (1981) [hereinafter George, *1980-1981 Term*]; B.J. George, Jr., *United States Supreme Court 1979-1980 Term: Criminal Law Decisions*, 26 N.Y.L. SCH. L. REV. 99 (1981) [hereinafter George, *1979-1980 Term*]; B.J. George, Jr., *United States Supreme Court 1978-1979 Term: Criminal Law Decisions*, 25 N.Y.L. SCH. L. REV. 217 (1979) [hereinafter George, *1978-1979 Term*]; B.J. George, Jr., *United States Supreme Court 1977-1978 Term: Criminal Law Decisions*, 1978 B.Y.U. L. REV. 497 [hereinafter George, *1977-1978 Term*]; B.J. George, Jr., *Foreword—Doctrinal Doldrums: The Supreme Court 1976 Term Criminal Law Decisions*, 68 J. CRIM. L. & CRIMINOLOGY 469 (1977) [hereinafter George, *1976-1977 Term*]; B.J. George, Jr., *United States Supreme Court Term 1975-1976: Criminal Law Decisions*, 23 WAYNE L. REV. 1 (1976) [hereinafter George, *1975-1976 Term*]; B.J. George, Jr., *United States Supreme Court 1974-1975 Term: Criminal Law Decisions*, 21 WAYNE L. REV. 1291 (1975) [hereinafter George, *1974-1975 Term*].

5. 111 S. Ct. 1547 (1991).

6. The Court had previously addressed this issue in Michigan v. Chesternut, 486 U.S. 567 (1988). In *Chesternut*, police officers in a patrol vehicle had followed Chesternut as he rapidly walked away from the site of suspicious activity. The Court held that this conduct did not constitute a seizure in Fourth Amendment terms. *See id.* at 575. Hence, the police were free to recover the controlled substances that Chesternut discarded as he walked. The Court noted that the officers had not physically blocked Chesternut's path, turned on their light bar, sounded the vehicle siren, or done anything else that would qualify as a Fourth Amendment seizure of Chesternut's person. *See id.*

7. The officers were dressed in street clothes but wore jackets with "Police" embossed

parked car. As the officers approached, the youths fled while the parked car sped off. The officers gave chase, first together in their vehicle, and then one officer on foot. When Hodari D. looked back and saw the officer close behind, he tossed away what looked like a small rock. The officer tackled Hodari D., placed him under arrest, searched him and discovered $130 in cash, and retrieved the object that Hodari D. had discarded, which proved to be crack cocaine.[8]

After the State commenced a juvenile delinquency proceeding, Hodari D.'s counsel moved to suppress the evidence as the fruit of an unlawful seizure.[9] The juvenile court denied the motion,[10] but the California Court of Appeal reversed.[11] On appeal, the United States Supreme Court reversed the state court.[12]

The sole issue, as the majority saw it, was whether Hodari D. had been seized at the time he discarded the crack; if he had not been seized, then his act of discarding the substance constituted an abandonment, legitimating its recovery by the police.[13] The Court worked from dictionary definitions of "seizure" as "taking possession,"[14] and from traditions of arrest law, which hold that officers affect arrests by laying hands on arrestees for purposes of arrest, even though arrestees are not reduced immediately to effective control.[15] Nevertheless, during

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on the front and back. *See Hodari D.*, 111 S. Ct. at 1549.

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.* The California Supreme Court denied the state's application for review. *Id.*

12. *See Hodari D.*, 111 S. Ct. at 1552. Justice Scalia delivered the Court's opinion, joined by Chief Justice Rehnquist and Justices White, Blackmun, O'Connor, Kennedy, and Souter. *Id.* at 1548. Justice Stevens, joined by Justice Marshall, dissented. *Id.* at 1552 (Stevens, J., dissenting).

13. *See id.* at 1549. The Court noted parenthetically that if the officer recognized the discarded item as rock cocaine, that "would provide reasonable suspicion for the unquestioned seizure that occurred when [the officer] tackled Hodari." *Id.*

14. *See id.*; *see also* BLACK'S LAW DICTIONARY 1359 (6th ed. 1990) (defining seizure as "[t]he act of taking possession").

15. *See Hodari D.*, 111 S. Ct. at 1550 (citing RESTATEMENT OF TORTS § 41 cmt. h (1934) and ASHER L. CORNELIUS, SEARCH AND SEIZURE 163-64 (2d ed. 1930)).

"fugitivity"[16] there is no continuing arrest, even if there is a fleeting initial physical contact, which there was not in this case.[17]

The Court refused to equate a "show of authority" with physical seizure, as urged by Hodari D.'s counsel.[18] Principles of traditional arrest law require either physical force or submission by an arrestee to a show of authority.[19] The Court would not stretch the Fourth Amendment beyond its literal language[20] and the traditional principles of arrest law to embrace a mere show of authority:

> Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. . . . Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. . . . [I]t fully suffices to apply the deterrent [of the Fourth Amendment exclusionary rule] to . . . genuine, successful seizures [by police officers].[21]

Accordingly, even assuming that the officer's pursuit of Hodari D. constituted a "show of authority" enjoining him to stop, because Hodari D. ignored it, there was no seizure until the officer tackled him.[22] Hodari D. abandoned the crack cocaine as he ran; thus, the crack was not the fruit of an unlawful seizure. On that basis, the majority concluded that the evidence should not have been suppressed.[23]

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16. *Id.* The Court noted that even if the officer had grabbed Hodari D. to arrest him, and Hodari D. had broken away and then thrown away the cocaine, it would be unrealistic to say "that disclosure had been made during the course of an arrest." *Id.*

17. *Id.*

18. *Id.* at 1550-51.

19. *See id.* at 1551 (citing Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 206 (1940)).

20. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." (emphasis added)).

21. *Hodari D.*, 111 S. Ct. at 1551.

22. *Id.* at 1552.

23. *See id.* The majority found support for its analysis in the Court's holding in Brower v. Inyo County, 489 U.S. 593 (1989) (discussed in George, *1988-1989 Term*, *supra* note 4, at 578-79). In *Brower*, the Court concluded that there had been no Fourth Amendment seizure when police vehicles pursued the defendant for 20 miles at high speed with flashing lights. *Brower*, 489 U.S. at 595-97; *see also Hodari D.*, 111 S. Ct. at 1552 (stating that this was "surely an adequate 'show of authority'"). The Court in *Brower* held that the seizure occurred only when the suspect crashed into a police barricade. *See Brower*, 489 U.S. at 598-99.

Florida v. Bostick[24] presented an issue the Court had not previously addressed: whether police, lacking an articulable suspicion of criminal activity, could board a public conveyance and question passengers.[25] Officers of the Broward County, Florida Sheriff's Department routinely boarded buses at scheduled stops and asked passengers for permission to search their luggage. Pursuant to this policy, officers approached Bostick without an articulable suspicion and asked him for his ticket and personal identification. They returned the items after inspecting them. The officers then asked if they could examine Bostick's luggage, advising him that he had the right to refuse. Bostick consented,[26] and the officers discovered cocaine in the luggage. Bostick was charged with criminal trafficking in cocaine. He then moved to suppress the cocaine, asserting that the police investigative procedures were unconstitutional under the Fourth Amendment.[27]

The trial court denied the motion without opinion.[28] Bostick pleaded guilty, reserving the right to appeal the suppression issue.[29] The Florida District Court of Appeals affirmed[30] but certified the question to the Florida Supreme Court.[31] The latter court reversed, finding that the practice of boarding buses and questioning passengers without an

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24. 111 S. Ct. 2382 (1991).

25. *Id.* at 2384. The Court noted that it had ruled "that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to, ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate." *Id.* The Court's then most recent holding on point was in Florida v. Rodriguez, 469 U.S. 1 (1984) (per curiam), in which the Court concluded that colloquies initiated by police officers in passenger terminals are "the sort of consensual encounter[s] that implicate[] no Fourth Amendment interest." *Id.* at 5-6.

26. One of the officers was carrying a service pistol in a zipper pouch but did not remove it or call Bostick's attention to it. *See Bostick*, 111 S. Ct. at 2384-85, 2388. The state trial court found the consent voluntary, and the Florida Supreme Court did not disturb this finding on review. *See* Bostick v. State, 554 So. 2d 1153, 1154-55 (Fla. 1989), *rev'd and remanded on other grounds*, 111 S. Ct. 2382 (1991). The state court ruled instead that the practice of boarding buses and questioning passengers was unconstitutional per se. *See id.* at 1157. Because the Florida Supreme Court, relying on its per se invalidation of the police technique at issue, had not determined whether Bostick's consent to search was voluntary, the Supreme Court reversed and remanded the case to the Florida court for a determination on this question. *See Bostick*, 111 S. Ct. at 2388-89.

27. *See Bostick*, 111 S. Ct. at 2385.

28. *See id.*

29. *See id.*

30. *See* Bostick v. State, 510 So. 2d 321 (Fla. Dist. Ct. App. 1987), *rev'd*, 554 So. 2d 1153 (Fla. 1989), *rev'd and remanded*, 111 S. Ct. 2382 (1991).

31. *See id.* at 322.

articulable suspicion violated the Fourth Amendment, even though the same technique was permissible in most public places.[32] After granting certiorari,[33] the United States Supreme Court reversed.[34]

The Court reiterated its conclusion in *Hodari D.* that, despite want of reasonable suspicion, police officers do not infringe upon individuals' Fourth Amendment rights by approaching them and asking questions—if a reasonable person would feel free to disregard the police.[35] Only when an exchange loses its consensual character—as when officers restrain an individual's liberty by exerting physical force or making a show of authority—is there a "seizure" in Fourth Amendment terms.[36]

Under the Court's precedents going back to the original "stop-and-frisk" holding,[37] approaches like those made by the officers in *Bostick* do not implicate the Fourth Amendment because they do not involve seizure of the person. This principle is readily applicable to encounters in the street, in airport terminals, and in bus lobbies.[38] The Florida Supreme Court distinguished the general stop-and-frisk rule on the facts and based its per se rule of invalidity on the cramped confines of a bus, where a police presence would be considerably more intimidating than in more open places and would thus curtail a passenger's functional freedom to leave.[39] The *Bostick* majority found that rationale unpersuasive. The fact that passengers might not have felt free to leave the bus did not mean that they had been exposed to coercion; coercion arises through police conduct, not the personal reactions of those with whom police interact.[40]

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32. *See Bostick*, 554 So. 2d at 1157; *see also* Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984) (per curiam) (holding that colloquies initiated by police officers in passenger terminals do not violate the Fourth Amendment).

33. *See* Florida v. Bostick, 111 S. Ct. 241 (1990).

34. *See Bostick*, 111 S. Ct. at 2389 (6-3 decision). Justice O'Connor delivered the Court's majority opinion, joined by Chief Justice Rehnquist and Justices White, Scalia, Kennedy, and Souter. *Id.* at 2384. Justice Marshall dissented, joined by Justices Blackmun and Stevens. *Id.* at 2389 (Marshall, J., dissenting).

35. *See id.* at 2386 (citing California v. Hodari D., 111 S. Ct. 1547, 1551). *Hodari D.* is discussed *supra* text accompanying notes 5-23.

36. *See Bostick*, 111 S. Ct. at 2386.

37. *See* Terry v. Ohio, 392 U.S. 1, 19 & n.16 (1968).

38. *See* Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984) (per curiam).

39. *See* Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989), *rev'd and remanded*, 111 S. Ct. 2382 (1991).

40. *See Bostick*, 111 S. Ct. at 2387. The Court thought that its holding in Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210 (1984) (discussed in George, *1983-1984 Term*, *supra* note 4, at 70-71, 74-75), had established the doctrine from which *Bostick* was "analytically indistinguishable." *Bostick*, 111 S. Ct. at 2387. The critical question in *Delgado* was whether the alien (and other) workers were not free to leave a workplace

Accordingly, the Court's rule governing police-citizen encounters outside the home is as follows:

> [I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus.[41]

2. Container Searches

In *California v. Acevedo*,[42] the Court overruled two of its previous decisions, *United States v. Chadwick*[43] and *Arkansas v. Sanders*,[44] which had become increasingly difficult, if not impossible, to reconcile with more recent precedents. *Chadwick* and *Sanders* required either a valid consent or a search warrant before officers could search the contents of luggage or other containers that they lawfully had seized or impounded.[45] In *United States v. Ross*,[46] however, the Court revitalized its earlier precedents holding that officers with probable cause to believe that a vehicle is carrying something seizable under a search warrant can stop the vehicle without a warrant and search it as thoroughly as they could have had a warrant been obtained.[47] The mobility of vehicles justified such a special exemption from standard Fourth Amendment

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during an INS "workplace sweep" solely because of the INS agents' activities; an inability to leave during working hours because of employer restrictions, for example, would not amount to a "seizure." *See Delgado*, 466 U.S. at 218. Thus if, in *Bostick*, a passenger's subjective belief that he or she was not free to leave the bus was not based on the specific police conduct manifested at the time, there would be no seizure. *See Bostick*, 111 S. Ct. at 2387. The Supreme Court, however, declined to resolve the issue of coercive police conduct or its absence in *Bostick* and remanded the case to the Florida courts. *See id.* at 2384; *see also supra* note 26.

41. *Bostick*, 111 S. Ct. at 2389.

42. 111 S. Ct. 1982 (1991).

43. 433 U.S. 1 (1977) (discussed in George, *1976-1977 Term*, *supra* note 4, at 470).

44. 442 U.S. 753 (1979) (discussed in George, *1978-1979 Term*, *supra* note 4, at 228-30).

45. *See id.* at 766 (suitcase); *Chadwick*, 433 U.S. at 5-6 (footlocker).

46. 456 U.S. 798 (1982) (discussed in George, *1981-1982 Term*, *supra* note 4, at 554-63).

47. *See id.* at 823-25.

requirements of consent or advance judicial authorization, an exemption that may be characterized as stereotypical exigency.[48] In a later case, *United States v. Johns*,[49] the Court upheld the delayed search of the vehicle's cargo that was constitutionally intercepted and impounded in accordance with the *Ross* rule.[50] After *Ross* and *Johns*, about all one could assume was that the *Chadwick-Sanders* rule applied only if the seizure of luggage or containers was unrelated to the exercise of *Ross* search-and-seizure powers or to the valid custodial arrest of an individual.[51] It is little wonder that a majority of the Court came to believe that its *Chadwick-Sanders* doctrine had "confused courts and police officers and impeded effective law enforcement."[52] The Court's decision in *Acevedo* was intended to eliminate the problem.[53]

The facts in *Acevedo* substantially replicated those of *Chadwick* and *Sanders*. Officers conducting a controlled substances trafficking investigation came to believe that Acevedo was carrying a paper bag containing marijuana.[54] The California Court of Appeal treated the

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48. *See id.* at 806-07.

49. 469 U.S. 478 (1985) (discussed in George, *1984-1985 Term*, *supra* note 4, at 167-68).

50. *See id.* at 487-88.

51. The Court has yet to address definitively the legitimacy of a police search of items like purses, briefcases, or totebags in the possession or under the control of persons lawfully arrested in a public place but in which no vehicle is involved. The basic premise is that the person and clothing of individuals lawfully placed under custodial arrest may be searched without further justification. *See, e.g.*, Gustafson v. Florida, 414 U.S. 260 (1973) (upholding a search incident to arrest for driving without a license); United States v. Robinson, 414 U.S. 218 (1973) (holding that the full search of person incident to a lawful arrest is reasonable under the Fourth Amendment). In Illinois v. Lafayette, 462 U.S. 640 (1983) (discussed in George, *1982-1983 Term*, *supra* note 4, at 254-58), the Court endorsed the premise that the possessions of persons lawfully arrested and taken to a police facility may be routinely searched incident to booking and detention, but this does not legitimate a police search of possessions at the time and place of a lawful arrest. *See id.* at 645, 648. In Smith v. Ohio, 494 U.S. 541 (1990) (per curiam) (discussed in George, *1989-1990 Term*, *supra* note 4, at 487-88), the Court confirmed that a lawful arrest is a condition precedent to a search of something an individual is carrying at the inception of a police interception, *see id.* at 543-44, which again seems to imply that containers and the like in the immediate possession of an arrestee may be searched incident to a valid custodial arrest.

52. *Acevedo*, 111 S. Ct. at 1989.

53. *See id.* at 1991.

54. Specifically, federal drug enforcement officers in Hawaii notified a California police agency that a package containing marijuana was being delivered by a private courier agency to a local address. In a controlled delivery operation, Jamie Daza picked up the package and took it to his apartment. Daza left the apartment about an hour later, deposited the box and its paper wrappings in a trash bin, and returned to the apartment. A few

transaction as falling within *Chadwick-Sanders* rather than *Ross* and held that the evidence should have been suppressed.[55] The Supreme Court granted certiorari[56] and, by a six-to-three majority, reversed.[57]

The Court found no essential differences between the prototypical fact patterns represented by *Ross* and *Chadwick-Sanders*, and no fundamental distinctions based on subjective expectations of privacy.[58] The *Chadwick-Sanders* doctrine provided no significant protection of privacy, because it permitted officers to seize and impound containers; the doctrine's only restriction governed later searches of those containers. By their nature, those searches are far less sweeping and destructive than searches legitimated by the *Ross* holding.[59] Accordingly, the Court's failure to provide any special privacy protection, coupled with the confusion it had generated in courts and law enforcement agencies,[60] made the *Chadwick-Sanders* rule a prime candidate for abandonment.[61]

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minutes later, Richard St. George left the apartment carrying a knapsack that appeared to be half full. The officers stopped him as he drove off, searched the knapsack and found one and one-half pounds of marijuana. Fifteen minutes later, Acevedo arrived, entered Daza's apartment, stayed a few minutes, and came out with an apparently full paper bag. He went to his car, placed the bag in the trunk, and started to drive away. The officers intercepted him, opened the trunk and the bag, and found marijuana. *See id.* at 1984-85.

55. *See* People v. Acevedo, 265 Cal. Rptr. 23 (Ct. App. 1990), *rev'd and remanded*, 111 S. Ct. 1982 (1991). The court recognized "the anomalous nature" of the dichotomy between the two rules, *id.* at 592, a dichotomy summarized by the Supreme Court as dictating

> that if there is probable cause to search a car, then the entire car—including any closed container found therein—may be searched without a warrant, but if there is probable cause only as to a container in the car, the container may be held but not searched until a warrant is obtained.

Acevedo, 111 S. Ct. at 1985.

56. *See* California v. Acevedo, 111 S. Ct. 39 (1990).

57. Justice Blackmun delivered the Court's opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter. *Acevedo*, 111 S. Ct. at 1984. Justice Scalia concurred in the judgment. *Id.* at 1992 (Scalia, J., concurring). Justice White dissented in a brief statement agreeing with most of Justice Stevens's dissenting opinion. *Id.* at 1994 (White, J., dissenting). Justice Stevens, joined by Justice Marshall, dissented at greater length. *Id.* (Stevens, J., dissenting).

58. *See id.* at 1987-88.

59. *See id.* at 1989. The Court had summarized the *Ross* rule earlier in its opinion. *See id.* at 1986.

60. *See id.* at 1989-90.

61. The Court noted that its adherence to the doctrine of stare decisis is not absolute and that it has overruled a precedent "on the comparatively rare occasion when it has bred confusion or been a derelict or led to anomalous results." *Id.* at 1991. The Court further pointed out that its decision in *Ross* had explicitly undermined *Sanders*. *See id.*

Consequently, the *Acevedo* Court replaced the *Chadwick-Sanders* doctrine with the *Ross* standard, applying *Ross* to closed containers found in vehicles.[62] Officers may search closed containers if they have probable cause to believe that the containers hold matter seizable under a search warrant;[63] if their probable cause belief relates only to specific containers, they cannot search any other part of the vehicle in which the containers are found.[64] On the *Acevedo* record, the Court concluded that the officers had probable cause to believe that the paper bag in Acevedo's car contained marijuana and, therefore, had properly searched and seized it.[65]

3. Consent to Automobile Searches

In *Florida v. Jimeno*,[66] the Court held that a valid consent to the search of a vehicle extends to all closed containers within the vehicle, unless the consent itself delineates a more limited scope.[67] The Florida courts have ruled that a consent to search a vehicle or area does not extend to sealed containers located therein.[68] The search activities by the local officers,[69] therefore, extended beyond the legal scope of Jimeno's consent. The Supreme Court granted certiorari[70] and reversed the Florida Supreme Court's judgment.[71]

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62. *See id.*

63. *Id.* The police may search an automobile and the containers within it when they have probable cause to believe that the items searched contain contraband or evidence. *Id.*

64. *Id.*

65. *See id.*

66. 111 S. Ct. 1801 (1991).

67. *See id.* at 1804.

68. *See* Jimeno v. State, 550 So. 2d 1176 (Fla. Dist. Ct. App. 1989), *aff'd*, 564 So. 2d 1083 (Fla. 1990), *rev'd and remanded*, 111 S. Ct. 1801 (1991).

69. An officer believed that Jimeno was arranging an illegal drug transaction. When Jimeno committed a moving traffic violation the officer stopped him. The officer stated that he intended to issue a traffic citation and that he had reason to believe Jimeno was carrying narcotics in the car. The officer asked permission to search the car after advising Jimeno that he did not have to consent to the search. Jimeno said that he had nothing to hide and gave the officer permission to search. After the vehicle's two passengers left the car, the officer opened the door and saw a folded brown paper bag on the floorboard. The officer picked up the sack, opened it, and found a kilogram of cocaine inside. *See Jimeno*, 111 S. Ct. at 1803.

70. *See* Florida v. Jimeno, 111 S. Ct. 554 (1990).

71. *See Jimeno*, 111 S. Ct. at 1803, 1804. Chief Justice Rehnquist delivered the Court's opinion, joined by Justices White, Blackmun, O'Connor, Scalia, Kennedy, and Souter. *Id.* at 1802. Justice Marshall, joined by Justice Stevens, dissented. *Id.* at 1804

In accordance with the mode of analysis it had established in *Illinois v. Rodriguez*,[72] the *Jimeno* Court confirmed that the scope of an individual's consent to search, determined objectively or on the basis of the consenting individual's state of mind, does not dispose of all Fourth Amendment issues. Instead, because the Fourth Amendment proscribes only "unreasonable searches,"[73] the standard for determining the scope of a consent under the Amendment is "'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect"?[74] Nevertheless, the focus is on "whether it is reasonable for an officer to consider a suspect's general consent to a search of [the suspect's] car to include consent to examine a paper bag lying on the floor of the car."[75] The Court thought it was and rejected the Florida trial court's conclusion that specific consent must be obtained for the search of each closed container within a vehicle.[76] To the Court, doctrines relating to consent should encourage cooperation with authorities,[77] not discourage it, as a "separate consent" rule for individual containers would have done.[78]

4. Probable Cause for Detention

The uninitiated might wonder what the Fourth Amendment has to do with detention authorized by judicial action following production of arrested persons in court. Either the constitutional requirement of due process or an asserted right to bail, extracted from the Eighth Amendment prohibition against excessive bail,[79] would seem to be more applicable to the judicial setting than the prohibition against unreasonable seizures of the person. Since 1975, however, the constitutionality of detention orders has been governed by the Court's holding in *Gerstein v. Pugh*.[80] In *Gerstein*,

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(Marshall, J., dissenting).

72. 110 S. Ct. 2793 (1990) (discussed in George, *1989-1990 Term*, *supra* note 4, at 494-97).

73. *Id.* at 2799.

74. *Jimeno*, 111 S. Ct. at 1803-04 (quoting *Rodriguez*, 110 S. Ct. at 2801).

75. *Id.* at 1804.

76. *See id.* The Court saw "no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness." *Id.*

77. *See id.* (citing Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973), the leading Supreme Court precedent on the criteria for consent to Fourth Amendment regulated searches and seizures).

78. *See id.*

79. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

80. 420 U.S. 103 (1975) (discussed in George, *1974-1975 Term*, *supra* note 4, at

the Court held that a prompt judicial hearing must be afforded persons arrested without a warrant but that, in the case of arrest pursuant to a warrant, detention may be ordered on the basis of the same probable cause showing required by the Fourth Amendment for the issuance of the warrant.[81]

In *Gerstein*, the Court did not consider the time limits within which detention hearings must be held, because the prisoner plaintiffs in that case had not been given any judicial hearing. Sixteen years later, in *County of Riverside v. McLaughlin*,[82] the Court finally addressed the question in a Federal Civil Rights Act[83] class action.[84] It continued its endorsement in *Gerstein* of a federalist analysis that requires states to provide prompt determinations of probable cause but that does not impose on them a rigid procedural framework.[85] Under such an analysis, states remain free to comply with the constitutional requirement in different ways. Although it found that the Ninth Circuit's holding precluded that flexibility, the Court cautioned that "flexibility has its limits; *Gerstein* is not a blank check."[86] The requirement under *Gerstein* that probable cause determinations be

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1291-92, 1301-03).

81. *See id.* at 120 n.21. The Fourth Amendment requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

82. 111 S. Ct. 1661 (1991).

83. 42 U.S.C. § 1983 (1988).

84. A class of arrestees challenged the county's policy of combining probable cause determinations with arraignment procedures: the latter were to be conducted under county ordinance "without unnecessary delay," in conformity with CAL. PENAL CODE § 825 (West 1985); but could be delayed as long as five days over a weekend or seven days over a Thanksgiving holiday. *See McLaughlin*, 111 S. Ct. at 1665. One complainant had never received a probable cause determination. After various procedural wrangles were resolved, the district court issued an injunction requiring the county to provide probable cause determinations within 36 hours following arrest. *See id.* at 1665-66. After the case was consolidated with another case on appeal, the Ninth Circuit affirmed the district court's holding that the county's rule based on a 48-hour delay was unreasonable under *Gerstein* and therefore unconstitutional, because no more than 36 hours were required "to complete the administrative steps incident to arrest." McLaughlin v. County of Riverside, 888 F.2d 1276, 1278 (9th Cir. 1989), *vacated and remanded*, 111 S. Ct. 1661 (1991). That interpretation, also adopted by the Fourth and Seventh Circuits, had been rejected by the Second Circuit. *See McLaughlin*, 111 S. Ct. at 1666-67 (citing and discussing conflicting circuit court decisions). The Court granted certiorari to resolve the conflict among the circuits. *See id.* at 1667.

85. *See McLaughlin*, 111 S. Ct at 1668 (citing *Gerstein*, 420 U.S. at 123).

86. *Id.* at 1669.

"prompt" had proven too vague to offer guidance.[87] Accordingly, the Court adopted a rule "that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. . . . [These] jurisdictions will be immune from systemic challenges."[88] If delay extends beyond forty-eight hours, the burden shifts to the government to show a bona fide emergency or other extraordinary circumstances warranting delay.[89] Because the county's practice did not conform to the Court's newly announced standard, the matter was remanded for appropriate further proceedings.[90]

B. *Interrogation*

1. The *Miranda* Rule

In *Miranda v. Arizona*,[91] the Supreme Court laid down several "prophylactic rights" designed "to counteract the 'inherently compelling pressures' of custodial interrogation, including the right to have counsel present."[92] In *Edwards v. Arizona*,[93] the Court established what it has described as "a second layer of prophylaxis for the *Miranda* right to counsel."[94] The *Edwards* Court held that when suspects exercise their right to counsel, interrogation must cease immediately, and no efforts at

87. *Id.*

88. *Id.* at 1670. Nevertheless, even a 48-hour delay can violate the Fourth Amendment if based on unacceptable and therefore unreasonable grounds. *Id.* "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.*

89. *Id.* The Court rejected as "extraordinary circumstances" the fact that it takes more than 48 hours to consolidate pretrial proceedings or that a weekend has intervened. *Id.* The Court noted that various mechanisms have been adopted in a number of states that can meet the basic 48-hour requirement but declined to mandate any particular approach. *See id.* at 1670-71.

90. *See id.* at 1671. Justice O'Connor delivered the Court's opinion, joined by Chief Justice Rehnquist and Justices White, Kennedy, and Souter. *Id.* at 1665. Justice Marshall, joined by Justices Blackmun and Stevens, dissented, *id.* at 1671 (Marshall, J., dissenting), as did Justice Scalia in a separate dissenting opinion, *id.* at 1671 (Scalia, J., dissenting).

91. 384 U.S. 436 (1966).

92. McNeil v. Wisconsin, 111 S. Ct. 2204, 2208 (1991) (quoting *Miranda*, 384 U.S. at 467). The rights to counsel and protection against self-incrimination can, however, be waived. *Id.*

93. 451 U.S. 477 (1981).

94. *McNeil*, 111 S. Ct. at 2208.

further interrogation may be made until counsel has been made available[95] to suspects in custody.[96] Later conversations leading to waivers of *Miranda* rights and further interrogation must be initiated by suspects.[97]

McNeil v. Wisconsin[98] presented the Court with the issue whether the assertion of the Sixth Amendment right to counsel in unrelated proceedings automatically invokes *Miranda*'s Fifth Amendment right to counsel for purposes of the *Edwards* rule. In the context of the separate Sixth Amendment restriction on the interrogation of defendants,[99] the assertion of the right to counsel triggers a counterpart to the *Edwards* rule, as explained in *Michigan v. Jackson*.[100] The *McNeil* Court, however, viewed the *Jackson* rule as "offense-specific"[101] and held that it does not trigger the *Edwards* doctrine for purposes of an investigation into unrelated criminal matters.[102] The Court rejected McNeil's argument that an exercise of the Sixth Amendment right to counsel served as the equivalent of a request for counsel under *Edwards*. Such a rule would render "most persons in pretrial custody for serious offenses . . . *unapproachable* by police officers suspecting them of involvement in other

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95. This means that counsel must actually be present. *See* Minnick v. Mississippi, 111 S. Ct. 486, 491 (1990); *see also McNeil*, 111 S. Ct. at 2208 (citing *Minnick* and reiterating the requirement that counsel be present). For a further discussion of *Minnick*, see *infra* notes 105-12 and accompanying text.

96. *See Edwards*, 451 U.S. at 484-85. For a further discussion of *Edwards*, see George, *1980-1981 Term*, *supra* note 4, at 22-23; *see also* Smith v. Illinois, 469 U.S. 91, 98-99 (1984) (per curiam) (holding that post-request responses to further interrogation may not be used to cast doubt on the clarity of the initial request for counsel); Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (holding that the defendant's question, "Well, what is going to happen to me now?," was a waiver of the right to counsel); George, *1982-1983 Term*, *supra* note 4, at 265-67 (discussing *Bradshaw*).

97. "*Edwards* does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities . . . ." *Minnick*, 111 S. Ct. at 492.

98. 111 S. Ct. 2204 (1991).

99. Suspects become "defendants" for Sixth Amendment purposes at the commencement of adversary criminal proceedings. Moran v. Burbine, 475 U.S. 412, 428-30 (1986) (discussed in George, *1985-1986 Term*, *supra* note 4, at 445-46); Brewer v. Williams, 430 U.S. 387, 401 (1977) (discussed in George, *1976-1977 Term*, *supra* note 4, at 476).

100. 475 U.S. 625 (1986) (discussed in George, *1985-1986 Term*, *supra* note 4, at 446-48).

101. *McNeil*, 111 S. Ct. at 2207.

102. *See id.* at 2209. The Court stated that the *Edwards* doctrine is concerned not with the likelihood that a suspect would wish counsel present, but rather with whether he or she has expressed that wish. *See id.*

crimes, *even though they ha[d] never expressed any unwillingness to be questioned.*"[103] The Court categorically "decline[d] to add yet another story to *Miranda.*"[104]

If a suspect in custody asks for counsel and does not initiate any subsequent conversations or discussions, what options, if any, do authorities have if they wish to try for a voluntary confession? According to *Minnick v. Mississippi*,[105] it is not enough merely to facilitate one or more conferences between a suspect or defendant and defense counsel.[106] Instead, counsel must actually attend any later interview not initiated by the suspect in custody.[107] The Court saw no merit in a rule that would allow the *Edwards* protection to flash on and off depending on the frequency of client-attorney interviews, after which an identical protection might well attach based on an assertion of the Sixth Amendment right to counsel at preliminary proceedings.[108] Moreover, the nature of the consultations that would suffice to terminate the *Edwards* protection would have to be determined case by case, and that very well could interfere with the attorney-client privilege.[109] Finally, clients whose attorneys

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103. *Id.* at 2210.

104. *Id.* at 2211. Justice Scalia delivered the Court's opinion, joined by Chief Justice Rehnquist and Justices White, O'Connor, Kennedy, and Souter. *Id.* at 2206. Justice Kennedy also filed a concurring opinion. *Id.* at 2211 (Kennedy, J., concurring). Justice Stevens, joined by Justices Marshall and Blackmun, dissented. *Id.* at 2212 (Stevens, J., dissenting).

105. 111 S. Ct. 486 (1990).

106. In *Minnick*, the defendant and another person escaped from a Mississippi jail, murdered two persons, kidnapped two others, and fled to San Diego, California. During the FBI's interrogation, Minnick requested counsel. An appointed attorney then met with Minnick two or three times. Two days later, in the San Diego jail, Mississippi officers questioned Minnick without counsel present. During this questioning, Minnick made incriminating admissions, which were later used against him in a Mississippi capital murder trial. Minnick was convicted and sentenced to death. *Id.* at 488-89. The Mississippi Supreme Court ruled that *Edwards* had been satisfied because the officers made no further attempts to interrogate Minnick until after counsel was made available to him; from that point on, it was as if there were a completely new interrogation transaction. *See* Minnick v. State, 551 So. 2d 77, 83-85 (Miss. 1988), *rev'd*, 111 S. Ct. 486 (1990). The Supreme Court granted certiorari, *see* Minnick v. Mississippi, 110 S. Ct. 1921 (1990), to consider the Fifth Amendment (*Miranda*), but not the Sixth Amendment, implications of the state court's holding. *See Minnick*, 111 S. Ct. at 489.

107. The Court noted that this had been the expectation in its *Miranda* holding. *See Minnick*, 111 S. Ct. at 491.

108. *See id.* at 492; *see also* Michigan v. Jackson, 475 U.S. 625 (1986) (holding that *Edwards* protection applies to police interrogation after assertion at arraignment of the right to counsel).

109. *Minnick*, 111 S. Ct. at 492.

appeared promptly would lose the benefit of *Edwards*, while those with dilatory counsel would not.[110] The Court concluded that the policies underlying *Edwards* can be satisfied only through a complete suspension of interrogation or through actual attendance by defense counsel.[111] Because neither alternative was satisfied in Minnick's case, his statement to the Mississippi police officer should have been excluded at trial.[112]

2. Coerced Confessions

A defendant is denied due process of law if his or her coerced confession is admitted into evidence at trial. This doctrine underlies the Supreme Court's earliest efforts at using the Constitution as a means of controlling the interrogation process.[113] The doctrine remains a fully viable constitutional principle, even though most issues relating to confessions are dealt with under *Miranda*[114] and the Court's Sixth Amendment interrogation doctrine.[115] In *Arizona v. Fulminante*,[116] the Court confirmed the basic doctrine that coerced confessions are generally inadmissible and that voluntariness is to be determined according to the totality of the circumstances.[117] On the *Fulminante* facts, a majority of the Court affirmed[118] the Arizona Supreme Court's finding that Fulminante's confession was involuntary.[119]

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110. *Id.*

111. *See id.* at 486; *see also* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (rearticulating the view expressed in *Miranda* and its progeny that it is unconstitutional for police to reinterrogate an accused in custody who has clearly asserted the right to counsel).

112. *Minnick*, 111 S. Ct. at 492. Justice Kennedy delivered the Court's opinion, joined by Justices White, Marshall, Blackmun, Stevens, and O'Connor. *Id.* at 488. Justice Scalia dissented, joined by Chief Justice Rehnquist. *Id.* at 492 (Scalia, J., dissenting). Justice Souter did not participate. *Id.*

113. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 287 (1936) (reversing convictions of three defendants who had been convicted solely on the basis of torture-induced confessions). *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 294-99 (2d ed. 1992) (discussing the Court's interpretation of *Miranda*'s interrogation protection):

114. *See supra* notes 91-97 and accompanying text.

115. *See supra* notes 98-104 and accompanying text.

116. 111 S. Ct. 1246 (1991).

117. *See id.* at 1251-52.

118. *See id.* at 1251. Justice White wrote the majority opinion on this point, joined by Justices Marshall, Blackmun, Stevens, and Scalia. *Id.* at 1249. Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter would have rejected the Arizona Supreme Court's finding of involuntariness. *See id.* at 1261-63 (Rehnquist, C.J., dissenting in part), 1266-67 (Kennedy, J., concurring in the judgment).

119. *See* State v. Fulminante, 778 P.2d 602, 609 (Ariz. 1988), *aff'd*, 111 S. Ct. 1246,

The Court, however, with a differently composed majority,[120] determined that the constitutional harmless-error rule can apply to the use of constitutionally involuntary confessions.[121] The original majority bloc then concluded that the error in this case was reversible[122] and affirmed the Arizona Supreme Court's reversal of Fulminante's conviction and death sentence.[123]

1248 (1991). Fulminante, later convicted of capital murder and sentenced to death, was incarcerated in a federal correctional facility based on a conviction on independent federal charges of possession of a firearm by a felon. Sarivola, a former police officer incarcerated with Fulminante, attempted to find out from him the truth of rumors that Fulminante had killed his minor stepdaughter. When he told an FBI agent the inconclusive information he had gleaned from Fulminante, the agent told Sarivola to find out more. Sarivola told Fulminante that he understood Fulminante was beginning to get tough treatment from other inmates based on the rumors about the death of the stepdaughter, and indicated his willingness to protect Fulminante if Fulminante would tell him the truth about the rumors. Fulminante then confessed to the murder of his stepdaughter, and repeated the confession again to Sarivola's fiancée (later his wife). At trial on the Arizona murder charges, Fulminante moved to suppress the confessions as involuntarily made. The motion was denied, and Fulminante was convicted and sentenced to death. *Id.* at 606. The Arizona Supreme Court reversed, holding that the first confession was coerced. *See id.* at 602. The United States Supreme Court affirmed the Arizona Supreme Court. Arizona v. Fulminante, 111 S. Ct. 1246 (1991).

120. Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, and Scalia constituted the majority on this point. *Fulminante*, 111 S. Ct. at 1261, 1263-66. Justices White, Marshall, Blackmun, and Stevens would have rejected any harmless error application in cases involving coerced or involuntary confessions. *See id.* at 1253 (White, J., dissenting in part).

121. *Id.* at 1257.

122. *See id.* at 1258-61. The Court, in Justice White's majority opinion, held that the prosecution had failed to carry its burden of proving beyond a reasonable doubt that Fulminante's confession admitted at trial was harmless error. *See id.* at 1258.

123. *See id.* at 1261. Compare *Fulminante* with Yates v. Evatt, 111 S. Ct. 1884 (1991), in which the Court considered the constitutional harmless-error rule in the context of a jury instruction incorporating a presumption that impermissibly shifted the burden of persuasion to a defendant. Before finding such an instruction harmless error, a court must take two distinct steps: it must (1) determine the evidence a jury actually considered in reaching its verdict, and (2) weigh the probative value of that evidence against the presumption standing alone. *See id.* at 1893. A constitutional harmless-error finding is unacceptable unless the reviewing court finds that the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. *Id.* at 1893-94. The South Carolina Supreme Court had failed to follow this mode of analysis in *Yates*. Because the case was before the United States Supreme Court for the third time, the Court took the unusual step of determining that the error was not constitutionally harmless and remanded for appropriate action by the South Carolina Supreme Court. *See id.* at 1897.

III. THE SIXTH AMENDMENT CONFRONTATION RIGHT

A substantial number of states have enacted "rape-shield" statutes that preclude, in the trial of rape and other sexual assault crimes, the defense from introducing evidence of the victim's unrelated sexual activities.[124] Such statutes, however, exempt certain circumstances under which basic fairness demands that this type of evidence be admissible.[125] The defense may be required to give advance notice of its intent to invoke one or more of the statutory exceptions as a basis for submitting victim-related evidence, and may be precluded from submitting the evidence if proper notice is not given.[126]

The constitutionality of rape-shield legislation came under direct attack during the Term under discussion in *Michigan v. Lucas*.[127] Lucas was charged with having perpetrated several nonconsensual sex acts on his ex-girlfriend.[128] The Michigan rape-shield legislation[129] exempted from its general prohibition the introduction of evidence of the victim's past sexual conduct with the actor/defendant[130] and of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.[131] The Michigan statute, however, requires defendants to file a written motion and offer of proof relating to any claimed exceptions within ten days after arraignment.[132] Lucas did not file the required notice, and the trial court refused to allow defense evidence of earlier consensual sexual activity between Lucas and the complainant. After a bench trial, Lucas was convicted and sentenced to a lengthy prison term.[133]

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124. For further discussion of rape-shield statutes, see, e.g., Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245 (1989); David Waxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219; Kathleen Winters, Comment, United States v. Shaw: *What Constitutes an "Injury" Under the Federal Rape-Shield Statute?*, 43 U. MIAMI L. REV. 947 (1989).

125. *See, e.g.*, People v. Williams, 289 N.W.2d 863 (Mich. App. 1980) (interpreting Michigan's rape-shield law, MICH. COMP. LAWS § 750.520j (1979)), *rev'd on other grounds*, 330 N.W.2d 823 (Mich. 1982).

126. Williams v. Florida, 399 U.S. 78, 86 (1970).

127. 111 S. Ct. 1743 (1991).

128. *See id.* at 1745.

129. MICH. COMP. LAWS § 750.520j (1979).

130. *See id.* § 750.520j(1)(a).

131. *See id.* § 750.520j(1)(b).

132. *See id.* § 750.520j(2).

133. *See Lucas*, 111 S. Ct. at 1745. Lucas was sentenced to a term of 44 to 180 months. *See id.*

The Michigan Court of Appeals reversed.[134] It concluded that the notice-and-hearing requirement was unconstitutional when invoked to preclude evidence of past sexual activity between a rape defendant and rape victim.[135] In the state court's view, requiring advance notice furthered no useful purpose and therefore was insufficient to legitimate an interference with a criminal defendant's Sixth Amendment right to confront prosecution witnesses.[136] The United States Supreme Court disagreed with this constitutional analysis and reversed.[137]

The Court acknowledged that rape-shield statutes with advance notice requirements implicate the Sixth Amendment right of confrontation but stated that such a right is not absolute and can be limited to accommodate other legitimate interests in the criminal trial process.[138] Contrary to the Michigan Court of Appeals, the Supreme Court found that the notice

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134. People v. Lucas, 408 N.W.2d 431 (Mich. Ct. App. 1987). The Michigan Supreme Court reversed and remanded the case based upon its decision in People v. Lalone, 437 N.W.2d 611 (Mich. 1989) (holding that excluding evidence of the victim's sexual history violated neither the rape-shield statute nor the Sixth Amendment right of confrontation). *See* People v. Lucas, 446 N.W.2d 291 (Mich. 1989). The Michigan Court of Appeals then reversed Lucas's conviction and remanded once more. *See* People v. Lucas, 469 N.W.2d 435 (Mich. Ct. App. 1990). The United States Supreme Court granted certiorari against the latter judgment. *See* Michigan v. Lucas, 111 S. Ct. 507 (1990).

135. The Michigan statute, MICH. COMP. LAWS § 750.520j (1979), does not contain a specific preclusion sanction for a failure to file the requisite notice. The Michigan trial court ruled on the assumption that preclusion was the appropriate sanction, and the Michigan Court of Appeals did not address the matter because it found that the notice-and-hearing provision was unconstitutional per se. *See Lucas*, 111 S. Ct. at 1745-46. Subsequently, the United States Supreme Court indicated that, after remand, the Michigan courts were free to determine whether preclusion is an available sanction based on Michigan law. *See id.* at 1748.

136. *See Lucas*, 111 S. Ct. at 1746. The Supreme Court noted that under the Michigan appellate court's rationale, trial courts would be unable to exclude such evidence "even where a defendant's failure to comply with the notice-and-hearing requirement is a deliberate ploy to delay the trial, surprise the prosecution, or harass the victim." *Id.*

137. *See id.* at 1748. Justice O'Connor delivered the Court's opinion, joined by Chief Justice Rehnquist and Justices White, Scalia, Kennedy, and Souter. *Id.* at 1744. Justice Blackmun concurred in the judgment. *Id.* at 1748 (Blackmun, J., concurring). Justice Stevens dissented, joined by Justice Marshall. *Id.* at 1749 (Stevens, J., dissenting).

138. *See id.* at 1746-47 (citing Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (discussed in George, *1985-1986 Term*, *supra* note 4, at 489-91), and Rock v. Arkansas, 483 U.S. 44, 55 (1987) (discussed in George, *1986-1987 Term*, *supra* note 4, at 274-76)).

requirement serves useful purposes[139] and found nothing unconstitutional in the notice provision, based on the Court's prior decisions.[140]

The broader question, then, was whether the legitimate interests advanced by a notice requirement ever could justify the exclusion of evidence of earlier sexual activity between rape defendants and their alleged victims. The Supreme Court, rejecting the position adopted by the Michigan Court of Appeals, held that they could, based on the Court's decisions upholding the preclusion sanction for failure to notify in other discovery contexts.[141] Because the Michigan Court of Appeals had invalidated the Michigan notice statute on its face, and hence had not inquired into the justification for preclusion *vel non* in Lucas's case, the Supreme Court remanded for a determination whether, on the facts of the case, preclusion violated Lucas's right of confrontation.[142]

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139. Advance notice allows prosecutors to investigate whether the asserted relationship actually existed and enables trial courts to determine before trial whether the evidence would be material to an issue in the case and whether its inflammatory or prejudicial nature outweighs its probative value—a basic qualification embodied in the state legislation. *See* MICH. COMP. LAWS § 750.520j(1) (1979); *Lucas*, 111 S. Ct. at 1746-47.

140. *See Lucas*, 111 S. Ct. at 1747. The *Lucas* Court relied on Wardius v. Oregon, 412 U.S. 470 (1973), and Williams v. Florida, 399 U.S. 78 (1970). In *Williams*, the Court sustained the constitutionality of an alibi notice statute that required the defendant to notify the State in advance of trial of any alibi witnesses. *See Williams*, 399 U.S. at 83. The Court further explained in *Wardius* that all that is constitutionally required is that discovery rules and statutes be reciprocal—that they impose like burdens on prosecution and defense. *Wardius*, 412 U.S. at 472-75.

The *Lucas* Court noted, however, that such restrictive rules may be unconstitutionally arbitrary and signaled a possibility that Michigan's statutory ten-day notice requirement (the briefest period allowed anywhere in the country), might be vulnerable to constitutional attack. The Michigan Court of Appeals, however, had not passed on that ground; hence, it was not before the Supreme Court. *Lucas*, 111 S. Ct. at 1747.

141. *See Lucas*, 111 S. Ct. at 1747-48 (citing Taylor v. Illinois, 484 U.S. 400, 414-15 (1988), and United States v. Nobles, 422 U.S. 225, 241 (1975) (discussed in George, *1974-1975 Term*, *supra* note 4, at 1303-05)). In *Taylor*, the Court approved the preclusion sanction for defense counsel's failure to identify a particular defense witness in response to a prosecution pretrial discovery request. *See Taylor*, 484 U.S. at 414.

142. *See Lucas*, 111 S. Ct. at 1748.

IV. SENTENCING AND OFFENDER TREATMENT

A. *Capital Punishment*

1. Notice of Possibility of Death Sentence

In *Lankford v. Idaho*,[143] the Supreme Court held that due process of law requires that persons convicted of a capital crime be given adequate advance notice, before sentencing proceedings commence, that the court may sentence them to death. In *Lankford*, a capital murder case, sentencing proceedings were delayed for some time after the entry of a judgment of guilt, and when they commenced, the prosecution offered no evidence and recommended an indeterminate life sentence with a ten- to twenty-year minimum.[144] At the conclusion of the capital sentencing hearing, the trial court sentenced Lankford to death,[145] a determination affirmed by the state supreme court.[146] A bare majority[147] of the Supreme Court reversed.[148]

The Court concluded that the prosecution's response to the trial court's inquiry, indicating no advocacy of capital punishment, served (or appeared to serve) to eliminate the death penalty from the case and thus

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143. 111 S. Ct. 1723 (1991).

144. *See id.* at 1727.

145. *See id.* at 1728.

146. *See* State v. Lankford, 747 P.2d 710 (Idaho 1987), *vacated and remanded*, 486 U.S. 1051 (1988), *aff'd*, 775 P.2d 593 (Idaho 1989), *rev'd*, 111 S. Ct. 1723 (1991). The United States Supreme Court granted certiorari, vacated the Idaho judgment, and remanded the case for reconsideration in light of its holding in Satterwhite v. Texas, 486 U.S. 249 (1988) (discussing the applicability of the constitutional harmless-error rule to cases involving the prosecution's use of evidence of dangerousness based on psychiatric interviews improperly obtained under the doctrine established in Estelle v. Smith, 451 U.S. 454 (1981)). The Idaho court reinstated its original judgment. *See* State v. Lankford, 775 P.2d 593 (Idaho 1989). The United States Supreme Court granted certiorari a second time, *see* Lankford v. Idaho, 111 S. Ct. 292 (1990), on "the question raised by the trial court's order concerning the death penalty and the State's response thereto." *Lankford*, 111 S. Ct. at 1728-29.

147. Justice Stevens delivered the Court's opinion, joined by Justices Marshall, Blackmun, O'Connor, and Kennedy. *Lankford*, 111 S. Ct. at 1724. Justice Scalia dissented, joined by Chief Justice Rehnquist and Justices White and Souter. *Id.* at 1733 (Scalia, J., dissenting). Justice Marshall's retirement from the Court appears to have placed the *Lankford* holding in jeopardy, because the dissenters did not limit themselves to the fact-specific dimensions of the case; rather, they indicated that due process is satisfied if the statute under which the defendant is convicted authorizes capital punishment and thus apprises all convicted defendants that they may be sentenced to death. *See id.* at 1736.

148. *See id.* at 1733.

misled defense counsel as to the preparation needed for the sentencing hearing.[149] The trial court's decision to select the death penalty apparently rested largely on its disbelief of Lankford's testimony suggesting that he was less culpable than his accomplice.[150] Although this did not amount to a consideration of secret information about the defendant outside the record,[151] in effect, it concealed from both parties the principal issue to be decided at the capital sentencing hearing.[152] Because "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure,"[153] Lankford's due process rights had been imperiled, or might have been imperiled, to the point that a reversal and remand were required.[154]

2. Admissibility of Victim Impact Evidence

In two of its relatively recent precedents, *Booth v. Maryland*[155] and *South Carolina v. Gathers*,[156] the Court had held that jurors at a capital sentencing hearing could not consider victim impact evidence, whether in the form of a victim impact statement[157] or otherwise.[158] "Victim impact" evidence relates to the personal characteristics of the victim, the

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149. *See id.* at 1729-30. The Court noted that, based on the case record, there were at least three case-related points for which counsel could have prepared had she believed Lankford might be sentenced to death. *See id.* at 1730-31.

150. *See id.* at 1727.

151. The Court indicated that this was the reasoning upon which it had based its decision in Gardner v. Florida, 430 U.S. 349, 357 (1977) (discussed in George, *1976-1977 Term*, *supra* note 4, at 488). *See Lankford*, 111 S. Ct. at 1731-32.

152. *Lankford*, 111 S. Ct. at 1732.

153. *Id.*

154. *Id.* at 1733.

155. 482 U.S. 496 (1987) (holding victim impact evidence inadmissible at capital sentencing hearing).

156. 490 U.S. 805 (1989) (extending *Booth* by prohibiting a prosecutor from discussing victim impact evidence in the closing argument).

157. A victim impact statement is an oral or written statement about the financial, social, psychological, and emotional harm done to, or loss suffered by, a victim of a crime. *See, e.g.*, FED. R. CRIM. P. 32(c)(2)(D). The *Booth* Court held that this kind of evidence was not admissible in capital sentencing trials. *See Booth*, 482 U.S. at 509.

158. In *Gathers*, the Court extended its holding in *Booth* and concluded that oral statements pertaining to victim impact were also inadmissible at capital sentencing trials. *See Gathers*, 490 U.S. at 811. The constitutional issue as formulated by the Court in Payne v. Tennessee, 111 S. Ct. 2597 (1991), relates to the admissibility of any "victim impact" evidence about the personal characteristics of the victim and the emotional impact of the crimes on the victim's family. *See id.* at 2604.

emotional impact of the crimes on the victim's family, and the characterizations and opinions on the part of the victim's family members about the crime, the defendant, and the appropriate sentence.[159] In *Payne v. Tennessee*,[160] the Court specifically granted certiorari for the purpose of considering whether its *Booth–Gathers* doctrine should be retained.[161] A six-to-three majority[162] overruled the *Booth* Court's holding[163] and allowed the use of victim impact evidence—at least as it relates to the victim and the impact of a victim's death on his or her family.[164]

The Court noted that harm caused by crimes has become an important factor in noncapital sentencing, based at times on legislation rather than the exercise of judicial discretion to receive data germane to sentencing determinations.[165] Although, in capital sentencing, all evidence that enables a capital defendant to be seen as a "'uniquely individual human bein[g]'"[166] must be received in mitigation of the death penalty, the *Payne* Court found in that doctrine nothing that would require an individualized consideration of the defendant apart from the circumstances of the crime.[167]

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159. *See Payne*, 111 S. Ct. at 2604 (citing *Booth*, 482 U.S. at 496).

160. *Id.* at 2597.

161. In *Payne*, the sentencing court allowed a relative of the victims to testify how a child, whose mother and sister Payne had murdered, had been affected by the crime. The prosecution based a significant part of its closing statement on that testimony, and the jury voted in favor of the death penalty. *See id.* at 2603. The Tennessee Supreme Court affirmed the sentencing court's decision. *See* State v. Payne, 791 S.W.2d 10 (Tenn. 1990), *cert. granted*, Payne v. Tennessee, 111 S. Ct. 1031 (1991) (specifically limiting certiorari to the question whether *Booth* and *Gathers* should be overruled), *aff'd*, 111 S. Ct. 2597 (1991).

162. Chief Justice Rehnquist, joined by Justices White, O'Connor, Scalia, Kennedy, and Souter, delivered the Court's opinion. *Payne*, 111 S. Ct. at 2601. Justice O'Connor, joined by Justices White and, in part, Kennedy, entered one concurring opinion. *Id.* at 2611 (O'Connor, J., concurring). Justice Scalia, joined in part by Justices O'Connor and Kennedy entered a separate concurring opinion. *Id.* at 2613 (Scalia, J., concurring). Justice Souter, joined by Justice Kennedy, entered the third concurring opinion. *Id.* at 2614 (Souter, J., concurring). Justice Marshall, joined by Justice Blackmun, dissented in one opinion. *Id.* at 2619 (Marshall, J., dissenting). Justice Stevens, joined by Justice Blackmun, dissented in another opinion. *Id.* at 2625 (Stevens, J. dissenting).

163. The majority in *Payne* indicated that the Court need not be constrained by the doctrine of stare decisis. *See id.* at 2609-11.

164. *See infra* text accompanying note 177.

165. *See Payne*, 111 S. Ct. at 2606.

166. *Id.* at 2606-07 (alteration in original) (quoting *Booth*, 482 U.S. at 504).

167. *See id.* at 2606. The Court stated that in its earlier holdings on mitigation data, the focus was on evidence that must be admitted at the defense's request, and not on evidence that could not be utilized. *See id.* at 2607.

In changing its collective mind, the Court discounted the concern espoused in *Booth* that the admission of victim impact evidence and defense evidence in rebuttal would create a mini-trial of the victim's character.[168] The new operative majority believed that most of the evidence on this issue already would have been before a jury at the guilt phase.[169] In any event, the Court reasoned that the admissibility of such evidence functionally would be no different from data on future dangerousness, which is admissible subject to the usual opportunities for rebuttal and impeachment.[170] As the Court acknowledged, victim impact evidence might cause juries to "find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy."[171] This form of evidence, however, is not offered for the purpose of encouraging such comparative judgments, but rather to show each victim's uniqueness, "whatever the jury might think the loss to the community resulting from [the victim's] death might be."[172]

Within the procedural and substantive limits set by the Court to circumscribe capital sentencing determinations,[173] state legislatures and courts are free to determine the "substantive factors relevant to . . . penalty determination[s],"[174] as well as the procedures and remedies appropriate to "meet felt needs."[175] "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."[176] Accordingly, the *Payne* majority overturned the bulk of the *Booth* doctrine as inappropriately conceived because it allowed defendants to put in any kind of evidence whatever about their character but disallowed all forms of prosecution

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168. *See id.* at 2607 (citing *Booth*, 482 U.S. at 506-07).

169. *See id.*

170. *See id.* (citing Barefoot v. Estelle, 463 U.S. 880, 898 (1983) (discussed in George, *1982-1983 Term*, *supra* note 4, at 307-09)).

171. *Id.* (citing *Booth*, 482 U.S. at 506 n.8).

172. *Id.* The Court thought that the facts in *Gathers* provided an excellent illustration: "[T]he evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being." *Id.*

173. *See id.* at 2607-08 (citing the Court's summary of Eighth Amendment concerns in McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987) (discussed in George, *1986-1987 Term*, *supra* note 4, at 292-96)).

174. *Id.* at 2608 (citing California v. Ramos, 463 U.S. 992, 1001 (1983) (discussed in George, *1982-1983 Term*, *supra* note 4, at 309-12)).

175. *Id.*

176. *Id.*

proof bearing on the victim.[177] Henceforth, states are free to admit certain forms of victim impact evidence and prosecutorial arguments resting upon such evidence because "evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."[178]

Because the Court addressed and rejected only the per se exclusion rationale of *Booth-Gathers*, it remains possible to argue that in a given case victim impact evidence and the prosecution's argument based upon it have rendered the capital sentencing fundamentally unfair and thus violative of due process.[179]

3. Lesser-Included Offense Instructions

Under the Supreme Court's decision in *Beck v. Alabama*,[180] a capital defendant has a constitutional right to have the jury instructed about any lesser-included offense, provided that any are legally available in the case.[181] In *Schad v. Arizona*,[182] the Court concluded that the *Beck* decision was not infringed when a court refused to instruct the jury as to a potential robbery charge in a prosecution for first-degree murder based on either premeditation or felony murder premised on the robbery.[183]

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177. *See id.* at 2608-09, 2611.

178. *Id.* at 2609.

179. That viewpoint was noted in Justice O'Connor's concurring opinion. *See id.* at 2612 (O'Connor, J., concurring). Also, the majority implied, *see id.* at 2611 n.2, and Justices O'Connor, *see id.* at 2612 (O'Connor, J., concurring), and Souter, *see id.* at 2614 n.1 (Souter, J., concurring), expressly noted that the *Payne* holding does not impair *Booth* to the extent that the latter constitutionally precluded the admission of information concerning characterizations of and opinions about the crime and an appropriate sentence, tendered by the family members of a murder victim.

180. 447 U.S. 625, 637-38 (1980) (discussed in George, *1979-1980 Term*, *supra* note 4, at 176-77).

181. *See* Spaziano v. Florida, 468 U.S. 447, 455 (1984). In *Spaziano*, the expiration of the limitations period precluded the submission of a lesser-included offense to the jury; thus, *Beck* was not violated. *See id.*

182. 111 S. Ct. 2491 (1991).

183. *See id.* at 2504-05. *Schad* also presented an issue of the constitutionality of embodying both premeditated and felony murder in a single statute as alternative modes of committing capital (first-degree) murder, and then submitting the case to the jury without requiring it to agree unanimously on one of the alternatives. *See id.* at 2496 (plurality opinion). A plurality of the Court, composed of Justice Souter, Chief Justice Rehnquist, and Justices O'Connor and Kennedy, *id.* at 2494 (plurality opinion), did not find a due process defect in enacting statutes and lodging charges that include alternative means of committing a crime in a single provision. *See id.* at 2496-504 (plurality opinion). Justice Scalia did not accept the plurality's reasoning on this point and therefore joined Justice Souter's opinion

The Court reached this conclusion because the jury was instructed that it could consider second-degree murder as a lesser-included offense to the capital charge.[184]

4. Appellate Review

The Supreme Court's constitutional jurisprudence governing capital punishment is aimed at preventing the arbitrary or irrational imposition of the death penalty.[185] States may elect from a variety of procedures governing the allocation of responsibilities between court and jury,[186] but the sine qua non of constitutionality is an automatic plenary review of death sentences by a state's highest appellate court.[187] In *Parker v. Dugger*,[188] the Court found that the Florida Supreme Court, in its review

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solely with regard to the analysis of *Beck* as applied in *Schad*, discussed in the main text. *See id.* at 2507 (Scalia, J., concurring in part). Perhaps Justice Thomas, replacing Justice Marshall, one of the *Schad* dissenters, might help form a doctrinal majority on the issue of the use of alternative theories of murder.

184. *Id.* at 2505 (plurality opinion). The majority on this point comprised Justice Souter, the author of the opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Scalia. *Id.* at 2494 (plurality opinion). Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented. *Id.* at 2507 (White, J., dissenting).

185. *See* Parker v. Dugger, 111 S. Ct. 731, 739 (1991) (citing *Spaziano*, 468 U.S. at 466-67).

186. The trial of capital charges can be either unitary or bifurcated into a guilt phase and a penalty phase. *See* Gregg v. Georgia, 428 U.S. 153, 190-95 (1976). Trial courts may be authorized to select between life and death, once a jury has found guilt of a capital offense beyond a reasonable doubt, Cabana v. Bullock, 474 U.S. 376, 386 (1986) (discussed in George, *1985-1986 Term*, *supra* note 4, at 508-10), or to find aggravating circumstances authorizing the imposition of a death sentence after juries unanimously have recommended a death sentence, Hildwin v. Florida, 490 U.S. 638, 640 (1989) (per curiam). Juries can be assigned a screening function of determining whether at least one statutory aggravating circumstance is present as a prerequisite to death penalty eligibility, and they may be required to weigh or not weigh aggravating against mitigating circumstances in the process. Zant v. Stephens, 462 U.S. 862, 874, 878-89 (1983); *Gregg*, 428 U.S. at 193-98. Legislatures may then provide rules to conclude whether a jury finding in favor of life imprisonment is binding on a trial court. *Spaziano*, 468 U.S. at 465 (holding that a jury's sentencing recommendation is merely advisory). Legislation also can mandate a jury determination of death upon a conviction of the predicate capital offense, as long as a trial court has discretion either to confirm that determination or to substitute a life sentence. Baldwin v. Alabama, 472 U.S. 372 (1985) (discussed in George, *1984-1985 Term*, *supra* note 4, at 191). *See generally* 2 B.J. GEORGE, JR., THE COMPREHENSIVE CRIME CONTROL ACT OF 1984: CONTEMPORARY FEDERAL CRIMINAL PRACTICE §§ 486.71-.72 (1988 & Supp. 1991) (discussing procedures for imposing the death penalty).

187. *See Parker*, 111 S. Ct. at 739.

188. *Id.* at 731.

of the record in a capital punishment proceeding, had abdicated its constitutional responsibility to reweigh independently the evidence or to conduct a harmless-error analysis.[189] The Florida Supreme Court struck down two of the aggravating circumstances relied on by the trial court but then failed to assess whether there were any mitigating circumstances.[190] Therefore, the Supreme Court vacated Parker's death sentence and remanded the case for appropriate proceedings.[191]

5. Federal Habeas Corpus Review

The Supreme Court's controlling majority has endeavored in various ways to reduce the burden placed on the federal courts in the form of federal habeas corpus proceedings initiated by state prisoners, including death-row inmates.[192] In two decisions handed down during the 1990-1991 Term, the Court significantly restricted the availability of federal habeas corpus relief to state prisoners.

In *McCleskey v. Zant*,[193] a Georgia death-row inmate unsuccessfully pursued one sequence of collateral federal habeas review proceedings after completion of direct state appellate review of his death sentence. Subsequently, he commenced a second sequence predicated on different claims of constitutional error.[194] The district court rejected the state's assertion that the new federal habeas sequence constituted an abuse of the

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189. *See id.* at 738. The Court found that the lower state courts had determined that there were mitigating circumstances. *See id.* at 736-38.

190. *Id.* at 738. The Court noted that the Florida Supreme Court had stated on several occasions that it does not reweigh evidence of aggravating and mitigating circumstances. *See id.*

191. *See id.* at 740. The majority opinion was delivered by Justice O'Connor, joined by Justices Marshall, Stevens, Blackmun, and Souter. *Id.* at 733. Justice White dissented, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. *Id.* at 740 (White, J., dissenting). Justice Marshall's replacement by Justice Thomas may lead to an early repudiation of *Parker*, given the dissenters' strong expression that the *Parker* majority had abandoned the Court's "fairly supported by the record" standard, adopted in Wainwright v. Goode, 464 U.S. 78 (1983) (per curiam), under which considerable deference is paid to factual determinations of any state court. *See Parker*, 111 S. Ct. at 741 (White, J., dissenting). Justice White stated that deference should be given to those state courts that are attempting to apply their own law faithfully and responsibly. *See id.*

192. Federal habeas corpus proceedings are brought under 28 U.S.C. §§ 2241-2254 (1988).

193. 111 S. Ct. 1454 (1991).

194. For the litigation history of *McCleskey*, see the appendix to the majority opinion, *id.* at 1475-76.

writ[195] but was reversed by the Eleventh Circuit.[196] The Supreme Court granted certiorari and requested that the parties address the question whether a state must demonstrate that a claim was deliberately abandoned in an earlier habeas petition in order to establish that its inclusion in a later habeas petition constitutes an abuse of the writ.[197] The Court concluded, by a six-to-three majority,[198] that McCleskey had abused the writ by failing to advance his second claim at the time of his original federal petition.[199]

The Court canvassed the common-law history of habeas corpus, to which the doctrine of res judicata does not apply,[200] and reviewed the Court's efforts at developing a doctrine of abuse of the writ to forestall the repetitious or fragmented submission of federal constitutional claims.[201] The *McCleskey* majority concluded that one point was clear from its precedents: "Abuse of the writ is not confined to instances of deliberate abandonment" of a federal constitutional claim.[202] Instead, in the context of the requirement of exhausting state remedies as a prerequisite to the availability of federal habeas corpus review, the Court has developed a standard of "inexcusable neglect."[203] According to this standard, procedural defaults in advancing federal constitutional issues will not be overlooked unless a petitioner shows that (1) an objective factor external to the defense impeded defense counsel's efforts to raise an issue, and (2) the applicant has been prejudiced as a result[204]—the so-called "cause-

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195. *See* McCleskey v. Zant, 580 F. Supp. 338, 347 (N.D. Ga. 1984), *rev'd*, 890 F.2d 342 (11th Cir. 1989), *aff'd*, 111 S. Ct. 1454 (1991).

196. *See McCleskey*, 890 F.2d at 350-51.

197. McCleskey v. Zant, 110 S. Ct. 2585 (1990).

198. Justice Kennedy delivered the Court's opinion, joined by Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Souter. *McCleskey*, 111 S. Ct. at 1457. Justice Marshall, joined by Justices Blackmun and Stevens, dissented. *Id.* at 1477 (Marshall, J., dissenting).

199. *Id.* at 1475.

200. *See id.* at 1462-63.

201. *See id.* at 1463-67.

202. *Id.* at 1467.

203. *Id.* at 1467-70 (reviewing the development of the doctrine and concluding that the excuse of a habeas corpus petitioner's procedural default turns on a determination of "inexcusable neglect"). This standard was originally developed by the Court and is now incorporated in 28 U.S.C. § 2254(d) (1988). *See generally* Rose v. Lundy, 455 U.S. 509 (1982) (holding that state prisoners must limit habeas corpus petitions to exhausted claims) (discussed in George, *1981-1982 Term*, *supra* note 4, at 661-62).

204. *McCleskey*, 111 S. Ct. at 1470.

and-prejudice" rule.[205] In *McCleskey*, the Court extended this standard to abuse-of-writ cases:

> When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse [a] failure to raise the claim earlier, [the petitioner] must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard. If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.[206]

The Court saw its cause-and-prejudice standard as a prime means to "curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process."[207] Applying its standard to McCleskey's case, the Court concluded that he had abused the writ and had failed to cross the threshold of the cause-and-prejudice standard.[208] To preclude further litigation in the case, the *McCleskey* majority also rejected in advance any contention that denial of McCleskey's claim,[209] which had been predicated on "the admission at

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205. *See id.* at 1470-71. The Court's jurisprudence on the cause-and-prejudice rule is discussed in 1 WILLIAM H. ERICKSON & B.J. GEORGE, JR., UNITED STATES SUPREME COURT CASES AND COMMENTS: CRIMINAL LAW AND PROCEDURE 28-37 (1985 & Supp. 1991).

206. *McCleskey*, 111 S. Ct. at 1470. The application of the doctrine in the abuse-of-writ context was not intended by the Court to mitigate the force of Teague v. Lane, 489 U.S. 288 (1989) (addressing the retroactivity of constitutional precedents) (discussed in George, *1988-1989 Term*, *supra* note 4, at 628-30, 644). *Id.* at 1470-71.

207. *McCleskey*, 111 S. Ct. at 1471.

208. *See id.* at 1472-75.

209. He claimed that his statements to police had been made in violation of his Sixth Amendment right to counsel under the rule first laid down in Massiah v. United States, 377 U.S. 201 (1964) (holding that incriminating statements, deliberately elicited in the absence of petitioner's attorney, violate a petitioner's Sixth Amendment right to counsel). *See McCleskey*, 111 S. Ct. at 1459-60, 1472-75.

trial of truthful inculpatory evidence . . . not affect[ing] the reliability of the guilt determination," would constitute a "miscarriage of justice."[210] Hence, McCleskey's second habeas petition had been properly dismissed as an abuse of the writ.[211]

The Court achieved a further limiting of federal habeas corpus in *Coleman v. Thompson.*[212] Because the Constitution requires a case or controversy as a condition to the exercise of federal judicial powers,[213] neither the Supreme Court on certiorari review, nor a federal district court in habeas corpus proceedings, can review a state court determination exclusively decided on the basis of state law.[214] To apply the independent and adequate state ground doctrine in the former but not the latter context would allow habeas review to serve as "an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws."[215]

The independent and adequate state ground doctrine applies to both substantive claims and federal claims that have been procedurally defaulted upon in state courts.[216] Admittedly, it is not always easy to discern the existence of an independent state ground.[217] In line with the Court's earlier precedent,[218] however, courts on habeas review are to presume that

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210. *McCleskey*, 111 S. Ct. at 1474.

211. *Id.* at 1475. Two months after the *McCleskey* decision, in Ylst v. Nunnemaker, 111 S. Ct. 2590 (1991), the Court applied the cause-and-prejudice norm in its original context of failure to exhaust state remedies—in *Ylst* a *Miranda*-based attack on a confession admitted at the original state trial.

212. 111 S. Ct. 2546 (1991).

213. *See* U.S. CONST. art. III, § 2.

214. *See Coleman*, 111 S. Ct. at 2553-54. The Court recognized that there is a measure of difference between the Court's direct review of a state court judgment—its function in certiorari cases under 28 U.S.C. § 1257 (1988)—and habeas corpus review of the lawfulness of custody. *See Coleman*, 111 S. Ct. at 2554. Nevertheless, custody requires a valid underlying judgment, so the basic inquiry is essentially the same in both contexts. *Id.*

215. *Coleman*, 111 S. Ct. at 2554.

216. *See id.* at 2555.

217. *Id. Cf.* Michigan v. Long, 463 U.S. 1032 (1983) (holding that the Supreme Court may review state court decisions unless the state court's opinion contains a plain statement that the decision rests upon an independent state ground and that the asserted ground is adequate) (discussed in George, *1982-1983 Term*, *supra* note 4, at 339-40). In *Long*, the Court explained that the strong policy in favor of uniformity in federal law requires it to review state decisions appearing to rest on federal grounds. *See id.* at 1040.

218. *See, e.g.*, Harris v. Reed, 489 U.S. 255 (1989) (holding that ambiguous state court decisions in which the court does not expressly set forth its reliance on state law are presumed to be based on federal law) (discussed in George, *1988-1989 Term*, *supra* note 4, at 639-41).

there are no independent and adequate state grounds for a state decision that "'appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'"[219] If this presumption is not rebutted, a federal court may address a habeas petition.[220] The fact that an applicant originally presented claims to a state trial court, however, is insignificant; the last state decision on the matter is all that counts.[221] In Coleman's case, the Virginia Supreme Court had invoked its procedural rules to determine that Coleman's counsel had not filed a timely appeal of the trial court's judgment.[222] Because Coleman could not satisfy the cause-and-prejudice standard for overcoming procedural defaults, and had not argued a fundamental miscarriage of justice in his case, there was no basis for affording him federal habeas corpus relief.[223]

B. *Eighth Amendment Disproportionality in Noncapital Cases*

Changes in the Supreme Court's composition in recent years had engendered some doubt in the author as to whether the Court's five-to-four decision in *Solem v. Helm*[224] would long survive. *Harmelin v. Michigan*[225] seemed to be a likely vehicle for the Court to overrule *Helm*. Harmelin attacked a mandatory life term without possibility of

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219. *Coleman*, 111 S. Ct. at 2557 (quoting *Long*, 463 U.S. at 1040-41).

220. *See id.*

221. *See id.*

222. *See id.* at 2559-61. The Court adhered to its precedent that the Sixth Amendment right to counsel does not extend to discretionary appeals, so that Coleman could not assert incompetency of counsel as a basis for avoiding the impact of the adequate and independent state ground rule based on procedural default. *See id.* at 2568.

223. *See id.* at 2566-68. Justice O'Connor delivered the Court's opinion, joined by Chief Justice Rehnquist and Justices White, Scalia, Kennedy, and Souter. *Id.* at 2552. Justice White concurred in the Court's opinion. *Id.* at 2568 (White, J., concurring). Justice Blackmun dissented, joined by Justices Marshall and Stevens. *Id.* at 2569 (Blackmun, J., dissenting).

224. 463 U.S. 277 (1983) (discussed in George, *1982-1983 Term*, *supra* note 4, at 293-96). Helm had received a mandatory life sentence for six nonviolent property felonies arguably caused by his alcoholism, without any legal possibility of parole or any realistic expectation of executive clemency. *Id.* at 282. The Court held that noncapital sentences could be disproportionate and could therefore constitute cruel and unusual punishment under the Eighth Amendment. *See id.* at 288-89. The criteria for disproportionality review are (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals for other offenses in the same jurisdiction, and (3) the sentences assessed in other jurisdictions for the same crime. *Id.* at 290-95.

225. 111 S. Ct. 2680 (1991) (plurality opinion).

parole imposed on him as a recidivist controlled-substances trafficker.[226] A majority of the Justices voted to affirm the Michigan Court of Appeals determination[227] that the Michigan statute under which Harmelin was convicted did not violate the Eighth Amendment disproportionality standards.[228] There was, however, a doctrinal majority[229] only on the premise that a mandatory sentencing scheme like that in the Michigan legislation does not violate the Eighth Amendment; a penal statute does not have to set forth an array of alternative sanctions to be constitutional.[230] A perusal of the two opinions on which the judgmental majority is based, as well as the dissenting opinions, supports a conclusion that, for the time being, *Solem v. Helm* does not totter on the brink of extinction, but may be simplified in its detail.[231]

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226. *See id.* at 2684.

227. *See* People v. Harmelin, 440 N.W.2d 75 (Mich. Ct. App. 1989), *aff'd*, 111 S. Ct. 2680 (1991). The Michigan Supreme Court denied leave to appeal, *see* 111 S. Ct. at 2684, and the United States Supreme Court granted certiorari, *see* Harmelin v. Michigan, 495 U.S. 956 (1990).

228. *See Harmelin*, 111 S. Ct. at 2701-02.

229. Justice Scalia delivered the Court's opinion on the point, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter. *See id.* at 2683.

230. *See id.* at 2701-02. Any form of life imprisonment is less than capital punishment, and individualized sentencing is constitutionally required only in death penalty cases. *Id.* at 2702.

231. Justice Scalia's doctrinal discussion, according to which the Eighth Amendment requires that violative punishment be *both* "cruel" *and* "unusual," thus precluding proportionality review comparing the seriousness of a crime and length of sentencing, *see id.* at 2684-2701, was endorsed only by Chief Justice Rehnquist. *See id.* at 2683. Justices Kennedy, O'Connor, and Souter disagreed with Justice Scalia's reasoning and indicated that proportionality review clearly is required under the Eighth Amendment in noncapital as well as capital cases, *see id.* at 2702-09 (concurring in part), but would have abandoned the *Helm* three-factor test in favor of a single standard of "gross disproportionality," *see id.* at 2707. The dissenters—Justice White joined by Justices Blackmun and Stevens; Justice Marshall; and Justice Stevens joined by Justice Blackmun—rejected Justice Kennedy's single standard and endorsed a continuation of the *Helm* three-factor test. *See id.* at 2709 (White, J., dissenting); *id.* at 2719 (Marshall, J., dissenting); *id.* at 2719 (Stevens, J., dissenting).

If Justice Scalia and Chief Justice Rehnquist do not persist in their insistence that proportionality review in noncapital cases is not required by the Eighth Amendment, and Justice Thomas identifies with the Kennedy position, a doctrinal majority in support of Justice Kennedy's "gross proportionality" standard may emerge.

C. *Prisoner Litigation*

Class actions based on the Federal Civil Rights Act (FCRA)[232] have been one of the primary vehicles through which the constitutional protections of prisoners have been limited and implemented under the cruel and unusual punishment component of the Eighth Amendment.[233] For the most part, parties in actions of this sort have sought injunctive or declaratory judgment relief against the practices complained of, and the cases very often result in consent decrees accomplishing sweeping changes in the operation of prisons or entire prison systems.[234] FCRA, however, also permits plaintiffs to recover damages against municipalities[235] and persons who in their official capacities have infringed other's constitutional rights.[236] In both of the latter contexts, the Court has fixed a standard

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232. 42 U.S.C. §§ 1981, 1983, 1985 (1988). For a discussion of the Federal Civil Rights Act, see ERICKSON & GEORGE, *supra* note 205, at 66-148.

233. The primary Supreme Court decision addressing the impact of the Eighth Amendment on prison overcrowding is Rhodes v. Chapman, 452 U.S. 337 (1981) (discussed in George, *1980-1981 Term*, *supra* note 4, at 62-64).

234. *See, e.g.*, Williams v. Treen, 671 F.2d 892 (5th Cir. 1982) (holding that state prison officials' knowingly depriving prisoners of needed medication constitutes a violation of the constitutional prohibition against cruel and unusual punishment); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) (finding Eighth Amendment violations in a state prison in the areas of shelter, sanitation, food, safety, and medical care), *cert. denied*, 450 U.S. 1041 (1981); Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979) (holding that unwarranted use of painful and dangerous tear gas and excessive restraints imposed during out-of-cell movements violate the Eighth Amendment); Battle v. Anderson, 594 F.2d 786 (10th Cir. 1979) (holding that the state's obligation to accord constitutionally humane treatment of inmates does not depend on the willingness or financial ability of the state to provide decent penitentiaries); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977) (holding that steps taken by the district court to ensure reasonable treatment of inmates, although possibly exceeding constitutional minimum, were justified for the eradication of prison conditions violative of the Eighth Amendment), *cert. denied*, 438 U.S. 915 (1978); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854 (4th Cir. 1975) (holding that an indefinite limitation on an inmate's exercise periods and showers that adversely affects inmate's health violates his constitutional rights).

235. *See* Monell v. Department of Social Servs., 436 U.S. 638 (1978) (discussed in George, *1977-1978 Term*, *supra* note 4, at 547). Punitive damages, however, cannot be awarded against municipalities. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (discussed in George, *1980-1981 Term*, *supra* note 4, at 81-82). The Eleventh Amendment, however, bars actions for damages against states and state-level entities unless the state in question has consented to suit; 42 U.S.C. § 1983 (1988) does not amount to a congressional abrogation of the Eleventh Amendment. *See* Quern v. Jordan, 440 U.S. 332, 338-45 (1979) (discussed in George, *1978-1979 Term*, *supra* note 4, at 307).

236. *See, e.g.*, Hafer v. Melo, 112 S. Ct. 358 (1991) (unanimously reaffirming that state officials may be held personally liable for acts performed in their official capacities);

requiring a mens rea of intent or "deliberate indifference"[237] before individual officers or governmental employees, and the municipalities employing them, incur FCRA liability.[238]

In *Wilson v. Seiter*,[239] the Court, by a five-to-four majority,[240] held that the "deliberate indifference" standard also governs efforts by state prisoners to challenge the conditions of their confinement under the Eighth Amendment.[241] One may assume that this will lead to a reduction

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Monroe v. Pape, 365 U.S. 167, 169 (1961) (holding that police officers who subjected persons to illegal search and physical abuse acted "under color of" state law, and consequently were subject to suit under § 1983, even though the conduct was illegal under state law) (quoting 42 U.S.C. § 1983 (1988)).

237. City of Canton v. Harris, 489 U.S. 378 (1989) (holding that a municipality may be liable under 42 U.S.C. § 1983 (1988), when its failure to train police on when to summon medical care for injured detainees amounts to deliberate indifference toward the detainees' rights).

238. *See* Whitley v. Albers, 475 U.S. 312 (1986) (discussed in George, *1985-1986 Term, supra* note 4, at 521-24); Estelle v. Gamble, 429 U.S. 97 (1976) (discussed in George, *1976-1977 Term, supra* note 4, at 486-87).

239. 111 S. Ct. 2321 (1991).

240. Justice Scalia delivered the Court's opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter. *Id.* at 2322. Justice White, joined by Justices Marshall, Blackmun, and Stevens, concurred in the judgment only, and repudiated the majority's reasoning. *See id.* at 2328-31 (White, J., concurring).

241. *Id.* at 2326-27. Wilson, a prisoner at the Hocking federal correctional facility in Nelsonville, Ohio, lodged an FCRA complaint against Seiter, at the time the Director of the Ohio Department of Rehabilitation and Correction, and Humphreys, the warden at Hocking, alleging that Wilson's confinement constituted cruel and unusual punishment based on overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates. *Id.* at 2322-23. He sought declaratory and injunctive relief as well as $900,000 in compensatory and punitive damages. *Id.* at 2323. The defendants moved for and received a summary judgment in their favor, and the Sixth Circuit affirmed. *See* Wilson v. Seiter, 893 F.2d 861 (6th Cir. 1990), *vacated and remanded*, 111 S. Ct. 2321 (1991). The Supreme Court granted certiorari. *See* Wilson v. Seiter, 111 S. Ct. 41 (1990).

The Court vacated and remanded because the Sixth Circuit appeared to have utilized a standard of liability that would have required a showing that "the respondents 'acted maliciously and sadistically for the very purpose of causing harm.'" *Wilson*, 111 S. Ct. at 2328 (quoting *Whitley*, 475 U.S. at 320-21). Both that standard and the majority's endorsed standard of "deliberate indifference" would have excluded mere negligence, which was all that Wilson had alleged. *See id.* Therefore, the circuit court's error in selecting the wrong standard may have been harmless, but, "[o]ut of an abundance of caution," the Court remanded so that the district court could evaluate Wilson's complaint under the proper standard. *Id.* The minority bloc rejected the majority's standard for resolving prison-conditions litigation and concurred in the judgment only because they thought prison-conditions litigation should be resolved without a mens rea component. *See id.* at 2330

in the number of cases in which federal district courts will be permitted by federal appellate courts to address problems created by the chronic crowding that characterizes federal, state, and local correctional and detention facilities.[242] It seems unlikely to the author that the consequences of crowding, in most instances, can be attributed to "deliberate indifference" on the part of facility administrators. They do the best they can to cope with the acute problems created for them by courts infused with a "law-and-order" approach to penal sanctions, or bound by Draconian sentencing guidelines or restrictions on the availability of probation. The Supreme Court majority's obsession with the crowded state of federal judicial dockets seems to have created a possibility, if not a likelihood, that objectively "cruel" incarceration brought about through no direct fault of correctional administrators will be constitutionally tolerated because correctional administrators have no evil mens rea legitimating judicial intervention through FCRA. If the choice is between protecting saturated federal judicial dockets and safeguarding masses of prisoners in saturated prisons, then, under the author's sense of justice, the latter ought to take priority over the former.

V. CONCLUSION

As noted at the beginning of this article, Justice Marshall's retirement from the Court and his replacement by Justice Clarence Thomas will perhaps precipitate a more significant shift in the Court's constitutional jurisprudence than has any retirement or resignation for many years. Among the decisions of the 1990-1991 Term discussed in this Article, at least three probably will be overturned, simply because Justice Marshall was a member of a five-Justice majority bloc and at least four members of the Court dissented vigorously on points of fundamental constitutional principle.[243] During the Term, an operative majority of the Court appeared disinclined to allow the doctrine of stare decisis to stand in its

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(White, J., concurring).

242. *See generally* Jeff Bleich, Comment, *The Politics of Prison Crowding*, 77 CAL. L. REV. 1125, 1153 & n.133 (1989) (discussing pre-*Wilson* federal court decisions holding that overcrowded prisons resulted in conditions rising to the level of cruel and unusual punishment within the meaning of the Eighth Amendment).

243. See, in order of discussion, Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (discussed *supra* notes 116-23 and accompanying text, and see in particular *supra* note 118); Lankford v. Idaho, 111 S. Ct. 1723 (1991) (discussed *supra* notes 143-54 and accompanying text, and see in particular *supra* note 147); Parker v. Dugger, 111 S. Ct. 731 (1991) (discussed *supra* notes 185-91 and accompanying text, and see in particular *supra* note 191).

way, and it became disenchanted with precedents not involving property and contract rights.[244]

It is characteristic of aging humankind to express, or at least to feel, that the world is "heading for hell in a handbasket" as they leave the scene; the author is certainly not immune from that syndrome. Of course, hundreds of generations have passed and the world has not arrived at hell in that handbasket, and will not until the end of time, if one happens to believe in it. Nevertheless, Justice Marshall may well have been right in his view, expressed in his dissent in *Payne v. Tennessee*,[245] that stare decisis is not a significant policy in the eyes of the new majority, or at least not a significant enough policy to outweigh that majority's pursuit of its preferred constitutional principles.[246]

A large number of what Justice Marshall characterized as "endangered precedents"[247] fall outside the scope of this article—those for example, which fall under the First Amendment,[248] the Equal Protection Clause,[249]

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244. *See* Payne v. Tennessee, 111 S. Ct. 2597, 2610 (1991) (stating that because of the reliance interests involved, "considerations in favor of stare decisis are at their acme in cases involving property and contract rights [whereas] the opposite is true in cases . . . involving procedural and evidentiary rules") (citations omitted). The *Payne* majority noted that during the preceding 20 terms the Court had overruled 33 previous constitutional decisions in whole or in part. See *id.* at 2610-11 & n.1, for a list of these decisions. But see Planned Parenthood v. Casey, 112 S. Ct. 2791, 2812 (1992) (plurality opinion), in which five justices refused to overturn Roe v. Wade, 410 U.S. 113 (1973), on stare decisis grounds.

245. *See Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting).

246. *See id.* at 2619, 2621-25, 2623 n.2.

247. *Id.* at 2623 n.2 (Marshall, J., dissenting).

248. *See, e.g.*, Rutan v. Republican Party of Ill., 110 S. Ct. 2729 (1990) (holding that the First Amendment forbids denying public employment on the basis of political party affiliation); Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990) (holding that an attorney has a First Amendment right to advertise legal specialization); Rankin v. McPherson, 483 U.S. 378 (1987) (holding that the First Amendment protects the right of a public employee to express views on matters of public importance) (discussed in George, *1986-1987 Term*, *supra* note 4, at 254-56); Aguilar v. Felton, 473 U.S. 402 (1985) (holding that the Establishment Clause bars federal financial assistance to public school employees teaching in parochial schools).

249. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (holding that the federal government has the authority to set aside broadcast licenses for minority applicants); United States v. Paradise, 480 U.S. 149 (1987) (holding that a court-ordered promotion was a permissible remedy for racial discrimination in government hiring).

the Due Process Clause,[250] and the Tenth Amendment.[251] Some of the cases he listed as snail darters and spotted owls, however, do affect criminals' rights under the Fourth,[252] Fifth,[253] Sixth,[254] and Eighth[255] Amendments. Whether Justice Marshall will, in hindsight, be certified as an elderly male Cassandra is a matter for the future. But, based on the new majority's 1990-1991 Term, the odds that he will be proven right are better than the odds of prevailing in Atlantic City or Las Vegas.

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250. Justice Marshall targeted as early casualties the Court's abortion-rights cases: Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (discussed in George, *1986-1987 Term*, *supra* note 4, at 569-74); and Roe v. Wade, 410 U.S. 113 (1973). *But see supra* note 244. He also listed Zinermon v. Burch, 494 U.S. 113 (1990) (holding that the Due Process Clause guarantees the right to procedural safeguards aimed at assuring the voluntariness of a decision to commit oneself to a mental health facility), and Pulliam v. Allen, 466 U.S. 522 (1984) (upholding the right to obtain injunctive relief for constitutional violations committed by judicial officials).

251. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that the Tenth Amendment does not provide state immunity from federal regulation).

252. *See* James v. Illinois, 493 U.S. 307 (1990) (holding that illegally obtained evidence introduced to impeach defense witnesses is inadmissable under the Fourth Amendment) (discussed in George, *1989-1990 Term*, *supra* note 4, at 513).

253. *See* Grady v. Corbin, 495 U.S. 508 (1990) (upholding the right, under the Double Jeopardy Clause, not to be subjected to prosecution more than once for the same criminal conduct) (discussed in George, *1989-1990 Term*, *supra* note 4, at 527-29).

254. *See* Rock v. Arkansas, 483 U.S. 44 (1987) (holding that a criminal defendant has the right to provide hypnotically refreshed testimony in personal defense) (discussed in George, *1986-1987 Term*, *supra* note 4, at 274-76); Maine v. Moulton, 474 U.S. 159 (1985) (holding that the defendant's Sixth Amendment right to counsel was violated by the introduction of statements made to a government informant/co-defendant in the course of preparing defense strategy) (discussed in George, *1985-1986 Term*, *supra* note 4, at 445-46).

255. *See* Mills v. Maryland, 486 U.S. 367 (1988) (holding that a defendant has an Eighth Amendment right to jury instructions that do not preclude consideration of nonunanimous mitigating factors in capital sentencing); Gray v. Mississippi, 481 U.S. 648 (1987) (rejecting the applicability of harmless-error analysis to instances of improper exclusion of jurors in capital cases) (discussed in George, *1986-1987 Term*, *supra* note 4, at 286); Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the Eighth Amendment protects the right not to be executed if the defendant is not mentally responsible for his or her actions) (discussed in George, *1985-1986 Term*, *supra* note 4, at 513-15).