THE VERY LATEST DIRTY DOZEN:
THE 12 WORST REHNQUIST COURT CRIMINAL PROCEDURE DECISIONS DURING THE 1990-91 TERM

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The criminal procedure counterrevolution being carried out by the U. S. Supreme Court is shifting into high gear. The new Rehnquisition, that is, is getting worse. The 12 cases summarized below prove this.

If there is any one thread running through these 12 cases, and the other criminal procedure decisions last term which I have not mentioned, it is that government is god and the police and prosecutors sit on the right hand of that god. These decisions blaspheme the Bill of Rights, which this strange Court apparently has relegated to Hades, where the devil (i.e., the criminal defendant) keeps company with demons (i.e., criminal defense lawyers).

With Clarence Thomas about to join the Court, it may be anticipated that things will get worse--far, far worse. Soon I shall be writing not of the Supreme Court's Dirty Dozen, but of the Supreme Court's Chamber of Horrors.

1. *Arizona v. Fulminante*, 499 U. S. 279 (1991) (admission of an involuntary confession may be harmless error (!)) (Rehnquist, C. J.)

2. *McCleskey v. Zant*, 499 U. S. 467 (1991) (doctrine of abuse of writ in habeas corpus jurisprudence modified to a "cause and prejudice" test, thereby making it more difficult for convicted person to raise in a second habeas petition a claim not raised in the initial petition; in this case, the district court granted the petitioner's second petition because police had violated petitioner's right to counsel under Massiah v. United States, 377 U. S. 201 (1964), by using a jail cell informer to elicit incriminating statements in the absence of counsel, although the informer and police and prosecutorial officials denied this for years, and it was not until 1987 that petitioner finally obtained a copy of a 21-page document signed by the informer showing that he had been working for the police; it was also not until 1987 that the testimony of a jailor had been obtained as to the working relationship between the informer and the police; despite this, however, the Court thinks petitioner's attorneys should have raised the Massiah claim in the initial petition; therefore, according to the Court, because of the mistake of counsel in not raising the claim earlier, the merits of the claim will not be considered and petitioner may be denied all relief, even though this is a death penalty case, even though the state affirmatively misled petitioner and counsel for years, and even though the district court found a violation of petitioner's constitutional rights) (Kennedy, J.)

3. *California v. Hodari D.*, 499 U. S. 621 (1991) (lacking even reasonable suspicion, plainclothes police wearing jackets marked "police" began to chase four or five Oakland, California youths huddled around a parked car who, having noted the police, apparently panicked and ran in all directions; while running and before being captured, one of the youths, defendant here, threw away a rock of crack cocaine which the police then retrieved; HELD, there

was no violation of the Fourth Amendment since at the moment of discarding the cocain the defendant, while being pursued illegally by the police, had not been seized; the Court says in support of its conclusion that "compliance with police orders to stop should therefore be encouraged. Only a few of these orders, we presume, will be without an adequate basis" (!)) (Scalia, J.)

4. *City of Riverside v. McLaughlin*, 500 U. S. 44 (1991) (in this case the Court construes Gerstein v. Pugh, 420 U. S. 103 (1975), which held that states must provide persons arrested without a warrant a judicial determination of probable cause "promptly after arrest," and which also held a policeman's probable cause determination justifies arrest and "a brief period of detention to take the administrative steps incident to arrest;" the Court holds that "the Fourth Amendment does not compel an immediate determination of probable cause upon completing the administrative steps incident to arrest (!); "the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system;" "a jurisdiction that provides judicial determination of probable cause within 48 hours of arrest will, as a general matter, comply" with Fourth Amendment requirements; the Court rejects view of dissenters and court below that 24 hours is more appropriate outer boundary for providing probable cause determinations; the Court also rejects the view of the court below that a probable cause determination must be made as "soon as the administrative steps incident to arrest were completed") (O'Connor, J.)

5. *Michigan v. Lucas*, 500 U. S. 145 (1991) (state court erred in holding that provision of rape-shield statute was unconstitutional because it may bar a defendant who has not given proper notice of his intention to introduce evidence if an alleged rape victim's past sexual conduct from introducing evidence of defendant's prior sexual relationship with alleged victim) (O'Connor, J.)

6. *Florida v. Jimeno*, 500 U. S. 248 (1991) (a person's general consent to a search of his automobile for drugs is to be construed as consent to search any closed containers in the automobile which might contain the drugs sought) (Rehnquist, C. J.)

7. *Mu'Min v. Virginia*, 500 U. S. 415 (1991) (defendant, a prison inmate, was sentenced to death for murdering a woman while out of prison after escaping from a work detail; the crime engendered substantial publicity, and 8 of the 12 jurors answered on voir dire that they had heard or read about the case; nonetheless, the trial judge refused to permit the potential jurors from being questioned about the specific contents of the news reports to which they had been exposed, but simply asked them whether they could be impartial; HELD, there was no violation of the right to an impartial jury) (Rehnquist, C. J.)

8. *McNeil v. Wisconsin*, 501 U. S. 171 (1991) (defendant was arrested on an armed robbery charge and brought before a magistrate who set bail and scheduled a preliminary hearing, with an attorney from the public defender's office representing defendant at this initial appearance; thereafter, while defendant was in jail on the armed robbery charges, defendant was twice visited in jail by a policeman investigating certain other unrelated crimes allegedly committed by defendant; on both occasions the policeman advised defendant of his Miranda rights, the defendant waived his rights, and then made incriminating statements concerning the unrelated charges; these statements were then used against the defendant at his trial on the unrelated

charges and led to his conviction; the issue before the Court is whether the incriminating statements were obtained in violation of either the Sixth Amendment right to counsel or the Fifth Amendment self-incrimination privilege; HELD, there was no violation of defendant's right to counsel since at the time of the interrogation adversary judicial charges had not been instituted against defendant with respect to the unrelated charges, and there was no violation of Miranda since defendant waived his Miranda rights and since we decline to hold that defendant originally invoked his Miranda rights when he invoked his right to counsel before the magistrate with respect to the armed robbery charge; if the defendant's contention were correct, most persons in pretrial custody wold be unapproachable for interrogation purposes, and this would unduly impede law enforcement, since "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," and "admissions of guilt resulting from valid Miranda waivers are more than merely desirable, they are essential to society's compelling interest in... punishing those who violate the law") (Scalia, J.)

9. *Florida v. Bostick*, 501 U. S. 429 (1991) (upholding the constitutionality of the practice of Florida police called "working the buses;" under this practice, 2 armed officers, wearing badges and insignia, board buses waiting to leave the bus station and without articulable suspicion approach passengers and ask for tickets and identification and for permission to search) (O'Connor, J.)

10. *Coleman v. Thompson*, 501 U. S. 722 (1991) (because the attorney for petitioner, sentenced to death for murder, filed his notice of appeal seeking state supreme review of the denial of state habeas relief 3 days late, petitioner forfeited his right to federal habeas corpus review and may be executed without the merits of his federal constitutional claims ever being considered by a federal court (!)) (O'Connor, J.)

11. *Payne v. Tennessee*, 501 U. S. 808 (1991) (overruling Booth v. Maryland, 482 U. S. 496 (1987), and South Carolina v. Gather, 490 U. S. 805 (1989), and upholding at the sentencing phase of a capital punishment trial the admission of "victim impact evidence"--that is, evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family) (Rehnquist, C. J.)

12. *Harmelin v. Michigan*, 501 U. S. 957 (1991) (state criminal statute authorizing mandatory life sentence without parole for persons convicted of possessing more than 650 grams of cocaine is constitutional (!)) (Scalia, J.)