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The United States Supreme Court: The 1978-79 Term

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THE UNITED STATES SUPREME COURT: THE 1978-79 TERM

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The latest term of the U.S. Supreme Court ended in early July. Following a pattern which first emerged in the early 1960's, the Court handed down a significant number of decisions involving criminal procedure. This article reviews many of these decisions.

SEARCH AND SEIZURE

Several important issues concerning the Fourth Amendment's prohibition against unreasonable searches and seizures were decided by the Court. In contrast with some recent terms, many of the Court's decisions strengthened, rather than weakened, that provision.

Stop and Frisk

In the landmark case of Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court recognized for the first time that the detention of a person on less than probable cause was constitutionally permissible under certain circumstances. Although the Court found that such "stops" were "seizures" within the meaning of the Fourth Amendment, they were not violative of that clause if based upon reasonable suspicion. A number of issues left unresolved by *Terry* concerning the scope of the stop and frisk doctrine were addressed by the Court last term.

In Dunaway v. New York, 99 S.Ct. 2248 (1979), the Court ruled upon the constitutionality of prolonged detentions for the purpose of interrogation, a question which it had reserved ten years earlier in Morales v. New York, 396 U.S. 102 (1969). Acting upon an informant's tip, which proved insufficient to establish probable cause, the police detained Dunaway and later transported him to the stationhouse for questioning. After receiving *Miranda* warnings, he confessed on two occasions to killing a pizza parlor owner during an armed robbery. At trial, Dunaway moved to suppress those statements as well as sketches which he had drawn during his detention. A New York appellate court upheld the admissibility of the statements and sketches, even though the police lacked probable cause to arrest Dunaway. The court stated: "Law enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment Rights." People v. Dunaway, 61 App. Div.2d 299, 302, 402 N.Y.S.2d 490, 492 (1978), *quoting* People v. Morales, 42 N.Y.2d 129, 135, 397 N.Y.S.2d 587, 590, 366 N.E.2d 248, 251 (1977).

The U.S. Supreme Court rejected this analysis. In the Court's view, upholding the legality of a seizure as "intrusive" as Dunaway's "would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." 99 S.Ct. at 2256. The Court emphasized that its decision did not turn on whether the suspect was informed that he was under arrest:

> Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go"; indeed; he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless . . . obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny. *Id.*

Having found the detention invalid, the Court next considered whether the evidence derived from the detention should be excluded as "fruit of the poisonous tree." Under that doctrine, the contested evidence would be admissible only if the taint of the illegal police conduct had been sufficiently attentuated. *See* Wong Sun v. U.S., 371 U.S. 471 (1963). In elaborating on the attenuation doctrine in Brown v. Illinois, 422 U.S. 590 (1975), the Court identified several critical factors: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and particularly, the purpose and flagrancy of the official misconduct . . ." *Id.* at

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603-04. Applying these factors, the Court concluded that Dunaway was "admittedly seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance." qq. S.Ct. at 2259. Thus, the Court ruled that the evidence should have been suppressed. As in *Brown*, the reading of *Miranda* rights did not change the result. "To admit petitioner's confession in such a case would allow law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth.'" *Id.* at 2260, *quoting* Comment, 25 Emory L.J. 227, 238 (1976).

The Court also considered the applicability of the *Terry* doctrine to automobile stops. In Delaware v. Prouse, 99 S.Ct. 1391 (1979), police seized marijuana in plain view from the defendant's automobile during a "routine" traffic stop. At a suppression hearing, the seizing officer "testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and registration." *Id.* at 1394. The state argued that its "interest in discretionary spot checks as a means of ensuring the safety of its roadways outweighs the resulting intrusion on the privacy and security of the persons detained." *Id.* at 1397. The Supreme Court held that "stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of the [Fourth and Fourteenth] Amendments, even though the purpose of the stop is limited and the resulting detention quite brief." *Id.* at 1396. The Court also recognized the state's "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspections requirements are being observed." *Id.* at 1398. Nevertheless, the Court found the practice of randomly stopping automobiles unconstitutional. In reaching this result, the Court questioned the efficacy of random stops as a means of promoting the state's interest, noted the availability of alternative methods of enforcement, and recognized the substantial interference with personal liberty and security involved in random stops. The Court was especially concerned about the "standardless and unconstrained discretion" entrusted to the police in the context of random stops.

Two additional points deserve mention. First, the Court's holding does not cover a situation in which the police have "articulable and reasonable suspicion" of a traffic offense. *Id.* at 1401. Second, the holding "does not preclude . . . States from developing methods of spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all on-coming traffic at roadblock-type stops is one possible alternative." *Id.* Thus, the Court appears to be endorsing the distinction between random stops and fixed checkpoint stops that it had earlier formulated in border patrol cases. *Compare* U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding fixed checkpoint stops), *with* U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975) (invalidating roving patrol stops).

The *Terry* doctrine was also implicated in Brown v. Texas, 99 S.Ct. 2637 (1979), which involved a "stop and identify" statute. El Paso police stopped Brown in a high crime area, requesting him to identify himself and explain what he was doing. After refusing to answer, he was arrested for violating a Texas statute, which provided that a "person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a police officer who has lawfully stopped him and requested the information." Tex. Penal Code §38.02(a). The Court, in a unanimous opinion authored by Chief Justice Burger, reversed the conviction. According to the Court, Brown's detention was "a seizure of his person subject to the requirements of the Fourth Amendment," 99 S.Ct. at 2640, and since the record failed to establish the existence of "a reasonable suspicion, based on objective facts, that the individual [was] involved in criminal activity," the conviction violated Fourth Amendment guarantees. *Id.* at 2641.

The constitutionality of the statute, however, was not addressed. The statute applies only if a person is "lawfully stopped." If, for example, the El Paso police stopped Brown based on reasonable suspicion and he then refused to identify himself or answer questions, could he validly be convicted under the Texas statute? The Court left this issue unresolved; in a footnote the Court remarked: "We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements." *Id.* at 2641 n.3. The issue was likewise sidestepped in a companion case, Michigan v. DeFillippo, 99 S.Ct. 2627 (1979), which involved a similar provision. Nevertheless, Justice Brennan, joined by Justices Marshall and Stevens, confronted the issue in his dissent. His answer was unequivocal: "[I]ndividuals accosted by the police on the basis merely of reasonable suspicion have a right not to be searched, a right to remain silent and, as a corollary, a right not to be searched if they choose to remain silent." *Id.* at 2636.

For an excellent discussion of stop and frisk law, *see* 3 W. LaFave, Search and Seizure 1-175 (1979).

The Warrant Clause

In Lo-Ji Sales, Inc. v. New York, 99 S.Ct. 2319 (1979), the Court had occasion to examine two aspects of the warrant clause — the particularity requirement and the neutrality of the issuing magistrate. In that case two films purchased from the defendant's adult bookstore were viewed by a state magistrate and found to violate New York obscenity laws. A search warrant for the seizure of other copies of these films was then issued by the magistrate. The warrant, however, was not limited to the two films. It also authorized the seizure of additional material determined to be obscene by the magistrate at the time of the search. Accompanying the police to the store, the magistrate examined numerous films and magazines. Those which he found to be obscene were seized. A total of 397 magazines and 431 reels of film were seized during a six hour search. These items were subsequently added to the original warrant. After indictment, the

defendant moved to suppress all evidence seized during the search.

The Supreme Court, in a unanimous opinion authored by the Chief Justice, held the warrant violative of the Fourth Amendment which provides that "no warrant shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." The Court commented:

> Based on the conclusionary statement of the police investigator that other similarly obscene materials would be found at the store, the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action . . . . Nor does the Fourth Amendment countenance open-ended warrants, to be completed while a search is being conducted and items seized or after the seizure has been carried out. *Id.* at 2324.

Moreover, the participation of the magistrate ran afoul of another constitutional procedure. According to the Court, the magistrate had abandoned his position of "neutrality and detachment" because he "allowed himself to become a member, if not the leader of the search party which was essentially a police operation . . . [H]e was not acting as a judicial officer but as an adjunct law-enforcement officer." *Id.* at 2325.

Exigent Circumstances and the Automobile Exception

The Supreme Court has repeatedly held that for a search to be reasonable within the meaning of the Fourth Amendment, it generally must be conducted pursuant to a warrant issued upon probable cause by a neutral and detached magistrate. Thus, although the Court has recognized exceptions to the warrant requirement, they are "jealously and carefully drawn." Jones v. United States, 357 U.S. 493, 499 (1958). One of the more important exceptions involves the so-called "automobile exception." *See* Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). Under this exception, the police may lawfully stop and search an automobile without a warrant if they have probable cause to believe the car contains contraband or evidence of a crime. The mobility of the car, in effect, creates an "exigent circumstance" which is thought to justify dispensing with the protections afforded by a search warrant. If the automobile is not mobile, however, this exception may not be applicable. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

In United States v. Chadwick, 433 U.S. 1 (1977), the Court again considered a search involving an automobile. In *Chadwick* the defendants were arrested immediately after they had placed a footlocker containing marihuana in the trunk of a car. Since the police had probable cause, the arrests of the defendants and the seizure of the locker were valid. The locker, however, was not opened until after it had been transported to the stationhouse. Before the Supreme Court, the Government proposed a warrant exception for all movable personal property seized in a public place upon probable cause. In effect, the Government was attempting to extend the automobile exception to all personal property. The Court refused to sanction such a broad based exception. Moreover, the actual search in *Chadwick* could not be sustained on an exigency rationale. Since the police had exclusive control of the footlocker at the time of the search, "there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained." *Id.* at 13.

Last term, the Court in Arkansas v. Sanders, 99 S.Ct. 2586 (1979), considered the applicability of *Chadwick* to a search of a suitcase found during a valid automobile search. Unlike *Chadwick*, the search in *Sanders* occurred at the time the automobile was searched. The state argued that the automobile exception, and not *Chadwick*, applied. While recognizing that a "closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides," the Court pointed out that "the exigency of mobility must be assessed at the point immediately before the search . . . ." *Id.* at 2593. Since the suitcase was "securely within [police] control" at that time, no exigency existed and thus a warrant was required. "Where — as in the present case — the police, without endangering themselves or risking loss of evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained." *Id.* at 2594.

See generally, Moylan, The Automobile Exception: What it is and What it is not — A Rationale in Search of a Clearer Label, 27 Mercer L. Rev. 987 (1976).

Standing

One of the most important decisions handed down by the Court last term dealt with a defendant's standing to object to illegally seized evidence. In Rakas v. Illinois, 99 S.Ct. 421 (1979), a police officer spotted a car which he suspected was the getaway car in a recent robbery. After stopping the car and ordering the occupants out, the officer found rifle shells in a locked glove compartment and a sawed-off shotgun under the front seat. The defendants' motion to suppress these items was denied because, according to the trial court, they lacked standing.

The defendants argued before the Supreme Court that they were "legitimately on the premises" at the time of the search and they therefore had standing under the rule first announced in Jones v. U.S., 362 U.S. 257 (1960). Prior to *Rakas*, the legitimately-on-the-premises rule had been one of the mainstays of the standing doctrine. Nevertheless, the Court repudiated the rule, stating that "the phrase 'legitimately on the premises' coined in *Jones* creates too broad a gauge for measurement of Fourth Amendment rights." 99 S.Ct. at 429. Instead, the Court relied upon the substantive Fourth Amendment doctrine of "reasonable expectations of privacy" in determining the constitutionality of the search. The Court concluded that the defendants' rights had not been infringed since they had "made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger *qua* passenger

simply would not normally have a legitimate expectation of privacy." *Id.* at 433.

From a defense perspective, the most important aspect of *Rakas* is that it involves only one approach to standing — the legitimately-on-the-premises rule. Other methods of establishing standing were left untouched by the opinion. First, the defendants could have gained standing by claiming an interest in the items seized, either ownership or possession of the shells or shotgun. The *Rakas* Court repeatedly emphasized that the defendants had not asserted such an interest. *Id.* at 433. *See also id.* at 423 & 430 n.11. Moreover, had the defendants lost the suppression motion, the state would have been precluded from introducing the defendant's assertions of interest in its case-in-chief. *See* Simmons v. U.S., 390 U.S. 377 (1968). Second, had the defendants claimed an interest in the place searched — ownership or possession of the automobile, they would have met the standing requirement, since reasonable expectations of privacy are created under these circumstances. Again, the Court noted that the defendants "asserted neither a property nor a possessory interest in the automobile . . . ." *Id.* at 433. Third, the *Rakas* decision addressed the narrow issue of a passenger's standing to object to searches of specific places, the glove compartment and the area under the seat. (The Court also indicated that a car trunk would be treated similarly.) Whether the same result would have been reached had the items been seized from the top of the seat or from the floor of the car was left unresolved. *Id.* 434 n.17. Finally, *Rakas* did not examine another aspect of the *Jones* decision — automatic standing. *See id.* at 426 n.4. Where a defendant is charged with a possessory offense, standing is automatic. Reliance on the automatic standing rule may be unwise, however, since its continued validity has been questioned in another case. *See* Brown v. U.S., 411 U.S. 223, 228-29 (1973). *See generally*, 3 W. LaFave, Search and Seizure 543-612 (1979).

Electronic Eavesdropping

The Court decided two cases involving electronic surveillance. In Dalia v. U.S., 99 S.Ct. 1682 (1979), the Court held that neither the Fourth Amendment nor Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§2510-20 (1976), are violated by a covert entry to install a listening device where the eavesdropping has been judicially authorized. The circuit courts of appeal had divided on this issue. *Compare* U.S. v. Finazzo, 583 F.2d 837 (6th Cir. 1978); U.S. v. Santora, 583 F.2d 453 (5th Cir. 1978); U.S. v. Ford, 553 F.2d 146 (D.C. Cir. 1977), *with* U.S. v. Scafidi, 564 F.2d 633 (2d Cir. 1977); In re U.S., 563 F.2d 637 (4th Cir. 1977); U.S. v. Agrusa, 541 F.2d 690 (8th Cir. 1976).

Addressing the Fourth Amendment issue, the Court stated: "It is well established that law enforcement officers may break and enter to execute a search warrant where such entry is the only means by which the warrant effectively may be executed." *Id.* at 1688. In addition, the Court held that Congress intended to authorize surreptitious entries when it enacted Title III even though the statute "does not explicitly refer to covert entry . . . ." *Id.* at 1689. Finally, the Court held that the manner of entry need not be specified in the order authorizing the eavesdropping. *Id.* at 1694.

In Smith v. Maryland, 99 S.Ct. 2577 (1979), the Court focused on police use of a pen register, a mechanical device which records the numbers dialed from a telephone but not the conversation. In U.S. v. New York Telephone Co., 434 U.S. 159 (1977), the Court had held that Title III did not apply to pen registers. In *Smith* the Court ruled that the Fourth Amendment was also inapplicable. Citing Katz v. U.S., 389 U.S. 347 (1967), the Court held that a person does not have "a legitimate expectation of privacy" regarding the numbers dialed from his or her telephone. The effect of *Smith* and *New York Telephone Co.* is to remove all restrictions from the police use of pen registers.

For a comprehensive treatment of electronic surveillance, *see* Carr, The Law of Electronic Surveillance, (1977).

POLICE INTERROGATIONS

The Court decided two cases last term dealing with police interrogation practices, both of which required an examination of the waiver of rights mandated by Miranda v. Arizona, 384 U.S. 436 (1966). In North Carolina v. Butler, 99 S.Ct. 1755 (1979), the defendant was informed of his *Miranda* rights after his arrest. In addition, he read the FBI's "Advice of Rights" form and stated that he understood those rights. Although he refused to sign the waiver at the bottom of the form, he nonetheless told the agents: "I will talk to you but I am not signing any form." *Id.* at 1756. Subsequently he made incriminating statements which he later sought to exclude at a suppression hearing. On appeal the North Carolina Supreme Court held that the statements were obtained in violation of *Miranda* because an express waiver was not secured from the defendant. The U.S. Supreme Court, however, declined to accept such "an inflexible per se rule." *Id.* at 1758. The Court upheld the waiver in *Butler*, but nevertheless emphasized the heavy burden that the prosecution must carry to establish a valid waiver:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but it is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated. *Id.* at 1757.

In the second *Miranda* case, Fare v. Michael C., 99 S.Ct. 2560 (1979), a juvenile requested to see his probation officer during a police interrogation. The juvenile had been taken into custody after he became im-

plicated in a murder. After being advised of his *Miranda* rights, he was asked if he wished to give up his right to have an attorney present. At that point, he requested the presence of his probation officer. The police refused to honor this request, but again informed him of his right to have an attorney present. He waived that right and made an incriminating statement, which was subsequently admitted into evidence by the juvenile court. On appeal the Supreme Court of California held that a juvenile's request to see his probation officer constituted a per se invocation of Fifth Amendment rights. The U.S. Supreme Court reversed. According to the Court, an attorney's role in protecting a client's Fifth Amendment rights differs markedly from that of a probation officer. "A probation officer simply is not necessary, in the way an attorney is, for the protection of legal rights of the accused, juvenile or adult. He is significantly handicapped by the position he occupies in the juvenile system from serving as an effective protector of the rights of a juvenile suspected of a crime." *Id.* at 2570.

Hence, a juvenile's waiver of *Miranda* rights should be judged by the same totality of circumstances approach that is applied to adults. This is not to suggest, however, that a juvenile's age and limited experience would not play a significant part in that determination. As the Court noted: "Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination." *Id.* at 2572.

See generally, Giannelli, Police Interrogations and Confessions, 2 Public Defender Rptr. (May-June 1979).

JUDICIAL PROCEEDINGS

Grand Jury — Racial Discrimination

In Rose v. Mitchell, 99 S.Ct. 2993 (1979), defendants challenged the systematic exclusion of blacks from the grand jury and the selection of the grand jury foreman on equal protection grounds. The case is significant because it rejects two arguments that would have inhibited equal protection attacks on grand jury selection procedures. First, the state argued that since the defendants had been found guilty beyond a reasonable doubt by a constitutionally valid petit jury they should be precluded from raising the equal protection issue. The Court refused to accept this argument, stating: "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process . . . The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole." *Id.* at 3000. Furthermore, even though other remedies are available to redress such violations, permitting challenges by criminal defendants has been the principal method of vindicating this type of constitutional violation. *Id.* at 3001.

Similarly, the Court rejected the state's argument that federal habeas review should be foreclosed to a state prisoner alleging discrimination in the selection of a grand jury. In effect, the state was asking the Court to extend its decision in Stone v. Powell, 428 U.S. 465 (1976), which foreclosed habeas review of Fourth Amendment claims "absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review." *Id.* at 494.

First Amendment — Closure Orders

In Gannett Co. v. DePasquale, 99 S.Ct. 2898 (1979), the Court returned to the free press-fair trial controversy. Previously, in Sheppard v. Maxwell, 384 U.S. 333 (1966), the Court had overturned a conviction because of the trial court's failure to take affirmative steps to minimize the effects of prejudicial pretrial publicity. In Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the Court struck down a "gag order" prohibiting the reporting of evidence adduced at an open preliminary hearing. According to the Court, such prior restraint on speech, under the circumstances of that case, infringed First Amendment guarantees. The Court, however, left open the issue of whether a trial court could close pretrial proceedings to protect against prejudicial pretrial publicity. *Id.* at 564 n.8.

Gannett Co. presented the Court with that very issue. In that case defendants moved to exclude the public and press from a pretrial suppression hearing. When the trial court granted the motion, a newspaper challenged the ruling on First, Sixth, and Fourteenth Amendment grounds. In reviewing these challenges, the Supreme Court held that the "constitutional guarantee of a public trial is for the benefit of the defendant," 99 S.Ct. at 2906, and "that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Id.* at 2911. Moreover, without deciding whether the press and public had a First Amendment right of access to pretrial proceedings, the Court held that First Amendment rights had not been violated in this particular case since the trial court considered First Amendment interests and only closed the proceedings after determining that there was a reasonable probability of prejudice to the defendants. *Id.* at 2912. In addition, the denial of access "was not absolute but only temporary," a transcript of the suppression hearing having been released after the danger of prejudice had dissipated. *Id.*

Three concurring opinions were written and should prove critical to future adjudication of this issue. Chief Justice Burger emphasized that the pretrial aspect of the case was of critical importance. Thus, closure of a trial itself would present a different issue for him. Justice Powell addressed the First Amendment issue reserved by the majority opinion. In his view, a First Amendment right of access exists but is not absolute. Under the circumstances of the case before the Court, Justice Powell believed that the trial court correctly dealt with the conflict between First and Sixth Amendment rights. Justice Rehnquist opposed the Powell view; he found no First Amendment

right of access and employed sweeping language in stating the consequences of the Court's decision: "[I]f the parties agree on a closed proceeding, the trial court is not required by the Sixth Amendment to advance any reason whatsoever for declining to open a pretrial hearing or trial to the public." *Id.* at 2918. It is noteworthy that he included *trial* as well as pretrial proceedings in his statement. Whether the Rehnquist view would command a majority of the Court seems doubtful in light of the other opinions, including a vigorous dissent issued by four Justices.

Jury Trial

Two cases decided by the Court last term presented jury trial issues. Both cases involved further development of prior decisions. In Burch v. Louisiana, 99 S.Ct. 1623 (1979), the Court examined a state procedure that permitted conviction by a nonunanimous verdict of a six-person jury in nonpetty offense cases. While the Court had held previously that a 12-person jury was not constitutionally required, Williams v. Florida, 399 U.S. 78 (1970), it had also decided that a five-person jury was constitutionally deficient. Ballew v. Georgia, 435 U.S. 223 (1978). The Court had also decided that unanimous verdicts were not constitutionally mandated in noncapital cases, upholding a 10-2 verdict in Johnson v. Louisiana, 406 U.S. 356 (1972), and a 9-3 verdict in Apodaca v. Oregon, 406 U.S. 404 (1972). As the Court noted, the issue in *Burch* "lies at the intersection of our decision concerning jury size and unanimity." 99 S.Ct. at 1627. The Court unanimously agreed that a split verdict by a six-person jury violated Sixth Amendment guarantees.

The Sixth Amendment requirement of a fair cross section of the community was the focal point of Duren v. Missouri, 99 S.Ct. 664 (1979). In 1975 the Court had held that the systematic exclusion of females during the jury selection process resulted in a jury pool which was not "reasonably representative" of the community and therefore violated the fair cross section requirement. Taylor v. Louisiana, 419 U.S. 522 (1975). The system struck down in *Taylor* had required female jurors to file a written declaration of their willingness to serve. The Missouri system challenged in *Duren*, which provided for an automatic exemption for females, proved equally offensive to the fair cross section requirement. While females represented 54% of the adult population, they accounted for only 15.5% of the jury pool from which the defendant's panel was selected. By demonstrating the critical role played by the automatic exemption in this process, the defendant met his burden of establishing a prima facie case of a fair cross section violation. Since the state failed to offer evidence establishing that the automatic exemption was not the cause of the underrepresentation or to advance a substantial justification for the exemption, the Court found a constitutional violation.

Right of Confrontation

Parker v. Randolph, 99 S.Ct. 2132 (1979), another case decided by the Court last term, turned on the defendant's Sixth Amendment right of confrontation. *Randolph* is the progeny of an earlier landmark case, Bruton v. United States, 391 U.S. 123 (1968). In that case, an accomplice's confession implicating Bruton was introduced at a joint trial. Even though the trial judge instructed the jury that the confession could only be considered in determining the accomplice's guilt, the Supreme Court reversed. According to the Court:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. *Id.* at 135-36.

Since the Court found the instruction ineffective and the accomplice did not take the stand, Bruton was deprived of his right to confront the extrajudicial statement. In subsequent cases the Court held *Bruton* binding upon the states and retroactive, Roberts v. Russell, 392 U.S. 293 (1968), and subject to the harmless error doctrine. Harrington v. California, 395 U.S. 250 (1969). The most significant of the post-*Bruton* cases was Nelson v. O'Neil, 402 U.S. 622 (1971), which involved the applicability of *Bruton* to trials in which the accomplice testifies. The Court stated: "We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." *Id.* at 629-30.

With this backdrop the Court decided *Parker v. Randolph*. Unlike *Bruton* and *O'Neil*, the defendant in *Parker* had also confessed, thus presenting the Court with the question of the applicability of *Bruton* to a case involving "interlocking confessions." The courts of appeals had divided on this issue. *Compare* Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978); U.S. v. DiGilio, 538 F.2d 972 (3rd Cir. 1976); *cert. denied*, 429 U.S. 1038 (1977), *with* Ignacio v. Guam, 413 F.2d 513 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970); Mack v. Maggio, 538 F.2d 1129 (5th Cir. 1976). The plurality opinion in *Parker* distinguished *Bruton*. "The right protected in *Bruton* — the 'constitutional right of cross-examination,' . . . — has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. Successfully impeaching a codefendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged." *Id.* at 2139. Consequently, the plurality found the *Bruton* rule inapplicable.

As noted by Justice Stevens in his dissenting opinion, the plurality opinion rests on two dubious assumptions: "First, it assumes that the jury's ability to disregard a codefendant's inadmissible and highly prejudicial confession is invariably increased by the existence of a corroborating statement by the defendant. Second, it assumes that all unchallenged confessions

by a defendant are equally reliable." *Id.* at 2145. It should be kept in mind that only four Justices joined in the plurality opinion. Three Justices dissented, Justice Powell did not participate in the decision, and Justice Blackmun concurred in the judgment on harmless error grounds. Justice Blackmun's opinion indicated that he did not share the plurality's view. Thus, the issue remains clouded and the Sixth Circuit's decision applying *Bruton* to interlocking confessions may still be controlling in Ohio. *See* Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978).

Impeachment Use of Immunized Testimony

In Harris v. New York, 401 U.S. 222 (1971), the Court sanctioned the impeachment use of statements obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). *Accord,* Oregon v. Haas, 420 U.S. 714 (1975). Last term in New Jersey v. Portash, 99 S.Ct. 1292 (1979), the state argued that the *Harris* rationale also applied to the impeachment use of testimony given pursuant to a grant of immunity. Portash was granted immunity after indicating that he would claim his Fifth Amendment privilege against compulsory self-incrimination before a state grand jury. He was subsequently indicted for misconduct in office and extortion. At trial the defense sought a ruling precluding the state from using Portash's grand jury testimony for the purpose of impeaching him. The trial judge ruled in favor of the state and consequently Portash did not testify. In addressing this issue, the Supreme Court distinguished statements that are the product of coercion from those taken in violation of *Miranda*. In *Harris*, which involved the latter situation, the Court found the incremental deterrent effect of the exclusionary rule outweighed by the "strong policy against countenancing perjury." *Id.* at 1297. Immunized testimony, on the other hand,

> is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt . . . . Balancing of interests was thought to be necessary in *Harris* and *Haas* when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible. *Id.*

Presumptions and Jury Instructions

In Sandstrom v. Montana, 99 S.Ct. 2450 (1979), the defendant was charged with deliberate homicide. Under the applicable state law, the state was required to establish that the killing was committed purposely or knowingly. The prosecution requested a jury instruction that provided: "The law presumes that a person intends the ordinary consequences of his voluntary acts." When the defense objected on due process grounds and offered federal decisions in support of the objection, the judge replied: "You can give those to the Supreme Court. The objection is overruled." *Id.* at 2454. The defendant did just that and the Supreme Court reversed.

The Court found that the jury could have construed the instruction in ways which would violate constitutional principles. "First, a reasonable jury could well have interpreted the presumption as 'conclusive,' that is, not technically as a presumption at all, but rather as an irrebuttable direction of the court to find intent once convinced of the facts triggering the presumption." *Id.* at 2456. Under these circumstances the jury could have "concluded that they were directed to find against the defendant on the element of intent" once they found that the defendant caused the victim's death. *Id.* at 2459. Thus, the state was not required to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged" as required by due process. *See* In re Winship, 397 U.S. 358 (1970).

"Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence — thus effectively shifting the burden of persuasion on the element of intent." 99 S.Ct. 2456. Under these circumstances the instruction would have contravened the Court's decision in Mullaney v. Wilbur, 421 U.S. 684 (1975).

The Ohio jury instruction on "natural consequences" is found at Ohio Jury Instructions — Criminal 409.56 (Provisional 1974). *See generally,* Koosed & Aynes, Constitutional Challenges to Placing the Burden of Proof of Affirmative Defenses Upon the Accused, 2 Public Defender Rptr. (Jan.-Feb. 1979).

In County Court of Ulster County v. Allen, 99 S.Ct. 2213 (1979), an automobile in which three male adults and a 16-year-old girl were riding, was stopped for a speeding violation by the police. Two handguns were spotted in the girl's handbag, and a subsequent search of the trunk revealed a machine gun and heroin. All occupants were charged with illegal possession of weapons and heroin. The state's case was buttressed by a New York statute which provided, with certain exceptions, that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle. N.Y. Penal L. §265.15(3). A majority of the Court upheld the presumption as applied to the facts of the case.

Allen represents a departure from the Court's prior decisions. In a series of cases involving criminal presumptions, the Court appeared to have established two principles concerning the prosecution's use of a presumption which relates to elements of the charged offense. First, notwithstanding the label, a criminal presumption could have only the effect of a permissive inference. *See* C. McCormick, Evidence 817 (2d ed. 1972) ("[I]t is unlikely that the Court would approve the use of a presumption in a criminal case other than as a permissive inference."). Second, there must be a "rational connection between the fact proved and the ultimate fact presumed . . . ." Tot v. U.S., 319 U.S. 463, 467 (1943). *Accord,* U.S. v. Gainey, 380 U.S. 63 (1965); U.S. v. Romano, 382 U.S. 136 (1965). As developed further in Leary v. U.S., 395 U.S. 6 (1969), a rational connection means at the very least, "that the presumed fact is more like-

ly than not to flow from the proved fact on which it is made to depend." *Id.* at 36. Whether a higher standard – beyond a reasonable doubt – is constitutionally required was left open by *Leary* and subsequent cases. *Id.* at 36 n.64; Turner v. U.S., 396 U.S. 398, 416 (1970); Barnes v. U.S., 412 U.S. 837, 842-43 (1973).

The *Allen* majority reworked both principles. It recognized two types of presumptions: mandatory and permissive. The constitutionality of permissive presumptions, as in *Allen*, are to be examined as applied in a particular case; the "more likely than not" standard controls. In contrast, the constitutionality of mandatory presumptions are to be examined facially; the beyond reasonable doubt standard controls. The majority's "novel approach," as aptly described by the dissent, *id.* at 2234, will introduce more confusion into an area already permeated with confusion. For example, a mandatory presumption in a civil case shifts, at least, the burden of production. Thus, if no evidence controverting the presumed fact is offered, the party in whose favor the presumption operates is entitled to a directed verdict on that issue. In the criminal context, however, a defendant cannot suffer a directed verdict. Thus, although mandatory presumptions are recognized by the *Allen* majority, their meaning and effect remains clouded.

See generally, C. McCormick, Evidence ch. 36 (2d ed. 1972); 21 C. Wright & K. Graham, Federal Practice and Procedure 684-758 (1977); 1 J. Weinstein & M. Berger, Weinstein's Evidence 303 (1978).

Right to Counsel

The Sixth Amendment right to counsel was held binding upon the states in Gideon v. Wainwright, 372 U.S. 335 (1963). In Argersinger v. Hamlin, 407 U.S. 25 (1972), the right to counsel was extended to all cases in which imprisonment is imposed. The exact scope of the right was left open by the *Argersinger* opinion. Last term, in Scott v. Illinois, 99 S.Ct. 1158 (1979), the Court clarified this issue. Scott was charged with petty theft, an offense which carried a maximum penalty of a $500 fine and a prison term of less than a year. Upon conviction, Scott was fined $50. He argued that his right to counsel had been violated because the offense for which he was tried authorized imprisonment as a sanction. Rejecting this argument, the Court held that actual imprisonment, rather than authorized imprisonment, triggered the right to counsel.

See generally, S. Krantz, Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin (1976).

HABEAS CORPUS REVIEW

In Thompson v. Louisville, 362 U.S. 199 (1960), the Supreme Court set forth the standard for judging the sufficiency of evidence in federal habeas corpus proceedings. Under that standard, a federal court could reverse a state conviction only if there was no evidence to support the conviction. Subsequently, in In re Winship, 397 U.S. 358 (1970), the Court declared for the first time that due process protects a criminal defendant against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. The continued validity of the "no evidence" rule after *Winship* was raised in Freeman v. Zahradnick, 429 U.S. 1111 (1977) (dissent from denial of certiorari). In Jackson v. Virginia, 99 S.Ct. 2781 (1979), the Court held that *Winship* compelled the overruling of the no evidence standard. "After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence would reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 2789. The import of *Jackson* would seem to go beyond the context of federal habeas review. The arguments advanced by the Court apply with equal force to direct review by state appellate courts and to directed verdict determinations by state trial courts.

RECENT DEVELOPMENTS

Publications

Professor Wayne LaFave, the leading authority on Fourth Amendment law, has recently published a three volume work entitled: Search and Seizure, A Treatise on the Fourth Amendment (West Publishing Co. 1979). This work is the most comprehensive treatment of the subject yet published. The editor of this Reporter is co-author of another West publication: Imwinkelried, Giannelli, Gilligan & Lederer, Criminal Evidence (1979). Recent articles of interest include: Lee, The Grand Jury in Ohio: An Empirical Study, 4 U. Dayton L. Rev. 325 (1979); Entrapment in the State of Ohio, 5 Ohio Northern L. Rev. 642 (1979).

Allied Offenses of Similar Import

The Court held that the offenses of sale of heroin and possession for sale of heroin under R.C. 3719.20(B) and R.C. 3719.20(A) are "allied offenses of similar import" within the meaning of R.C. 2941.25(A) "when both charges arise from the same transaction, and are predicated upon identical evidence." Consequently, the defendant's conviction for the lesser offense of possession for sale was vacated. *State v. Roberts,* No. 37848, Cuyahoga Cty. Ct. App. (1979).

Privacy Act Exclusionary Rule

Although the Court found no material violation of the defendant's right to privacy, it noted that the use of a welfare recipient's social security number in violation of Section 7(b) of the Privacy Act of 1974, 5 U.S.C. §552(a), to detect welfare fraud would require the suppression of the evidence derived from the violation. In applying the exclusionary rule to such statutory violations, the Court concluded that "evidence obtained in violation of a statute is obtained in violation of the due process clause of the Fourteenth Amendment . . ." and must be suppressed. *State v. McMiller,* No. CR-40584, Cuyahoga Cty. Ct. C.P. (1979).