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U.S. Supreme Court: 1982-83 Term: Part I

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THE UNITED STATES SUPREME COURT: THE 1982-1983 TERM

Part I

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The 1982-1983 Term of the U.S. Supreme Court ended on July 6, 1983. This is the first of two articles reviewing the major decisions involving criminal procedure decided this Term. The issue that most observers thought would be the most significant one addressed this Term was not decided. In Illinois v. Gates, 103 S. Ct. 2317 (1983), the Court, after requesting argument on the issue, declined to decide whether the Fourth Amendment exclusionary rule embraced a "good faith" exception. Writing for a majority, Justice Rehnquist commented: "We decide today, with apologies to all, that the issue we framed for the parties was not presented to the Illinois courts and, accordingly, do not address it." *Id.* at 2321. The Court, however, subsequently granted certiorari in three cases that raise the good faith exception: Massachusetts v. Sheppard, 32 Crim. L. Rptr. 2157 (Mass. 1982); Colorado v. Quintero, 657 P.2d 948 (Colo. 1983); U.S. v. Leon (9th Cir. 1983); *cert. granted,* 33 Crim. L. Rptr. 4093-94 (1983). Thus, it seems all but certain that the issue will be resolved next Term.

The Court also declined to decide another case on procedural grounds. In City of Los Angles v. Lyons, 103 S. Ct. 1660 (1983), the respondent filed suit in federal court alleging that the police had illegally used a "chokehold" which rendered him unconscious and caused damage to his larynx while he was stopped for a traffic violation. The district court entered a preliminary injunction against the use of chokeholds. The Court, in a 5-4 decision, refused to consider the merits of the claim on the grounds that the respondent had failed to satisfy the case or controversy requirements of Article III of the Constitution. According to the majority, the respondent had not shown a "real and immediate threat" that he would again be subjected to a chokehold.

ARREST, SEARCH AND SEIZURE

Reasonable Expectations of Privacy — Beepers

In U.S. v. Knotts, 103 S. Ct. 1081 (1983), the Court addressed the issue of whether the use of a "beeper" came within the protections of the Fourth Amendment and was therefore subject to the warrant and probable cause requirements. In *Knotts* the defendants were charged with the unlawful manufacture of controlled substances. After the police had focused their investigation on the defendant, a beeper (a small radio transmitter) was attached to a five-gallon drum of chloroform, a substance used in the manufacture of illicit drugs. The beeper enabled the police to track a car, in which the drum was subsequently loaded, to a cabin. Based on this and other information, the police obtained a warrant and discovered a clandestine drug laboratory in the cabin. The defendant moved to suppress this evidence on Fourth Amendment grounds. The Eighth Circuit ruled in favor of the defendant.

On review, however, the Supreme Court reversed, holding that the use of a beeper is neither a search nor a seizure within the meaning of the Fourth Amendment. In reaching this result, the Court cited Katz v. U.S., 389 U.S. 347 (1967), as the controlling precedent. Under *Katz* and its progeny, the Fourth Amendment protects only activities in which a person has a justifiable expectation of privacy. According to the Court, a "person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 103 S. Ct. at 1085. "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory facilities bestowed upon them at birth with such enhancement as science and technology afforded them in this case." *Id.* at 1086.

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This last statement was questioned by Justice Stevens, who, in a concurring opinion, pointed out that in *Katz* the Court reached a different result when it held that the augmentation of natural senses through electronic eavesdropping devices was covered by the Fourth Amendment. *Id.* at 1089.

The Court left one issue concerning the use of beepers unresolved. Knotts did not challenge the legality of the police's conduct in installing the beeper; it had been installed with the consent of the manufacturer prior to the time the drum was purchased by the defendant. In a footnote, the Court observed: "Respondent does not challenge the warrantless installation of the beeper in the container.... We note that while several Courts of Appeals have approved warrantless installations,...we have not before and do not now pass on the issue." *Id.* at 1084n.**. Thus, if the police had entered the defendant's house or garage to install the beeper, the Court would have confronted a different issue.

Reasonable Expectations of Privacy — Containers

Illinois v. Andreas, 103 S. Ct. 3319 (1983), involved the warrantless search of a container which the defendant had received from Calcutta. When the container arrived at O'Hare International Airport, a customs inspector found marijuana hidden in a table packed in the container. The inspector notified a DEA agent who resealed the container and, along with another officer, delivered the container to the defendant's apartment. After the container was left with the defendant, one officer kept the apartment under surveillance while the other sought a warrant. Before a warrant could be obtained, however, the defendant left his apartment with the container. He was arrested and taken to a stationhouse where the container was reopened without a warrant. Relying on container search cases, *see* Arkansas v. Sanders, 442 U.S. 753 (1979); U.S. v. Chadwick, 433 U.S. 1 (1977), the lower courts had held the search invalid. The Supreme Court reversed.

The majority's analysis, however, was not based on a warrant exception. Instead, the Court held that reopening the container was not a search. According to the Court, "No protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal." *Id.* at 3323. The Court recognized that some limitation on its holding was necessary; at some subsequent point, a person's expectations of privacy in a returned container would be justified. Accordingly, the Court wrote that "absent a substantial likelihood that the contents have been changed, there is no legitimate expectation of privacy in the contents of a container previously opened under lawful authority." *Id.* at 3325. Applying this standard, the Court found that the "unusual size of the container, its specialized purpose, and the relatively short break in surveillance, combined to make it substantially unlikely that the respondent removed the table or placed new items inside the container while it was in this apartment." *Id.* Thus, the police had not intruded upon any legitimate expectation of privacy.

Justice Brennan, dissenting along with Justice Marshall, criticized the Court for its novel holding: "We have, to my knowledge, never held that the physical opening and examination of a container in the possession of an individual was anything other than a 'search.' It might be a permissible search or an impermissible search, require a warrant or not require a warrant, but it is [in] any event a 'search.' " *Id.*

Probable Cause

Although the Court bypassed the opportunity to rule on the good faith exception to the exclusionary rule, it did decide an important Fourth Amendment issue in Illinois v. Gates, 103 S. Ct. 2317 (1983). In *Gates* the police received an anonymous letter stating that Lance and Sue Gates derived their income from illicit drug traffic, kept drugs in their home, and were about to depart to Florida for the purpose of obtaining drugs. The police corroborated a number of the facts set forth in the letter, including the fact that Lance Gates left by plane for Florida, met a woman there, and departed West Palm Beach in a car registered to him. Based on this information, the police obtained a warrant and searched the Gates' car and home when they arrived back in Illinois. Marijuana was discovered.

The Court agreed that the letter alone did not provide probable cause, and thus considered whether the corroboration produced by the police investigation amounted to probable cause. In holding the search invalid, the Illinois Supreme Court applied the two-pronged test derived from Spinelli v. U.S., 393 U.S. 410 (1964). Under this test, an informant's tip must satisfy two independent requirements. First, the tip must establish the informant's basis of knowledge; and second, the information given the magistrate must establish that the informant is credible or his information is reliable. The state court found both prongs deficient; there was no information upon which the magistrate could determine that the informant was credible, and the corroboration of innocent details did not establish that the tip was reliable. Moreover, there was no information showing the basis of the informant's knowledge.

In upholding the search, the Court, in an opinion written by Justice Rehnquist, jettisoned the *Spinelli* two-pronged test and substituted a "totality of the circumstances" test, under which the credibility of the informant, the reliability of his information, and the basis of his knowledge are merely factors in determining probable cause. Under this analysis, "a deficiency in one [prong] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." Id. at 2329.

The Court offered several reasons for rejecting *Spinelli.* According to the Court, that test "has en-

couraged an excessively technical dissection of informant's tips." *Id.* at 2330. Moveover, the "rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules that some have seen implicit in our *Spinelli* decision, cannot be reconciled with the fact that many warrants are — quite properly... — issued on the basis of nontechnical, commonsense judgments of laymen applying a standard less demanding than those used in more legal proceedings." *Id.* at 2330-31. Such technical applications might also encourage the police to "resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search." *Id.* at 2331.

The Court summarized the totality of the circumstances test in the following passage:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for...concluding]" that probable cause existed. *Id.* at 2332.

Although the Court went on to state that mere conclusory assertions in a affidavit would not satisfy this test, the opinion provides very little guidance. For the Court, the corroboration of the innocent details set forth in the letter as well as the "range of details" provided was sufficient in *Gates. Id.* at 2335.

In a concurring opinion, Justice White joined the Court's judgment. Significantly, however, he based his opinion on the good faith exception to the exclusionary rule. According to Justice White, the *Spinelli* two-pronged test should not be rejected. Justice Brennan, in an opinion joined by Justice Marshall, also disagreed with the Court's abandonment of the *Spinelli* test because the new test "provides no assurance that magistrates, rather than the police, or informants, will make determinations of probable cause; imposes no structure on magistrates' probable cause inquiries, and invites the possibility that intrusions may be justified on less than reliable information from an honest or credible person...." *Id.* at 2359. Justice Stevens also dissented, finding that the tip did not satisfy the probable cause requirements.

Plain View

The Court's most extensive discussion of the plain view doctrine is found in Coolidge v. New Hampshire, 403 U.S. 443 (1971). In *Coolidge,* a plurality of the Court specified three requirements for a plain view seizure. First, the initial intrusion which brings the evidence into plain view must be lawful. Second, the discovery of the evidence must be "inadvertent"; that is, the police must not know in advance that the evidence will be discovered. This requirement protects against pretext searches. Third, the incriminating nature of the evidence must be "immediately apparent."

In Texas v. Brown, 103 S. Ct. 1535 (1983), the Court elaborated on these requirements. Brown's car was stopped by the police at a routine driver's license checkpoint. When the officer shined his flashlight into the car, he observed a green party balloon in the defendant's hand. Alerted, he changed position and noticed several small plastic vials and quantities of white powder in an open glove compartment. The defendant was then ordered out of the car and the balloon seized.

The Court upheld the seizure. Applying the plain view doctrine, the Court found the initial stop valid, Delaware v. Prouse, 440 U.S. 648 (1979), and that the use of the flashlight to see into the car and glove compartment was not a search. U.S. v. Lee, 274 U.S. 559 (1927). The Court also found that the seizure was "inadvertent"; the roadblock was not a pretext. 103 S. Ct. at 1543. More importantly, the Court explained that the requirement that the incriminating nature of the evidence be immediately apparent meant that the officer must have had probable cause that the evidence was associated with criminal activity. According to the Court, the officer, based on his experience, had probable cause to seize the balloon. *Id.* at 1543.

Justice Stevens, concurring, objected to one aspect of the Court's opinion, finding that it gave "inadequate consideration to our cases holding that a closed container may not be opened with a warrant, even when the container is in plain view and the officer has probable cause to believe contraband is concealed within." *Id.* at 1545.

Stationhouse Inventory Searches

In Illinois v. LaFayette, 103 S. Ct. 2605 (1983), the Court addressed the constitutionality of stationhouse inventory searches. The police transported the defendant to the stationhouse after placing him under arrest for disturbing the peace. At the stationhouse he was required to empty his pockets and turn over a purse-type shoulder bag. Searching the bag, the police found amphetamine pills. Although the prosecution argued that the search could be justified as a delayed search incident to arrest, the Supreme Court decided the issue on the basis of an inventory search: "At the stationhouse, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed." *Id.* at 2609.

As an administrative search, the inventory procedure requires neither a warrant nor probable cause. According to the Court, such a standardized procedure deters false claims, inhibits theft or careless handling of articles, removes dangerous instrumentalities, and assists in identifying the arrestee. The fact that the police could have used less intrusive means, such as placing the purse in a secure locker, was not considered significant.

Concurring, Justices Marshall and Brennan pointed out that the search could not have been justified as a search incident to arrest because it

had not been undertaken for the purpose of protecting the officer or preventing the destruction of evidence. *Id.* at 2611.

Stop & Frisk — Request for Identification

Kolender v. Lawson, 103 S. Ct. 1855 (1983), involved a challenge to a California penal statute that required persons who loiter or wander on the street to provide credible and reliable identification and to account for their presence under circumstances that would justify a stop under Terry v. Ohio, 392 U.S. 1 (1968). Failure to provide such identification is disorderly conduct, a misdemeanor. Edward Lawson was detained or arrested approximately 15 times pursuant to this statute. He was prosecuted twice and convicted once. Lawson filed a civil suit seeking a declaratory judgment that the statute was unconstitutional; he also sought injunctive relief and damages.

The Court, in an opinion written by Justice O'Connor, held the statute unconstitutional under the void-for-vagueness doctrine. As the Court pointed out, the statute was not simply a stop-and-identify law. Under the California cases the statute had been interpreted to require that persons detained provide "credible and reliable" identification that carries a "reasonable assurance" of its authenticity and provides the "means for later getting in touch with the person who has identified himself." *Id.* at 1859.

In examining the statute, the Court set forth the rationale for the vagueness doctrine. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 1858. It was the second aspect that doomed the California statute. Neither the statute nor the state court decisions provided a "standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Id.* at 1859. Consequently, the decision whether credible and reliable identification has been produced is entrusted to the unguided discretion of the policeman on the beat.

Having disposed of the case on this ground, the Court declined to discuss the other issues raised. *Id.* at 1860 n.10. Justice Brennan, in a concurring opinion, however, concluded that the statute also violated the Fourth Amendment:

> In sum, under the Fourth Amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions. They may ask their questions in a way calculated to obtain an answer. But they may not *compel* an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause to justify an arrest.
>
> California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a *Terry* encounter. . . . *Id.* at 1863.

Stop & Frisk — Drug Courier Profile

The defendant in Florida v. Royer, 103 S. Ct. 1319 (1983), was stopped at Miami International Airport by two plain-clothes detectives because he fit the "drug courier profile." They asked him if he had a "moment" to speak with them and he replied, "Yes." Upon request, he gave them his airline ticket and driver's license, which contained different names. At this point, the police stated that he was suspected of transporting narcotics and requested that he accompany them to a small room. They subsequently brought in his luggage and asked to search it. He gave them the keys. Drugs were discovered in the luggage.

Before the Supreme Court, the state proffered three arguments in support of the officer's conduct. First, they argued that the entire encounter was consensual. A plurality of the Court, in an opinion by Justice White, found this argument "untenable":

> Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. *Id.* at 1326.

Second, the state argued that even if the defendant had been seized, the seizure was based on a reasonable articulable suspicion under Terry v. Ohio, 392 U.S. 1 (1968). While conceding that the early stages of the encounter could be justified under this theory, the plurality found that by the time Royer turned over the key to the suitcase, he was as "a practical matter" under arrest. 103 S. Ct. at 1327. In support of this conclusion, the plurality pointed out that the officers had Royer's ticket and identification, had seized his luggage, had never informed him that he was free to leave, and had taken him to a small room where he was alone with the two officers.

The plurality also concluded that the officer's conduct was more intrusive than necessary to effectuate an investigative detention under *Terry.* There were no safety or security reasons that required the transfer of Royer from the concourse to the room, and alternative investigative measures, such as the use of dogs to detect the presence of controlled substances in the luggage, were not used. This aspect of the *Terry* rule was summarized as follows: "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.* at 1325.

Third, the state argued that the seizure was based upon probable cause, an argument rejected

by the plurality. Justices Powell and Brennan concurred in the plurality opinion; four Justices dissented.

Stop & Frisk — Seizure of Property

Raymond Place aroused the suspicion of narcotics agents before he boarded a plane at Miami International Airport. After discovering discrepancies in the address and telephone number that he had provided, the agents notified agents in New York, who met Place when he deplaned. After he refused to consent to a search of his bags, the agents seized them. Place, however, was permitted to depart. The bags were then taken to a different airport where they were subjected to a "sniff test" by a trained narcotics dog. The dog reacted positively. The entire episode, from the seizure to the sniff test, took approximately 90 minutes. Because it was late on a Friday afternoon, the agents did not apply for a warrant until the following Monday morning, when one was issued by a magistrate. A search of the bags revealed cocaine. The Supreme Court addressed the legality of the agent's conduct in U.S. v. Place, 103 S. Ct. 2637 (1983).

In an opinion by Justice O'Connor, the Court held that the initial seizure was valid under the stop and frisk doctrine of Terry v. Ohio, 392 U.S. 1 (1968). The Court rejected the defendant's argument that *Terry* applied only in circumstances where the police's safety was involved. "In sum, we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided the investigative detention is properly limited in scope." *Id.* at 2644.

The Court next considered whether conducting a "sniff-test" constituted a search within the meaning of the Fourth Amendment. The Court held that it did not. The sniff test did not involve opening the luggage, nor did it involve "an officer's rummaging through the contents of luggage." *Id.* at 2644. Moreover, although the test does tell the police something about the contents of the luggage, the information is limited to disclosing the presence or absence of drugs.

Finally, the Court considered the duration of the detention. Here, the Court rejected the Government's argument that the seizure of property should be distinguished from the seizure of the person because the former is generally less intrusive. According to the Court, "such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return." *Id.* at 2645. Applying the *Terry* cases, the Court ruled the detention unconstitutional. The agents had ample time, according to the Court, to arrange for the dog's presence since they knew in advance the time of arrival. "Thus, although we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case." *Id.* at 2646. The Court also noted that the violation was exacerbated "by failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion." *Id.*

Justice Marshall, along with Justice Brennan, concurred in the judgment but disagreed with parts of the majority opinion. The difference between Justice Marshall and the majority is significant. According to Justice Marshall, "While *Terry* may authorize seizures of personal effects incident to a lawful seizure of the person, nothing in the *Terry* line of cases authorizes the police to seize personal property, such as luggage, independent of the seizure of the person." *Id.* at 2649. In his view, *Terry* left unchanged the rule that seizures of property must be based on probable cause. *Id.* at 2650. Justice Blackmun also concurred, in an opinion joined by Justice Marshall. In his view, the sniff-test issue should not have been addressed by the Court because it had not been raised by the defendant.

Stop & Frisk — Protective Weapons Search

In Michigan v. Long, 103 S. Ct. 3469 (1983), police officers approached the defendant's stopped car after they had observed it speeding and travelling erratically. After the officers asked for the car's registration, the defendant began walking toward the driver's door which was open. When they observed a hunting knife, the police stopped and frisked the defendant. Looking for other weapons, they shone their flashlights into the car. Observing something protruding from under the armrest, they entered the car and examined the object more closely. This examination led them to believe that marijuana was contained in the package. Long challenged the officer's entry into the car on the ground that *Terry v. Ohio* authorized only a limited pat-down search of a person and not the search of an area.

On review, the Supreme Court, in an opinion by Justice O'Connor, rejected this reading of *Terry*. According to the Court, a "search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believeing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* at 3480.

Justice Brennan, along with Justice Marshall, dissented. In his view, "Nothing in *Terry* authorized police officers to search a suspect's car based on reasonable suspicion." *Id.* at 3484.

INTERROGATIONS

The defendant in Wyrick v. Fields, 103 S. Ct. 394 (1982), was charged with rape. After arrest, he was released on his own recognizance and retained counsel. He requested a polygraph examination after conferring with counsel. Prior to the examination he signed a written consent form which advised him of his *Miranda* rights. At the conclusion of the examination, the examiner told him that there had been some deceit and asked if he could explain his answers. At this point, the defendant admitted having intercourse with the victim but claimed that the act was consensual. At trial he moved to suppress his statement. The motion was denied. The defendant subsequently commenced habeas proceedings and the Eighth Circuit granted relief, holding that the examiner had failed to provide warnings prior to the post-test interrogation.

The Supreme Court summarily reversed in a per curiam opinion. The central issue in the case involved the interpretation of Edwards v. Arizona, 451 U.S. 477 (1981), in which the Court had held that once a defendant had invoked his right to counsel under *Miranda,* he may not be interrogated unless he "initiates further communication, exchanges or conversations with the police." According to the Court, by requesting a polygraph examination, the defendant had "initiated interrogation" and thus no new warnings were required prior to the post-test interrogation.

Significantly, the Court declined to discuss whether the defendant's Sixth Amendment right to counsel had been violated since that issue had not been considered by the lower court. Justice Marshall's dissent indicates that he, at least, believed a substantial Sixth Amendment issue was present.

The Court also relied on *Edwards v. Arizona* in Oregon v. Bradshaw, 103 S. Ct. 2830 (1983). During the course of a vehicular homicide investigation, Bradshaw was asked to accompany the police to the stationhouse for questioning. After receiving *Miranda* warnings, he denied being the driver of the car. When the police rejected his story, he stated that he wanted an attorney and the questioning ceased. He was subsequently transported to the county jail, at which time he said, "Well, what is going to happen to me now?" The police officer responded by informing him that he did not have to talk and "since you have requested an attorney, you know, it has to be at your own free will." Bradshaw said he understood and a conversation ensued, during which the officer suggested a polygraph examination. The next day, after *Miranda* warnings were again read, a polygraph examination was conducted. When the examiner told Bradshaw that he did not believe Bradshaw was being truthful, Bradshaw changed his story and admitted driving the vehicle while intoxicated.

Justice Rehnquist wrote the plurality opinion. In *Edwards* the Court held that once the right to counsel has been invoked further questioning must cease "unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-85. According to the plurality opinion, the initiation requirement was intended as "a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers...." 103 S. Ct. at 2834. This requirement, however, was only the first step in a two-step analysis. Even when the defendant initiates the conversation, the prosecution must establish a voluntary waiver of the right to counsel. Having set forth this two-step analysis, the plurality found that both steps had been satisfied in the case. Although recognizing that many comments, such as asking for a drink of water or requesting to use the telephone, would not satisfy the "initiation" requirement, the plurality concluded that Bradshaw's statement, albeit ambiguous, evinced a willingness to discuss the investigation and that his subsequent conduct constituted a voluntary waiver of the right to counsel. *Id.* at 2835

Four dissenting Justices, in an opinion by Justice Marshall, agreed with the plurality's two-step analysis. In other words, *Edwards* did establish a per se rule; in the absence of a defendant-initiated conversation, a subsequent statement is inadmissible. The dissenters, however, disagreed with the plurality's application of the two-step analysis to the facts. In their view, Bradshaw's question evinced only a desire to find out where he was being taken and not a desire to discuss the investigation.

The critical vote in support of the judgment was cast by Justice Powell, who concurred. He believed that it was not clear that *Edwards* announced a per se rule. He also left no doubt that, in his opinion, such a rule was undesirable. Thus, although the Court was badly divided over the application of *Edwards,* eight Justices did agree that the case established a two-step analysis and that the first step — the initiation requirement — was a per se requirement.