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# U.S. Supreme Court: The 1983-84 Term

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## THE UNITED STATES SUPREME COURT: THE 1983-84 TERM

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The 1983-84 Term of the U.S. Supreme Court ended on July 5, 1984. The most significant decisions handed down by the Court, U.S. v. Leon, 104 S.Ct. 3405 (1984), and Massachusetts v. Sheppard, 104 S.Ct. 3424 (1984), recognized a good-faith exception to the exclusionary rule. The last issue of the Reporter discussed these cases. This article summarizes some of the Court's other criminal procedure cases.

### ARREST, SEARCH AND SEIZURE

#### Private Searches

The Fourth Amendment prohibition against unreasonable searches and seizures applies only to governmental searches; it does not apply to private searches. Burdeau v. McDowell, 256 U.S. 456 (1921). Nevertheless, a private search that has been significantly expanded by the police does fall within the purview of the Fourth Amendment and thus triggers the warrant requirement. Walter v. U.S., 447 U.S. 649 (1980).

In U.S. v. Jacobsen, 104 S.Ct. 1652 (1984), Federal Express employees observed a white powdery substance while examining a damaged package. They notified a DEA agent and apparently repackaged the substance. Upon his arrival, the agent removed the substance and subjected it to a chemical test which revealed the presence of cocaine. The defendant argued that the search was illegal because the agent had failed to obtain a warrant, while the Government contended that the field test did not change the private character of the search. The Eighth Circuit agreed with the defendant.

On review, the Supreme Court reversed. The Court's analysis involved three steps. First, the Court found that the removal of the powder from the package did not violate any privacy interest because the agent learned nothing more than what the private employees had already revealed to him. Second, the seizure of the package prior to testing was constitutionally permissible because an examination of the package provided probable cause for such a limited seizure. Third, field testing did not implicate any privacy interest protected by the Fourth Amendment:

> A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy . . . [E]ven if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. Congress had decided . . . to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest. *Id.* at 1662.

#### Open Fields Doctrine

The "open fields" doctrine, first announced by the Supreme Court in Hester v. U.S., 265 U.S. 57 (1924), permits the police to enter and search a field without a warrant. The continued validity of this doctrine, however, was suspect after the Court decided Katz v. U.S., 389 U.S. 347 (1967). The Court in *Katz* held that the Fourth Amendment applies whenever a person has a reasonable expectation of privacy.

In Oliver v. U.S., 104 S.Ct. 1735 (1984), narcotics officers entered the defendant's farm without a warrant and discovered marijuana. During their entry, the officers walked around a locked gate which was posted with a "no trespassing" sign. In addition, the field was secluded—bounded on all sides by woods, fences, embankments and not observable from any point of public access. The district court, citing *Katz,* held that the defendant had a reasonable expectation that the fields would remain private, a ruling that triggered the Fourth Amendment's warrant requirement.

On review, the Supreme Court disagreed. It reaffirmed the open fields doctrine, finding no conflict between that doctrine and the *Katz* decision: "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." 104 S.Ct at

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1741. In reaching this conclusion, the Court cited three factors that are relevant to determining whether a reasonable expectation of privacy exists: the intention of the Framers of the Fourth Amendment, the uses to which a location is put, and the societal understanding that certain areas deserve protection from government invasion. According to the Court, none of these factors require Fourth Amendment protection for open fields. Unlike a home, an open field does not provide a setting for those intimate activities that the Framers intended to shelter from governmental interference. Moreover, there is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Finally, fences and "no trespassing" signs generally do not effectively bar the public from viewing open fields.

**Prison Searches**

Hudson v. Palmer, 104 S.Ct. 3194 (1984), involved the search of a prison cell, which the inmate challenged on Fourth Amendment grounds. The case required the Court to decide whether prisoners have justifiable expectations of privacy in their cells. If they do, the Fourth Amendment applies, at least in some form. The Court, however, refused to recognize Fourth Amendment rights in this context: "The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Id.* at 3200. The Court's holding rested on its view that security and other objectives could not be attained if the Fourth Amendment applied to prison cells: "Virtually the only place inmates can conceal weapons, drugs, and other contraband is in their cells. Unfettered access to these cells by prison officials, thus, is imperative if drugs and contraband are to be ferretted out and sanitary surroundings are to be maintained." *Id.*

**Beepers**

In U.S. v. Knotts, 460 U.S. 276 (1983), the Court held that the warrantless monitoring of an electronic tracking beeper inside a container of chemicals did not violate the Fourth Amendment when the information revealed could have been obtained by visual surveillance. This Term, the Court in U.S. v. Karo, 104 S.Ct. 3296 (1984), decided several other issues relating to beepers.

A beeper was installed in a can of ether with the consent of the owner when DEA agents learned that the defendants intended to use the ether to extract cocaine from clothing imported into the country. After the defendants purchased the cans of ether, including the one with the beeper, the agents maintained surveillance by means of the beeper for several months, following the cans when they were moved on several occasions. The agents eventually obtained a warrant and searched a house, discovering the cocaine. Defendants moved to suppress the evidence on Fourth Amendment grounds.

On review, the Supreme Court held that the installation of the beeper in the can did not violate the Fourth Amendment because the owner consented to the installation. Moreover, the Court held that the transfer of the can to the defendants did not violate their right of privacy; the transfer "conveyed no information that Karo wished to keep private, for it conveyed no information at all." *Id.* at 3302. Consequently, there was no search. Nor was there a seizure, because the defendants' possessory interest in the cans were not interfered with in any meaningful way.

The Court, however, did find that monitoring the beeper in a private residence, a location not open to visual surveillance, violated the Fourth Amendment. The warrantless use of the beeper, according to the Court, was the equivalent of a warrantless entry into the house. Although it is less intrusive than a full-scale search, it does reveal a critical fact about the premises that the Government could not have otherwise learned without a warrant. This fact distinguished *Karo* from *Knotts* because in the latter case the beeper revealed nothing about the interior of a house. Moreover "[r]equiring a warrant will have the salutary effect of ensuring that use of beepers is not abused, by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search." *Id.* at 3305.

**Probable Cause—Informants**

In the 1982-83 Term the Court in Illinois v. Gates, 103 S.Ct. 2317 (1983), overruled the *Aguilar-Spinelli* two-prong test for establishing probable cause. According to those cases, information obtained from an informant could not establish probable cause for a search unless the (1) basis of the informant's knowledge and (2) reliability of his information were demonstrated. Rejecting this two-prong test in *Gates,* the Court substituted a "totality of the circumstances" approach.

The lower courts have split on the meaning of *Gates.* Some have interpreted *Gates* narrowly; others have interpreted it liberally. In a per curiam decision, Massachusetts v. Upton, 104 S.Ct. 2085 (1984), the Supreme Court summarily reversed one of the more stringent applications of *Gates.* The Court wrote: "The Massachusetts court apparently viewed *Gates* as merely adding a new wrinkle to [the Aguilar-Spinelli] two-pronged test: where an informant's veracity and/or basis of knowledge are not sufficiently clear, substantial corroboration of the tip may save an otherwise invalid warrant." *Id.* at 2087. The Court went on to comment: "We think that the Supreme Judicial Court of Massachusetts misunderstood our decision in *Gates.* We did not merely refine or qualify the two-pronged test. We rejected it . . . " *Id.* Instead of considering the informant's information as a whole, the state court judged only "bits and pieces of information in isolation against the artificial standards provided by the two-pronged test." *Id.* at 2088. Moreover, the state court failed to defer to the trial court's judgment and instead conducted a de novo review. According to the Court, "[a] deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Id.*

**Automobile Exception**

In Chambers v. Maroney, 399 U.S. 42 (1970), the Court held that the police could conduct a warrantless

search of an automobile when it has been stopped on the road and there is probable cause to believe evidence is in the car. Although this exception to the warrant requirement was based on the mobility of the car, the Court held that a search of the car at the police station after it had been immobilized was also permissible. In a per curiam opinion, Florida v. Meyers, 104 S.Ct. 1852 (1984), the Court reaffirmed *Chambers*. In *Meyers* the police searched a validly impounded car eight hours after the defendant had been arrested and his car seized. The Court ruled the search constitutional under *Chambers* and its progeny.

**Warrantless Arrests in Houses**

In a 1980 case, Payton v. New York, 445 U.S. 573 (1980), the Court had held that in the absence of exigent circumstances, a warrantless arrest in the home violated the Fourth Amendment. At that time, however, the Court declined to consider what circumstances would qualify as "exigent." The Court addressed one aspect of this issue in Welsh v. Wisconsin, 104 S.Ct. 2091 (1984), where the police made a warrantless night entry into the defendant's home in order to arrest him for a nonjailable traffic offense.

After driving his car off the road, the defendant left the scene and walked a short distance to his home. When the police arrived at the scene, they learned of the defendant's action from a witness, who opined that the defendant was either inebriated or very sick. The police obtained the defendant's address from the car's registration and proceeded to his home without securing a warrant. The defendant's stepdaughter answered the door, at which time the police proceeded to an upstairs bedroom where they placed the defendant under arrest for driving under the influence of an intoxicant. The state supreme court upheld the arrest because it found a number of exigent circumstances: the need for hot pursuit of a suspect, the need to prevent physical harm to the offender and the public, and the need to prevent the destruction of evidence.

The U.S. Supreme Court disagreed. According to the Court:

> Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. . . . When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate. *Id.* at 2098.

In sum, the seriousness of the offense for which the arrest is made is an important factor in evaluating the exigency of the situation. The possibility that the blood-alcohol content would dissipate if the police failed to act quickly was not a compelling reason in light of the fact that the State treated first-offender drunk driving as a noncriminal civil offense. Moreover, there was no continuous hot pursuit from the scene of the crime and the public safety was not at risk because the defendant was already at home and the car was abandoned.

## INTERROGATIONS

**Miranda-Misdemeanor Cases**

In Berkemer v. McCarty, 104 S.Ct. 3138 (1984), the Court considered the applicability of *Miranda* to misdemeanor traffic offenses. The Court refused to recognize a "misdemeanor" exception, holding that the *Miranda* requirements applied "regardless of the nature or severity of the offenses of which [the defendant] is suspected or for which he was arrested." *Id.* at 3148. According to the Court, a misdemeanor exception would be difficult to apply because the police often do not know whether a felony or misdemeanor has been committed at the time of arrest and interrogation. Moreover, investigations which initially focus on minor offenses sometimes escalate into investigations of serious crimes.

In order to decide the case, however, the Court was required to address a second issue—whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered "custodial interrogation." The *Miranda* warnings are required only during custodial interrogation. In resolving this issue, the Court acknowledged that the stopping of an automobile was a "seizure" within the meaning of the Fourth Amendment. *See* Delaware v. Prouse, 440 U.S. 648 (1979). *Miranda,* however, is based on Fifth, not Fourth, Amendment concerns—namely, the inherently coercive atmosphere associated with police interrogations. The Court found that these concerns were not significant during the typical traffic stop because such stops are of relatively short duration and occur in public view, thus reducing the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminatory statements. Accordingly, the Court held that traffic stops were not "custodial" within the meaning of *Miranda.* 104 S.Ct. at 3151. The Court, however, noted that a person subject to a traffic stop could be treated in such a way as to render him "in custody" for practical purposes, thereby triggering the *Miranda* requirements. In determining when a stop has been transformed into the functional equivalent of an arrest, the Court used an objective test: "how a reasonable man in the suspect's position would have understood his situation." *Id.* at 3152.

**Miranda—The Public Safety Exception**

In New York v. Quarles, 104 S.Ct. 2626 (1984), the Court recognized a "public safety" exception to *Miranda.* The defendant in *Quarles* was arrested soon after the police were informed by a rape victim that a man fitting his description had attacked her. The complaint included the fact that the rapist had a gun. At the time of his arrest, the defendant was wearing an empty shoulder holster. After handcuffing the defendant, the arresting officer asked where the gun was and the defendant responded, "the gun is over there." The trial court excluded both the statement and the gun.

On review, the Supreme Court reversed, recognizing for the first time a "public safety" exception to *Miranda:* "So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a

customer or employee might later come upon it." *Id.* at 2632. The Court went on to hold that in such a situation the threat to the public safety outweighed the need for *Miranda's* prophylactic rule protecting the Fifth Amendment. Although the Court labeled the public safety exception a "narrow exception," it failed to provide much guidance on its applicability.

**Probation Officer Interrogations**

Minnesota v. Murphy, 104 S.Ct. 1136 (1984), involved the admissibility of statements made by a defendant during a meeting with his probation officer. In 1974 Murphy was questioned by the police concerning a rape-murder. No charges were brought at that time. In 1980 he was convicted of false imprisonment, an offense which arose from an unrelated sex episode. He was placed on probation on the condition that he participate in a program for sexual offenders. A counselor in the program subsequently informed his probation officer that he had admitted committing the 1974 rape-murder. When confronted with this admission, Murphy also confessed to the probation officer. He was subsequently indicted for that crime and moved to suppress his statements on Fifth Amendment grounds.

On review, the Supreme Court rejected Murphy's claim. Although he was subject to a number of restrictive conditions, he was not under arrest and was free to leave at the end of the meeting. Accordingly, he was not in custody and thus had no right to *Miranda* warnings.

In addition, the Court reiterated its long standing position that the Fifth Amendment generally is not self-executing; that is, a person subject to compulsion must assert the Fifth Amendment privilege. Otherwise, his statements are considered voluntary. In reversing Murphy's conviction, the Minnesota Supreme Court had cited a number of factors which it thought justified an exception to this rule: (1) the probation officer could compel the defendant's attendance and truthful answers, (2) the officer consciously sought incriminating evidence, (3) the defendant did not expect to be questioned about the rape murder, and (4) no observers were present to protect against abuse and trickery. The Court found these factors unpersuasive. According to the Court, most of these factors are present when a witness testifies before a grand jury and *Miranda* has not been applied in that context. Moreover, the meeting with the probation officer did not present the same coercive atmosphere that is present during police interrogations.

Finally, the Court declined to find that the state had applied an impermissible penalty to the defendant's exercise of his Fifth Amendment right. There was no indication that under state law his probation would be revoked because he claimed the Fifth Amendment privilege.

## DERIVATIVE EVIDENCE

The Supreme Court has long held that the exclusionary rule applies not only to primary evidence obtained as a direct result of an illegal search or seizure but also to evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." Nardone v. U.S., 308 U.S. 338, 341 (1939). The Court, however, has recognized several exceptions to the derivative evidence doctrine. For example, the Court has held that if knowledge of the "fruits" is gained from an "independent source" the evidence is admissible. Silverthorne Lumber Co. v. U.S., 251 U.S. 385, 392 (1920). Two of the Court's cases this Term involved the derivative evidence doctrine. One case involved the traditional "independent source" exception; the other recognized a new exception—the "inevitable discovery" rule.

**Independent Basis**

In Segura v. U.S., 104 S.Ct. 3380 (1984), narcotics agents received information that the defendants were trafficking in cocaine from their apartment. Eventually, one of the defendants was arrested in the lobby of the apartment building and was taken to the apartment, at which time the police secured the apartment until a search warrant could be obtained. The agents conducted a limited security check of the apartment and discovered some drug paraphernalia in plain view. They then arrested the second defendant who had been in the apartment, discovering additional evidence during a search incident to arrest. The defendants were transported to DEA headquarters, while two agents remained in the apartment awaiting the warrant. The warrant, however, was not executed until 19 hours after the initial entry. The search conducted pursuant to the warrant revealed drugs, weapons, and drug trafficking records.

The trial court ruled that the initial entry was illegal because there had been no exigent circumstances to justify a warrantless entry. Consequently, the evidence discovered during the inital entry and search incident to arrest were illegal "fruits." The court also considered the evidence obtained in the search pursuant to the warrant as illegal "fruits" of the initial entry.

The Supreme Court accepted the lower court's finding that the initial entry and search incident to arrest were illegal and considered only the admissibility of the evidence seized pursuant to the warrant. The Court held that although the entry into the apartment may have been illegal, the "seizure" of the premises (even from within) based on probable cause was not: "We hold . . . that securing a dwelling, on the basis of probable cause, to prevent the destruction of evidence or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." *Id.* at 3389. Accordingly, the evidence eventually seized by warrant was not tainted by the seizure of the apartment. Furthermore, this evidence was obtained from a source independent of the illegal initial entry. None of the evidence on which the warrant was secured derived from this entry; it had been obtained prior to the entry.

**Inevitable Discovery**

In Nix v. Williams, 104 S.Ct. 2501 (1984), the Court recognized for the first time that evidence unconstitutionally seized may nevertheless be admissible if it would have been inevitably discovered by the police. Williams was convicted of the murder of a ten-year-old girl. His first conviction was overturned by the Supreme Court in 1977 because he was denied the

right to counsel at the time he made incriminating statements that led to the discovery of the victim's body. Brewer v. Williams, 430 U.S. 387 (1977). Although his inculpatory statements were not offered in evidence at the retrial, the prosecution did introduce evidence concerning the location of the victim's body, its condition, articles and photographs of clothing, and the results of postmortem medical and chemical tests. Williams claimed that this evidence was the "fruit" of his illegally obtained confession.

On review, the Supreme Court disagreed. As in other recent cases, the Court began its analysis by focusing on the deterrent effect of the exclusionary rule. According to the Court, this deterrent effect is not undercut by the recognition of an inevitable discovery rule: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received." *Id.* at 2509. Here, the prosecution argued that the victim's body would have been discovered by a search party even if Williams had not made his incriminatory admissions. Significantly, the Court refused to recognize a good faith component to the inevitable discovery rule. All that the prosecution is required to show is that the evidence probably would have been discovered, a finding that the Court said was supported by the record in Williams' case.

## RIGHT TO COUNSEL

### Ineffective Assistance

The Court's most important right to counsel cases involved the appropriate standard for determining whether a defendant has been denied the right to effective assistance of counsel. In Strickland v. Washington, 104 S.Ct. 2052 (1984), the Court defined that standard. Although all the federal circuit courts and most state courts had adopted the "reasonably effective assistance" standard in one formulation or another, the Supreme Court had not directly considered the issue until *Washington.* The Court set forth two requirements for an ineffectiveness claim: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 2064.

As for the first issue—deficient representation—the Court adopted the reasonably effective assistance standard. The defendant must establish that the representation fell below an objective standard of reasonableness. According to the Court, no specific guidelines can be articulated: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 2065. The ABA Standards are guides for determining what is reasonable, but they are only guides. The Sixth Amendment, in the Court's view, is not designed to improve the quality of legal representation but rather to ensure a fair trial. Moreover, judicial scrutiny of counsel's performance must be "highly deferential." "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence. . . ." *Id.* at 2066. Accordingly, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 2066-67.

In considering the second issue, the Court held that counsel's performance, even if falling below prevailing norms, must prejudice the defense. The Court adopted the following standard for judging prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 2068. The Court, however, did recognize some situations in which prejudice would be presumed, including instances of state interference with counsel's role and conflicts of interest.

In U.S. v. Cronic, 104 S.Ct. 2039 (1984), the trial court appointed a young lawyer with a real estate practice to represent the accused and allowed him only 25 days to prepare for trial on mail fraud charges. The court of appeals found that the accused had been denied effective assistance of counsel based on a number of factors: the time afforded for preparation, the experience of counsel, the gravity of the charge, the complexity of possible defenses, and the accessibility of witnesses.

The Supreme Court reversed. It did not question the relevancy of any of these factors. Instead, the Court held that the lower court improperly inferred incompetency based on these factors. According to the Court, a claim of ineffective assistance generally can be established "only by pointing to specific errors made by trial counsel." *Id.* at 2051. Moreover, these specific errors must adversely affect the trial: "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Id.* at 2046. The Court remanded the case for such a determination.

### Standby Counsel

In Faretta v. California, 422 U.S. 806 (1975), the Court held that a criminal defendant's Sixth Amendment right to counsel included the right to conduct one's own defense. The Court also held that a trial court may appoint "standby counsel" to assist the *pro se* defendant in such as case. In McKaskle v. Wiggins, 104 S.Ct. 944 (1984), the Court was called upon to decide the role of standby counsel who is appointed over a defendant's objection.

The Court identified two values underlying the right of self-representation. The first is the defendant's right to control the case presented to the jury: "The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *Id.* at 949. There was no question that Wiggins exercised

these rights at his trial. His principal argument was that the standby counsel impaired his defense by intrusive and unsolicited participation in the trial.

The second value underlying *Faretta,* according to the Court, concerns the jury's perception of the defendant's control over the case: "[P]articipation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *Id.* at 951. As the Court pointed out, however, this value is not undercut by counsel's participation in the trial outside the presence of the jury. As long as the defendant is given an opportunity to express his views to the trial judge, this right is protected. The judge is presumed capable of differentiating between the defendant's and standby counsel's views on legal issues.

Participation by standby counsel in the presence of the jury presents a more difficult question. Nevertheless, the Court refused to adopt a categorical ban on counsel's participation before the jury. In evaluating whether counsel's involvement eroded the right to self-representation in this context, the Court identified several factors. First, the defendant's conduct in agreeing to counsel's participation is relevant. Once the defendant invites participation, subsequent appearances by counsel are presumed to be with the defendant's acquiescence—at least, until he expressly requests counsel's silence. Second, counsel's participation in routine procedural and evidentiary issues does not infringe the right of self-representation.

**Initiation of the Right to Counsel**

In U.S. v. Gouveia, 104 S.Ct. 2292 (1984), defendants who were serving sentences in a federal prison were placed in administrative detention following the murders of fellow inmates. They remained in detention for an extended period until they were indicted on criminal charges. The court of appeals held that the right to counsel attached when the defendants were placed in administrative detention, even though not yet indicted. The Supreme Court reversed, citing prior cases which held that the right to counsel does not attach until the commencement of adversary judicial proceedings. Kirby v. Illinois, 406 U.S. 682 (1972). According to the Court, placement in administrative detention is not the initiation of judicial adversary proceedings and thus the right to counsel had not attached.

## DOUBLE JEOPARDY

The Supreme Court decided a number of double jeopardy cases this Term. The Court's prior cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. Illinois v. Vitale, 447 U.S. 410 (1980).

**Civil Suits Following Acquittal**

In U.S. v. One Assortment of 89 Firearms, 104 S.Ct. 1099 (1984), a gun owner argued that his prior acquittal on criminal charges involving firearms precluded a subsequent *in rem* forfeiture proceeding against those firearms. The Supreme Court rejected his argument, adhering to the traditional view that the Double Jeopardy Clause prohibits only a second *criminal* trial. According to the Court, "neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges." *Id.* at 1104.

**Death Penalty Acquittal**

In Arizona v. Rumsey, 104 S.Ct. 2305 (1984), the defendant was convicted of first degree murder and armed robbery. The trial court sentenced him to life imprisonment because it found the aggravating circumstances specified in the state death penalty statute inapplicable. The defendant appealed on an unrelated issue and the state filed a cross-appeal on the death penalty issue. The state supreme court agreed with the prosecution's view of the death penalty statute and remanded for resentencing, at which time the death penalty was imposed.

On review, the U.S. Supreme Court held that the issue was controlled by Bullington v. Missouri, 451 U.S. 430 (1981), in which it had held that the ordeal and anxiety suffered at a capital sentencing proceeding was equivalent to that suffered in a trial on the merits. Accordingly, the Court held that the Double Jeopardy Clause prohibited the resentencing of a defendant to death after the sentencer has in effect acquitted the defendant of that penalty, even if the acquittal was based on legal error.

**Guilty Pleas**

In Ohio v. Johnson, 104 S.Ct. 2536 (1984), the defendant was indicted for murder, involuntary manslaughter, aggravated robbery, and grand theft. All offenses arose from the killing of Thomas Hill and the theft of property from his apartment. At arraignment, the defendant offered to plead guilty to the manslaughter and theft counts. Over the prosecution's objection, the trial court accepted the pleas and dismissed the remaining counts on Double Jeopardy grounds, finding that manslaughter and theft were lesser included offenses of murder and robbery. The Ohio Supreme Court upheld the trial court's decision.

The U.S. Supreme Court reversed. According to the Court, although the Double Jeopardy Clause protects a defendant against cumulative punishments for convictions for the same offense, it does not prohibit prosecution for such multiple offenses in a single trial. Thus, for example, while the defendant may not be punished separately for manslaughter and murder, he could be tried for both at the same time. The Court also held that the multiple prosecution aspect of the Double Jeopardy Clause would not be violated. The defendant had never been exposed to conviction on the more serious charges; the prosecution was not seeking a second chance at conviction; and the plea of guilty could not be considered an implied acquittal of the more serious charges.

**Mistrials—Hung Jury**

The jury trying the defendant in Richardson v. U.S., 104 S.Ct. 3081 (1984), acquitted him of one count but

could not agree on other counts. The trial court therefore declared a mistrial and the defendant claimed that a second trial would violate the Double Jeopardy Clause because the evidence on the remaining counts was insufficient for conviction. The defendant relied on Burks v. U.S., 437 U.S. 1 (1978), in which the Supreme Court had held that if a defendant obtained an unreversed appellate ruling that the evidence introduced at trial was insufficient to convict, a second trial was precluded by the Double Jeopardy Clause. In short, a finding of insufficient evidence is equivalent to an acquittal. The Supreme Court, however, refused to extend *Burks* to the defendant's case. Instead, the Court adhered to its long established rule that a retrial following a hung jury does not violate the Double Jeopardy Clause. *See* Logan v. U.S., 144 U.S. 263, 297-98 (1892).

**Sentencing After Retrial**

In North Carolina v. Pearce, 395 U.S. 711 (1969), the Court held that neither the Double Jeopardy nor Equal Protection Clauses precluded an increased sentence on retrial following a successful appeal. The Court, however, did hold that due process prohibited an increased sentence on retrial where the enhanced sentence resulted from vindictive retaliation by the trial judge. According to the Court, such vindictiveness might chill a defendant's right to appeal. Thus, an increased sentence on retrial is presumptively vindictive but this presumption can be rebutted by reasons set forth in the record.

The defendant in Wasman v. U.S., 104 S.Ct. 3217 (1984), was convicted of making a false statement in a passport application and sentenced to a 2-year partially suspended sentence with probation. After his conviction was overturned, he was retried and convicted. This time he was sentenced to two years imprisonment, none of which was suspended. The increased punishment resulted from a conviction for a different crime, which was adjudged after the first trial. In *Wasman* the Court found the presumption of vindictiveness applicable. It also found, however, that the record contained reasons which rebutted the presumption—namely, the intervening conviction.

## OPEN TRIALS

**First Amendment Right of Access**

In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the Supreme Court recognized a First Amendment right of access to criminal trials: "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials . . . important aspects of freedom of speech and of the press could be eviscerated." *Id.* at 580. In a subsequent case, the Court held that the mandatory closure of a trial during the testimony of a sex offense victim was unconstitutional. Globe Newspapers Co. v. Superior Court, 457 U.S. 596 (1982). The Court returned to the open trial issue last Term.

Press-Enterprise Co. v. Superior Court, 104 S.Ct. 819 (1984), involved a rape-murder trial in which the defendant was sentenced to death. Prior to the voir dire examination of propsective jurors, the petitioner, Press-Enterprise, moved that the voir dire be open to the public. The prosecutor opposed the motion on the grounds that the presence of the press would affect the candor of the prospective jurors' responses. The trial court ruled to open only the general voir dire to the public and press and to close the individual voir dire. After the jury was empaneled, Press-Enterprise moved for the release of the transcript of the voir dire proceedings. The court denied this motion on the grounds it would impinge on the jurors' right to privacy. Press-Enterprise sought a writ of mandamus to compel the release of the transcript and to vacate the closure order. The state courts declined to grant relief.

On review, the Supreme Court reversed. According to the Court, a presumption of openness attends criminal trials. This presumption can only be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 824. Applying this standard to the facts, the Court found that the record did not support the trial court's findings that the defendant's right to a fair trial and the jurors' right to privacy were jeopardized by an open voir dire. Furthermore, the trial court had failed to consider alternative ways to protect these interests. As an example, the Court pointed out that the jurors could have been provided with an in camera hearing to consider embarrassing questions. In addition, sensitive material could have been deleted from the transcript.

**Sixth Amendment Right to Public Trial**

In addition to the First Amendment right of access, the closing of a criminal trial implicates an accused's right to a public trial. In Gannett Co. v. DePasquale, 443 U.S. 368 (1979), the Supreme Court commented: "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . ." *Id.* at 380.

In Waller v. Georgia, 104 S.Ct. 2210 (1984), the Court held that the right to a public trial extends to suppression hearings. The hearing could be closed over a defendant's objection only if the standards of *Press-Enterprise* have been satisfied: "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect the interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 2216.

## PREVENTIVE DETENTION

In Schall v. Martin, 104 S.Ct. 2403 (1984), the Court upheld the constitutionality of preventive detention for accused juvenile delinquents. The question left unanswered is whether preventive detention for adults is also constitutional. Much of the rationale underlying *Martin* centers on juvenile court proceed-

ings. Although the Court recognized the applicability of the Due Process Clause to juvenile proceedings, it also recognized the State's *parens patriae* interest in protecting the welfare of children. At one point the Court distinguished between juveniles and adults by stating that the child's liberty interest "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody." *Id.* at 2410.

Other parts of the opinion, however, could be cited to support preventive detention for adults. The Court held that preventive detention served a legitimate state objective—the "legitimate and compelling state interest in protecting the community from crime." In addition, the Court rejected the view that it is virtually impossible to predict future criminal conduct with any degree of accuracy: "[F]rom a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct." *Id.* at 2417.

## PROSECUTORIAL VINDICTIVENESS

The defendant in Thigpen v. Roberts, 104 S.Ct. 2916 (1984), was involved in a car accident in which a passenger died. As a result, he was convicted of four misdemeanors in a Justice of the Peace Court and appealed. Under state law, he was entitled to a trial de novo in the Circuit Court. While the appeal was pending, a grand jury indicted him for manslaughter based on the same incident and he was subsequently convicted.

The Supreme Court reversed, holding that the case was governed by Blackledge v. Perry, 417 U.S. 21 (1974). In *Perry* the Court found a due process violation where the prosecution obtained an indictment after a defendant exercised his right to appeal and obtain a trial de novo. According to the Court, a defendant's right to appeal would be chilled if the prosecution could obtain an indictment in retaliation for the exercise of the right to appeal. In order to preclude this result, the Court established a rebuttable presumption of unconstitutional vindictiveness in these circumstances. Since the record in *Roberts* failed to contain evidence rebutting this presumption, the Court reversed.

## PLEA BARGAINS—SPECIFIC PERFORMANCE

In Mabry v. Johnson, 104 S.Ct. 2543 (1984), the Court considered whether a defendant's acceptance of a prosecutor's proposed plea bargain creates a constitutional right to specific performance of that bargain. The bargain was withdrawn by the prosecutor after it was accepted by the defendant, but before the defendant pled guilty. The defendant later pled guilty to a different bargain. According to the Court, a "plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in a judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution." *Id* at 2546. Since the defendant's subsequent plea was voluntary, there was no constitutional violation.

The Court was careful to distinguish *Johnson* from its earlier decision in Santobello v. New York, 404 U.S 257 (1971). The defendant in that case entered the plea which was accepted by the trial court before the prosecutor attempted to renege on the agreement. "It follows that when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand . . ." 104 S.Ct. at 2547.

## RIGHT OF PRESERVATION

California v. Trombetta, 104 S.Ct. 2528 (1984), concerned a defendant's right to have breath samples preserved after he had been given an intoxilyzer test to determine his blood-alcohol content. The defendant argued that such a right was derived from the Due Process Clause. In prior cases, the Court had held that due process requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment. U.S. v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963).

The Court began its analysis by stating that it had "never squarely addressed the Government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants." 104 S.Ct. at 2533. The Court refused to recognize such a right, at least in this context. There was no evidence that the police destroyed evidence for the purpose of avoiding the *Brady* disclosure requirements. Moreover, "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Id.* at 2534. In order to meet this requirement, the "evidence must possess an exculpatory value that was apparent before the evidence was destroyed, and also be of a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.*

Neither condition is satisfied with breath samples. Given the accuracy of the intoxilyzer the breath samples are more likely to be inculpatory than exculpatory. Moreover, the defendant has other means of challenging the evidence. Under state law, he had the right to inspect both the machine and the weekly calibration results. Other sources of error, such as radio waves and the presence of chemicals in the blood of people dieting, can be challenged by the introduction of evidence at trial.

## CONCLUSION

The Court's decisions this Term continue to evidence the conservative trend of recent years. Many of the landmark decisions of the Warren Court era have been eroded. The good faith exception to the exclusionary rule and the public safety exception to *Miranda* are prime examples. In addition, the present majority appears to seek out and reverse those lower court decisions that extend constitutional protections to criminal defendants. There seems little reason to believe that this trend will not continue.