THE LATEST DIRTY DOZEN:
THE 12 WORST REHNQUIST COURT
CRIMINAL PROCEDURE DECISIONS DURING THE 1989-90 TERM

Published in *The Georgia Defender*, p. 2 (January 1991).

Author: Donald E. Wilkes, Jr., Professor of Law, University of Georgia School of Law.

The criminal procedure counterrevolution--sometimes known as the new rehnquisition--continues apace. During the U.S. Supreme Court's last Term the Court, under the leadership of Chief Justice William Rehnquist, continued along its remorseless path of handing down criminal procedure decisions that usually side with the government and take a narrow view of the rights of criminal suspects. Listed and explained below are 12 of the Court's 1989-90 Term decisions in the field of criminal procedure. These 12 decisions are, in my opinion, the worst of the 1989-90 Term's criminal procedure decisions.

Of course, not every criminal procedure decision of the 1989-90 Term was unfavorable to the cause of criminal suspects. There were a few bright spots, including: (1) James v. Illinois, 493 U. S. 307 (1990) (confession obtained from defendant in violation of 4th amendment may not be used to impeach credibility of defense witnesses); (2) Florida v. Wells, 495 U. S. 1 (1990) (inventory search of locked suitcase found in impounded automobile violated 4th amendment because state highway patrol had no policy relating to the opening of closed containers discovered in the course of an inventory search); and (3) Grady v. Corbin, 495 U. S. 508 (1990) (double jeopardy bars subsequent prosecution where the government, in order to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted), overruled, United States v. Dixon, 509 U. S. 688 (1993). Nonetheless, the 12 cases described below are, especially in view of Justice Brennan's departure, ominous portents that the criminal procedure counterrevolution is far from over.

1. *Dowling v. United States*, 493 U. S. 342 (1990) (at defendant's trial for a bank robbery committed by a man wearing a ski mask and armed with a small pistol who after exiting the bank scurried around in the street momentarily and then commandeered a passing taxi cab, part of the prosecution's case consisted of the testimony of a witness, Ms. Henry, who testified, over the defendant's objection, that approximately two weeks before the bank robbery defendant, wearing a mask with cutout eyes and carrying a small handgun had, together with a man named Christian, entered her home and tried to rob her; prior to the bank robbery trial, defendant had been tried on burglary, attempted robbery, assault, and weapons charges arising out of the Henry incident and acquitted on all counts; Henry's testimony was admitted at the bank robbery trial under Fed. R. Evid. 404(b), which provides that evidence of other crimes, wrongs, and acts may be admissible against a defendant for purposes other than character evidence; the government claimed that Henry's testimony was admissible to strengthen eyewitness identifications of defendant as the bank robber and also to link defendant with Christian, was seen near the bank shortly before it was robbed and who allegedly was to have been the getaway driver for defendant; after Henry's testimony and again in his instructions at the close of the trial the judge told the jury that defendant had been acquitted of robbing Henry and emphasized the limited purpose of

introducing Henry's testimony; the defendant was convicted; HELD, conviction affirmed; evidence otherwise admissible under Rule 404(b) is not inadmissible under double jeopardy principles"simply because it relates to alleged conduct for which a defendant has been acquitted (!)"; the defendant's acquittal of charges with respect to the Henry incident did not prove he was innocent of those charges, but only that there was reasonable doubt of his guilt; evidence is admissible under Rule 404(b) without meeting the reasonable doubt requirement, and an acquittal in a criminal case does not preclude the government from relitigating an issue when the issue is presented in a subsequent action governed by a lower standard of proof; furthermore, Henry's testimony did not violate double jeopardy protections because defendant has not shown that his previous acquittal rested on a jury finding that he did not enter Henry's home; Henry's testimony did not violate due process because it does not violate fundamental fairness principles) (White, J.) (6-3)

2. *Holland v. Illinois*, 493 U. S. 474 (1990) (during voir dire in criminal proceedings against petitioner, a white man, the venire consisted of 30 persons, only 2 of whom were black, and both of whom the prosecution had dismissed through use of peremptory challenges; HELD, the fair cross-section requirement of the 6th amendment right to an impartial jury does not protect a defendant against a prosecutor's racially motivated use of peremptory jury challenges; the judgment of the Illinois Supreme Court affirming the petitioner's conviction is affirmed) (Scalia, J.) (5-4)

3. *United States v. Verdugo-Urquidez*, 494 U. S. 259 (1990) (defendant, an alien in custody awaiting trial on federal drug charges whose Mexican residences were searched by DEA agents, lacks sufficient voluntary connections to the United States to be entitled to the protections of the 4th amendment; the use of the term "people" in the 4th amendment means that its protections, unlike those of the 5th and 6th amendments, extend only "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community (!)"; with respect to illegal aliens in the United States and 4th amendment rights, Court is only willing to "assum[e] that such aliens would be entitled to Fourth Amendment protections (!)"; the 4th amendment's "purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters (!);" "[w]ere defendant to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters (!);" the judgment of the United States Court of Appeals for the Ninth Circuit granting motion to suppress is reversed for overextending the rights of a criminal defendant) (Rehnquist, C.J.) (5-3) (Stevens, J., concurs in judgment)

4. *Maryland v. Buie*, 494 U. S. 325 (1990) (pursuant to a valid arrest warrant charging him with armed robbery, 6 or 7 armed policemen arrested the defendant at his home without incident, handcuffed him, and took him to jail; at issue is the lawfulness of a so-called "protective sweep" of the home conducted incident to the arrest; possessing a valid arrest warrant and probable cause to believe the suspect is at home, police officers are entitled to enter and search anywhere in the home in which the suspect may be found; the fact that the suspect has been found and arrested, however, does not mean that the other rooms in the house are immune from search, and police are permitted to take reasonable steps to ensure their safety after and while making the arrest; in arresting a suspect in his home pursuant to a valid arrest warrant, police, as a

precautionary matter and without probable cause or reasonable suspicion, may look in closets or other spaces immediately adjoining the place of arrest from which an attack by others could be immediately launched; and a "protective sweep"--that is, "a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of officers or others" and "narrowly confined to a cursory visual inspection of those places in which a person might be hiding"--may be conducted if the police have reasonable suspicion that the area to be "swept" harbors an individual posing danger to those on the arrest scene; the judgment of the Maryland Court of Appeals is reversed for overextending the rights of a criminal defendant; in so concluding the majority omits mentioning two embarrassing facts: first, the Maryland Court of Appeals had specifically stated that "at the time of the warrantless search, [the defendant] was safely outside the house, handcuffed and unarmed;" and second, the policeman who made the allegedly illegal "sweep" of the basement--where no one was present but where incriminating clothing was found, allegedly in plain view--had participated in surveilling the defendant's house for the three days before the arrest, and yet supplied no explanation for why he might have thought another person was in the basement) (White, J.) (7-2)

5. *Michigan v. Harvey*, 494 U. S. 344 (1990) (statement deliberately elicited from a defendant by the police in violation of the 6th amendment right to counsel and inadmissible as substantive evidence of guilt may nonetheless be used as a prior inconsistent statement to impeach the defendant's credibility if the defendant takes the stand; at several places in its opinion, the court demotes the protection against use of statements obtained in violation of the 6th amendment, which protection originated in Massiah v. United States, 377 U.S. 201 (1964), from the status of a constitutional right by referring to the protection as only a "prophylactic rule" and as an example (like the Miranda rule) of "procedural safeguards that are not themselves required by the Constitution" but are "instead measures designed to ensure that constitutional rights are protected;" the judgment of the Michigan Court of Appeals is reversed for overextending the rights of a criminal defendant) (Rehnquist, C.J.) (5-4)

6. *Butler v. McKellar*, 494 U. S. 407 (1990) (*Arizona v. Roberson*, 486 U.S. 675 (1988), which bars police from interrogating a suspect about other crimes once the suspect has received the Miranda warnings and invoked the right to counsel, and which was decided after petitioner's conviction became final, was not dictated by prior precedent and therefore is not retroactively applicable to cases on collateral review at time of Roberson decision; therefore, even though petitioner's murder conviction and death sentence rest on a confession obtained in violation of Roberson holding, petitioner may be executed; order denying §2254 habeas corpus relief is affirmed) (Rehnquist, C.J.) (5-4)

7. *Clemons v. Mississippi*, 494 U. S. 738 (1990) (the U.S. Constitution does not require that a jury impose a sentence of death or make the findings prerequisite to a death sentence, and the decision whether the death penalty is appropriate in any given case is not one required by the Constitution to be made by a jury; nor does the Constitution prohibit a judge from overriding a jury's decision to impose a life sentence and imposing a death sentence instead; nor does the Constitution require that the jury specify the aggravating circumstances that permit imposition of a death sentence; nor does the Constitution require jury sentencing even where imposition of a death sentence turns on specific findings of fact; therefore, in a case where a jury imposes a death sentence based on several aggravating circumstances and one or more of those aggravating

circumstances is invalid, the Constitution does not forbid an appellate court from reweighing the evidence and affirming the death sentence after finding that one or more remaining valid aggravating circumstances outweigh the mitigating evidence) (White, J.) (5-4)

8. *New York v. Harris*, 495 U. S. 14 (1990) (where police having probable cause to believe the suspect has committed a crime arrest the suspect, but the arrest is nonetheless violative of the 4th amendment because the suspect was arrested in his home without a warrant, incriminating statements made by the suspect while in his home under arrest are inadmissible under the 4th amendment, but incriminating statements made outside of the home--here, at the police station where defendant was taken--are admissible under the 4th amendment; the judgment of the New York Court of Appeals is reversed for overextending the rights of a criminal defendant) (White, J.) (5-4)

9. *Illinois v. Perkins*, 494 U. S. 292 (1990) (undercover law enforcement officer posing as fellow inmate need not give Miranda warnings before interrogating and obtaining incriminating statements from incarcerated suspect (!); the judgment of the Appellate Court of Illinois is reversed for overextending the rights of a criminal defendant) (Kennedy, J.) (7-1) (Brennan, J., concurs in the judgment)

10. *Alabama v. White*, 496 U. S. 325 (1990) (according to Montgomery, Alabama police, they received a telephone call from an anonymous person who supposedly said that Vanessa White would be leaving 235-C Lynwood Terrace Apartments at a particular time--although the police never said what that time was--in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about an ounce of cocaine inside a brown attache case; two plainclothes policemen then proceeded to Lynwood Terrace Apartments where they saw a brown Plymouth station wagon with a broken right taillight in the parking lot in front of the 235 building; they then observed White leave the 235 building, carrying nothing in her hands, and drive away in the station wagon; the officers then followed the wagon on a four-mile route that was the most direct route possible to Dobey's Motel; just short of the motel White was stopped by two uniformed policemen in a marked police car, and "asked" to step to the rear of her wagon; she was told that the officers suspected she had cocaine in her vehicle and supposedly voluntarily consented to a search of the car, which turned up marijuana in a brown attache case; after White was arrested 3 milligrams of cocaine were found in her purse; HELD, under the circumstances here, although this is a close case, there was reasonable suspicion and an investigatory stop of White's car was justified; the judgment of the Alabama Court of Criminal Appeals is reversed for overextending the rights of a criminal defendant) (White, J.) (6-3) Note: In his dissenting opinion, Justice Stevens said: "Millions of people leave their apartments at about the same time every day carrying an attache case and heading for a destination known to their neighbors.... This decision makes a mockery of [the 4th amendment's] protection."

11. *Michigan Dep't of State Police v. Sitz*, 496 U. S. 444 (1990) (upholding the validity, under the 4th amendment, of police drunk driver roadblocks--called by the Court "highway sobriety checkpoints"--conducted by stopping every car passing through the roadblock and questioning the driver, all without a warrant, without probable cause, without reasonable suspicion, and without any indication of criminal activity; the judgment of the Michigan Court of Appeals is

reversed for overextending the rights of a criminal defendant) (Rehnquist, C.J) (5-3) (Blackmun, J., concurs in the judgment)

12. *Maryland v. Craig*, 497 U. S. 836 (1990) (the Court phrases the issue as whether the 6th amendment confrontation clause "categorically prohibits" (!) child witnesses in child abuse criminal prosecutions from testifying against the defendant at his trial outside of the defendant's physical presence, and for the first time in history construes the confrontation clause to mean that a prosecution witness who appears at the defendant's trial may testify against the defendant outside the physical presence of the defendant; under the Maryland statutory provisions invoked and used in this case, if the trial judge after hearing specifically finds that the child witness would be traumatized by testifying in the physical presence of the defendant, he may invoke a procedure whereby the child witness, the prosecutor, and defense attorney withdraw into another room while the defendant, judge, and jury remain in the courtroom, and the child witness's testimony is then transmitted live to the courtroom via one-way closed circuit television so that the child cannot see the defendant or anything else in the courtroom; HELD, the procedures established by these statutes do not violate the confrontation clause, even though they deny the defendant a face-to-face meeting with a witness against him; "[w]e have never held ... that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial (!)"; "[a]lthough face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause,' ... we have nevertheless recognized that it is not the sine qua non of the confrontation right (!);" "we have never insisted on an actual face-to-face encounter at trial in every instance in which testimony is admitted against a defendant [citing examples of the use of hearsay evidence (!)]"); "though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers (!);" the issue, "therefore, is whether use of the [Maryland] procedure is necessary to further an important state interest, and "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court (!);" the fact that "a significant majority of States has enacted statutes to protect child witnesses ... attests to the widespread belief in the importance of such a public policy (!);" although the Maryland Court of Appeals upheld the statutory procedures at issue here, it reversed the defendant's convictions because it thought the statutory procedures could not be invoked unless the child witness is first questioned at a hearing by the judge in the defendant's presence, and also because it thought that before permitting use of one-way closed circuit television the judge should first consider less restrictive alternatives such as two-way closed circuit television; however, "we decline to establish ... any such categorical evidentiary prerequisites (!) for the use of the one-way television procedure," and therefore vacate the judgment of the Maryland Court of Appeals for having, in that respect, overextended the rights of a criminal defendant) (O'Connor, J.) (5-4) Note: In his dissenting opinion, Justice Scalia wrote: "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion."