

# Recent Criminal Procedure Decisions of the United States Supreme Court: The 1997-1998 Term

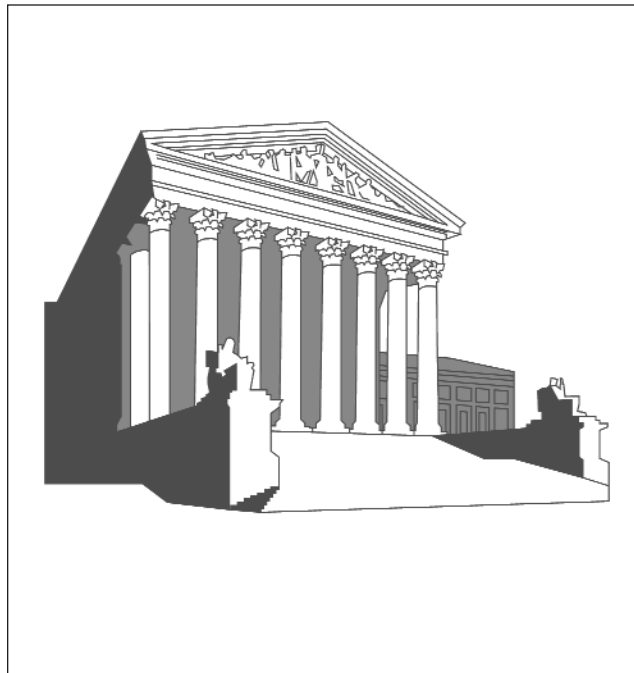
by Charles H. Whitebread

**D**uring the 1997-1998 Term, the Supreme Court ruled on a variety of significant issues affecting constitutional criminal procedure. For the most part, the Court continued its current tendency to restrict defendants' rights under the Constitution, as illustrated by its recent holdings on the Fourth Amendment, the exclusionary rule, the Sixth Amendment right to present a defense, the Eighth Amendment right against the imposition of excessive punitive fines, the Fifth Amendment privilege against self-incrimination, double jeopardy, and sentencing. However, there were a few outlying decisions, such as the ruling expanding the protections afforded criminal defendants

under the Confrontation Clause of the Sixth Amendment and the holding granting white defendants standing to challenge racial discrimination against African-Americans in the selection of a grand jury foreperson. Furthermore, two of the four rulings on issues affecting habeas corpus broke from the Court's ongoing inclination to decrease state criminal defendants' access to federal courts.<sup>1</sup>

## THE FOURTH AMENDMENT

The Fourth Amendment right against unreasonable searches and seizures was further constrained by the Rehnquist Court in *United States v. Ramirez*.<sup>2</sup> In *Ramirez*, the Court unanimously held that the Fourth Amendment does not require a stricter standard for "no-knock" entries that result in the destruction of property. In *Richards v. Wisconsin*,<sup>3</sup> the Court had held that "no-knock" searches were permissible where police had a reasonable suspicion that announcing their presence "would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." In *Ramirez*, Chief Justice Rehnquist reaffirmed that the standard announced in *Richards* was all that was necessary to justify a "no-knock" entry, regard-



less of whether property was destroyed during the entry or search. Moreover, the Court concluded that the officers' conduct in this case was reasonable in light of the fact that they had broken only one window in a garage, where they had been informed weapons were being stored.

The Court also limited the availability of the exclusionary rule as a remedy for Fourth Amendment violations. In *Pennsylvania Board of Probation and Parole v. Scott*,<sup>4</sup> the Court held 5 to 4 that the exclusionary rule did not apply in parole revocation hearings. This decision was consistent with historical reluctance to apply the exclusionary rule in contexts other than criminal trials. Writing for a bare majority, Justice

Thomas explained that the exclusionary rule "is prudential rather than constitutionally mandated" and, therefore, was "applicable only where its deterrence benefits outweigh its 'substantial social costs.'" The Court reasoned that since the use of the exclusionary rule in criminal trials already provided significant deterrence of unconstitutional searches, any deterrence effect from use of the exclusionary rule in parole revocation proceedings would be minimal. Moreover, applying the exclusionary rule in this context would "hinder the functioning of state parole systems." This decision illustrated the Court's concern with the exclusionary rule's "costly toll" upon truth-seeking and other objectives of law enforcement. In dissent, Justice Souter argued out that parole revocation proceedings, which "serve[] the same function as a criminal trial," may be the only context in which a state will seek to use evidence of a parole violation, and, therefore, the exclusionary rule should apply.

## FIFTH AMENDMENT

Continuing on its trend of confining defendants' rights within the criminal process, the Court delivered a narrow interpretation of the Fifth Amendment Self-Incrimination

Clause. In *United States v. Balsys*,<sup>5</sup> the Court held 7 to 2 that the privilege against self-incrimination was not available where a party seeks to assert the privilege out of fear of criminal prosecution by a foreign country. Justice Souter concluded that a criminal prosecution by a foreign nation not subject to our constitutional guarantees was not a “criminal case” for purposes of the Fifth Amendment privilege. Souter further explained that the Self-Incrimination Clause granted “a witness the right against compelled self-incrimination when reasonable fearing prosecution by the government whose power the Clause limits, but not otherwise.” Moreover, under domestic laws, respondent Balsys’ testimony would only have subjected him to deportation, which constitutes a civil proceeding, within which the privilege against self-incrimination may not be asserted.

### SIXTH AMENDMENT

The Court both restricted and expanded defendants’ rights under the Sixth Amendment. In one case, the Court limited a defendant’s right to present a defense with scientific evidence of questionable reliability. However, in another Sixth Amendment case, the Court reversed its course with respect to constricting criminal defendants’ rights by expanding the protections afforded under the Confrontation Clause.

In *United States v. Scheffer*,<sup>6</sup> the Court held that a per se rule against the admissibility of polygraph evidence, such as Military Rule of Evidence 707, at issue here, was not a violation of a defendant’s Sixth Amendment right to present a defense. During a court martial proceeding, respondent Scheffer was prevented by Military Rule of Evidence 707 from using exculpatory polygraph evidence in support of his argument that he did not knowingly use drugs. Scheffer challenged his subsequent conviction on the basis that Military Rule of Evidence 707 violated his Sixth Amendment right to present a defense.

The Court explained that a defendant’s right to present relevant evidence was subject to reasonable restrictions that accommodate legitimate government interests in the criminal trial process. Here, Rule 707 served to ensure that only reliable evidence was admitted at trial. States may justifiably conclude that polygraph evidence is unreliable since there is a lack of consensus in the scientific community regarding the reliability of polygraph testing. Moreover, Rule 707 ensures the preservation of the jury’s role in determining credibility (“the jury is the lie detector”). Finally, the per se ban on the use of polygraph evidence serves the legitimate government purpose of avoiding litigation that is collateral to the primary purpose of the trial.

In contrast, *Gray v. Maryland*,<sup>7</sup> expanded criminal defendants’ protections under the Sixth Amendment. In 1968, the Court had held in *Bruton v. United States*,<sup>8</sup> that despite limiting instructions, the admission of a codefendant’s out-of-court confession at a defendant’s trial, naming and incriminating the defendant, violated the defendant’s Sixth Amendment right to cross-examine witnesses. Subsequently, in *Richardson v. Marsh*,<sup>9</sup> the Court had held that a confession by a codefendant redacted so as to omit all references to the defendant fell outside of the protection afforded under *Bruton*. In *Gray*, however, the Court concluded 5 to 4 that codefendant confessions redacted only to the extent that the defendant’s name was replaced with a blank space, the word “delete,” or other symbols, fell within the protection of the *Bruton* rule, and were, thereby, inadmissible. The Court reasoned that juries would realize that a codefendant’s confession redacted in this manner refers specifically to the defendant. Moreover, substituting blank spaces or the word “delete” was likely to cause juries to pay heightened attention to the accusations within the confession and overemphasize their significance. In dissent, Justice Scalia argued for the admissibility of confessions redacted in this manner because they were not “facially incriminating.” Scalia vehemently protested that expanding the *Bruton* rule in these circumstances would “seriously compromise society’s compelling interest in finding, convicting, and punishing those who violate the law.”

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### EIGHTH AMENDMENT

The Supreme Court’s recent decisions affecting defendants’ rights under the Eighth Amendment were generally consistent with its past and continuing propensity to limit defendant’s rights in the criminal trial process.

In *Buchanan v. Angelone*,<sup>10</sup> the Court held 6 to 3 that the Eighth Amendment did not require jury instructions on mitigating evidence in a capital case. At the sentencing hearing of a defendant convicted of multiple murder as part of the same act under Virginia law, the jury was instructed that the Commonwealth must establish beyond a reasonable doubt that the defendant’s conduct was “vile” before they could impose

#### Footnotes

1. For a more in-depth analysis of the Supreme Court’s recent decisions in criminal procedure please refer to CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 1997-1998 (American Academy of Judicial Education 1998).
2. 118 S. Ct. 992 (1998).
3. 520 U.S. 385 (1997).
4. 118 S. Ct. 2014 (1998).

5. 118 S. Ct. 2218 (1998).
6. 118 S. Ct. 1261 (1998).
7. 118 S. Ct. 1151 (1998).
8. 391 U.S. 123 (1968).
9. 481 U.S. 200 (1987).
10. 118 S. Ct. 757 (1998).

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the death penalty. If the jury found that this condition was met, they were instructed to impose the death penalty only if they found that it was justified. Buchanan requested but was denied jury instructions on factors considered mitigating evidence under Virginia law. Chief Justice Rehnquist stated that the jury instructions given at Buchanan's trial were in conformity with constitutional protections because there was not a reasonable likelihood that they were applied in a manner that prevented consideration of constitutionally relevant evidence. It has

never been held that "the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." Moreover, the Court reasoned, it was highly unlikely that the jury would disregard the extensive evidence of mitigating factors presented by the defense throughout the sentencing hearing, especially when the instructions given required the jury to consider "all of the evidence."

To some degree, the decision in favor of the defendant in *United States v. Bajakajian*,<sup>11</sup> appears to be a victory for defendants' rights under the Eighth Amendment's Excessive Fines Clause. On the other hand, the standard announced for violating the Excessive Fines Clause is clearly consistent with the Court's desire to side with law enforcement. In *Bajakajian*, the Court ruled 5 to 4 that forfeiture of the full \$357,144 that respondent Hosep Bajakajian failed to report that he was transporting out of the United States pursuant to federal statute violated the Excessive Fines Clause of the Eighth Amendment. Although the defendant won, Justice Thomas announced that a violation of the Excessive Fines Clause would only occur where there was "gross disproportionality" between the severity of the crime and the value of the property seized, thereby erecting an extremely high hurdle for defendants seeking to enforce their Eighth Amendment rights. The majority felt that because Bajakajian had caused minimal harm and because he could not be characterized as the "money launderer," "drug trafficker," or "tax evader" for whom the statute was designed, full forfeiture of the \$357,144 he was attempting to transport out of the United States was grossly disproportionate to his crime. Although the dissent agreed with the "gross disproportionality standard," it criticized the majority for disdainfully downplaying the seriousness of Bajakajian's offense.

## DUE PROCESS

The Court's continuing inclination to favor law enforcement and to restrict the rights of criminal defendants is further illus-

trated by this Term's series of cases addressing due process issues, both substantive and procedural.

In *County of Sacramento v. Lewis*,<sup>12</sup> the Court unanimously held that a police officer who kills a suspect during a high speed chase must have had a purpose to cause harm unrelated to the legitimate purpose of arrest in order for his conduct to constitute an unconstitutional deprivation of the substantive due process right. Justice Souter emphasized that the threshold question is "whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." In further qualifying this standard, the Court stated that conduct intended to cause harm in a manner unjustifiable by any government interest would be the type of conduct most likely to be found to shock the conscience. The police officer in this case, on the other hand, had done nothing to cause the fleeing suspect to drive recklessly or evade law enforcement authority, rather, he was merely reacting instinctively.

Turning to issues of procedural due process, in *Ohio Adult Parole Authority v. Woodard*,<sup>13</sup> the Court held 8 to 1 that Ohio's clemency procedures did not violate due process under the Fourteenth Amendment. Respondent Eugene Woodard had challenged Ohio's clemency procedures on the basis that he was not provided timely notice of, nor allowed to have counsel present at, his clemency interview, thereby unconstitutionally depriving him of his "continuing life interest." In spite of the attempt to characterize his deprived interest as a "continuing life interest," the Court rejected Woodard's claim under *Connecticut Bd. of Pardons v. Dumschat*,<sup>14</sup> which held that refusal to commute a prisoner's life sentence did not deprive him of a protected liberty interest since his liberty interest had already been extinguished by his conviction and life sentence. The Court stressed that pardon and commutation decisions were rarely, if ever, appropriate subjects for judicial review. Moreover, an appeal for clemency is merely a "unilateral hope," not a "constitutional entitlement" or "right explicitly conferred by the State," therefore, Woodard had no reasonable expectation of clemency.

Finally, in *Hopkins v. Reeves*,<sup>15</sup> the Court held 8 to 1 that state trial courts were not required to provide jury instructions on lesser included offenses of felony murder that were not recognized under state law. Respondent challenged his felony murder conviction and death sentence on the grounds that his request for jury instructions on second degree murder and manslaughter as lesser included offenses of felony murder was improperly denied. Justice Thomas' opinion focused on distinguishing *Beck v. Alabama*,<sup>16</sup> in which the Court held that denying state juries the option of convicting a capital defendant with a lesser included, noncapital offense was unconstitutional. First, the Alabama statute at issue in *Beck* prohibited jury instructions on lesser included offenses clearly recognized under Alabama law and it did so only in capital cases. Here, on the other hand, the Nebraska trial court merely refused to

11. 118 S. Ct. 2028 (1998).

12. 118 S. Ct. 1708 (1998).

13. 118 S. Ct. 1244 (1998).

14. 452 U.S. 458 (1981).

15. 118 S. Ct. 1895 (1998).

16. 447 U.S. 625 (1980).

provide instructions on crimes the Nebraska Supreme Court had not recognized as lesser included offenses of felony murder. Second, in *Beck*, the jury's decision to convict was automatically tied to the death penalty, whereas in *Hopkins*, the jury was not required to impose a sentence.

## HABEAS CORPUS

The Supreme Court's recent decisions affecting criminal defendants' rights to habeas relief were not entirely consistent with the Court's zealous effort to restrict state criminal defendants' access to federal court. At least one decision affecting habeas, *Stewart v. Martinez-Villareal*,<sup>17</sup> stands in stark contrast to the Court's current trend in habeas jurisprudence.

The ruling in *Stewart* marks a relatively significant victory for state prisoners seeking adjudication of federally protected rights in federal courts. In *Stewart*, the Court held 7 to 2 that a habeas petitioner's claim of incompetence to be executed, after initially being dismissed as premature, was not subject to the prohibition against "second or successive" applications for habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA). Chief Justice Rehnquist rejected a literal reading of the AEDPA's prohibition against successive habeas applications. Instead, Rehnquist argued that respondent's claim of incompetence to be executed, previously dismissed as premature, "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies," since in both circumstances the habeas petitioner has not received adjudication of his claims. Justice Scalia wrote a strong dissent attacking the majority for revising "the very lathe of judge-made habeas jurisprudence [the AEDPA] was designed to repair."

In a smaller victory for criminal defendants seeking federal habeas relief, the Court unanimously held in *Trest v. Cain*,<sup>18</sup> that in reviewing a district court's habeas decision, a court of appeals was not required to raise sua sponte a habeas petitioner's potential procedural default. The Court left for another day, however, the issue of whether a court of appeals was "permitted" to raise a habeas petitioner's potential procedural default when the state itself did not do so.

The Supreme Court also decided two cases in accord with its inclination to limit the availability of federal habeas relief to state prisoners. In *Spencer v. Kemna*,<sup>19</sup> the Court held 8 to 1 that, although a habeas petitioner's release from prison did not cause his petition to become moot, the collateral consequences allegedly resulting from petitioner's parole revocation were insufficient to satisfy the injury-in-fact requirement of Article III. Justice Scalia explained that a habeas petitioner was only required to be incarcerated at the time he filed the petition. Once the petitioner was no longer in custody, there was a presumption that "some concrete and continuing injury" or "collateral consequence of the conviction" still existed for purposes of Article III. However, Scalia concluded that the presumption of continuing collateral consequences for wrongful

convictions did not extend to wrongful termination of parole status. Without the benefit of the presumption, petitioner was forced to allege specific "concrete injuries-in-fact" resulting from his parole revocation, such as, that it could be used against him in future parole or sentencing proceedings, and it could be used to impeach him as a witness in a future criminal or civil proceeding. However, all of petitioners' alleged injuries-in-fact were rejected as insufficient.

Furthermore, in *Calderon v. Ashmus*,<sup>20</sup> the Court unanimously held that an action brought by state death-row prisoners seeking injunctive and declaratory relief to determine whether California qualified under Chapter 154 of the Antiterrorism and Effective Death Penalty Act, which imposes heightened restrictions on filing for habeas relief for prisoners in qualifying states, was not a justiciable case within the meaning of Article III. Chief Justice Rehnquist reasoned that the true "controversy" between respondent and petitioner was whether respondent was entitled to habeas relief setting aside his sentence or conviction obtained under California law. Here, however, respondent was not seeking resolution of a "case or controversy," but rather attempting to determine whether California qualified under Chapter 154 in order to anticipate the best course of action in filing his habeas petition, thereby gaining a litigation advantage by obtaining an advance ruling on an affirmative defense.

## DOUBLE JEOPARDY

The Rehnquist Court also issued rulings restricting the protections afforded defendants under the Double Jeopardy Clause by narrowly defining its scope of applicability. In *Hudson v. United States*,<sup>21</sup> the Court determined that the administrative proceedings in which the Office of the Comptroller of Currency (OCC) imposed monetary penalties and debarment sanctions on petitioners for unlawful banking practices were civil proceedings for purposes of the Double Jeopardy Clause. Therefore, subsequent criminal prosecution was not unconstitutional. In concluding that the sanctions imposed by the OCC were civil in nature, the Court pointed to the language of the statute pursuant to which the sanctions were imposed as well as the fact that sanctions did not involve any "affirmative disability or restraint." Moreover, the purpose of the sanctions was to deter conduct, and deterrence serves civil as well as criminal goals. Consequently, petitioners could be criminally prosecuted for the same conduct for which the OCC penalties were imposed.

**The ruling in Stewart marks a relatively significant victory for state prisoners seeking adjudication ... in federal courts.**

17. 118 S. Ct. 1618 (1998).

18. 522 U.S. 87 (1997).

19. 118 S. Ct. 978 (1998).

20. 118 S. Ct. 1694 (1998).

21. 522 U.S. 93 (1997).

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In *Monge v. California*,<sup>22</sup> the Court further limited defendants' rights against successive prosecutions for the same offense after acquittal or conviction as well as protections against the imposition of multiple criminal punishments for the same criminal act by refusing to apply the Double Jeopardy Clause in noncapital sentencing proceedings. Justice O'Connor, writing for the 5 to 4 majority, held that the prosecution may seek

review of sentencing determinations and a defendant's sentence could be enhanced upon retrial without violating double jeopardy. The Court reasoned that sentence enhancements had never been construed as additional punishment for a past offense and sentencing determinations made in the defendant's favor could never be analogized to an acquittal, since they did not have the same qualities of constitutional finality. Although the Court had held in *Bullington v. Missouri*,<sup>23</sup> that double jeopardy principles applied in capital sentencing proceedings, the Court refused to extend this narrow exception to noncapital sentencing proceedings.

#### **SENTENCING**

The Court's lone and short ruling on sentencing upheld judges' authority under the Sentencing Guidelines to draw evidentiary conclusions beyond those drawn by the jury. In *Edwards v. United States*,<sup>24</sup> the Court unanimously held that a jury's beliefs about whether a conspiracy involved crack or cocaine were irrelevant in light of the judge's authority under the Sentencing Guidelines to consider whether defendants' offense-related activities involved either crack or cocaine.

#### **STANDING**

One of the most significant, as well as controversial, breaks from the Court's general trend of cutting off state defendants' access to federal courts was the holding of *Campbell v. Louisiana*,<sup>25</sup> in which the Court determined that a white defendant had standing to bring Equal Protection and Due Process claims for discrimination against African-Americans under Louisiana's system of selecting grand jury forepersons. In applying the three preconditions for third-party standing under *Powers v. Ohio*,<sup>26</sup> Justice Kennedy reasoned that, first, the defendant's injury in fact was the doubt cast on the integrity of the judicial system resulting from the discrimination; second, the white defendant's connection to the excluded

African-American veniremen was the common interest in eliminating racial discrimination in the selection of grand jury members; and third, the excluded veniremen had minimal incentive to assert their rights due to economic burdens. In dissent, Justices Scalia and Thomas argued that the alleged racial discrimination constituted "injury in perception" as opposed to injury in fact; and moreover, there was little, if any, connection between white defendants seeking reversal of their convictions and excluded African-American veniremen.

#### **CONCLUSION**

For the most part, the Supreme Court's decisions for the 1997-1998 Term followed the pattern established by the Court under Chief Justice Burger, in which the constitutional protections afforded defendants were narrowly defined throughout the criminal process. The Court reasserted its inclination to side with law enforcement in contexts such as the Fourth Amendment protection against unreasonable search and seizure, and the availability of the exclusionary remedy. However, there were a few small but significant victories for defendants seeking access to the federal courts and procedural protections throughout the trial process from cases addressing the Confrontation Clause, habeas corpus and standing.



*Charles H. Whitebread (A.B., Princeton University, 1965; LL.B. Yale Law School, 1968) is the George T. and Harriet E. Pflieger Professor of Law at the University of Southern California Law School, where he has taught for almost two decades. His oral presentation at the annual meetings of the American Judges Association exploring recent Supreme Court decisions on criminal procedure have been well received for many years. Professor Whitebread gratefully acknowledges the research assistance of Stephanie Zavala.*

#### **SUGGESTIONS FOR THE RESOURCE PAGE**

Each issue of *Court Review* features The Resource Page (see pages 35-36), which seeks to help judges find solutions to problems they may be facing, alert them to new publications, and generally try to provide some practical information judges can use. Please let us know of resources you have found useful in your work as a judge so that we can tell others. Write to the editor, Judge Steve Leben, 100 N. Kansas Ave., Olathe, Kansas 66061, e-mail: [sleben@ix.netcom.com](mailto:sleben@ix.netcom.com).

22. 118 S. Ct. 2246 (1998).

23. 451 U.S. 430 (1981).

24. 118 S. Ct. 1475 (1998).

25. 118 S. Ct. 1419 (1998).

26. 499 U.S. 400 (1991).