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Capital Punishment: Summary of Supreme Court Decisions During the 1997-98 Term

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ABSTRACT

Report summarizes five capital punishment cases which were decided during the 1997-98 term of the Supreme Court. The cases reveal two distinct characteristics: (1) they did not break any new ground insofar as capital punishment sentencing procedures are concerned and (2) instead of preeminence at the federal level, the Court gives considerable recognition to the traditional powers of the state to regulate crime.

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Summary

In 1972, the U.S. Supreme Court found the death penalty as written in various state laws to be “arbitrary and capricious”. Therefore, the Court found it to be unconstitutional under the Eighth and Fourteenth Amendments and subsequently, executions throughout the states were stopped. Shortly after that, states began to rewrite their capital-crime laws using the new guidelines promulgated by the Court and capital punishment was resumed in the United States. None of the cases decided during the last term (1997-98) are likely to be remembered as landmark decisions which will impact significantly on the current drift of the Court in capital punishment decisions. It held in *Breard v. Angelone* that the Eighth Amendment did not require special jury instructions on the concept of mitigation or on the statutorily defined mitigating factors and that in the context of the case, jurors were unlikely to have misunderstood their obligation to consider mitigating evidence. In the other decision on jury instructions, the Court held in *Hopkins v. Reeves* that instructions on lesser offenses are constitutionally required only if the state law recognizes them as included in the capital crime charged. In a decision that was critical of action taken by a federal court of appeals to cancel a state prisoner’s imminent execution, the Court in *Calderon v. Thompson* set an onerous standard for the appeals court to meet before it voluntarily recalls a mandate denying habeas relief to the prisoner in order to reassess the merits of the prior decision. In the *Breard v. Greene* case, the Court, noting that the procedural rules of the forum state govern the implementation of the treaty in that state, declined to halt the state’s execution of a foreign national notwithstanding claims by the prisoner and his country that state officials violated provisions of the treaty. Lastly, the Court in *Ohio Adult Parole Authority v. Woodard* decided that conferring upon the inmate the option of voluntarily participating in a pre-hearing interview with members of the parole board, without giving him immunity for his statements at the interview, did not compel the inmate to speak and, therefore, did not violate his Fifth Amendment privilege against self-incrimination.

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Background

In 1972, the Supreme Court in *Furman v. Georgia*¹ found the death penalty as written in various state laws to be “arbitrary and capricious”. The effect of this decision was to invalidate most of the existing state and federal death penalty provisions. Prior to 1972, the states generally allowed the jury to be the conscience of the community as well as the judge in determining whether or not to impose the death penalty.²

Soon after the *Furman* decision, states began rewriting their capital-crime laws using the Supreme Court’s guidelines. With these new and revised death penalty statutes,³ the Supreme Court in 1976, in *Gregg v. Georgia*,⁴ decided that capital punishment did not invariably violate the constitution. With this new trend, it was not long before more than two-thirds of the states reacted by enacting new death penalty statutes.⁵

In the same period that witnessed the expansion of capital punishment throughout the states, Congress also legislated new federal capital sentencing

¹408 U.S. 238 (1972). Although the states still had the power to impose the death penalty, the Court ruled that a statute allowing unbridled discretion in a jury to determine whether to impose the death penalty amounted to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. By invalidating the capital punishment laws of approximately 37 states, the federal government, and the District of Columbia, the ruling had a decisive effect in as much as executions ceased until January 17, 1977. See W. White, Capital Punishment’s Future, 91 Mich. L. Rev. 1429, 1429 (1993) and D. Schrader, Capital Punishment: Summary of Supreme Court Decisions on the Death Penalty, CRS Rep. No. 96-116A (Feb. 1, 1996).

²See D. Schrader, *supra* note 1, at 1.

³The revised statutes remedied the flaws of *Furman* by providing a checklist of aggravating and mitigating factors which the judge and jury could consider when determining whether the death sentence was warranted. See P. Ellsworth and L. Ross, Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionist and Retentionist, 29 Crime and Delinquency 116, 118 (1983).

⁴428 U.S. 153, 169 (1976).

⁵See D. Schrader, *supra* note 1, at 1.

procedures to overcome the constitutional infirmities and added substantially to the list of federal crimes subject to the death penalty.⁶

As a result of a series of Supreme Court cases,⁷ a standard was developed which approved procedures which minimized the heretofore subjective standards by removing the arbitrariness and capriciousness as much as possibly.⁸ The preponderance of these cases approved procedures requiring:

(1) that the sentencing authority, jury or judge, be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused (that is, “individualized capital sentencing”), and (2) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was in fact fairly imposed. The desired result is a principled way to distinguish cases in which the death penalty is deemed warranted from other cases in which it is not.⁹

Decisions During the 1997-98 Term

While the five decisions of the 1997-98 Term are not likely to be remembered as landmark, they do appear to have two distinct characteristics: (1) they did not break any new ground in so far as capital punishment sentencing procedures are concerned and (2) the Court gives considerable recognition to the conventional powers of the state to regulate crime.

In two cases¹⁰ the Court rejected the defense arguments for specific jury instructions. In two others,¹¹ the Court dealt with last-minute efforts to avoid executions and in the fifth,¹² the Court considered the constitutional implications of clemency proceedings but did not give a clear answer as to whether due process principles apply.

⁶*Id.* at 2. See, C. Doyle, Crime Control Act of 1994: Capital Punishment Provisions Summarized, CRS Rep. No. 94-721 A.

⁷See, *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 153 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976).

⁸These procedures would appear to help ensure that death penalty cases are administered fairly and impartially in accordance with due process and to minimize the risk that innocent persons may be executed.

⁹D. Schrader, *supra*, note 1, at 2.

¹⁰*Buchanan v. Angelone*, 522 U.S. 269 (1998); *Hopkins v. Reeves*, 118 S.Ct. 1895 (1998).

¹¹*Calderon v. Thompson*, 118 S.Ct. 1489 (1998); *Breard v. Greene*, 118 S.Ct. 1352 (1998).

¹²*Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244 (1998).

Buchanan v. Angelone.¹³ The petitioner Buchanan was convicted of capital murders of his father, stepmother, and two brothers. Evidence was presented during the sentencing phase of the trial regarding the petitioner’s troubled family life. The jury received instructions stating that before the death penalty could be imposed, the state first had to prove beyond a reasonable doubt the existence of the aggravating factor--the vileness of the crime--it sought to prove. The instruction added that if the jury found the vileness condition met, “then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.”¹⁴ The trial court refused the petitioner’s request to give additional instructions listing four statutory mitigating factors and explaining that if the jury found any to exist, “then that is a fact which mitigates against imposing the death penalty, and you shall consider that fact in deciding whether to impose a sentence of death or life imprisonment.”¹⁵ The court also declined to instruct the jury that, besides other mitigating factors, it should “consider the circumstances surrounding the offense, the history and background of [Buchanan] and any other facts in mitigation of the offense.”¹⁶ The jury returned a death sentence.

The petitioner contended that the trial court violated his Eighth and Fourteenth Amendment rights to be free from the arbitrary and capricious imposition of the death penalty by failing to provide the jury with express guidance on the concept of mitigation and to instruct the jury on particular statutorily defined mitigating factors.¹⁷

The Fourth Circuit Court of Appeals rejected the petitioner’s argument and it was affirmed by the Supreme Court. The Court distinguished between the “eligibility” (multiple murders) and “selection” (vileness) phases of the capital sentencing process.¹⁸ It is only in regard to the “eligibility” phase, in which the class of death-eligible defendants is narrowed, that there is a constitutional necessity for channeling and limiting the jury’s discretion so that the penalty is a proportionate punishment and therefore not arbitrary and capricious.¹⁹ In contrast, based upon the Court’s prior decisions on the “selection” phase-- the phase at issue here--where there is a “... need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination.”²⁰

The Court said “[its] consistent concern has been that restrictions on the jury’s sentencing determination not preclude the jury from being able to give effect to

¹³522 U.S. 269 (1998).

¹⁴*Id.*, at 272-73.

¹⁵*Id.*, at 273.

¹⁶*Id.*

¹⁷*Id.*, at 275.

¹⁸*Id.*

¹⁹*Id.*, at 275-76.

²⁰*Id.*, at 276.

mitigating evidence.”²¹ The instructions given in this case did not foreclose the jury’s consideration of any mitigating evidence, and the direction to base its decision on “all the evidence” afforded the jurors an opportunity to consider mitigating evidence. Furthermore, the majority concluded, the volume of mitigating evidence presented and with the instructions that they had to weigh it ensured that in terms of the constitutional test set forth in *Boyde v. California*²², there was no “reasonable likelihood” that the jurors understood the contested instructions to preclude consideration of relevant mitigating evidence.²³ Notwithstanding, “we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence.”²⁴ And indeed, the Court said, “our decisions suggest that complete jury discretion is constitutionally permissible.”²⁵

Hopkins v. Reeves.²⁶ In the second capital case on jury instructions the majority held that a state trial court is not constitutionally required to give instructions on offenses that, under state law, are not considered lesser included offenses with respect to the charged crime.²⁷

The respondent was charged in Nebraska with felony murder for killing two women who were sexually assaulted and stabbed to death. Under Nebraska law, felony murder is a form of first degree murder and renders a defendant eligible for the death penalty.²⁸ The respondent/defendant sought jury instructions on second-degree murder and manslaughter, but the trial court denied the request on the basis that the Nebraska Supreme Court has consistently held that those offenses are not lesser included offenses of felony murder.²⁹ The jury convicted the respondent of the capital crime, and a three-judge sentencing panel sentenced him to death.³⁰ On *habeas corpus* review, the Court of Appeals for the Eighth Circuit decided that the case was analogous to *Beck v. Alabama*³¹ and that the trial court erred by denying the jury the

²¹*Id.*

²²494 U.S. 370 (1990).

²³522 U.S. at 278-79.

²⁴*Id.*

²⁵*Id.*

²⁶118 S.Ct. 1895 (1998).

²⁷*Id.*, at 1897.

²⁸*Id.*, at 1898.

²⁹*Id.*, at 1898-99.

³⁰*Id.*

³¹447 U.S. 625 (1980). In *Beck*, state law left the jury with two options: convicting the defendant of a capital crime and imposing a death sentence, or acquitting him outright. Although Alabama law recognized the existence of a non-capital, lesser included offense, it forbade juries from being instructed on it.

third option of convicting the defendant on a recognized lesser included offense and therefore the state denied the respondent due process.³²

The majority described *Beck* as holding “... that a State may not erect a capital-specific, artificial barrier to the provision of instructions on offenses that actually are lesser included offenses under state law.”³³ This case is distinguishable from *Beck* in two critical respects, the majority said. The Alabama statute at issue in *Beck* “...prohibited instructions on offenses that state law clearly recognized as lesser included offenses of the charged crime, and it did so only in capital cases.”³⁴ In this case, “... by contrast, the Nebraska trial court did not deny respondent instructions on any existing lesser included offense of felony murder; it merely declined to give instructions on crimes that are not lesser included offenses.”³⁵

The Court said that the rule announced by the Court of Appeals “... limited state sovereignty more severely than the rule in *Beck*.”³⁶ “The Court of Appeals ... required in effect that States create lesser included offenses to all capital crimes by requiring that an instruction be given on some other offense--what could be called a ‘lesser related’--when no lesser included offense exists.”³⁷ “Such a requirement is not only unprecedented, but also unworkable,”³⁸ said the majority.

Calderon v. Thompson.³⁹ A common strategy to avoid the bar on successive federal habeas appeals has been to ask the appeals courts that have already upheld the death sentence to “recall the mandate” (reopen the case) and review new evidence or procedural flaws from prior hearings. In the *Calderon* case, the Court was very critical of the action the Court of Appeals for the Ninth Circuit took to stop the pending execution of a California State prisoner. The majority held that only with “clear and convincing evidence” of a defendant’s innocence could it *sui sponte* recall a mandate denying *habeas* relief to a state prisoner in order to reassess the merits of

³²*Id.*, at 1899.

³³*Id.*, at 1901.

³⁴*Id.*, at 1900.

³⁵*Id.*

³⁶*Id.*, at 1901.

³⁷*Id.*

³⁸*Id.*

³⁹118 S.Ct. 1489 (1998).

the prior decision.⁴⁰ Reversing the Ninth Circuit’s ruling, the Supreme Court said that it’s decision was tantamount to a grave abuse of discretion.⁴¹

In defining the proper standard, the Court placed emphasis on the concept of respect for states’ interest in the finality of convictions.⁴² The Court said “real finality” is necessary so the state can “execute its moral judgment in the case” and so the victims can “move forward knowing the moral judgment will be carried out.”⁴³ “[T]he State’s interests in finality are all but paramount” when, after a long process of state and federal review concluding in the denial of relief, a federal court recalls its mandate for the purpose of revisiting the merits.⁴⁴ The miscarriage of justice standard is appropriate and is consistent with the central concerns of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which set limits on successive federal *habeas* applications.⁴⁵

Breard v. Greene.⁴⁶ Following affirmance of a conviction for rape and capital murder, and denial of state *habeas corpus* petition, the defendant, who was a foreign national, filed a federal *habeas* petition. The district court dismissed the petition and the defendant appealed. In a separate proceeding, the Republic of Paraguay through its ambassador and consul general brought suit for a declaratory judgement, alleging that Virginia officials had violated the Vienna Convention by failing to notify the Paraguayan consulate of the defendant’s arrest. The petition was dismissed by the district court and it was affirmed by the Court of Appeals. Shortly, before the

⁴⁰*Id.*, at 1492. In 1983, a California jury convicted the *habeas* petitioner of rape and murder and also found the “special circumstances” of murder during the commission of the rape, thus making the petitioner eligible for death. At the jury’s unanimous recommendation, the petitioner was sentenced to death. In 1995, after affirmance of the conviction and three unsuccessful petitions for state post-conviction relief, a federal district court granted *habeas* relief from the rape conviction and the death sentence, citing what it deemed to be ineffective assistance by trial counsel. A Ninth Circuit Court of Appeals panel reversed in 1996 and denied rehearing in 1997; at the same time the Court of Appeals also stated that no active judge of the court had requested a vote on the petitioner’s suggestion for rehearing *en banc*.

After the appellate court issued its mandate denying relief, the state set an execution date. A motion by the petitioner to recall the mandate was denied; a couple of days later, however, with the execution date less than a week away, the full Ninth Circuit voted to consider *en banc* whether to recall the mandate. Shortly after that, the court, by a divided vote, recalled the mandate and reinstated the district court’s partial grant of the writ. Explaining why its actions came so late, the majority said misunderstandings within the court had prevented an earlier call for an *en banc* rehearing, and that after the problem was discovered, it put off the vote until the state courts finished with a fourth state *habeas* action. The court also stated that the recall was necessary to prevent a miscarriage of justice.

⁴¹*Id.*, at 1506.

⁴²*Id.*, at 1498.

⁴³*Id.*, at 1501.

⁴⁴*Id.*, at 1502.

⁴⁵*Id.*

⁴⁶118 S.Ct. 1352 (1998).

scheduled execution, Paraguay obtained a ruling from the International Court of Justice to the effect that the United States should seek to delay the execution.⁴⁷

In a *per curiam* opinion issued on the day of the execution, the Court's majority declined to intervene. The Court agreed with the lower courts that the prisoner had procedurally defaulted by bringing the claim too late, and Paraguay's suit was barred by the Eleventh Amendment⁴⁸ The Court also rejected the argument that the Vienna Convention claim "trumps" the procedural default rule. By international law and the treaty's own terms, said the Court, "... absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."⁴⁹

Ohio Adult Parole Authority v. Woodard.⁵⁰ The state inmate, under sentence of death for aggravated murder committed in the course of a car jacking, filed suit under 42 U.S.C. § 1983, alleging that Ohio's clemency process violated his Fourteenth Amendment due process privilege and his Fifth Amendment right to remain silent. His due process claims went to the timeliness of the notice he received regarding the clemency hearing prior to execution, the adequacy of the opportunity he had to prepare his clemency application, limitations on participation by his attorney, and the procedures governing the conduct of the hearing.⁵¹

The Court was unable to reach a decision about what Fourteenth Amendment Due Process Clause standard applies to clemency proceedings for prisoners who are facing death sentences.⁵² The case was resolved by the agreement of eight justices that the Ohio death-row inmate was not denied due process by any applicable standard.⁵³ The Court ruled that giving the inmate the option of voluntarily participating in a pre-hearing interview with members of the parole board, without giving him immunity for his statements at the interview, did not compel the inmate to speak and, therefore, did not violate his Fifth Amendment privilege against self-incrimination.⁵⁴

⁴⁷*Id.*, at 1354 (1998).

⁴⁸*Id.*, at 1354.

⁴⁹*Id.*

⁵⁰118 S.Ct. 1244 (1998).

⁵¹*Id.*, at 1248.

⁵²*Id.*, at 1246.

⁵³*Id.*, 1246-47.

⁵⁴*Id.*, at 1246.

Conclusion

None of the cases decided during the 1997-98 term are likely to be remembered as landmark decisions which will impact significantly on the current drift of the Court in capital punishment decisions. This may be due in part to a tendency of the Court to avoid deciding major constitutional issues which test the powers of the states. This notion is based upon two distinct characteristics of the five decisions : (1) they did not break any new ground in so far as capital punishment sentencing procedures are concerned and (2) instead of preeminence at the federal level, the Court gives considerable recognition to the traditional powers of the state to regulate crime. Applying the rational of *Calderon v. Thompson*, as an example, there have been very few cases which have been accepted for review by the Court which address lingering issues surrounding the 1996 Antiterrorism and Effective Death Penalty Act which sharply limits the federal appeals by death row inmates by raising the standards for overturning state decisions. Consequently, one might argue that the rulings on death penalty appeals which were decided during the last term are procedural wins for the states which may be due in part to Congress' response to complaints about the length, costly, and seemingly endless federal appeals by state death row inmates by authorizing a new fast-track procedure.

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