The Counterrevolution Enters a New Era: Criminal Procedure Decisions During the Final Term of the Burger Court

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I. INTRODUCTION

In its final term, the Burger Court continued its counterrevolution[1] in criminal procedure by issuing a series of rulings that restructure the balance between the state and the criminally accused. The elevation of Justice Rehnquist to Chief Justice and the appointment of Justice Antonin Scalia to the Court will certainly give this counterrevolution further impetus. Before making predictions, however, it is first important to identify the five major themes that have marked the Burger Court's counterrevolution in criminal procedure and demonstrate how these themes were illustrated by various decisions this term during the 1985-86 term.

The first of these five themes is that the majority of the Court is committed to the crime control model of the criminal justice system. The majority is eager to accommodate the perceived needs of law enforcement and to assist the police by eliminating legal obstacles whenever possible. Unlike the Warren Court, the Burger Court has generally presumed the regularity of police conduct. Consequently, the Court places a heavy burden on a criminal defendant to demonstrate the unlawfulness of police conduct. While the Warren Court was often concerned with bridging the gap between its perception of police practices and the constitutional ideal, the Burger

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1. This article presents the substance of Professor Whitebread's address at the Tenth Annual Law Review Banquet, and is the third in a series of articles describing the counterrevolution in American criminal procedure. Whitebread, *The Burger Court's Counter-revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 47-98 (1985); Whitebread, *The Counter-Revolution in Criminal Procedure*, 24 JUDGES J. 41-3 (1985).

Court has believed that actual police practices generally comply with the constitutional ideal.

The second theme which has marked the Burger Court counterrevolution is that certain constitutional rights of a criminal defendant are considered less important than others. This hierarchy or ranking of rights is determined by asking how much impact does the right in question have on the issue of the defendant's guilt or innocence? Because the Court views convicting the guilty as the ultimate mission of the criminal justice system, rights which most impact the determination of guilt are accorded higher status. Thus, the right to jury trial, the right to counsel, and the right to public trial have received close scrutiny from the Burger Court. The fifth amendment right to be free from compelled self-incrimination receives somewhat less scrutiny, especially when it involves the prophylactic rules of *Miranda*, as opposed to a truly involuntary confession. At the bottom of the hierarchy is the fourth amendment right prohibiting unreasonable searches and seizures. The Burger Court clearly has taken a negative view of the fourth amendment and its unpopular exclusionary remedy because the Court believes they interfere with, and sometimes contradict, the Court's view of the mission of the criminal justice system; to convict the guilty and acquit the innocent.

The third theme of the Burger Court has been a preference for analyzing issues on a case-by-case basis rather than announcing clear-cut rules in criminal decisions. The Court has been reluctant to set forth any rules, perhaps because of its own difficulty in reaching any broad consensus beyond the decision in the case before it. For example, the Court's decisions have even blurred formerly well-established rules such as the need to give *Miranda* warnings. While the Court apparently is trying to be supportive of law enforcement concerns, the Court's preference for case-by-case decision making will actually work, in the long run, to the detriment of police officers, trial courts, and criminal justice practitioners who will all be at a loss as to what police may lawfully do.

The fourth theme of the Burger Court is related to all the others, and perhaps explains the Burger Court's preference for case-by-case adjudication. The fourth theme is that the constitutional claims of a defendant are often subsidiary, in the Court's view, to the issue of whether or not the defendant is in

fact guilty. This theme has created not only a fact-specific style of argument before the Court, but it has also resulted in the development and refinement of various fact-specific legal doctrines such as inevitable discovery and harmless error.

The fifth and final theme of the Burger Court counterrevolution has been the institution of a new federalism and the transfer of power from federal courts to state courts to interpret the meaning of constitutional rights in state criminal cases. The Burger Court has been so successful in closing the doors of the federal courts to state prisoners that the fifth theme has almost been dormant in recent years, although the Court this term made several important pronouncements in this area. This theme is important because it is perhaps the Burger Court's most enduring legacy in the area of criminal justice. By limiting the access of state prisoners to federal *habeas* review, the Burger Court has effectively insulated state criminal convictions from federal court oversight and thereby granted state judges considerable authority to interpret the Federal Constitution. The long-term implications of this theme are obvious.

II. THE CRIME CONTROL MODEL

The crime control model of criminal justice has clearly been a predominant theme of the Burger Court and has gained considerable momentum since the appointment of Justice O'Connor. Several significant cases during the final term have demonstrated the Burger Court's determination to assist law enforcement personnel, especially in their battles against drug traffickers. In addition, the Court has also illustrated its crime control mentality by trying to assist prosecutors in several ways during the 1985-86 term.

The two aerial search cases during the final term are prime examples of the Court's crime control mentality at work. In *California v. Ciraolo*,[2] the Court held that a warrantless, naked-eye observation of a field by police officers flying at 1000 feet in a small aircraft did not constitute a search under the fourth amendment. Similarly, in *Dow Chemical Co. v. United States*,[3] the Court held that the government's warrantless taking of aerial photographs was not a search under the fourth amendment.

2. 106 S.Ct. 1809 (1986).
3. 106 S.Ct. 1819 (1986).

In *Ciraolo*, police officers received an anonymous tip that marijuana was growing in Ciraolo's backyard.[4] Police officers were unable to view the contents of the yard because it was enclosed by both a 6-foot fence and a 10-foot inner fence. The officers then obtained a private plane, flew over the yard and determined marijuana was growing. A search warrant was then obtained to seize the marijuana plants. Ciraolo was later convicted of cultivating marijuana. The California Court of Appeal reversed the conviction on the ground that the warrantless aerial observation of Ciraolo's yard violated the fourth amendment.

The Supreme Court, in a 5-4 decision, reversed, holding that Ciraolo had no constitutionally protected expectation of privacy as to his "unlawful agricultural pursuits."[5] The Court asserted that Ciraolo's expectation of privacy was unreasonable because anyone flying in the airspace "could have seen everything that these officers observed."[6] Thus police traveling in the airways are not required to obtain a warrant "in order to observe what is visible to the naked eye."[7]

In *Dow*, the Court approved the taking of aerial photographs of an industrial plant complex. The Court held 5-4 that the open areas of Dow's industrial plant complex are similar to an open field which is "open to the view and observation of persons in aircraft lawfully in the public airspace."[8] As such, the taking of aerial photographs by the Environmental Protection Agency did not constitute a search for purposes of the fourth amendment.

Although the decision in *Dow* is indicative of the crime control mentality, the Court emphasized that its holding was limited to aerial observation and photographing of an outdoor commercial facility.

In another fourth amendment case, *New York v. Class*,[9] the Court also demonstrated its commitment to the crime control model of criminal justice. In *Class*, the Court held 5-4 that a police officer can constitutionally reach into an automobile to move papers in order to observe the car's Vehicle Identification Number (VIN). The Court indicated that the police officer's

4. *Id.* at 1810.
5. *Id.* at 1812-13.
6. *Id.* at 1813.
7. *Id.*
8. *Dow*, 106 S. Ct. at 1826.
9. 106 S.Ct. 960 (1986).

actions were not unreasonable especially in light of the pervasive regulation of automobiles and the lesser expectation of privacy citizens have in cars, boats, planes, trains, and, since 1985, motorhomes. Clearly, the Court's opinion was designed to be supportive of law enforcement personnel. Indeed, the Court indicated that any other result in the case "would expose police officers to potentially grave risks without significantly reducing the instrusiveness of [their] ultimate conduct."[10]

Several other cases during the final term reflect the Court's crime control model of criminal procedure and demonstrate the Court's desire to assist not only police officers, but also prosecutors in their efforts to convict the guilty. For example, in *United States v. Inadi*,[11] the Court held 7-2 that the Confrontation Clause of the sixth amendment does not require a prosecutor to show that a co-conspirator is unavailable as a condition for admitting the co-conspirator's out-of-court statements. The majority emphasized that requiring prosecutors to make a showing of unavailability would detract from the "truth-determining process," while at the same time it would impose a substantial burden on the entire criminal justice system.[12] In explaining its decision, the Court discussed the law enforcement concerns which influenced the result:

> [A]n unavailability rule places a significant practical burden on the prosecution. In every case involving co-conspirator statements, the prosecution would be required to identify with specificity each declarant, locate those declarants, and then endeavor to ensure their continuing availability for trial. Where declarants are incarcerated there is the burden on prison officials and marshals of transporting them to and from the courthouse, as well as the increased risk of escape. For unincarcerated declarants the unavailability rule would require that during the sometimes lengthy period before trial the Government must endeavor to be aware of the whereabouts of the declarant or run the risk of a court determination that its efforts to produce the declarant did not satisfy the test of "good faith."[13]

The Court also assisted prosecutors during the final term

10. *Id.* at 968.
11. 106 S. Ct. 1121 (1986).
12. *Id.* at 1128.
13. *Id.*

in a case dealing with jury selection. In *Lockhart v. McCree*,[14] the Court held 6-3 that the fair cross-section and impartial jury rights guaranteed by the sixth amendment are not violated by the exclusion, prior to the guilt phase, of prospective jurors who are strongly opposed to death penalty. The Court rejected as unpersuasive numerous studies introduced by McCree to show that "death-qualified" juries are prone to convict defendants.[15] Even assuming that such juries are more conviction prone, the Court held that death-qualified juries do not violate the sixth amendment. Justice Marshall's dissent accused the Court of approving "a practice that allows the state a special advantage in those prosecutions where the charges are the most serious and the possible punishments, the most severe."[16]

The Court's most significant double jeopardy case during the final term also reflects the crime control model of criminal justice. In *Heath v. Alabama*,[17] the Court held that successive prosecutions by two States for the same conduct are not barred by the double jeopardy clause. The Court rejected the defendant's contention that successive prosecutions should only be permitted when the different states have different interests in bringing a defendant to justice: "A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws."[18]

III. THE HIERARCHY OF CONSTITUTIONAL RIGHTS

As discussed previously, the Burger Court has created a hierarchy of rights; rights perceived to have significant impact on the determination of guilt at trial receiving more scrutiny, and rights which are deemed merely prophylactic or which the Court believes may actually impede the quest for accurate fact finding. In the instant term, the Court has added a new wrinkle to this ranking of rights by placing a series of cases dealing with racial discrimination at the top of the hierarchy. Throughout these decisions, the Court indicated that racial discrimination in the criminal justice system can impact not only the

14. 106 S.Ct. 1758 (1986).

15. *Id.* at 1763-64.

16. *Id.* at 1780-81.

17. 106 S.Ct. 433 (1986).

18. *Id.* at 440.

determination of guilt but also the public perception of the system's fairness.

The Court first held, in *Vasquez v. Hillery*,[19] that systematic racial discrimination in the selection of the grand jury that indicted a defendant requires reversal of the defendant's conviction. In a strongly-worded opinion, the Court rejected the notion that the harmless error doctrine should be applied to claims of grand jury racial discrimination, which the Court referred to as "a grave constitutional trespass."[20] The Court stressed the tremendous power of grand juries to alter charges, to charge multiple counts or a single count, and to charge a capital or non-capital offense, and concluded that racial discrimination in the selection of a grand jury "undermines the . . . integrity of the criminal tribunal itself."[21]

In another strongly-worded opinion, the Court invalidated a prosecutor's use of peremptory challenges to exclude members of a defendant's race from a petit jury. In *Batson v. Kentucky*,[22] the Court concluded that the equal protection clause forbids a prosecutor from using peremptory challenges to exclude potential jurors solely on account of their race. Such a practice denies the defendant the protection a jury is designed to afford, robs potential jurors of their right to serve as jurors and "undermine[s] public confidence in the fairness of our system of justice."[23]

Under *Batson*,[24] a defendant may establish a *prima facie* case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.[25] The defendant must show that he is a member of a cognizable racial group; that the prosecutor used peremptory challenges to remove from the venire members of defendant's race; and, the defendant must show that the facts and circumstances create an inference that the prosecutor excluded veniremen on account of their race. Once such a showing is made, the burden shifts to the State to advance a neutral explanation for the exclusion of jurors. Absent a neu-

19. 106 S.Ct. 617 (1986).

20. *Id.* at 624.

21. *Id.* at 623.

22. 106 S.Ct. 1712 (1986).

23. *Id.* at 1718-21.

24. *Id.* at 1722-23.

25. *Id.* at 1723.

tral explanation, the defendant's conviction must be reversed.[26]

In *Turner v. Murray*,[27] a case decided the same day as *Batson*, the Court held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the victim's race and entitled to *voir dire* questioning regarding the issue of racial prejudice. The divided Court found significant that the defendant was charged with a capital crime and that the jury in such a case is called upon to make a subjective judgment regarding an appropriate punishment. According to the Court, the range of discretion such a jury has at sentencing presents a "unique opportunity for racial prejudice to operate but remain undetected."[28] The risk of racial prejudice during a capital sentencing proceeding is "especially serious in light of the complete finality of the death sentence."[29] Because of this, a capital defendant accused of an interracial crime is entitled, upon request, to have prospective jurors questioned regarding racial basis.

In addition to the racial discrimination cases during the final term, the Court also decided several cases which indicate the primacy of the sixth amendment's trial-related rights in the Court's hierarchy. For example, in *Maine v. Moulton*,[30] the Court held 5-4 that the sixth amendment right to counsel was violated by police when they arranged to record conversations between an indicted defendant and his co-defendant. The Court emphasized the importance of the right to counsel, indicating that it is "indispensable" to the system of criminal justice because it "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding."[31] The Court thus held unconstitutional the state's "knowing exploitation" of the "accused's right to have counsel present in a confrontation between the accused and a state agent."[32]

In another right to counsel case, *Michigan v. Jackson*,[33] the Court held that once a defendant requests counsel, police may not initiate interrogation until counsel has been made available to the suspect. Relying on the "bright-line rule" of

26. *Id.*
27. 106 S.Ct. 1683 (1986).
28. *Id.* at 1687.
29. *Id.* at 1688.
30. 106 S.Ct. 477 (1986).
31. *Id.* at 483-84.
32. *Id.* at 487.
33. 106 S.Ct. 1404 (1986).

Edwards v. Arizona,[34] the majority held that a defendant's right to counsel at a post-arraignment, custodial interrogation was clear beyond doubt.[35] The only issue, according to the Court, was whether the defendants had validly waived their right to counsel by signing written waivers. Relying on the "presumption against waiver of fundamental constitutional rights," the Court concluded that the written waivers were insufficient to allow police-initiated interrogation after the defendants requested counsel.[36]

One of the last cases during the final term, *Kimmelman v. Morrison*,[37] contains one of the Court's clearest expressions of its hierarchy of rights. In *Kimmelman*, the Court held that the limitations on *habeas* review of fourth amendment claims should not be extended to apply to sixth amendment claims. The Court noted that the sixth amendment right to counsel is "beyond question a fundamental right" which is essential to a fair trial and all of the accused's other constitutional rights.[38] However, fourth amendment rights, especially when coupled with the judicially created exclusionary rule, are not designed to ensure the fairness of a criminal trial and are therefore subject to a lesser scrutiny. Thus, fourth amendment claims cannot be reviewed in a federal *habeas* petition when the petitioner has been afforded a full and fair opportunity to raise his claims in state court.[39] By contrast, sixth amendment claims of ineffective assistance of counsel when raised in a *habeas* petition are not limited in the same manner. The Court explained: "Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some sixth amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation."[40]

Fifth amendment claims in the final term continued to receive less scrutiny than sixth amendment cases. In addition, the Court continues to place more importance on fifth amendment cases that involve issues of the voluntariness of confessions, as opposed to those cases involving *Miranda*-based

34. 451 U.S. 477 (1981).
35. *Michigan*, 106 S. Ct. at 1407.
36. *Id.* at 1409 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
37. 106 S.Ct. 2574 (1986).
38. *Id.* at 2583.
39. Stone v. Powell, 428 U.S. 465 (1976).
40. *Kimmleman*, 106 S. Ct. at 2585.

claims. With regard to voluntariness, the Court first held 8-1, in *Miller v. Fenton*,[41] that the voluntariness of a confession is an issue of law upon which a federal court must make an independent determination, even in a *habeas* proceeding. The Court emphasized that the issue of whether a confession is voluntary involves the Due Process Clause and its guarantee of "fundamental fairness."[42] Relying on "nearly a half century of unwavering precedent," and congressional intent, the Court concluded that, in the context of confessions, independent federal review of the voluntariness of confessions is required.[43]

In another voluntariness case, the Court in *Crane v. Kentucky*[44] held that the trial court denied the defendant's right to present a defense by refusing to admit evidence regarding the environment in which police secured his confession. The trial court excluded such evidence after making the determination that the confession was voluntary. In a sharply-written unanimous opinion, the Supreme Court reversed, explaining that the environment in which a confession is secured is relevant not only to the determination of voluntariness but also to the reliability and credibility of the confession.[45] Accordingly, a blanket exclusion of profferred evidence regarding the circumstances of a confession deprives the defendant of his right to a fair trial.

In another unanimous decision, the Court in *Wainwright v. Greenfield*[46] condemned a prosecutor's use of the defendant's silence after receiving *Miranda* warnings to counter defendant's claim of insanity. Relying on *Doyle v. Ohio*,[47] the Court concluded that due process is violated whenever a prosecutor uses a defendant's silence after *Miranda* warnings as evidence against him either for impeachment or as evidence of sanity.[48] The Court reiterated that the *Miranda* warnings contain an implied promise, rooted in the Constitution, that "silence will carry no penalty."[49]

In a case which raised both fifth and sixth amendment

41. 106 S.Ct. 445 (1986).
42. *Id.* at 453.
43. *Id.* at 454.
44. 106 S.Ct. 2142 (1986).
45. *Id.* at 2146.
46. 106 S.Ct. 634 (1986).
47. 426 U.S. 610 (1976).
48. *Greenfield*, 106 S. Ct. at 639.
49. *Id.* at 641 (quoting *Doyle*, 426 U.S. at 618).

claims, *Moran v. Burbine,*[50] the Court rejected challenges to the defendant's waiver of his fifth and sixth Amendment rights. The defendant executed a series of written waivers and confessed to the murder of a young woman. At no point did he request an attorney, although his sister had obtained an attorney without his knowledge. Also unbeknownst to the defendant, the attorney called the police station and advised the detectives that she was representing the defendant. She was assured that the police would not be questioning the defendant or putting him in a lineup that evening. An hour later, the defendant was questioned by police, signed written waivers of his rights and signed three statements admitting the murder.[51]

The Court majority concluded that the defendant's waiver of his rights was valid notwithstanding the failure of the police to inform him of the telephone call from his attorney.[52] The Court rejected the defendant's contentions that the values underpinning *Miranda* require reversal of a conviction when the police mislead an attorney or fail to inform a suspect of an attorney's efforts to reach him.[53] The Court noted that the *Miranda* warnings are not constitutional rights themselves but are instead only measures designed to protect the right against compelled self-incrimination.[54]

As noted previously, the fourth amendment claims raised in *California v. Ciraolo,*[55] *Dow v. United States,*[56] and *New York v. Class*[57] all received short shrift from the Court. In one other significant fourth amendment case, *New York v. P.J. Video,*[58] the Court rejected the contention that a higher probable-cause standard is mandated when issuing warrants to seize such things as books or movies under obscenity statutes. Although the Court "recognized that the seizure of films or books . . . implicates First Amendment concerns," the Court nonetheless held that no higher probable-cause standard is required.[59] The seizure of films or books requires the same probable cause showing as with other evidence, namely, a

50. 106 S.Ct. 1135 (1986).
51. *Id.* at 1139.
52. *Id.* at 1141-42.
53. *Id.* at 1143.
54. *Id.* (citing New York v. Quarles, 467 U.S. 649 (1984)).
55. *See supra* note 2 and accompanying text.
56. *See supra* note 3 and accompanying text.
57. *See supra* note 9 and accompanying text.
58. 106 S.Ct. 1610 (1986).
59. *Id.* at 1614.

showing of a probability or substantial chance of criminal activity.[60]

IV. CASE-BY-CASE REVIEW

The Burger Court's tendency to avoid rule-oriented decisions has been a constant source of criticism. Although the Court states that it wants to be supportive of law enforcement, at the same time it has unnecessarily blurred previously bright-line rules governing law enforcement conduct.

The Burger Court's preference for case-by-case decision-making was expressed clearly during the final term by the retiring Chief Justice himself in his concurrence in *Michigan v. Jackson*.[61] In the case, the Court majority continued the bright-line rule of *Edwards v. Arizona*[62] by holding that once an accused requests appointment of counsel, no further interrogation may be initiated by the police. Expressing his reluctance to join the Court's decision, Chief Justice Burger wrote:

> The urge for "bright-line" rules readily applicable to a host of varying situations would likely relieve this Court somewhat from more than a doubling of the Court's work in recent decades, but this urge seems to be leading the Court to an absolutist, mechanical treatment of the subject. At times, it seems, the judicial mind is in conflict with what behavioral and theological-specialists have long recognized as a natural human urge of people to confess wrongdoing.[63]

One notable example of the confusion resulting from the Court's case-by-case approach is the *Dow* case involving aerial photography of an industrial plant.[64] The Court asserted that Dow's outdoor manufacturing facility was more like an "open field" as opposed to the curtilage of the plant.[65] Left unanswered, however, is the critical question of where curtilage ends and the open field begins. The Court even admits that Dow's plant "fall[s] somewhere between 'open fields' and curtilage" while "lacking some of the critical characteristics of both."[66] Yet, the Court leaves police, practitioners and trial

60. *Id.* at 1615.
61. 106 S. Ct. 1404, 1411 (1986) (Burger, C.J., concurring).
62. 451 U.S. 477 (1981). *See also supra* note 34 and accompanying text.
63. *Michigan*, 106 S. Ct. at 1411 (Burger, C.J., concurring).
64. *See supra* note 3 and accompanying text.
65. *Dow*, 106 S. Ct. at 1827.
66. *Id.* at 1825-26.

courts guessing as to how the decision in *Dow* was reached and how to determine in future factual situations whether an area is more like open fields or more like curtilage. In addition, the Court fails to provide any guidance for future cases where the photography is part of a criminal, as opposed to regulatory, investigation or where significant enhancement and magnification of human vision is employed. The lingering questions remaining as a result of *Dow* clearly demonstrate the drawbacks of the Court's case-by-case approach.

Two other cases during the final term demonstrate the Court's preference for case-by-case analysis as opposed to rule-oriented decisions. First, in *Holbrook v. Flynn*,[67] the Court held that claims of prejudice from the presence of security guards at trial should be analyzed on a case-by-case basis. Unfortunately, the Court does not offer any guidance as to when the presence of uniformed guards becomes prejudicial.

Similarly, in *McMillan v. Pennsylvania*,[68] the Court explicitly acknowledges that it is not providing any guidance as to when a statute is unconstitutional for violating the due process standards enunciated in *In re Winship*.[69] Although the majority in *McMillan* upheld Pennsylvania's Mandatory Minimum Sentencing Act, Justice Rehnquist admitted that the Court was unable to lay down any "bright line" test for determining the constitutionality of a statute, and that future situations may depend on "differences of degree."[70] Differentiating between degrees, however, requires some guidance, but the Court fails to provide any.

V. THE IMPORTANCE OF FACTUAL GUILT

One of the overriding themes of the Burger Court's counter-revolution in criminal procedure has been the Court's emphasis on the factual guilt of the particular defendant challenging a conviction. One of the outgrowths of the Court's emphasis on factual guilt has been the harmless error doctrine, which was significantly expanded this term.

For example, in *United States v. Lane*,[71] the Court held that misjoinder of defendants in violation of the Federal Rules

67. 106 S.Ct. 1340 (1986).
68. 106 S.Ct. 2411 (1986).
69. 397 U.S. 358 (1970).
70. 106 S.Ct. at 2413-20.
71. 106 S.Ct. 725 (1986).

of Criminal Procedure is subject to harmless error analysis and does not require reversal unless the prejudice from misjoinder influences the jury's verdict. The Court proceeded to apply the harmless error analysis to the facts in *Lane* and concluded that "[i]n the face of overwhelming evidence of guilt shown here, . . . the claimed error was harmless."[72]

In *United States v. Mechanik*,[73] the Court extended the harmless error doctrine to a case where two witnesses appeared and testified simultaneously before the grand jury which indicted the defendants. The joint appearance and testimony before the grand jury violated the Federal Rules of Criminal Procedure. The Court concluded that the petit jury's guilty verdict against the defendants demonstrated that there was probable cause to indict the defendants and that the joint testimony before the grand jury was therefore harmless.[74] In reaching its decision, the Court explained that a rule of automatic reversal entails substantial social costs which should only be borne when an error affects the determination of guilt or innocence.[75] Justice Rehnquist wrote for the majority:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The "[p]assage of time, erosion of memory, and disperson of witnesses may render retrial difficult, even impossible." Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from the prosecution," and thereby "cost society the right to punish admitted offenders." Even if a defendant is convicted in a second trial, the intervening delay may compromise society's "interest in the prompt administration of justice," and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the

72. *Id.* at 732.
73. 106 S.Ct. 938 (1986).
74. *Id.* at 942.
75. *Id.*

outcome of the trial.[76]

In *Delaware v. Van Arsdell*,[77] the Court again expanded the harmless error doctrine to apply to cases where a defendant is unconstitutionally denied his right, under the confrontation clause, to impeach a witness for bias. In *Van Arsdell*, the trial judge had improperly prohibited the defendant from cross-examining a witness who may have been biased as a result of the State's dismissal of pending criminal charges against the witness.[78] The Court agreed that the limitation on cross-examination violated the defendant's rights under the confrontation clause. However, the Court reaffirmed its prior holding in *Chapman v. California*[79] that certain constitutional errors may be harmless, including the denial of a defendant's right to cross-examine a witness for bias.[80] The Court remanded the case to the Delaware courts to determine whether the error was harmless beyond a reasonable doubt.

The importance the Court attaches to factual guilt also showed itself in *Morris v. Mathews*.[81] In *Morris*, the Court held that a conviction barred by the double jeopardy clause can be remedied by reducing the conviction to a lesser-included offense that is not jeopardy barred. Although the Court expressly stated that the case was not subject to harmless error analysis, the Court's decision indicates that a fact-oriented analysis of a defendant's guilt must be undertaken to determine the appropriate remedy for the double jeopardy clause violation. The Court indicated that, when a state seeks to remedy a double jeopardy violation by reducing the conviction to a lesser included offense, the burden shifts to the defendant.[82] In order to obtain a new trial, the defendant must show a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense, but for the presence of the jeopardy-barred offense.[83] The standard adopted by the Court necessitates that a reviewing court consider the strength of the evidence establishing the defendant's guilt to

76. *Id.* at 942-43 (citations omitted).

77. 106 S.Ct. 1431 (1986).

78. *Id.* at 1433.

79. 386 U.S. 18 (1967) (announcing harmless-error standard to be applied).

80. *Van Arsdell*, 106 S. Ct. at 1436.

81. 106 S.Ct. 1032 (1986).

82. *Id.* at 1038.

83. *Id.*

determine whether or not there is a reasonable probability that he would not have been convicted.

In one of the final decisions of the Burger Court, *Kuhlmann v. Wilson*,[84] a plurality of the Court held that a "successive," or second, *habeas* petition must be denied unless the petitioner supplements his constitutional claims with "a colorable showing of factual innocence."[85] Moreover, when considering whether a petitioner has made a sufficient showing of innocence, a court should review all probative evidence of guilt or innocence, even evidence illegally admitted.[86] The Court's emphasis on factual guilt was thus clearly demonstrated in *Kuhlmann*.

VI. THE NEW FEDERALISM

One of the most significant changes implemented by the Burger Court in the area of criminal procedure is the great deference which is now paid to state court decisions regarding constitutional rights. In case after case, the Court has limited the ability of convicted individuals to obtain collateral review of their convictions through the writ of *habeas corpus*. For example, in *Stone v. Powell*,[87] the Court announced that a convicted individual cannot raise fourth amendment claims in a habeas petition when the state has already given the individual a full and fair hearing on those claims. In other cases, the Court has indicated that various factual determinations made in state courts are entitled to a presumption of correctness in federal *habeas* cases. The doors of the federal courts were shut so dramatically by the Burger Court that in the last several years only a small number of *habeas* cases have been decided by the Court. Late in the final term, however, the Court handed down several significant *habeas* decisions which confirm that the federal courthouse doors are shut, although not completely.

In two *habeas* cases, the Court revisited *Wainwright v. Sykes*,[88] in which the Court held that a federal *habeas* petitioner, who has failed to comply with state procedures for raising a constitutional claim, cannot litigate the constitutional

84. 106 S.Ct. 2616 (1986).
85. *Id.* at 2627.
86. *Id.* at 2622-24.
87. 428 U.S. 465 (1976).
88. 433 U.S. 72 (1972).

claim in a federal *habeas* proceeding unless he can show cause for his procedural default and prejudice attributable thereto.

In *Smith v. Murray*,[89] the Court held 5-4 that a deliberate, tactical decision by counsel does not constitute cause for a procedural default under the *Wainwright v. Sykes* standard.[90] Justice O'Connor wrote, "Our cases . . . leave no doubt that a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a state's legitimate rules for the fair and orderly disposition of its criminal cases."[91] The Court emphasized that the petitioner's counsel had deliberately decided to abandon on appeal his objections to the admission of certain testimony.[92] The deliberate nature of the decision to not pursue this issue was dispositive on the "cause" requirement, according to the majority.[93]

Similarly, in *Murray v. Carrier*,[94] the Court held 7-2 that a federal *habeas* petitioner cannot show cause for a procedural default in state court merely by establishing that competent defense counsel inadvertently failed to recognize or raise a particular substantive claim. Unless defense counsel's performance was constitutionally ineffective, mere error or inadvertence by an attorney does not establish cause under *Wainwright v. Sykes*.[95] Justice O'Connor, writing for five members of the Court, explained that the cause-and-prejudice limitation on federal *habeas* review was designed to reduce the enormous societal costs of *habeas* intervention, including the "reduction in the finality of litigation and the frustration of 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' "[96]

Interestingly, the Court in *Murray v. Carrier*,[97] also indicated, in what may be dicta, that the cause-and-prejudice limitation is not absolute. The majority asserted the "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting

89. 106 S.Ct. 2661 (1986).

90. 433 U.S. 72 (1977) (cause and prejudice rule requires court to defer to state court judgments when decisions rest on independent state grounds).

91. *Smith*, 106 S. Ct. at 2666.

92. *Id.*.

93. *Id.*

94. 106 S.Ct. 2639 (1986).

95. *See supra* note 90 and accompanying text.

96. *Carrier*, 106 S. Ct. at 2645.

97. *Id.* at 2642-50.

a fundamentally unjust incarceration.' "[98] Thus, according to Justice O'Connor, in an "extraordinary case," in which a constitutional error resulted in the conviction of an innocent person, a federal *habeas* court may grant the writ "even in the absence of a showing of cause for the procedural default."[99]

Perhaps the Court wanted to indicate that the federal courthouse doors are still open to correct manifest injustice, but closed to repetitive, inconsequential claims of those who are, without doubt, guilty.

While the Court in *Murray v. Carrier*[100] suggested that the federal courts are still open for certain *habeas* claims, in *Kimmelman v. Morrison*[101] and *Miller v. Fenton*,[102] the Court clearly held that the federal writ of *habeas corpus* is not a dead letter. As discussed earlier, the Court in *Kimmelman* held that sixth amendment claims of ineffective assistance of counsel are not governed by the restrictions that *Stone v. Powell*[103] imposes on fourth amendment claims. Justice Brennan, writing for six Justices in *Kimmelman*, explained that *Stone* dealt "merely" with the exclusionary rule as opposed to the "fundamental right of criminal defendants" to have counsel.[104]

In *Miller v. Fenton*,[105] the Court held that the voluntariness of a confession is a legal question requiring an independent federal determination. Thus, a state court's determination of voluntariness is not an issue of fact entitled to a presumption of correctness in a federal *habeas corpus* proceeding. The Court held that "the ultimate question whether, under the totality of the circumstances, [a] challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination."[106] The Court pointed out that the voluntariness of a confession has traditionally been subject to an independent federal determination, that Congress did not intend voluntariness to be a factual issue, and that the nature of the inquiry itself leads to the conclusion that voluntariness is a legal question

98. *Id.* at 2646.

99. *Id.* at 2646-47.

100. *See supra* note 94 and accompanying text.

101. *See supra* note 37 and accompanying text.

102. *See supra* note 41 and accompanying text.

103. *See supra* note 39 and accompanying text.

104. *Kimmelman*, 106 S. Ct. at 2584.

105. *See supra* notes 41, 102 and accompanying text.

106. *Fenton*, 106 S. Ct. at 450.

meriting independent consideration.[107] Moreover, because confessions frequently occur in a secretive, inherently coercive environment, the Court indicated that independent federal review more adequately protects the fourteenth amendment's guarantee of fundamental fairness.[108]

VII. CONCLUSION

The Burger Court clearly has had a different approach from the Warren Court with regard to the rights of the criminally accused. Indeed, in many significant respects, a counterrevolution in criminal procedure has occurred in reaction to the Warren Court's expansion of defendants' rights. Yet, the counterrevolution has never been sweeping or complete. In fact, a number of cases during the final term of the Burger Court indicate that there are limits to the counterrevolution. For example, although the Burger Court has tried to shut the doors of the federal courts to *habeas corpus* petitioners, the Court this term indicate that (1) sixth amendment claims in federal *habeas* petitions are not subject to the same limitations that apply to fourth amendment claims; (2) the cause-and-prejudice standard of *Wainwright v. Sykes*[109] can be disregarded in a *habeas* proceeding if it appears the petitioner was wrongfully convicted; and, (3) a federal court must make an independent determination in a *habeas* proceeding that a petitioner's confession is voluntary.

Moreover, despite its counterrevolutionary tendencies, the Court actually expanded the rights of criminal defendants in several significant ways this term. The Court limited the use of peremptory challenges by prosecutors;[110] prohibited prosecutors from using silence after Miranda warnings as evidence of sanity;[111] established an automatic reversal rule when racial discrimination infects a grand jury;[112] and, determined that, once an accused requests counsel at arraignment, all police interrogation must stop until counsel is appointed.[113] Indeed, approximately one-third of the criminal cases decided by opinion were clear-cut victories for criminal defendants. The Bur-

107. *Id.* at 452-53.
108. *Id.* at 453.
109. *See supra* notes 88 & 90 and accompanying text.
110. *See supra* note 22 and accompanying text.
111. *See supra* note 46 and accompanying text.
112. *See supra* note 19 and accompanying text.
113. *See supra* note 33 and accompanying text.

ger Court's counterrevolution thus has its limits and is not entirely dogmatic.

Will the changes in the Court's composition increase its counterrevolutionary fervor? Perhaps. Chief Justice Rehnquist is considered a more affable individual than the retiring Chief Justice. And, by all accounts, Justice Antonin Scalia is a convincing and persuasive jurist with a clear conservative bent. Together they may be able to keep the counterrevolutionary fire burning. Or perhaps the fires will slowly flicker out and die. Only the decisions next term will give us any real indication.