

Per Curiam

401 U. S.

JOHNSON *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 5247. Argued March 24, 1971—Decided April 5, 1971

138 U. S. App. D. C. 174, 426 F. 2d 651, certiorari dismissed
as improvidently granted.*William J. Lippman*, by appointment of the Court, 400
U. S. 940, argued the cause and filed briefs for petitioner.*Samuel Huntington* argued the cause for the United
States. With him on the brief were *Solicitor General*
Griswold, *Assistant Attorney General Wilson*, and *Roger*
A. Pauley.

PER CURIAM.

The writ of certiorari is dismissed as improvidently
granted.THE CHIEF JUSTICE took no part in the consideration
or decision of this case.MR. JUSTICE STEWART, with whom MR. JUSTICE DOUG-
LAS joins, dissenting.In the petitioner's trial on a charge of rape, the Dis-
trict Judge instructed the jury that it could return a
verdict of guilty with the death penalty. Yet that ver-
dict was constitutionally impermissible in light of this
Court's decision in *United States v. Jackson*, 390 U. S.
570. See *Bailey v. United States*, 132 U. S. App. D. C.
82, 86 and n. 3, 405 F. 2d 1352, 1356 and n. 3. I think
the extreme prejudice arising from this erroneous instruc-
tion requires reversal of the judgment of conviction and
a remand of this case for a new trial. Cf. *Price v. Geor-
gia*, 398 U. S. 323, 331–332.