APRIL 20, 1981

Appeals Dismissed

No. 80–851. PRINGLE *v.* TEXAS. Appeal from County Court of Hale County, Tex., dismissed for want of substantial federal question.

No. 80–927. THOMAS *v.* CROUCH, JUDGE. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 603 S. W. 2d 532.

No. 80–1303. POTOMAC EDISON CO. *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 491 Pa. 432, 421 A. 2d 214.

No. 80–1441. KODGER *v.* SINGH. Appeal from Ct. App. Ohio, Cuyahoga County, dismissed for want of substantial federal question.

No. 80–1360. GENERAL ATOMIC CO. *v.* UNITED NUCLEAR CORP. ET AL. Appeal from Sup. Ct. N. M. Motion of appellant to defer consideration of the appeal denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this motion and this case. Reported below: 96 N. M. 155, 629 P. 2d 231.

No. 80–5972. RUHL *v.* ALABAMA STATE BAR. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 391 So. 2d 1036.

No. 80–6169. STREATER *v.* UNITED STATES. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 429 A. 2d 173.

No. 80–6273. PRENZLER *v.* KAMRATH ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 80–1420. UNCLE BEN'S, INC. *v.* JOHNSON. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Texas Dept. of Community Affairs* v. *Burdine,* 450 U. S. 248 (1981). Reported below: 628 F. 2d 419.

No. 80–1463. MARSHALL, CORRECTIONAL SUPERINTENDENT *v.* LONBERGER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Sumner* v. *Mata,* 449 U. S. 539 (1981). Reported below: 635 F. 2d 1189.

Miscellaneous Orders

No. A–825. MISSOURI ET AL. *v.* LIDDELL ET AL. C. A. 8th Cir. Application for stay, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. A–848. DEWEESE *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–858. DEERFIELD MEDICAL CENTER ET AL. *v.* CITY OF DEERFIELD BEACH ET AL. D. C. S. D. Fla. Application for stay and injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied. JUSTICE BRENNAN would grant the application.

No. D–193. In re Disbarment of Leach. Disbarment entered. [For earlier order herein, see 446 U. S. 963.]

No. D–196. In re Disbarment of Broadwell. Disbarment entered. [For earlier order herein, see 449 U. S. 978.]

No. D–215. In re Disbarment of Long. George Wayne Long, of Bayside, Tex., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 19, 1981 [449 U. S. 1107], is hereby discharged.

No. D–216. In re Disbarment of Mehta. Mahendra R. Mehta, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 19, 1981 [449 U. S. 1107], is hereby discharged.

No. D–231. In re Disbarment of Kelley. It is ordered that Joseph P. Kelley, of Columbus, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–233. In re Disbarment of Barbara. It is ordered that Peter R. Barbara, of Detroit, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80–544. First National Maintenance Corp. *v.* National Labor Relations Board. C. A. 2d Cir. [Certiorari granted, 449 U. S. 1076.] Motion of American Federation of Labor and Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* granted.

No. 80–289. UNITED MINE WORKERS OF AMERICA, LOCAL No. 1854, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 80–692. NATIONAL LABOR RELATIONS BOARD *v.* AMAX COAL CO., A DIVISION OF AMAX, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 449 U. S. 1110.] Motion of the Solicitor General for divided argument granted.

No. 80–756. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* GRAY PANTHERS. C. A. D. C. Cir. [Certiorari granted *sub nom. Harris* v. *Gray Panthers,* 449 U. S. 1123.] Motion of the Solicitor General to permit George W. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 80–757. NEW YORK MERCANTILE EXCHANGE ET AL. *v.* LEIST ET AL.;

No. 80–895. CLAYTON BROKERAGE CO. OF ST. LOUIS, INC. *v.* LEIST ET AL.; and

No. 80–936. HEINOLD COMMODITIES, INC., ET AL. *v.* LEIST ET AL. C. A. 2d Cir. [Certiorari granted, 450 U. S. 910.] Motions of Futures Industry Association, Inc., New York Stock Exchange, Inc., and Board of Trade of the City of Chicago et al. for leave to file briefs as *amici curiae* granted.

No. 80–795. HEFFRON, SECRETARY AND MANAGER OF THE MINNESOTA STATE AGRICULTURAL SOCIETY BOARD OF MANAGERS, ET AL. *v.* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL. Sup. Ct. Minn. [Certiorari granted, 449 U. S. 1109.] Motion of New York for leave to file a brief as *amicus curiae* granted.

No. 80–846. ROSE, WARDEN *v.* LUNDY. C. A. 6th Cir. [Certiorari granted, 450 U. S. 910.] Motion for appointment of counsel granted, and it is ordered that D. Shannon Smith, Esquire, of Cincinnati, Ohio, be appointed to serve as counsel for respondent in this case.

No. 80–1070. RIDGWAY ET AL. *v.* RIDGWAY ET AL. Sup. Jud. Ct. Me. [Certiorari granted, 450 U. S. 979.] Motion of respondents for appointment of counsel granted, and it is ordered that Curtis Webber, Esquire, of Auburn, Me., be appointed to serve as counsel for respondents in this case.

No. 80–1082. SMITH, CORRECTIONAL SUPERINTENDENT *v.* PHILLIPS. C. A. 2d Cir. [Certiorari granted, 450 U. S. 909.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 80–1146. ZOBEL ET UX. *v.* WILLIAMS, COMMISSIONER OF REVENUE OF ALASKA, ET AL. Sup. Ct. Alaska. [Probable jurisdiction noted, 450 U. S. 908.] Motion of appellants to dispense with printing the joint appendix granted.

No. 80–1251. UNITED STATES *v.* VOGEL FERTILIZER CO. Ct. Cl. [Certiorari granted, 450 U. S. 994.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 80–6390. IN RE WELCH. Petition for writ of habeas corpus denied.

No. 80–6268. IN RE CROSS; and

No. 80–6352. IN RE PIATT. Petitions for writs of mandamus denied.

No. 80–1414. IN RE INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. Petition for writ of mandamus and prohibition denied.

Certiorari Granted

No. 80–644. G. D. SEARLE & CO. *v.* COHN ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 628 F. 2d 801.

No. 80–988. HAVENS REALTY CORP. ET AL. *v.* COLEMAN ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 633 F. 2d 384.

No. 80–203. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* CURRAN ET AL. C. A. 6th Cir. Certiorari granted limited to Question 1 presented by the petition and case set for oral argument in tandem with No. 80–757, *New York Mercantile Exchange* v. *Leist;* No. 80–895, *Clayton Brokerage Co. of St. Louis, Inc.* v. *Leist;* and No. 80–936, *Heinold Commodities, Inc.* v. *Leist* [certiorari granted, 450 U. S. 910]. Reported below: 622 F. 2d 216.

No. 80–1417. OKIN ET AL. *v.* ROGERS ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 634 F. 2d 650.

No. 80–1190. PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC. *v.* SWINT ET AL.; and

No. 80–1193. UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* SWINT ET AL. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by each petition, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 624 F. 2d 525.

No. 80–1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES. C. A. 6th Cir. Motions of respondents Lincoln Isaac and Kenneth L. Bell for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 646 F. 2d 1129 (first case); 635 F. 2d 575 (second case); 642 F. 2d 451 (third case).

Certiorari Denied. (See also Nos. 80–1360, 80–5972, 80–6169, and 80–6273, *supra.*)

No. 80–660. SILVER SPUR CASINO ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 80–1083. BARNEY'S CLUB, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 571.

No. 80–904. California *v.* Hall. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–1057. 400 Condominium Assn. et al. *v.* Tully, Cook County Assessor, et al. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 80–1060. Taylor *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 605 S. W. 2d 930.

No. 80–1164. McVicker *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 80–1200. Roza *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 224.

No. 80–1201. Holley *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 857.

No. 80–1213. Johnson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 735.

No. 80–1217. City of Gallup *v.* Federal Energy Regulatory Commission et al. C. A. 10th Cir. Certiorari denied. Reported below: 628 F. 2d 1267.

No. 80–1227. Tanner et al. *v.* McCall. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1183.

No. 80–1228. Bullard *v.* Webster, Director, Federal Bureau of Investigation. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 1042.

No. 80–1236. Motor Vehicle Manufacturers Association of the United States, Inc., et al. *v.* Costle, Administrator, United States Environmental Protection Agency. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1218.

No. 80–1249. DEFOURNEAUX, ADMINISTRATRIX *v.* STURM, RUGER & Co., INC. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 768.

No. 80–1260. LEONHARD ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 599.

No. 80–1270. MITCHELL *v.* AMALGAMATED COUNCIL OF GREYHOUND DIVISIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1091.

No. 80–1276. PATRICELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 770.

No. 80–1282. PODESTA *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 80–1301. RUSS ET AL. *v.* WILKINS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 914.

No. 80–1314. NADER *v.* MCBRIDE ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–1325. DAHL *v.* AKIN ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 630 F. 2d 277.

No. 80–1330. SCHANBARGER *v.* WRIGHT, POLICE CHIEF OF THE VILLAGE OF MASSENA, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1204.

No. 80–1334. FRENCH LINE ET AL. *v.* BARULIC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 75 App. Div. 2d 761, 427 N. Y. S. 2d 815.

No. 80–1354. INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, LOCAL 241, AFL–CIO *v.* ASSOCIATION OF SCIENTISTS & PROFESSIONAL ENGINEERING PERSONNEL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 771.

No. 80–1358. THOMPSON ET AL. *v.* PEOPLES LIBERTY BANK. Ct. App. Ky. Certiorari denied.

No. 80–1359. FLAGG *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 634 F. 2d 1087.

No. 80–1364. ISKE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 1225.

No. 80–1382. MARX ET AL. *v.* COMPUTER SCIENCES CORP. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1356.

No. 80–1388. DOWE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 80–1392. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 598 S. W. 2d 884.

No. 80–1395. BRADLEY ET AL. *v.* J. F. BATTE & SONS OF RICHMOND, INC., ET AL.; and LAFAYETTE, INC., ET AL. *v.* J. F. BATTE & SONS OF RICHMOND, INC., ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. lxviii (first case); 221 Va. cxii (second case).

No. 80–1399. BERNDT *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 785.

No. 80–1401. MALANCHE *v.* AMERICAN MOTORS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80–1404. EHLERS *v.* BOGUE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1314.

No. 80–1405. SHAPIRO ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 1214.

No. 80–1406. Gartenberg *v.* Pollack, U. S. District Judge (Merrill Lynch Asset Management, Inc., et al., Real Parties in Interest). C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 16.

No. 80–1410. E-Systems, Inc. *v.* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, et al. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 487.

No. 80–1413. Marion County School District et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 607.

No. 80–1415. Murphy *v.* Eagen, Justice, Pennsylvania Supreme Court, et al. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 774.

No. 80–1426. Zeigler Coal Co. *v.* Dethloff et ux. Sup. Ct. Ill. Certiorari denied. Reported below: 82 Ill. 2d 393, 412 N. E. 2d 526.

No. 80–1433. Evans *v.* Arkansas Racing Commission et al. Sup. Ct. Ark. Certiorari denied. Reported below: 270 Ark. 788, 606 S. W. 2d 578.

No. 80–1438. Tennessee River Pulp & Paper Co. et al. *v.* Seger. Sup. Ct. Miss. Certiorari denied. Reported below: 390 So. 2d 595.

No. 80–1443. Sapag, S. A. *v.* Standard Fittings Co. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 630.

No. 80–1444. Klumpp *v.* Colonial Pipeline Co. et al. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 389 So. 2d 457.

No. 80–1447. Allen *v.* Snow et al. C. A. 1st Cir. Certiorari denied. Reported below: 635 F. 2d 12.

No. 80–1456. CATALANO ET AL. *v.* PECHOUS ET AL.; and
No. 80–1466. PECHOUS *v.* CATALANO ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 83 Ill. 2d 146, 419 N. E. 2d 350.

No. 80–1458. EDWARD J. SWEENEY & SONS, INC., ET AL. *v.* TEXACO, INC. C. A. 3d Cir. Certiorari denied. Reported below: 637 F. 2d 105.

No. 80–1473. STEVENSON *v.* STEVENSON. Ct. App. Ky. Certiorari denied. Reported below: 608 S. W. 2d 64.

No. 80–1476. TANKLINING CORP. *v.* GALVESTON SHIPBUILDING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 731.

No. 80–1482. SIMPSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 275 S. C. 426, 272 S. E. 2d 431.

No. 80–1483. MILLEDGEVILLE FARMER'S ELEVATOR CO. *v.* WAGNER ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 84 Ill. App. 3d 1198, 410 N. E. 2d 692.

No. 80–1484. U. S. STEEL CREDIT CORP. *v.* AMERICAN FLETCHER MORTGAGE CO., INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 635 F. 2d 1247.

No. 80–1497. AB TURN-O-MATIC *v.* TVETER, DBA SGT ENTERPRISES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 831.

No. 80–1508. GILA RIVER INDIAN COMMUNITY *v.* HENNINGSON, DURHAM & RICHARDSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 708.

No. 80–1510. KURTZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 380, 414 N. E. 2d 699.

No. 80–1513. HERMAN BLUM CONSULTING ENGINEERS, INC. *v.* HADRA. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1242.

No. 80–1531. TWIN FALLS CANAL CO. ET AL. *v.* CANYON VIEW IRRIGATION CO. Sup. Ct. Idaho. Certiorari denied. Reported below: 101 Idaho 604, 619 P. 2d 122.

No. 80–1539. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 882.

No. 80–1554. DAWE *v.* ROBINSON, UNITED STATES MARSHAL. C. A. 9th Cir. Certiorari denied.

No. 80–1555. LINTON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 930.

No. 80–1557. BUCHANAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 423.

No. 80–1560. CALDER *v.* UNITED STATES; and
No. 80–6291. CALDER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 641 F. 2d 76.

No. 80–1585. SINDONA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 792.

No. 80–1598. BOWMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 163.

No. 80–5790. WEAVER *v.* PHILLIPS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1102.

No. 80–5813. RESENDEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 80–5836. WILSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1158.

No. 80–5900. SIMMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–5910. DELGADO *v.* ISRAEL, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–5925. KANTORSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 212.

No. 80–5951. BLACK *v.* MARSHALL, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 213.

No. 80–5977. MAYOLA *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 992.

No. 80–5996. REED *v.* JAGO, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 218.

No. 80–5998. GIRARDI *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. 459, 270 S. E. 2d 743.

No. 80–6012. GRANT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 390 So. 2d 341.

No. 80–6029. DALLAS *v.* MCCLAY, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 768.

No. 80–6051. LEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 787.

No. 80–6064. FUREY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1211.

No. 80–6068. COMBS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 634 F. 2d 1295.

No. 80–6075. PAPPAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 639 F. 2d 1.

No. 80–6076. MACK *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 225 Ct. Cl. ——, 635 F. 2d 828.

No. 80–6154. PATTERSON *v.* GENERAL MOTORS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 476.

No. 80–6198. GREEN *v.* WARDEN, FEDERAL CORRECTIONAL INSTITUTION, TEXARKANA, TEXAS. C. A. 5th Cir. Certiorari denied.

No. 80–6199. MANNING *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 390 So. 2d 494.

No. 80–6200. FULLERTON *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 46 N. C. App. 837, 266 S. E. 2d 684.

No. 80–6209. BROWNFIELD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6211. MAKARA *v.* BRITISH PETROLEUM CORP. App. Term, Sup. Ct. N. Y., 9th & 10th Jud. Dists. Certiorari denied.

No. 80–6212. ARCE *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1200.

No. 80–6213. ROSS *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1219.

No. 80–6216. HUTCHINSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 391 So. 2d 637.

No. 80–6219. COVINGTON ET AL. *v.* ALLSBROOK. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 63.

No. 80–6223. MATHIESEN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 27 Wash. App. 257, 616 P. 2d 1255.

No. 80–6224. THOMPSON *v.* HARGETT, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–6225. REED *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–6226. DISNEY ET AL. *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 80–6228. WIDEMON *v.* CAMPBELL ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6229. WORTHINGTON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 405 N. E. 2d 913.

No. 80–6233. SWOFFORD *v.* CITY OF JASPER ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 392 So. 2d 1380.

No. 80–6234. DUDAR *v.* GEORGIA MILITARY COLLEGE ET AL. Ct. App. Ga. Certiorari denied.

No. 80–6235. WILLIAMS *v.* JERRY'S FORD SALES, INC., ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. clxi.

No. 80–6237. MOHN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6241. LOMBARDI *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th & 10th Jud. Dists. Certiorari denied.

No. 80–6244. JOHNSON *v.* MARSHALL, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 885.

No. 80–6245. ATENCIO *v.* NEW MEXICO BOARD OF BAR EXAMINERS. Sup. Ct. N. M. Certiorari denied.

No. 80–6247. FELTUS *v.* DEES, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 581.

No. 80–6249. JAYNES *v.* FLORIDA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 311.

No. 80–6252. JONES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 490.

No. 80–6257. JACKSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–6259. JAFFER *v.* CITY OF MIAMI, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 892.

No. 80–6260. WORKMAN *v.* BRACKEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 166.

No. 80–6262. WRIGHT ET AL. *v.* NIGH, GOVERNOR OF OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–6263. LANE *v.* JEEP CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 451.

No. 80–6267. CAMPBELL *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 423 A. 2d 952.

No. 80–6271. STEVENS *v.* SEYMOUR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 782.

No. 80–6276. HARRIS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 634 F. 2d 1152.

No. 80–6278. CASH *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 450.

No. 80–6285. WHITELAW *v.* MWP LIMITED PARTNERSHIP. Ct. App. D. C. Certiorari denied.

No. 80–6292. IN RE CURRIER. C. A. 1st Cir. Certiorari denied.

No. 80–6294. MINES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 390 So. 2d 332.

No. 80–6318. In re Warden. C. A. 8th Cir. Certiorari denied.

No. 80–6321. Young *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 974.

No. 80–6323. Coffman et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 638 F. 2d 192.

No. 80–6329. Alexander *v.* United States. Ct. App. D. C. Certiorari denied.

No. 80–6334. Beckett *v.* Cuyler, Correctional Superintendent, et al. C. A. 3d Cir. Certiorari denied.

No. 80–6346. Davis *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 76.

No. 80–6348. Nelson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 313.

No. 80–6356. Roche *v.* Fenton, Warden, et al. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 443.

No. 80–6372. Stewart *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 563.

No. 80–6377. Clay *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 889.

No. 80–6380. Kajevic *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 786.

No. 80–6382. Ford *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 642 F. 2d 77.

No. 80–1147. Local 1576, International Longshoremen's Assn., AFL–CIO *v.* Equal Employment Opportunity Commission et al. C. A. 5th Cir. Motion of Southern Stevedoring Co. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 623 F. 2d 1054.

No. 80–1173. J. F. Hoff Electric Co. *v.* National Labor Relations Board et al. C. A. D. C. Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 206 U. S. App. D. C. 298, 642 F. 2d 1266.

No. 80–1203. New Jersey *v.* Reading Co. et al. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 211.

Justice Rehnquist, dissenting.

Bankruptcy cases seldom receive much notice outside of those who are familiar with this branch of the law, and it is therefore understandable that there is a dearth of recent bankruptcy precedents decided on the merits in this Court as compared with constitutional cases, labor cases, and other more alluring subjects. Nonetheless, because it seems to me that the Court of Appeals has failed to heed the meaning of a statute which was enacted by Congress—a meaning plain on its face—I would grant certiorari in order to consider the claims of the State of New Jersey here.

Title 28 U. S. C. § 960 provides:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

Section 77 (e)(3) of the Bankruptcy Act, 11 U. S. C. § 205 (e)(3), as in effect prior to the 1978 revision of the Act, requires a reorganization court to approve a plan of reorganization only if it is satisfied that

> "the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled

thereto will accept such payment, and the judge is hereby given power to approve the same."

The District Court here recognized that a trustee, while conducting the business of a debtor railroad, must pay state and local taxes as they accrue. It stated: "It is without question, as the State argues, that a railroad is under a duty to pay state and local taxes as they accrue during a reorganization. 28 U. S. C. § 960." *In re Reading Co.*, 439 F. Supp. 389, 391 (ED Pa. 1977). Yet notwithstanding its acknowledgment of this fact, the District Court on May 21, 1980, approved the trustees' plan which did *not* provide for the payment of state taxes as they accrue and the United States Court of Appeals for the Third Circuit subsequently affirmed.

The District Court rejected the State's contentions because it "found the necessity for the continued operation of the railroad sufficient justification to defer tax payments . . . ." — F. Supp. —, — (1980). The District Court placed reliance on what is perceived to be the public interest in the maintenance of a railroad system. Although one can readily understand and sympathize with such a "public interest," when opposed to Acts of Congress it can turn out to be just as "unruly" a horse as "public policy" has been described in decisions in other fields of the law.

The State of New Jersey now has tax claims against the trustees for the years 1972–1977 in the amount of $250,000. The State has not consented to be paid in securities for its current tax obligations, as would be permitted under § 77 (e)(3) of the Bankruptcy Act. The paramount federal interest to which the District Court and all other courts must defer in this case is the one enacted into law by Congress through the specific legislation previously quoted. Until a contrary intent is manifested through subsequent legislation, it is my opinion that the District Court must follow this ex-

press mandate. Because the courts below failed to adhere to it, I would grant the petition for a writ of certiorari.

No. 80–1294. HONEYWELL, INC. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 636 F. 2d 1217.

No. 80–1343. AERONAUTICAL RADIO, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 80–1408. UNITED STATES *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 206 U. S. App. D. C. 253, 642 F. 2d 1221.

No. 80–1380. GONSALVES *v.* CATERPILLAR TRACTOR CO., INC. C. A. 7th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 634 F. 2d 1065.

No. 80–1400. CITIES SERVICE OIL CO. *v.* TIRE SALES CORP. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 637 F. 2d 467.

No. 80–6274. WILLIAMS *v.* ARKANSAS PUBLIC SERVICE COMMISSION. Cir. Ct., Pulaski County, Ark. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–1442. ROMILLY ET AL. *v.* AMOCO TRINIDAD OIL CO. ET AL. C. A. 9th Cir. Motion of petitioners for leave to proceed as seamen under 28 U. S. C. § 1916 granted. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this motion and this petition. Reported below: 632 F. 2d 82.

No. 80–1462. MAITER ET AL. *v.* CHICAGO BOARD OF EDUCATION ET AL. Sup. Ct. Ill. Motion of respondent Raquel Guerrero for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 82 Ill. 2d 373, 415 N. E. 2d 1034.

No. 80–5757. DAVIS *v.* GEORGIA;

No. 80–5775. SPRAGGINS *v.* GEORGIA; and

No. 80–5850. BROOKS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: Nos. 80–5757 and 80–5775, 246 Ga. 432, 271 S. E. 2d 828; No. 80–5850, 246 Ga. 262, 271 S. E. 2d 172.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

These cases were all remanded to the Supreme Court of Georgia for reconsideration in light of our opinion in *Godfrey* v. *Georgia,* 446 U. S. 420 (1980). On remand, that court reaffirmed petitioners' death sentences. Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth Amendment, I would grant the petitions for certiorari in these cases and vacate the judgments below insofar as they leave undisturbed the death sentences. I add a few extra lines, however, to point out that even accepting, *arguendo,* the prevailing view that there are circumstances in which the death sentence may constitutionally be imposed, the state court in these cases has ignored the mandates of this Court.

Under Georgia law, the jury is responsible for sentencing in death penalty cases. Petitioners in all three of these cases were sentenced to death after the jury found, pursuant to Ga. Code § 27–2534.1 (b)(7) (1978), that they had committed murders that were "outrageously or wantonly vile, horrible or inhuman in that [they] involved torture, depravity of mind, or an aggravated battery to the victim." This statutory language is so broad that it openly invites the jury to impose the death penalty in every murder case. It was

the recognition that this invitation was being accepted that led to our decision last Term in *Godfrey*. There, four Justices of this Court agreed that "[a] person of ordinary sensibility could fairly characterize almost every murder" as falling within the language of § 27–2534.1 (b)(7). 446 U. S., at 428–429. The plurality explained that in order to be constitutionally valid, a State's capital punishment scheme "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.*, at 428 (footnotes omitted). See *id.*, at 436–437 (MARSHALL, J., concurring in judgment). Because the Georgia courts had failed to provide such guidance to sentencing juries, the plurality reasoned that the death sentence imposed in that case had to be vacated.

Following our decision in *Godfrey*, we vacated the judgments in these and several other cases insofar as they left undisturbed the sentences of death. On remand, the Georgia Supreme Court has treated every case in exactly the same way: it has reviewed the record to discern whether the jury, *if* properly instructed, *could* still have found the existence of this aggravating circumstance beyond a reasonable doubt. On the basis of this review, that court affirmed the death sentences imposed without a proper jury instruction. I would have thought that *Godfrey* made clear that this sort of appellate speculation is impermissible. What I took to be the rule of *Godfrey* is that it is the discretion of the *sentencer* that must be properly narrowed. See also *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.); *Westbrook* v. *Balkcom*, 449 U. S. 999, 1001 (1980) (STEWART, J., dissenting from denial of certiorari). In murder cases in the State of Georgia, only the trier of fact may impose a sentence of death. Consequently, it is the discretion of the trier of fact—in these cases, the jury—that must be narrowed. And no matter what facts the jury might find, it always retains under Georgia law the ultimate discre-

tion to refuse to impose the penalty at all. An appellate court can do no more than guess at what a jury might have done. Thus only a new sentencing hearing before a properly instructed jury can accomplish the purpose of our remands for reconsideration in light of *Godfrey*. The decision of the Georgia Supreme Court in these cases to substitute its own judgment for that of the sentencer is, in my view, contrary to the mandates of this Court. I would therefore grant the petitions for certiorari in these cases and vacate the judgments below on this additional ground as well.

No. 80–5933. HILL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 402, 271 S. E. 2d 802.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that capital punishment is under all circumstances cruel and unusual punishment forbidden by the Eighth Amendment, I would vacate the judgment of the Supreme Court of Georgia, insofar as it left undisturbed the death penalty in this case. Moreover, even assuming, *arguendo*, the death penalty may under certain conditions be imposed constitutionally, those conditions are absent here.

Petitioner was convicted of first-degree murder and forcible rape. The jury imposed the death sentence on the basis of two statutory aggravating circumstances. The first aggravating circumstance was that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27–2534.1 (b)(7) (1978). We considered this provision of Georgia law in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). There, a plurality of this Court held that the discretion of the trier of fact must be narrowed when it considers the possibility of aggravation under § 27–2534.1 (b)(7). Our decision in *Godfrey* which was decided after the trial in this case, was available to the Georgia Supreme Court when it reviewed petitioner's appeal. That reviewing court

assumed it could determine for itself the presence of the aggravating circumstance in light of *Godfrey*. The proper course instead would have been to remand for reconsideration by the State's sole sentencing authority, the trial court. See *Westbrook* v. *Balkcom*, 449 U. S. 999, 1001 (1980) (STEWART, J., dissenting from denial of certiorari) (citing Ga. Code §§ 27–2503 (b), 27–2534.1 (b) (1978)).

The error of the State Supreme Court in this regard is not remedied by the jury's assessment of another statutory aggravating circumstance in this case. Neither this Court nor the State Supreme Court has the ability to forecast the decision of the properly instructed sentencing authority. *Davis* v. *Georgia*, *ante*, p. 921 (MARSHALL, J., dissenting from denial of certiorari). The State Supreme Court's failure to follow the proper course is particularly troubling in cases, such as this, where the remaining ground for imposing the death sentence is itself vulnerable to constitutional attack. The second aggravating circumstance here involved is that the offense of murder was committed while the offender was engaged in the commission of another capital felony, Ga. Code § 27–2534.1 (b)(2) (1978). The aggravating felony found here was forcible rape. Yet the jury may well have declined to find this aggravating circumstance had the trial judge granted petitioner's request for an instruction on statutory rape. It is uncontested that the victim here was 12 years old, and that Georgia defines statutory rape as sexual intercourse with a female under the age of 14. Ga. Code § 26–2018 (1978). It is also undisputed that statutory rape would not constitute an aggravating circumstance permitting imposition of the death sentence.

The Georgia Supreme Court reasoned that no instruction on this offense was necessary because statutory rape is not a lesser included offense of forcible rape. This conclusion accurately reflects the legislature's assignment of different elements to each of the two offenses. For statutory rape, the fact of sexual intercourse must be supplemented by proof of

the victim's age. For forcible rape, the fact of intercourse must be supplemented by proof it occurred forcibly and against the victim's will. Ga. Code § 26–2001 (1978). Yet in light of the proof necessary to the two offenses, where a minor is the victim, these differences dissolve. The Georgia Supreme Court recently has reaffirmed its longstanding view that "[a] female under 14 years of age is legally incapable of giving consent," so the element of rape against the victim's will is "automatically shown by her age." *Drake* v. *State,* 239 Ga. 232, 233, 236 S. E. 2d 748, 750 (1977). As a result, the only remaining difference between statutory rape and forcible rape is the element of force. And the Georgia Supreme Court has held that the youth of the victim may support a finding of force based on the victim's "state of mind" and "subjective apprehension of danger." *Id.,* at 236, 236 S. E. 2d, at 751. Where a defendant's life depends on whether the evidence beyond a reasonable doubt establishes forcible rape rather than statutory rape, minimal fairness calls for letting the jury consider the possibility of a statutory rape conviction.

Indeed, this was the essential thrust of our reasoning in *Beck* v. *Alabama,* 447 U. S. 625 (1980). There we concluded that "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.,* at 637. We concluded that this risk introduces "a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.,* at 643. This reasoning casts serious doubt on the trial court's refusal to instruct the jury on statutory rape in this capital case. Petitioner's death sentence thus rests on an exercise of sentencing discretion unbounded as required by *Godfrey* and unaided by an instruction on a lesser offense.

If a death sentence may ever be properly imposed, it must be the result of correct procedures, carefully applied. Because I believe this requirement was lacking here, I dissent.

No. 80–6026. MONTANO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE BLACKMUN would grant certiorari.

No. 80–6030. WILLIS *v.* BALKCOM, WARDEN. Super. Ct. Ga., Tattnall County. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was convicted of murder and the jury returned a sentence of death. On direct appeal, the Georgia Supreme Court affirmed the conviction and death sentence. Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would grant the petition for a writ of certiorari and vacate the judgment below insofar as it left the death sentence undisturbed. But even assuming, *arguendo,* that there are circumstances in which the death penalty may constitutionally be imposed, I believe those circumstances are not present in this case.

Under Georgia law, the jury is responsible for sentencing in death penalty cases. In imposing the death sentence in this case, the jury found three statutory aggravating circumstances: (1) the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"; [1] (2) the "offense of murder was committed against any peace officer . . . while engaged in the performance of his official duties"; [2] and (3) the "murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself

[1] Ga. Code § 27–2534.1 (b) (7) (1978).

[2] § 2534.1 (b) (8).

or another." [3] In seeking review of the death sentence imposed in this case, petitioner does not challenge the validity of the findings concerning the latter two aggravating circumstances. He does argue, however, that the trial court's charge to the jury on the first aggravating circumstance was constitutionally defective.

This provision, Ga. Code § 27–2534.1 (b)(7) (1978) (hereafter § (b)(7)), was the same one involved in this Court's decision last Term in *Godfrey* v. *Georgia,* 446 U. S. 420 (1980). In that case, the trial judge instructed the jury about this aggravating circumstance simply by reading the text of the statute. A plurality of this Court found that practice unconstitutional. It reasoned that the language of § (b)(7) does not impose "any inherent restraint on the arbitrary and capricious infliction of the death sentence" since "[a] person of ordinary sensibility could fairly characterize almost every murder" as falling within the language of § (b)(7). *Id.,* at 428–429. The plurality explained that to be constitutionally valid, a State's capital punishment scheme "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Id.,* at 428 (footnote omitted) (quoting *Gregg* v. *Georgia,* 428 U. S. 153, 198 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.); *Proffitt* v. *Florida,* 428 U. S. 242, 253 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.); *Woodson* v. *North Carolina,* 428 U. S. 280, 303 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.)). Because the trial court had failed to provide adequate guidance to the jury, the death sentence imposed in that case was vacated.

In the instant case, as in *Godfrey,* the trial court's instruction to the jury on § (b)(7) consisted of simply reciting the statutory language. Although both the trial and direct appeal in this case predated *Godfrey,* petitioner challenged the

[3] § 2534.1 (b)(10).

adequacy of the charge in a state habeas corpus proceeding. The Georgia habeas court held, however, that "*Godfrey* is not germane to or controlling of Petitioner's case," because petitioner's death sentence was based not only on § (b)(7) but also on the other two aggravating circumstances. App. to Pet. for Cert. B–5. Thus, the court simply assumed that the jury would still have sentenced petitioner to death even if it had found only the two unchallenged aggravating circumstances. But under Georgia law, the finding of one or more aggravating circumstances *permits,* but does not *require* a sentence of death. See *Bowen* v. *State,* 241 Ga. 492, 246 S. E. 2d 322 (1978). Moreover, the jury verdict to impose the death penalty must be unanimous. See *Miller* v. *State,* 237 Ga. 557, 229 S. E. 2d 376 (1976). Under this scheme, it is evident that each aggravating circumstance may play an important role in influencing the jury's verdict. Just what weight each juror attached to a particular aggravating circumstance can never be known by a reviewing court, and if a jury is allowed to base its decision partly upon an improper finding of a § (b)(7) circumstance, it is impossible to determine to what extent the jury's verdict rested upon this circumstance. This situation, which exists in the instant case, is sufficient to invoke the rule that any doubt as to whether a criminal judgment rests upon a constitutionally unsound basis requires its reversal. See *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); *Stromberg* v. *California,* 283 U. S. 359 (1931).

This defect is not cured by a reviewing court's speculation about what a jury faced with a finding of two aggravating circumstances would or might have done. Under Georgia law, only the trier of fact may impose a death sentence. The reviewing court is neither privy to the jury's deliberations nor endowed with psychic powers. Most important, such speculation is, in my judgment, inconsistent with the recognition that because "the penalty of death is qualitatively different from a sentence of imprisonment," there is a heightened "need for reliability in the determination that death is

the appropriate punishment in a specific case." *Woodson* v. *North Carolina, supra,* at 305 (opinion of STEWART, POWELL, and STEVENS, JJ.). See *Beck* v. *Alabama,* 447 U. S. 625 (1980). The proper procedure to follow in cases such as this is to vacate the death sentence and remand the case for resentencing by a properly instructed jury. Cf. *Westbrook* v. *Balkcom,* 449 U. S. 999, 1001 (1980) (STEWART, J., dissenting from denial of certiorari); *Davis* v. *Georgia, ante,* p. 921 (MARSHALL, J., joined by BRENNAN, J., dissenting from denial of certiorari).

Because it cannot be said with assurance that an improper finding of a § (b)(7) circumstance played no part in the jury's decision to impose the death penalty in this case, I would grant the petition for a writ of certiorari and vacate the death sentence on this additional ground.

JUSTICE STEWART joins all but the first and last paragraphs of this dissenting opinion. He would grant the petition for certiorari and vacate the judgment imposing the death penalty, so that a properly instructed jury may consider what sentence to impose. See *Westbrook* v. *Balkcom,* 449 U. S. 999, 1001 (1980) (dissent from denial of certiorari).

No. 80–6039. GREEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 925.

JUSTICE MARSHALL, dissenting.

In *United States* v. *Dinitz,* 424 U. S. 600 (1976), this Court held that when a criminal defendant's successful request for a mistrial is precipitated by " 'prosecutorial or judicial overreaching,' " a subsequent trial on the same charges is barred by the Double Jeopardy Clause of the Fifth Amendment. *Id.,* at 607 (quoting *United States* v. *Jorn,* 400 U. S. 470, 485 (1971)). Because the decision of the Court of Appeals in the present case raises substantial questions concerning the scope of the *Dinitz* rule, I dissent from the denial of certiorari.

Petitioner was tried for conspiracy to distribute heroin.

The prosecution's chief witness was Special Agent Robert Dixon of the Drug Enforcement Administration. During cross-examination, defense counsel succeeded in eliciting several statements that substantially damaged Dixon's credibility.[1] Annoyed at this turn of events, Dixon made a deliberate, impermissible reference to petitioner's prior conviction for armed robbery. Defense counsel then moved for a mistrial, which was granted. Petitioner was subsequently reindicted on the same drug charge. He moved to dismiss this second indictment on the ground that the Double Jeopardy Clause, as interpreted in *Dinitz,* barred his retrial. The District Judge denied the motion, and a divided Court of Appeals for the Fourth Circuit affirmed. 636 F. 2d 925 (1980). The majority reasoned that *Dinitz* was inapplicable because the improper statement was made with the general purpose of prejudicing petitioner rather than the specific purpose of provoking a mistrial and because the misconduct was by a Government witness rather than the prosecutor.

The court's reasoning is questionable on both grounds. The central issue presented by this case—whether prosecutorial misconduct must have the specific purpose of provoking a defendant's request for a mistrial in order to raise double jeopardy concerns—has divided the Courts of Appeals. The majority in the court below, as well as the Court of Appeals for the Tenth Circuit in *United States* v. *Nelson,* 582 F. 2d 1246 (1978), cert. denied, 439 U. S. 1079 (1979), have limited *Dinitz* to situations in which the prosecution

[1] Under the Government's theory of the case, petitioner was a distributor for a heroin dealer. Agent Dixon testified that dealers did not distribute heroin through heroin users. The defense then produced evidence that petitioner was receiving large amounts of heroin for his personal use at the relevant time, and that the arrest report on petitioner noted that he was a "heroin user." The defense then asked Dixon if he was the agent who had arrested petitioner. Agent Dixon stated that he was not. The defense, however, again discredited Dixon by proving that he was indeed the arresting officer.

deliberately attempts to provoke a mistrial. In contrast, the Courts of Appeals for the Fifth and Eighth Circuits have concluded that the "prosecutorial overreaching" referred to in *Dinitz* is not limited to specific attempts to provoke a mistrial, but may also encompass other forms of serious Government misconduct intended in a more generalized way to prejudice the defendant. *United States* v. *Weaver,* 565 F. 2d 129, 133 (CA8 1977), cert. denied, 434 U. S. 1074 (1978); *United States* v. *Kessler,* 530 F. 2d 1246 (CA5 1976).

In my view, this latter interpretation of *Dinitz* is the correct one.[2] The Double Jeopardy Clause protects a criminal defendant's interest in a single, fair adjudication of his guilt or innocence. *United States* v. *Jenkins,* 420 U. S. 358, 370 (1975); *United States* v. *Wilson,* 420 U. S. 332, 343 (1975); *Downum* v. *United States,* 372 U. S. 734, 736 (1963). This constitutional interest is implicated whenever intentional governmental misconduct results in a mistrial. Regardless of whether the Government's misbehavior was designed specifically to provoke a mistrial or was simply intended to reduce the chances of an acquittal, the net effect on the defendant is the same: he is faced with the burdens and risks of a second trial solely because the Government has deliberately undermined the integrity of the first proceeding. Indeed, in *United States* v. *Jorn,* 400 U. S. 470 (1971), the central decision relied on in *Dinitz,* this Court concluded that

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[2] As an initial matter, I question the validity of the lower court's assumption that the Government in such cases tailors its misconduct to achieve one improper result as opposed to another. It is far more likely that in cases such as this, where the prosecution is concerned that the trial may result in an acquittal, that the Government engages in misconduct with the general purpose of prejudicing the defendant. In this case, for example, the Government stood to benefit from Dixon's misconduct, regardless of whether it resulted in a guilty verdict or a mistrial. Moreover, even if such subtle differences in motivation do exist, I suspect that a defendant seeking to prevent a retrial will seldom be able to prove the Government's actual motivation.

"where a defendant's mistrial motion is necessitated by . . . prosecutorial impropriety *designed to avoid an acquittal,* reprosecution might well be barred." 400 U. S., at 485, n. 12 (emphasis added). This language strongly suggests that a general governmental intent to affect the trial in a manner that *objectively* might be viewed as risking a mistrial, rather than a specific, *subjective* intent on the part of the prosecution to achieve that precise result, is sufficient to invoke the double jeopardy concerns discussed in *Dinitz.* In any event, because the Courts of Appeals are divided on this important issue, I believe that this Court is obliged to resolve the conflict.

The second ground for the decision of the court below—that *Dinitz* does not apply to Government witnesses—is equally suspect. *Dinitz* referred to " 'prosecutorial . . . overreaching,' " 424 U. S., at 607, but nothing in that decision suggests that its holding was limited solely to misconduct by the prosecutor. To be sure, the prosecutor cannot be held responsible for the misconduct of every Government witness. However, in this case, Agent Dixon's role in the prosecution of petitioner was far more extensive than that of an ordinary Government witness. As Judge Winter observed in dissent:

> "Agent Dixon was a four-year veteran of the Drug Enforcement Administration. . . . Since joining DEA he had made over 150 arrests and participated in approximately 35 cases. Manifestly he was the agent in charge of the instant case; he sat at counsel table throughout the entire trial. Significantly, the government had been advised that defendant would not testify because of his record. Undoubtedly, as the agent in charge, Dixon had that knowledge." 636 F. 2d, at 930.

Given Dixon's extensive involvement in the prosecution of the Government's case against petitioner, I question whether the court below correctly found *Dinitz* to be inapplicable. In any event, the question is sufficiently important to warrant this Court's review.

Accordingly, I dissent from the denial of certiorari and would instead grant the petition and set the case for argument.

Rehearing Denied

No. 79–1266. STEADMAN *v.* SECURITIES AND EXCHANGE COMMISSION, 450 U. S. 91;

No. 80–532. FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES ET AL. *v.* FLORIDA NURSING HOME ASSN. ET AL., 450 U. S. 147;

No. 80–694. WOOD *v.* WOOD, 449 U. S. 1081;

No. 80–843. CARIBE TRAILER SYSTEMS, INC., ET AL. *v.* PUERTO RICO MARITIME SHIPPING AUTHORITY ET AL., 450 U. S. 914;

No. 80–876. SCARPELLI *v.* ILLINOIS, 450 U. S. 915;

No. 80–1054. OLTERSDORF *v.* CHESAPEAKE & OHIO RAILROAD CO., 450 U. S. 920;

No. 80–1071. SMITH *v.* UNITED STATES, 450 U. S. 920;

No. 80–1309. LEE *v.* LAW OFFICES OF ALIOTO ET AL., 450 U. S. 967;

No. 80–5584. OUTLAW *v.* ILLINOIS, 450 U. S. 983;

No. 80–5768. MCDONALD *v.* TENNESSEE, 450 U. S. 983;

No. 80–5859. MCDONALD *v.* DRAPER, JUDGE, 450 U. S. 983;

No. 80–5902. DE PRIEST *v.* BIBLE, COMMISSIONER, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., 450 U. S. 903;

No. 80–5924. TENG ET AL. *v.* UNITED STATES, 450 U. S. 930;

No. 80–5944. KOHLS *v.* UNITED PARCEL SERVICE, INC., ET AL., 450 U. S. 931;

No. 80–5986. GREEN *v.* GEORGIA, 450 U. S. 936;

No. 80–5990. HOCKENBURY *v.* SOWDERS, PENITENTIARY SUPERINTENDENT, 450 U. S. 933;

No. 80–6000. DAVIS *v.* TEXAS, 450 U. S. 968; and

No. 80–6050. HARRIS *v.* SPAIN, JUDGE, ET AL., 450 U. S. 985. Petitions for rehearing denied.

No. 80–6053. MULLINS *v.* OHIO, 450 U. S. 985;

No. 80–6091. HENDERSON *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, 450 U. S. 985; and

No. 80–6159. WRIGHT *v.* UNITED STATES, 450 U. S. 970. Petitions for rehearing denied.

No. 80–910. CALAVO GROWERS OF CALIFORNIA *v.* GENERALI BELGIUM ET AL., 449 U. S. 1084. Motion for leave to file petition for rehearing denied.

No. 80–1117. CASTILLO *v.* FORSHT, UNITED STATES MARSHAL, 450 U. S. 922. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

APRIL 27, 1981

Dismissal Under Rule 53

No. 80–1453. SHOWCASE CINEMAS, INC., ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari dismissed under this Court's Rule 53. Reported below: 156 Ga. App. 225, 274 S. E. 2d 578.

Affirmed on Appeal

No. 80–1183. MISSISSIPPI *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. JUSTICE WHITE and JUSTICE STEVENS would postpone the question of jurisdiction and set case for oral argument. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

No. 80–1275. GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC., ET AL. *v.* ORR, GOVERNOR OF INDIANA, ET AL. Affirmed on appeal from D. C. N. D. Ind. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 496 F. Supp. 894.

Appeal Dismissed

No. 80–1486. OMNI FARMS, INC. *v.* ARKANSAS POWER & LIGHT CO. Appeal from Sup. Ct. Ark. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 271 Ark. 61, 607 S. W. 2d 363.

Certiorari Granted—Vacated and Remanded

No. 80–461. RETAIL, WHOLESALE & DEPARTMENT STORE UNION, AFL–CIO *v.* G. C. MURPHY CO. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Northwest Airlines, Inc.* v. *Transport Workers, ante,* p. 77. Reported below: 629 F. 2d 248.

Certiorari Dismissed

No. 80–1284. GRAY, TREASURER OF HARRIS COUNTY, TEXAS (KRIEGEL, SUCCESSOR IN OFFICE) *v.* VAN OOTEGHEM. C. A. 5th Cir. Certiorari dismissed without prejudice. Reported below: 628 F. 2d 488.

Miscellaneous Orders

No. 80–689. WIDMAR ET AL. *v.* VINCENT ET AL. C. A. 8th Cir. [Certiorari granted, 450 U. S. 909.] Motions of Anti-Defamation League of B'nai B'rith and American Jewish Congress for leave to file briefs as *amici curiae* granted.

No. 80–1010. CURREY ET AL., DBA CURREY & CURREY *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL. Sup. Ct. Okla.;

No. 80–1494. UNITED AIR LINES, INC. *v.* DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA ET AL. C. A. 9th Cir.; and

No. 80–1523. FAIRDALE FARMS, INC. *v.* YANKEE MILK, INC., ET AL. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 80–6406. In re Nolan. Petition for writ of habeas corpus denied.

No. 80–1511. In re Halvorsen. Petition for writ of mandamus and/or other relief denied.

No. 80–6293. In re Jones. Petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 80–415. Railway Labor Executives' Assn. *v.* Gibbons, Trustee, et al. Appeal from D. C. N. D. Ill.; and

No. 80–1239. Railway Labor Executives' Assn. *v.* Gibbons, Trustee, et al. Appeal from C. A. 7th Cir. In No. 80–415, further consideration of question of jurisdiction postponed to hearing of case on the merits. In No. 80–1239, probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. In the course of briefing the questions presented in these cases, the parties are requested to address whether the issue of the constitutionality of sections 106 and 110 of the Rock Island Railroad Transition and Employee Assistance Act, as modified by section 701 of the Staggers Rail Act of 1980, Pub. L. 96–448, 94 Stat. 1959, 45 U. S. C. §§ 1005 and 1008 (1976 ed., Supp. IV), is properly before us. See Fed. Rule Civ. Proc. 65 (a)(2). Reported below: No. 80–1239, 645 F. 2d 74.

No. 80–6298. Mills *v.* Habluetzel. Appeal from Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

Certiorari Granted

No. 80–1436. Baldrige, Secretary of Commerce, et al. *v.* Shapiro, Essex County Executive. C. A. 3d Cir. Certiorari granted. Reported below: 636 F. 2d 1210.

Certiorari Denied. (See also No. 80–1486, *supra.*)

No. 80–980. MICHIENZI ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 630 F. 2d 455.

No. 80–966. SMITH *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 193.

No. 80–1154. HAYWARD ET AL. *v.* PROCUNIER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 629 F. 2d 599.

No. 80–1176. BLOCK *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 270 Ark. 671, 606 S. W. 2d 362.

No. 80–1244. ALESSI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1133.

No. 80–1248. BRIGUGLIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1211.

No. 80–1262. SUPREME OPTICAL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 628 F. 2d 1262.

No. 80–1286. F. W. WOOLWORTH CO. *v.* FELL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 629 F. 2d 1204.

No. 80–1295. CORNET STORES ET AL. *v.* BUCHANAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 96.

No. 80–1296. SOUTHERN CALIFORNIA FINANCIAL CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 225 Ct. Cl. ——, 634 F. 2d 521.

No. 80–1310. TRANSWESTERN PIPELINE CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1266.

No. 80–1326. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1228.

No. 80–1342. BASSETT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 633 F. 2d 108.

No. 80–1375. ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1196.

No. 80–1423. ASSARSSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 635 F. 2d 1237.

No. 80–1445. HEARST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 1190.

No. 80–1446. LAVIN *v.* COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 80–1451. ROBBINS & MYERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 653 F. 2d 237.

No. 80–1468. BATTELSTEIN ET AL. *v.* INTERNAL REVENUE SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 1182.

No. 80–1470. PENNINGTON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 635 F. 2d 1387.

No. 80–1472. HOUSTON *v.* BENTTREE, LTD. C. A. 10th Cir. Certiorari denied. Reported below: 637 F. 2d 739.

No. 80–1485. LOHMAN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–1487. HARVEY *v.* CONNOR. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 85 Ill. App. 3d 1061, 407 N. E. 2d 879.

No. 80–1488. PARKS ET AL. *v.* ALEXANDER, GOVERNOR OF TENNESSEE, ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 608 S. W. 2d 881.

No. 80–1489. COYNE ET AL. *v.* CITY OF CINCINNATI. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 2d 28, 413 N. E. 2d 1177.

No. 80–1490. WORKMAN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 47 Ore. App. 1055, 615 P. 2d 1140.

No. 80–1495. CALIFORNIA *v.* AUSTIN. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 80–1505. RANCHO LA COSTA *v.* COUNTY OF SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 111 Cal. App. 3d 54, 168 Cal. Rptr. 491.

No. 80–1524. TIFFANY, DBA PATRICIA ANN'S COUNTRY STORE *v.* COUNTY OF ALBEMARLE, VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. cli.

No. 80–1559. ZELLER *v.* RANKIN. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 844.

No. 80–1636. MAIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 580.

No. 80–5660. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 207.

No. 80–6009. ROGERS *v.* BRITTON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 631 F. 2d 572.

No. 80–6025. SOAP *v.* CARTER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 632 F. 2d 872.

No. 80–6031. ABELL *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 606 S. W. 2d 198.

No. 80–6059. MITCHELL ET AL. *v.* SUPERIOR COURT FOR THE COUNTY OF SANTA CLARA, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 767.

No. 80–6107. NELSON *v.* MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1291.

No. 80–6135. ISBLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 885.

No. 80–6146. TSOSIE *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 630 F. 2d 1328.

No. 80–6258. DRUCKER *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 562.

No. 80–6265. CHRISTIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 1354.

No. 80–6282. HARRINGTON *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 165.

No. 80–6284. HEIRENS *v.* MIZELL, WARDEN, ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 89 Ill. App. 3d 1208, 417 N. E. 2d 277.

No. 80–6288. PORTELA *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–6289. WEXLER *v.* LOWER MORELAND TOWNSHIP POLICE DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6295. LIGHTCSY *v.* SUMNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 80–6296. KICKASOLA, ADMINISTRATRIX *v.* JIM WALLACE OIL CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 580.

No. 80–6297. CODA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 287 Pa. Super. 570, 428 A. 2d 240.

No. 80–6300. JOHN *v.* JOSEPH. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1208.

No. 80–6305. TRUPPI *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 182 Conn. 449, 438 A. 2d 712.

No. 80–6308. WEDDELL *v.* MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 211.

No. 80–6310. GAMBLE *v.* JONES, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–6312. HOLLAND *v.* RICHTMYER. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. ci.

No. 80–6370. GARCIA-YEPES *v.* UNITED STATES; and
No. 80–6420. DELOS-RIOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 642 F. 2d 42.

No. 80–6376. SCANLON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 640 F. 2d 144.

No. 80–6391. MAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6396. BLAIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 882.

No. 80–6402. ROBLES-SANDOVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 692.

No. 80–6404. FOX *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1355.

No. 80–6407. GAFFNEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 421 A. 2d 924.

No. 80–6413. MILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 634 F. 2d 1134.

No. 80–6424. HUBBARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 783.

No. 80–6428. HEIMERLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 80–500. NEWELL BRIDGE & RAILWAY CO. *v.* DAILEY, STATE TAX COMMISSIONER OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: — W. Va. —, 266 S. E. 2d 453.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

Petitioner is a West Virginia corporation. Its pays West Virginia property, capital stock, and income taxes. Petitioner's sole business is the operation and maintenance of a toll bridge across the Ohio River. The bridge spans the river between Newell, W. Va., and East Liverpool, Ohio. Two-thirds of the bridge is within West Virginia and one-third is within Ohio. The bridge has only one entrance and exit in each State and carries an equal volume of traffic in both directions. There is a single tollbooth, located on the Ohio side.

The West Virginia Business and Occupation Tax, W. Va. Code § 11–13–2 (1974), imposes an annual privilege tax on persons, including corporations, measured by gross receipts. The statute, however, specifically exempts "gross income de-drived from commerce between this State and other states of the United States . . . ." § 11–13–2d. Since 1933, petitioner has regularly reported all tolls collected in its operation of the bridge, but has claimed that this income falls within the exemption for income received from interstate commerce.

In January 1974, respondent assessed the corporation $83,000 in unpaid taxes, representing the tax due on the tolls received between 1968 and 1972. Petitioner appealed

this assessment and won a reversal. That decision, however, was subsequently reversed, and the tax reinstated, by the Supreme Court of Appeals of West Virginia.

That court held that the exemption for gross income derived from commerce between West Virginia and other States is identical in scope to the federal Interstate Commerce Clause: "If revenues from bridges are not covered by the federal constitution's commerce clause, they are not excepted from the statute." — W. Va. —, —, 266 S. E. 2d 453, 454 (1980). To determine the scope of the federal Commerce Clause, the court relied on two prior decisions of this Court: *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150 (1897), and *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 83 (1935). In *Henderson Bridge,* the Court upheld a Kentucky tax on the intangible property of a Kentucky corporation, the business of which was the operation of a railroad bridge over the Ohio River between the Kentucky and Indiana shores. The West Virginia court relied on the following language from that opinion:

> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge." 166 U. S., at 153–154.

In *Detroit International Bridge Co.,* the Court specifically relied on the above language to reach a similar conclusion. 294 U. S., at 86. It upheld a state tax on a state corporation, the sole business of which was to operate and maintain a toll bridge across the Detroit River, from Detroit, Mich., to Ontario, Canada. In both cases, the Court held that the bridge itself was an "instrumentality which others may use in conducting foreign commerce," *id.,* at 85, but that operation of the bridge was not itself interstate commerce.

The West Virginia court correctly noted that *"Hender-*

son . . . is still good law having never been overruled." —— W. Va., at ——, 266 S. E. 2d, at 456. In my view, however, it is time that this Court took a new look at *Henderson* and *Detroit International Bridge Co.* to consider whether they are consistent with this Court's more recent treatment of the effect of the Interstate Commerce Clause on the power of the States to impose taxes.

The Court has dealt with other fixed facilities as "instrumentalities" of interstate commerce and treated their operation as interstate commerce. In *Colonial Pipeline Co.* v. *Traigle,* 421 U. S. 100 (1975), the Court assumed that a corporation that owned and operated an interstate pipeline linking the oil refining complexes of Texas and Louisiana with the population centers of the Northeast and Southeast was engaged in interstate commerce. See also *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157 (1954). It is not at all clear that a pipeline is distinguishable from a bridge as an instrumentality of interstate commerce.

Furthermore it is arguable that the Court's conclusion in *Henderson,* subsequently followed in *Detroit International Bridge Co.,* that operation of an interstate bridge is not interstate commerce was not necessary to support the result reached there. Kentucky had excluded tangible and intangible property located in Indiana from its tax: "The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky." 166 U. S., at 154. Petitioner argues that the case "involved in reality a *de facto* apportionment to property within the state." Pet. for Cert. 16. More importantly, under today's standards it would be unnecessary to exclude an interstate bridge from the interstate commerce field to sustain the Kentucky tax involved in the *Henderson* case. Under *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274 (1977), a state tax on a corporation will be sustained if there is a substantial nexus between its operations and the taxing State, and if the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to

the services provided by the State. Under this test, it makes no difference whether operation of an interstate bridge is considered "interstate commerce." Although the Kentucky tax probably would have been upheld under this test, the West Virginia tax involved in the case before us now is an unapportioned tax and would probably not satisfy the test. This creates an incongruous situation: The West Virginia court relied on *Henderson*'s reasoning, which may never have been, and in any case is not now, necessary to support the conclusion it was designed to reach, to support another conclusion that might not otherwise survive under contemporary standards.

Accordingly, I think this case should be given plenary consideration, and therefore I dissent from denial of certiorari.

No. 80–1032. GARTNER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE STEWART would grant certiorari.

No. 80–1258. MARKHAM ET AL. *v.* GELLER. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 1027.

JUSTICE REHNQUIST, dissenting.

This case presents the question whether a school board may enact a policy which, for budgetary reasons, favors the hiring of less experienced teachers. Because I think the Court of Appeals for the Second Circuit erred in holding that such a policy violates the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.*, I dissent from the denial of the petition for a writ of certiorari.

The respondent in this action was 55 years old when she applied for a position as an art teacher in the West Hartford, Conn., school system. Respondent had 13 years of prior experience as a teacher in New Jersey. When the job opening for which respondent applied was filled by a 26-year-old teacher with three years' experience, respondent initiated this lawsuit alleging violations of the ADEA and pointing in par-

ticular to the "sixth step" policy adopted by the West Hartford Board of Education (Board). This cost-cutting policy read:

> "Except in special situations and to the extent possible, teachers needed in West Hartford next year will be recruited at levels below the sixth step of the salary schedule."

The "sixth step" is the salary grade reached by teachers with more than five years' experience. This policy would be applicable to the respondent because the Board, like most school districts, gives credit for experience received in other schools.

At trial, the respondent introduced statistical evidence establishing that 92.6% of Connecticut teachers between 40 and 65 years of age (the protected age group under ADEA) have more than five years' experience and thus are discriminated against by the sixth-step policy. The significance of this evidence, however, was minimized by the additional evidence that over 60% of teachers under age 40 also have more than five years' experience. The District Court instructed the jury that petitioners' sixth-step policy was discriminatory as a matter of law and that respondent was entitled to recover if petitioners' employment "decision about [respondent] was made in whole or in part because she was above the fifth step on the salary scale . . . . " The jury returned a verdict for the respondent.

On appeal, the Court of Appeals affirmed in pertinent part. The Court of Appeals likened this case to a Title VII discriminatory impact case and held that respondent's statistics had established a prima facie case of discriminatory impact and that petitioners had not justified their employment practice by a showing of business necessity or need. The Court of Appeals specifically rejected petitioners' contention that the sixth-step policy was supportable as a necessary cost-cutting gesture in the face of tight budgetary constraint. The Court of Appeals reasoned that this cost-cutting justification

must fail because of 29 CFR § 860.103 (h) (1979), which provides in part:

> "[A] general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed."

The Court of Appeals held that this regulation similarly defeated petitioners' defense to respondent's disparate-treatment case.

In my opinion, the decision of the Court of Appeals is inconsistent with the express provisions of the ADEA and is not supported by any prior decision of this Court. The ADEA makes it unlawful for any employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U. S. C. § 623 (a)(1). The policy under attack in this case, however, makes no reference to age. For budgetary reasons, a school board simply adopted a policy to hire teachers with fewer years of experience. No one contends that the Board discriminated against teachers over the age of 40 who had fewer than five years of prior teaching experience and who sought employment. In spite of this, the courts below found the Board's policy unlawful because it has a greater "impact" on teachers between

the ages of 40 and 65 than it has on teachers under the age of 40. They reached this conclusion even though over 60% of all teachers under the age of 40 also have more than five years of experience and are detrimentally affected by the Board's policy. This Court has never held that proof of discriminatory impact can establish a violation of the ADEA, and it certainly has never sanctioned a finding of a violation where the statistical evidence revealed that a policy, neutral on its face, has such a significant impact on all candidates concerned, not simply the protected age group.

Of greater importance, however, is the rationale employed by the Court of Appeals in rejecting the Board's "cost" justification for its policy. The court held that such justification conflicted with 29 CFR § 860.103 (h) (1979), which is one of the many guidelines that has been issued by the Secretary of Labor in this area. By its express terms, however, this regulation is inapplicable to the present situation. The Board has not made a general assertion that "the average cost of employing older workers as a group is higher than the average cost of employing younger workers," nor does this involve an attempt "[t]o classify or group employees solely on the basis of age for the purpose of comparing costs . . . ." Rather, this is a policy which by its express terms makes no reference to age and which in practice has had a significant impact on teachers under the age of 40 as well as those over that age. The Court of Appeals' opinion manages to tie the hands of local school boards in dealing with ever-increasing costs without the sanction of the Act which Congress passed to protect older workers. Presumably, the Court of Appeals' rationale would similarly prohibit the Board from deciding no longer to give full credit for teaching experience received at other school districts. Such a policy, although neutral on its face with regard to age and affecting all teachers, would no doubt have a statistically different impact on teachers over the age of 40 than on those under that age.

In my view, Congress did not intend the ADEA to have

the restraining influence on local governments which will result from the decision below. Congress revealed this intention in 29 U. S. C. § 623 (f)(1), which provides that it shall not be unlawful for an employer to take any action otherwise prohibited "where the differentiation is based on reasonable factors other than age." Because the differential based on experience in petitioners' sixth-step policy has nothing to do with age, I would grant the petition for a writ of certiorari and give plenary consideration to the decision of the Court of Appeals.

No. 80–1289. OHIO DEPARTMENT OF HIGHWAY SAFETY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 635 F. 2d 1195.

No. 80–1389. ALESSANDRELLO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 637 F. 2d 131.

No. 80–5980. COLEMAN *v.* BALKCOM, WARDEN. Super. Ct. Ga., Tattnall County. Certiorari denied.

JUSTICE STEVENS, concurring.

The Court's management of its discretionary docket is a subject that merits re-examination from time to time in the light of changes that affect the business of the federal judiciary. See, *e. g., Watt* v. *Alaska, ante,* p. 273 (STEVENS, J., concurring), and *Singleton* v. *Commissioner,* 439 U. S. 940, 942–946 (opinion of STEVENS, J.). Opinions dissenting from the denial of certiorari sometimes create the impression that we review fewer cases than we should; I hold the opposite view. Today JUSTICE REHNQUIST advances the proposition, as I understand his dissenting opinion, that we should promptly grant certiorari and decide the merits of every capital case coming from the state courts in order to expedite the administration of the death penalty.

In my judgment, the Court wisely rejects this proposal.

In the last 10 months, over 90 certiorari petitions have been filed in capital cases. If we were to hear even a substantial percentage of these cases on the merits, they would consume over half of this Court's argument calendar. Although the interest in protecting the constitutional rights of persons sentenced to death is properly characterized as a federal interest, the interest in imposing the death sentence is essentially a state interest. Because the persons on death row are concentrated in only a few States, because some States have no capital punishment at all, and because the range of capital offenses differs in different States, it is quite clear that all States do not share the same interest in accelerating the execution rate. This Court's primary function is to adjudicate federal questions. To make the primary mission of this Court the vindication of certain States' interests in carrying out the death penalty would be an improper allocation of the Court's limited resources.

Moreover, one may also question whether JUSTICE REHNQUIST's proposal would accomplish its intended purpose. As I understand his proposal, it would preclude the federal district courts from granting writs of habeas corpus in any capital cases on any ground that had been presented to and rejected by this Court. Because this Court is not equipped to process all of these cases as expeditiously as the several district courts, it is most unlikely that this innovative proposal would dramatically accelerate the execution of the persons on death row.[1]

One of the causes of delay in the conclusion of litigation in capital cases has been the fact that the enactment of new

[1] This proposed procedure in some cases would require the Court to grant certiorari and review the merits twice, once on direct appeal and once to review state collateral proceedings. Review of the merits would certainly involve more delay than would a denial of certiorari. Moreover, JUSTICE REHNQUIST's proposal would not have any effect on the delay in those cases in which a state court's resolution of collateral proceedings on procedural grounds would bar this Court's consideration of the merits of the claims raised in those proceedings.

state legislation after this Court's decision in *Furman* v. *Georgia,* 408 U. S. 238, generated a number of novel constitutional questions. Although those questions have not been difficult for three Members of the Court,[2] other Justices have found a number of these questions sufficiently important and difficult to justify the delays associated with review in this Court. The principal delay—a matter of four years—was the period between the entry of the stays in the *Furman* litigation in 1972, and the decisions in July 1976 in *Gregg* v. *Georgia,* 428 U. S. 153, *Proffitt* v. *Florida,* 428 U. S. 242, and *Jurek* v. *Texas,* 428 U. S. 262, in which the constitutionality of the death penalty was ultimately sustained. Following that basic holding, the Court has also decided several other cases presenting substantial constitutional issues relating to capital punishment statutes;[3] presumably those issues will no longer detain the state or federal courts in their consideration of cases in which the death penalty has been imposed.[4] One therefore should not assume that the delays of the past few years will necessarily be reflected in the future if the various state authorities act with all possible diligence.[5]

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[2] JUSTICE BRENNAN and JUSTICE MARSHALL have invariably voted to set aside the death penalty and, if my memory serves me correctly, JUSTICE REHNQUIST has invariably voted to uphold the death penalty.

[3] See *Adams* v. *Texas,* 448 U. S. 38; *Beck* v. *Alabama,* 447 U. S. 625; *Godfrey* v. *Georgia,* 446 U. S. 420; *Green* v. *Georgia,* 442 U. S. 95; *Presnell* v. *Georgia,* 439 U. S. 14; *Lockett* v. *Ohio,* 438 U. S. 586; *Bell* v. *Ohio,* 438 U. S. 637; *Coker* v. *Georgia,* 433 U. S. 584; *Dobbert* v. *Florida,* 432 U. S. 282; *Roberts* v. *Louisiana,* 431 U. S. 633; *Gardner* v. *Florida,* 430 U. S. 349; *Davis* v. *Georgia,* 429 U. S. 122.

[4] It must be emphasized that some of the delay in these cases is attributable to a congressional determination that state prisoners must exhaust state remedies prior to seeking review in federal court. See 28 U. S. C. § 2254 (b).

[5] In the case of John Spenkelink, the only person who continued to attack his sentence and who has been executed since 1976, the date of his crime was February 3, 1973, and the date of his execution was May 25, 1979. Of the more than six years between his crime and his execution, approximately 38 months was spent in the federal courts. During 17 of

The deterrent value of any punishment is, of course, related to the promptness with which it is inflicted. In capital cases, however, the punishment is inflicted in two stages. Imprisonment follows immediately after conviction; but the execution normally does not take place until after the conclusion of post-trial proceedings in the trial court, direct and collateral review in the state judicial system, collateral review in the federal judicial system, and clemency review by the executive department of the State. However critical one may be of these protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution. If the death sentence is ultimately set aside, or its execution delayed for a prolonged period, the imprisonment during that period is nevertheless a significant form of punishment. Indeed, the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself. In all events, what is at stake in this procedural debate is the length of that period of incarceration rather than the question whether the offender shall be severely punished.

How promptly a diligent prosecutor can complete all of the proceedings necessary to carry out a death sentence is still uncertain. Much of the delay associated with past litigation should not reoccur in cases that merely raise issues that have now been resolved. As is true of all other types of litigation as well, however, inevitably new issues arise that will be sufficiently important and difficult to require

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those months Spenkelink's certiorari petition was awaiting this Court's determination of the constitutionality of the Florida death penalty statute in *Proffitt* v. *Florida*, 428 U. S. 242. Thus over three of the six-plus years were spent at trial, on appeal in the Florida state courts, before the Governor of Florida on a petition for executive clemency, and before the trial court on a motion to vacate, set aside, or correct a sentence. See *Spinkellink* v. *State*, 313 So. 2d 666 (1975); *Spenkelink* v. *Wainwright*, 442 U. S. 1301 (REHNQUIST, J., in chambers). These delays would be unaffected by JUSTICE REHNQUIST's proposal.

deliberation before they are fully resolved. This Court should endeavor to conclude capital cases—like all other litigation—as promptly as possible. We must, however, also be as sure as possible that novel procedural shortcuts have not permitted error of a constitutional magnitude to occur. For after all, death cases are indeed different in kind from all other litigation. The penalty, once imposed, is irrevocable. In balance, therefore, I think the Court wisely declines to select this group of cases in which to experiment with accelerated procedures. Accordingly, I concur in the order denying certiorari.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was convicted of first-degree murder and sentenced to death. After exhausting his direct appeals, petitioner filed this action in the Superior Court of Tattnall County, Ga., seeking a writ of habeas corpus. One of petitioner's claims was that prejudicial publicity had created an atmosphere in which a fair trial was impossible. Petitioner's counsel asserted in an affidavit that the jurors in his original trial, if called as witnesses, would "testify as to the widespread discussion of the [offense] in Seminole County . . . and to the fact that they, as jurors, were affected in their statutory decision-making process by the adverse pre-trial publicity." The affidavit further alleged that the county jury commissioners, members of the jury panels, and numerous reporters and expert witnesses would offer testimony to similar effect. In order to prove these allegations, petitioner sought compulsory process to require the witnesses to testify.

At that point, petitioner's efforts were thwarted by Ga. Code § 38–801 (e) (1978). Although that statute has since been amended,[1] at the time of petitioner's habeas hearing, it

[1] The statute as amended, effective February 15, 1980, permits service of process "at any place within the state." 1980 Ga. Laws 71–72. Petitioner's hearing was held prior to that date.

provided that subpoenas in habeas cases could be served only in the county in which the hearing was held or within 150 miles of that county. None of the witnesses petitioner wished to summon lived so close. As one would expect, most of them lived in or near Seminole County, where the offense was committed. Petitioner was further constrained by the provisions of Ga. Code § 50–127 (1978) to file his habeas petition in the county where he was incarcerated.[2] In sum, only the State's procedural requirement threatened to prevent petitioner from calling the witnesses who he alleged would testify in support of his claim. Consequently, petitioner asked the trial court to declare § 38–801 (e) unconstitutional and to permit him to perfect service anywhere in the State. The trial court sustained the statute and denied the petition for habeas corpus on the merits. The Georgia Supreme Court declined to grant leave to appeal. Because the availability of compulsory process to an individual challenging his death penalty raises important questions under the Due Process Clause, I would grant the petition for certiorari.[3]

A habeas corpus proceeding is, of course, civil rather than criminal in nature, and consequently the ordinary Sixth Amendment guarantee of compulsory process, which is made applicable to the States by the Fourteenth Amendment,[4] does not apply. Nevertheless, when the death penalty is in issue, the Constitution may impose unusual limitations on the States. As we emphasized just last Term in *Beck* v. *Ala-*

[2] It is true that Rule 45 (e)(1) of the Federal Rules of Civil Procedure limits service of district court subpoenas to 100 miles of the hearing site. But under 28 U. S. C. § 2241 (d) an individual has the option of filing his petition for a writ of habeas corpus in the district where the conviction occurred rather than the one where he is incarcerated. The Georgia statutory scheme challenged in this case does not include that option.

[3] Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment, I would in any event grant the petition for certiorari and vacate the judgment below insofar as it leaves undisturbed the death sentence.

[4] *Washington* v. *Texas*, 388 U. S. 14, 17–19 (1967).

bama, 447 U. S. 625, 637 (1980), "there is a significant constitutional difference between the death penalty and lesser punishments." If an individual is imprisoned for an offense he did not commit, the error can to some extent be rectified. But if he is executed, the wrong that has been done can never be corrected. That is just one reason that I, of course, adhere to my view that the State may never put an individual to death without imposing a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Yet surely those among my Brethren who believe that there are circumstances in which the State may legitimately impose this ultimate sanction would not want to see an innocent individual put to death. Certainly no Member of this Court would countenance a conviction obtained in violation of the Constitution. Because of the unique finality of the death penalty, its imposition must be the result of careful procedures and must survive close scrutiny on post-trial review. I do not believe that this rigorous scrutiny is possible when, as here, procedural rules ultimately abandoned by the State are all that stand between the convicted individual and the chance to prove his claims.

Petitioner offered to call as witnesses the jurors, who, he alleged, would testify not merely to the atmosphere surrounding the trial, but to the actual effect of that atmosphere on their deliberations. The only obstacle to calling those witnesses was the State's failure to provide him with a means of serving compulsory process. In order to agree with petitioner that this failure amounts to a violation of the Due Process Clause, it would not be necessary to hold that compulsory process is constitutionally required in any other civil, or indeed, in any other habeas proceeding. It would instead be sufficient, as it was last Term in *Beck,* to recognize the unique character of the death penalty and of the restraints required by the Constitution before the State may impose it. Granting the assistance of compulsory process to an individual under sentence of death but ready and willing to demon-

strate the unconstitutionality of the manner of his conviction might well be among those restraints.[5] Accordingly, I would grant the petition for certiorari to consider that question.

JUSTICE REHNQUIST, dissenting.

Ordinarily I would have no hestitation joining the majority of my colleagues in denying the petition for certiorari in this case. The questions presented in the petition are of importance only to petitioner himself and therefore are not suitable candidates for the exercise of our discretionary jurisdiction. But in a larger sense, the case raises significant issues about the administration of capital punishment statutes in this country, and reflects the increasing tendency to postpone or delay the enforcement of those constitutionally valid statutes. Because I think stronger measures are called for than the mere denial of certiorari in a case such as this, I would grant the petition for certiorari so that the case can be fully briefed and argued.

A mere recital of the facts of this case illustrates the delay to which I have referred. Petitioner was convicted by a jury in 1973 of murdering six members of a family, after raping and torturing some members of that family. He was sentenced to death under Georgia's capital punishment statute, a statute expressly held constitutional in *Gregg* v. *Georgia*, 428 U. S. 153 (1976). The sentence was affirmed by the Supreme Court of Georgia, *Coleman* v. *State*, 237 Ga. 84, 226 S. E. 2d 911 (1976), and this Court denied the first petition for certiorari. *Coleman* v. *Georgia*, 431 U. S. 909, rehearing denied, 431 U. S. 961 (1977). Petitioner subse-

[5] Because Georgia law now permits service anywhere in the State, it cannot fairly be argued that requiring compulsory process to force witnesses to appear would be contrary to any state policy. It is no longer true, as the State asserts in its brief in opposition, that the 150-mile limit reflects a legislative determination concerning "the interests of sparing undue burdens to witnesses and of establishing realistic boundaries to the jurisdictional reach of the trial courts."

quently sought state collateral relief, which was denied by the state habeas court. The Georgia Supreme Court then denied his application for a writ of probable cause to appeal. Petitioner has now filed his second petition for certiorari in this Court. Because petitioner has had a full opportunity to have his claims considered on direct review by both the Supreme Court of Georgia and this Court and on collateral review by the state courts of Georgia, and because the issues presented are not substantial, it is not surprising that the majority of the Court votes to deny the petition for certiorari.

I dissent not because I believe that petitioner has made any showing in the Georgia courts that he was deprived of any rights secured to him by the United States Constitution, but rather because our mere denial of certiorari will not in all likelihood end the already protracted litigation in this case. If petitioner follows the path of many of his predecessors, he will now turn to a single-judge federal habeas court, alleging anew some or all of the reasons which he urges here for granting the petition for certiorari. If he fails to impress the particular United States District Court in which his habeas petition is filed, he may upon the issuance of a certificate of probable cause appeal to a United States Court of Appeals. And throughout this exhaustive appeal process, any single judge having jurisdiction over the case may of course stay the execution of the penalty pending further review. 28 U. S. C. § 1651. Given so many bites at the apple, the odds favor petitioner finding some court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error. See *Estelle* v. *Jurek*, 450 U. S. 1014 (1981) (REHNQUIST, J., dissenting).

It seems to me that we have thus reached a stalemate in the administration of federal constitutional law. Although this Court has determined that capital punishment statutes do not violate the Constitution, *Gregg* v. *Georgia, supra,* and although 30-odd States have enacted such statutes, apparently in the belief that they constitute sound social policy, the ex-

istence of the death penalty in this country is virtually an illusion. Since 1976, hundreds of juries have sentenced hundreds of persons to death, presumably in the belief that the death penalty in those circumstances is warranted, yet virtually nothing happens except endlessly drawn out legal proceedings such as those adverted to above. Of the hundreds of prisoners condemned to die who languish on the various "death rows," few of them appear to face any imminent prospect of their sentence being executed. Indeed, in the five years since *Gregg* v. *Georgia,* there has been only one execution of a defendant who has persisted in his attack upon his sentence. See *Spenkelink* v. *Wainwright,* 442 U. S. 1301 (1979) (REHNQUIST, J., in chambers). My in-chambers opinion in that case describes some of the many avenues of relief which can be pursued by one sentenced to death.

I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system. Perhaps out of a desire to avoid even the possibility of a "Bloody Assizes," this Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty by the States and the Federal Government into arcane niceties which parallel the equity court practices described in Charles Dickens' "Bleak House." Even though we have upheld the constitutionality of capital punishment statutes, I fear that by our recent actions we have mistakenly sent a signal to the lower state and federal courts that the actual imposition of the death sentence is to be avoided at all costs.

That surely was not the intent of the opinion of JUSTICES STEWART, POWELL, and STEVENS in *Gregg* v. *Georgia.* That opinion recognized that capital punishment is said to serve two principal social purposes—retribution and the deterrence of capital crimes by prospective offenders. It went on to explain:

> "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which

properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. . . .

"In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." 428 U. S., at 186–187.[1]

What troubles me is that this Court, by constantly tinkering with the principles laid down in the five death penalty cases decided in 1976, together with the natural reluctance of state and federal habeas judges to rule against an inmate on death row, has made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes. When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system. To be

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[1] That same opinion once again rejected the argument that evolving "standards of decency" demand the end of the death penalty, as if the role of judges, as opposed to democratically elected legislatures, is to "divine" what are "decent" societal values. The opinion made clear that recent developments—such as the enactment of capital punishment statutes by 35 States—had undercut that argument. "Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction." 428 U. S., at 179–180.

sure, the importance of procedural protections to an accused should not be minimized, particularly in light of the irreversibility of the death sentence. But it seems to me that when this Court surrounds capital defendants with numerous procedural protections unheard of for other crimes and then pristinely denies a petition for certiorari in a case such as this, it in effect all but prevents the States from imposing a death sentence on a defendant who has been fairly tried by a jury of peers. As Justice Jackson stated in *Stein* v. *New York,* 346 U. S. 156, 197 (1953): "The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law."

The other principal purpose of capital punishment is retribution. The testimony of Lord Justice Denning, then Master of the Rolls of the Court of Appeal in England, before the Royal Commission on Capital Punishment answers those who insist that respect for the "sanctity of life" compels the end of the death sentence for any crime, no matter how heinous. He explained:

> "Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not." Royal Commission on Capital Punishment, Minutes of Evidence, Dec. 1, 1949, p. 207 (1950), quoted in *Gregg* v. *Georgia,* 428 U. S., at 184, n. 30.

There can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution. As

the opinion in *Gregg* stated, " '[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve" then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.' " *Id.*, at 183, quoting *Furman* v. *Georgia*, 408 U. S. 238, 308 (1972) (STEWART, J., concurring). San Francisco experienced vigilante justice during the Gold Rush in the middle part of the last century; the mining towns of Montana experienced it a short time later; and it is still with us as a result of the series of unsolved slayings of Negro children in Atlanta.[2]

In thinking about capital punishment, it is important to remember that the preservation of some degree of liberty for all demands that government restrain the few who kill law-abiding members of the community. As Judge Learned Hand long ago recognized:

> "And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the

[2] A recent article in the Washington Star, Mar. 21, 1981, p. 1, cols. 3–4, illustrates this growing problem. It reads:

"ATLANTA (AP)—Two gun-wielding men were arrested yesterday at the start of a housing project's self-defense patrol to protect youngsters against Atlanta's child killers.

"Younger members of the patrol, who carried baseball bats, were not stopped but those carrying weapons were questioned by police. The two arrested were charged with possession of deadly weapons at a public gathering. . . .

"Israel Green, who heads the project's tenants' association, called for national support of the patrol's right to carry arms.

" 'We cannot stop them (killers) by consulting psychics, by having seances, by prayer vigils or by lighting little candles or forms of distracting activity that is not directly connected to the problems we face,' Green said in a statement. 'We have to face these killers in the real world.' "

possession of only a savage few; as we have learned to our sorrow." The Spirit of Liberty 190 (3d ed. 1960).

James Madison made the same point in this now famous passage from Federalist Paper No. 51:

> "But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: *you must first enable the government to control the governed;* and in the next place oblige it to control itself." The Federalist Papers 322 (1961). (Emphasis supplied.)

I believe we have in our judicial decisions focused so much on controlling the government that we have lost sight of the equally important objective of enabling the government to control the governed. When our systems of administering criminal justice cannot provide security to our people in the streets or in their homes, we are rapidly approaching the state of savagery which Learned Hand describes. In Atlanta, we cannot protect our small children at play. In the Nation's Capital, law enforcement authorities cannot protect the lives of employees of this very Court who live four blocks from the building in which we sit and deliberate the constitutionality of capital punishment.[3]

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[3] When the issue of capital punishment arises, one is reminded of Judge Parker, a well-known judge who sat in the Western District of Arkansas for more than 20 years, and had to deal with the outlaws of his time and place. He had earned the reputation of a "hanging judge." Of the several biographies written of him, J. Gregory & R. Strictland, Hell on the Border 28 (1971) makes the following statement:

"It did not seem to Judge Parker to be an act of cruelty to sentence such blood-thirsty men to die. 'I never hanged a man,' he said when lying on his death bed, 'I never hanged a man. It is the law. The good ladies who carry flowers and jellies to criminals mean well. There is no

In light of the foregoing, I do not believe it is a responsible exercise of our certiorari jurisdiction to blithely deny petitions for certiorari in cases where petitioners have been sentenced to death and present for review claims which seem on their face to have little merit, and which have been extensively considered by state and federal courts on both direct and collateral review. The 5-year history of death sentences, as opposed to execution of those sentences, is a matter with respect to which no Member of this Court can be unaware. If capital punishment is indeed constitutional when imposed for the taking of the life of another human being, we cannot responsibly discharge our duty by pristinely denying a petition such as this, realizing full well that our action will simply further protract the litigation.

Accordingly, I believe that the petition should be granted in order that this Court may deal with all of petitioner's claims on their merits. If after full briefing and argument the Court decides to affirm, the provisions of 28 U. S. C. § 2244 (c) would come into operation. That section provides in pertinent part:

> "In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein . . . ."

See *Neil* v. *Biggers,* 409 U. S. 188 (1972).

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doubt of that, but what mistaken goodness! Back of the sentimentality are the motives of sincere pity and charity, sadly misdirected. They see the convict alone, perhaps chained in his cell; they forget the crime he perpetrated and the family he made husbandless and fatherless by his assassin work.' "

Thus the jurisdiction of the federal courts over petitioner's sentence of death would be at an end, and unless the appropriate state officials commuted petitioner's sentence, it would presumably be carried out. In any event, the decision would then be in the hands of the State which had initially imposed the death penalty, not in the hands of the federal courts.

No. 80–6281. SCHILLER ET AL. *v.* UNITED STATES. Ct. App. D. C. Motion of James R. Walker et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 424 A. 2d 51.

No. 80–6299. PICKENS *v.* ARKANSAS. Sup. Ct. Ark.; and No. 80–6369. PEEK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 80–6369, 395 So. 2d 492.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–5932. DOE ET AL. *v.* DELAWARE, 450 U. S. 382;

No. 80–485. IMMIGRATION AND NATURALIZATION SERVICE *v.* JONG HA WANG ET UX., 450 U. S. 139; and

No. 80–6061. MACARTHUR *v.* PHILIPPINE AIR LINES, INC., ET AL., 450 U. S. 985. Petitions for rehearing denied.

MAY 4, 1981

Appeals Dismissed

No. 80–1407. WINTERS ET AL. *v.* CITY OF KLAMATH FALLS. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 289 Ore. 747, 619 P. 2d 217.

No. 80–6243. HELLER ET AL. *v.* HANCOCK COUNTY CHILDREN SERVICES BOARD ET AL. Appeal from Sup Ct. Ohio dismissed for want of substantial federal question.

No. 80–6277. HARRIS *v.* FUERST. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 64 Ohio St. 2d 130, 413 N. E. 2d 826.

No. 80–6341. THOMPSON *v.* KENTUCKY. Appeal from Cir. Ct. Ky., Kenton County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 78–1851. HARRIS *v.* H. SCHULDT REEDEREI, 444 U. S. 839. Petition for rehearing granted and order of October 1, 1979, denying petition for writ of certiorari is vacated. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 596 F. 2d 92.

No. 79–813. AMERICAN COMMERCIAL LINES, INC. *v.* GRIFFITH ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 610 F. 2d 116.

No. 79–1625. SIERRA CLUB ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *California* v. *Sierra Club, ante,* p. 287. Reported below: 610 F. 2d 581.

No. 80–26. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. *v.* FLOWERS ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United Parcel Service, Inc.* v. *Mitchell, ante,* p. 56. Reported below: 622 F. 2d 573.

No. 80–245. OCEANIC NAVIGATION CORP. ET AL. *v.* SARAUW. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 622 F. 2d 1168.

No. 80–455. FUTO, ADMINISTRATRIX *v.* LYKES BROTHERS STEAMSHIP CO., INC., ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 619 F. 2d 81.

No. 80–1643. SILVER BULK SHIPPING, LTD. *v.* MCCARTHY. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 639 F. 2d 775.

No. 80–6017. PAYTON *v.* HARRIS. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated, and case remanded for further consideration in light of *Cuyler* v. *Adams,* 449 U. S. 433 (1981). Reported below: 636 F. 2d 1203.

Miscellaneous Orders

No. A–856 (80–1728). YEOHAM ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–870. PREMACHANDRA *v.* MITTS, ACTING ASSOCIATE DEPUTY CHIEF MEDICAL DIRECTOR, VETERANS ADMINISTRATION, DEPARTMENT OF MEDICINE AND SURGERY, ET AL. Application for injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–198. IN RE DISBARMENT OF FOGEL. Disbarment entered. [For earlier order herein, see 449 U. S. 979.]

No. D–200. IN RE DISBARMENT OF MCMAHON. Disbarment entered. [For earlier order herein, see 449 U. S. 1006.]

No. D–203. In re Disbarment of Henderson. Disbarment entered. [For earlier order herein, see 449 U. S. 978.]

No. D–205. In re Disbarment of Silaski. Disbarment entered. [For earlier order herein, see 449 U. S. 979.]

No. D–208. In re Disbarment of Noren. Disbarment entered. [For earlier order herein, see 449 U. S. 990.]

No. D–213. In re Disbarment of Halverson. Disbarment entered. [For earlier order herein, see 449 U. S. 1007.]

No. D–234. In re Disbarment of Fontaine. It is ordered that Ernest H. Fontaine III of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–235. In re Disbarment of Williams. It is ordered that Michael W. Williams, of Corpus Christi, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–236. In re Disbarment of Rosenblum. It is ordered that Henry Rosenblum, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 79–404. United States *v.* Cortez et al., 449 U. S. 411. Motion for appointment of counsel granted, and it is ordered that S. Jeffrey Minker, Esquire, of Tucson, Ariz., be appointed to serve as counsel for respondent, Jesus Cortez, *nunc pro tunc.*

No. 77, Orig. TENNESSEE *v.* ARKANSAS. Report of the Special Master received and ordered filed. Exceptions, if any, with supporting briefs to the Report may be filed by the parties within 45 days. Reply briefs, if any, to such Exceptions may be filed within 30 days. [For earlier order herein, see, *e. g.*, 439 U. S. 1061.]

No. 80–757. NEW YORK MERCANTILE EXCHANGE ET AL. *v.* LEIST ET AL.;

No. 80–895. CLAYTON BROKERAGE CO. OF ST. LOUIS, INC. *v.* LEIST ET AL.; and

No. 80–936. HEINOLD COMMODITIES, INC., ET AL. *v.* LEIST ET AL. C. A. 2d Cir. [Certiorari granted, 450 U. S. 910.] Motion of petitioners in No. 80–757 to divide oral argument with petitioners in Nos. 80–895 and 80–936, and motion of petitioners in Nos. 80–895 and 80–936 to divide oral argument with petitioners in No. 80–757, granted. Motions of petitioners in Nos. 80–895 and 80–936 for designation of counsel to present oral argument denied.

No. 80–1499. COMMISSIONER OF INTERNAL REVENUE *v.* DELTA METALFORMING CO., INC. C. A. 5th Cir. Motion of respondent to consolidate this case with No. 80–1251, *United States* v. *Vogel Fertilizer Co.* [certiorari granted, 450 U. S. 994], denied.

Probable Jurisdiction Noted

No. 80–1188. EDGAR *v.* MITE CORP. ET AL. Appeal from C. A. 7th Cir. Probable jurisdiction noted. Reported below: 633 F. 2d 486.

No. 80–1538. PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* DOE, GUARDIAN, ET AL. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 628 F. 2d 448.

Certiorari Granted

No. 80–1074. VELDE, ADMINISTRATOR, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, ET AL. *v.* NATIONAL BLACK POLICE ASSN., INC., ET AL. C. A. D. C. Cir. Certiorari granted. JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 203 U. S. App. D. C. 202, 631 F. 2d 784.

No. 80–1345. KAISER STEEL CORP. *v.* MULLINS ET AL. C. A. D. C. Cir. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 206 U. S. App. D. C. 334, 642 F. 2d 1302.

Certiorari Denied. (See also No. 80–6341, *supra.*)

No. 79–706. MCCULLEY, ADMINISTRATOR *v.* MITSUI O. S. K. LINES, LTD., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 596 F. 2d 746.

No. 79–1240. STOCKSTILL ET AL. *v.* GYPSUM TRANSPORTATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1112.

No. 80–94. COMPANIA MARITIME NAVEGACION NETUMAR, S. A. *v.* IRIZARRY. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1345.

No. 80–503. KING, CHIEF, FAIRFAX COUNTY POLICE DEPARTMENT, ET AL. *v.* WALLACE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 1157.

No. 80–642. RAYMOND, ADMINISTRATRIX *v.* I/S CARIBIA. C. A. 1st Cir. Certiorari denied. Reported below: 626 F. 2d 203.

No. 80–745. ORIENTAL STEAMSHIP CORP. *v.* MCMICHAEL. C. A. 9th Cir. Certiorari denied.

No. 80–890. LIOTTA *v.* NATIONAL FORGE CO.; and
No. 80–1115. NATIONAL FORGE CO. *v.* LIOTTA. C. A. 3d Cir. Certiorari denied. Reported below: 629 F. 2d 903.

No. 80–1101. KELCE *v.* U. S. FINANCIAL INC. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 2d 515.

No. 80–1261. GRUBB *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1211.

No. 80–1332. BERKOWITZ ET AL. *v.* SELZER; and
No. 80–1335. SELZER *v.* BERKOWITZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 809.

No. 80–1344. VIEGAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 639 F. 2d 42.

No. 80–1376. CORROS, ADMINISTRATRIX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 630 F. 2d 224.

No. 80–1385. INDUSTRIAL CONTRACTORS, INC., ET AL. *v.* CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION NO. 215. C. A. 7th Cir. Certiorari denied. Reported below: 636 F. 2d 1223.

No. 80–1402. PRINCIPE ET AL. *v.* MCDONALD'S CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 303.

No. 80–1416. ROGERS ET AL. *v.* GORDON, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 633 F. 2d 739.

No. 80–1480. ROWE ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 799.

No. 80–1504. SUMMITT *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 301 N. C. 591, 273 S. E. 2d 425.

No. 80–1516. LoBue *v.* Nevada ex rel. Department of Highways. Sup. Ct. Nev. Certiorari denied. Reported below: 96 Nev. 505, 611 P. 2d 1077.

No. 80–1519. Barber, Commissioner, Department of Agriculture and Markets of New York, et al. *v.* International Society for Krishna Consciousness, Inc., et al. C. A. 2d Cir. Certiorari denied.

No. 80–1520. Sangster *v.* United Air Lines, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 864.

No. 80–1522. Duemig *v.* Colorado. Sup. Ct. Colo. Certiorari denied. Reported below: 620 P. 2d 240.

No. 80–1526. D'Arc *v.* D'Arc. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 175 N. J. Super. 598, 421 A. 2d 602.

No. 80–1530. Boise Baseball Club, Inc. *v.* Kuhn et al. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1226.

No. 80–1532. Entrekin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 597.

No. 80–1533. Barham *v.* Welch et al. C. A. 8th Cir. Certiorari denied. Reported below: 635 F. 2d 1322.

No. 80–1535. Morgan et al. *v.* Global Communications, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1203.

No. 80–1537. Pittston Stevedoring Corp. *v.* Doca et al. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 30.

No. 80–1546. Acquisto *v.* Lee County Board of Public Instruction et al. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 581.

No. 80–1548. ESTY ET AL. *v.* O'NEAL, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. Reported below: 637 F. 2d 846.

No. 80–1605. DELELLO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 80–1645. DEPALMA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 53.

No. 80–1649. PAYNE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 635 F. 2d 643.

No. 80–1657. FLETCHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 637 F. 2d 227.

No. 80–1660. CORONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 689.

No. 80–1671. HAZELIP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 790.

No. 80–5918. LEACH *v.* GRECO, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1202.

No. 80–6093. TOURTILLOTT *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 289 Ore. 835, 618 P. 2d 423.

No. 80–6102. BARRERA *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 99 Wis. 2d 269, 298 N. W. 2d 820.

No. 80–6112. WILLIAMS *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1220.

No. 80–6145. BOWDEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–6240. COBB *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 80–6301. JOHN *v.* ATTORNEY GENERAL OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1208.

No. 80–6314. WRIGHT, AKA THOMPSON *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 80–6319. KRAIMER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 99 Wis. 2d 306, 298 N. W. 2d 568.

No. 80–6320. JACKSON *v.* HOWARD, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 442.

No. 80–6325. CHAVEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6326. SMITH *v.* FAIRMAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 80–6327. PIERCE ET AL. *v.* YOCHUM ET AL. Sup. Ct. Ind. Certiorari denied.

No. 80–6330. SEGARRA *v.* SEA-LAND SERVICE OF PUERTO RICO, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 636 F. 2d 1199.

No. 80–6331. CUNDRIFF *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 382 Mass. 137, 415 N. E. 2d 172.

No. 80–6333. KOLINSKY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 182 Conn. 533, 438 A. 2d 762.

No. 80–6335. TURNER *v.* MOORE, SHERIFF, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–6337. HUFFMAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 394 So. 2d 278.

No. 80–6338. RYAN *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 782.

No. 80–6339. PORTER *v.* MILLER, DETENTION CENTER SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 625.

No. 80–6340. BAKER ET AL. *v.* METCALFE, JUDGE. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 1198.

No. 80–6343. WARD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 493 Pa. 115, 425 A. 2d 401.

No. 80–6344. PAYNE *v.* ET & WNC TRANSPORTATION CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 452.

No. 80–6347. MILLER *v.* TRW, INC., CREDIT DATA DIVISION. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 789.

No. 80–6349. ANDERSON *v.* MORROW ET AL. Sup. Ct. Colo. Certiorari denied.

No. 80–6350. JOHN *v.* FENTON, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 443.

No. 80–6351. LITTLEFIELD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 613 S. W. 2d 138.

No. 80–6353. ASHLOCK *v.* SHIELDS. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 876.

No. 80–6357. HUGHES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–6360. MOUNT *v.* CHASE BANK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1203.

No. 80–6361. BAKER *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 620.

No. 80–6371. MATHEWS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 80–6427. OWENS *v.* MCCALL, CHAIRMAN, U. S. PAROLE COMMISSION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 443.

No. 80–6443. VALLIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 174.

No. 80–6444. CRIBBS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6452. GARCIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 75.

No. 80–6453. HILGERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 641 F. 2d 72.

No. 80–6455. HUBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 630.

No. 79–624. ERNST RUSS STEAMSHIP CO. *v.* MATTHEWS. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 603 F. 2d 676.

No. 80–1118. STANCIL ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant the petition and reverse the convictions. Reported below: 155 Ga. App. 731, 272 S. E. 2d 511.

No. 80–1257. DONALD SCHRIVER, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Motion of Center on National Labor Policy for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 204 U. S. App. D. C. 4, 635 F. 2d 859.

No. 80–1267. GRAVES TRUCK LINE, INC. *v.* APPLETON ELECTRIC CO. C. A. 7th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 635 F. 2d 603.

No. 80–1683. GENERAL ELECTRIC CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 206 U. S. App. D. C. 253, 642 F. 2d 1221.

No. 80–1449. FLORIDA *v.* HARRISON. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BLACKMUN would grant certiorari. Reported below: 389 So. 2d 293.

No. 80–6231. DICK *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 697, 273 S. E. 2d 124.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Granted. (See No. 78–1851, *supra.*)

Rehearing Denied

No. 80–1085. UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., ET AL. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL., 450 U. S. 996. Petition for rehearing denied.

No. 80–6090. STEIN *v.* FRANK ET UX., 450 U. S. 990;

No. 80–6101. MABRY *v.* CENLA FINANCE, INC., 450 U. S. 1002; and

No. 80–6179. DORTY *v.* HAYES ET AL., 450 U. S. 1034. Petitions for rehearing denied.

No. 80–5577. WILEY *v.* KANSAS, 449 U. S. 1087. Motion for leave to file petition for rehearing denied.

MAY 11, 1981

Dismissal Under Rule 53

No. 80–6429. DANIELS ET AL. *v.* BOONE ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 639 F. 2d 779.

MAY 18, 1981

Appeals Dismissed

No. 80–1034. WARMUTH *v.* JONES. Appeal from Sup. Ct. App. W. Va. dismissed, it appearing that the judgment below rests upon independent and adequate state grounds. Reported below: —— W. Va. ——, 272 S. E. 2d 446.

No. 80–1073. MARCAL *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 388 So. 2d 656.

No. 80–6232. BEACHBOARD *v.* COLUMBIA UNIVERSITY. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 51 N. Y. 2d 768, 411 N. E. 2d 801.

No. 80–1291. HADWEN, INC. *v.* VERMONT DEPARTMENT OF TAXES. Appeal from Sup. Ct. Vt. dismissed for want of substantial federal question. Reported below: 139 Vt. 37, 422 A. 2d 255.

No. 80–1313. LAMPKIN-ASAM *v.* FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSN. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 392 So. 2d 1371.

No. 80–1611. SHILLING *v.* STATE COMMISSION ON JUDICIAL CONDUCT. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 51 N. Y. 2d 397, 415 N. E. 2d 900.

No. 80–1628. WALL *v.* DONOVAN. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Reported below: 113 Cal. App. 3d 122, 169 Cal. Rptr. 644.

Certiorari Granted—Vacated and Remanded

No. 79–538. MAMMOTH BULK CARRIERS, LTD. *v.* BACHTEL ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 605 F. 2d 438.

No. 79–850. TWIN HARBORS STEVEDORING CO. *v.* BACHTEL ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156, and *Bloomer* v. *Liberty Mutual Ins. Co.,* 445 U. S. 74 (1980). Reported below: 605 F. 2d 438.

Miscellaneous Orders

No. A–887 (80–6581). MCDONALD *v.* DRAPER, JUDGE. Ct. App. Tenn. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–202. IN RE DISBARMENT OF EASLER. Disbarment entered. [For earlier order herein, see 449 U. S. 989.]

No. D–214. IN RE DISBARMENT OF TOOMEY. Disbarment entered. [For earlier order herein, see 449 U. S. 1106.]

No. D–217. IN RE DISBARMENT OF DOUGLAS. Disbarment entered. [For earlier order herein, see 449 U. S. 1107.]

No. D–218. IN RE DISBARMENT OF KAUFMAN. Disbarment entered. [For earlier order herein, see 449 U. S. 1120.]

No. D–220. IN RE DISBARMENT OF OSTROFF. Disbarment entered. [For earlier order herein, see 450 U. S. 976.]

No. D–237. IN RE DISBARMENT OF CONNAGHAN. It is ordered that John D. Connaghan, of St. Louis, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–238. IN RE DISBARMENT OF NATALE. It is ordered that David J. Natale, of Media, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80–608. UNITED STATES POSTAL SERVICE *v.* COUNCIL OF GREENBURGH CIVIC ASSNS. ET AL. D. C. S. D. N. Y. [Probable jurisdiction noted, 449 U. S. 1076.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 80–689. WIDMAR ET AL. *v.* VINCENT ET AL. C. A. 8th Cir. [Certiorari granted, 450 U. S. 909.] Motion of Baptist Joint Committee on Public Affairs for leave to file a brief as *amicus curiae* granted.

No. 80–848. PIPER AIRCRAFT CO. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL.; and

No. 80–883. HARTZELL PROPELLER, INC. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL. C. A. 3d Cir. [Certiorari granted, 450 U. S. 909.] Motion of Boeing Co. et al. for leave to file a brief as *amici curiae* granted.

No. 78–1545. ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.;

No. 78–1549. TRANS WORLD AIRLINES, INC. *v.* ZIPES ET AL.; and

No. 80–951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 450 U. S. 979.] TWA's motion to limit review in No. 80–951 to the order of the District Court entitled "Order Awarding Seniority," and thereafter to dismiss Nos. 78–1545 and 78–1549 as moot, is denied. Motion filed by petitioners in No. 78–1545 (the "plaintiff class"), requesting that the Court (1) grant TWA's motion; or (2) order TWA and the plaintiff class to stipulate to dismissal of the writs in Nos. 78–1545 and 78–1549; or (3) dismiss Nos. 78–1545 and 78–1549 as moot, is denied. No. 78–1549 is removed from the argument calendar, and further consideration of the case is deferred. The writ of certiorari in No. 80–951 is limited to Questions 1 and 2 presented by the petition and is otherwise dismissed as improvidently granted. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 80–939. FEDERAL ELECTION COMMISSION *v.* DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE; and

No. 80–1129. NATIONAL REPUBLICAN SENATORIAL COMMITTEE *v.* DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE ET AL. C. A. D. C. Cir. [Certiorari granted, 450 U. S. 964.] Motion of National Republican Senatorial Committee to be designated to argue on behalf of all petitioners denied. Alternative request for divided argument and motion of Federal Election Commission for divided argument granted. Federal Election Commission allotted 20 minutes for oral argument, and National Republican Senatorial Committee allotted 10 minutes for oral argument.

No. 80–1556. CORY, CONTROLLER OF CALIFORNIA, ET AL. *v.* WHITE, ATTORNEY GENERAL OF TEXAS, ET AL. C. A. 5th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari granted.

No. 80–5727. EDDINGS *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 450 U. S. 1040.] Motion for appointment of counsel granted, and it is ordered that Jay C. Baker, Esquire, of Tulsa, Okla., be appointed to serve as counsel for petitioner in this case.

No. 80–6527. IN RE WILLIAMS. Petition for writ of habeas corpus denied.

No. 80–6385. IN RE JONES. Petition for writ of mandamus denied.

No. 80–6386. IN RE JONES. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 80–1208. NEW ENGLAND POWER CO. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL.;

No. 80–1471. MASSACHUSETTS ET AL. *v.* NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL ET AL.; and

No. 80–1610. ROBERTS, ATTORNEY GENERAL OF RHODE ISLAND, ET AL. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL. Appeals from Sup. Ct. N. H. Motions of Edison Electric Institute and New England Power Tool Executive Committee for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 120 N. H. 866, 424 A. 2d 807.

No. 80–1577. CITY OF MESQUITE *v.* ALADDIN'S CASTLE, INC. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 630 F. 2d 1029.

No. 80–1576. PRINCETON UNIVERSITY ET AL. *v.* SCHMID. Appeal from Sup. Ct. N. J. Further consideration of question of jurisdiction postponed to hearing of case on the merits. JUSTICE BRENNAN took no part in the consideration or decision of this case. Reported below: 84 N. J. 535, 423 A. 2d 615.

Certiorari Granted

No. 80–1348. FLORIDA DEPARTMENT OF STATE *v.* TREASURE SALVORS, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 621 F. 2d 1340.

No. 80–1496. UNDERWRITERS NATIONAL ASSURANCE CO. *v.* NORTH CAROLINA LIFE & ACCIDENT & HEALTH INSURANCE GUARANTY ASSN. ET AL. Ct. App. N. C. Certiorari granted. Reported below: 48 N. C. App. 508, 269 S. E. 2d 688.

No. 80–1594. UNITED STATES *v.* ERIKA, INC. Ct. Cl. Certiorari granted. Reported below: 225 Ct. Cl. ——, 634 F. 2d 580, and 225 Ct. Cl. ——, 647 F. 2d 129.

No. 80–1429. YOUNGBERG, SUPERINTENDENT, PENNHURST STATE SCHOOL AND HOSPITAL, ET AL. *v.* ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, ROMEO. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of American Psychiatric Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 644 F. 2d 147.

No. 80–5887. WHITE *v.* NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 629 F. 2d 697.

Certiorari Denied. (See also Nos. 80–1073 and 80–6232, *supra.*)

No. 79–571. ILLINOIS *v.* CITY OF MILWAUKEE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 599 F. 2d 151.

No. 80–56. LORAIN, A DIVISION OF KOEHRING CO. *v.* UNITED STEELWORKERS OF AMERICA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 616 F. 2d 919.

No. 80–870. PERRY v. ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 81 Ill. App. 3d 422, 401 N. E. 2d 1263.

No. 80–985. PUTNAM FABRICATING CO. *v.* NULL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 311.

No. 80–1167. MCCORD *v.* BAILEY ET AL.; and

No. 80–1168. BAILEY ET AL. *v.* MCCORD. C. A. D. C. Cir. Certiorari denied. Reported below: 204 U. S. App. D. C. 334, 636 F. 2d 606.

No. 80–1233. SYUFY ENTERPRISES *v.* NORTHERN CALIFORNIA STATE ASSOCIATION OF I. A. T. S. E. LOCALS, LOCAL UNION No. 241. C. A. 9th Cir. Certiorari denied. Reported below: 631 F. 2d 124.

No. 80–1246. MAX FACTOR & CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 197.

No. 80–1252. PUERTO RICO *v.* REGAN, SECRETARY OF THE TREASURY;

No. 80–1253. VIRGIN ISLANDS *v.* REGAN, SECRETARY OF THE TREASURY (TWO CASES); and

No. 80–1647. REGAN, SECRETARY OF THE TREASURY *v.* PUERTO RICO; AND REGAN, SECRETARY OF THE TREASURY *v.* VIRGIN ISLANDS. C. A. D. C. Cir. Certiorari denied. Reported below: Nos. 80–1252, 80–1253 (first case), and 80–1647 (first case), 206 U. S. App. D. C. 217, 642 F. 2d 622; Nos. 80–1253 (second case) and 80–1647 (second case), 206 U. S. App. D. C. 236, 642 F. 2d 641.

No. 80–1256. NESBITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 433.

No. 80–1274. CONNOR *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1089.

No. 80–1281. SEA-LAND SERVICE, INC. *v.* FEDERAL MARITIME COMMISSION ET AL.; and

No. 80–1346. TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 209 U. S. App. D. C. 27, 650 F. 2d 1235.

No. 80–1302. SHAFFER *v.* COOK, JUDGE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 634 F. 2d 1259.

No. 80–1308. OCANAS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 353.

No. 80–1333. PROCHASKA *v.* MARCOUX. C. A. 10th Cir. Certiorari denied. Reported below: 632 F. 2d 848.

No. 80–1341. IN RE SUTTON. C. A. 2d Cir. Certiorari denied.

No. 80–1369. SOUTH DAKOTA *v.* LEWIS, SECRETARY OF TRANSPORTATION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 635 F. 2d 698.

No. 80–1384. SHINDELAR *v.* HOLDEMAN ET AL. C. C. P. A. Certiorari denied. Reported below: 628 F. 2d 1337.

No. 80–1432. KENNEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1205.

No. 80–1452. SAHARA-TAHOE CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 2d 553.

No. 80–1461. CLEAR PINE MOULDINGS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 721.

No. 80–1477. CRUZ *v.* KNIGHT, DIRECTOR, UNITED STATES SECRET SERVICE. C. A. D. C. Cir. Certiorari denied.

No. 80–1500. CLIPPER *v.* STARKEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 621.

No. 80–1503. DICKEY FARMS, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 1176.

No. 80–1506. ARIZONA FUELS CORP. ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 638 F. 2d 239.

No. 80–1515. CUARON *v.* ESTRADA; DAWSON ET AL. *v.* HOLGUIN ET AL.; and CUARON *v.* MECHEM, U. S. DISTRICT JUDGE. C. A. 10th Cir. Certiorari denied.

No. 80–1540. PARTIDO NUEVO PROGRESISTA *v.* PEREZ, ADMINISTRATOR, PUERTO RICO ELECTIONS COMMISSION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 639 F. 2d 825.

No. 80–1551. GODERRE *v.* CITY OF PEEKSKILL ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 52 N. Y. 2d 754, 417 N. E. 2d 565.

No. 80–1552. WILLIAMS *v.* BOORSTIN, LIBRARIAN OF CONGRESS. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 345, 663 F. 2d 109.

No. 80–1564. FORT PITT STEEL CASTING DIVISION, CONVAL-PENN, INC. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 635 F. 2d 1071.

No. 80–1566. GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* EWALD. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 884.

No. 80–1567. MADHANI *v.* MT. VERNON AVIATION. Ct. App. Mich. Certiorari denied.

No. 80–1568. PADUCAH ASSOCIATES, LTD. *v.* INDIANA INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1219.

No. 80–1570. SMITH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 790.

No. 80–1571. EASTERN ASSOCIATED COAL CORP. *v.* AETNA CASUALTY & SURETY CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 632 F. 2d 1068.

No. 80–1572. JACKSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 391 So. 2d 637.

No. 80–1574. ROGERS ET UX. *v.* SARRETT BUILDERS & REALTY, INC. Sup. Ct. Miss. Certiorari denied. Reported below: 391 So. 2d 654.

No. 80–1578. CARPENTER *v.* CONTINENTAL TRAILWAYS. C. A. 6th Cir. Certiorari denied. Reported below: 635 F. 2d 578.

No. 80–1580. LINCOLN UNIVERSITY ET AL. *v.* TROTMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 635 F. 2d 216.

No. 80–1581. MATTIS ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1227.

No. 80–1584. CRIST *v.* CRIST. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1226.

No. 80–1587. SAFEWAY STORES, INC. *v.* CRESPIN. C. A. 10th Cir. Certiorari denied. Reported below: 634 F. 2d 1273.

No. 80–1590. LURIE ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 786.

No. 80–1593. KURLAND *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 28 Cal. 3d 376, 618 P. 2d 213.

No. 80–1596. MOREHOUSE PARISH SCHOOL ET AL. *v.* PEGUES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1279.

No. 80–1603. BERARD *v.* GENERAL MOTORS CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 657 F. 2d 261.

No. 80–1612. HAWKINS *v.* HOLIDAY INNS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 634 F. 2d 342.

No. 80–1618. YOUNGSTOWN SHEET & TUBE CO., DBA FIBERCAST CO., ET AL. *v.* PIERCE ASSOCIATES, INC. C. A. D. C. Cir. Certiorari denied.

No. 80–1620. CITY OF PHILADELPHIA *v.* GILFILLAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 637 F. 2d 924.

No. 80–1623. BRAGER & CO., INC. *v.* LEUMI SECURITIES CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 559.

No. 80–1630. CELOTEX *v.* UNITED STATES GYPSUM CO. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 76.

No. 80–1634. NEW YORK *v.* ONOFRE; and

No. 80–1710. NEW YORK *v.* PEOPLES ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 476, 415 N. E. 2d 936.

No. 80–1639. MILLER, GUARDIAN *v.* BOCK LAUNDRY MACHINE CO. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 2d 265, 416 N. E. 2d 620.

No. 80–1651. LEONARD ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 163.

No. 80–1654. HUMPHRIES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1172.

No. 80–1682. BROWNING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 630 F. 2d 694.

No. 80–1718. SARMIENTO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 783.

No. 80–1732. GUST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 2d 265.

No. 80–1756. VLCEK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 637 F. 2d 227.

No. 80–5795. ISAACS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 26 Wash. App. 1006.

No. 80–5982. COLEMAN *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–6096. WALLACE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 738, 273 S. E. 2d 143.

No. 80–6109. BROWN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. lxxi.

No. 80–6125. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 461.

No. 80–6136. SEMENAK *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 98 Wis. 2d 749, 297 N. W. 2d 515.

No. 80–6188. FITZHARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 416.

No. 80–6194. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 635 F. 2d 526.

No. 80–6202. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 453.

No. 80–6210. BLOCKER *v.* HERMAN ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 409 Mich. 942.

No. 80–6217. WADE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 390 So. 2d 1309.

No. 80–6358. WEBER *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 166.

No. 80–6359. CIUMMEI *v.* AMARAL, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 636 F. 2d 1199.

No. 80–6362. JOHNSON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 156 Ga. App. 411, 274 S. E. 2d 778.

No. 80–6363. PHILLIPS *v.* EVENING STAR NEWSPAPER CO. Ct. App. D. C. Certiorari denied. Reported below: 424 A. 2d 78.

No. 80–6365. READ *v.* KUBINSKI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1210.

No. 80–6373. JACKSON *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 624 P. 2d 751.

No. 80–6381. WILSON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 87 Ill. App. 3d 544, 408 N. E. 2d 1209.

No. 80–6383. DUNHAM *v.* SHIELDS, CHAIRMAN, VIRGINIA PAROLE BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 622.

No. 80–6388. HAMMOND *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 80–6392. MCCRARY *v.* MINER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 561.

No. 80–6393. BRISBON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 89 Ill. App. 3d 513, 411 N. E. 2d 956.

No. 80–6394. WILLIAMS *v.* MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 640 F. 2d 140.

No. 80–6399. LYNCH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 894, 435 N. Y. S. 2d 617.

No. 80–6400. BONNETT *v.* SOLEM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 640 F. 2d 125.

No. 80–6405. DE ANDA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 114 Cal. App. 3d 480, 170 Cal. Rptr. 830.

No. 80–6409. ROBINSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 88 Ill. App. 3d 96, 410 N. E. 2d 331.

No. 80–6410. FREE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 392 So. 2d 857.

No. 80–6411. FRIEDMAN *v.* FAIRHILL HOSPITAL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–6412. MARTIN *v.* FAUVER, CORRECTION COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6414. FIELDS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. lxxxviii.

No. 80–6415. SPINELLI *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 311.

No. 80–6416. OSBORNE *v.* DISTRICT OF COLUMBIA PAROLE BOARD. Ct. App. D. C. Certiorari denied.

No. 80–6417. HURST *v.* HARVEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 80–6421. MCFARLAND *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 74.

No. 80–6422. COLLINS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 415 N. E. 2d 46.

No. 80–6423. GLENN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 48 N. C. App. 742, 271 S. E. 2d 107.

No. 80–6425. PHILLIPS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 640 F. 2d 87.

No. 80–6426. ODES *v.* NOWLAND, ACTING DIRECTOR, DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 80–6436. HOWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 80–6440. COOPER *v.* COOPER. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 389 So. 2d 281.

No. 80–6446. BLAND *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 390 So. 2d 1098.

No. 80–6454. MARKLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 174.

No. 80–6465. HARRELL *v.* HOPKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 885.

No. 80–6467. CHEUNG HON LAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 1156.

No. 80–6481. HERMANN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 167.

No. 80–6484. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 1352.

No. 80–6487. BOSQUE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 78 App. Div. 2d 986, 433 N. Y. S. 2d 658.

No. 80–6491. THOMPSON *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 167.

No. 80–6501. MANLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 58.

No. 80–6503. ROBINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 981.

No. 80–6509. NEVITT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 55.

No. 80–6518. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 173.

No. 80–6522. HART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 640 F. 2d 856.

No. 80–6528. WINCHELL *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 60.

No. 80–6532. SANTOVENIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 383.

No. 80–6537. MCCUE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 643 F. 2d 394.

No. 80–6543. BEACHEM *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 47 Md. App. 737.

No. 80–6549. DICKINSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 219.

No. 80–6550. BAZAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 363.

No. 80–6553. HUDSON *v.* COMMERCE CLEARING HOUSE, INC. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 161.

No. 80–6555. CARCIONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 858.

No. 80–6558. BOWERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 320.

No. 80–6562. DOMINGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 457.

No. 80–6563. FOUNTAIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 642 F. 2d 1083.

No. 80–6566. BURROUGHS *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 56.

No. 80–254. CALIFORNIA *v.* SMITH. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 103 Cal. App. 3d 840, 163 Cal. Rptr. 322.

No. 80–1027. MARSHALL ET AL. *v.* DOE. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST would grant the petition and reverse the judgment for the reasons stated by JUSTICE REHNQUIST in his dissent from the denial of certiorari in *Alioto* v. *Williams,* 450 U. S. 1012 (1981). Reported below: 622 F. 2d 118.

No. 80–1160. HOLLYWOOD MARINE, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner Hollywood Marine, Inc., for leave to submit the Rule 28.1 listing under seal denied. Certiorari denied. Reported below: 625 F. 2d 524.

JUSTICE REHNQUIST, dissenting.

Petitioner Hollywood Marine is engaged in the business of transporting petroleum cargo by barge. Its barges are towed by tugboat operators who are in no way associated with petitioner except by reason of the contract between the two for services to be performed by the tugboat operator. Under such contract, the tugboat operator exercises complete control over the method and manner of performing the towing operations, including all decisions to be made as to questions of navigation.

On August 5, 1976, a barge owned by petitioner discharged over 2,000 gallons of oil into the Intracoastal Waterway in Texas. The spill occurred as a result of damage sustained by the barge while it was under the control of a tugboat operator. The spill was cleaned up by the Coast Guard at a total cost to the United States of $61,816.85. Pursuant to §§ 311 (f)(1), (n), of the Federal Water Pollution Control Act, as added, 86 Stat. 866 and 869, 33 U. S. C. §§ 1321 (f)(1), (n), the United States brought this suit to recover from petitioner the costs incurred during the cleanup. Under § 1321 (f)(1), the owner or operator of a discharging vessel is liable for the costs of cleaning up an oil spill except

> "where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) *an act or omission of a third party without regard to whether any such act or omission was or was not negligent,* or any combination of the foregoing clauses . . . ." (Emphasis added.)

Petitioner's defense to the Government's action was that

the oil spill was caused by an act or omission of its independent contractor, the tugboat operator, and that the tugboat operator was a "third party" under § 1321 (f)(1). The District Court sustained the defense, but the United States Court of Appeals for the Fifth Circuit reversed. 625 F. 2d 524 (1980). The Court of Appeals relied on its earlier decision in *United States* v. *LeBeouf Brothers Towing Co.*, 621 F. 2d 787, rehearing denied, 629 F. 2d 1350 (1980). In *LeBeouf*, the Court of Appeals concluded that the third-party defense contained in § 1321 (f)(1) must be narrowly interpreted. The statute's scheme for preventing and cleaning up oil spills would be undermined if barge owners could escape liability merely by hiring out their operations to tugs and independent contractors. The term "third party" was intended to refer to a complete outsider (*e. g.*, a colliding vessel or a vandal), not an independent contractor whom the vessel owner was responsible for hiring in the first place.

While no one can say that the decision of the Court of Appeals places a wholly unreasonable interpretation on the language contained in § 1321 (f)(1), that court itself stated that the term "third party" must be narrowly interpreted. The court's interpretation, however, is not supported by the plain language of the statute, which in its express terms provides a defense whenever the discharge is the result of an act of a "third party." The statute is entirely silent as to what judicial refinements, if any, were intended to be placed on the term "third party."

Because the Federal Water Pollution Control Act is legislation of vital importance, and the furnishing of oil for the country's economy is likewise of vital importance, the question presented will continue to arise. The Court of Appeals' interpretation is at odds with the decision reached by the District Court in *Tug Ocean Prince, Inc.* v. *United States*, 436 F. Supp. 907 (SDNY 1977), aff'd in part and rev'd in part on other grounds, 584 F. 2d 1151 (CA2 1978), cert. denied,

440 U. S. 959 (1979), where on almost identical facts the Government's claim against a barge owner was dismissed because the owner was found not to be responsible for the oil spill.

There is no question that either the barge owner or the tug operator is liable for reimbursement to the Government for expenses incurred by the Coast Guard in cleaning up the oil spill. The Court of Appeals has decided that it should be the barge owner, while the District Court for the Southern District of New York has implicitly decided that it should be the tugboat operator. It seems to me that the Court of Appeals has supplied a good deal of gloss to the statutory language in reaching the result it has; perhaps it is justified in so doing, but certainly it has greatly narrowed the enacted language of Congress on the subject. Since it clearly was not the policy of the Federal Water Pollution Control Act to prohibit the movement of oil in barges, but simply to fix responsibility as to which segment of the oil transportation industry should be responsible for reimbursement to the Government for the cost of cleaning up spills, I do not think this is the type of case in which the Court should await a conflict between two Courts of Appeals to resolve the question in point. Though it cannot be said with certainty on the basis of this record, it seems highly probable that contracts such as this, as well as the insurance coverage of the various parties, depend on the way this "third party" exception is construed. Insurance policies and contracts, unlike actual collisions, are frequently matters which are entered into consensually for a period of months or years in reliance upon one or another construction of applicable law. This factor is sufficiently important, when combined with the recognized importance of the enterprise being conducted and the evil at which the legislation is aimed, to justify the Court granting certiorari and giving the issue plenary consideration at this time.

No. 80–1163. TRAPPER ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 48 N. C. App. 481, 269 S. E. 2d 680.

JUSTICE BRENNAN, dissenting.

Stone v. *Powell,* 428 U. S. 465 (1976), held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.,* at 494 (footnote omitted). The effect of this holding was to make this Court, on direct review, the only federal forum available to the accused to monitor state-court compliance with the Fourth Amendment. I dissented in that case and reminded my Brethren that "institutional constraints totally preclude any possibility that this Court can adequately oversee whether state courts have properly applied federal law." *Id.,* at 526. "[O]ur certiorari jurisdiction is inadequate for containing state criminal proceedings within constitutional bounds," because "federal review by certiorari in this Court is a matter of grace, and it is grace now seldom bestowed at the behest of a criminal defendant." *Id.,* at 534. While the lower federal courts by way of habeas corpus are better suited than are we on direct review to assure state-court compliance with Fourth Amendment requirements, we are now duty bound by *Stone* v. *Powell* to fulfill this monitoring function. The denial of certiorari in this case demonstrates, however, that the Court will not discharge that duty, because the petition presents a substantial issue whether the North Carolina courts properly applied the Fourth Amendment. I, therefore, dissent from the denial of certiorari and would set this case for argument.

I

Petitioners were arrested for various crimes connected with the possession, sale, and delivery of marihuana. Deputy

Sheriff Charlie Carawan, of Hyde County, N. C., first met petitioner Lombardo two years prior to his arrest when Lombardo purchased property about one-half mile from Carawan's home. App. to Pet. for Cert. 13. Lombardo's property is "located adjacent to a paved, rural road and adjacent to the main stream of Fortescue Creek" which is connected to the Intracoastal Waterway. *Id.*, at 13–14. Improvements were made on the property, including construction of rock driveways and a metal gate.

Several events caused Carawan to become suspicious of activities on the Lombardo property. First, "Carowan [*sic*] began to receive reports from some of his acquaintances in the neighborhood that they had begun to hear the sounds of heavy truck and boat engines on and near the Lombardo property," sounds which were "unusual in that area." *Id.*, at 14. In addition, on December 21, 1978, Carawan assisted a boat which was stuck in the mud bottom of Fortescue Creek about one mile from the Lombardo property. Based on his knowledge of the channels of the creek and of the prevailing winds that day, Carawan disbelieved the story of the boat's skipper that he had become disabled in the Pungo River and then drifted into the creek where he ran aground. *Id.*, at 14–16. Sometime thereafter, Carawan motored his small boat near the Lombardo property to observe activities thereon. While doing so, he heard two rifle shots which he believed came from the Lombardo property, one of which apparently passed near him. *Id.*, at 16.

These events led Carawan to suspect that the Lombardo property was being used for marihuana smuggling. *Id.*, at 16–17. Accordingly, Carawan arranged for two state troopers to be stationed east and west of the intersection of the rural paved road leading to the Lombardo property and U. S. Highway 264. *Id.*, at 17. On the night of January 13, 1979, Carawan secluded himself 50 yards from the Lombardo gate and observed the property until about midnight, when a truck which appeared to be heavily loaded left the Lom-

bardo property. *Id.*, at 17–18. Carawan followed the truck past his own home, where he left his personal car and took his patrol car. He also radioed the two state troopers who were stationed on U. S. Highway 264. After following the truck, which was being driven by petitioner Trapper, Carawan and the state troopers eventually stopped it. *Id.*, at 18. Upon reaching the truck, the two state troopers and Carawan smelled marihuana. *Id.*, at 19. Trapper was then arrested and one of the troopers left for Swan Quarter to obtain a warrant to search the truck. *Ibid.* The trooper returned at 1:40 a.m. on January 14, 1979, with a warrant. The search of the truck revealed approximately 4,000 pounds of marihuana. Carawan then obtained a warrant "to search the Lombardo double-wide house trailer for marijuana," and "the Lombardo house and curtilage, including a metal storage building was searched and . . . a large quantity of baled and loose marijuana was found and seized from the aforesaid metal building." *Id.*, at 19–20.

Prior to trial, petitioners moved to suppress the evidence seized during the two searches on Fourth Amendment grounds. Their motion to suppress was denied. Petitioners then pleaded guilty to various marihuana-related crimes and received suspended sentences. They subsequently appealed the trial court's ruling on the suppression motion to the North Carolina Court of Appeals, which affirmed the trial judge. 48 N. C. App. 481, 269 S. E. 2d 680 (1980). The court, taking judicial notice that "Hyde County is on the coast of North Carolina in an area which is regularly used by smugglers of marijuana," *id.*, at 486, 269 S. E. 2d, at 683, held that Carawan, as an experienced law enforcement officer, had "reasonable suspicion" that a crime was being committed and thus was authorized to conduct a *Terry* stop of the truck. *Terry* v. *Ohio*, 392 U. S. 1 (1968); see *Delaware* v. *Prouse*, 440 U. S. 648 (1979). The court further concluded that the stop was reasonable in extent and time, and that when the officers smelled marihuana from their outside inspection of

the truck, they had probable cause to arrest Trapper and to obtain a warrant to search the truck. The court also held that the marihuana discovered in the truck created probable cause to obtain a warrant to search the Lombardo premises.

The Supreme Court of North Carolina subsequently dismissed petitioners' appeal, finding that it did not present a substantial constitutional question. This petition followed.

II

Petitioners challenge the ruling of the North Carolina Court of Appeals on two grounds: (1) that the stop of the truck was illegal as not based on reasonable suspicion, resting on objective articulable facts, that the driver was involved in criminal activity; and (2) that the search of the Lombardo property was unlawful since the warrant authorizing it was issued pursuant to an affidavit which itself was premised on illegally seized evidence. Petitioners' second argument depends entirely on the validity of the first.

The first argument has substantial merit. The reasons advanced by Carawan as justification for stopping the truck hardly amounted in the aggregate to objective articulable facts leading to reasonable suspicion that individuals associated with the Lombardo property were engaged in criminal activity. See *Brown* v. *Texas,* 443 U. S. 47, 51 (1979). Boat and truck noises and the presence of a locked metal gate across the Lombardo premises are fully consistent with lawful activity. Similarly, the grounding of the boat in Fortescue Creek occurred over one mile from the Lombardo premises. Even if Carawan totally disbelieved the skipper's story of how the boat came to be grounded, there is no basis for linking the boat to the Lombardo premises. Moreover, the fact that Hyde County, N. C., may be an area frequented by marihuana smugglers is of no significance in the absence of articulable facts linking the Lombardo premises to marihuana smuggling. See *Ybarra* v. *Illinois,* 444 U. S. 85 (1979);

United States v. *Mendenhall*, 446 U. S. 544, 572 (1980) (WHITE, J., dissenting).

The only arguably objective fact of criminal activity was the firing of two rifle shots, which may have occurred as long as 24 days before the arrest. However, if Carawan believed that the shots were directed at him, it is hard to understand why he took no immediate action. Nor is there any indication how Carawan believed those shots to be linked to criminal activity, particularly since Lombardo had previously told Carawan that he bought the land for hunting purposes. The record before us is simply too ambiguous on the purpose, origin, and date of the shots to assess the incident properly in terms of whether Carawan had a reasonable suspicion that individuals on the Lombardo premises were engaged in criminal activity on January 13, 1979. This is precisely the type of ambiguity that a hearing before a federal habeas court is ideally designed to resolve. But since *Stone* v. *Powell* effectively eliminated federal habeas corpus review of Fourth Amendment claims, this Court has no choice but to decide petitioners' nonfrivolous constitutional claims presented in this case on the record as it comes to us from the state courts.

If a federal habeas forum were available to petitioners, I would not hesitate to vote to deny certiorari and leave to a habeas court the burden of resolving any ambiguity in the key facts. Moreover, the lower federal courts might well determine that the state courts committed constitutional error, thereby obviating the need for review in this Court. However, since *Stone* v. *Powell* saddles this Court with the duty of providing the only federal forum for decision of Fourth Amendment claims, we are obligated to decide cases on direct review which we might otherwise deny. This is such a case because there is a substantial question whether Carawan had reasonable suspicion to stop Trapper's truck.

JUSTICE STEWART also dissents from the denial of certiorari.

No. 80–1277. SMITH, REFORMATORY SUPERINTENDENT *v.* BROWN. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE POWELL would grant certiorari. Reported below: 633 F. 2d 213.

No. 80–1237. UVALDE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 547.

JUSTICE REHNQUIST, dissenting.

In this case, the Attorney General has filed a complaint under § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended in 1975, 42 U. S. C. § 1973,[1] alleging that petitioner School District's at-large system of electing members " 'has been implemented with the intent and purpose of causing . . . irreparable injury to Mexican-American voters . . . by effectively and purposefully precluding them from meaningful access to the political process . . . .' " 625 F. 2d 547, 548–549 (CA5 1980). The complaint further alleges:

> "[T]he seven member Board of Trustees of the Uvalde Consolidated Independent School District is elected at-large;
>
> "approximately fifty percent of the population of the school district is Mexican-American, but Mexican-American voters' residences are concentrated in one part of the City of Uvalde;

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[1] The statute was amended to include the italicized below:

"No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or implied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, *or in contravention of the guarantees set forth in § 4(f)(2)* [42 U. S. C. § 1973b (f)(2)]." 89 Stat. 402.

The guarantees of § 1973b (f)(2) assure against any denial or abridgment of the right to vote because the voter is a member of a language minority group. Congress enacted this amendment to § 2 pursuant to its power to enforce the guarantees of both the Fourteenth and Fifteenth Amendments. 42 U. S. C. § 1973b (f)(1).

"only one Mexican-American has ever been elected to the Board of Trustees and currently no Mexican-Americans serve on the Board; [2]

"voting is normally along racial lines;

"the Board has discriminated against Mexican-Americans in the past by operating intentionally segregated elementary schools and is unresponsive to the needs of the Mexican-American community;

"as a result of the school district's election system, Mexican-Americans have less opportunity than 'whites' to participate in the political process and to elect candidates of their choice to the Board." *Id.*, at 549 (footnote omitted).

The United States District Court for the Western District of Texas dismissed the suit for failure to state a claim upon which relief could be granted. 461 F. Supp. 117 (1978). It concluded that the Fifteenth Amendment, upon which § 2 of the Act rests,[3] applies only to practices which directly affect access to the ballot and is thus not available to challenge at-large election districts on the basis of so-called "vote dilution."

The Court of Appeals reversed, finding that respondent had stated a cause of action under the Fifteenth Amendment. It canvassed the various opinions in *Mobile* v. *City of Bolden*, 446 U. S. 55 (1980), and concluded that a majority of *this* Court had held that the *Fifteenth* Amendment prohibits not just the actual prevention or hindrance of people from voting, but also purposeful vote dilution. The Court of Appeals, however, did not rest its decision on that ground alone. It

[2] As the court below noted, the United States now stipulates that two Mexican-Americans have recently been elected. 625 F. 2d 547, 549, n. 2 (CA5 1980).

[3] The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

looked to the 1975 amendment of § 2. The court held that even if the Fifteenth Amendment does not proscribe at-large voting districts purposefully adopted to dilute the voting strength of minorities, the Fourteenth Amendment clearly does. According to the court, when Congress, pursuant to its authority to enforce the guarantees of the Fourteenth Amendment, extended § 2 to protect the right to vote of linguistic minorities, it did so cognizant of the problem of vote dilution and intended to incorporate the broad reach of the Fourteenth Amendment into § 2 of the Act. Thus, in the court's view, respondent had stated a cause of action under § 2 of the Act as amended. Judge Hill concurred on the grounds that it was unnecessary to determine whether the *Fifteenth* Amendment applies to the voting practices alleged in the complaint, because the court properly found that the 1975 amendment incorporated the Fourteenth Amendment.[4]

Because I believe that the Court of Appeals has misread the language, holding, and spirit of this Court's decision in *Bolden,* and has misconstrued the congressional purpose behind the 1975 amendment, I dissent from the denial of the petition for certiorari. In the first place, as I read the plurality decision in *Bolden,* it held that the Fifteenth Amendment proscribed only the denial or the abridgment of the right to vote: When blacks "register and vote without hindrance," the provisions of the Fifteenth Amendment are thus

[4] The Court of Appeals also concluded that a school board is a "political subdivision" within the meaning of § 2. In *Dougherty County Board of Education* v. *White,* 439 U. S. 32 (1978), and *United States* v. *Sheffield Board of Comm'rs,* 435 U. S. 110 (1978), this Court broadly construed the terms "State or political subdivision" so as to subject the entities at issue there to the § 5 preclearance requirement. By contrast, in *City of Rome* v. *United States,* 446 U. S. 156 (1980), the Court narrowly construed the terms for the purpose of limiting resort to the Act's so called "bailout" provisions. Because this Court has not yet settled on the proper construction of the term "political subdivision", this issue also strikes me as worthy of review by this Court.

satisfied. 446 U. S., at 65. In contrast to the Fourteenth Amendment, there is nothing in the Fifteenth Amendment which prohibits at-large election districts. See *Beer* v. *United States*, 425 U. S. 130, 142, n. 14 (1976) (observing that "[t]here is no decision in this Court holding a legislative apportionment or reapportionment violative of the Fifteenth Amendment"). Because the Attorney General does not allege in this case that Mexican-Americans have been prohibited or discouraged from voting, I do not believe that the Attorney General has stated a cause of action under the Fifteenth Amendment and, consequently, § 2 of the Voting Rights Act.

With respect to the 1975 amendment, I do not view that amendment as changing the substantive law of § 2. The purpose of the change was to extend § 2 protections to a new group of persons, namely, members of language minorities such as Mexican-Americans. See S. Rep. No. 94–295, p. 24 (1975) (the amendment was made to "broaden [the Act's] special coverage to new geographic areas . . ."). Congress based the addition to § 2 on its power to enforce the guarantees of the Fourteenth Amendment in order to ensure the constitutionality of the change, not to allow language minorities to challenge at-large voting districts on grounds of vote dilution. The legislative history reveals that Congress was concerned about the possibility that certain language minority groups might not be considered members of a "race or color" group protected under the Fifteenth Amendment. Thus, Congress based the 1975 "expansion amendment" on *both* the Fourteenth and Fifteenth Amendments in order to "doubly insure the constitutional basis for the Act." *Id.*, at 47–48. In sum, the Court of Appeals quite clearly erred in concluding that the 1975 amendment to § 2 incorporates the Fourteenth Amendment's prohibition of purposeful vote dilution. Even as amended, § 2 simply does not permit the Attorney General to bring suits challenging at-large electoral systems.

Moreover, even if § 2 does incorporate the prohibitions of

the Fourteenth Amendment, I do not believe that the Attorney General's allegations are sufficient to survive a motion to dismiss. The plurality opinion in *Mobile* v. *City of Bolden*, *supra*, observed that the Court of Appeals there held that a plaintiff may establish purposeful discrimination by adducing evidence that satisfies the standards announced in its earlier decision in *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973). We rejected that view:

> "That approach, however, is inconsistent with our decisions in *Washington* v. *Davis*, [426 U. S. 229 (1976)], and *Arlington Heights* [v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977)]. Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case." 446 U. S., at 73.

Yet if one reads the specific allegations of the complaint heretofore set forth, they bear a striking resemblance to the so-called *Zimmer* criteria. If, as is alleged, approximately 50% of the population of the School District is Mexican-American, one wonders why an at-large system should result in no Mexican-American being elected. Indeed, the fact that two Mexican-Americans *have* recently been elected under the at-large system belies the Attorney General's allegations. In *Bolden*, we rejected emphatically the theory that every "political group" or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers. 446 U. S., at 75. A court-imposed requirement that a specified number of Mexican-American seats be guaranteed by virtue of the approximately 50% Mexican-American population would, in my view, be clearly unwarranted.

Finally, it is important to remember that this is the beginning of a decennium which will involve a good deal of reapportionment. That task will fall primarily to legislators. "The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt. *Connor* v. *Finch,* 431 U. S. 407, 414–415 (1977); *Chapman* v. *Meier,* 420 U. S. 1, 27 (1975); *Gaffney* v. *Cummings,* 412 U. S. 735, 749 (1973); *Burns* v. *Richardson,* 384 U. S. 73, 84–85 (1966)." *Wise* v. *Lipscomb,* 437 U. S. 535, 539–540 (1978). In *Minnesota State Senate* v. *Beens,* 406 U. S. 187, 200 (1972), we concluded that "the action of the three-judge court in so drastically changing the number of legislative districts and the size of the respective houses of the Minnesota Legislature is not required by the Federal Constitution and is not justified as an exercise of federal judicial power." Accordingly, those legislators who embark on the difficult and politically sensitive task of reapportionment will need clear rules for determining whether a particular plan for a particular governmental district is or is not constitutional.

Unfortunately, those legislators will not be aided by the decisions of this Court, decisions which are obviously not wholly in harmony with one another. Cf. *Burns* v. *Richardson,* 384 U. S. 73 (1966); *East Carroll Parish School Board* v. *Marshall,* 424 U. S. 636 (1976); *White* v. *Regester,* 412 U. S. 755, 765 (1973); *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971); *Connor* v. *Johnson,* 402 U. S. 690 (1971); *Mahan* v. *Howell,* 410 U. S. 315 (1973); *Gaffney* v. *Cummings,* 412 U. S. 735, 749 (1973). The decision below is no exception: it will further confuse an already confused area. If all of the various governmental units subject to the ever-oscillating "one-person, one-vote" rule are to have even a fighting chance of reapportioning themselves within constitutional limits, rather than to be remitted to court-ordered redistricting, with all of the additional legal baggage which such plans bring with them, this Court should make every effort to

clarify what the Voting Rights Act and the Federal Constitution require.

For the foregoing reasons, I dissent from the denial of the petition for certiorari.

No. 80–1278. SOWDERS, WARDEN *v.* CLEAVER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE POWELL would grant certiorari. Reported below: 634 F. 2d 1010.

No. 80–1322. FAMILIA DE BOOM ET AL. *v.* AROSA MERCANTIL, S. A., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 629 F. 2d 1134.

No. 80–1457. HARDIN *v.* PITNEY-BOWES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

JUSTICE REHNQUIST, dissenting.

The petitioner in this case brought suit under the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 *et seq.*, alleging that respondent had unlawfully discharged him from his job. The District Court granted respondent's motion for summary judgment and the Court of Appeals for the Sixth Circuit affirmed. 636 F. 2d 1217 (1980). Chief Judge Edwards dissented, reasoning that summary judgment is improperly invoked where, as here, the defendant's motive and intent in discharging the plaintiff is at issue. Because I believe that petitioner raised a triable issue of fact under the Federal Rules of Civil Procedure, I believe that it was error to grant respondent's motion for summary judgment. Accordingly, I would grant the petition for certiorari in order to give the case plenary consideration.

It has long been established that it is inappropriate to resolve issues of credibility, motive, and intent on motions for summary judgment. It is equally clear that where such issues are presented, the submission of affidavits or deposi-

tions is insufficient to support a motion for summary judgment. In *Arnstein* v. *Porter,* 154 F. 2d 464, 469 (1946), for example, the Court of Appeals for the Second Circuit fully explored the circumstances in which summary judgment could be granted and concluded that "[a]lthough part of plaintiff's testimony on deposition (as to 'stooges' and the like) does seem 'fantastic,' yet plaintiff's credibility, even as to those improbabilities, should be left to the jury." And this Court has recently questioned the propriety of deciding defamation cases on summary judgment where the defendant's state of mind is called into question under the "actual malice" standard. *Hutchinson* v. *Proxmire,* 443 U. S. 111, 120, n. 9 (1979); *Wolston* v. *Reader's Digest Assn., Inc.,* 443 U. S. 157, 161, n. 3 (1979). Likewise in this case, I agree, substantially for the reasons set forth by Chief Judge Edwards in his dissent, that petitioner raised a triable issue of fact as to the reasons for his discharge.

This case illustrates the frequency with which courts misapprehend the rule against summary judgment. In *Butz* v. *Economou,* 438 U. S. 478 (1978), for example, this Court held that top-level federal officials had only a qualified or good-faith immunity, such as that accorded in *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), against damages suits for malicious institution of administrative proceedings. The Court went on, however, to reassure that such litigation could still be disposed of summarily. The Court asserted:

> "[D]amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 U. S., at 250. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." 438 U. S., at 508 (footnote omitted).

For the reasons stated above and demonstrated by this case, I believe that view is wrong. Summary judgment simply may not be granted when such matters as the defendant's motive and intent are questioned. Thus in any suit where the defendant is not accorded *absolute* immunity, so that the defendant's state of mind is at issue, it will not require an ingenious advocate to force a trial of the case. It seems to me that even the most frivolous lawsuits filed against top-level federal officials will have to be tried. Indeed, that is one reason why I dissented in *Butz* v. *Economou, supra,* at 517 (concurring in part and dissenting in part), and remain convinced that the case was wrongly decided.

Just as summary judgment is inappropriate in qualified-immunity cases and in defamation cases, it is inappropriate here. Because petitioner raised issues going to respondent's motive and intent, it was error to grant the motion for summary judgment. Accordingly, I dissent from the denial of the petition for certiorari.

No. 80–1602. Illinois State Dental Society et al. *v.* Schiller et al. C. A. 7th Cir. Certiorari denied. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 645 F. 2d 73.

No. 80–1606. Price Enterprises, Inc., et al. *v.* American International Pictures, Inc., et al. C. A. 4th Cir. Certiorari denied. Justice Stewart took no part in the consideration or decision of this petition. Reported below: 636 F. 2d 933.

No. 80–6256. Berry *v.* Louisiana. Sup. Ct. La. Certiorari denied. Justice Stewart would grant certiorari. Reported below: 391 So. 2d 406.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428

U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 80–6366. TURNER *v.* VIRGINIA. Sup. Ct. Va.;

No. 80–6368. JONES *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County; and

No. 80–6375. SOLOMON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 80–6366, 221 Va. 513, 273 S. E. 2d 36; No. 80–6375, 247 Ga. 27, 277 S. E. 2d 1.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–1157. ROSEWELL, TREASURER OF COOK COUNTY, ILLINOIS, ET AL. *v.* LASALLE NATIONAL BANK, TRUSTEE, 450 U. S. 503;

No. 79–1733. W. D. R. *v.* TAYLOR COUNTY CHILD WELFARE UNIT, 450 U. S. 989;

No. 80–537. IN RE J. W. B. ET AL., 450 U. S. 990;

No. 80–763. ESTELLE, CORRECTIONS DIRECTOR *v.* JUREK, 450 U. S. 1014;

No. 80–840. WEBER ET AL. *v.* BARRETT, 450 U. S. 1022;

No. 80–1021. WOOD *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (FIVE POINTS SHOPPING CENTER, REAL PARTY IN INTEREST), 450 U. S. 995;

No. 80–1229. EHRMAN *v.* CITY OF PHILADELPHIA, 450 U. S. 997;

No. 80–1378. CASAREZ-ULLOA, AKA MOLINA *v.* UNITED STATES, 450 U. S. 999; and

No. 80–5942. AMADEO *v.* RUSSEAU, SHERIFF, 450 U. S. 1035. Petitions for rehearing denied.

No. 80–6127. McDowell *v.* North Carolina, 450 U. S. 1025; and

No. 80–6163. Johns *v.* King, Lieutenant Governor of Hawaii, et al., 450 U. S. 1033. Petitions for rehearing denied.

No. 80–5949. Burkhalter *v.* Chrysler Corp. et al., 450 U. S. 931. Motion for leave to file petition for rehearing denied.

May 20, 1981

Dismissals Under Rule 53

No. 80–309. Heverly et al. *v.* Commissioner of Internal Revenue. C. A. 3d Cir.; and

No. 80–310. Chapman et al. *v.* Commissioner of Internal Revenue. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53. Reported below: No. 80–309, 621 F. 2d 1227; No. 80–310, 618 F. 2d 856.

May 26, 1981

Appeals Dismissed

No. 80–1641. Supreme Court of Virginia et al. *v.* Consumers Union of the United States, Inc., et al.; and

No. 80–1664. Consumers Union of the United States, Inc., et al. *v.* Virginia State Bar et al. Appeals from D. C. E. D. Va. Motions of appellants to defer consideration of the appeals denied. Appeals dismissed for want of jurisdiction. Justice Powell took no part in the consideration or decision of these motions and these cases. Reported below: 505 F. Supp. 822.

No. 80–1661. Egan *v.* New York. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of substantial federal question. Reported below: 78 App. Div. 2d 1017, 435 N. Y. S. 2d 201.

No. 80–6460. PRENZLER *v.* ALLEN. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 80–1507. CITY OF PARMA, OHIO, ET AL. *v.* RECORD REVOLUTION No. 6, INC., ET AL. Appeal from C. A. 6th Cir. Judgment vacated and case remanded for further consideration in light of the recently enacted Section 2925.14 of the Ohio Revised Code. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 638 F. 2d 916.

Certiorari Granted—Vacated and Remanded

No. 79–6366. BLAKNEY *v.* MONTANA. Sup. Ct. Mont. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. JUSTICE BLACKMUN dissents and would deny certiorari. Reported below: —— Mont. ——, 605 P. 2d 1093.

No. 79–6601. WHITE *v.* FINKBEINER. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. Reported below: 611 F. 2d 186.

No. 80–997. MISSOURI *v.* GREER; MISSOURI *v.* KENDRICK; and MISSOURI *v.* WILLIAMS. Sup. Ct. Mo. Motions of respondents Williams, Kendrick, and Greer for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Albernaz* v. *United States,* 450 U. S. 333 (1981). Reported below: 605 S. W. 2d 93 (first case); 606 S. W. 2d 643 (second case); 606 S. W. 2d 777 (third case).

No. 80–1674. CONSUMERS POWER CO. ET AL. *v.* UTILITY WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alessi* v. *Raybestos-Manhattan, Inc., ante,* p. 504. Reported below: 637 F. 2d 1082.

No. 80–5084. LEUSCHNER *v.* MARYLAND. Ct. Sp. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. Reported below: 45 Md. App. 323, 413 A. 2d 227.

No. 80–5258. MONROE *v.* IDAHO. Sup. Ct. Idaho. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. Reported below: 101 Idaho 251, 611 P. 2d 1036.

No. 80–5640. WANTLAND *v.* MARYLAND. Ct. Sp. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. JUSTICE BLACKMUN dissents and would deny certiorari. JUSTICE POWELL and JUSTICE REHNQUIST dissent. Reported below: 45 Md. App. 527, 413 A. 2d 1376.

No. 80–5799. JAMES *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. JUSTICE STEWART, JUSTICE POWELL, and JUSTICE REHNQUIST dissent. JUSTICE BLACKMUN dissents and would deny certiorari. Reported below: 82 Ill. App. 3d 551, 402 N. E. 2d 936.

Miscellaneous Orders

No. A–894 (80–6646). WHITE *v.* UNITED STATES. Super. Ct. D. C. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–916. DIAMOND M CO. ET AL. *v.* RAINS. Ct. App. La., 3d Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–219. IN RE DISBARMENT OF ROSPOND. Disbarment entered. [For earlier order herein, see 450 U. S. 976.]

No. D–223. IN RE DISBARMENT OF WOLF. Edward H. Wolf, of New York, N. Y., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 9, 1981 [450 U. S. 977], is hereby discharged.

No. D–224. IN RE DISBARMENT OF KLAUBER. Disbarment entered. [For earlier order herein, see 450 U. S. 976.]

No. D–239. IN RE DISBARMENT OF FAHY. It is ordered that Francis X. Fahy, of Jersey City, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80–885. NATIONAL LABOR RELATIONS BOARD *v.* HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP.; NATIONAL LABOR RELATIONS BOARD *v.* MALLEABLE IRON RANGE CO.; and

No. 80–1103. HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. [Certiorari granted, 450 U. S. 964.] Motion of United Auto Workers for leave to file a brief as *amicus curiae* granted.

No. 80–608. UNITED STATES POSTAL SERVICE *v.* COUNCIL OF GREENBURGH CIVIC ASSNS. ET AL. D. C. S. D. N. Y. [Probable jurisdiction noted, 449 U. S. 1076.] Motion of appellant for leave to file a supplemental brief after argument granted.

No. 80–5950. LOGAN *v.* ZIMMERMAN BRUSH CO. ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 450 U. S. 909.] Motion of Illinois Congress of Organizations of the Physically Handicapped et al. for leave to file a brief as *amici curiae* granted.

No. 80–6582. IN RE CORLEY; and

No. 80–6587. IN RE EL-AMIN. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 80–1582. UNITED STATES *v.* MACDONALD. C. A. 4th Cir. Certiorari granted. Reported below: 632 F. 2d 258 and 635 F. 2d 1115.

No. 80–1640. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* SHOLLY ET AL.; and

No. 80–1656. METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 209 U. S. App. D. C. 71, 651 F. 2d 792.

Certiorari Denied. (See also No. 80–6460, *supra.*)

No. 79–6801. RIGLER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 488 Pa. 441, 412 A. 2d 846.

No. 80–238. BARTLETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 387 So. 2d 886.

No. 80–1534. OCHS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1205.

No. 80–1434. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* UNITED STATES ET AL.;

No. 80–1439. RAILWAY LABOR EXECUTIVES' ASSN. *v.* UNITED STATES ET AL.; and

No. 80–1632. ILLINOIS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 392.

No. 80–1536. MARYLAND ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 73.

No. 80–1599. HOME MUTUAL INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 333.

No. 80–1607. ALCON LABORATORIES (PUERTO RICO), INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 636 F. 2d 876.

No. 80–1613. STARR ET UX. *v.* PRING. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1227.

No. 80–1633. DAVIS *v.* FLORIDA EAST COAST RAILWAY CO. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 392 So. 2d 69.

No. 80–1648. NIERRAS *v.* OHIO. Ct. App. Ohio, Richland County. Certiorari denied.

No. 80–1652. INTERNATIONAL PRODUCE, INC. *v.* A/S ROSSHAVET. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 548.

No. 80–1653. SMITH *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 86 Ill. App. 3d 575, 408 N. E. 2d 743.

No. 80–1673. FREDERIKSEN ET AL. *v.* POLOWAY. C. A. 7th Cir. Certiorari denied. Reported below: 637 F. 2d 1147.

No. 80–1678. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 34.

No. 80–1685. PACIFIC DEVELOPMENT, INC., ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 203 U. S. App. D. C. 128, 629 F. 2d 162.

No. 80–1701. NEWPORT TANKERS CORP. *v.* SIMMONS. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 312.

No. 80–1709. PRUDENTIAL FEDERAL SAVINGS & LOAN ASSN. *v.* MADSEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 635 F. 2d 797.

No. 80–1723. BECK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–1752. WERNKE *v.* MILLER, CHIEF OF POLICE OF THE TOWN OF PLAINFIELD, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 75.

No. 80–1775. KLAUBER *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 289 Md. 446, 423 A. 2d 578.

No. 80–1776. GAGNON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 635 F. 2d 766.

No. 80–1782. HERZOG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 644 F. 2d 713.

No. 80–1789. CALABRESE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 645 F. 2d 1379.

No. 80–1812. BAKER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 787.

No. 80–5921. KRUEGER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 82 Ill. 2d 305, 412 N. E. 2d 537.

No. 80–6055. WILLIAMS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 606 S. W. 2d 777.

No. 80–6118. CAUSEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 735, 273 S. E. 2d 6.

No. 80–6165. WILLIAMS *v.* KELLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 695.

No. 80–6192. MCCRARY *v.* HONGISTO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 162.

No. 80–6214. DUFFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1211.

No. 80–6269. BURTON *v.* WHITE, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 80–6286. MCKNABB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–6384. BUTLER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 205 U. S. App. D. C. 19, 636 F. 2d 727.

No. 80–6431. BROWN ET AL. *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 88 Ill. App. 3d 514, 410 N. E. 2d 505.

No. 80–6432. SINCLAIR *v.* DALSHEIM, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 54.

No. 80–6433. CHICCO *v.* PECK. C. A. 1st Cir. Certiorari denied. Reported below: 647 F. 2d 159.

No. 80–6435. YIP *v.* UNITED STATES; and
No. 80–6495. GAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 28.

No. 80–6441. COOLIDGE *v.* SCHOONER CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1321.

No. 80–6442. PFAFF *v.* CITY OF CHILLICOTHE. Ct. App. Ohio, Ross County. Certiorari denied.

No. 80–6445. HAMILTON *v.* ABSHIRE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 885.

No. 80–6448. ROPER, AKA BARRY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 77 App. Div. 2d 820, 429 N. Y. S. 2d 340.

No. 80–6449. PRINCE *v.* TEXAS ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 80–6450. LEWIS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 396 So. 2d 290.

No. 80–6456. ALLEN *v.* FARLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 56.

No. 80–6457. COX *v.* WATSON, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 312.

No. 80–6459. MCKINLEY *v.* PULLEY, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 80–6463. CUMMINS *v.* JAGO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 164.

No. 80–6466. BURNS *v.* STATE BAR OF WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 76.

No. 80–6468. KUMMER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 100 Wis. 2d 220, 301 N. W. 2d 240.

No. 80–6470. Cox *v.* Wyrick, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 642 F. 2d 222.

No. 80–6476. Ross *v.* Correctional Institutional Inspection Committee. Sup. Ct. Ohio. Certiorari denied.

No. 80–6497. Miranda de Chavez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 457.

No. 80–6565. Sivigliano *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 80–6571. McCaskill *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 882.

No. 80–6579. Wright *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 641 F. 2d 602.

No. 80–6584. Brunk *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 639 F. 2d 206.

No. 80–6603. Roush *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 80–456. Thompson, Secretary, Department of Social and Health Services of Washington, et al. *v.* Berry et al. Sup. Ct. Wash. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 93 Wash. 2d 17, 604 P. 2d 1288.

No. 80–664. California *v.* Braeseke. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 28 Cal. 3d 86, 618 P. 2d 149.

No. 80–974. Ford *v.* Ford et al. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Motion of respondent Dorothy Ford for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 80–1158. FLORIDA *v.* RODRIGUEZ. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE POWELL would grant certiorari and reverse the judgment. Reported below: 389 So. 2d 4.

No. 80–1306. DOE, BY DOE ET UX., HER PARENTS AND NEXT FRIENDS *v.* RENFROW, SUPERINTENDENT OF THE HIGHLAND COMMUNITY SCHOOL CORPORATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 91.

JUSTICE BRENNAN, dissenting.

I dissent from the denial of the petition for certiorari. I would grant the petition and summarily reverse the judgment of the Court of Appeals insofar as it affirmed the judgment of the District Court. I cannot agree that the Fourth Amendment authorizes local school and police officials to detain every junior and senior high school student present in a town's public schools and then, using drug-detecting, police-trained German shepherds, to conduct a warrantless, student-by-student dragnet inspection "to see if there were any drugs present." While school officials acting *in loco parentis* may take reasonable steps to maintain a safe and healthful educational environment, their actions must nonetheless be consistent with the Fourth Amendment. The problem of drug abuse in the schools is not to be solved by conducting schoolhouse raids on unsuspecting students absent particularized information regarding drug users or suppliers.

I

Petitioner Diane Doe is a 13-year-old student at Highland Junior High School in Highland, Ind., a community of approximately 30,000 residents. Highland has one junior high school and one senior high school, located in adjacent buildings. There are 2,780 students enrolled in those schools.

On the morning of March 23, 1979, petitioner went to her first-period class as usual. Shortly before 9:15, when the class was scheduled to adjourn, petitioner's teacher ordered

everyone to remain seated until further notice. An assistant principal, accompanied by a police-trained German shepherd, a dog handler, and a uniformed police officer, then entered the classroom as one of six teams conducting simultaneous raids at the Highland schools. For the next 2½ hours, petitioner and her classmates were required to sit quietly in their seats with their belongings in view and their hands upon their desks. They were forbidden to use the washroom unless accompanied by an escort. Uniformed police officers and school administrators were stationed in the halls. Guards were posted at the schoolhouse doors. While no student was allowed to leave the schoolhouse, representatives of the press and other news media, on invitation of the school authorities, were permitted to enter the classrooms to observe the proceedings.

The dogs were led up and down each aisle of the classroom, from desk to desk, and from student to student. Each student was probed, sniffed, and inspected by at least 1 of the 14 German shepherds detailed to the school. When the search team assigned to petitioner's classroom reached petitioner, the police dog pressed forward, sniffed at her body, and repeatedly pushed its nose and muzzle into her legs. The uniformed officer then ordered petitioner to stand and empty her pockets, apparently because the dog "alerted" to the presence of drugs. However, no drugs were found. After petitioner emptied her pockets, the dog again sniffed her body, and again it apparently "alerted." Petitioner was then escorted to the nurse's office for a more thorough physical inspection.

Petitioner was met at the nurse's office by two adult women, one a uniformed police officer. After denying that she had ever used marihuana, petitioner was ordered to strip. She did so, removing her clothing in the presence of the two women. The women then looked over petitioner's body, inspected her clothing, and touched and examined the hair on

her head. Again, no drugs were found.[1] Petitioner was subsequently allowed to dress and was escorted back to her classroom.

Each of the 2,780 students present at Highland Junior and Senior High Schools that day was subjected to the mass detention and general exploratory search. Eleven students, including petitioner, were subjected to body searches. Although the police dogs "alerted" 50 times, no junior high school students, and only 17 senior high school students, were found to be in possession of contraband. This contraband included marihuana, drug "paraphernalia," and three cans of beer.

Petitioner brought suit in the District Court for the Northern District of Indiana against various Highland school officials, the Highland Police Chief, and the trainer of the German shepherds used in the search. Claiming a violation of rights secured by the Fourth, Ninth, and Fourteenth Amendments to the Constitution, petitioner sought injunctive and declaratory relief and compensatory and punitive damages under 42 U. S. C. §§ 1983 and 1985 (3) (1976 ed., Supp. III).

After trial, the District Court rejected petitioner's claims. 475 F. Supp. 1012 (1979). First, it found that all aspects of the mass detention and inspection, except for the strip-search, were constitutionally valid. Then, it dismissed petitioner's action against the Police Chief and the dog trainer on the ground that they did not personally participate in the strip-search, and it denied petitioner's claim for damages against the school administrators on the ground that they enjoyed qualified good-faith immunity under *Wood* v. *Strickland*, 420 U. S. 308 (1975).[2]

The Court of Appeals for the Seventh Circuit affirmed all parts of the judgment except for the grant of good-faith im-

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[1] Apparently, the police dogs alerted to petitioner because she had been playing with her own dog, which was in heat, on the morning of the raid.

[2] The court also denied petitioner's motion for class certification.

munity with respect to the strip-search. 631 F. 2d 91 (1980).[3] Expressly relying upon the District Court's reasoning, it held that the entry into the classrooms "was a justified action taken in accordance with the *in loco parentis* doctrine," and that "the sniffing of a trained narcotic detecting canine is not a search." 475 F. Supp., at 1019. The court also found that there was sufficient evidence of drug activity at the Highland schools to establish "reasonable cause to believe" contraband would be found, and thus to justify the use of drug-sniffing police dogs. Petitioner's request for rehearing en banc was denied, with Chief Judge Fairchild and Judges Swygert, Wood, and Cudahy dissenting. 635 F. 2d 582 (1980).

II

I cannot agree that the Highland school officials' use of the trained police dogs did not constitute a search. The dogs were led from student to student for the express purpose of sniffing their clothing and their bodies to obtain information that the school authorities and police officers, with their less developed sense of smell, were incapable of obtaining. In the case of petitioner, the dog repeatedly jabbed its nose into her legs. Petitioner testified that the experience of being sniffed and prodded by trained police dogs in the presence of the police and representatives of the press was degrading and embarrassing. I am astonished that the court did not find that the school's use of the dogs constituted an in-

[3] With respect to good-faith immunity, the Court of Appeals concluded:

"It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under 'settled indisputable principles of law' [*Wood* v. *Strickland*, 420 U. S. 308, 321 (1975).] . . . We suggest as strongly as possible that the conduct herein described exceeded the 'bounds of reason' by two and a half country miles." 631 F. 2d, at 92–93.

vasion of petitioner's reasonable expectation of privacy. See *Katz* v. *United States,* 389 U. S. 347 (1967); *Wolf* v. *Colorado,* 338 U. S. 25 (1949).[4]

Moreover, even if the Fourth Amendment permits school authorities, acting *in loco parentis,* to conduct exploratory inspections if they have "reasonable cause to believe" contraband will be found, that standard could not apply where, as here, the school officials planned and conducted the search with the full participation of local police officials.[5] Once school authorities enlist the aid of police officers to help maintain control over the school's drug problem, they step outside the bounds of any quasi-parental relationship, and their conduct must be judged according to the traditional probable-cause standard.[6]

Although a number of incidents involving alcohol, drugs, and related paraphernalia had been reported to school authorities in the seven months preceding the raid on the Highland schools, those incidents involved only 21 students, 13 of

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[4] Although the court below relied on a number of cases holding that the use of trained dogs to sniff out contraband does not constitute a search, see, *e. g., United States* v. *Solis,* 536 F. 2d 880 (CA9 1976); *United States* v. *Bronstein,* 521 F. 2d 459 (CA2 1975), cert. denied, 424 U. S. 918 (1976); *United States* v. *Fulero,* 162 U. S. App. D. C. 206, 498 F. 2d 748 (1974), those cases involved the sniffing of inanimate and unattended objects rather than persons. Thus, even if those cases correctly state the law, they are inapposite.

[5] For the same reason, I would disagree with the Court of Appeals' conclusion that the mass detention of students by school authorities and police officers did not constitute an unreasonable seizure. See *Terry* v. *Ohio,* 392 U. S. 1 (1968).

[6] The Court of Appeals found it significant that the police officials agreed not to seek prosecution of students found to possess drugs. However, I agree with the dissenting opinion of Judge Swygert that the Fourth Amendment's protection against unreasonable searches is based on "'the right of the people to be secure in their persons,'" and that it is constitutionally irrelevant that the police officers may have agreed not to arrest students found to be in possession of contraband. 635 F. 2d 582, 584 (1980).

whom had been "withdrawn" from the school system by March 1979. 475 F. Supp., at 1015, and n. 1. At the time of the raid, school authorities possessed no particularized information as to drugs or contraband, suppliers or users. Furthermore, they had made no effort to focus the search on particular individuals who might have been engaged in drug activity at school. The authorities had no more than a generalized hope that their sweeping investigative techniques would lead to the discovery of contraband.

This Court has long expressed its abhorrence of unfocused, generalized, information-seeking searches. See, *e. g., Ybarra* v. *Illinois,* 444 U. S. 85 (1979) (mass investigatory detention, interrogation, and search of bar patrons); *Davis* v. *Mississippi,* 394 U. S. 721 (1969) (mass detention and fingerprinting of black men fitting general description of perpetrator of crime). But that is precisely the type of search the Highland officials conducted. They certainly had far less than probable cause—or in my view even reasonable suspicion—to believe that each student searched would possess drugs or other contraband. Accordingly, I believe the search was unconstitutional.

We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been or is being committed. Schools cannot expect their students to learn the lessons of good citizenship when the school

authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.

No. 80–1465. CROCKER NATIONAL BANK *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE POWELL would grant certiorari. Reported below: 639 F. 2d 458.

No. 80–1583. COLORADO *v.* CHAVEZ. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 621 P. 2d 1362.

No. 80–1637. MCELROY, WARDEN *v.* HOLLOWAY. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 605.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Perhaps the tersest summary of the reasons I would grant certiorari in this case is contained in the "black letter" heading of Part II, section B, subsection 4 of the opinion of the Court of Appeals: *"Where the states are left after Winship, Mullaney, and Patterson."* 632 F. 2d 605, 624. The opinion of that court, which comprises 79 printed pages of the appendix to the petition for certiorari here, suggests that the answer is not crystal clear, even to the Court of Appeals for the Fifth Circuit whose judgment we are asked to review.

Mullaney v. *Wilbur,* 421 U. S. 684 (1975), established that a State must prove every element of a criminal offense beyond a reasonable doubt. It is equally well established, however, that state legislatures and state courts, not federal judges, define the elements of a state criminal offense. *Id.,* at 691. The Court of Appeals for the Fifth Circuit in this case followed the former rule but not the latter and, on the strength of this possible error, ordered released from prison a person convicted of voluntary manslaughter whose conviction had been affirmed on direct appeal and state habeas corpus. Because I believe that it is for Georgia, and not the Court of

Appeals for the Fifth Circuit, to define the elements of the crime of voluntary manslaughter under Georgia law, I would grant plenary consideration.

Respondent Holloway was tried before a Georgia jury for murder and convicted of the lesser included offense of voluntary manslaughter. Under Georgia law "[a] person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." Ga. Code § 26–1101 (a) (1978). Voluntary manslaughter is defined as causing the death of another human being under circumstances which would otherwise be murder if the killer "acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person." § 26–1102. Respondent admitted that he intentionally killed the victim but claimed that he acted in self-defense. Georgia law recognizes the defense of self-defense, § 26–902, and explicitly provides that a claim of self-defense "is an affirmative defense." § 26–907. The trial judge accordingly instructed the jury, without objection from respondent's counsel, that after the State had proved an intentional homicide *"the burden is on the slayer"* to show that the killing was justified, in this case by self-defense. 632 F. 2d, at 619 (emphasis in original).

Respondent appealed his conviction, but did not raise any *Mullaney* issue. The Georgia Court of Appeals affirmed, 137 Ga. App. 124, 222 S. E. 2d 898 (1975), and the Georgia Supreme Court denied certiorari. Respondent then sought federal habeas relief, but the District Court dismissed his application without prejudice for failure to exhaust, suggesting *sua sponte* that the trial court's instruction was " 'notably suspect under the principles of *Mullaney* v. *Wilbur*.' " 632 F. 2d, at 614. The state trial court denied state habeas relief, and the Georgia Supreme Court affirmed. Rejecting respondent's *Mullaney* claim, the Georgia Supreme Court ruled: "The burden placed on the defendant to excuse the homicide

is an affirmative defense. Code Ann. § 26–907. The defendant is not required to negate any of the elements of the crime which the state must prove to convict." 241 Ga. 400, 401, 245 S. E. 2d 658, 659 (1978).

Respondent thereupon again sought federal habeas relief, which this time was granted on the ground that the instruction impermissibly shifted the burden of proof from the State. The Court of Appeals for the Fifth Circuit affirmed. After stating that "the statute's characterization of self-defense as an 'affirmative defense' tells us nothing about the burden of persuasion on the self-defense issue," 632 F. 2d, at 630, the court concluded that since an element of the crime for which respondent was convicted was that the killing be "unlawful," and self-defense negates that element, requiring the defendant to prove that he acted in self-defense relieves the State of its burden of proving the unlawfulness of the killing. The court noted that "[t]he State has not cited, and our research has not found, any case from the Georgia courts which holds that the absence of self-defense has . . . been read out of the requirement of unlawfulness." *Id.*, at 634.

A common-sense reading of a statutory characterization of a defense as an "affirmative defense," however, certainly suggests that its absence is not an "element of the crime" which the State must prove. But more significantly, that is the exact reading given to this statutory characterization of self-defense as an affirmative defense by the Supreme Court of Georgia in the opinion which denied this very respondent state habeas relief. In the words of that court, the putting of the burden of proof on the defendant to prove self-defense is not requiring him to "negate any of the elements of the crime which the state must prove to convict." 241 Ga., at 401, 245 S. E. 2d, at 659.

In *Patterson* v. *New York*, 432 U. S. 197, 210 (1977), this Court declined "to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a

reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." By interpreting the term "unlawful" in the Georgia statutes as broadly as it has, the Court of Appeals in this case achieved just this result. It is doubtful that any state legislature would intend such a result; the Georgia Supreme Court in this case has told us that the Georgia Legislature did not. As stated in *Mullaney* itself, "state courts are the ultimate expositors of state law . . . and . . . we are bound by their constructions." 421 U. S., at 691. In *Patterson* we recognized that the rule that the definition of the elements of a crime is a state-law matter would permit state legislatures to allocate burdens of proof "by labeling as affirmative defenses" that which could otherwise be considered elements of a crime. 432 U. S., at 210. In that opinion, the Court noted that in *Rivera* v. *Delaware,* 429 U. S. 877 (1976), decided *after Mullaney,* we had dismissed for want of a substantial federal question the claim that the latter case had overruled *Leland* v. *Oregon,* 343 U. S. 790 (1952), which held that a State might make insanity an "affirmative defense." That is precisely what Georgia has done in this case with respect to "self-defense." Because the Court of Appeals for the Fifth Circuit deprived Georgia of an option specifically recognized in *Patterson,* by substituting its own reading of the term "unlawful" in the Georgia Code for the reading given that term by the Georgia Supreme Court, I dissent from the denial of certiorari.

No. 80–1669. Moss *v.* Lawrence. C. A. 10th Cir. Motion of Society of Professional Journalists, Sigma Delta Chi, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 639 F. 2d 634.

No. 80–6324. Milton *v.* Texas. Ct. Crim. App. Tex.; and

No. 80–6367. Briley *v.* Virginia. Sup. Ct. Va. Certio-

rari denied. Reported below: No. 80–6324, 599 S. W. 2d 824; No. 80–6367, 221 Va. 532, 273 S. E. 2d 48.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–950. NICOLADZE *v.* UNITED STATES, 450 U. S. 995;

No. 80–1162. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HANSEN, 450 U. S. 785;

No. 80–1316. BAUER *v.* UNITED STATES ET AL., 450 U. S. 1031;

No. 80–5572. DOUTHIT *v.* ESTELLE, CORRECTIONS DIRECTOR, 449 U. S. 1064;

No. 80–6195. HORNICK *v.* NOYES ET AL., 450 U. S. 1044; and

No. 80–6352. IN RE PIATT, *ante*, p. 905. Petitions for rehearing denied.

No. 80–6274. WILLIAMS *v.* ARKANSAS PUBLIC SERVICE COMMISSION, *ante*, p. 920. Petition for rehearing denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1032 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.