ORDERS FROM JULY 2 THROUGH SEPTEMBER 19, 1984

JULY 2, 1984

Dismissal Under Rule 53

No. 83–1843. MITCHELL ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, MARIN COUNTY (MOUNTANOS, REAL PARTY IN INTEREST). Appeal from Ct. App. Cal., 1st App. Dist., dismissed under this Court's Rule 53.

Vacated and Remanded on Appeal

No. 83–1564. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* UNION CARBIDE AGRICULTURAL PRODUCTS CO. ET AL. Appeal from D. C. S. D. N. Y. Judgment vacated and case remanded for further consideration in light of *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984). JUSTICE WHITE took no part in the consideration or decision of this case. Reported below: 571 F. Supp. 117.

Certiorari Granted—Vacated and Remanded

No. 83–902. BOEING VERTOL CO. ET AL. *v.* EDWARDS. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867 (1984). Reported below: 717 F. 2d 761.

No. 83–1506. TERRY *v.* BOTHKE. C. A. 9th Cir. Motion of respondent for damages denied. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Davis* v. *Scherer*, *ante*, p. 183. Reported below: 713 F. 2d 1405.

Miscellaneous Orders

No. A–888. PEARCE *v.* UNITED STATES. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–974. WISCONSIN ELECTIONS BOARD ET AL. *v.* REPUBLICAN PARTY OF WISCONSIN ET AL. Motion to vacate the stay, heretofore entered by the Court on June 7, 1984 [467 U. S. 1232], denied.

No. A–1027. HARGRAVES *v.* SCRIVNER, JUDGE OF THE TWENTIETH JUDICIAL CIRCUIT COURT OF ST. CLAIR COUNTY, ILLINOIS, ET AL. Cir. Ct., St. Clair County, Ill. Application for stay, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. D–419. IN RE DISBARMENT OF STEVENS. Disbarment entered. [For earlier order herein, see 466 U. S. 948.]

No. D–435. IN RE DISBARMENT OF MANN. William Davis Mann, of Akron, Ohio, 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 June 11, 1984 [467 U. S. 1237], is hereby discharged.

No. 65, Orig. TEXAS *v.* NEW MEXICO. The Honorable Jean Sala Breitenstein, whose long and invaluable service to the Court in this case is deeply appreciated, has requested that he be relieved of his duties as Special Master, and the Court having granted that request, it is necessary that a Special Master be appointed to conclude this case. It is therefore ordered that Charles J. Meyers of Denver, Colo., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier order herein, see, *e. g.*, 467 U. S. 1238.]

No. 82–1295. ESCAMBIA COUNTY, FLORIDA, ET AL. *v.* MCMILLAN ET AL., 466 U. S. 48. Motion of appellees to retax costs denied.

No. 83–599. CAPITAL CITIES MEDIA, INC., TDBA THE WILKES-BARRE TIMES LEADER, ET AL. *v.* TOOLE, JUDGE, COURT OF COMMON PLEAS OF LUZERNE COUNTY, 466 U. S. 378. Motion of respondent to retax costs denied.

No. 83–703. FLORIDA POWER & LIGHT CO. *v.* LORION, DBA CENTER FOR NUCLEAR RESPONSIBILITY, ET AL.; and

No. 83–1031. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* LORION ET AL. C. A. D. C. Cir. [Certiorari granted, 466 U. S. 903.] Motion of petitioner in No. 83–703 for divided argument granted, and a total of 15 minutes allotted for that purpose. Motion of the Solicitor General for divided argument granted, and a total of 15 minutes allotted for that purpose.

No. 83–727. ALEXANDER, GOVERNOR OF TENNESSEE, ET AL. *v.* CHOATE ET AL. C. A. 6th Cir. [Certiorari granted *sub nom. Alexander* v. *Jennings*, 465 U. S. 1021.] Motion of respondent Hershel Choate for leave to proceed further herein *in forma pauperis* granted.

No. 83–1170. UNITED STATES *v.* 50 ACRES OF LAND ET AL. C. A. 5th Cir. [Certiorari granted, 465 U. S. 1098.] Motion of respondents and National Governors' Association et al. for divided argument to permit National Governors' Association et al. to present oral argument as *amici curiae* denied.

No. 83–1362. CLEVELAND BOARD OF EDUCATION *v.* LOUDERMILL ET AL.;

No. 83–1363. PARMA BOARD OF EDUCATION *v.* DONNELLY ET AL.; and

No. 83–6392. LOUDERMILL *v.* CLEVELAND BOARD OF EDUCATION ET AL. C. A. 6th Cir. [Certiorari granted, 467 U. S. 1204.] Motion of James Loudermill for appointment of counsel granted, and it is ordered that Robert M. Fertel, Esquire, of Cleveland, Ohio, be appointed pursuant to Rule 46.6 to serve as counsel for James Loudermill in these cases.

No. 83–1897. IN RE FERNANDEZ-TOLEDO ET AL. Motion of petitioners to expedite consideration of the petition for writ of mandamus denied.

No. 83–6610 (A–1024). BARFIELD *v.* HARRIS, SUPERINTENDENT, NORTH CAROLINA CORRECTIONAL CENTER FOR WOMEN, ET AL., 467 U. S. 1210. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, is granted pending further order of the Court. Respondent is requested to file a response to the petition for rehearing within 30 days.

Certiorari Granted

No. 82–1889. SPRINGFIELD TOWNSHIP SCHOOL DISTRICT ET AL. *v.* KNOLL. C. A. 3d Cir. Certiorari granted. Reported below: 699 F. 2d 137.

Certiorari Denied

No. 82–1778. SELLFORS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 697 F. 2d 1362.

No. 83–861. CITY OF COLUMBUS ET AL. *v.* LEONARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 705 F. 2d 1299.

No. 82–2079. ALABAMA *v.* PRINCE. Ct. Crim. App. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 431 So. 2d 565.

No. 83–1429. ALABAMA POWER CO. ET AL. *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 231 U. S. App. D. C. 192, 719 F. 2d 436.

Rehearing Denied

No. 83–1457. RIVERA-RAMIREZ *v.* UNITED STATES, 467 U. S. 1215;

No. 83–1617. COLEMAN *v.* AMERICAN CYANAMID CO. ET AL., 467 U. S. 1215;

No. 83–6514. TILLI *v.* CAPOBIANCO ET AL., 467 U. S. 1217; and

No. 83–6629. KAVANAUGH *v.* SPERRY UNIVAC, 467 U. S. 1218. Petitions for rehearing denied.

No. 83–382. RUSH *v.* UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL., 464 U. S. 1052 and 465 U. S. 1074. Motion of petitioner for leave to file second petition for rehearing denied.

No. 83–592. OSTROSKY ET AL. *v.* ALASKA, 467 U. S. 1201. Motion of appellants for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 83–1345. UNION CARBIDE CORP. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., 467 U. S. 1219. Petition for rehearing denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 82–1587. CHRISTIAN *v.* MASSACHUSETTS ET AL., 461 U. S. 907;

No. 83–1674. YOUNG *v.* COMMISSIONER OF INTERNAL REVENUE, 467 U. S. 1206; and

No. 83–6374. ATTWELL ET UX. *v.* HERITAGE BANK OF MOUNT PLEASANT ET AL., 466 U. S. 953. Motions for leave to file petitions for rehearing denied.

JULY 5, 1984

Dismissals Under Rule 53

No. 83–1941. TROSCLAIR *v.* LOUISIANA. Sup. Ct. La. Certiorari dismissed under this Court's Rule 53. Reported below: 443 So. 2d 1098.

No. 83–1757. COTTON STATES MUTUAL INSURANCE CO. *v.* MCFATHER ET AL. Appeal from Sup. Ct. Ga. dismissed under this Court's Rule 53. Reported below: 251 Ga. 739, 309 S. E. 2d 799.

Appeals Dismissed

No. 83–651. FEDERAL COMMUNICATIONS COMMISSION *v.* LEAGUE OF WOMEN VOTERS OF CALIFORNIA ET AL. Appeal from D. C. C. D. Cal. dismissed for want of jurisdiction.

No. 83–1513. MOUNT DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA *v.* CURRAN. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of a final judgment. Reported below: 147 Cal. App. 3d 712, 195 Cal. Rptr. 325.

Vacated and Remanded on Appeal

No. 83–637. MINNESOTA PUBLIC INTEREST RESEARCH GROUP *v.* SELECTIVE SERVICE SYSTEM ET AL. Appeal from D. C. Minn. The order of the United States Court of Appeals for the Eighth Circuit filed August 17, 1983, transferring this case to the Supreme Court of the United States pursuant to 28 U. S. C. § 1252 is vacated, and the case is remanded to the Court of Appeals to consider whether appellant has standing. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 557 F. Supp. 925.

Certiorari Granted—Vacated and Remanded

No. 82–315. OREGON *v.* ROBERTI. Sup. Ct. Ore. Certiorari granted, judgment vacated, and case remanded for further con-

sideration in light of *Berkemer* v. *McCarty*, *ante*, p. 420. Reported below: 293 Ore. 236, 646 P. 2d 1341.

No. 82–819. UNITED STATES *v.* CROZIER ET AL. C. A. 9th Cir. Motion of respondent Florence Margaret Wolke for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Segura* v. *United States*, *ante*, p. 796; *United States* v. *Leon*, *ante*, p. 897; and *United States* v. *$8,850*, 461 U. S. 555 (1983). Reported below: 674 F. 2d 1293.

No. 83–24. UNITED STATES *v.* TATE ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Leon*, *ante*, p. 897. Reported below: 694 F. 2d 1217.

No. 83–817. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* DOUGLAS. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Strickland* v. *Washington*, 466 U. S. 668 (1984). Reported below: 714 F. 2d 1532.

No. 83–866. BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, NAACP, INC., ET AL.; and

No. 83–885. BOSTON POLICE PATROLMEN'S ASSN., INC. *v.* CASTRO ET AL. C. A. 1st Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Firefighters* v. *Stotts*, 467 U. S. 561 (1984). JUSTICE MARSHALL took no part in the consideration or decision of these cases. Reported below: 716 F. 2d 931.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

The Court today logically applies yesterday's illogic. I cannot disagree with the Court's conclusion that the mootness issue in these cases is similar to some portions of the mootness issue in *Firefighters* v. *Stotts*, 467 U. S. 561 (1984). I therefore do not dispute that there is reason to think that the decision in *Stotts* bears on the Court of Appeals' conclusion that these cases are moot. In my view, however, the portions of *Stotts* relevant to the mootness issue in this case are demonstrably wrong; they depart sharply from our precedents and ignore the jurisdictional limits imposed by the "case or controversy" requirements of Article

III of the Constitution. The sooner they are forgotten, the earlier that the longstanding principles governing mootness doctrine can be resurrected. The Court of Appeals disposed of these cases in accordance with those principles, and I would let its ruling stand.

I

The controversy in these cases has remarkable similarity to the controversy in *Stotts*. It began when the city of Boston announced a plan to conduct a reduction in force as a response to its fiscal difficulties. The proposed reductions included layoffs in the Police and Fire Departments, both of which were operating under consent decrees to remedy past discrimination. Those decrees required the Departments to engage in preferential hiring of members of minority groups in order to raise the representation of minorities in the Departments to the level in the surrounding work force. The proposed layoffs were to be conducted on a "last-hired, first-fired" basis, and would have affected many minority persons hired under the consent decree.

Minority officers brought suit in federal court to enjoin the layoffs, and the court concluded that seniority-based layoffs would impede its efforts to remedy the past discrimination. Accordingly, the District Court enjoined the Police and Fire Departments from conducting layoffs in a manner that would reduce the percentage of minorities employed in those Departments. *Castro* v. *Beecher*, 522 F. Supp. 873 (Mass. 1981). As a consequence, some nonminority employees were laid off ahead of minorities with less seniority. The State Civil Service Commission and the unions representing affected nonminority persons challenged the orders of the District Court. The Court of Appeals, however, affirmed. *Boston Chapter, NAACP* v. *Beecher*, 679 F. 2d 965 (CA1 1982).

Following the Court of Appeals' decision and this Court's grant of certiorari to review it, 459 U. S. 967 (1982), the Massachusetts Legislature enacted the Tregor Act to address the situation. 1982 Mass. Acts, ch. 190. That legislation provided the city of Boston with new revenues, required reinstatement of all police and firefighters laid off during the reductions in force, secured those personnel against future layoffs for fiscal reasons, and required the maintenance of minimum-staffing levels in the Police and Fire Departments through June 30, 1983. This legislative action terminated all layoffs, and greatly diminished the risk that

future layoffs might take place. Respondents argued before this Court that the legislation rendered the controversy in these cases moot, and deprived the Court of jurisdiction to decide them. Because the legislation's effects raised serious questions concerning this Court's jurisdiction, we vacated the Court of Appeals' judgment and remanded the case for consideration of mootness in light of the Tregor Act. *Firefighters* v. *Boston Chapter, NAACP*, 461 U. S. 477 (1983).

On remand, the Court of Appeals held that the Tregor Act's mandatory reinstatement of all laid-off police and firefighters, and its requirement of minimum-staffing levels, removed the legally cognizable stake that the litigants had in the suits before the layoffs ended. *Boston Chapter, NAACP* v. *Beecher*, 716 F. 2d 931 (CA1 1983). The court also rejected the claim that the controversy presented by the case was "capable of repetition yet evading review." If future layoffs occurred despite the Tregor Act, the court explained, there was no reason to assume that the state legislature would once again intervene before resolution by this Court. Finally, the court rejected the claim that these cases remain live because the District Court order interferes with backpay claims filed with the State Civil Service Commission by the affected nonminority workers. The Court of Appeals explained that those issues properly were to be resolved in the administrative proceedings before the Commission.

II

Because the Tregor Act is a Massachusetts statute, and *Stotts* involved layoffs in Tennessee, this Court's decision in *Stotts* obviously sheds no light on whether the Court of Appeals properly assessed the Tregor Act's effect on the likelihood that future layoffs will occur in the Boston Police and Fire Departments. This Court's decision in *Stotts* bears only on the question whether the backpay claims of individuals affected by the Boston layoffs create a controversy sufficient to provide a federal court with jurisdiction over these cases. The nature of those claims and the most basic principles of Article III make clear that they do not.

The elements of Article III's "case or controversy" requirement are well established. Among them is the requirement that parties before the Court have legally cognizable interests that are adverse to each other. Such adversity of interests must exist "at stages of appellate or certiorari review, and not simply at the date

the action is initiated." *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In addition, a complaining party must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38 (1976). A ruling that does not provide any relief to the prevailing party ignores the duty of federal courts "'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Oil Workers* v. *Missouri*, 361 U. S. 363, 367 (1960), quoting *Mills* v. *Green*, 159 U. S. 651, 653 (1895).

When a case becomes moot while pending review, it is the "duty of the appellate court" to vacate the judgment below and remand with directions to dismiss. *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267 (1936). "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 40 (1950). This disposition serves the purpose of preserving the rights of all parties to the controversy in any future litigation that might arise presenting similar issues.

Application of these principles makes it readily apparent that backpay claims filed against the city do not keep these cases alive and that the Court of Appeals correctly found them to be moot. First, claims for backpay simply are not a part of these cases. Petitioners do not seek backpay in them, and a decision of these cases will not provide backpay to anyone. It may be true, as the parties concede, that backpay claims are being litigated, or already have been decided, in administrative proceedings before the State Civil Service Commission. But the status of any such litigation is irrelevant here, for it has always been the rule that a case is not kept alive because of issues that might arise in other proceedings in another forum. A federal court's jurisdiction is determined by the conditions of the case before it. *Oil Workers* v. *Missouri*, 361 U. S., at 370 ("'Our power only extends over and is limited by the conditions of the case now before us,'" quoting *American Book Co.* v. *Kansas*, 193 U. S. 49, 52 (1904)). Because backpay is not an issue in these cases, it cannot provide a jurisdictional basis for these suits.

Second, it is apparent that the minority officers have no stake in the resolution of backpay claims of others filed with the State Civil

Service Commission. If backpay is awarded, it will come from the city, not from the minority officers, who are not parties to those proceedings, and who have no interest in whether such backpay is awarded. The possible dispute over backpay therefore does not create a controversy with respect to the minority officers who are respondents in these cases.

The Court of Appeals based its conclusion that these cases are moot on precisely these considerations. In rejecting the claim that backpay issues keep these cases live, the court explained:

> "According to the established practice of the federal courts, when a case is found moot, the district court's judgment will be vacated. Thus even assuming . . . that the district court's order directly inhibits the state Civil Service Commission respecting the backpay claims, it will no longer do so. To be sure, a definitive ruling on the constitutionality of the district court's past order might facilitate the Civil Service Commission's resolution of the back pay claims. But such a ruling now—rendered in the absence of a present case or controversy in this proceeding—would amount to no more than an advisory opinion. The federal courts are forbidden by Article III of the Constitution from giving advisory opinions. [Petitioners'] interest in the resolution of this case shows that the issue here may retain some collateral vitality, but to avoid mootness a case must present both live issues and parties with legally cognizable interests. Plaintiffs now lack the 'personal stake' necessary to keep alive the controversy which engendered this proceeding. The Civil Service Commission must therefore be left to decide the back pay claims under the governing state law without an advisory resolution of the constitutional issue by the federal courts." 716 F. 2d, at 933 (citations omitted).

Nothing in this Court's opinion in *Stotts* explains why these principles are not fully applicable here. It is true that *Stotts* involved ancillary backpay issues somewhat similar to those in these cases, but the Court's opinion never explained why vacating the District Court's orders would not have cleared the path for full litigation of the backpay issues in an appropriate proceeding involving adverse parties. Instead, this Court's opinion in *Stotts* proceeded from the misconception that even if the District Court's orders in those cases were vacated, they still might control

backpay claims. 467 U. S., at 571. Because a vacated judgment, by definition, cannot have any preclusive effect in subsequent litigation, the portion of the Court's decision in *Stotts* that assumes the contrary is tautologically incorrect.

In addition to being controlled by longstanding principles of Article III, these cases attest to the underlying wisdom of those tenets. Petitioners do not suggest that they are entitled to backpay under Title VII of the Civil Rights Act of 1964. Any backpay claims that may have arisen as a result of the Boston layoffs presumably are controlled by state rather than federal law. We cannot claim familiarity with the standards governing such claims, and hence we are in no position to determine how the federal questions formerly presented by these cases are relevant to the claims for backpay under state law. It seems likely, however, that the issue raised in the civil service proceedings is whether the layoffs of the nonminority persons were "justified" under state law. See Mass. Gen. Laws Ann., ch. 31, § 43 (West Supp. 1984–1985). To the extent that application of this standard might involve consideration of whether the layoffs were pursuant to a federal-court order, further review of these cases would shed no new light on that question. There is no dispute over whether the layoffs were conducted pursuant to outstanding federal-court orders that were validly entered and that the city had a legal duty to obey. See *Walker* v. *City of Birmingham*, 388 U. S. 307, 314 (1967) (court order entered by court with subject-matter and personal jurisdiction over case gives rise to a plain duty to obey until order is stayed, vacated, or reversed). If the Fire and Police Departments can defend backpay claims on the ground that the layoff of nonminority persons was justified because of the city's duty to obey a federal-court injunction, that defense presumably would exist regardless of whether the injunction is overturned on appeal. In any event, it is precisely because the issue of backpay is not being litigated in these cases, and hence the relevance of the District Court's injunction is unclear, that it is improper for a federal court to use those claims as a basis for its jurisdiction over these cases. If resolution of backpay claims under state law ultimately does involve a federal question, that question would be reviewable when presented as part of a decision resolving the backpay claims.

The Court's treatment of these cases is especially incongruous given that just last Term the Court implicitly rejected the view that backpay claims kept these cases live. When this Court

vacated the judgment in these cases and remanded them to the Court of Appeals, the Court expressly based its decision on the possibility that the Tregor Act rendered the cases moot. 461 U. S., at 479. That Act affected only the prospective aspects of the layoffs; it ordered reinstatement of laid-off employees and protected them from similar layoffs in the future. There was no suggestion, either then or now, that the Tregor Act had any effect whatsoever on backpay claims stemming from layoffs in the past. Thus, the backpay claims that petitioners now assert as keeping these cases alive were in the same posture last Term. Had this Court then believed that backpay issues created a controversy in these cases, there would have been no reason to remand them to the Court of Appeals for consideration of the Tregor Act. By remanding the cases, this Court implicitly expressed its view that the backpay claims did not save the cases from being moot. The Court offers no explanation for taking a contrary position now.

III

Because the Court of Appeals properly stayed within the scope of its Article III powers, I would simply deny the petitions for certiorari in these cases. If the Court believes that the Court of Appeals improperly applied the principles of Article III, the Court has a duty to explain why. It is incongruous for the Court simply to remand for further consideration of the mootness issue "in light of" *Stotts*, because the Court's opinion in *Stotts* ignored the principles that the Court of Appeals relied upon here. Rather than shedding any light on the mootness issue in these cases, *Stotts* casts a murky shadow over well-established Article III principles.

No. 83–995. DOUGLAS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Waller* v. *Georgia*, 467 U. S. 39 (1984). Reported below: 714 F. 2d 1532.

No. 83–1037. UNITED STATES *v.* CROSS. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hobby* v. *United States*, *ante*, p. 339. Reported below: 708 F. 2d 631.

No. 83–1393. UNITED STATES *v.* CASSITY ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded

for further consideration in light of *United States* v. *Leon*, *ante*, p. 897. Reported below: 720 F. 2d 451.

No. 83–1431. McDANIEL ET AL. *v.* GEORGIA ASSOCIATION OF RETARDED CITIZENS ET AL.; and

No. 83–1451. BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM ET AL. *v.* GEORGIA ASSOCIATION OF RETARDED CITIZENS ET AL. C. A. 11th Cir. Motion of National School Boards Association et al. for leave to file a brief as *amici curiae* in No. 83–1431 granted. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Smith* v. *Robinson*, *ante*, p. 992. Reported below: 716 F. 2d 1565.

No. 83–1535. IMMIGRATION AND NATURALIZATION SERVICE *v.* OLIVAS-MONORREZ. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *INS* v. *Lopez-Mendoza*, *ante*, p. 1032. Reported below: 718 F. 2d 1111.

Certiorari Granted—Reversed. (See No. 82–6935, *ante*, p. 1062.)

*Miscellaneous Orders**

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 465 U. S. 1018.]

No. 81–1859. ILLINOIS *v.* LAFAYETTE, 462 U. S. 640. Motion of respondent for leave to proceed *in forma pauperis* granted. Respondent's petition for writ of error *coram nobis* to vacate the judgment in this case denied. JUSTICE MARSHALL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 82–1913. GARCIA *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL.; and

No. 82–1951. DONOVAN, SECRETARY OF LABOR *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL. D. C. W. D. Tex. [Probable jurisdiction noted, 464 U. S. 812.] Cases restored to calendar for reargument. In addition to the questions presented in the jurisdictional statements and previously briefed

*For the Court's order prescribing amendments to the Rules of this Court, see *post*, p. 1253.

and argued, the parties are requested to brief and argue the following question: "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), should be reconsidered?"

No. 83–18. DUN & BRADSTREET, INC. *v.* GREENMOSS BUILDERS, INC. Sup. Ct. Vt. [Certiorari granted, 464 U. S. 959.] Case restored to calendar for reargument. In addition to the questions presented by the petition for writ of certiorari and previously briefed and argued, the parties are requested to brief and argue the following questions:

"1. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a nonmedia defendant?

"2. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?"

No. 83–712. NEW JERSEY *v.* T. L. O. Sup. Ct. N. J. [Certiorari granted, 464 U. S. 991.] Case restored to calendar for reargument. In addition to the question presented by the petition for writ of certiorari and previously briefed and argued, the parties are requested to brief and argue the following question: "Did the assistant principal violate the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?"

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In its decision in this case, the New Jersey Supreme Court addressed three distinct questions: (1) what is the proper standard for judging the reasonableness of a school official's search of a student's purse; (2) on the facts of this case, did the school official violate that standard; and (3) whether the exclusionary rule bars the use in a criminal proceeding of evidence that a school official obtained in violation of that standard. The Supreme Court held (1) that the correct standard is one of reasonable suspicion rather than probable cause; (2) that the standard was violated in this case; and (3) that the evidence obtained as the result of a violation may not be introduced in evidence against T. L. O. in any criminal proceeding, including this delinquency proceeding.

New Jersey's petition for certiorari sought review of only the third question.[1] The reasons why it did not seek review of either of the other two questions are tolerably clear. There is substantial agreement among appellate courts that the New Jersey Supreme Court applied the correct standard, and it is apparently one that the New Jersey law enforcement authorities favor. As far as the specific facts of the case are concerned, presumably New Jersey believed that this Court is too busy to take a case just for the purpose of reviewing the State Supreme Court's application of this standard to the specific facts of this case.

The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that New Jersey decided not to bring here. This is done even though New Jersey *agrees* with its Supreme Court's resolution of these questions, and has no desire to seek reversal on those grounds.[2] Thus, in this nonadversarial context, the Court has decided to plunge into the merits of the Fourth Amendment issues despite the fact that no litigant before it wants the Court's guidance on these questions. Volunteering unwanted advice is rarely a wise course of action.

Of late, the Court has acquired a voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen. In *United States* v. *Leon*, *ante*, at 905, and *Massachusetts* v. *Sheppard*, *ante*, at 988, n. 5, the Court fashioned a new exception to the exclusionary rule despite its acknowledgment that narrower

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[1] The petition presented a single question for review: "Whether the Fourth Amendment's exclusionary rule applies to searches made by public school officials and teachers in school."

[2] At oral argument, the following colloquy took place between counsel for New Jersey and the bench:

"QUESTION: Well, do you think it is open to us to deal with the reasonableness of the search?

"MR. NODES: I believe that could be considered a question subsumed within the—

"QUESTION: But it wasn't your intention to raise it?

"MR. NODES: It wasn't our intention to raise it because we agree with the standard that was set forth by the New Jersey Supreme Court. We feel that that is a workable standard." Tr. of Oral Arg. 7.

grounds for decision were available in both cases.[3] In *United States* v. *Karo*, *ante*, p. 705, in order to reverse a decision requiring the suppression of evidence, the Court on its own initiative made an analysis of a factual question that had not been presented or argued by either of the parties and managed to find a basis for ruling in favor of the Government. In *Segura* v. *United States*, *ante*, p. 796, two creative Justices reached the surprising conclusion that an 18–20-hour warrantless occupation of a citizen's home was "reasonable," despite the fact that the issue had not been argued and the Government had expressly conceded the unreasonableness of the occupation. And, as I have previously observed, in recent Terms the Court has elected to use its power of summary disposition exclusively for the benefit of prosecutors.[4] In this case, the special judicial action is to order the parties to argue a constitutional question that they have no desire to raise, in a context in which a ground for decision that the Court currently views as nonconstitutional is available,[5] and on which the State's chief prosecutor believes no guidance from this Court is necessary.

I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review. I respectfully dissent.

Certiorari Granted

No. 83–963. BOARD OF LICENSE COMMISSIONERS OF THE TOWN OF TIVERTON *v.* PASTORE, LIQUOR CONTROL ADMINISTRATOR OF RHODE ISLAND, ET AL. Sup. Ct. R. I. Certiorari granted. Reported below: 463 A. 2d 161.

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[3] See *ante*, at 962–963 (STEVENS, J., concurring in judgment in *Sheppard* and dissenting in *Leon*).

[4] See *Florida* v. *Meyers*, 466 U. S. 380, 385–386, and n. 3 (1984) (STEVENS, J., dissenting).

[5] We are told that questions concerning the remedies for a Fourth Amendment violation are not constitutional in dimension. *United States* v. *Leon*, *ante*, at 905–906. Apparently, this Court has imposed the exclusionary rule on the States as a result of the Fourth Amendment's "invisible radiations," *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 780, n. 12 (1984), which act to somehow give the Court nonconstitutional supervisory powers over the state courts. My own view is different. See *ante*, at 978, and n. 37 (STEVENS, J., concurring in judgment in *Sheppard* and dissenting in *Leon*).

Certiorari Denied

No. 82–6230. ARNAU *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 27, 444 N. E. 2d 13.

No. 83–70. PENNSYLVANIA *v.* SANTNER. Super. Ct. Pa. Certiorari denied. Reported below: 308 Pa. Super. 67, 454 A. 2d 24.

No. 83–681. DENTICO ET AL. *v.* UNITED STATES;
No. 83–690. MUSTO ET AL. *v.* UNITED STATES; and
No. 83–806. D'AGOSTINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: Nos. 83–681 and 83–690, 715 F. 2d 822; No. 83–806, 722 F. 2d 735.

No. 83–979. CRONN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 164.

No. 83–5063. TRANOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 702 F. 2d 668.

No. 83–5504. WILKINS *v.* WHITAKER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 4.

No. 83–5689. TYDINGS *v.* DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 11.

No. 83–5861. PEREZ ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 714 F. 2d 52.

No. 83–5911. GOODAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 80.

No. 83–768. FAULKNER ET AL. *v.* WELLMAN ET AL. C. A. 7th Cir. Motion of respondents Dwight Walker and Billie R. Adams for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 715 F. 2d 269.

No. 83–1212. KENTUCKY *v.* HAMILTON. Sup. Ct. Ky. Certiorari denied. Reported below: 659 S. W. 2d 201.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

Respondent Hamilton was tried for the crimes of rape and incest, in which he was charged with having had sexual intercourse with his 10-year-old daughter. He was found guilty on both

counts and was sentenced to life imprisonment on the rape charge and 10 years on the incest charge, the sentences to be served concurrently. The Supreme Court of Kentucky affirmed his conviction for rape and his sentence of life imprisonment, but reversed his conviction for incest. 659 S. W. 2d 201 (1983). That court was of the view that sentencing respondent for two different crimes based on the single act of intercourse with his daughter violated the constitutional guarantee against double jeopardy.

The Supreme Court of Kentucky believed that the closest analogy to the present case was our decision in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977), in which we held that petitioner Harris, who had earlier been tried and convicted of the felony murder of a grocery clerk, could not be later tried for the armed robbery of the store which was the predicate offense for the felony-murder prosecution. In the present case, however, it is undisputed that the State defines rape as sexual intercourse with one who is less than 12 years old, Ky. Rev. Stat. § 510.040(1)(b)(2) (1975), and defines incest as sexual intercourse with a member of one's family, Ky. Rev. Stat. § 530.020 (1975). Thus while both offenses require the element of sexual intercourse, each requires an additional element which the other does not. Although the Kentucky Supreme Court purported to rely on our decision in *Blockburger* v. *United States*, 284 U. S. 299 (1932), its ruling is directly contrary to this language from *Blockburger:*

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . ." *Id.*, at 304.

Earlier this Term, we reiterated the traditional definition of the protection of the Double Jeopardy Clause of the Fifth Amendment:

> "'"It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."' *Brown* v. *Ohio*, 432 U. S. 161, 165 (1977), quoting *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969)." *Ohio* v. *Johnson*, 467 U. S. 493, 498 (1984).

In the present case, respondent Hamilton has neither been acquitted and subjected to a second prosecution, nor convicted and subjected to a second prosecution. The only conceivable double jeopardy protection which he can invoke is that against multiple punishments for the same offense. But we held in *Missouri* v. *Hunter*, 459 U. S. 359, 368 (1983), that the question whether punishments are "multiple" under the Double Jeopardy Clause is essentially one of legislative intent, a principle we reaffirmed in *Ohio* v. *Johnson*, *supra*, at 499, and n. 8. Here the Kentucky Legislature has given no indication that it wishes something less than the statutorily provided penalty imposed for each offense when a defendant is convicted of both rape and incest. There was, therefore, no violation of the Double Jeopardy Clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment to the United States Constitution, entailed in the sentences imposed by the Kentucky trial court.

I believe that the decision of the Supreme Court of Kentucky is so obviously mistaken that it should be summarily reversed on the authority of *Ohio* v. *Johnson*, *supra*, and *Missouri* v. *Hunter*, *supra*, but at the very least I would grant the State's petition for certiorari, vacate the judgment below, and remand this case to the Supreme Court of Kentucky for reconsideration in the light of those cases.

No. 83–1318. GARRISON, WARDEN, ET AL. *v.* ALSTON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 720 F. 2d 812.

No. 83–1321. CALIFORNIA ET AL. *v.* TENNECO OIL CO. ET AL.;

No. 83–1432. PUBLIC UTILITY COMMISSIONER OF OREGON ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.;

No. 83–1433. NORTHWEST PIPELINE CORP. ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.;

No. 83–1442. EL PASO NATURAL GAS CO. *v.* TENNECO OIL CO. ET AL.;

No. 83–1443. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* TENNECO OIL CO. ET AL.; and

No. 83–1618. FEDERAL ENERGY REGULATORY COMMISSION *v.* TENNECO OIL CO. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the

consideration or decision of these petitions. Reported below: 708 F. 2d 1011.

No. 83–5614. MAHONEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 712 F. 2d 956.

No. 83–6195. DOBBERT *v.* STRICKLAND ET AL. C. A. 11th Cir.;

No. 83–6326. SIVAK *v.* IDAHO. Sup. Ct. Idaho;

No. 83–6405. ROUTLY *v.* FLORIDA. Sup. Ct. Fla.;

No. 83–6611. GIBSON *v.* IDAHO. Sup. Ct. Idaho; and

No. 83–6653. PARADIS *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: No. 83–6195, 718 F. 2d 1518; No. 83–6326, 105 Idaho 900, 674 P. 2d 396; No. 83–6405, 440 So. 2d 1257; No. 83–6611, 106 Idaho 54, 675 P. 2d 33; No. 83–6653, 106 Idaho 117, 676 P. 2d 31.

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.

No. 83–7041 (A–1068). WOOLLS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application and the petition. JUSTICE REHNQUIST took no part in the consideration or decision of this application and petition. Reported below: 665 S. W. 2d 455.

JULY 10, 1984

Dismissal Under Rule 53

No. 83–1923. LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT *v.* LULING INDUSTRIAL PARK, INC., ET AL. Ct. App. La., 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 443 So. 2d 672.

JULY 11, 1984

Miscellaneous Order

No. A–22. STANLEY *v.* KEMP, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE POWELL,

and by him referred to the Court, denied. JUSTICE STEVENS would grant the application.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner challenges his conviction and death sentence on six colorable grounds. His stay application presenting those assignments of error did not arrive in this Court until 10:25 p. m. on July 11, 1984, less than two hours before his scheduled execution. At a minimum, I would grant a stay of sufficient duration to make possible a meaningful evaluation of petitioner's claims. In my view, the importance and irrevocability of our decision require at least that we take the time necessary to ensure that the proceedings below were as error free as humanly possible.

I dissent.

JULY 12, 1984

Miscellaneous Orders

No. A–24. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* SMITH. Application to vacate the order of the United States Court of Appeals for the Eleventh Circuit entered July 12, 1984, granting a stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. A–27. WASHINGTON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied.

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 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting), we would grant petitioner's application for a stay of his execution.

JULY 18, 1984

Dismissal Under Rule 53

No. 83–1897. IN RE FERNANDEZ-TOLEDO ET AL. Petition for writ of mandamus dismissed under this Court's Rule 53.

JULY 30, 1984

Dismissal Under Rule 53

No. 83–1248. MOBIL OIL CORP. ET AL. *v.* BATCHELDER ET AL. Sup. Ct. Kan. Certiorari dismissed as to petitioner Atlantic Richfield Co. under this Court's Rule 53. Reported below: 233 Kan. 846, 667 P. 2d 337.

JULY 31, 1984

Dismissal Under Rule 53

No. 83–1835. WALKER *v.* LOCKHART, SUPERINTENDENT, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 726 F. 2d 1238.

AUGUST 2, 1984

Dismissal Under Rule 53

No. 83–1928. STARK ET AL. *v.* ATWOOD GROUP ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 725 F. 2d 255.

Miscellaneous Orders

No. — – ——. CENTRAL JERSEY INDUSTRIES, INC., ET AL. *v.* UNITED STATES RAILWAY ASSN. ET AL. Statement of appellants as to dismissal of the appeal was received July 26, 1984, and presented to the Court for its consideration. The appeal from the Special Court, Regional Rail Reorganization Act of 1973, to review the final judgment entered July 23, 1984, shall not be dismissed at this time under § 303(d) of the Regional Rail Reorganization Act of 1973. The time to docket the appeal is extended to and including September 21, 1984. The application for leave to file a statement as to jurisdiction in excess of the page limitations is granted provided the statement as to jurisdiction does not exceed 40 pages. JUSTICE BRENNAN took no part in the consideration or decision of this order.

No. A–1025 (84–19). MCDONALD ET AL. *v.* BURROWS, SHERIFF OF WICHITA COUNTY, TEXAS, ET AL. C. A. 5th Cir. Application for recall and stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–420. IN RE DISBARMENT OF BROWNLOW. Disbarment entered. [For earlier order herein, see 466 U. S. 948.]

No. D–429. IN RE DISBARMENT OF COOPER. Disbarment entered. [For earlier order herein, see 466 U. S. 969.]

No. D–440. IN RE DISBARMENT OF WORK. It is ordered that Daniel Michael Work, Jr., of Oklahoma City, Okla., 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–441. IN RE DISBARMENT OF MUSHKIN. It is ordered that Morrow D. Mushkin, of Brooklyn, N. Y., 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–442. IN RE DISBARMENT OF SWEENEY. It is ordered that John J. Sweeney, Jr., of New York, N. Y., 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–443. IN RE DISBARMENT OF DIZAK. It is ordered that Robert Earl Dizak, of Brooklyn, N. Y., 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–444. IN RE DISBARMENT OF SHERR. It is ordered that William C. Sherr, of New York, N. Y., 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–445. IN RE DISBARMENT OF NICHOLAS. It is ordered that John G. Nicholas, of Flushing, N. Y., 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–447. IN RE DISBARMENT OF THORNELL. It is ordered that Michael Thornell, 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.

Rehearing Denied

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL., 467 U. S. 310;

No. 82–432. LOCAL NO. 82, FURNITURE & PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN & PACKERS, ET AL. *v.* CROWLEY ET AL., 467 U. S. 526;

No. 82–1643. INTERSTATE COMMERCE COMMISSION ET AL. *v.* AMERICAN TRUCKING ASSNS., INC., ET AL., 467 U. S. 354;

No. 83–904. OHIO *v.* JOHNSON, 467 U. S. 493;

No. 83–1067. MADDOX *v.* UNITED STATES, 467 U. S. 1214;

No. 83–1261. LYDDAN *v.* UNITED STATES, 467 U. S. 1214;

No. 83–1578. MERRITT *v.* GEORGIA, 467 U. S. 1241;

No. 83–1588. CRAMER *v.* STATE BAR OF MICHIGAN ET AL., 466 U. S. 974;

No. 83–1614. GOTTFRIED ET AL. *v.* UNITED STATES ET AL., 467 U. S. 1252;

No. 83–1731. COHRAN *v.* STATE BAR OF GEORGIA, 467 U. S. 1223;

No. 83–1769. BURCHE *v.* WALTERS ET AL., 467 U. S. 1242;

No. 83–1806. MCANLIS *v.* UNITED STATES ET AL., 467 U. S. 1227;

No. 83–1810. MILLER *v.* PORT OF ILWACO ET AL., 467 U. S. 1243;

No. 83–5088. GILBERT *v.* SOUTH CAROLINA, 467 U. S. 1220;

No. 83–5092. GLEATON *v.* AIKEN, WARDEN, ET AL., 467 U. S. 1220;

No. 83–5148. HIGH *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, 467 U. S. 1220;

No. 83–6090. BERRYHILL *v.* FRANCIS, WARDEN, 467 U. S. 1220;

No. 83–6614. TILLIS *v.* COOKE ET AL., 467 U. S. 1244;

No. 83–6626. COLLINS *v.* WESTERN ELECTRIC CO., INC., 467 U. S. 1254; and

No. 83–6627. ALERS *v.* PUERTO RICO ET AL., 467 U. S. 1230. Petitions for rehearing denied.

No. 83–5716. CORN *v.* ZANT, WARDEN, 467 U. S. 1220. Petition for rehearing denied. JUSTICE POWELL would defer action

on the petition pending decision by the Court in No. 83–1590, *Francis* v. *Franklin* [certiorari granted, 467 U. S. 1225].

AUGUST 9, 1984

Miscellaneous Orders

No. 82–2157. CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND ET AL. *v.* CENTRAL TRANSPORT, INC., ET AL. C. A. 6th Cir. [Certiorari granted, 467 U. S. 1250.] Motion of petitioners to dispense with printing the joint appendix denied.

No. 83–297. ARMCO INC. *v.* HARDESTY, TAX COMMISSIONER OF WEST VIRGINIA, 467 U. S. 638. Appellant is requested to file a response to the petition for rehearing within 30 days.

No. 83–997. TRANS WORLD AIRLINES, INC. *v.* THURSTON ET AL. C. A. 2d Cir. [Certiorari granted, 465 U. S. 1065]; and

No. 83–1325. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* THURSTON ET AL. C. A. 2d Cir. [Certiorari granted, 466 U. S. 926.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 83–1013. CHEMICAL MANUFACTURERS ASSN. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 83–1373. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 466 U. S. 957.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 83–1045. UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* PROVENZANO. C. A. 3d Cir. [Certiorari granted, 466 U. S. 926]; and

No. 83–5878. SHAPIRO ET AL. *v.* DRUG ENFORCEMENT ADMINISTRATION. C. A. 7th Cir. [Certiorari granted, 466 U. S. 926.] Motion of respondent in No. 83–1045 and petitioners in No. 83–5878 for divided argument granted.

No. 83–1065. COUNTY OF ONEIDA, NEW YORK, ET AL. *v.* ONEIDA INDIAN NATION OF NEW YORK STATE ET AL.; and

No. 83–1240. NEW YORK *v.* ONEIDA INDIAN NATION OF NEW YORK STATE ET AL. C. A. 2d Cir. [Certiorari granted, 465

U. S. 1099.] Motion of petitioners for divided argument and for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument granted, and 15 additional minutes allotted for that purpose.

No. 83–1084. VISTA RESOURCES, INC., ET AL. *v.* SEAGRAVE CORP. C. A. 2d Cir. [Certiorari granted, 466 U. S. 970.] Motions of Advance Ross Corp. and Ivan K. Landreth et al. for leave to file briefs as *amici curiae* granted.

Dismissal Under Rule 53

No. 83–1084. VISTA RESOURCES, INC., ET AL. *v.* SEAGRAVE CORP. C. A. 2d Cir. [Certiorari granted, 466 U. S. 970.] Writ of certiorari dismissed under this Court's Rule 53.

AUGUST 16, 1984

Miscellaneous Orders

No. 94, Orig. SOUTH CAROLINA *v.* REGAN, SECRETARY OF THE TREASURY. Motion of National Governors' Association for leave to intervene as a party petitioner referred to the Special Master. [For earlier order herein, see, *e. g.*, 466 U. S. 948.]

No. A–37 (84–138). SOUTH CAROLINA *v.* UNITED STATES ET AL. D. C. D. C. Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

Rehearing Denied

No. 82–1350. UNITED STATES *v.* UNITED SCOTTISH INSURANCE CO. ET AL., 467 U. S. 797;

No. 83–490. DAVIS ET AL. *v.* SCHERER, *ante*, p. 183;

No. 83–747. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *v.* JOHNSON ET AL., 467 U. S. 925;

No. 83–916. UNITED STATES *v.* MORTON, 467 U. S. 822;

No. 83–6260. TRAVAGLIA *v.* PENNSYLVANIA, 467 U. S. 1256;

No. 83–6277. HANDY *v.* PECK, 467 U. S. 1253;

No. 83–6410. PATTERSON *v.* HEFFRON ET AL., 467 U. S. 1259;

No. 83–6567. ARNOLD *v.* SOUTH CAROLINA, 467 U. S. 1265;

No. 83–6575. PLATH *v.* SOUTH CAROLINA, 467 U. S. 1265; and

No. 83–6591. PERSHE *v.* IRIZARRY ET AL., 467 U. S. 1237. Petitions for rehearing denied.

No. 83–6610. BARFIELD *v.* HARRIS, SUPERINTENDENT, NORTH CAROLINA CORRECTIONAL CENTER FOR WOMEN, ET AL., 467 U. S. 1210; and

No. 83–6649. SLATER *v.* UNITED STATES, 467 U. S. 1254. Petitions for rehearing denied.

No. 82–1005. CHEVRON U. S. A. INC. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.;

No. 82–1247. AMERICAN IRON & STEEL INSTITUTE ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 82–1591. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., 467 U. S. 837. Petition for rehearing denied. JUSTICE MARSHALL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 83–6395. WARD *v.* GENERAL MOTORS CORP., 466 U. S. 961; and

No. 83–6396. WARD *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 466 U. S. 953. Motions for leave to file petitions for rehearing denied.

AUGUST 23, 1984

Miscellaneous Orders

No. A–1038 (83–6864). TAFOYA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Motion of New York and Rhode Island for divided argument granted. [For earlier order herein, see, *e. g.*, *ante*, p. 1213.]

No. 82–1913. GARCIA *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL.; and

No. 82–1951. DONOVAN, SECRETARY OF LABOR *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL. D. C. W. D. Tex. [Probable jurisdiction noted, 464 U. S. 812.] Motion of the Solicitor General for divided argument granted.

No. 82–1922. SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL. *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 467 U. S. 1240.] Motions of American Movers

Conference et al. and Edison Electric Institute for leave to file briefs as *amici curiae* granted.

No. 83–812. WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL.; and

No. 83–929. SMITH ET AL. *v.* JAFFREE ET AL. C. A. 11th Cir. [Probable jurisdiction noted, 466 U. S. 924.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–990. SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS ET AL. *v.* BALL ET AL. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1064.] Motion of respondents to permit Nancy L. Dilley to present oral argument *pro hac vice* denied.

No. 83–1437. MAREK ET AL. *v.* CHESNY, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF CHESNY. C. A. 7th Cir. [Certiorari granted, 466 U. S. 949.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–1476. UNITED STATES *v.* DANN ET AL. C. A. 9th Cir. [Certiorari granted, 467 U. S. 1214.] Motion of American Land Title Association for leave to file a brief as *amicus curiae* granted.

No. 83–1625. UNITED STATES *v.* JOHNS ET AL. C. A. 9th Cir. [Certiorari granted, 467 U. S. 1250.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

AUGUST 27, 1984

Dismissal Under Rule 53

No. 84–37. CESSNA AIRCRAFT CO. *v.* BLEVINS. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 728 F. 2d 1576.

AUGUST 29, 1984

Dismissal Under Rule 53

No. 84–8. HAZELTINE CORP. *v.* RCA CORP. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 730 F. 2d 1440.

AUGUST 30, 1984

Dismissal Under Rule 53

No. 83–2103. IN RE UNITED STATES. Petition for writ of mandamus dismissed under this Court's Rule 53.

SEPTEMBER 4, 1984

Miscellaneous Order

No. A–139. KNIGHTON *v.* MAGGIO, WARDEN. C. A. 5th Cir. Application for certificate of probable cause and stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In this application—presented to us three days after the Fifth Circuit denied an appeal from a first federal habeas petition—Knighton has applied for a stay of his execution scheduled for September 5, 1984. The stay will enable Knighton to file a full-fledged petition for certiorari. Even given the time pressures under which it was prepared, the application raises two substantial constitutional questions.

Knighton argues that his jury—which was death-qualified in accordance with *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968)—was improperly constituted because a *Witherspoon*-qualified jury is as a matter of empirical fact more inclined to convict at the guilt phase of the trial than is a jury composed of a fair cross section of the community. If Knighton is correct, he will have been convicted of a capital offense by a jury that would fail to meet our standards for neutrality in a much less serious offense.

At least one District Court has accepted a claim like that made by Knighton. *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (ED Ark. 1983), appeal pending, No. 83–2113 (CA8). One other District Court accepted a similar claim, see *Keeten* v. *Garrison*, 578 F. Supp. 1164 (WDNC 1984), but was recently reversed by the Fourth Circuit, see *Keeten* v. *Garrison*, 742 F. 2d 129 (1984). Yet the District Court here did not even grant Knighton an evidentiary hearing on this point. And the Court of Appeals inexplicably affirmed the denial of Knighton's habeas petition without rejecting his argument and without deciding it. The panel held

that the argument "must be directed to other fora, legislative and judicial." *Knighton* v. *Maggio*, 740 F. 2d 1344, 1351 (1984). I do not know why the panel felt unqualified to consider the issue, but Knighton—like any litigant—deserves the opportunity to be put to his proof before some competent forum. By its decision today, the Court has in effect sent him to his death without such an opportunity.

Knighton's claim of ineffective assistance of counsel also seems to me compelling. The murder with which Knighton was charged was a murder of a white proprietor by a black man in the course of a robbery. He was arrested in April and by June he was sentenced to death. Regardless whether this 2-month period could have provided sufficient preparation time even for dedicated attorneys who could singlemindedly devote themselves to the complexities of a capital case, Knighton's appointed attorney seems to have failed to take advantage of even the small amount of time that was available. He spent a shockingly small period of time—six hours in all—interviewing his client. And he seems to have spent no time at all investigating Knighton's background and character in order to put on a defense at the sentencing phase.

If the attorney had been preparing for a trial of a minor felony or some small-scale racket, this kind of preparation may have been enough, at least to meet constitutional requirements. But with his client's life at stake, this minimal effort is insufficient to meet the Constitution's demands that a capital defendant have reasonably effective representation. The failure of representation is particularly glaring in a case like this, where the defendant's previous criminal record was already before the jury, no evidence of mitigating factors seems to have been introduced, and the aggravating circumstances were exceptionally weak. Given this lack of aggravating circumstances—the only clearly valid one being that Knighton committed the murder in the course of a robbery, see *State* v. *Knighton*, 436 So. 2d 1141, 1159 (La. 1983)—Knighton could certainly make out a fair case of prejudice as well.

I continue to adhere to my view 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 (1976) (BRENNAN, J., dissenting), and would therefore grant the application in this case. But even if I believed otherwise, I would stay the execution in this case—where the entire federal habeas proceedings have taken a little over three months,

only slightly more time than a noncapital defendant is accorded just to *prepare* a petition for certiorari—so that Knighton has the opportunity to prepare a petition for certiorari and this Court has an orderly opportunity to give it fair consideration.

SEPTEMBER 7, 1984

Certiorari Denied

No. 84–5378 (A–157). DOBBERT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution. Reported below: 742 F. 2d 1274.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The State of Florida intends to electrocute the applicant Ernest John Dobbert, Jr. in several hours. Dobbert seeks a stay of his execution pending the orderly disposition of a petition for a writ of certiorari. He raises substantial issues concerning the constitutionality of his death sentence and the proper measure of federal deference to state-court factfinding under 28 U. S. C. § 2254(d). I would grant Dobbert's application and stay his execution.

I

Dobbert was convicted in 1974 of the first-degree murder of his 9-year-old daughter Kelly. Although the jury recommended a life sentence by a vote of 10–2, the presiding judge, R. Hudson Olliff, overrode the recommendation and imposed the death sentence.

Dobbert's 13-year-old son, John III, testified at trial that he saw Dobbert kick Kelly in the stomach several times on the night before her death and that, on the subsequent evening, he saw Dobbert choke the girl until she stopped breathing. John III was "the State's key witness" at trial. *Dobbert* v. *State*, 414 So. 2d 518, 519 (Fla. 1982). There was abundant evidence that Dobbert had committed unspeakably brutal acts toward his children, but John III's testimony was the sole evidence that Dobbert had actually and deliberately strangled Kelly to death. "While the evidence presented without his testimony was adequate to convict of second-degree murder, young Dobbert's testimony supplied the

sole basis for finding premeditation. There is no doubt that Dobbert inflicted injuries that caused the death of his daughter, but only through the trial testimony of young Dobbert is there evidence of his intent to cause that death." *Dobbert* v. *State*, 456 So. 2d 424, 431 (1984) (McDonald, J., dissenting in part).

In 1982, eight years after his father had been convicted and sentenced to death, John III recanted his trial testimony. His affidavit, set forth in full as an appendix to this opinion, is direct and to the point: "I did not testify truthfully about the cause of my sister Kelly's death at the trial. . . . My father did not kill Kelly." John III stated that, in fact, the "kicking incident" had occurred two weeks before Kelly's death. With respect to the fatal night, John III now states that he remembers Kelly "sitting in bed eating some soup. She started vomiting, and then choking on her own vomit and food. My father tried to give her mouth to mouth resuscitation, but it didn't work. Kelly was not killed by my father; she died accidentally, choking on food or vomit."

Why had John III earlier testified that Dobbert choked Kelly to death? First, at the time of the trial "I was still deathly afraid of my father after all I'd been through and seen, and wanted to be sure he'd be locked up where I'd be safe from him." Second, in the time leading up to and following the trial, John III was living at a children's home in Wisconsin where he was undergoing hypnosis and kept "heavily medicated" on Thorazine. Finally, "[a]lthough no one ever said it directly," John III "knew" that the staff at the children's home "wanted me to testify that my father killed my sister. I looked up to these people and wanted desperately to please them—they were good to me and concerned about me in a way I hadn't known for years."

Dobbert has twice argued in state court that his capital conviction and sentence are unconstitutional in light of John III's perjured testimony. The first time, in connection with his request to file a petition for a writ of error *coram nobis*, the Supreme Court of Florida held that John III's recantation is not "new evidence" and therefore does not deserve judicial attention. *Dobbert* v. *State*, 414 So. 2d, at 520. The court argued that, because John III had given a statement to the police after Kelly's death which contradicted the testimony he later gave at trial, defense counsel could have cross-examined the boy at trial on the inconsistencies between the earlier statement and his testimony. *Ibid.*

The second time, in connection with a motion to vacate the conviction, Circuit Judge R. Hudson Olliff held that, even in the face of the recantation, there is no "evidence or proof" to support Dobbert's claim of perjured testimony. *State* v. *Dobbert*, No. 73–5068, p. 81 (Fla. 4th Cir. Ct., May 1, 1984), aff'd, 456 So. 2d 424 (1984). Judge Olliff, who had presided over the original trial, reviewed John III's statements to the police, deposition testimony, trial testimony, and subsequent deposition testimony in a civil proceeding. Although John III's initial statements to the police contradicted his subsequent trial testimony, Judge Olliff found that the inconsistencies were easily explained away in light of the boy's terror of the father. Judge Olliff then reviewed John III's other prerecantation statements and held that they "are all consistent and each corroborates the other." Thus, he concluded, even in the face of the recantation "it is obvious that the murder conviction was not based solely—or in part—upon perjured testimony. Nor is there any evidence or proof to support [Dobbert's] allegation of perjury." *State* v. *Dobbert*, No. 73–5068, at 81. Judge Olliff made this conclusion without any discussion or analysis of John III's recantation. The Supreme Court of Florida affirmed, holding that Dobbert's claim of perjury is "without merit" because "there is no evidence or proof to support present counsel's allegation of perjury." 456 So. 2d, at 429.

Dobbert then filed a successive petition for federal habeas relief in the United States District Court for the Middle District of Florida. Although there is no question that Dobbert was not abusing the writ on this issue—John III's recantation had come *after* Dobbert's first federal petition had been denied—the District Court denied the petition because Judge Olliff had found that "even in light of the 1982 recantation John's trial testimony was not perjured. Judge Olliff found, instead, that there was 'no evidence or proof to support [petitioner's] allegation of perjury.'" 593 F. Supp. 1418, 1427 (1984). This finding, the District Court concluded, commands deference under 28 U. S. C. § 2254(d). See *Sumner* v. *Mata*, 449 U. S. 539 (1981). The Eleventh Circuit has now affirmed 2–1. 742 F. 2d 1274 (1984) (Clark, J., dissenting).

II

Recantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of convictions, is very

often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction. For these reasons, a witness' recantation of trial testimony typically will justify a new trial only where the reviewing judge after analyzing the recantation is satisfied that it is true and that it will "render probable a different verdict." See, *e. g.*, *Brown* v. *State*, 381 So. 2d 690, 692–693 (Fla. 1980).

Dobbert argues that, notwithstanding the strong presumption against recanting testimony, the circumstances of John III's recantation in this capital case raise important constitutional issues that demand sober and measured reflection. First, although federal courts traditionally have held that a conviction supported by perjured testimony is not unconstitutional unless the prosecutor or judge knew or had reason to know that the testimony was perjured, Dobbert argues that this approach is no longer valid after *Jackson* v. *Virginia*, 443 U. S. 307 (1979). Dobbert correctly notes a split among the Circuits concerning the authority of federal courts to grant habeas relief when "newly available evidence conclusively shows that a vital mistake ha[s] been made." *Grace* v. *Butterworth*, 586 F. 2d 878, 880 (CA1 1978). Compare *Grace* (such claims are cognizable); *United States ex rel. Sostre* v. *Festa*, 513 F. 2d 1313 (CA2) (same), cert. denied, 423 U. S. 841 (1975), with *Drake* v. *Francis*, 727 F. 2d 990 (CA11 1984) (such claims are not cognizable because habeas is not concerned with questions of guilt or innocence), rehearing en banc granted, *id.*, at 1003.

Second, Dobbert argues that the federal courts should give attention to formulating proper standards for evaluating the materiality and credibility of recantations. He notes that the need for such consideration is especially great where, as here, the recanted testimony was the *sole* evidence supporting a conviction of first-degree murder.

Dobbert argues finally that, whatever the usual procedural rules regarding the consideration of a recantation, those rules must bend in the face of the Eighth Amendment. He notes that this Court has repeatedly invalidated procedural rules that "'diminish the reliability of the guilt determination'" in capital cases, Application for Stay of Execution 16, quoting *Beck* v. *Alabama*, 447 U. S. 625, 638 (1980), and argues that Eighth Amendment scrutiny should be applied to rules barring postconviction reconsideration of guilt as well as to procedural rules employed at trial.

However we ultimately might resolve these issues after research, argument, and reflection, they certainly are not frivolous. Yet the federal courts are about to let Dobbert go to the electric chair out of misplaced deference to an unexplained, and palpably inexplicable, state-court "factual" finding that there is, in fact, no "evidence or proof" to support his claim of perjury.

A

If Judge Olliff's "finding" that there is no "evidence" of perjury found fair support in the record, the law would mandate that the federal habeas court defer to that finding. 28 U. S. C. § 2254(d); see *Sumner* v. *Mata*, *supra*. But no fair-minded person could conclude on the basis of the record before us that the "finding" is plausible. It is absurd on its face. Dobbert has offered stark "evidence" of perjury—the recantation affidavit of John III. Rather than analyzing *that* evidence for its strengths and weaknesses, Judge Olliff reviewed John III's *previous* statements—statements which John III now recants—and on finding that *those* statements "are all consistent and each corroborates the other," proceeded to conclude that notwithstanding the recantation "it is obvious that the murder conviction was not based solely—or in part—upon perjured testimony. Nor is there any evidence or proof to support [the] allegation of perjury."

This "factual determination" should not stand because it most certainly is *not* "fairly supported by the record." 28 U. S. C. § 2254(d)(8). Some may choose to argue that Judge Olliff's "finding" represents an implicit rejection of the materiality and credibility of John III's recantation. Perhaps it does. Cf. *LaVallee* v. *Delle Rose*, 410 U. S. 690, 697 (1973) (in the "ordinary case," federal courts may assume that a state court which did not articulate its reasoning fairly considered the merits of the factual dispute). But Judge Olliff's asserted reasoning—that earlier statements were consistent with each other, thereby demonstrating the absolute lack of *any* "proof or evidence" of perjury—is not entitled to deference where the recantation asserts that those statements were untrue. There may well be numerous reasons why John III's recantation should not be entitled to controlling weight, but there is nothing here to suggest that Judge Olliff considered those possible reasons, let alone relied upon them in reaching his conclusion. In the face of a specific recantation of critical testimony, a court must evaluate the recantation itself and explain what it is

about that recantation that warrants a conclusion that it is not credible evidence.

That Judge Olliff's rejection of the recantation was not based on any evaluation of the recantation itself is demonstrated, I believe, by the District Court's opinion. The court made an urgent effort to demonstrate that Judge Olliff's finding was related to a consideration and analysis of the recantation itself, noting, for example, that "Judge Olliff reviewed the facts depicted in John's [earlier testimony] and determined that they were much more detailed than . . . the 1982 recantation. (Olliff's Order at 63, 67)." 593 F. Supp., at 1427. Nothing in the cited pages supports the District Court's characterization of Judge Olliff's analysis; the recantation is not even mentioned in these pages. In fact, nowhere in the order does Judge Olliff compare the earlier testimony with the recantation.

The proper analysis under § 2254(d), I submit, is illustrated by a case cited with approval in *Sumner* v. *Mata* itself, see 449 U. S., at 547–548. In *Taylor* v. *Lombard*, 606 F. 2d 371 (CA2 1979), cert. denied, 445 U. S. 946 (1980), defense counsel came forward after the state conviction with an affidavit charging that key testimony had been perjured and that the prosecution nevertheless had knowingly used it. In a post-trial proceeding the state court concluded that there was "no showing" of perjured testimony. 606 F. 2d, at 374. The Second Circuit reviewed the record and concluded that the state court's finding that "there was no factual basis for the claim of perjury is not fairly supported by the record, and therefore is not entitled to deference." *Id.*, at 375. The Second Circuit's requirement of fair support in the record was not, of course, an exercise of judicial fiat—it was required by Congress in 28 U. S. C. § 2254(d)(8). I cannot comprehend how the federal courts in this capital case can in good conscience avoid that statutory command.

I emphasize again that John III's recantation ultimately may not deserve controlling weight. But such a conclusion cannot rest upon a finding that there is no "evidence or proof" of perjury at all, especially when that clearly erroneous finding is coupled with a complete failure to analyze the recanting evidence *itself*.*

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*It might be argued that the State Supreme Court's earlier determination that John III's recantation is not "new evidence," *Dobbert* v. *State*, 414 So. 2d 518, 520 (Fla. 1982), now serves as a procedural bar to federal review. That

B

The strong presumption against recantation testimony reflects an uneasy balance between, on the one hand, society's interest in resolving factual disputes in one proceeding and in according finality to those resolutions, and, on the other, the interests of a convicted individual and society at large in ensuring that only the guilty are punished. However the balance is ultimately struck in the ordinary criminal case, the Eighth Amendment requires that courts—state and federal—strike a special balance in the capital context. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976). See also *Beck* v. *Alabama*, 447 U. S., at 638 (normal procedural rules must give way in the capital case where they "diminish the reliability of the sentencing determination"). For this reason, the Court historically has taken special care to minimize the risk that death sentences are "imposed out of whim, passion, prejudice, or mis-

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finding should not preclude the federal courts from considering the merits of Dobbert's claim. First, the state courts themselves have failed to abide by the finding. Judge Olliff professed to consider the recantation itself and concluded that there was no "evidence or proof" of perjury, and the Supreme Court of Florida affirmed on those grounds.

Second, as Judge Olliff himself found, there were compelling reasons why Dobbert could not effectively have used John III's initially inconsistent statements to the police at trial: The inconsistencies, such as they were, could easily have been explained away; John III might well have broken down under such questioning, thereby further inflaming the jury; and such questioning would almost certainly have led to a "parade of horribles" concerning Dobbert's abuse of his children.

Finally, I believe it manifest that John III's 1982 recantation is "new" evidence. It seems obvious that it is much more powerful for John III now to state that his father did not kill his sister than it was when the boy first suggested this in 1972. At that time, John III clearly was terrified of his father and was living in a nightmare world, both of which (as Judge Olliff found) probably would have led a jury to discount the inconsistencies as part of the boy's effort to protect himself. Now that John III is a grown man and is willing to recant his trial testimony—when he has no reason to fear his father and has, we can only hope, recovered from the trauma to which he was subjected—his statements carry much more powerful force. Thus the recantation is not merely duplicative of the earlier statement.

take." *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (O'CONNOR, J., concurring).

In the face of a sworn recantation from the only witness who provided testimony supporting Dobbert's conviction of first-degree murder, are we confident that there has been a reliable factual determination of his guilt, sufficient to warrant public confidence in the outcome as he proceeds to the electric chair? I believe there are compelling reasons to stay Dobbert's execution while we give this question further thought. First, no federal court addressing Dobbert's claim has yet even attempted to analyze the appropriate ground rules for considering the materiality and credibility of John III's recantation. As Dobbert has demonstrated, these are open issues that sooner or later will require our attention. Second, the sole reason for this failure has been the federal courts' mistaken invocation of 28 U. S. C. § 2254(d) in relying on Judge Olliff's "finding" that in the face of the recantation admitting perjury there is no "evidence or proof" of perjury. In the "ordinary case" it may well be appropriate to engage in all manner of tidy assumptions about what Judge Olliff "really" meant to say. Cf. *LaVallee* v. *Delle Rose*, 410 U. S. 690 (1973). But this is no ordinary case. I must conclude at this juncture that there is *no* fair support in the record for the "finding" that there is no "evidence or proof" of perjury where (a) the "finding" is absurd on its face, and (b) the "finding" has been made without *any* discussion of the merits of the recantation itself. I would submit that what really is going on in this case can be gleaned from Judge Olliff's introduction to his opinion: "This case has been pending for a longer period of time than this nation was involved in World War II and the Korean War combined." *State* v. *Dobbert*, No. 73–5068, at 2. In the face of such impatience, I believe that *any* confession by John III to perjured testimony, however strong, would in the end have made not one bit of difference.

III

I continue to adhere to my view 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 (1976) (BRENNAN, J., dissenting), and would therefore grant the application in this case. But even if I believed otherwise, I would stay the execution to permit for a fair and rational consideration of Dobbert's claims.

Only two men know whether Kelly Dobbert was strangled or whether she accidentally choked to death. One of them will die in several hours. The other will live with the consequences of his damning testimony for the rest of his life. Both now swear that the testimony was false. I would have thought that the federal courts would take the time to ensure that John III's recantation truly deserves no weight, or at the very least that it has received principled consideration in the state courts. This is not another mere example of "ordinary" deference to state-court factfinding. It is an outright abdication of our responsibility to minimize the risk that innocent people are put to death.

I dissent.

APPENDIX TO OPINION OF BRENNAN, J., DISSENTING

COUNTY OF EAU CLAIRE

STATE OF WISCONSIN

AFFIDAVIT

Ernest John Dobbert, III, being first duly sworn, deposes and says:

1. I am the son of Ernest John Dobbert, Jr., who was convicted and sentenced to death in Jacksonville, Florida in April, 1974, for the murder of my sister, Kelly Ann Dobbert. I testified as a witness against my father at his trial. I did not testify truthfully about the cause of my sister Kelly's death at the trial.

2. On Sunday, January 31, 1982, I read in the newspaper that my father was to be executed within two days. After learning of my father's execution date, I called my close personal friend and lawyer, Paul Kelly, and asked him to help me correct my untrue testimony that was responsible for my father being convicted of murdering Kelly.

3. Some of the questions asked of me at trial by Mr. Shorstein, the Assistant State Attorney, are listed below. The answers in the left column are some of the answers given at trial that were false. The true answers are listed on the right under the column designated "Correct Answer."

Question: "Let me go back to the night before New Year's Eve. Did he [your father] do anything to Kelly the night before she died?" [T.T. 2113]

Answer at trial:	Correct Answer:
"Yes."	"No."

Question: "What did he do to her?" [T.T. 2113]

Answer at trial:	Correct Answer:
"Kicked her."	"Nothing."

The answers indicating that my father kicked Kelly the night before she died were untrue. My father did kick Kelly in much the way I described, but weeks before she died.

Question: "Did he [your father] do anything to her [Kelly] the night she died?" [T.T. 2113]

Answer at trial:	Correct Answer:
"Choked her."	"No."

All the answers indicating my father choked Kelly the night she died are untrue. He did not choke her that night, nor did he kill her. Her death was accidental.

4. I am making this affidavit because there are statements I made at trial that were untrue, and need correcting. I do not make this affidavit out of any great love for my father. I still have not forgiven him for the abuse that I (and my brother and sisters) suffered at his hands for the four years before Kelly died and I ran away. I have no desire to see him free. He should be in prison for the abuse to his children.

5. I read my testimony at trial again recently. Although it is accurate in parts, there are statements that are clearly false, and parts of the story came out in a way that is very misleading about what happened before Kelly's death. The story as it came out is just untrue. The trial testimony creates this story: The night before Kelly died, my father kicked her several times in the stomach. The next night, after she ate some soup, he choked her and she stopped moving. I listened to her heart, but couldn't hear a beat. My father then tried mouth to mouth resuscitation, but it didn't work.

What happened in reality was that the kicking incident occur[r]ed long before the night Kelly died, more like two weeks before she died. The night she died, she was sitting in bed eating some soup. She started vomiting, and then choking on her own vomit and food. My father tried to give her mouth to mouth resuscitation, but it didn't work. Kelly was not killed by my father; she died accidentally, choking on food or vomit.

6. I'd like to explain a little more about why I think I testified as I did at the trial, and why I'm taking action to correct it now.

At the time of the trial I was thirteen years old. I was still deathly afraid of my father after all I'd been through and seen, and wanted to be sure he'd be locked up where I'd be safe from him. I was undergoing hypnosis in a psychologist's office in Wisconsin for about a year before the trial. (The therapy ended one month after the trial.) I was hypnotized approximately two times a week for a period of time, and then about once every week thereafter. At each session, I'd be hypnotized and then asked questions about my father and how he abused us. I was later kept heavily medicated on what I was told was Thorazine, from 1972 to 1976, and then on other medication until 1978.

Although no one ever said it directly, I knew that my social worker, Mrs. Lenz, and other people on the staff at the children's home wanted me to testify that my father killed my sister. I looked up to these people and wanted desperately to please them—they were good to me and concerned about me in a way I hadn't known for years. Mrs. Lenz, in particular, influenced me. I saw her almost every day for the period before the trial. She developed some emotional difficulties herself, and began to obsess about my father.

When I finally left the institutions in 1978 and came off the medication, I thought about what I had done in testifying that Kelly was murdered when she died accidentally. Although I knew I had done something wrong, I wasn't sure what, if anything, I wanted to do about it. After awhile, I spoke to Paul Kelly, and asked him to locate and notify my father's attorneys to see what might be done. I now want to make it known that I did not testify truthfully at my father's trial, as this affidavit shows. My father did not kill Kelly.

ERNEST JOHN DOBBERT, III

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I

The "right" of the State to a speedy execution has now clearly eclipsed the right of an individual to considered treatment of a substantial claim that he has been sentenced to death for an offense that he did not commit. Ernest John Dobbert, Jr., raised such a claim in a federal habeas corpus petition filed on August 30, 1984, and here is the entire history of the deliberate speed with which the claim was considered: On September 3, the Federal

District Court for the Middle District of Florida denied relief, 593 F. Supp. 1418 (1984), but issued a certificate of probable cause to appeal, thereby indicating that Dobbert's petition had significant merit; three days after that, on September 6, the Court of Appeals for the Eleventh Circuit in a 2–1 vote affirmed the District Court's judgment, 742 F. 2d 1274 (1984), with the dissenting judge pleading that "there has not been enough time in which justiciably *[sic]* to decide this case;" and that very same day, at 4:40 p. m., Dobbert filed a stay application with this Court. That application asked the Court to stay his execution just long enough so that Dobbert's counsel could pause to brief properly the substantial constitutional issue raised by this case. But at 10 a. m. the next day—a scant 19 hours after Dobbert asked this Court to consider his claim and a mere 8 days after the claim was first brought before any court—Dobbert is to be executed. This is swift, but is it justice?*

There is substantial reason in this case to think it is not. Dobbert was convicted under Florida law of child abuse, child torture, second-degree murder, and the first-degree murder of his 9-year-old daughter; only the last of these carries with it the possibility of a death sentence. It is impossible to know, however, whether Dobbert actually committed the offense of first-degree murder as defined by Florida law, for the jury's verdict on this count was infected by the trial judge's repeated and invalid instruction on the scope of first-degree murder. The instruction at issue told the jury that it could convict for first-degree murder if it found that the daughter was killed by premeditated design *or* that she was killed *without premeditation* but while Dobbert was committing an "abominable and detestable crime against nature." As

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*The frenzied rush to execution that characterizes this case has become a common, if Kafkaesque, feature of the Court's capital cases. See, *e. g.*, *Wainwright* v. *Adams*, 466 U. S. 964, 965 (1984) (MARSHALL, J., dissenting) (noting the Court's "indecent desire to rush to judgment in capital cases"); *Woodard* v. *Hutchins*, 464 U. S. 377, 383 (1984) (BRENNAN, J., dissenting) (criticizing "rush to judgment" in Court's decision to vacate stay of execution); *Autry* v. *Estelle*, 464 U. S. 1, 5 (1983) (STEVENS, J., dissenting) (criticizing decision to deny stay of execution); see also *Autry* v. *McKaskle*, 465 U. S. 1085 (1984) (MARSHALL, J., dissenting); *Woodard* v. *Hutchins*, 464 U. S., at 383 (WHITE and STEVENS, JJ., dissenting); *id.* at 383–384 (MARSHALL, J., dissenting); *Barefoot* v. *Estelle*, 463 U. S. 880, 906 (1983) (MARSHALL, J., dissenting).

a matter of state constitutional law, the Florida Supreme Court, in a holding that preceded the crimes for which Dobbert was convicted, had held that the statutory term "crime against nature" is too vague to sustain a conviction. *Franklin* v. *State*, 257 So. 2d 21, 22 (1971). Dobbert was therefore found guilty after a felony-murder instruction that permitted the jury to convict him of a crime that did not exist under state law at the time of his conviction.

The jury was thus granted impermissible leeway in violation of Dobbert's federal due process rights. This fundamental defect occurred when the trial judge—no fewer than six times during the instruction phase—instructed the jury with one variant or another of the following words:

> "If a person has a premeditated design to kill one person . . . he is . . . guilty of murder in the first degree. The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree *even though there is no premeditated design or intent to kill.*" Tr., as printed in Record, Exhibit 5, p. 162 (emphasis supplied).

It is vital to understand what is put at stake by this definition of first-degree murder. First, the record offers no suggestion that the death of Dobbert's daughter occurred during an arson, rape, robbery, burglary, or kidnaping—the only underlying felonies upon which Florida has predicated the crime of felony murder and the capital penalty that attaches to it. Second, the trial judge gave no narrowing definition of the "crime against nature," and even if he had, there appears again to be absolutely no evidence that Dobbert's daughter died while Dobbert was sodomizing her—presumably the core offense to which the vague statutory term applies. See *Franklin, supra.* Third, there *was* ample evidence that Dobbert beat his daughter, and there was testimony that he kicked her in the stomach the night that she died.

From these facts it is quite plausible that the jury relied on the very vagueness for which the Florida Supreme Court had already struck down the statute to conclude that, even if Dobbert had not premeditated the killing of his daughter, he nonetheless should be convicted of first-degree murder for child abuse leading to death. I do not now question whether a State *could* create such a crime,

but the indisputable fact is that Florida has not chosen to do so. Nor, as a corollary, has Florida chosen to make such an offense a capital one. Yet the jury in this case was not only permitted but invited six times to define a new capital crime to fit Dobbert's offense. This leeway, resulting from statutory vagueness, was the very defect inherent in the statutory term for which the Florida Supreme Court invalidated it.

There is simply no way to tell upon which theory—premeditation or felony murder based on a nonexistent predicate offense—the jury relied. Indeed, when the jury specifically requested to be reinstructed on the definitions of first- and second-degree murder, the trial judge compounded the error by repeating the invalid instruction: "Now, murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping." Tr., as printed in the Record, Exhibit 5, p. 184.

This is clearly error of federal constitutional magnitude. In *Stromberg* v. *California*, 283 U. S. 359 (1931), the Court announced a rule from which we have not since departed: "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Zant* v. *Stephens*, 462 U. S. 862, 881 (1983). It is also clear that *Stromberg* applies to state criminal proceedings, for *Stromberg* itself involved a state conviction. See also *Williams* v. *North Carolina*, 317 U. S. 287, 292 (1942); cf. *Zant*, *supra*, at 891–893 (WHITE, J., concurring in part and concurring in judgment) (*Stromberg* applies when jury was invited to convict on two or more grounds, one of which was not sufficient to sustain the conviction). Moreover, the State essentially concedes that *Stromberg* error was committed, for the State does not argue that there was sufficient evidence of any form of felony murder recognized by Florida law.

The real question at this stage is whether this error—which goes to the question whether Dobbert was actually found guilty of first-degree murder—casts a serious enough doubt on the integrity of the jury's verdict that the error is still reviewable at this stage of the proceedings. The instruction was not objected to at

trial, nor was the erroneous instruction raised in Dobbert's first federal habeas petition. Citing these procedural derelictions of Dobbert's counsel, the courts below—both state and federal—have refused to consider the merits of the alleged *Stromberg* violation.

There are sound arguments that the alleged violation in this case is so fundamental that neither *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), nor the abuse-of-the-writ doctrine ought to be applied to allow Dobbert's execution to take place before this Court is at least provided with focused briefing. The Court has recognized that the cause-and-prejudice standard must be applied in such a way that fundamental "miscarriage[s] of justice" will meet it, see *id.*, at 91; as JUSTICE STEVENS noted in his concurrence in *Wainwright*, "if the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused." *Id.*, at 95. Similarly, *Sanders* v. *United States*, 373 U. S. 1, 15 (1963), makes clear that a federal court may consider even claims raised and decided in a previous habeas petition "if the ends of justice" would thereby be served; surely the same standard or a lesser one should apply to a successive petition that raises a *new* claim, at least when that claim casts significant doubt on a defendant's guilt. See *Sanders*, *supra*, at 18–19 (A "federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits" of certain claims raised for the first time on a successive habeas petition). Lower federal courts in settings similar to the one here have applied these principles to review fundamental trial errors to which timely objections have not been made. See, *e. g.*, *Adams* v. *Murphy*, 653 F. 2d 224, 225 (CA5 1981) (reversing conviction based on nonexistent state crime despite absence of trial objection to instruction). When, as in this case, the question is the fundamental one of guilt or innocence on the indicted charge, and the case is a capital case, the argument is strong that the "ends of justice" and fundamental "miscarriage of justice" standards have been met. I would allow Dobbert to make that argument in a certiorari petition.

As the United States District Court for the Middle District of Florida acknowledged, this is a "difficult case" with regard to the question of whether the abuse-of-the-writ doctrine should apply. 593 F. Supp., at 1440. We need not resolve that "difficult" issue today, however, to decide the only issue before the Court on this stay application: whether that claim is "difficult enough" and potentially worthy enough of the Court's attention that a stay of

the execution ought to be granted until certiorari papers can be filed and the Court can make a considered evaluation of the argument. Put another way, the question is whether there is a significant claim that the State cannot execute Dobbert on the basis of a conviction that may be constitutionally invalid—with respect to an issue affecting guilt or innnocence—merely because Dobbert's attorneys have not made timely objections on the point.

In sum, there is no question that Dobbert abused and tortured his children, but there is a serious question as to whether the defect in the instruction allowed the jury to bypass the question of premeditation by concluding that the girl's death resulted from Dobbert's callous and reckless beating of her. That may well make Dobbert guilty of second-degree murder in Florida, but it cannot make him guilty of first-degree murder there. Nor can it subject him to the death penalty in that State. Dobbert is certainly no innocent man, but he may well be a guilty one to whom Florida's legislators have not chosen to apply the death penalty.

II

Because I continue to adhere to my view 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, 231 (1976), I would in any event grant the stay application and vacate the death sentence. But I am deeply troubled by the undue dispatch with which a majority of this Court is willing to send this stay applicant, as well as a host of others, see n., *supra*, to their death. In the case of an applicant like Dobbert, who raised a substantial claim going to the question of whether he committed a capital offense, the majority's haste is particularly disquieting.

SEPTEMBER 9, 1984

Certiorari Denied

No. 84–5383 (A–162). BALDWIN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied.

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 the application for stay of execution, grant certiorari, and vacate the death sentence in this case.

SEPTEMBER 17, 1984

Dismissal Under Rule 53

No. 83–2026. SUMMA CORP., DBA FRONTIER HOTEL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 734 F. 2d 21.

SEPTEMBER 18, 1984

Miscellaneous Orders

No. A–1071. DUKES *v.* MARYLAND. C. A. 4th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D–397. IN RE DISBARMENT OF BERGMAN. Disbarment entered. [For earlier order herein, see 465 U. S. 1002.]

No. D–415. IN RE DISBARMENT OF LUOMA. Disbarment entered. [For earlier order herein, see 466 U. S. 902.]

No. D–421. IN RE DISBARMENT OF TAYLOR. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D–425. IN RE DISBARMENT OF DENEND. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D–426. IN RE DISBARMENT OF PECKRON. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D–431. IN RE DISBARMENT OF WATSON. Disbarment entered. [For earlier order herein, see 466 U. S. 969.]

No. D–433. IN RE DISBARMENT OF GRAMZA. Disbarment entered. [For earlier order herein, see 467 U. S. 1203.]

No. D–434. IN RE DISBARMENT OF SCHETTINO. Disbarment entered. [For earlier order herein, see 467 U. S. 1224.]

No. D–436. IN RE DISBARMENT OF HOWARD. Disbarment entered. [For earlier order herein, see 467 U. S. 1237.]

No. D–439. IN RE DISBARMENT OF GERZOF. Disbarment entered. [For earlier order herein, see 467 U. S. 1238.]

No. D–446. IN RE DISBARMENT OF WINNER. It is ordered that David Lee Winner, of Wooster, 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–448. IN RE DISBARMENT OF HOLLOWAY. It is ordered that Willis Walter Holloway, Jr., of Lexington, Ky., 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–451. IN RE DISBARMENT OF JONES. It is ordered that Rafford Eugene Jones, of Raleigh, N. C., 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. 82–1913. GARCIA *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL.; and

No. 82–1951. DONOVAN, SECRETARY OF LABOR *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL. D. C. W. D. Tex. [Probable jurisdiction noted, 464 U. S. 812.] Motion of National League of Cities et al. for leave to participate in oral argument as *amici curiae* and for additional time for oral argument denied.

No. 82–1922. SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL. *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 467 U. S. 1240.] Motion of petitioners for divided argument and for additional time for oral argument denied.

No. 82–2157. CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND ET AL. *v.* CENTRAL TRANSPORT, INC., ET AL. C. A. 6th Cir. [Certiorari granted, 467 U. S. 1250.] Motions of Bricklayers Fringe Benefit Funds-Metropolitan Area et al., Arthur Young & Co., and National Coordinating Committee for Multiemployer Plans for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–18. DUN & BRADSTREET, INC. *v.* GREENMOSS BUILDERS, INC. Sup. Ct. Vt. [Certiorari granted, 464 U. S. 959.]

Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 83–469. UNITED STATES *v.* YOUNG. C. A. 10th Cir. [Certiorari granted, 465 U. S. 1021.] Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument *pro hac vice* granted.

No. 83–712. NEW JERSEY *v.* T. L. O. Sup. Ct. N. J. [Certiorari granted, 464 U. S. 991.] Motions of New Jersey School Boards Association, National Association of Secondary School Principals, and National School Boards Association for leave to file briefs as *amici curiae* granted. Motion of National School Boards Association for leave to participate in oral argument as *amicus curiae* denied.

No. 83–1015. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* HAMPTON COUNTY ELECTION COMMISSION ET AL. D. C. S. C. [Probable jurisdiction noted, 467 U. S. 1250.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 83–1035. TENNESSEE *v.* GARNER ET AL. C. A. 6th Cir. [Probable jurisdiction noted, 465 U. S. 1098]; and

No. 83–1070. MEMPHIS POLICE DEPARTMENT ET AL. *v.* GARNER ET AL. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1098.] Motion of The Police Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 83–1362. CLEVELAND BOARD OF EDUCATION *v.* LOUDERMILL ET AL.;

No. 83–1363. PARMA BOARD OF EDUCATION *v.* DONNELLY ET AL.; and

No. 83–6392. LOUDERMILL *v.* CLEVELAND BOARD OF EDUCATION ET AL. C. A. 6th Cir. [Certiorari granted, 467 U. S. 1204.] Motions of petitioners in Nos. 83–1362 and 83–1363 for divided argument denied.

No. 83–1476. UNITED STATES *v.* DANN ET AL. C. A. 9th Cir. [Certiorari granted, 467 U. S. 1214.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 83–1660. ATKINS, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* PARKER ET AL.; and

No. 83–6381. PARKER ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 1st Cir. [Certiorari granted, 467 U. S. 1250.] Motion of the Solicitor General for divided argument granted.

No. 83–1708. DEAN WITTER REYNOLDS INC. *v.* BYRD. C. A. 9th Cir. [Certiorari granted, 467 U. S. 1240.] Motion of Securities Industry Association, Inc., et al. for leave to file a brief as *amici curiae* granted.

Rehearing Denied

No. 82–6935. PAYNE *v.* VIRGINIA, *ante*, p. 1062;

No. 83–850. UNITED STATES *v.* KARO ET AL., *ante*, p. 705; and

No. 83–979. CRONN *v.* UNITED STATES, *ante*, p. 1217. Petitions for rehearing denied.

No. 81–757. ALLEN *v.* WRIGHT ET AL.; and

No. 81–970. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* WRIGHT ET AL., *ante*, p. 737. Petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 82–1771. UNITED STATES *v.* LEON ET AL., *ante*, p. 897. Petition of Sanchez and Stewart for rehearing denied.

No. 83–851. SOUTH STREET SEAPORT MUSEUM, AS OWNER OF THE BARK PEKING *v.* MCCARTHY ET AL., 465 U. S. 1078 and 466 U. S. 994. Motion for leave to file second petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 83–1321. CALIFORNIA ET AL. *v.* TENNECO OIL CO. ET AL.;

No. 83–1432. PUBLIC UTILITY COMMISSIONER OF OREGON ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.;

No. 83–1433. NORTHWEST PIPELINE CORP. ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.;

No. 83–1442. EL PASO NATURAL GAS CO. *v.* TENNECO OIL CO. ET AL.;

No. 83–1443. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* TENNECO OIL CO. ET AL.; and

No. 83–1618. FEDERAL ENERGY REGULATORY COMMISSION *v.* TENNECO OIL CO. ET AL., *ante*, p. 1219. Petition for rehearing

denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

SEPTEMBER 19, 1984

Miscellaneous Orders

No. A–205. HENRY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied.

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 the application for stay, a petition for writ of certiorari, and vacate the death sentence in this case.

No. A–206. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMS. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit on September 18, 1984, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE REHNQUIST would grant the application.