

ORDERS FROM OCTOBER 1, 1984, THROUGH
FEBRUARY 19, 1985

OCTOBER 1, 1984

Affirmed on Appeal

No. 83-1823. STRAKE *v.* SEAMON ET AL. Affirmed on appeal from D. C. E. D. Tex.

Appeals Dismissed

No. 83-1611. WALTON *v.* ALASKA BAR ASSN. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question. Reported below: 676 P. 2d 1078.

No. 83-1814. VOLKSWAGEN OF AMERICA, INC. *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (NOSSE ET AL., REAL PARTIES IN INTEREST). Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 83-1979. PERRUCCIO *v.* CONNECTICUT. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. Reported below: 192 Conn. 154, 471 A. 2d 632.

No. 83-2029. SAFE WATER FOUNDATION OF TEXAS ET AL. *v.* CITY OF HOUSTON. Appeal from Ct. App. Tex., 1st Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 661 S. W. 2d 190.

No. 83-2168. GALBREATH *v.* SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 446 So. 2d 1045.

No. 83-6510. L. C. *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of substantial federal question. Reported below: 446 So. 2d 107.

No. 84-40. TALIKKA, GUARDIAN OF THE ESTATE OF BALDAUF *v.* OHIO DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION, SECTION OF REIMBURSEMENT SERVICES, ET AL. Appeal from Ct. App. Ohio, Lake County, dismissed for want of

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substantial federal question. Reported below: 13 Ohio App. 3d 420, 469 N. E. 2d 888.

No. 84-43. *GOOD SAMARITAN HOSPITAL OF MARYLAND, INC. v. MARYLAND ET AL.* Appeal from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 299 Md. 310, 473 A. 2d 892.

No. 84-66. *WINE & SPIRITS SPECIALTY, INC. v. DANIEL, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY, ET AL.* Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 666 S. W. 2d 416.

No. 84-98. *POPE v. TEXAS.* Appeal from Ct. App. Tex., 14th Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 667 S. W. 2d 163.

No. 84-126. *PERELLA v. NEW JERSEY.* Appeal from Super. Ct. N. J., App. Div., dismissed for want of substantial federal question.

No. 84-134. *CORUZZI v. NEW JERSEY ET AL.* Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 95 N. J. 557, 472 A. 2d 546.

No. 84-137. *DAVIDSON v. ILLINOIS.* Appeal from App. Ct. Ill., 5th Dist., dismissed for want of substantial federal question.

No. 84-152. *BREWER ET AL. v. CITY OF WINSTON-SALEM, NORTH CAROLINA, ET AL.* Appeal from Ct. App. N. C. dismissed for want of substantial federal question. Reported below: 67 N. C. App. 164, 312 S. E. 2d 517.

No. 84-156. *MACON ASSOCIATION FOR RETARDED CITIZENS v. MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION.* Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 252 Ga. 484, 314 S. E. 2d 218.

No. 84-158. *ROCKY B. FISHERIES, INC., ET AL. v. NORTH BEND FABRICATION & MACHINE, INC., ET AL.* Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 66 Ore. App. 625, 676 P. 2d 319.

No. 84-167. *FIRESTONE TIRE & RUBBER CO. v. FRANCHISE TAX BOARD OF CALIFORNIA.* Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

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No. 84-221. *HENSHAW ET AL. v. STATE TAX COMMISSION OF MICHIGAN ET AL.* Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 126 Mich. App. 806, 338 N. W. 2d 224.

No. 84-5221. *EVANS ET UX., INDIVIDUALLY, AND AS NEXT FRIENDS FOR GATES ET AL. v. HARLEY HOTELS, INC.* Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 253 Ga. 53, 315 S. E. 2d 896.

No. 83-1770. *DELTA MARINE CONTRACTORS, INC. v. AVONDALE SHIPYARDS, INC.* Appeal from Ct. App. La., 4th Cir., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 440 So. 2d 164.

No. 83-1790. *MISSISSIPPI RIVER TRANSMISSION CORP. v. SIMONTON, SHERIFF AND EX-OFFICIO TAX COLLECTOR, LINCOLN PARISH, LOUISIANA.* Appeal from Ct. App. La., 2d Cir., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 442 So. 2d 764.

No. 83-1955. *HARMAN v. LA CROSSE TRIBUNE ET AL.* Appeal from Ct. App. Wis. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 117 Wis. 2d 448, 344 N. W. 2d 536.

No. 83-1997. *AMIS v. CITY OF FORT MYERS, FLORIDA, ET AL.* Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 444 So. 2d 419.

No. 83-2037. *CITY OF LAMBERTVILLE v. LAMBERTVILLE POLICEMEN'S ASSN.* Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-2068. *GANN v. SAN JOSE CITY COUNCIL ET AL.* Appeal from Super. Ct. Cal., County of Santa Clara, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

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No. 83-2074. *HESTER v. DEPARTMENT OF HEALTH AND HUMAN SERVICES*. Appeal from C. A. Fed. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 732 F. 2d 168.

No. 83-2138. *CITIZENS FEDERAL SAVINGS & LOAN ASSOCIATION OF DAYTON, OHIO v. PAGE ET AL.* Appeal from Ct. App. Ohio, Warren County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-2149. *DOBREFF ET UX. v. TOWNSHIP OF HARRISON*. Appeal from Ct. App. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-2157. *CRANE NECK ASSN., INC., ET AL. v. NYC/LONG ISLAND COUNTY SERVICES GROUP ET AL.* Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 61 N. Y. 2d 154, 460 N. E. 2d 1336.

No. 83-5907. *ISELEY v. PENNSYLVANIA*. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6272. *OSIPOVA v. BROOKS ET AL.* Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6479. *ALEXANDER v. TENNESSEE*. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6670. *ROY ET AL. v. CITY OF MIDDLETOWN*. Appeal from Ct. App. Ohio, Butler County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6803. *GEORGE v. HOUSTON POLICE DEPARTMENT ET AL.* Appeal from C. A. 5th Cir. dismissed for want of juris-

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diction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 727 F. 2d 1107.

No. 83-6864. *TAFOYA ET AL. v. UNITED STATES*. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6886. *VELILLA v. UTC/HAMILTON STANDARD DIVISION ET AL.* Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6894. *LINNE v. VIRGINIA*. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-7008. *PERRY v. DISTRICT OF COLUMBIA*. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 474 A. 2d 824.

No. 83-7027. *SMITH v. CHATTANOOGA-HAMILTON COUNTY HOSPITAL ET AL.* Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-208. *CAITO v. INDIANA*. Appeal from Sup. Ct. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 459 N. E. 2d 1179.

No. 84-247. *CHETISTER v. CHETISTER*. Appeal from Ct. App. Ohio, Lucas County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-5033. *SUMMA v. RUSSO ET AL.* Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 738 F. 2d 419.

No. 84-5073. *MACK v. W. R. GRACE & CO. ET AL.* Appeal from D. C. N. D. Ga. dismissed for want of jurisdiction. Treat-

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ing the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 578 F. Supp. 626.

No. 84-5326. *MEDLIN v. CITY AND BOROUGH OF SITKA*. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-1893. *EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. MARTIN INDUSTRIES, INC.* Appeal from D. C. N. D. Ala. dismissed for want of jurisdiction. Reported below: 581 F. Supp. 1029.

No. 83-1938. *EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. WESTINGHOUSE ELECTRIC CORP.* Appeal from D. C. W. D. Pa. dismissed for want of jurisdiction.

No. 84-63. *JERRY v. GENERAL MOTORS CORP., HYDRA-MATIC DIVISION*. Appeal from D. C. E. D. Mich. dismissed for want of jurisdiction.

No. 84-176. *UTILITY CONSULTING SERVICES, INC. v. CITY OF SAN JUAN*. Appeal from Sup. Ct. P. R. dismissed for want of jurisdiction. Reported below: 115 D. P. R. 88.

No. 84-5280. *MATKOVCIK v. ILLINOIS*. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Reported below: 101 Ill. 2d 268, 461 N. E. 2d 964.

No. 83-2046. *BERRY v. MICHIGAN RACING COMMISSIONER*. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 116 Mich. App. 164, 321 N. W. 2d 880.

No. 84-147. *MILLER ET AL. v. CALIFORNIA COMMISSION ON THE STATUS OF WOMEN*. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of jurisdiction. *Doremus v. Board of Education*, 342 U. S. 429 (1952). Reported below: 151 Cal. App. 3d 693, 198 Cal. Rptr. 877.

Certiorari Granted—Vacated and Remanded

No. 82-976. *CALIFORNIA v. HOWARD*, 466 U. S. 957. Petition for rehearing granted and order entered April 30, 1984, denying

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the petition for writ of certiorari, vacated. Certiorari granted, judgment vacated, and case remanded to the Court of Appeal of California, Fifth Appellate District, for further consideration in light of *California v. Beheler*, 463 U. S. 1121 (1983). JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE STEVENS dissent.

No. 83-1691. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* PAYNE ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Heckler v. Community Health Services*, 467 U. S. 51 (1984). Reported below: 714 F. 2d 1510 and 721 F. 2d 741.

No. 83-1818. UNITED STATES *v.* HYLIN, ADMINISTRATOR OF THE ESTATE OF HYLIN. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States v. Varig Airlines*, 467 U. S. 797 (1984). Reported below: 715 F. 2d 1206.

No. 84-120. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* MICHIGAN ACADEMY OF FAMILY PHYSICIANS ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Heckler v. Ringer*, 466 U. S. 602 (1984). Reported below: 728 F. 2d 326.

Miscellaneous Orders

No. — — —. SURMAN ET AL. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A-150. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BISMARCK *v.* HULM ET AL. C. A. 8th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D-423. IN RE DISBARMENT OF HEDICKE. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D-427. IN RE DISBARMENT OF STONER. Disbarment entered. [For earlier order herein, see 467 U. S. 1202.]

No. D-437. IN RE DISBARMENT OF FEINBERG. Alexander Feinberg, of Haddonfield, N. J., 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

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Bar of this Court. The rule to show cause, heretofore issued on June 11, 1984 [467 U. S. 1238], is hereby discharged.

No. D-438. *IN RE DISBARMENT OF GUARDINO*. Disbarment entered. [For earlier order herein, see 467 U. S. 1238.]

No. D-449. *IN RE DISBARMENT OF HOCHSTEIN*. It is ordered that Ralph Hochstein, of Minneapolis, Minn., 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-450. *IN RE DISBARMENT OF REISCH*. It is ordered that Erich Reisch, of the Bronx, 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-452. *IN RE DISBARMENT OF SHANKMAN*. It is ordered that Morton Roy Shankman, of Cooper City, Fla., 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-453. *IN RE DISBARMENT OF NOTHSTEIN*. It is ordered that Gary Zane Nothstein, of Baltimore, Md., 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-454. *IN RE DISBARMENT OF WEST*. It is ordered that Robert Edward West, of Rutland, Vt., 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. 9, Orig. *UNITED STATES v. LOUISIANA ET AL.* Exceptions to the Report of the Special Master are set for oral argument in due course. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 467 U. S. 1213.]

No. 79, Orig. *OKLAHOMA v. ARKANSAS*. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45

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days. Replies to such Exceptions, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.*, 439 U. S. 1124.]

No. 83-529. UNITED STATES *v.* SHARPE ET AL. C. A. 4th Cir. [Certiorari granted, 467 U. S. 1250.] Motion of respondents for leave to proceed further herein *in forma pauperis* denied. Motion of respondents for appointment of counsel denied. Mark Jeffrey Kadish, Esquire, of Atlanta, Ga., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 83-558. IRVING INDEPENDENT SCHOOL DISTRICT *v.* TATRO ET UX., INDIVIDUALLY AND AS NEXT FRIENDS OF TATRO, A MINOR, 468 U. S. 883. Motion of respondents to retax costs denied.

No. 83-712. NEW JERSEY *v.* T. L. O. Sup. Ct. N. J. [Certiorari granted, 464 U. S. 991.] Motions of Legal Aid Society of the City of New York et al. and National Education Association for leave to file briefs as *amici curiae* granted. Motion of Los Angeles County Public Defender's Office for leave to file a brief as *amicus curiae* out of time denied.

No. 83-812. WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL. C. A. 11th Cir. [Probable jurisdiction noted, 466 U. S. 924.] Motion of Lowell P. Weicker, Jr., for leave to participate in oral argument as *amicus curiae* denied.

No. 83-912. LUCE *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, 466 U. S. 903.] Motion of the Solicitor General to permit Bruce N. Kuhlik, Esquire, to present oral argument *pro hac vice* granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 83-935. UNITED STATES *v.* ABEL. C. A. 9th Cir. [Certiorari granted, 465 U. S. 1098.] Motion for appointment of counsel granted, and it is ordered that Yolanda Barrera Gomez, of Los Angeles, Cal., be appointed to serve as counsel for respondent in this case.

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.,

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ET AL. C. A. 3d Cir. [Certiorari granted, 466 U. S. 957.] Motion of Southeastern Fisheries Association, Inc., for leave to file a brief as *amicus curiae* 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 Open Lands Projects et al. for leave to file a brief as *amici curiae* granted.

No. 83-1274. METROPOLITAN LIFE INSURANCE CO. ET AL. *v.* WARD ET AL. Sup. Ct. Ala. [Probable jurisdiction noted, 466 U. S. 935.] Motion of appellee Ward for leave to file out-of-time motion for divided argument denied.

No. 83-1427. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* WITT. C. A. 11th Cir. [Certiorari granted, 466 U. S. 957.] Motion of petitioner to strike portions of respondent's brief denied.

No. 83-1452. MARRESE ET AL. *v.* AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS. C. A. 7th Cir. [Certiorari granted, 467 U. S. 1258.] Motion of Illinois et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted. JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 83-1623. ANDERSON *v.* CITY OF BESSEMER CITY, NORTH CAROLINA. C. A. 4th Cir. [Certiorari granted, 467 U. S. 1250.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-1751. ROBINSON *v.* MISSISSIPPI. Sup. Ct. Miss.;

No. 83-1868. WHITE *v.* DOUGHERTY COUNTY BOARD OF EDUCATION ET AL. Appeal from D. C. M. D. Ga.;

No. 83-1896. MOBIL OIL CORP. *v.* BLANTON ET AL. C. A. 9th Cir.;

No. 83-1925. HILLSBOROUGH COUNTY, FLORIDA, ET AL. *v.* AUTOMATED MEDICAL LABORATORIES, INC. Appeal from C. A. 11th Cir.;

No. 83-1963. TOAN, DIRECTOR, MISSOURI DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* CUNNINGHAM. C. A. 8th Cir.;

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No. 83-1968. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL. Appeal from D. C. E. D. N. C.;

No. 83-2052. TEL-OREN, AS FATHER, ON BEHALF OF THE DECEASED, TEL-OREN, ET AL. *v.* LIBYAN ARAB REPUBLIC ET AL. C. A. D. C. Cir.;

No. 84-21. SCOTT *v.* CITY OF HAMMOND, INDIANA, ET AL. C. A. 7th Cir.; and

No. 84-38. ILLINOIS ET AL. *v.* CITY OF MILWAUKEE ET AL. C. A. 7th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 83-6760. SANDERS *v.* GRAND UNION CO. ET AL. C. A. 11th Cir. Motion of petitioner to consolidate this case with No. 83-1739, *Local Union No. 1020, United Brotherhood of Carpenters & Joiners of America, AFL-CIO v. McNaughton*, denied.

No. 83-2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. Motions of American Association of Exporters et al. and Government of Japan for leave to file briefs as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83-5954. LINDAHL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. [Certiorari granted, 467 U. S. 1251.] Motion for appointment of counsel granted, and it is ordered that John Murcko, Esquire, of Oakland, Cal., be appointed to serve as counsel for petitioner in this case.

No. 83-6061. GARCIA ET AL. *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 466 U. S. 926.] Motion of Robyn J. Hermann to permit Charles G. White, Esquire, to present oral argument *pro hac vice* on behalf of petitioners granted.

No. 83-6536. CIRILLO *v.* REPUBLIC STEEL CORP., 467 U. S. 1213. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis*, or in the alternative, for an extension of time to comply with order of May 29, 1984, denied.

No. 83-6634. DAWN ET AL. *v.* H. REX GREENE, M. D., INC., ET AL., 467 U. S. 1249. Motion of appellants for reconsideration of order denying leave to proceed *in forma pauperis* denied.

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No. 83-6774. *SOONG v. HOFSTRA UNIVERSITY*. C. A. 2d Cir.;
No. 83-6828. *PEPPER v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST)*. Ct. App. Cal., 2d App. Dist.; and

No. 83-6881. *BRADFORD v. BRADFORD*. Ct. App. D. C. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 22, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 84-150. *WISCONSIN ELECTIONS BOARD ET AL. v. REPUBLICAN PARTY OF WISCONSIN ET AL.* Appeal from D. C. E. D. Wis. Motion of Rex R. Reed et ux. for leave to intervene denied.

No. 84-5029. *PALENO v. QUINN, INSURANCE COMMISSIONER OF CALIFORNIA*. Appeal from Ct. App. Cal., 1st App. Dist.; and

No. 84-5183. *MOORE v. DELAWARE*. Appeal from Sup. Ct. Del. Motions of appellants for leave to proceed *in forma pauperis* denied. Appellants are allowed until October 22, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit statements as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeals for want of jurisdiction and, treating the papers whereon the appeals would be taken as petitions for writs of certiorari, we would deny certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 83-2056. *IN RE C. ITOH & CO. (AMERICA) INC.* C. A. 5th Cir. Petition for writ of common-law certiorari denied. Reported below: 725 F. 2d 970.

No. 83-6893. *IN RE GREEN*; and

No. 84-5023. *IN RE PALMER*. Petitions for writs of habeas corpus denied.

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No. 83-2055. IN RE C. ITOH & CO. (AMERICA) INC.;
No. 83-6707. IN RE DOHM;
No. 83-6842. IN RE DOHM;
No. 83-6976. IN RE ACOSTA;
No. 83-7003. IN RE SOMMER; and
No. 84-5243. IN RE JONES. Petitions for writs of mandamus denied.

No. 83-2094. IN RE PEARCE. Petition for writ of mandamus and other relief denied.

No. 84-5021. IN RE CARTER. Petition for writ of mandamus and/or prohibition denied.

No. 83-6897. IN RE BARRITT. Petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 83-2030. BOARD OF EDUCATION OF OKLAHOMA CITY *v.* NATIONAL GAY TASK FORCE. Appeal from C. A. 10th Cir. Probable jurisdiction noted. Reported below: 729 F. 2d 1270.

No. 83-2166. ZAUDERER *v.* OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO. Appeal from Sup. Ct. Ohio. Probable jurisdiction noted. Reported below: 10 Ohio St. 3d 44, 461 N. E. 2d 883.

No. 84-28. BROCKETT *v.* SPOKANE ARCADES, INC., ET AL.; and

No. 84-143. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. *v.* J-R DISTRIBUTORS, INC., ET AL. Appeals from C. A. 9th Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 725 F. 2d 482.

No. 83-1492. NATIONAL RAILROAD PASSENGER CORPORATION *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.; and

No. 83-1633. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* NATIONAL RAILROAD PASSENGER CORPORATION. Appeals from C. A. 7th Cir. In No. 83-1492, probable jurisdiction noted. In No. 83-1633, further consideration of question of jurisdiction postponed to hearing of case on the merits. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 723 F. 2d 1298.

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No. 84-16. CORY ET AL. *v.* WESTERN OIL & GAS ASSN. ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 726 F. 2d 1340.

No. 83-2097. BURGER KING CORP. *v.* RUDZEWICZ. Appeal from C. A. 11th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 724 F. 2d 1505.

Certiorari Granted

No. 83-1329. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION *v.* REAL. Sup. Jud. Ct. Mass. Certiorari granted. Reported below: 390 Mass. 399, 456 N. E. 2d 1111.

No. 83-1368. NORTHWEST WHOLESALE STATIONERS, INC. *v.* PACIFIC STATIONERY & PRINTING CO. C. A. 9th Cir. Certiorari granted. Reported below: 715 F. 2d 1393.

No. 83-1673. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NUTT ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 718 F. 2d 1048.

No. 83-1750. UNITED STATES *v.* MILLER. C. A. 9th Cir. Certiorari granted. Reported below: 715 F. 2d 1360 and 728 F. 2d 1269.

No. 83-1798. BELL, SECRETARY OF EDUCATION *v.* KENTUCKY DEPARTMENT OF EDUCATION. C. A. 6th Cir. Certiorari granted. Reported below: 717 F. 2d 943.

No. 83-1807. EASTERN AIR LINES, INC. *v.* MAHFOUD ON BEHALF OF MAHFOUD ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 729 F. 2d 777.

No. 83-1842. GARRETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted. Reported below: 727 F. 2d 1003.

No. 83-1894. PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 724 F. 2d 57.

No. 83-1919. CITY OF OKLAHOMA CITY *v.* TUTTLE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF TUTTLE.

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C. A. 10th Cir. Certiorari granted. Reported below: 728 F. 2d 456.

No. 83-1944. JENSEN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF NEBRASKA, ET AL. *v.* QUARING. C. A. 8th Cir. Certiorari granted. Reported below: 728 F. 2d 1121.

No. 83-2064. BELL, SECRETARY OF EDUCATION *v.* NEW JERSEY. C. A. 3d Cir. Certiorari granted. Reported below: 724 F. 2d 34.

No. 83-2146. WILSON ET AL. *v.* GARCIA. C. A. 10th Cir. Certiorari granted. Reported below: 731 F. 2d 640.

No. 83-2161. MONTANA ET AL. *v.* BLACKFEET TRIBE OF INDIANS. C. A. 9th Cir. Certiorari granted. Reported below: 729 F. 2d 1192.

No. 84-4. WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. *v.* HAMILTON BANK OF JOHNSON CITY. C. A. 6th Cir. Certiorari granted. Reported below: 729 F. 2d 402.

No. 83-1545. WESTERN AIR LINES, INC. *v.* CRISWELL ET AL. C. A. 9th Cir. Certiorari granted limited to Questions 2 and 3 presented by the petition. Reported below: 709 F. 2d 544.

No. 83-1748. ALLIS-CHALMERS CORP. *v.* LUECK. Sup. Ct. Wis. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 116 Wis. 2d 559, 342 N. W. 2d 699.

No. 83-1785. AIR FRANCE *v.* SAKS. C. A. 9th Cir. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 724 F. 2d 1383.

No. 83-1911. LOWE ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Motion of Financial Publishers of America for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 725 F. 2d 892.

No. 83-2129. SCHREIBER *v.* BURLINGTON NORTHERN INC. ET AL. C. A. 3d Cir. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 731 F. 2d 163.

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No. 84-9. MASSACHUSETTS MUTUAL LIFE INSURANCE CO. ET AL. *v.* RUSSELL. C. A. 9th Cir. Motions of American Council of Life Insurance and Health Insurance et al., Construction Laborers Pension Trust for Southern California et al., Alaska Fishermen's Union—Salmon Cannery Pension Trust et al., Southern California Pipe Trades Trust Funds et al., and Board of Trustees of the Carpenters Health and Welfare Trust Fund for California et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 722 F. 2d 482.

No. 83-6663. FUGATE *v.* NEW MEXICO. Sup. Ct. N. M. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 101 N. M. 58, 678 P. 2d 686.

No. 83-6766. HAYES *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 439 So. 2d 896.

No. 84-5004. BALL *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 734 F. 2d 965.

Certiorari Denied. (See also Nos. 83-1770, 83-1790, 83-1955, 83-1997, 83-2037, 83-2068, 83-2074, 83-2138, 83-2149, 83-2157, 83-5907, 83-6272, 83-6479, 83-6670, 83-6803, 83-6864, 83-6886, 83-6894, 83-7008, 83-7027, 84-208, 84-247, 84-5033, 84-5073, 84-5326, and 83-2056, *supra*.)

No. 83-1386. LEGGETT, COLLECTOR OF REVENUE IN THE CITY OF ST. LOUIS, ET AL. *v.* LIDDELL ET AL.;

No. 83-1721. MISSOURI ET AL. *v.* LIDDELL ET AL.; and

No. 83-1838. NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION ET AL. *v.* LIDDELL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 731 F. 2d 1294.

No. 83-1459. PIEDMONT PUBLISHING CO., INC., ET AL. *v.* COCHRAN. Ct. App. N. C. Certiorari denied. Reported below: 62 N. C. App. 548, 302 S. E. 2d 903.

No. 83-1481. PUNIKAIA ET AL. *v.* CLARK, DIRECTOR, DEPARTMENT OF HEALTH FOR HAWAII. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 564.

No. 83-1499. O'BRIEN *v.* PENNSYLVANIA STATE EMPLOYEES' RETIREMENT SYSTEM. Sup. Ct. Pa. Certiorari denied. Reported below: 503 Pa. 414, 469 A. 2d 1008.

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No. 83-1500. *SUPER TIRE ENGINEERING CO. v. TEAMSTERS LOCAL UNION No. 676*. C. A. 3d Cir. Certiorari denied. Reported below: 721 F. 2d 121.

No. 83-1508. *SEQUOIA BOOKS, INC. v. McDONALD ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 1091.

No. 83-1522. *REDDING FORD v. CALIFORNIA STATE BOARD OF EQUALIZATION ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 496.

No. 83-1537. *HASLER ET AL. v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 718 F. 2d 202.

No. 83-1559. *AYRES v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 725 F. 2d 806.

No. 83-1560. *CANTRELL v. KANSAS*. Sup. Ct. Kan. Certiorari denied. Reported below: 234 Kan. 426, 673 P. 2d 1147.

No. 83-1563. *WILLS v. GEORGIA*. Ct. App. Ga. Certiorari denied. Reported below: 169 Ga. App. 260, 312 S. E. 2d 367.

No. 83-1598. *WISWELL v. KANSAS*. Sup. Ct. Kan. Certiorari denied. Reported below: 234 Kan. 1078.

No. 83-1605. *FRANKS ET UX. v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 723 F. 2d 1482.

No. 83-1634. *HAROLD V. SIMPSON & Co. v. SHULER*. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 1253.

No. 83-1635. *WAGSHAL v. CROZER-CHESTER MEDICAL CENTER ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 394, 717 F. 2d 1451.

No. 83-1651. *KAMRIN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 1225.

No. 83-1655. *SOWERS v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 83-1667. *WILLIAMS ET AL. v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 678.

No. 83-1669. *SINITO v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 1250.

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No. 83-1675. *BEGG v. BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF PARK RIDGE, ILLINOIS, ET AL.* Sup. Ct. Ill. Certiorari denied. Reported below: 99 Ill. 2d 324, 459 N. E. 2d 925.

No. 83-1687. *RODRIGUEZ v. NEW YORK.* App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 961, 470 N. Y. S. 2d 64.

No. 83-1688. *TURK v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 1439.

No. 83-1692. *TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO v. CIVIL AERONAUTICS BOARD ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 233 U. S. App. D. C. 248, 725 F. 2d 775.

No. 83-1695. *NEAL v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Reported below: 718 F. 2d 1505.

No. 83-1697. *JONES ET UX. v. LUCAS.* Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 148 Cal. App. 3d 1008, 196 Cal. Rptr. 437.

No. 83-1704. *HILDEBRAND, STANDING CHAPTER 13 TRUSTEE v. SOCIAL SECURITY ADMINISTRATION.* C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 1080.

No. 83-1706. *WARDSWORTH v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 503.

No. 83-1710. *COUSSENS ET AL. v. CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1055.

No. 83-1713. *RANSOM v. KANSAS.* Sup. Ct. Kan. Certiorari denied. Reported below: 234 Kan. 322, 673 P. 2d 1101.

No. 83-1715. *GAJEWSKI v. COMMISSIONER OF INTERNAL REVENUE.* C. A. 2d Cir. Certiorari denied. Reported below: 723 F. 2d 1062.

No. 83-1716. *NEWPARK SHIPBUILDING & REPAIR, INC., ET AL. v. ROUNTREE ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 399.

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No. 83-1723. PRINCE WILLIAM COUNTY, VIRGINIA, ET AL. *v.* HUTTO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 954.

No. 83-1726. TOOKES *v.* STYNCHCOMBE, SHERIFF OF FULTON COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 918.

No. 83-1727. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* CROW. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1224.

No. 83-1729. BOSS ET AL. *v.* INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1446.

No. 83-1732. PHILLIPS *v.* TVA ENGINEERING ASSN., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 684.

No. 83-1738. PHILLIPS ET UX. *v.* HOWARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-1743. MORRIS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 1514.

No. 83-1744. DEFELICE MARINE CONTRACTORS, INC., DIVISION OF GULF FLEET MARINE OPERATIONS, INC. *v.* RAY. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 439 So. 2d 1102.

No. 83-1753. HORTON, ADMINISTRATRIX OF THE ESTATE OF EHRLICH *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 83-1756. VARGAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 727 F. 2d 941.

No. 83-1758. LEVENSALER *v.* HARTFORD ACCIDENT & INDEMNITY CO. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1435.

No. 83-1760. ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. *v.* CULVER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 722 F. 2d 114.

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No. 83-1762. *HARRY & BRYANT CO. ET AL. v. FEDERAL TRADE COMMISSION ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 726 F. 2d 993.

No. 83-1766. *JONNET DEVELOPMENT CORP. ET AL. v. CALIGUIRI ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 727 F. 2d 1100.

No. 83-1767. *BILLUPS v. GARRISON, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 665.

No. 83-1771. *WERLING ET AL. v. GRACE EVANGELICAL LUTHERAN CHURCH OF RIVER FOREST, ILLINOIS.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 118 Ill. App. 3d 151, 454 N. E. 2d 1038.

No. 83-1776. *M. W. ZACK METAL CO. v. SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, ET AL.* App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 96 App. Div. 2d 1018, 467 N. Y. S. 2d 105.

No. 83-1777. *UMPHLETT v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-1779. *WESTINGHOUSE ELECTRIC CORP. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.* C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 211.

No. 83-1781. *MICHAELS v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 726 F. 2d 1307.

No. 83-1782. *ALLEN v. PENSION BENEFIT GUARANTY CORPORATION ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 727 F. 2d 1100.

No. 83-1783. *R. J. D'HEMECOURT PETROLEUM, INC., ET AL. v. MCNAMARA, SECRETARY OF REVENUE OF LOUISIANA.* Sup. Ct. La. Certiorari denied. Reported below: 444 So. 2d 600.

No. 83-1788. *HOLLIS v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 377.

No. 83-1789. *MADDOX v. GEORGIA.* Sup. Ct. Ga. Certiorari denied. Reported below: 252 Ga. 198, 312 S. E. 2d 325.

No. 83-1791. *BREEN ET AL. v. INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 309, 722 F. 2d 795.

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No. 83-1792. *HOOVER & BRACKEN ENERGIES, INC. v. UNITED STATES DEPARTMENT OF THE INTERIOR ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 723 F. 2d 1488.

No. 83-1799. *BAY HEAD IMPROVEMENT ASSN. v. MATTHEWS ET AL.* Sup. Ct. N. J. Certiorari denied. Reported below: 95 N. J. 306, 471 A. 2d 355.

No. 83-1800. *MURPHY v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied. Reported below: 665 S. W. 2d 116.

No. 83-1805. *EKANEM ET AL. v. HEALTH & HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 563.

No. 83-1812. *BACHTEL ET UX. v. MAMMOTH BULK CARRIERS, LTD., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 744.

No. 83-1813. *VANDYGRIFF v. PHILLIPS;* and

No. 83-1969. *FIRST SAVINGS & LOAN ASSOCIATION OF BOWIE ET AL. v. PHILLIPS.* C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 1217 and 724 F. 2d 490.

No. 83-1815. *FIRST MISSISSIPPI NATIONAL BANK v. INTERNATIONAL MARINE TOWING, INC.* C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 126.

No. 83-1819. *MILLER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MILLER, ET AL. v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 1311.

No. 83-1820. *GOAD v. GOAD.* Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied.

No. 83-1822. *CITY OF BIRMINGHAM, MICHIGAN v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 560.

No. 83-1826. *ANGEL ET AL v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (CASTLE, REAL PARTY IN INTEREST).* Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-1827. *SOWA & SONS, INC. v. AMERICAN HOIST & DERRICK Co.* C. A. Fed. Cir. Certiorari denied. Reported below: 725 F. 2d 1350.

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No. 83-1830. *LEWIS v. HILLSBOROUGH TRANSIT AUTHORITY*. C. A. 11th Cir. Certiorari denied. Reported below: 726 F. 2d 664 and 668.

No. 83-1831. *HOUSEAL ET AL. v. TENNESSEE*. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 667 S. W. 2d 108.

No. 83-1832. *ALEXANDER v. LOS ANGELES COUNTY ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 744.

No. 83-1833. *SIMMONS v. UNITED STATES ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1431.

No. 83-1834. *ROBERTSON v. FLORIDA BOARD OF BAR EXAMINERS*. Sup. Ct. Fla. Certiorari denied. Reported below: 443 So. 2d 77.

No. 83-1840. *BERTHELOT v. UNITED STATES*; and

No. 83-1841. *CHERRY v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: No. 83-1840, 729 F. 2d 1449; No. 83-1841, 729 F. 2d 1446.

No. 83-1844. *DOWNING v. OAKLAND RAIDERS, LTD., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1063.

No. 83-1846. *LIFE SCIENCE CHURCH ET AL. v. NEW YORK*. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 93 App. Div. 2d 774, 461 N. Y. S. 2d 803.

No. 83-1847. *RICHARD I, INC., DBA RICHARD I SCHOOL OF BEAUTY CULTURE, ET AL. v. AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.* Ct. App. N. Y. Certiorari denied. Reported below: 61 N. Y. 2d 784, 461 N. E. 2d 302.

No. 83-1848. *ELKIN ET AL. v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 2d 1005.

No. 83-1849. *HODGES v. ATCHISON, TOPEKA & SANTA FE RAILWAY CO.* C. A. 10th Cir. Certiorari denied. Reported below: 728 F. 2d 414.

No. 83-1850. *BUGHER ET AL. v. FEIGHTNER, DBA FEIGHTNER EXCAVATING CO.* C. A. 7th Cir. Certiorari denied. Reported below: 722 F. 2d 1356.

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No. 83-1851. *F/V BARANOF ET AL. v. ALASKA*. Sup. Ct. Alaska. Certiorari denied. Reported below: 677 P. 2d 1245.

No. 83-1852. *MORRIS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 777.

No. 83-1853. *ERICKSON ET AL. v. BOARD OF EDUCATION, PROVISIO TOWNSHIP HIGH SCHOOL, DISTRICT No. 209, COOK COUNTY, ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 120 Ill. App. 3d 264, 458 N. E. 2d 84.

No. 83-1854. *RENFROE v. KIRKPATRICK, SUPERINTENDENT, PIEDMONT CITY SCHOOLS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 722 F. 2d 714.

No. 83-1855. *GARVEY ET AL. v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 726 F. 2d 1569.

No. 83-1856. *SELVIDGE v. GEORGIA*. Sup. Ct. Ga. Certiorari denied. Reported below: 252 Ga. 243, 313 S. E. 2d 84.

No. 83-1858. *MURPHY v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: 669 S. W. 2d 320.

No. 83-1860. *SHAW v. MITCHELL ET AL.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-1862. *LUBIN v. BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL.* Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 974, 459 N. E. 2d 481.

No. 83-1863. *LIGHTLE v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 728 F. 2d 468.

No. 83-1867. *SUN TOWERS, INC., ET AL. v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 315.

No. 83-1869. *STERNGASS ET AL. v. BOWMAN ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1440.

No. 83-1870. *CONSUMERS UNION OF UNITED STATES, INC. v. GENERAL SIGNAL CORP. ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 724 F. 2d 1044.

No. 83-1871. *MITCHELL v. WYRICK, WARDEN*. C. A. 8th Cir. Certiorari denied. Reported below: 727 F. 2d 773.

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No. 83-1873. *PACEMAKER DIAGNOSTIC CLINIC OF AMERICA, INC. v. INSTRUMEDIX, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 537.

No. 83-1876. *TURNER ADVERTISING CO. v. GARCIA, AKA REES, ET AL.* Sup. Ct. Ga. Certiorari denied. Reported below: 252 Ga. 101, 311 S. E. 2d 466.

No. 83-1877. *IDAHO ET AL. v. COEUR D'ALENE TRIBE OF INDIANS.* C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 1461.

No. 83-1882. *HANNAHVILLE INDIAN COMMUNITY ET AL. v. UNITED STATES.* C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 2d 167.

No. 83-1884. *MCCONNEY v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 2d 1195.

No. 83-1885. *STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. v. SCHULTE.* C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 974.

No. 83-1886. *NEWMAN v. UNITED STATES.* C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 83-1887. *STRATFORD PLACE CORP. ET AL. v. CAPALINO, COMMISSIONER OF GENERAL SERVICES OF THE CITY OF NEW YORK, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 83-1888. *CHANNEL ISLANDS DEVELOPMENT CORP., DBA THE LOBSTER TRAP ET AL. v. NATIONAL LABOR RELATIONS BOARD.* C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 746.

No. 83-1889. *WILLIAMS v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-1895. *MARINELLI v. UNITED STATES;* and

No. 83-1998. *MARINELLI v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 148.

No. 83-1898. *SEA-LAND SERVICE, INC. v. DOLE, SECRETARY OF TRANSPORTATION, ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 449, 723 F. 2d 975.

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No. 83-1899. *VITALE v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1090.

No. 83-1900. *ROHDE ET AL. v. BOLGER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 18.

No. 83-1901. *TEAMSTERS FREIGHT LOCAL UNION No. 480 v. RYDER TRUCK LINES, INC.* C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 594.

No. 83-1905. *C. M. UBERMAN ENTERPRISES, INC., ET AL. v. HISTORIC FIGURES, INC., ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 234 U. S. App. D. C. 222, 728 F. 2d 503.

No. 83-1906. *BEACH ET UX. v. OWENS-CORNING FIBERGLAS CORP.* C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 407.

No. 83-1907. *PELT v. LOUISIANA*. Sup. Ct. La. Certiorari denied. Reported below: 448 So. 2d 1294.

No. 83-1909. *BEARD, ADMINISTRATRIX OF THE ESTATE OF BEARD v. O'NEAL ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 894.

No. 83-1910. *BUILDING MATERIAL & DUMP TRUCK DRIVERS LOCAL No. 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA v. TOYOTA LANDSCAPE CO., INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 525.

No. 83-1913. *WHITE v. JEFFREY MINING MACHINERY CO. ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: 723 F. 2d 1553.

No. 83-1915. *KOHN BEVERAGE CO. v. TEAMSTERS LOCAL No. 348*. Ct. App. Ohio, Summit County. Certiorari denied.

No. 83-1916. *JARBOE-LACKEY FEEDLOTS, INC. v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 726 F. 2d 1481.

No. 83-1917. *LIBERTARIAN PARTY OF LOUISIANA v. BROWN, SECRETARY OF STATE OF LOUISIANA, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 1491.

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No. 83-1920. *WINDSOR v. THE TENNESSEAN ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 719 F. 2d 155.

No. 83-1921. *TRANE CO. ET AL. v. BALDRIGE, SECRETARY OF COMMERCE, ET AL.*; and

No. 83-1957. *BRIGGS & STRATTON CORP. ET AL. v. BALDRIGE, SECRETARY OF COMMERCE, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 915.

No. 83-1922. *MENOMINEE TRIBE OF INDIANS ET AL. v. UNITED STATES* (two cases). C. A. Fed. Cir. Certiorari denied. Reported below: 726 F. 2d 712 (first case); 726 F. 2d 718 (second case).

No. 83-1926. *JAMES v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Reported below: 728 F. 2d 465.

No. 83-1927. *EVANS ET AL. v. GEORGIA.* Sup. Ct. Ga. Certiorari denied. Reported below: 252 Ga. 312, 314 S. E. 2d 421.

No. 83-1929. *SMITH ET AL. v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 817.

No. 83-1930. *PASARELL v. UNITED STATES.* C. A. 1st Cir. Certiorari denied. Reported below: 727 F. 2d 13.

No. 83-1932. *E. R. SQUIBB & SONS, INC. v. COLLINS, AKA GASTROW, ET AL.* Sup. Ct. Wis. Certiorari denied. Reported below: 116 Wis. 2d 166, 342 N. W. 2d 37.

No. 83-1933. *SUTHERLAND v. STATE BAR OF TEXAS.* Ct. App. Tex., 8th Sup. Jud. Dist. Certiorari denied.

No. 83-1934. *RIDDICK v. CRAIG ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 677.

No. 83-1936. *AMERICAN INVESTMENT PROPERTIES, INC., ET AL. v. VAREKA INVESTMENTS, N. V.* C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 907.

No. 83-1937. *ARNOLD v. BURGER KING CORP. ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 719 F. 2d 63.

No. 83-1939. *PROFESSIONAL POSITIONERS, INC., ET AL. v. T. P. LABORATORIES, INC.* C. A. Fed. Cir. Certiorari denied. Reported below: 724 F. 2d 965.

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No. 83-1940. GROSZ ET AL. *v.* CITY OF MIAMI BEACH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 729.

No. 83-1942. SIMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 641.

No. 83-1945. HAUGHEY, ON BEHALF OF THE ESTATE OF HAUGHEY *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-1946. SUNDEL *v.* JUSTICES OF THE SUPERIOR COURT OF RHODE ISLAND. C. A. 1st Cir. Certiorari denied. Reported below: 728 F. 2d 40.

No. 83-1949. INZONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 142.

No. 83-1950. MCALLISTER ET AL. *v.* GULF FEDERAL SAVINGS & LOAN ASSN. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 446 So. 2d 110.

No. 83-1951. GLEIXNER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 99 App. Div. 2d 842, 472 N. Y. S. 2d 586.

No. 83-1953. WORTHINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 726 F. 2d 1089.

No. 83-1954. FRAME, WARDEN *v.* PLESS. C. A. 3d Cir. Certiorari denied. Reported below: 727 F. 2d 1099.

No. 83-1956. THURSTON MOTOR LINES *v.* BRADY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 726 F. 2d 136.

No. 83-1960. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 2d 1199.

No. 83-1962. AMERICAN KOYO CORP. *v.* LINDLEY, TAX COMMISSIONER OF OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 83-1964. BEDNAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1043.

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No. 83-1965. *RELIANCE MORTGAGE CORP. v. CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO*. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1113.

No. 83-1966. *REPROSYSTEM, B. V., ET AL. v. SCM CORP.* C. A. 2d Cir. Certiorari denied. Reported below: 727 F. 2d 257.

No. 83-1970. *HULL v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 720 F. 2d 673.

No. 83-1972. *SCHULTE ET AL. v. SAYAD ET AL.* Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 667 S. W. 2d 26.

No. 83-1973. *JORDAN v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 692.

No. 83-1975. *RODRIGUEZ v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 161.

No. 83-1976. *COYNE v. OHIO*. Ct. App. Ohio, Clermont County. Certiorari denied.

No. 83-1977. *MILLER v. ILLINOIS*. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 119 Ill. App. 3d 21, 456 N. E. 2d 262.

No. 83-1978. *CORRIGAN v. GOODWIN*. C. A. 8th Cir. Certiorari denied. Reported below: 729 F. 2d 541.

No. 83-1980. *LILLIE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 748.

No. 83-1981. *NORTH CAROLINA COMMISSION OF INDIAN AFFAIRS ET AL. v. UNITED STATES DEPARTMENT OF LABOR*. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 238.

No. 83-1983. *LOPEZ v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 728 F. 2d 1359.

No. 83-1984. *FRITZ v. COLEMAN ET AL.* Ct. App. Md. Certiorari denied.

No. 83-1985. *FIELD v. OMAHA STANDARD INC. ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 145.

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No. 83-1987. *BRADSHAW v. GOVERNMENT OF THE VIRGIN ISLANDS*. C. A. 3d Cir. Certiorari denied. Reported below: 726 F. 2d 115.

No. 83-1991. *BLINDER, ROBINSON & Co., INC., ET AL. v. STATE CORPORATION COMMISSION*. Sup. Ct. Va. Certiorari denied. Reported below: 227 Va. 24, 313 S. E. 2d 652.

No. 83-1992. *CLAIBORNE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 727 F. 2d 842.

No. 83-1993. *LANE v. UNITED STATES ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 727 F. 2d 18.

No. 83-1994. *FULCHER TRUCKING OF ORIENTAL, INC. v. GASKILL, ADMINISTRATRIX OF THE ESTATE OF ARMSTRONG*. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1452.

No. 83-1995. *GREENSBORO NEWS CO. ET AL. v. FLANNERY, JUDGE ASSIGNED TO UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 727 F. 2d 1320.

No. 83-1996. *MERCHANTS NATIONAL BANK OF MOBILE v. FEDERAL DEPOSIT INSURANCE CORPORATION*. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 634.

No. 83-2002. *HOUGHTON v. PRUDENTIAL PROPERTY & CASUALTY CO. ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 145.

No. 83-2003. *HEMINGWAY, ADMINISTRATRIX OF THE ESTATE OF HEMINGWAY v. OCHSNER CLINIC ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 1220.

No. 83-2006. *JACKSON v. OHIO*. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 83-2007. *C. ITOH & CO. (AMERICA) INC. v. SPIESS ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 970.

No. 83-2008. *PHINNEY v. FIRST AMERICAN NATIONAL BANK*. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 155.

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No. 83-2009. *MATHIS ET AL. v. HEGWOOD ET AL.* Ct. App. Ga. Certiorari denied. Reported below: 169 Ga. App. 547, 314 S. E. 2d 122.

No. 83-2013. *STEVENS READY-MIX CONCRETE CO. v. OKC CORP.* C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 777.

No. 83-2015. *FIRST MULTIFUND ADVISORY CORP. v. WILLIAMS ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 141.

No. 83-2016. *LUTER v. IOWA.* Sup. Ct. Iowa. Certiorari denied. Reported below: 346 N. W. 2d 802.

No. 83-2017. *CHIN NIEN TSANG v. BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY.* C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 908.

No. 83-2019. *ZOLLA v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 724 F. 2d 808.

No. 83-2020. *FORD v. AMERICAN BROADCASTING COS., INC., ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1434.

No. 83-2021. *MANDARINO v. POLLARD, MAYOR OF LOMBARD, ILLINOIS, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 845.

No. 83-2023. *GARDNER v. TEC SYSTEMS, INC., ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: 725 F. 2d 1338.

No. 83-2024. *WIEBE v. UNITED STATES.* C. A. 10th Cir. Certiorari denied.

No. 83-2027. *GRIFFIN ET AL. v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 475.

No. 83-2028. *BUTLER v. FEDERAL NATIONAL MORTGAGE ASSOCIATION.* Sup. Ct. Okla. Certiorari denied.

No. 83-2031. *TEHFE ET AL. v. GRAND JURY EMPANELLED DECEMBER 16, 1983, UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

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No. 83-2033. *LIBERTARIAN PARTY OF FLORIDA ET AL. v. FLORIDA ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 790.

No. 83-2036. *RABITO v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 726 F. 2d 913.

No. 83-2038. *GOODWIN v. ELKINS & Co. ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 730 F. 2d 99.

No. 83-2039. *KAVANAGH v. MCSHEA.* Ct. App. N. Y. Certiorari denied. Reported below: 61 N. Y. 2d 606, 462 N. E. 2d 1203.

No. 83-2040. *WASHBURN v. WASHBURN.* Ct. App. D. C. Certiorari denied.

No. 83-2042. *RONALD ADAMS CONTRACTOR, INC., ET AL. v. OWL CONSTRUCTION Co., INC.* C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 540.

No. 83-2043. *WILLIS v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 571.

No. 83-2044. *CARTER v. SHEET METAL WORKERS' INTERNATIONAL ASSN.* C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 1472.

No. 83-2045. *XANDER ET AL. v. COMMISSIONER OF PATENTS AND TRADEMARKS.* C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 2d 168.

No. 83-2047. *MTD PRODUCTS INC. v. RADIO STEEL & MANUFACTURING Co.* C. A. Fed. Cir. Certiorari denied. Reported below: 731 F. 2d 840.

No. 83-2048. *ZUKOWSKI v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 889.

No. 83-2049. *KUZMA v. UNITED STATES POSTAL SERVICE ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 725 F. 2d 16.

No. 83-2050. *PACIFIC POWER & LIGHT Co. v. PUBLIC SERVICE COMMISSION OF WYOMING.* Sup. Ct. Wyo. Certiorari denied. Reported below: 677 P. 2d 799.

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No. 83-2054. *WINSLOW ET UX. v. WILLIAMS ET AL.* Ct. App. Colo. Certiorari denied.

No. 83-2058. *SMALLWOOD v. UNITED AIR LINES, INC.* C. A. 4th Cir. Certiorari denied. Reported below: 728 F. 2d 614.

No. 83-2059. *KISIELOWSKI ET AL. v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 145.

No. 83-2061. *DRAVO MECHLING, INC., ET AL. v. COMBI LINES ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 455.

No. 83-2063. *FENNELL v. WARNER LAMBERT CO.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1432.

No. 83-2066. *REINHOLD ET AL. v. FEE FEE TRUNK SEWER, INC., ET AL.* Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 664 S. W. 2d 599.

No. 83-2069. *CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC., ET AL. v. FEDERAL COMMUNICATIONS COMMISSION ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 2d 667.

No. 83-2070. *FIRST LEASING CORP. v. BROTHERS.* C. A. 9th Cir. Certiorari denied. Reported below: 724 F. 2d 789.

No. 83-2071. *NEW JERSEY ET AL. v. SINGER ET AL.* Sup. Ct. N. J. Certiorari denied. Reported below: 95 N. J. 487, 472 A. 2d 138.

No. 83-2072. *LISINSKI v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 887.

No. 83-2077. *DIXON v. SCOTT ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1542.

No. 83-2078. *ILLINOIS CENTRAL GULF RAILROAD CO. v. AIR PRODUCTS & CHEMICALS, INC.* C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 483.

No. 83-2079. *SLY v. FEDERAL TRADE COMMISSION.* C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1466.

No. 83-2080. *GIULIANI v. HAWAII ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 765.

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No. 83-2087. *COOK v. R. W. HARMON & SONS, INC., ET AL.* C. A. 8th Cir. Certiorari denied.

No. 83-2088. *BAYOU BOTTLING, INC. v. DR PEPPER CO. ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 300.

No. 83-2090. *MAYFIELD, DBA JOE'S CAFE ET AL. v. DONOVAN, SECRETARY OF LABOR.* C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1462.

No. 83-2091. *MANNING, AS EXECUTOR OF THE ESTATE OF NORELL v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-2092. *ABISLAIMAN v. FLORIDA.* Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 437 So. 2d 181.

No. 83-2093. *E. R. SQUIBB & SONS, INC. v. ABEL ET AL.* Sup. Ct. Mich. Certiorari denied. Reported below: 418 Mich. 311, 343 N. W. 2d 164.

No. 83-2095. *LANDMARK BEEF PROCESSORS, INC., ET AL. v. BLOCK, SECRETARY OF AGRICULTURE.* C. A. 9th Cir. Certiorari denied.

No. 83-2096. *CRANK v. TEXAS STATE BOARD OF DENTAL EXAMINERS.* Sup. Ct. Tex. Certiorari denied. Reported below: 666 S. W. 2d 91.

No. 83-2099. *ASSOCIATED DRY GOODS CORP. v. COMMISSIONER OF REVENUE OF MINNESOTA.* Sup. Ct. Minn. Certiorari denied. Reported below: 347 N. W. 2d 36.

No. 83-2100. *WIRE CLOTH ENTERPRISES, INC. v. REED, SMITH, SHAW & MCCLAY.* C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 9.

No. 83-2105. *GREEN CORP. ET AL. v. LOCAL UNION 59, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO.* C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 264.

No. 83-2107. *MADRID v. LAWYERS TITLE INSURANCE CORP. ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 1197.

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No. 83-2108. *CRISTALL v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CRISTALL, REAL PARTY IN INTEREST)*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-2109. *DOMINEY v. ATCHISON, TOPEKA & SANTA FE RAILWAY CO.* C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1457.

No. 83-2110. *CLARKSDALE BAPTIST CHURCH v. GREEN ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 235 U. S. App. D. C. 293, 731 F. 2d 995.

No. 83-2111. *VICORY v. WALTON, SHERIFF OF BUTLER COUNTY, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 721 F. 2d 1062 and 730 F. 2d 466.

No. 83-2113. *MINTER v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: 668 S. W. 2d 414.

No. 83-2115. *UNITED PARCEL SERVICE, INC. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 3d Cir. Certiorari denied.

No. 83-2116. *SCHRAM, PERSONAL REPRESENTATIVE OF THE ESTATE OF GAYDOS, ET AL. v. DADE COUNTY*. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 445 So. 2d 1080.

No. 83-2118. *VICKROY v. ROCKWELL INTERNATIONAL CORP. ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 772.

No. 83-2119. *CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE v. KASSEL ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1139.

No. 83-2121. *HUGHES v. UNITED STATES POSTAL SERVICE*. C. A. 4th Cir. Certiorari denied. Reported below: 730 F. 2d 967.

No. 83-2122. *STEWART ET AL. v. NATIONAL SHOPMEN PENSION FUND ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 235 U. S. App. D. C. 122, 730 F. 2d 1552.

No. 83-2123. *ROCHON v. WOLTER ET AL.* Ct. App. La., 4th Cir. Certiorari denied.

No. 83-2127. *AVILES-PEREZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

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No. 83-2128. RAYTHEON CO. *v.* ROPER CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 724 F. 2d 951.

No. 83-2133. J & S CONSTRUCTION CO., INC. *v.* HOME INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 683.

No. 83-2135. CANADIAN TRANSPORT CO. ET AL. *v.* HERCULES CARRIERS, INC., AS OWNER OF THE M/V SUMMIT VENTURE. C. A. 11th Cir. Certiorari denied. Reported below: 728 F. 2d 1359.

No. 83-2137. CHEMICAL REALTY CORP. *v.* HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF HOLLYWOOD. Ct. App. N. C. Certiorari denied. Reported below: 65 N. C. App. 242, 310 S. E. 2d 33.

No. 83-2141. SANCHEZ-MARQUEZ *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 61.

No. 83-2142. KAPLAN *v.* RUGGIERI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1436.

No. 83-2147. ROGERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 557.

No. 83-2150. BULK OIL (ZUG) A. G. *v.* SUN CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1431.

No. 83-2151. SKILLERN *v.* BOLGER, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 1121.

No. 83-2152. MANSO ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 449 So. 2d 480.

No. 83-2153. UNION COMMERCE BANK *v.* DEFFET RENTALS, INC., ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 83-2154. KOZIY, AKA KOSIJ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 728 F. 2d 1314.

No. 83-2155. LEAVITT *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: 17 Mass. App. 585, 460 N. E. 2d 1060.

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No. 83-2156. *PLOTNICK v. OHIO*. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 83-2158. *DEVINES ET AL. v. MAIER ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 876.

No. 83-2159. *SONOMA VINEYARDS, INC. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 9th Cir. Certiorari denied. Reported below: 727 F. 2d 860.

No. 83-2167. *NASSER v. FEDERAL HOME LOAN BANK BOARD*. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 1437.

No. 83-5987. *HOLMES ET AL. v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 717 F. 2d 1090.

No. 83-6224. *BATES v. GARRISON, WARDEN*. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 914.

No. 83-6286. *GRAVES v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-6402. *SHARMA v. DEPARTMENT OF LAND AND NATURAL RESOURCES OF HAWAII*. Sup. Ct. Haw. Certiorari denied. Reported below: 66 Haw. 632, 673 P. 2d 1030.

No. 83-6443. *HOLMES v. SLATE ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 974.

No. 83-6449. *BROWN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 977.

No. 83-6455. *MURLEY ET AL. v. HARKIN ET AL.* C. A. 10th Cir. Certiorari denied.

No. 83-6458. *DEVORE v. KENTUCKY*. Sup. Ct. Ky. Certiorari denied. Reported below: 662 S. W. 2d 829.

No. 83-6487. *FOSKEY ET AL. v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 717 F. 2d 1400.

No. 83-6496. *MILBY v. HAMM ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1092.

No. 83-6501. *CLEMENTS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 728 F. 2d 654.

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No. 83-6504. *LOWERY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 474.

No. 83-6506. *NOLL v. WISCONSIN*. Sup. Ct. Wis. Certiorari denied. Reported below: 116 Wis. 2d 443, 343 N. W. 2d 391.

No. 83-6518. *VANOTTI v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 685.

No. 83-6524. *WATTERS v. HUBBARD, SUPERINTENDENT, LIMA STATE HOSPITAL*. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 381.

No. 83-6528. *BELLO v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 721 F. 2d 476.

No. 83-6543. *RUSSELL ET AL. v. FLANNERY, UNITED STATES DISTRICT JUDGE, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 726 F. 2d 1007.

No. 83-6547. *TIEMENS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 928.

No. 83-6552. *CAMPANALE v. HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY*. C. A. 2d Cir. Certiorari denied. Reported below: 724 F. 2d 276.

No. 83-6565. *LOPEZ-MARTINEZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 471.

No. 83-6574. *MESTERINO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 83-6581. *BRYAN v. U. S. OFFICE OF PERSONNEL MANAGEMENT ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 149.

No. 83-6595. *DEANGELIS v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 728 F. 2d 107.

No. 83-6596. *KIMBERLIN v. LIPPMAN ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1113.

No. 83-6616. *TORRES v. CITY OF MIAMI ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 405.

No. 83-6644. *MCKINLAY v. CALIFORNIA*. App. Dept., Super. Ct. Cal., San Diego County. Certiorari denied.

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No. 83-6647. *ROSA-NORZAGARAY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 770.

No. 83-6654. *ORMSBY v. HEITKAMP, TRUSTEE OF THE ESTATE OF MICO INTERESTS, INC., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 680.

No. 83-6656. *BLEDSON v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1094.

No. 83-6661. *ASHLEY v. TV NETWORKS ET AL.* C. A. 4th Cir. Certiorari denied.

No. 83-6665. *BAUGUSS v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied. Reported below: 310 N. C. 259, 311 S. E. 2d 248.

No. 83-6671. *MCCLURKIN v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 472 A. 2d 1348.

No. 83-6672. *MCCLINNAHAN v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 83-6675. *ANTONELLI v. HEIN ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 687.

No. 83-6679. *BOJORQUEZ-VILLAGRANA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 724 F. 2d 842.

No. 83-6680. *BASHOR v. RISLEY, WARDEN, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 1228.

No. 83-6683. *PERRY v. RUSHEN, CHAIRPERSON, CORRECTIONAL INDUSTRIES COMMISSION, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 713 F. 2d 1447.

No. 83-6688. *HUNTER v. NEW MEXICO*. Sup. Ct. N. M. Certiorari denied. Reported below: 101 N. M. 5, 677 P. 2d 618.

No. 83-6689. *DULA v. TEXAS*. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied.

No. 83-6693. *TYLER v. WYRICK, WARDEN*. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1209.

No. 83-6695. *CRICK v. SMITH, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1038.

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No. 83-6696. *LARNER v. MARTIN CIRCUIT COURT ET AL.* Sup. Ct. Ind. Certiorari denied. Reported below: 456 N. E. 2d 395.

No. 83-6698. *GANT v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied.

No. 83-6702. *HINSON v. NORTH CAROLINA.* Sup. Ct. N. C. Certiorari denied. Reported below: 310 N. C. 245, 311 S. E. 2d 256.

No. 83-6706. *DIDIER v. FLYNN.* Sup. Ct. Tenn. Certiorari denied.

No. 83-6709. *MCCOWN v. CALLAHAN, ASSOCIATE COMMISSIONER OF FIELD SERVICES, MASSACHUSETTS DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 726 F. 2d 1.

No. 83-6712. *PATTERSON v. UNITED STATES;*

No. 83-6905. *SHINE v. UNITED STATES;* and

No. 83-6945. *VAN BRANDY v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 548.

No. 83-6714. *BROCK v. RYAN.* C. A. 3d Cir. Certiorari denied.

No. 83-6716. *CORLEY v. UNITED STATES.* Ct. App. D. C. Certiorari denied.

No. 83-6717. *JONES v. PARKE, WARDEN, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1461.

No. 83-6718. *DRAPER v. DEPARTMENT OF CORRECTIONS OF VIRGINIA ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1452.

No. 83-6722. *LYON ET AL. v. FARRIER ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 727 F. 2d 766.

No. 83-6723. *SNOWADZKI v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 1427.

No. 83-6727. *DILTS v. CALIFORNIA.* Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-6733. *KENNEDY v. OKLAHOMA.* Ct. Crim. App. Okla. Certiorari denied.

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No. 83-6738. *WILSON v. NEW YORK*. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 999, 470 N. Y. S. 2d 265.

No. 83-6741. *DOTSON v. PUBLIC UTILITIES COMMISSION ET AL.* Sup. Ct. Cal. Certiorari denied.

No. 83-6742. *CASTRO v. FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF BANCO CREDITO Y AHORRA PONCENO, ET AL.* C. A. 1st Cir. Certiorari denied.

No. 83-6749. *NELSON v. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY.* C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 141.

No. 83-6751. *ANTONELLI v. DOYLE ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1464.

No. 83-6752. *HOSKINS v. ILLINOIS.* Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 209, 461 N. E. 2d 941.

No. 83-6753. *HUMBLES v. LOUISIANA, THROUGH THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES, DIVISION OF SUBSTANCE ABUSE.* C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 751.

No. 83-6755. *OLIVER v. ROCKWELL.* C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 7.

No. 83-6756. *PORTER v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-6761. *MOORE ET AL. v. SMITH, ATTORNEY GENERAL, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1465.

No. 83-6765. *BACON v. DEROBERTIS, WARDEN.* C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 874.

No. 83-6767. *LOWE v. MASSACHUSETTS.* Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 391 Mass. 97, 461 N. E. 2d 192.

No. 83-6770. *HARRIS v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 401.

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No. 83-6771. *WILLIAMS v. DUCKWORTH, WARDEN, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 1439.

No. 83-6772. *WALTMAN v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 751.

No. 83-6773. *TORRES v. UNITED STATES.* C. A. 1st Cir. Certiorari denied. Reported below: 726 F. 2d 852.

No. 83-6776. *PRICE v. MAGGIO, WARDEN.* C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1457.

No. 83-6777. *RONSON v. COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1446.

No. 83-6778. *THOMAS v. GERBER PRODUCTIONS ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 83-6779. *SPRADLEY v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS.* C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6780. *KING v. SMITH, ATTORNEY GENERAL, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 6.

No. 83-6781. *SMITH v. SOUTH DAKOTA.* Sup. Ct. S. D. Certiorari denied. Reported below: 344 N. W. 2d 505.

No. 83-6782. *MOORE v. KEMP, WARDEN.* C. A. 11th Cir. Certiorari denied.

No. 83-6783. *SMITH, AKA STEPHENS v. STEPHENS ET AL.* Ct. App. La., 3d Cir. Certiorari denied. Reported below: 443 So. 2d 11.

No. 83-6784. *MILLER v. SOLEM, WARDEN, ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1020.

No. 83-6785. *LAWTON v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1466.

No. 83-6787. *SCHAPPE v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 165.

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No. 83-6789. *WALKER v. BROWN & ROOT, INC.* C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1115.

No. 83-6790. *HURD v. HURD ET AL.* Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-6791. *RANDALL v. FITZMORRIS ET AL.* Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-6796. *LOE v. UNITED STATES PAROLE COMMISSION ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1448.

No. 83-6799. *DIMINNIE v. UNITED STATES ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 728 F. 2d 301.

No. 83-6804. *BATHGATE v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 83-6805. *HEIRENS v. MIZELL, WARDEN, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 449.

No. 83-6810. *NASSER v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 143.

No. 83-6812. *WALBORN v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 192.

No. 83-6817. *KOZERSKI v. UNITED STATES.* C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 952.

No. 83-6818. *COSTANTINI v. AMERICAN EXPRESS Co., INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 764.

No. 83-6819. *COLE v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1114.

No. 83-6820. *GRAHAM v. SOLEM, WARDEN, ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1533.

No. 83-6821. *SPURLOCK v. OHIO.* Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 83-6822. *WRIGHT ET AL. v. LONDON GROVE TOWNSHIP.* C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1450.

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No. 83-6823. *MOHR v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1132.

No. 83-6825. *WILSON ET AL. v. COLORADO*. Ct. App. Colo. Certiorari denied. Reported below: 678 P. 2d 1024.

No. 83-6826. *ADORNATO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1467.

No. 83-6827. *WESSON v. COUGHLIN*. C. A. 2d Cir. Certiorari denied.

No. 83-6831. *DURANT v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1180.

No. 83-6834. *ELYSEE v. CITY OF CHICAGO*. C. A. 7th Cir. Certiorari denied.

No. 83-6835. *IRWIN v. FOLTZ, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1461.

No. 83-6836. *WRIGHT v. BARAN ET AL.* C. A. 7th Cir. Certiorari denied.

No. 83-6837. *OLIVER v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 83-6841. *CAMARILLO v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1107.

No. 83-6843. *REID v. ATTORNEY GRIEVANCE COMMISSION*. Sup. Ct. Mich. Certiorari denied. Reported below: 345 N. W. 2d 199.

No. 83-6844. *WILLIAMS ET AL. v. AIR TRANSPORT WORKERS LOCAL 504 ET AL.* C. A. 2d Cir. Certiorari denied.

No. 83-6845. *SMITH v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 152.

No. 83-6847. *CHRISTMAS v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 119 Ill. App. 3d 1161, 471 N. E. 2d 249.

No. 83-6848. *HOLMES v. UNITED STATES*; and

No. 83-6859. *HODGE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 1303.

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No. 83-6850. *DAVID v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 147.

No. 83-6853. *SHAID v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 225.

No. 83-6854. *SAUNDERS v. UNITED STATES POSTAL SERVICE ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1449.

No. 83-6857. *JAMES v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 165.

No. 83-6858. *AGUAYO-CORONA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 83-6860. *DUSTIN v. MASSACHUSETTS ET AL.* Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 391 Mass. 481, 462 N. E. 2d 108.

No. 83-6861. *FERNANDEZ v. WINANS, WARDEN*. C. A. 10th Cir. Certiorari denied.

No. 83-6863. *WILLIAMS v. MAGGIO, WARDEN*. C. A. 5th Cir. Certiorari denied.

No. 83-6867. *THOMAS v. VEASEY*. Ct. App. D. C. Certiorari denied.

No. 83-6869. *WRIGHT v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 728 F. 2d 1459.

No. 83-6871. *HUNT v. VERMONT*. Sup. Ct. Vt. Certiorari denied. Reported below: 145 Vt. 34, 485 A. 2d 109.

No. 83-6872. *JONES v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 903.

No. 83-6873. *BAIG v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-6877. *MERCHANT v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 731 F. 2d 186.

No. 83-6878. *GARRETT v. SUPERINTENDENT, NAPANOCH CORRECTIONAL FACILITY*. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 141.

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No. 83-6879. *FARRIS v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1180.

No. 83-6880. *MAZUREK v. MICHIGAN*. Sup. Ct. Mich. Certiorari denied. Reported below: 419 Mich. 854.

No. 83-6883. *OGLE v. MISSOURI*. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 668 S. W. 2d 138.

No. 83-6888. *OROZCO v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1374.

No. 83-6889. *OROZCO-PRADA v. UNITED STATES*; and

No. 84-224. *FORAND v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 1076.

No. 83-6890. *JONES v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 161.

No. 83-6892. *LIPSCOMB v. WOLVERINE TRUCK PLAZA, INC., ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 15.

No. 83-6896. *GOMETZ v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 730 F. 2d 475.

No. 83-6901. *FLETCHER v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 731 F. 2d 581.

No. 83-6902. *TERRY v. ENOMOTO*. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 697.

No. 83-6907. *TILLIE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 729 F. 2d 615.

No. 83-6909. *MOORE v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 974.

No. 83-6910. *FAISON v. FLORIDA ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 889.

No. 83-6913. *BELLAMY v. BRADLEY ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 416.

No. 83-6914. *LANDES v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 887.

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No. 83-6915. *BEAM v. ALABAMA*. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6916. *JOHNSON v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 5th Cir. Certiorari denied.

No. 83-6923. *BELGARDE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 163.

No. 83-6924. *EMMONS v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 453.

No. 83-6926. *CARR v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-6927. *CYNTJE v. DAILY NEWS PUBLISHING CO., INC., ET AL.* C. A. 3d Cir. Certiorari denied.

No. 83-6928. *HILL ET AL. v. DURIRON CO.* C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1109.

No. 83-6930. *THOMAS v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 120.

No. 83-6931. *PARSONS v. COUNTY OF DEL NORTE ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 2d 1234.

No. 83-6932. *MONROE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6933. *SMITH v. LINAHAN, SUPERINTENDENT, JACK P. RUTLEDGE CORRECTIONAL INSTITUTE*. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6936. *GRAVES v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 472 A. 2d 395.

No. 83-6937. *HICKERSON v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 611.

No. 83-6938. *BROADWAY v. CARLSON, DIRECTOR, BUREAU OF PRISONS, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 83-6939. *BROWN v. FLURE ET AL.* C. A. 11th Cir. Certiorari denied.

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No. 83-6940. *LANIGAN v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 8.

No. 83-6941. *FIOROT v. OKLAHOMA*. Ct. Crim. App. Okla. Certiorari denied.

No. 83-6942. *DEASY v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied.

No. 83-6944. *WILSON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 942.

No. 83-6947. *NOVEL v. PICARIELLO ET AL.* C. A. 2d Cir. Certiorari denied.

No. 83-6948. *TATE v. WEYERHAEUSER CO. ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 723 F. 2d 598.

No. 83-6949. *MATTHOW v. BARA, SUPERINTENDENT, LONG ISLAND CORRECTIONAL FACILITY*. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 1002, 470 N. Y. S. 2d 269.

No. 83-6950. *MAY v. KROGER CO. ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 155.

No. 83-6955. *DUBIE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 16.

No. 83-6956. *HOYOS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 942.

No. 83-6957. *FORRESTER v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 444.

No. 83-6958. *KORNBLUM v. MILLSTONE ET AL.* C. A. 9th Cir. Certiorari denied.

No. 83-6959. *BORNING v. LOUISIANA*. Sup. Ct. La. Certiorari denied. Reported below: 445 So. 2d 1227.

No. 83-6960. *HARRIS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 83-6961. *EVERETT v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 627.

No. 83-6963. *ORSINI v. ARKANSAS*. Sup. Ct. Ark. Certiorari denied. Reported below: 281 Ark. 348, 665 S. W. 2d 245.

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No. 83-6967. *RABB v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1445.

No. 83-6968. *ROOT v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 83-6969. *NORFLEET v. HOLLADAY-TYLER PRINTING CORP.* C. A. D. C. Cir. Certiorari denied. Reported below: 235 U. S. App. D. C. 294, 731 F. 2d 996.

No. 83-6970. *BROOME ET AL. v. UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 687.

No. 83-6971. *DYSON v. SMITH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.* C. A. 5th Cir. Certiorari denied.

No. 83-6972. *SHABAZZ v. FRAZIER, WARDEN, ET AL.* C. A. 10th Cir. Certiorari denied.

No. 83-6973. *RESTAINO v. OFFICE OF THE CLERK OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1435.

No. 83-6974. *ROY v. LEAVITT ET AL.* Sup. Ct. N. H. Certiorari denied.

No. 83-6975. *GOETZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 771.

No. 83-6977. *KENNEDY v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 83-6978. *BURROWS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 729 F. 2d 615.

No. 83-6979. *FLOWERS v. WYRICK, WARDEN, ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 659.

No. 83-6980. *BROADWAY v. CARLSON, DIRECTOR, BUREAU OF PRISONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 83-6982. *FAULKNER v. LOUISIANA*. Sup. Ct. La. Certiorari denied. Reported below: 449 So. 2d 1345.

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No. 83-6983. *BATES v. UNITED AIR LINES, INC., ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1465.

No. 83-6984. *SHAW v. CITY OF ST. LOUIS, MISSOURI, ET AL.* Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 664 S. W. 2d 572.

No. 83-6985. *LEFTRIDGE v. CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY.* C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 83-6986. *WILLIAMS v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 22.

No. 83-6987. *MARQUEZ v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied.

No. 83-6988. *PETWAY v. UNITED STATES PAROLE COMMISSION ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 676.

No. 83-6992. *KLETT v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 165.

No. 83-6993. *HENDERSON v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 903.

No. 83-6995. *EVERETT, BY HIS GUARDIAN AD LITEM, WARNER v. EVERETT ET AL.* Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 150 Cal. App. 3d 1053, 201 Cal. Rptr. 351.

No. 83-6998. *BOLES v. GUILFORD TECHNICAL INSTITUTE.* C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 149.

No. 83-6999. *NICKENS v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES.* C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 155.

No. 83-7000. *JACKSON v. WYRICK, WARDEN.* C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1177.

No. 83-7001. *COVINO v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1467.

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No. 83-7002. *POLIN ET UX. v. JEWS FOR JESUS ET AL.* Sup. Ct. Okla. Certiorari denied. Reported below: 675 P. 2d 1013.

No. 83-7004. *WEBER v. ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION.* C. A. 7th Cir. Certiorari denied. Reported below: 730 F. 2d 499.

No. 83-7005. *SYKES v. BALILES, ATTORNEY GENERAL OF VIRGINIA.* C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 83-7007. *IACIOFANO v. UNITED STATES.* C. A. 1st Cir. Certiorari denied. Reported below: 734 F. 2d 87.

No. 83-7011. *BEAZLEY v. STATE BAR OF GEORGIA.* C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 913.

No. 83-7012. *ESTRADA v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 683.

No. 83-7015. *TORNERO v. UNITED STATES.* Ct. App. D. C. Certiorari denied.

No. 83-7016. *LANDES v. SMITH, ATTORNEY GENERAL, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1349.

No. 83-7018. *RAKOSI v. COMMISSIONER OF INTERNAL REVENUE.* C. A. 9th Cir. Certiorari denied.

No. 83-7020. *SCHRODER v. CITY OF NEW YORK ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1437.

No. 83-7022. *MOFFITT v. ARIZONA.* Ct. App. Ariz. Certiorari denied.

No. 83-7023. *BUTLER v. MISSISSIPPI.* Cir. Ct. Miss., Neshoba County. Certiorari denied.

No. 83-7026. *NAYLOR v. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 727 F. 2d 1103.

No. 83-7030. *COOPER v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 83-7031. *HUMPHREY v. UNITED STATES.* C. A. 7th Cir. Certiorari denied.

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No. 83-7033. *MONROE v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 8.

No. 83-7035. *BEATTY ET AL. v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 56 Md. App. 627, 468 A. 2d 663.

No. 83-7036. *SMALLS v. LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS*. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1454.

No. 83-7037. *MONROE v. TARBUCK ET AL.* C. A. 11th Cir. Certiorari denied.

No. 83-7038. *WILSON v. GRIFFIN*. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1365.

No. 83-7040. *LEWIS v. DEROBERTIS, WARDEN, ET AL.* C. A. 7th Cir. Certiorari denied.

No. 83-7042. *DAVIDSON v. LUTHER, WARDEN*. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1366.

No. 83-7043. *QUALLS v. TULLAHOMA CONCRETE PIPE CO.* C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1110.

No. 83-7045. *SMITH v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied.

No. 83-7046. *ROGERS v. BRUNTRAGER ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 444.

No. 83-7049. *JOHNSON v. PENNSYLVANIA*. Super. Ct. Pa. Certiorari denied. Reported below: 323 Pa. Super. 597, 470 A. 2d 1030.

No. 83-7050. *GIBBS v. PHELPS ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1106.

No. 84-1. *ROHM & HAAS CO. v. CRYSTAL CHEMICAL CO. ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: 722 F. 2d 1556.

No. 84-2. *GARLOCK INC. v. W. L. GORE & ASSOCIATES, INC.* C. A. Fed. Cir. Certiorari denied. Reported below: 721 F. 2d 1540.

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No. 84-5. *GOLDSTEIN v. KELLEHER ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 728 F. 2d 32.

No. 84-11. *STROOM v. CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 84-12. *COLEMAN v. NEW YORK.* App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 95 App. Div. 2d 984, 464 N. Y. S. 2d 613.

No. 84-13. *ROBERTSON v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 778.

No. 84-14. *BOARD OF TRUSTEES OF THE ALLEN CHAPEL A. M. E. CHURCH ET AL. v. GROGANS ET AL.* Ct. App. Ohio, Fairfield County. Certiorari denied.

No. 84-19. *MCDONALD ET AL. v. BURROWS, SHERIFF OF WICHITA COUNTY, TEXAS, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 294.

No. 84-20. *DYKE, DBA WESTERN STATIONS CO., ET AL. v. GULF OIL CORP.* Temp. Emerg. Ct. App. Certiorari denied. Reported below: 734 F. 2d 797.

No. 84-22. *CIOLI v. FLORIDA.* Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 449 So. 2d 416.

No. 84-23. *PETRALIA v. NEW YORK.* Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 47, 464 N. E. 2d 424.

No. 84-24. *SIERRA, AKA MERLANO v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1055.

No. 84-26. *KRAFT ET AL. v. COMMISSIONER OF INTERNAL REVENUE.* C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 496.

No. 84-27. *SIDNEY v. JAMES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 691.

No. 84-29. *NYSA-ILA VACATION AND HOLIDAY FUND ET AL. v. WATERFRONT COMMISSION OF NEW YORK HARBOR.* C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 292.

No. 84-31. *MELODY ET UX. v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 159.

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No. 84-32. GOOLSBY *v.* NORFOLK & WESTERN RAILWAY CO. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 150.

No. 84-33. MANNING, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES OF CONNECTICUT *v.* NELSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 2d 105.

No. 84-34. BARGER ET AL. *v.* PLAYBOY ENTERPRISES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 163.

No. 84-36. COCHRAN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 2d 168.

No. 84-42. MASINEXPORTIMPORT ET AL. *v.* S & S MACHINERY CO. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1440.

No. 84-44. SAGONA *v.* AVCO FINANCIAL SERVICES OF LOUISIANA, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1107.

No. 84-45. MOE ET AL. *v.* AVIONS MARCEL DASSAULT-BREGUET AVIATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 727 F. 2d 917.

No. 84-46. TYSON *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1029.

No. 84-51. FLAV-O-RICH, INC. *v.* NORTH CAROLINA MILK COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 11.

No. 84-52. JARRELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1366.

No. 84-53. UNIVERSITY OF NEW MEXICO ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 731 F. 2d 703.

No. 84-54. HIBBS ET UX. *v.* JEEP CORP. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 666 S. W. 2d 792.

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No. 84-57. *DEGREGORIO v. WEAVER, ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION*. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 20.

No. 84-58. *KANSAS CITY SOUTHERN RAILWAY Co. v. CHAFFIN*. Ct. App. Tex., 6th Sup. Jud. Dist. Certiorari denied. Reported below: 658 S. W. 2d 186.

No. 84-59. *CLEVELAND-CLIFFS STEAMSHIP CO. ET AL. v. KRENZLER, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO*. C. A. 6th Cir. Certiorari denied.

No. 84-61. *BOONE v. MASS TRANSIT ADMINISTRATION*. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 149.

No. 84-65. *AMERICAN BEARING CO., INC. v. LITTON INDUSTRIES, INC.* C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 943.

No. 84-69. *TRAYLOR ET UX. v. L. B. SMITH, INC.* C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 158.

No. 84-71. *SANDERS v. WASSER, COMMISSIONER OF CORRECTIONS OF NEW YORK, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 419.

No. 84-73. *ROCKWOOL INDUSTRIES, INC. v. BLACK GOLD, LTD.* C. A. 10th Cir. Certiorari denied. Reported below: 729 F. 2d 676 and 732 F. 2d 779.

No. 84-75. *WILBUR v. SOUTHERN GALVANIZING CO.* C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 12.

No. 84-77. *TURNER v. VIRGINIA ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 84-79. *KANSAS CITY SOUTHERN RAILWAY Co. v. DUBOSE*. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1026.

No. 84-80. *HANZLIK v. PAUSTIAN*. Sup. Ct. Neb. Certiorari denied. Reported below: 216 Neb. 575, 344 N. W. 2d 649.

No. 84-84. *CRANE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS OF CRANE v. CONSOLI-*

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DATED RAIL CORPORATION. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 2d 1042.

No. 84-88. MOTELES *v.* UNIVERSITY OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 730 F. 2d 913.

No. 84-90. HARGRAVE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 195.

No. 84-91. SINGMAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 1448.

No. 84-94. YACHTS AMERICA, INC., ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 84-96. INLAND MARINE INDUSTRIES ET AL. *v.* HOUSTON. C. A. 9th Cir. Certiorari denied. Reported below: 729 F. 2d 1229.

No. 84-102. CATINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 718.

No. 84-103. ABBEY NURSING HOME, INC., ET AL. *v.* ESTATE OF RICHARDSON (BENTLEY, ADMINISTRATRIX). Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84-107. SANCHEZ-COLON *v.* MARSH, SECRETARY OF THE ARMY. C. A. 10th Cir. Certiorari denied. Reported below: 733 F. 2d 78.

No. 84-108. COLORADO *v.* CORR. Sup. Ct. Colo. Certiorari denied. Reported below: 682 P. 2d 20.

No. 84-110. TEXACO, INC., ET AL. *v.* NESMITH. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 497.

No. 84-111. BUTTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1514.

No. 84-117. ROSANO *v.* SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1372.

No. 84-118. BROOME ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 363.

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No. 84-119. *MOORE v. TEXAS*. Ct. App. Tex., 7th Sup. Jud. Dist. Certiorari denied. Reported below: 677 S. W. 2d 550.

No. 84-121. *IN RE SEKEREZ*. Sup. Ct. Ind. Certiorari denied. Reported below: 458 N. E. 2d 229.

No. 84-122. *OHIO v. CHATTON*. Sup. Ct. Ohio. Certiorari denied. Reported below: 11 Ohio St. 3d 59, 463 N. E. 2d 1237.

No. 84-123. *MARQUER ET AL. v. LOUISIANA*. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 446 So. 2d 1258.

No. 84-124. *WASHINGTON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 253.

No. 84-125. *RHOADES ET AL. v. ACLI GOVERNMENT SECURITIES, INC.* C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 141.

No. 84-128. *BERGLUND v. SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1442.

No. 84-130. *BOLAR PHARMACEUTICAL CO., INC. v. ROCHE PRODUCTS, INC.* C. A. Fed. Cir. Certiorari denied. Reported below: 733 F. 2d 858.

No. 84-132. *FRANTA v. FLORIDA*. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 450 So. 2d 495.

No. 84-135. *TWENTIETH CENTURY TRAVEL ADVISORS, INC., DBA TENDER LOVING CARE, ET AL. v. PITCHESS, SHERIFF OF LOS ANGELES COUNTY*. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 770.

No. 84-136. *P. E. P., INC., ET AL. v. MORAN MARITIME ASSOCIATES ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84-144. *COASTAL GEORGIA AUDUBON SOCIETY v. STURDIVANT ET AL.* Super. Ct. Ga., Glynn County. Certiorari denied.

No. 84-146. *HUBBY v. HISTORIC SAVANNAH FOUNDATION, INC., ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

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No. 84-148. *SMALLWOOD v. DECHENE*. Sup. Ct. Va. Certiorari denied. Reported below: 226 Va. 475, 311 S. E. 2d 749.

No. 84-149. *RIGGS ET AL. v. KENTUCKY ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 262.

No. 84-151. *JOHNSON ET VIR v. ELI LILLY & CO.* C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 422.

No. 84-153. *PEADEN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1493.

No. 84-154. *CALDER v. CRALL ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 598.

No. 84-155. *SHELTON v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 2d 1397.

No. 84-157. *BEER v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 6th Cir. Certiorari denied. Reported below: 733 F. 2d 435.

No. 84-159. *JOHNSON v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 20.

No. 84-161. *IRWIN ET AL. v. HAYES*. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1466.

No. 84-163. *LISTER v. UNITED STATES*; and

No. 84-174. *HILL v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 683.

No. 84-164. *COLLIER, DBA OZARK TROUT FARM v. CITY OF SPRINGDALE ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 733 F. 2d 1311.

No. 84-171. *KRAMER v. MITCHELL ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 953.

No. 84-172. *HETZEL v. BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY OF WISCONSIN*. Sup. Ct. Wis. Certiorari denied. Reported below: 118 Wis. 2d 257, 346 N. W. 2d 782.

No. 84-173. *COMPUTERVISION CORP. v. PERKIN-ELMER CORP.* C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 2d 888.

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No. 84-175. *SCHREIBER v. GENCORP, INC., ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 726 F. 2d 1075.

No. 84-178. *TECHNICAL DEVELOPMENT CORP. v. BECKMAN INSTRUMENTS, INC.* C. A. 7th Cir. Certiorari denied. Reported below: 730 F. 2d 1076.

No. 84-179. *SCHREIBMAN v. O'DONNELL, TRUSTEE.* C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1454.

No. 84-180. *RENWICK v. NEWS & OBSERVER PUBLISHING CO., DBA THE RALEIGH TIMES, ET AL.* Sup. Ct. N. C. Certiorari denied. Reported below: 310 N. C. 312, 312 S. E. 2d 405.

No. 84-182. *FEIN, PERSONAL REPRESENTATIVE OF THE ESTATE OF FEIN v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1211.

No. 84-183. *SMITH v. ALASKA DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT, DIVISION OF OCCUPATIONAL LICENSING.* Sup. Ct. Alaska. Certiorari denied.

No. 84-189. *ERON v. CITY OF MEQUON ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1366.

No. 84-190. *WINDJAMMER "BAREFOOT" CRUISES, LTD. v. KUNTZ, ADMINISTRATOR OF THE ESTATE OF KUNTZ.* C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 423.

No. 84-191. *EISENBERG v. SCHWALBE.* Ct. App. Wis. Certiorari denied. Reported below: 115 Wis. 2d 699, 341 N. W. 2d 418.

No. 84-199. *BROWN ET AL. v. GENERAL ELECTRIC CO. ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 733 F. 2d 1085.

No. 84-200. *WEATHERS v. ILLINOIS.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 122 Ill. App. 3d 1159, 475 N. E. 2d 299.

No. 84-202. *STORM v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 101.

No. 84-206. *BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS v. PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS,*

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INC. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 391 Mass. 709, 464 N. E. 2d 55.

No. 84-207. PASCUA YAQUI HOUSING AUTHORITY *v.* SUPERIOR COURT OF ARIZONA, COUNTY OF PIMA (TBI GENERAL CONTRACTORS, LTD., ET AL., REAL PARTIES IN INTEREST). Ct. App. Ariz. Certiorari denied.

No. 84-209. HUFFMAN *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 459 N. E. 2d 769.

No. 84-211. EHM *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. D. C. Cir. Certiorari denied. Reported below: 235 U. S. App. D. C. 293, 731 F. 2d 995.

No. 84-213. BURNETT *v.* MUNICIPALITY OF ANCHORAGE. Ct. App. Alaska. Certiorari denied. Reported below: 678 P. 2d 1364.

No. 84-214. RUGGIERO *v.* TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 773, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 7.

No. 84-216. BOARD OF TRUSTEES, MIAMI TOWNSHIP *v.* CITY OF MIAMISBURG, OHIO, ET AL. Ct. App. Ohio, Montgomery County. Certiorari denied. Reported below: 14 Ohio App. 3d 155, 470 N. E. 2d 183.

No. 84-226. LEVINE, ADMINISTRATOR OF THE ESTATE OF LEVINE *v.* BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 99 App. Div. 2d 688, 471 N. Y. S. 2d 730.

No. 84-227. OLIVARES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 1360.

No. 84-230. CHAPMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 955.

No. 84-5002. WILLIS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84-5003. MARTIN-TRIGONA *v.* BELFORD, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 170.

No. 84-5005. GUZMAN *v.* KERR. C. A. 7th Cir. Certiorari denied.

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No. 84-5006. *YANG v. CALIFORNIA*. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84-5009. *ANDERSON v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 84-5010. *NOE v. NEAVES, WARDEN, ET AL.* C. A. 5th Cir. Certiorari denied.

No. 84-5011. *VANCE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1365.

No. 84-5012. *YOUNG v. MISSISSIPPI*. Sup. Ct. Miss. Certiorari denied. Reported below: 451 So. 2d 208.

No. 84-5014. *SIMPSON v. NEW YORK*. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 97 App. Div. 2d 683, 468 N. Y. S. 2d 290.

No. 84-5015. *ICE v. KENTUCKY*. Sup. Ct. Ky. Certiorari denied. Reported below: 667 S. W. 2d 671.

No. 84-5016. *CASTRO v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 84-5017. *EFTHEMES v. HARANZO ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1452.

No. 84-5020. *STOKES v. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION*. C. A. 1st Cir. Certiorari denied.

No. 84-5022. *BIRDEN v. CONAN ET AL.* C. A. 2d Cir. Certiorari denied.

No. 84-5028. *MOORE v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 151.

No. 84-5030. *SLADEK v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1367.

No. 84-5031. *IUTERI v. CONNECTICUT*. Super. Ct. Conn., New Haven Jud. Dist. Certiorari denied.

No. 84-5032. *RUMPH v. HUDSON*. C. A. 5th Cir. Certiorari denied.

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No. 84-5034. SMITH ET AL. *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 445.

No. 84-5037. CRAWFORD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 2d 168.

No. 84-5038. GORMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 683.

No. 84-5039. CALLAHAN *v.* TEXACO, INC. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 750.

No. 84-5040. JOBSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 771.

No. 84-5042. GARRA *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 454.

No. 84-5043. LACY *v.* GABRIEL, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied. Reported below: 732 F. 2d 7.

No. 84-5046. INGRAM *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1, 463 N. E. 2d 760.

No. 84-5047. OAKES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 739 F. 2d 1050.

No. 84-5048. WILLIAMSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 84-5050. ARCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 354.

No. 84-5053. SIMMONS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 392 Mass. 45, 466 N. E. 2d 85.

No. 84-5055. RABAUIMAN *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1371.

No. 84-5056. DAHL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 2d 1284.

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No. 84-5058. *DOCKERY v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 736 F. 2d 1232.

No. 84-5061. *CALDWELL v. A. H. ROBINS CO.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1347.

No. 84-5062. *GUMZ ET AL. v. PIONEER NURSING HOME ET AL.* C. A. 8th Cir. Certiorari denied.

No. 84-5065. *WHEELER v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1462.

No. 84-5066. *MURPHY v. G. A. F. CORP. ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1433.

No. 84-5068. *TRUGLIO v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 731 F. 2d 1123.

No. 84-5069. *OURFALIAN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 165.

No. 84-5071. *KINNELL v. RAYL, DIRECTOR, KANSAS STATE PENITENTIARY, ET AL.* C. A. 10th Cir. Certiorari denied.

No. 84-5072. *ARCHER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 354.

No. 84-5075. *MORTON v. VIRGINIA*. Sup. Ct. Va. Certiorari denied. Reported below: 227 Va. 216, 315 S. E. 2d 224.

No. 84-5076. *SMART v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1374.

No. 84-5078. *ALBERTI, AKA LAMORT v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1055.

No. 84-5080. *McKEE v. AMAF INDUSTRIES, INC.* C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1453.

No. 84-5083. *BEDGOOD v. TURNER, WARDEN*. Ct. Crim. App. Tex. Certiorari denied.

No. 84-5084. *EVANS v. WOOD*. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 11.

No. 84-5086. *KEVAL v. WEINBERGER, SECRETARY OF DEFENSE*. C. A. D. C. Cir. Certiorari denied.

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No. 84-5087. *DINGLE v. SIMPKINS, ADMINISTRATOR OF THE ESTATE OF DINGLE*. Ct. Common Pleas of Richland County, S. C. Certiorari denied.

No. 84-5088. *BIRGES v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 666.

No. 84-5089. *BAIG v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 84-5090. *GATEWOOD v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 733 F. 2d 1390.

No. 84-5091. *GANN v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 718 F. 2d 1502.

No. 84-5094. *BANKHEAD v. WALTERS ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1446.

No. 84-5095. *HARRIS v. DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES*. Ct. App. D. C. Certiorari denied. Reported below: 476 A. 2d 1111.

No. 84-5096. *GROTH v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84-5097. *DOAK v. GARRISON, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1354.

No. 84-5098. *LOBUE v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1477.

No. 84-5099. *BRADY v. SMITH, ATTORNEY GENERAL*. C. A. D. C. Cir. Certiorari denied.

No. 84-5100. *KING v. REED ET AL.* C. A. 7th Cir. Certiorari denied.

No. 84-5101. *COVER v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84-5102. *AGRESTI v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 141.

No. 84-5103. *BAKER v. WILLIAMS*. C. A. 9th Cir. Certiorari denied.

No. 84-5105. *JENKINS v. CALIFORNIA*. Ct. App. Cal., 1st App. Dist. Certiorari denied.

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No. 84-5106. *HUMPHREY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 84-5107. *FUSI v. BROOKLYN CENTER SCHOOL DISTRICT* No. 286. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 443.

No. 84-5111. *STUMP v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 273.

No. 84-5112. *WASHINGTON v. NEW YORK*. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 755, 470 N. Y. S. 2d 332.

No. 84-5113. *CREWS v. PETROSKY, CLERK OF COURTS, WASHINGTON COUNTY, PENNSYLVANIA, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1348.

No. 84-5114. *MARTINEZ ET AL. v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 84-5115. *BURGETT v. OHIO*. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 84-5117. *SMITH v. NEW YORK*. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 99 App. Div. 2d 1032, 472 N. Y. S. 2d 525.

No. 84-5118. *ECHOLS v. MICHIGAN CIVIL RIGHTS COMMISSION ET AL.* Ct. App. Mich. Certiorari denied.

No. 84-5121. *BECKETT v. HOLLAND, WARDEN*. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5122. *TORRES ET AL. v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 733 F. 2d 449.

No. 84-5124. *HARRIS v. REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1461.

No. 84-5127. *FORRESTER v. UNITED STATES AIR FORCE*. C. A. D. C. Cir. Certiorari denied.

No. 84-5128. *FERRARA v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 440.

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No. 84-5130. *SANTANA v. CALIFORNIA*. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-5131. *SMITH v. CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1372.

No. 84-5136. *MOSLEY v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 441.

No. 84-5137. *WORKMAN v. OHIO*. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84-5138. *TEEGARDIN v. SOLEM, WARDEN*. C. A. 8th Cir. Certiorari denied.

No. 84-5139. *CARTER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 84-5140. *MOSLEY v. NORTH CAROLINA ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 431.

No. 84-5141. *HAIR v. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION*. C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 2d 390.

No. 84-5143. *CURRY-LEE v. LEE*. Ct. App. Ind. Certiorari denied. Reported below: 455 N. E. 2d 1179.

No. 84-5144. *HARDAWAY v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 1138.

No. 84-5145. *CAVALLARO v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 84-5146. *JONES v. HOWARD*. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 968.

No. 84-5148. *JOHNSON v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 84-5149. *BETHEA v. SWIGGETT ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1451.

No. 84-5150. *MAVIGLIA, DBA JOE'S SEWER SERVICE v. CENTRAL TELEPHONE CO. ET AL.* Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 815.

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No. 84-5151. *ANKER v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-5152. *BROOKS v. ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE*. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 438.

No. 84-5153. *BYRD v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 151.

No. 84-5155. *LIGHTSEY v. MURPHY, WARDEN, ET AL.* C. A. 10th Cir. Certiorari denied.

No. 84-5156. *WEATHERLY v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 442.

No. 84-5158. *BROWN v. JONES ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1451.

No. 84-5159. *THOMAS v. STRAWN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 770.

No. 84-5160. *SMITH v. SOUTH CAROLINA*. Sup. Ct. S. C. Certiorari denied.

No. 84-5162. *COOPER v. RANDALL ET AL.* C. A. 8th Cir. Certiorari denied.

No. 84-5165. *HOFFMAN v. NEW MEXICO*. Ct. App. N. M. Certiorari denied.

No. 84-5166. *TAYLOR v. ILLINOIS*. Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 508, 463 N. E. 2d 705.

No. 84-5168. *SOSA v. LOUISIANA*. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 446 So. 2d 429.

No. 84-5169. *HARTLEY v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 120 Ill. App. 3d 1163, 471 N. E. 2d 1081.

No. 84-5171. *MCCRARY v. FRANKLIN STATE BANK CORP. ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1350.

No. 84-5172. *VEROST v. BOARD OF EDUCATION OF VILLAGE OF RIDGEWOOD*. Super. Ct. N. J., App. Div. Certiorari denied.

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No. 84-5177. *HAWKS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 84-5181. *TURNER v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 122 Ill. App. 3d 81, 460 N. E. 2d 797.

No. 84-5182. *GROCE v. BOARD OF PRISON TERMS AND PAROLES ET AL.* C. A. 9th Cir. Certiorari denied.

No. 84-5184. *PETWAY v. CARLSON ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5186. *BENSON v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 84-5187. *HAMILTON v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 84-5188. *COVELLI v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 847.

No. 84-5189. *SMITH v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 22.

No. 84-5190. *RUMPH v. WHITE*. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1524.

No. 84-5192. *JOHNSON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 683.

No. 84-5193. *PERRY v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied.

No. 84-5196. *MARTIN-TRIGONA ET AL. v. COAN ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1434.

No. 84-5199. *OTERO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1376.

No. 84-5202. *LANIGAN v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 419.

No. 84-5203. *MCLAINE v. AGNEW ET AL.* Ct. App. D. C. Certiorari denied.

No. 84-5207. *HOYETT v. ALABAMA*. Ct. Crim. App. Ala. Certiorari denied.

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No. 84-5211. *BIGELOW v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 2d 412.

No. 84-5215. *SMITH v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 2d 1103.

No. 84-5216. *HANSON v. SANFORD ET AL.* Sup. Ct. N. D. Certiorari denied. Reported below: 343 N. W. 2d 776.

No. 84-5218. *ODUWOLE v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 955.

No. 84-5223. *FAYMORE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 2d 328.

No. 84-5226. *ANDERSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 84-5233. *HEIRENS v. IRVING, CHAIRMAN, ILLINOIS PRISON REVIEW BOARD, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 159.

No. 84-5234. *LANE v. LACY, WARDEN, ET AL.* C. A. 8th Cir. Certiorari denied.

No. 84-5236. *SMIDDY v. ANDERSON, JUDGE, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 440.

No. 84-5239. *PRICE v. BOOKER, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1357.

No. 84-5242. *FOY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1377.

No. 84-5244. *ATTWELL ET UX. v. U. S. POSTAL SERVICE ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5252. *MARTIN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84-5263. *SIMPSON v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 84-5267. *DENNIS v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 617.

No. 84-5273. *PAYNE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 449.

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No. 84-5278. JORGE-SALON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 789.

No. 84-5279. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 84-5286. DUKES *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 143.

No. 84-5301. PLEASANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 657.

No. 84-5302. WIGGINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 84-5305. TSIRIZOTAKIS, AKA ALASKA *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 736 F. 2d 57.

No. 84-5306. ORJUELA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 419.

No. 84-5313. JORDAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1377.

No. 84-5325. TAPIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 738 F. 2d 18.

No. 84-5328. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 955.

No. 83-1267. POWERS ET AL. *v.* CITY OF HUNTSVILLE. Ct. Crim. App. Ala. Motion of Albertsons, Inc.—Southco Division for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 440 So. 2d 1185.

No. 83-1534. GRAY ET AL. *v.* SHERRILLS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 725 F. 2d 685.

No. 83-1693. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BYRD. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 722 F. 2d 716.

No. 83-1875. SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. *v.* RITTER. C. A. 11th Cir. Motion of

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respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 726 F. 2d 1505.

No. 83-1914. JEFFERSON COUNTY, KENTUCKY, ET AL. *v.* BUCHANAN. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 729 F. 2d 1460.

No. 84-7. LEEKE ET AL. *v.* THOMAS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 725 F. 2d 246.

No. 84-60. BALKCOM, WARDEN *v.* HOUSE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 725 F. 2d 608.

No. 83-1616. FOREMAN ET AL. *v.* COLLINS ET AL. C. A. 2d Cir. Motion of respondent Howard V. Collins for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 729 F. 2d 108.

No. 83-1619. CHEMICAL BANK ET AL. *v.* ASSON ET AL. Sup. Ct. Idaho. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 105 Idaho 432, 670 P. 2d 839.

No. 83-1654. MEHRENS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. JUSTICE BRENNAN would grant certiorari. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 138 Ariz. 458, 675 P. 2d 718.

No. 83-1659. McDONALD ET AL. *v.* JOHNSON & JOHNSON; and No. 84-89. JOHNSON & JOHNSON *v.* McDONALD ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 722 F. 2d 1370.

No. 83-1793. GIVENS ET AL. *v.* UNITED STATES RAILROAD RETIREMENT BOARD. C. A. D. C. Cir. Motion to substitute Estate of Jack C. Givens as party petitioner in place of Jack C. Givens, deceased, granted. Certiorari denied. Reported below: 232 U. S. App. D. C. 21, 720 F. 2d 196.

No. 83-1817. HARKINS ET AL. *v.* INTERSTATE MOTOR FREIGHT SYSTEMS ET AL. C. A. 6th Cir. Motion of respondent

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ents to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 727 F. 2d 1109.

No. 83-1839. RAILROAD DYNAMICS, INC. *v.* A. STUCKI CO. C. A. Fed. Cir. Motion of respondent for damages denied. Certiorari denied. Reported below: 727 F. 2d 1506.

No. 83-1872. SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL. *v.* METROPOLITAN DADE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Motions of Associated General Contractors of America, Inc., and Southeastern Legal Foundation, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 723 F. 2d 846.

No. 83-1879. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD ET AL. *v.* COOPER ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 83-1948. BETHLEHEM STEEL CORP. ET AL. *v.* BOILEAU ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 730 F. 2d 929.

No. 83-6862. MACK *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 725 F. 2d 692.

No. 83-1880. PIHER INTERNATIONAL CORP. ET AL. *v.* CTS CORP. C. A. Fed. Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 727 F. 2d 1550.

No. 83-1904. BACHE & CO. (LEBANON) S. A. L. *v.* TAMARI ET AL. C. A. 7th Cir. Motion of Futures Industry Association, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 730 F. 2d 1103.

No. 83-1912. REED *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner to consolidate this case with No. 83-1590, *Francis v. Franklin* [certiorari granted, 467 U. S. 1225], denied. Certiorari denied. Reported below: 726 F. 2d 570.

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No. 83-1918. *EUBANK v. LEE LUMBER CO., LTD., ET AL.* C. A. 5th Cir. Motion of respondent International Paper Co. for damages denied. Certiorari denied. Reported below: 719 F. 2d 403.

No. 83-1943. *CAVANAUGH v. WESTERN MARYLAND RAILWAY CO. ET AL.* C. A. 4th Cir. Motion of United Transportation Union for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 729 F. 2d 289.

No. 83-1989. *SULLIVAN v. GEORGIA DEPARTMENT OF NATURAL RESOURCES ET AL.* C. A. 11th Cir. Motion of petitioner for leave to proceed as a seaman granted. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 724 F. 2d 1478.

No. 83-1990. *LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, ET AL. v. RANDALL ET AL.* C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 709 F. 2d 257 and 729 F. 2d 966.

No. 83-2001. *PASCHALL ET AL. v. KANSAS CITY STAR CO.* C. A. 8th Cir. Motion of Small Business Legal Defense Committee for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 727 F. 2d 692.

No. 83-2041. *BILLMEYER ET AL. v. TOVAR ET AL.* C. A. 9th Cir. Petition for writ of certiorari denied as untimely. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition. Reported below: 721 F. 2d 1260.

No. 83-2084. *CASE v. CPC INTERNATIONAL, INC., ET AL.* C. A. Fed. Cir. Motion of Wendell S. Miller for leave to file a brief as *amicus curiae* denied. JUSTICE STEVENS would grant this motion. Certiorari denied. Reported below: 730 F. 2d 745.

No. 83-2086. *FOSTER v. FILLINGER.* Sup. Ct. Ala. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 448 So. 2d 321.

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- No. 83-6555. *BOTTOSON v. FLORIDA*. Sup. Ct. Fla.;
No. 83-6580. *SKILLERN v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir.;
No. 83-6623. *GRIFFIN v. MISSOURI*. Sup. Ct. Mo.;
No. 83-6660. *CELESTINE v. LOUISIANA*. Sup. Ct. La.;
No. 83-6690. *MATSON v. TENNESSEE*. Sup. Ct. Tenn.;
No. 83-6694. *RAULT v. LOUISIANA*. Sup. Ct. La.;
No. 83-6699. *AGAN v. FLORIDA*. Sup. Ct. Fla.;
No. 83-6708. *DEUTSCHER v. WOLFF, DIRECTOR, DEPARTMENT OF PRISONS, ET AL.* C. A. 9th Cir.;
No. 83-6740. *COLVIN v. MARYLAND*. Ct. App. Md.;
No. 83-6748. *WORKMAN v. TENNESSEE*. Sup. Ct. Tenn.;
No. 83-6763. *HOCHSTEIN v. NEBRASKA*. Sup. Ct. Neb.;
No. 83-6802. *ANDERSON v. NEBRASKA*. Sup. Ct. Neb.;
No. 83-6806. *GUINAN v. MISSOURI*. Sup. Ct. Mo.;
No. 83-6811. *SILAGY v. ILLINOIS*. Sup. Ct. Ill.;
No. 83-6829. *PALMES v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir.;
No. 83-6833. *JONES v. FRANCIS, WARDEN*. Sup. Ct. Ga.;
No. 83-6855. *HOPKINSON v. WYOMING*. Sup. Ct. Wyo.;
No. 83-6882. *ROBERTS v. GEORGIA*. Sup. Ct. Ga.;
No. 83-6895. *LUSK v. FLORIDA*. Sup. Ct. Fla.;
No. 83-6912. *LASHLEY v. MISSOURI*. Sup. Ct. Mo.;
No. 84-85. *FELKER v. GEORGIA*. Sup. Ct. Ga.;
No. 84-5001. *STOCKTON v. VIRGINIA*. Sup. Ct. Va.;
No. 84-5007. *CASTELL v. GEORGIA*. Sup. Ct. Ga.;
No. 84-5049. *SHAW v. MARTIN, WARDEN*. C. A. 4th Cir.;
No. 84-5092. *BOOKER v. MISSISSIPPI*. Sup. Ct. Miss.;
No. 84-5125. *WILCHER v. MISSISSIPPI*. Sup. Ct. Miss.;
No. 84-5129. *RESNOVER v. INDIANA*. Sup. Ct. Ind.;
No. 84-5185. *CALDWELL v. TENNESSEE*. Sup. Ct. Tenn.; and
No. 84-5228. *JONES v. ALABAMA*. Sup. Ct. Ala. Certiorari denied. Reported below: No. 83-6555, 443 So. 2d 962; No. 83-6580, 720 F. 2d 839; No. 83-6623, 662 S. W. 2d 854; No. 83-6660, 443 So. 2d 1091; No. 83-6690, 666 S. W. 2d 41; No. 83-6694, 445 So. 2d 1203; No. 83-6699, 445 So. 2d 326; No. 83-6708, 720 F. 2d 1108; No. 83-6740, 299 Md. 88, 472 A. 2d 953; No. 83-6748, 667 S. W. 2d 44; No. 83-6763, 216 Neb. 515, 344 N. W. 2d 469; No. 83-6802, 216 Neb. 521, 344 N. W. 2d 473; No. 83-6806, 665 S. W. 2d 325; No. 83-6811, 101 Ill. 2d 147, 461 N. E. 2d 415;

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No. 83-6829, 725 F. 2d 1511; No. 83-6833, 252 Ga. 60, 312 S. E. 2d 300; No. 83-6855, 679 P. 2d 1008; No. 83-6882, 252 Ga. 227, 314 S. E. 2d 83; No. 83-6895, 446 So. 2d 1038; No. 83-6912, 667 S. W. 2d 712; No. 84-85, 252 Ga. 351, 314 S. E. 2d 621; No. 84-5001, 227 Va. 124, 314 S. E. 2d 371; No. 84-5007, 252 Ga. 418, 314 S. E. 2d 210; No. 84-5049, 733 F. 2d 304; No. 84-5092, 449 So. 2d 209; No. 84-5125, 448 So. 2d 927; No. 84-5129, 460 N. E. 2d 922; No. 84-5185, 671 S. W. 2d 459; No. 84-5228, 450 So. 2d 171.

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. 83-6801. *BERMUDEZ v. REID, SUPERINTENDENT, FISH-KILL CORRECTIONAL FACILITY, ET AL.* C. A. 2d Cir. Motion of Robert M. Morgenthau, District Attorney, New York County, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 733 F. 2d 18.

No. 83-6830. *BIRT v. MONTGOMERY, WARDEN.* C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 725 F. 2d 587.

No. 84-3. *SWAIDA v. IBM RETIREMENT PLAN ET AL.* C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 728 F. 2d 159.

No. 84-72. *AT&T TECHNOLOGIES, INC. v. BLIM ET AL.* C. A. 10th Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 731 F. 2d 1473.

No. 84-99. *COHEN v. PRESIDENT AND FELLOWS OF HARVARD UNIVERSITY ET AL.* C. A. 1st Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 729 F. 2d 59.

No. 84-105. *FINE ET AL. v. BELLEFONTE UNDERWRITERS INSURANCE Co.* C. A. 2d Cir. Motion of Municipal Art Society of New York for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 725 F. 2d 179.

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No. 84-106. RHODE ISLAND *v.* VON BULOW. Sup. Ct. R. I. Motions of Americans for Effective Law Enforcement, Inc., et al. and Annie Laurie Kneissel et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 475 A. 2d 995.

No. 84-5082. BROWN *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Motion of Harvey Kudler for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 735 F. 2d 1347.

Rehearing Granted. (See No. 82-976, *supra.*)

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Dismissal Under Rule 53

No. 83-2106. LOUISIANA *v.* SORINA. Ct. App. La., 4th Cir. Certiorari dismissed under this Court's Rule 53.

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Dismissal Under Rule 53

No. 84-138. SOUTH CAROLINA *v.* UNITED STATES ET AL. Appeal from D. C. D. C. dismissed under this Court's Rule 53. Reported below: 585 F. Supp. 418.

Appeals Dismissed

No. 83-1816. JIBSON *v.* WHITE CLOUD EDUCATION ASSN. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. JUSTICE BLACKMUN, JUSTICE REHNQUIST, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 101 Mich. App. 309, 300 N. W. 2d 551.

No. 83-7039. CHAMBERS *v.* VERMONT. Appeal from Sup. Ct. Vt. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 144 Vt. 234, 477 A. 2d 110.

No. 84-245. PELLEGRINO ET AL. *v.* O'NEILL ET AL. Appeal from Sup. Ct. Conn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 193 Conn. 670, 480 A. 2d 476.

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No. 84-293. *FERNEDING v. CONSOLIDATED RAIL CORPORATION ET AL.* Appeal from Ct. App. Ohio, Hamilton County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-5217. *ROBINSON v. THOMPSON, GOVERNOR OF ILLINOIS, ET AL.* Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 729 F. 2d 1464.

No. 84-278. *STAGNER, DBA WEST ROUTE TRADING CO. v. WYOMING STATE TAX COMMISSION ET AL.* Appeal from Sup. Ct. Wyo. dismissed for want of substantial federal question. Reported below: 682 P. 2d 326.

Miscellaneous Orders

No. — — —. *ONETT v. UNITED STATES*; and

No. — — —. *TROPIGAS, S. A. v. ANDERSON ET AL.* Motions to direct the Clerk to file the petitions for writs of certiorari that do not comply with the Rules of this Court denied.

No. — — —. *NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. v. TOWN OF HILTON HEAD ET AL.* Motion to direct the Clerk to file the jurisdictional statement that does not comply with the Rules of this Court denied. JUSTICE STEVENS and JUSTICE O'CONNOR would grant the motion.

No. A-169 (84-372). *FRIEDRICH v. UNITED STATES.* C. A. 10th Cir. Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A-178. *RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY v. UNION CARBIDE AGRICULTURAL PRODUCTS Co., INC., ET AL.* D. C. S. D. N. Y. Application for stay, presented to JUSTICE MARSHALL, and by him referred to the Court is granted, and the District Court's judgment in 79 Civ. 2913(RO) enjoining operation of § 3(c)(1)(D) [of the Federal Insecticide, Fungicide, and Rodenticide Act] is stayed pending disposition of the appeal.

No. A-200 (83-1836). *BURTON v. BOARD ON PROFESSIONAL RESPONSIBILITY OF THE DISTRICT OF COLUMBIA COURT OF*

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APPEALS. Ct. App. D. C. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A-214. WALTERS, ADMINISTRATOR OF VETERAN'S AFFAIRS, ET AL. *v.* NATIONAL ASSOCIATION OF RADIATION SURVIVORS ET AL. D. C. N. D. Cal. Motion to vacate the stay entered by JUSTICE REHNQUIST on September 27, 1984 [468 U. S. 1323], denied. JUSTICE STEVENS would grant the motion.

No. D-444. IN RE DISBARMENT OF SHERR. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

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 National Industrial Transportation League for leave to file a brief as *amicus curiae* granted.

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 the Solicitor General to permit Charles A. Rothfeld, Esquire, to present oral argument *pro hac vice* granted.

No. 83-1020. OHIO *v.* KOVACS, DBA B & W ENTERPRISES ET AL. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1078.] Motion of Thomas J. O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor, for leave to file a brief as *amicus curiae* out of time denied. 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 appellant in No. 83-1035 and petitioners in No. 83-1070 for divided argument granted.

No. 83-1097. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* TURNER ET AL. C. A. 9th Cir. [Certiorari granted, 465 U. S. 1064.] Motion of state respondents for leave to file reply brief in support of petitioner denied.

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No. 83-2076. *POLLARD v. BOARD OF POLICE COMMISSIONERS ET AL.* Sup. Ct. Mo.; and

No. 84-322. *REMINICK ET AL. v. MALTZ ET AL.* Ct. App. N. Y. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84-5266. *CHAMBERS v. AMERICAN GREETINGS CORP.* C. A. 8th Cir.; and

No. 84-5340. *CUMMINGS v. MERIT SYSTEMS PROTECTION BOARD.* C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 30, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 84-5294. *IN RE COOPER*; and

No. 84-5382. *IN RE THAPER.* Petitions for writs of mandamus denied.

No. 84-5310. *IN RE FORRESTER.* Petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 84-76. *HUNTER ET AL. v. UNDERWOOD ET AL.* Appeal from C. A. 11th Cir. Probable jurisdiction noted. Reported below: 730 F. 2d 614.

No. 84-231. *HOOPER ET AL. v. BERNALILLO COUNTY ASSESSOR.* Appeal from Ct. App. N. M. Probable jurisdiction noted. Reported below: 101 N. M. 172, 679 P. 2d 840.

No. 84-237. *AGUILAR ET AL. v. FELTON ET AL.*;

No. 84-238. *SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION v. FELTON ET AL.*; and

No. 84-239. *CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK v. FELTON ET AL.* Appeals from C. A. 2d Cir. Further consideration of question of jurisdiction post-

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poned to hearing of cases on the merits. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 739 F. 2d 48.

Certiorari Granted

No. 83-2148. OREGON DEPARTMENT OF FISH AND WILDLIFE ET AL. *v.* KLAMATH INDIAN TRIBE. C. A. 9th Cir. Certiorari granted. Reported below: 729 F. 2d 609.

No. 84-68. KERR-MCGEE CORP. *v.* NAVAJO TRIBE OF INDIANS ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 731 F. 2d 597.

No. 84-249. SPENCER ET UX. *v.* SOUTH CAROLINA TAX COMMISSION ET AL. Sup. Ct. S. C. Certiorari granted. Reported below: 281 S. C. 492, 316 S. E. 2d 386.

No. 84-233. PHILLIPS PETROLEUM CO. *v.* SHUTTS ET AL. Sup. Ct. Kan. Motions of Legal Foundation of America and National Association of Independent Insurers for leave to file briefs as *amici curiae* granted. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions and this petition. Reported below: 235 Kan. 195, 679 P. 2d 1159.

No. 84-262. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. *v.* PUEBLO OF SANTA ANA. C. A. 10th Cir. Motions of Atchison, Topeka & Santa Fe Railway Co. and Public Service Company of New Mexico for leave to file briefs as *amici curiae* granted. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of these motions and this petition. Reported below: 734 F. 2d 1402.

No. 83-6607. CALDWELL *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 443 So. 2d 806.

Certiorari Denied. (See also Nos. 83-7039, 84-245, 84-293, and 84-5217, *supra.*)

No. 83-1803. CALIFORNIA *v.* COHEN ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 149 Cal. App. 3d 507, 196 Cal. Rptr. 834.

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No. 83-1890. *McKEEL ET AL. v. ISLAMIC REPUBLIC OF IRAN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 582.

No. 83-1891. *JANNOTTI v. UNITED STATES*; and

No. 83-1892. *SCHWARTZ v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 213.

No. 83-2000. *AWECO, INC., ET AL. v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 293.

No. 83-2005. *ZWEIBON ET AL. v. MITCHELL.* C. A. D. C. Cir. Certiorari denied. Reported below: 231 U. S. App. D. C. 398, 720 F. 2d 162.

No. 83-2010. *GUTMAN v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 417.

No. 83-2018. *RUIZ v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 131.

No. 83-2085. *CHAMPEAU v. OKLAHOMA.* Ct. Crim. App. Okla. Certiorari denied. Reported below: 678 P. 2d 1192.

No. 83-2134. *BOCKOVEN ET AL. v. MARSH, SECRETARY OF THE ARMY, ET AL.*; and

No. 83-6876. *GELBER v. MARSH, SECRETARY OF THE ARMY.* C. A. Fed. Cir. Certiorari denied. Reported below: 727 F. 2d 1558.

No. 83-2162. *BELLAND ET AL. v. PENSION BENEFIT GUARANTY CORPORATION.* C. A. D. C. Cir. Certiorari denied. Reported below: 234 U. S. App. D. C. 8, 726 F. 2d 839.

No. 83-2164. *ANGLETON ET AL. v. PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 3.

No. 83-6666. *BECK v. ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1445.

No. 83-6793. *ARMON v. JONES ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 680.

No. 83-6922. *FLY ET VIR v. CELLA ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1180.

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No. 83-6934. THURMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 942.

No. 84-35. KOSTADINOV *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 734 F. 2d 905.

No. 84-39. YOUNG BROTHERS, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 728 F. 2d 682.

No. 84-41. MOORE, DBA LOG MOUNTAIN MINING CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 84-47. PERSINGER ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 234 U. S. App. D. C. 349, 729 F. 2d 835.

No. 84-50. TEACHERS INSURANCE & ANNUITY ASSN. ET AL. *v.* SPIRT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 23.

No. 84-64. CRYTS ET AL. *v.* FRENCH, TRUSTEE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 619.

No. 84-78. CAMPBELL ET AL. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 735 F. 2d 497.

No. 84-81. MORGAN *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 681 P. 2d 970.

No. 84-86. SCRIPPS-HOWARD BROADCASTING CO. ET AL. *v.* BARBER ET UX. Ct. App. Ohio, Stark County. Certiorari denied.

No. 84-92. EL PASO COUNTY COMMUNITY COLLEGE DISTRICT ET AL. *v.* PROFESSIONAL ASSOCIATION OF COLLEGE EDUCATORS, TSTA/NEA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 258.

No. 84-93. FINE *v.* BARRY & ENRIGHT PRODUCTIONS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 2d 1394.

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No. 84-100. *KUPFERSTEIN v. NEW YORK*. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 100 App. Div. 2d 983, 473 N. Y. S. 2d 898.

No. 84-101. *BRONTEL, LTD., ET AL. v. CITY OF NEW YORK ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 84-142. *REPUBLIC OF COLOMBIA v. FONSECA ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 734 F. 2d 944.

No. 84-162. *AN ARTICLE OF DEVICE: "TOFTNESS RADIATION DETECTOR" ET AL. v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 731 F. 2d 1253.

No. 84-166. *WINDRUSH PARTNERS, LTD., DBA WINDRUSH APARTMENTS, ET AL. v. METRO FAIR HOUSING SERVICES*. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 1417.

No. 84-181. *SUPERIOR WEST SIXTH CORP. v. CUYAHOGA COUNTY BOARD OF REVIEW ET AL.* Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84-187. *CHAPLAIN ET AL. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 149.

No. 84-192. *BRADLEY ET AL. v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 718.

No. 84-203. *BEHREND ET AL. v. GODWIN ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 731 F. 2d 153.

No. 84-204. *TOBRINER ET AL. v. REDEVELOPMENT AGENCY OF THE CITY OF CONCORD*. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 153 Cal. App. 3d 367, 200 Cal. Rptr. 364.

No. 84-212. *INTERNATIONAL HARVESTER CO. v. WASSON ET AL.* Sup. Ct. S. C. Certiorari denied. Reported below: 281 S. C. 458, 316 S. E. 2d 378.

No. 84-219. *MORRIS ET AL. v. PROVIDENCE HOSPITAL*. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

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No. 84-220. *DUNLAP v. WASHINGTON*. Ct. App. Wash. Certiorari denied. Reported below: 37 Wash. App. 1013.

No. 84-222. *STRACHAN SHIPPING CO. ET AL. v. BANKERS & SHIPPERS INSURANCE COMPANY OF NEW YORK ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 255.

No. 84-228. *SHAHEEN NATURAL RESOURCES CO., INC. v. LA SOCIETE NATIONALE POUR LA RECHERCHE, LA PRODUCTION, LE TRANSPORT, LA TRANSFORMATION ET LA COMMERCIALISATION DES HYDROCARBURES*. C. A. 2d Cir. Certiorari denied. Reported below: 733 F. 2d 260.

No. 84-234. *WILKINSON v. HAMPERS*. C. A. 1st Cir. Certiorari denied. Reported below: 732 F. 2d 140.

No. 84-235. *SHOWCASE CINEMAS CONCESSIONS OF DEDHAM, INC., ET AL. v. SILVA ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 736 F. 2d 810.

No. 84-242. *HEGHMANN ET UX. v. CONNECTICUT SAVINGS BANK*. Sup. Ct. Conn. Certiorari denied. Reported below: 193 Conn. 157, 474 A. 2d 790.

No. 84-246. *ANGEL ET UX. v. RENN*. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-250. *CHIC MAGAZINE, INC. v. BRAUN ET UX*. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 245 and 731 F. 2d 1205.

No. 84-251. *EDWARDS ET AL. v. CONSOLIDATED RAIL CORPORATION*. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 84-253. *HSIUNG v. WASHINGTON*. Sup. Ct. Wash. Certiorari denied.

No. 84-255. *GARLAM ENTERPRISES CORP. v. AUTORIDAD DE CARRETERAS DE PUERTO RICO*. Sup. Ct. P. R. Certiorari denied.

No. 84-257. *CITY OF LOS ANGELES ET AL. v. BUTTLER ET AL.* Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 153 Cal. App. 3d 520, 200 Cal. Rptr. 372.

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No. 84-264. *CHEMICAL BANK ET AL. v. ARTHUR ANDERSEN & Co.* C. A. 2d Cir. Certiorari denied. Reported below: 726 F. 2d 930.

No. 84-280. *CITY OF CLEVELAND v. CLEVELAND ELECTRIC ILLUMINATING Co.* C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 1157.

No. 84-282. *KNOWLES ET AL. v. UNITED STATES.* C. A. 11th Cir. Certiorari denied.

No. 84-286. *KONIK v. CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 733 F. 2d 1007.

No. 84-299. *JONES v. TEXAS.* Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied.

No. 84-300. *BESSER v. GREENFIELD.* Sup. Ct. N. M. Certiorari denied.

No. 84-301. *LANNING ET AL. v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 444.

No. 84-302. *HASTINGS v. INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1261.

No. 84-376. *SADOSKY v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 1388.

No. 84-377. *GLOMB v. UNITED STATES.* C. A. 5th Cir. Certiorari denied.

No. 84-5044. *CRANEY v. IOWA.* Sup. Ct. Iowa. Certiorari denied. Reported below: 347 N. W. 2d 668.

No. 84-5064. *MAYORAL ET AL. v. JEFFCO AMERICAN BAPTIST RESIDENCES, INC., ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 726 F. 2d 1361.

No. 84-5067. *FRAZIER v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1163.

No. 84-5109. *ARNETT v. PARKE, WARDEN.* C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1363.

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No. 84-5142. *GARAY v. SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY*. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 418.

No. 84-5194. *TENNART v. MAGGIO, WARDEN*. C. A. 5th Cir. Certiorari denied. Reported below: 720 F. 2d 1289.

No. 84-5198. *TARKOWSKI v. PENNZOIL CO., INC., ET AL.* C. A. 7th Cir. Certiorari denied.

No. 84-5209. *HUGHES v. FLORIDA; and TAYLOR, AKA KUEBLER v. FLORIDA*. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 451 So. 2d 852 (first case); 451 So. 2d 853 (second case).

No. 84-5212. *GREGORY v. WYRICK, WARDEN*. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 542.

No. 84-5222. *DOCK v. LATIMER ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 729 F. 2d 1287.

No. 84-5225. *LAMACKI v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 121 Ill. App. 3d 403, 459 N. E. 2d 1142.

No. 84-5229. *HORNICK v. PENNSYLVANIA ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1349.

No. 84-5230. *BARSHAI v. NEW YORK*. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 100 App. Div. 2d 253, 474 N. Y. S. 2d 288.

No. 84-5231. *JONES v. WOLVERINE BOLT CO.* C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1364.

No. 84-5232. *BETHEA v. J. A. JONES CONSTRUCTION SERVICES Co.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1368.

No. 84-5246. *STAPLES v. SCHERALLA ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 441.

No. 84-5248. *FERENC, AKA ROWE v. PAITE ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5250. *JOHN v. SILVERLIGHT ET AL.* C. A. 11th Cir. Certiorari denied.

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No. 84-5253. *PETROFSKY v. RICHARDS*. C. A. 10th Cir. Certiorari denied.

No. 84-5255. *BORRELLI v. ANDERSON ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 420.

No. 84-5259. *SHEMERDIAK v. WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-5272. *ROSS v. HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY*. C. A. 2d Cir. Certiorari denied.

No. 84-5275. *STINSON v. ALABAMA*. Ct. Crim. App. Ala. Certiorari denied. Reported below: 443 So. 2d 69.

No. 84-5277. *LAROSE v. FLORIDA*. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 451 So. 2d 861.

No. 84-5281. *MCCRARY v. COHEN ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1436.

No. 84-5283. *FELLS v. MABEN ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1348.

No. 84-5284. *FUENTES v. ROSS ET AL.* C. A. 2d Cir. Certiorari denied.

No. 84-5285. *HECK v. COMMUNICATIONS SATELLITE CORP.* Ct. App. Md. Certiorari denied. Reported below: 299 Md. 655, 474 A. 2d 1344.

No. 84-5289. *BOOKER v. MITCHELL, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 149.

No. 84-5290. *GOLDEN v. ALABAMA*. Ct. Crim. App. Ala. Certiorari denied. Reported below: 452 So. 2d 1359.

No. 84-5292. *HATCH v. MASON ET AL.* C. A. 10th Cir. Certiorari denied.

No. 84-5293. *LASKARIS ET AL. v. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 733 F. 2d 260.

No. 84-5295. *FREEMAN v. WHITE, WARDEN, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 131.

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No. 84-5296. *COOPER v. DAVIS, WARDEN*. C. A. 11th Cir. Certiorari denied.

No. 84-5299. *KUSTER v. MCCARTHY, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS*. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84-5311. *HARRISON v. MARYLAND*. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1355.

No. 84-5312. *COLE v. FRYE, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER*. C. A. 8th Cir. Certiorari denied.

No. 84-5337. *DEMOS v. MCNICHOLS ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1369.

No. 84-5341. *KAKLEY v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 741 F. 2d 1.

No. 84-5345. *AGUILAR, AKA PALACIOS v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1459.

No. 84-5355. *STAPLES v. ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION*. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 972.

No. 84-5358. *FISHERMAN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 22.

No. 84-5365. *CABEZAS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 448.

No. 84-5381. *MARTINEZ ET AL. v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA*. C. A. 9th Cir. Certiorari denied.

No. 84-5391. *GABRISH v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-5393. *LOCOSALE v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 83-1755. *BROTHERHOOD OF TEAMSTERS, LOCAL NO. 70 v. CALIFORNIA CONSOLIDATORS, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 2d 81.

WHITE, J., dissenting

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

In *South Prairie Construction Co. v. Operating Engineers*, 425 U. S. 800 (1976) (*per curiam*), this Court held that a Federal Court of Appeals did not have jurisdiction to decide the appropriateness of a bargaining unit in the first instance, but should have allowed the National Labor Relations Board to make an initial determination. Because two Courts of Appeals have adopted inconsistent interpretations of *South Prairie*, I dissent from the denial of certiorari.

In *South Prairie*, a union that represented the employees of one company had filed a complaint with the Board contending that its collective-bargaining agreement should cover the employees of a second company because the two companies actually constituted a "single employer" within the National Labor Relations Act. The Board concluded that the two companies were in fact separate employers, and dismissed the complaint. On appeal, the Court of Appeals for the District of Columbia Circuit set aside this determination. It then went on to reach and decide a second question, which had not been passed on by the Board: whether the employees of the two companies constituted the appropriate unit under § 9(b) of the Act for purposes of collective bargaining. Section 9(b) directs the Board to "decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 61 Stat. 143, 29 U. S. C. § 159(b). We held that the Court of Appeals had erred when it took upon itself the initial determination of this issue:

"In foreclosing the Board from the opportunity to determine the appropriate bargaining unit under § 9, the Court of Appeals did not give 'due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution.' *FCC v. Pottsville Broadcasting Co.*, 309 U. S. 134, 141 (1940)." 425 U. S., at 806.

In the present case, the Court of Appeals interpreted this language to mean that a federal court is precluded from deciding the appropriateness of a bargaining unit even when the question has never been presented to the Board. The union in this case had proceeded directly into federal court under § 301(a) of the Labor

Management Relations Act, 29 U. S. C. § 185(a). It alleged that the company whose employees it represented and another company constituted a "single employer," and sought a declaratory judgment that the second company was bound by the union's collective-bargaining agreement with the first company. The District Court determined that it lacked jurisdiction to adjudicate this complaint. The Court of Appeals held that *South Prairie* necessarily implied that "single employer questions comprise two subsidiary issues": whether two companies constitute a single employer, and whether the employees form a single or appropriate bargaining unit. 693 F. 2d 81, 82 (1982). Section 301 granted district courts jurisdiction to determine the first of these questions, but not the second. The appropriateness of a bargaining unit was a "representational question reserved in the first instance to the Board." *Id.*, at 84. Accordingly, the Court of Appeals remanded to the District Court for an evidentiary hearing on the single employer issue only.

Two days later, a panel of the Court of Appeals for the Fifth Circuit reached a contrary conclusion in a similar case. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F. 2d 489 (1982), cert. denied, 464 U. S. 932 (1983). The Fifth Circuit read *South Prairie* as being limited to the situation in which two claims are initially presented to the Board and only one of them is decided there. In the Fifth Circuit's view, *South Prairie* did not preclude a federal court with jurisdiction under § 301 from determining whether a bargaining unit is appropriate, where such a determination was necessary to a resolution of the underlying breach-of-contract issue. Because neither party had petitioned the Board to determine the appropriateness of the bargaining unit in *Pratt-Farnsworth*, the Fifth Circuit remanded the case to the District Court for consideration of the question. The Court of Appeals found support for this disposition in decisions of this Court upholding the jurisdiction of federal courts under § 301 even in the face of the Board's exclusive jurisdiction to consider allegations of unfair labor practices. The bargaining unit issue, the Fifth Circuit concluded, was a "collateral issue" that was essential to the determination of a breach-of-contract claim under § 301. Cf. *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U. S. 616, 626 (1975) (federal courts may decide unfair labor practice questions that emerge as collateral issues under the antitrust laws).

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These two decisions are in square conflict. Although the conflict is now limited to two Circuits, these Circuits are very large Circuits indeed, and the issue will surely arise elsewhere. The Eighth Circuit, addressing the narrower question whether a federal court may determine the appropriateness of a bargaining unit under §301 after the Board has made such a determination in a prior administrative proceeding, has read *South Prairie* broadly, as did the Ninth Circuit in this case. *Local Union 204 of International Brotherhood of Electrical Workers, Affiliated with AFL-CIO v. Iowa Electric Light and Power Co.*, 668 F. 2d 413 (1982). The Eighth Circuit drew the line "between those cases where the district court has jurisdiction under section 301 and those in which it does not" by "examining the major issues to be decided as to whether they can be characterized as primarily representational or primarily contractual." *Id.*, at 419. It characterized the determination of an appropriate bargaining unit as a representational question committed to the jurisdiction of the Board.

I would grant certiorari to resolve the conflict between the Fifth and Ninth Circuits, and to avert the wider conflict that will likely arise in the wake of these inconsistent decisions.

No. 83-1759. ROHRER, HIBLER & REPLOGLE, INC. *v.* PERKINS. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 728 F. 2d 860.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

In 1977, respondent, Dr. Robert Perkins, signed a contract of employment with petitioner Rohrer, Hibler & Replogle, Inc. The contract provided that the Circuit Court of Cook County, Ill., would have jurisdiction over any disputes that might arise between the parties. In 1983, such a dispute arose, and petitioner filed suit against respondent in the Cook County Circuit Court. Respondent removed the suit to the United States District Court for the Northern District of Illinois on grounds of diversity. Arguing that the contract required that the dispute be adjudicated in the Cook County court, petitioner filed a motion to remand to the state court. The District Court denied the motion on the ground that the contractual provision was not a mandatory forum selection clause, and petitioner attempted to appeal the ruling.

The Seventh Circuit held that it lacked jurisdiction to hear an interlocutory appeal from the denial of the motion to remand. 728 F. 2d 860. The court rejected petitioner's theory that the order was appealable under 28 U. S. C. § 1291 because it fell into "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949). The court noted that there was no reason to believe that the order would be effectively unreviewable on appeal from final judgment. The court also declined to hold the order reviewable under the All Writs Act, 28 U. S. C. § 1651, on the ground that a petition for a writ of mandamus may not be used as a substitute for an appeal. Finally, the court held that the order was not reviewable under 28 U. S. C. § 1292(a) (1), which allows appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Petitioner contended that this provision was applicable by virtue of *Enelow v. New York Life Ins. Co.*, 293 U. S. 379 (1935), and *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188 (1942), which hold that a stay issued to allow consideration of an equitable defense is an "injunction" for purposes of § 1292(a)(1). The Seventh Circuit pointed out, however, that remanding a case to a state court was not the equivalent of issuing a stay; accordingly, the denial of the motion was not appealable under § 1292(a)(1).

In short, the Seventh Circuit held that a district court's interlocutory order declining to give effect to a contractual forum selection clause is not an appealable order under 28 U. S. C. § 1291. This holding appears to place the Seventh Circuit in direct conflict with the Third Circuit, which held a similar order appealable in *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F. 2d 190, cert. denied, 464 U. S. 938 (1983). In *Coastal Steel*, the District Court denied defendant's motion to dismiss a contract action on the basis of a contractual provision calling for litigation of any claims under the contract in an English court. The Third Circuit held that it had jurisdiction to hear the appeal under either the *Cohen v. Beneficial Industrial Loan Corp.* exception to § 1291's finality requirement, the All Writs Act, or § 1292(a)(1) as interpreted in *Enelow* and *Ettelson*, *supra*.

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There is no meaningful distinction between this case and *Coastal Steel*. Indeed, the Seventh Circuit recognized as much when it declined even to attempt to distinguish the holding of the *Coastal Steel* majority. That the forum selection clause in *Coastal Steel* specified a foreign court while the one at issue here designates a domestic forum is of little moment: in both cases, denying immediate review would simply postpone the decision whether the contract requires litigation in another forum until after a trial on the merits. In neither case is the order more or less meaningfully reviewable on appeal from final judgment than in the other. The conflict created by the Third Circuit's decision in this case is inescapable, and this petition should be granted to resolve it. Accordingly, I dissent from the denial of certiorari.

No. 83-1829. *LEWIS v. UNIVERSITY OF PITTSBURGH ET AL.* C. A. 3d Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE BLACKMUN would grant certiorari. Reported below: 725 F. 2d 910.

No. 83-1902. *SIMPSON v. BEELER ET UX.* Ct. App. Ind. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 454 N. E. 2d 886.

No. 83-6920. *LEWIS v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari.

No. 83-2102. *TEXAS ET AL. v. UNITED STATES ET AL.* C. A. 5th Cir. Motion of Alabama Public Service Commission et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 730 F. 2d 339.

No. 83-2145. *NAVIOS CORP. ET AL. v. UNITED STATES, AS OWNER OF THE UNITED STATES COAST GUARD BUOY TENDER BLACKTHORN.* C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 728 F. 2d 1359.

No. 83-6704. *LAMBRIGHT v. ARIZONA.* Sup. Ct. Ariz.;

No. 83-7013. *FIELDS v. CALIFORNIA.* Sup. Ct. Cal.;

No. 83-7014. *WICKER v. TEXAS.* Ct. Crim. App. Tex.;

No. 83-7021. *DICKS v. TENNESSEE.* Ct. Crim. App. Tenn.;

No. 84-5200. *SQUIRES v. FLORIDA.* Sup. Ct. Fla.;

No. 84-5206. *ALBANESE v. ILLINOIS.* Sup. Ct. Ill.;

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No. 84-5261. *MCQUEEN v. KENTUCKY*. Sup. Ct. Ky.;
No. 84-5265. *PRESTON v. MISSOURI*. Sup. Ct. Mo.;
No. 84-5269. *JONES v. FLORIDA*. Sup. Ct. Fla.; and
No. 84-5505. *BRILEY v. BASS, WARDEN*. C. A. 4th Cir.
Certiorari denied. Reported below: No. 83-6704, 138 Ariz. 63,
673 P. 2d 1; No. 83-7013, 35 Cal. 3d 329, 673 P. 2d 680;
No. 83-7014, 667 S. W. 2d 137; No. 84-5200, 450 So. 2d 208;
No. 84-5206, 102 Ill. 2d 54, 464 N. E. 2d 206; No. 84-5261, 669
S. W. 2d 519; No. 84-5265, 673 S. W. 2d 1; No. 84-5269, 449
So. 2d 253; No. 84-5505, 742 F. 2d 155.

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. 83-6814. *WILLIFORD v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1106.

JUSTICE WHITE, dissenting.

Petitioner Phillip Williford was convicted of wire fraud in violation of 18 U. S. C. § 1343 and of making a false statement in a loan application in violation of 18 U. S. C. § 1014. The original indictment charging him was returned on May 4, 1982. A superseding indictment was filed on August 17, 1982, and a second superseding indictment was filed on April 21, 1983. This final indictment omitted one paragraph describing a fraudulent transaction contained in its predecessor.

Petitioner sought a postponement of the scheduled trial date under the Speedy Trial Act, 18 U. S. C. § 3161(c)(2). That provision guarantees an adequate time to prepare a defense to the charge by preventing trial commencement until 30 days from the defendant's first appearance, unless the defendant consents in writing to an earlier date. Petitioner argued that § 3161(c)(2) precluded commencement of his trial until 30 days elapsed following the return of the last indictment. The District Court disagreed, and petitioner's trial began on May 3, 1983, only 12 days after the final indictment was returned.

When an indictment is dismissed on the motion of a defendant, under 18 U. S. C. § 3161(d)(1) any reindictment for the same

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offense renews the 30-day period of § 3161(c)(2). In this case, however, the Fifth Circuit upheld petitioner's conviction, finding that a different rule applies when the prior indictment is dismissed on the motion of the Government: The minimum time limit runs from the original, not superseding, indictment, and any continuance is left to the discretion of the district judge. This holding is consistent with the view of the Seventh Circuit, *United States v. Horton*, 676 F. 2d 1165, 1169 (1982), the Second Circuit, *United States v. Todisco*, 667 F. 2d 255, 260 (1981), and the Eighth Circuit, *United States v. Dennis*, 625 F. 2d 782, 793 (1980). It conflicts, however, with the rule in the Ninth Circuit. In *United States v. Harris*, 724 F. 2d 1452 (1984), the Ninth Circuit held that the 30-day period applies even when the Government obtains an overlapping, superseding indictment. The court explained:

"We read section 3161(c)(2) as guaranteeing that the defendant is not forced to trial less than thirty days from the date on which the defendant first appears *on the indictment on which the defendant ultimately goes to trial*. Such a construction is necessary to implement the protective purpose underlying section 3161(c)(2)." *Id.*, at 1455 (emphasis in original).

Accord, *United States v. Arkus*, 675 F. 2d 245, 247-248 (CA9 1982); see also *United States v. Wooten*, 688 F. 2d 941, 951 (CA4 1982) ("[S]ection 3161(c)(2) . . . guarantee[s] to the criminal defendant the right to a delay of at least 30 days between arraignment and trial in any circumstances").

Section 3161(c) was designed to protect the basic due process right of having adequate time to prepare a defense without allowing defendants to delay their scheduled trials unduly. S. Rep. No. 96-212, p. 32 (1979). There is a direct conflict among the Circuits over how that command will be put into effect. Congress intended the Speedy Trial Act to provide a uniform national rule regarding trial scheduling and delay. Yet, because of the conflicting interpretations of the various Circuits, a defendant's right to a 30-day preparation period after a superseding indictment now depends almost as much on the happenstance of geography as it does on the will of the Legislative Branch.

Accordingly, I dissent from the denial of certiorari.

No. 83-6832. *EDDMONDS v. ILLINOIS*. Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 44, 461 N. E. 2d 347.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I would grant certiorari to consider the constitutionality of the Illinois death penalty statute, which vests in the prosecutor the unlimited and unguided discretion to trigger death sentencing proceedings. Under the statute, a death sentencing proceeding will follow a conviction for a crime punishable by death *only* "[w]here requested by the State." Ill. Rev. Stat., ch. 38, §9.1(d) (Supp. 1984). If the prosecutor chooses not to request such a proceeding, the defendant cannot be sentenced to death.

Yet the prosecutor's decision whether to make this request is not guided by any legislative standard. Thus, the Illinois scheme introduces unbridled discretion at a stage at which "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U. S. 153, 189 (1976) (joint opinion announcing the judgment of the Court). Accordingly, a substantial question is presented as to the constitutionality of the statute.

I

At the outset, it is important to state clearly what this case is *not* about. It is not about prosecutorial discretion in an area traditionally committed to such discretion. The discretion at issue here is fundamentally different from the discretion a prosecutor exercises in determining whether to seek an indictment for an offense punishable by death, or to accept a plea of guilty to a lesser included offense. What is at stake, instead, is standardless discretion at the *postconviction* phase of capital cases—the phase in which this Court has repeatedly emphasized that discretion must be carefully guided.

The joint opinion announcing the Court's judgment in *Gregg v. Georgia*, *supra*, carefully distinguishes preconviction discretion—which it deems permissible—from postconviction discretion—which, it states, can render a scheme unconstitutional. That opinion makes clear that unguided discretion at the latter stage is impermissible: "[T]he decision to impose the death sentence on a specific individual who ha[s] been convicted of a capital offense" must be guided by standards and cannot be imposed on a "capriciously selected group of offenders." *Id.*, at 199 (Stewart, POWELL, and STEVENS, JJ.).

II

In my mind, there are serious questions about the constitutionality of a scheme that gives the prosecutor the unbridled discretion to select, from the group of individuals convicted of an offense punishable by death, the subgroup that will be considered for death. The Court has focused its concern in death penalty cases on the decision of which defendants, among the many convicted of offenses punishable by death, will actually receive the death penalty. See, e. g., *Pulley v. Harris*, 465 U. S. 37, 44 (1984); *Lockett v. Ohio*, 438 U. S. 586, 600-601 (1978). It is at this stage—in which the focus of the proceedings shifts from the nature of the crime to the nature of the defendant—that arbitrariness, discrimination, and irrationality are most likely to infect the decision whether a defendant will live or die. To minimize the potential for these abuses, the Court has consistently required that, following conviction of an offense punishable by death, discretion in determining who will receive the death penalty be limited by statutory standards.

The Illinois scheme differs from schemes this Court has approved in that capital sentencing proceedings in Illinois do not inexorably follow conviction for a crime punishable by death. Instead, the prosecutor has the authority—and the duty—to narrow down the class of convicted defendants. Yet the Illinois statute does not set any standards to guide that decision. Such unguided discretion cannot help but produce the sort of arbitrary, capricious, and discriminatory application of the death penalty that is simply intolerable under *Furman v. Georgia*, 408 U. S. 238 (1972). Because the prosecutor has no standards to guide his postconviction decision, the Illinois scheme eliminates any “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.” *Id.*, at 313 (WHITE, J., concurring).

The potential for arbitrariness in the imposition of the death penalty is further exacerbated because the discretion to initiate sentencing proceedings is not vested in one individual, but in the State’s Attorneys of each of the State’s 102 counties. Each of these 102 individuals, subject to the different political pressures of his own constituency, can establish his own policy—or no policy at all—on how to narrow the group of individuals convicted of crimes punishable by death, and in this endeavor he is not aided by

any legislatively imposed standard or limited by any legislatively imposed constraint. *People ex rel. Carey v. Cousins*, 77 Ill. 2d 531, 557-558, 397 N. E. 2d 809, 822 (1979) (Ryan, J., dissenting); see *People v. Lewis*, 88 Ill. 2d 129, 192, 430 N. E. 2d 1346, 1376-1377 (1981) (Simon, J., dissenting). In such a system, there will often be no rational distinction between an individual who receives the death penalty and one who does not.

III

The postconviction discretion that the Illinois statute vests in prosecutors is particularly pernicious because it is coupled with the absence of a clear requirement of comparative proportionality review of death sentences on appeal. The Illinois death penalty statute does not mandate such review, and the Illinois Supreme Court has been ambiguous about whether it would ever engage in analysis of this type. See *People v. Kubat*, 94 Ill. 2d 437, 502-504, 447 N. E. 2d 247, 277-278 (1983); *People v. Brownell*, 79 Ill. 2d 508, 541-544, 404 N. E. 2d 181, 198-199 (1980). Thus, the scheme does not at any stage assure that like cases in Illinois are treated alike, and provides no mechanism to protect against arbitrary, capricious, or discriminatory winnowing of defendants convicted of crimes punishable by death.

Central to the Court's decision in *Pulley v. Harris*, *supra*, that comparative proportionality review is not in all capital cases constitutionally required was the fact that the scheme provided adequate standards to guide the decision whether individuals convicted of first-degree murder should be sentenced to death. Given such standards, the Court did not see much potential for arbitrary and capricious action. *Id.*, at 53. But the Court did state clearly that comparative proportionality review is a safeguard, *id.*, at 50, and that it might be constitutionally required in a scheme that did not contain sufficient other adequate safeguards, *id.*, at 51.

Under the Illinois scheme, there are no standards to guide an important part of the decision as to which defendants, among those convicted of crimes punishable by death, are actually sentenced to death. Thus, even if prosecutors try to act responsibly—whatever this might mean under the scheme—consistency is unattainable because they have no standards to guide their actions. The safeguards identified in *Pulley* might adequately

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protect the rationality of the death sentencing process once the prosecutor has initiated that process, but they in no way assure consistency across the spectrum of defendants who are convicted of offenses punishable by death. Thus, without comparative proportionality review, there is absolutely no guarantee that similarly situated defendants, charged and convicted for similar crimes, will not be treated differently. Irrationality and arbitrariness, even discrimination, are likely to be the norm.

IV

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and the Fourteenth Amendments. See *Gregg v. Georgia*, 428 U. S., at 231 (MARSHALL, J., dissenting); *Furman v. Georgia*, *supra*, at 314 (MARSHALL, J., concurring). The issue in this case, however, is such that I would grant review of the sentence even if I accepted the prevailing view that the death penalty may be constitutionally imposed under certain circumstances. The Illinois death penalty statute vests in the prosecutor unbridled discretion at a stage in the proceedings at which the Court has consistently stated that discretion must be channelled to prevent the arbitrary, capricious, and discriminatory application of the death penalty. The consideration of the constitutionality of this statute is, I believe, worthy of the attention of this Court. For that reason, I respectfully dissent.

No. 83-6839. STUCKETT *v.* UNITED STATES POSTAL SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 158.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

In *Zipes v. Trans World Airlines, Inc.*, 455 U. S. 385 (1982), we held that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) is not a jurisdictional prerequisite to a suit under Title VII of the Civil Rights Act of 1964 against a private employer. The time limit on the filing of a charge is therefore subject to waiver, estoppel, and equitable tolling. In so holding, we settled a conflict among the Courts of Appeals. This case presents a similar question, against the background of a similar conflict, regarding Title VII suits against the Federal Government.

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After being fired by respondent, petitioner filed a complaint with the EEOC alleging racial discrimination. The Commission denied relief, and petitioner then filed suit in Federal District Court. Under 42 U. S. C. §2000e-16(c), the complaint was due within 30 days of petitioner's receipt of notice of the EEOC's final action. The District Court determined that petitioner had missed this deadline and dismissed for want of jurisdiction. Fed. Rule Civ. Proc. 12(b)(1). The Court of Appeals affirmed, stating that "the time limits for filing Title VII actions against the federal government are jurisdictional." App. to Pet. for Cert. 2. The court relied on *Sims v. Heckler*, 725 F. 2d 1143 (CA7 1984), which held that a federal employee's failure to file a timely administrative charge barred a later suit. *Sims* concluded that considerations of sovereign immunity made the principles underlying *Zipes* inapplicable when the defendant is the Federal Government.

The position of the Seventh Circuit directly conflicts with that of three other Courts of Appeals. See *Martinez v. Orr*, 738 F. 2d 1107 (CA10 1984); *Milam v. United States Postal Service*, 674 F. 2d 860 (CA11 1982); *Saltz v. Lehman*, 217 U. S. App. D. C. 354, 672 F. 2d 207 (1982) (time limit for filing with EEOC). The Ninth Circuit might be added to this list, though its position is unclear. See *Cooper v. Bell*, 628 F. 2d 1208, 1213, and n. 10 (1980); *Ross v. United States Postal Service*, 696 F. 2d 720 (1983); *Rice v. Hamilton Air Force Base Commissary*, 720 F. 2d 1082, 1083-1084, and n. 1 (1983).

Whether tolling would be appropriate in this case if the time limit is not jurisdictional was neither argued nor considered below. Because the complaint was dismissed under Rule 12(b)(1), the question of the jurisdictional significance of the 30-day limit is squarely presented. In light of the conflict among the lower courts, I would grant certiorari.

No. 84-229. ACCARDI ET AL. *v.* DAVIDSON ET AL.; and

No. 84-5052. ZAHN, ADMINISTRATRIX OF THE ESTATE OF ZAHN *v.* DAVIDSON ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 734 F. 2d 10.

No. 84-240. FREEDMAN ET AL. *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 730 F. 2d 509.

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No. 84-263. *DOUBLE H PLASTICS, INC. v. SONOCO PRODUCTS Co.* C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 732 F. 2d 351.

No. 84-5287. *DAVID v. AMERICAN TELEPHONE & TELEGRAPH Co. ET AL.* C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 84-284. *NULL MANUFACTURING CO. v. LITTLEJOHN.* C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 732 F. 2d 150.

No. 84-5079. *STEBBING v. MARYLAND.* Ct. App. Md. Certiorari denied. Reported below: 299 Md. 331, 473 A. 2d 903.

JUSTICE BRENNAN, dissenting.

Adhering 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), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

The issue presented by this petition is the constitutionality of the Maryland capital punishment statute, which (1) bars consideration of certain mitigating evidence when the sentencer decides whether to impose a life or death sentence; (2) prevents the sentencer from making an independent determination as to whether death is a proper penalty; and (3) may easily be understood to impose on the defendant the burden of proving that death is not appropriate in his case. Because these three aspects of the Maryland death penalty statute raise profound questions of compliance with this Court's holdings in *Eddings v. Oklahoma*, 455 U. S. 104 (1982), and *Lockett v. Ohio*, 438 U. S. 586 (1978), I would grant the petition to review the constitutionality of the statute.

I

In *Lockett v. Ohio*, CHIEF JUSTICE BURGER, writing for a plurality of the Court, stated:

"[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from

considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original).

The opinion recognized that "the imposition of death by public authority is . . . profoundly different from all other penalties," and that the sentencer therefore must be free to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." *Id.*, at 605. As we later said: "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." *Eddings v. Oklahoma*, *supra*, at 112.

In *Eddings*, this Court reaffirmed that a sentencer may not be barred from considering all evidence of mitigating factors when it renders its decision on sentencing. The trial judge there had declined to consider the fact of Eddings' violent background, on which evidence had been introduced, as a mitigating circumstance. In reversing Eddings' death sentence, the Court observed,

"Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." 455 U. S., at 113-115 (emphasis in original).

It therefore is now well established that the Constitution requires that the sentencing body in a capital case not be precluded by statute from considering all relevant mitigating evidence and inferences. Put another way, a jury must be free to conclude that any relevant mitigating evidence amounts to a factor that mitigates the severity of the punishment a defendant ought to suffer. Yet the Maryland statute denies the sentencer the constitutionally required latitude.

II

Like most death penalty statutes, the Maryland statute begins by requiring the sentencing authority—either a judge or a jury—first to consider whether the prosecutor has proved, beyond a reasonable doubt, the existence of any of 10 statutory aggravating circumstances. Md. Ann. Code, Art. 27, § 413(d) (1982 and Supp. 1983). If the sentencer does not find at least one aggravating factor, the sentence must be life imprisonment. § 413(f). If the sentencer finds that one or more aggravating factors exist, it then must determine whether the defendant has proved, by a preponderance of the evidence, that any of eight statutory mitigating factors exist. § 413(g); 299 Md. 331, 361, 473 A. 2d 903, 918 (1984). If no mitigating factors are found, the sentencer must impose death.¹ If, instead, the sentencer has found at least one mitigating factor, it must determine, by a preponderance of the evidence, whether the proven mitigating factors outweigh the aggravating circumstances. § 413(h). If they do, the sentencer must impose a life sentence. If the mitigating factors do not outweigh aggravating factors, the jury must impose a death sentence. The statute states that the Court of Appeals shall consider whether “the evidence supports the jury’s or court’s finding that the aggravating circumstances are not outweighed by mitigating circumstances.” § 414(e)(3).

A

My initial concern is with the statute’s treatment of mitigating factors. Under the statutory scheme, the sentencer can consider a mitigating factor only after the defendant has established its existence by a preponderance of the evidence. But the mitigating

¹ Under Rule 772A of the Maryland Rules of Procedure, which applies to all capital cases, the sentencer must make written findings. Section I of the verdict form asks, factor by factor, which, if any, of the aggravating factors the sentencer has found. Section II of the form similarly asks whether the sentencer has found each of the listed mitigating factors. At the end of Section II, in parentheses, the form states: “If one or more of the above in Section II have been marked ‘yes,’ complete Section III. If all of the above in Section II are marked ‘no,’ you do not complete Section III.” Section III asks the sentencer to weigh aggravating and mitigating factors. Later, the verdict form states: “If Section II was completed and all of the answers were marked ‘no’ then enter ‘Death.’”

factors set out in the statute² are not matters of historical fact—they are matters of legal and moral judgment. These factors do not “exist,” and thus, unlike matters of historical fact, they are not easily proved or disproved. Each one rests on evidence that easily might influence the conclusion that death is proper, even if that evidence does not conclusively *prove* the statutory mitigating factor. For example, the sentencer might be influenced by evidence tending to demonstrate that the defendant acted under substantial duress, or it might even find that the defendant acted under moderate duress. Yet it would not necessarily find that the defendant had proved that he “acted under substantial duress.” Similarly, the sentencer might find that the defendant was of impaired mental capacity, but it might not believe that the impairment was substantial at the time of death. Under the statute, the sentencer would find that the defendant had not proved these mitigating factors. As a result, *the sentencer would be prevented from considering any of the evidence adduced in an effort to meet the burden of proof*, because the statute permits consideration only of the factors proved by a preponderance of the evidence. To preclude the sentencer from considering such potentially influential evidence—as does the statute by denying any weight to evidence if the defendant does not convince the jury that a factor “exists” by a preponderance of the evidence—is to bar, as a matter of law, consideration of all mitigating evidence and influence and thus to violate *Lockett* and *Eddings*. Such a result can only enhance “the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.” 438 U. S., at 605.

²The mitigating factors are: no prior criminal conviction or plea of guilty or *nolo contendere* for a crime of violence; the victim was a participant in the defendant’s conduct or consented to the act that caused the victim’s death; the defendant acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution; the murder was committed while the defendant’s capacity to appreciate its criminality, or conform his conduct, was substantially impaired because of mental incapacity, mental disorder, emotional disturbance, or intoxication; the youthful age of the defendant at the time of the crime; the act of the defendant was not the sole proximate cause of the death; it is unlikely the defendant will engage in further criminal activity that would constitute a threat to society; and any other fact the jury or court specifically sets forth in writing that it finds as mitigating circumstances in the case. § 413(g).

The manner in which Maryland applies the statute exacerbates the problem. The petitioner here was 19 years old at the time of the crime in question. She had previously been found to be mildly retarded, and had been described as immature, impressionable, and as an abuser of a variety of drugs. The trial judge, who acted as sentencer, nevertheless found that petitioner had not borne her burden of proving, as mitigating factors, either (1) "the youthful age of the defendant"; or (2) that her mental incapacity, disorder, or disturbance inhibited her capacity to appreciate the criminality of her conduct or to conform to the requirements of law. Affirming the trial court on this matter, the Court of Appeals viewed the evidence in the light most favorable to the prosecution and held that a rational sentencer could have concluded that the accused failed to *prove* the claimed mitigating factors. Because of that failure of proof, the sentencer could not consider the fact that the defendant was 19 and had a certain mental history. Since the statute permits only that "these mitigating circumstances"—those outlined in the statute—shall be considered, the statute both on its face and in its application to petitioner denies her the full consideration that has become one of the keystones of reliability in the Court's death penalty jurisprudence.³

³ Nor does the mere fact that the sentencer may find other mitigating circumstances to include in the balance, so long as it sets them forth in writing, salvage the statute. Initially, no sentencer, who has been told he may consider certain factors only if they are proved to him, will presume he is able to consider them if they are not proved. That result would render the burden of proof provision of the statute wholly meaningless, and cannot be presumed to be what the legislature had in mind. Additionally, it is wholly plausible that jurors will "intuit perfectly legitimate mitigating circumstances which they cannot articulate," see Weisberg, *Deregulating Death*, 1983 S. Ct. Rev. 305, 373, n. 262. A juror convinced that the evidence amounts to a mitigating factor "might stand mute, haunted by the defendant's look but unable to manufacture a reason for life." Ledewitz, *The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute*, 21 *Duquesne L. Rev.* 103, 155 (1982). The statute requires that the jury conceptualize mitigation as a historical fact to be proved, rather than as the complex legal and moral judgment that our cases require it to be. As a result, those mitigating circumstances that might be too "intangible" for a legislature to define and include in a death statute must be ignored, unless the sentencer somehow can articulate that which the legislature could not. Cf. *Gregg v. Georgia*, 428 U. S. 153, 222 (1976) (WHITE, J., concurring in judgment) (noting that the

B

In addition to compressing the sentencer's wealth of information on mitigation into a rigidly compartmentalized analysis, the statute also prevents a sentencer from answering the basic question: is death the proper sentence? The statute *requires* that death be imposed *whenever* mitigating circumstances do not outweigh aggravating circumstances. It leaves to the jury no room to consider whether death is the appropriate punishment in a specific case. And the sentencer is asked to fill out a form that expressly precludes such discretion.⁴ As JUSTICE STEVENS has written in a similar context:

"Literally read, however, those instructions may lead the jury to believe that it is required to make two entirely separate inquiries: First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? [Under the Maryland scheme, the legislature has rendered this judgment.] And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that 'death is the appropriate punishment in a specific case.'" *Smith v. North Carolina*, 459 U. S. 1056 (1982) (opinion respecting the denial of the petition for certiorari) (quoting *Lockett*, 438 U. S., at 601).

Georgia statute permitted the jury to dispense mercy "on the basis of factors too intangible to write into a statute").

⁴The statute requires the sentencer to return a sentence of death if *no* mitigating factors are proved by a preponderance of the evidence. Otherwise, the verdict form asks only one simple question: "Based on the evidence we unanimously find that it has been proved by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked 'yes' in Section II outweigh the aggravating circumstances marked 'yes' in Section I." Pet. for Cert. 13 (quoting Rule 772A). The sentencer must answer "yes" or "no." The verdict form then tells the sentencer how to fill out the sentence recommendation blanks based solely on that "yes" or "no" answer; much like directions to an income tax form, the instructions do not make clear precisely why a given answer in one section requires a certain response elsewhere.

The Maryland statute unambiguously poses the problem to which JUSTICE STEVENS alluded; given that this statutory scheme explicitly bars the jury from considering whether it thinks death is a proper result in a given case, for whatever reason, the constitutionality of the statute is seriously in doubt.⁵

C

Finally, the statute, the sentencing form, and the statutory standard of appellate review all focus on whether the *mitigating* factors outweigh the aggravating factors, rather than vice versa. This language inevitably would lead a sentencing body to believe that the burden of proof rests on the defendant—who must prove mitigating factors—to prove that mitigating factors outweigh aggravating ones.⁶ This is especially so in that the statute is silent

⁵ Moreover, if we assume that this balancing process permits the sentencer to determine whether death is the proper result given the totality of the circumstances, this subsection of the statute is strikingly infirm. Since the sentencer need find that mitigating factors *outweigh* aggravating factors in order to be freed from the mandate of imposing a death sentence, if a sentencer merely finds that mitigating factors equal aggravating factors—that is, if it finds that death *may or may not* be the appropriate sentence—death shall be imposed. To permit a State to require a death sentence when the jury or court is not certain that the death sentence is appropriate simply undermines every precept this Court has enunciated in its quest for reliability in capital sentencing.

⁶ The state court has not made clear that the contrary is true. In *Tichnell v. State*, 287 Md. 695, 415 A. 2d 830 (1980), the Court of Appeals wrote: “Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors.” *Id.*, at 730, 415 A. 2d, at 849. This statement, made in dictum, curiously flips the statutory order of the words “aggravating” and “mitigating.” The court implicitly recognized that the burden of proof was not immediately consistent with the wording of the statute. Yet this remark can hardly be read to require courts to place the burden on the prosecution on this issue, or to reverse the statutory order when addressing the jury. Indeed, the Court of Appeals has subsequently referred to the section as written in the statute. In this case, the court noted that it had met the statutory mandate of reviewing to assure that the evidence “supports the trial court’s finding that the aggravating circumstance is not outweighed by the mitigating circumstance.” 299 Md. 331, 374, 473 A. 2d 903, 924 (1984). Similarly, in an appeal after remand in the *Tichnell* case, the court discussed the final weighing phase of the sentencer’s decision and wrote: “To persuade the jury to impose a life rather than a death

as to which party bears the burden of proof on this point. As a result, the criminal defendant faces a mandatory death sentence if he is unable to prove that the mitigating circumstances that he has been able to prove outweigh the aggravating factors previously found. This burden places the risk of error squarely on the defendant's shoulders, and on the side of execution. I had not understood the Constitution to permit the State to transfer such an excruciating burden to a defendant.

D

The State contends that this case presents the same constitutional issue raised by other petitioners to whom review was denied, and that certiorari is therefore inappropriate. Brief in Opposition 5. Were it a rule of thumb not to hear cases presenting issues that we had previously declined to hear, our caseload would no doubt be considerably lightened. That argument has never been, and surely could never be, dispositive. But of far greater import is the fact that the opinion to which the State refers, *Tichnell v. State*, 297 Md. 432, 468 A. 2d 1 (1983), cert. denied, 466 U. S. 993 (1984), did not address these issues directly; in an earlier opinion in that same case, *Tichnell v. State*, 287 Md. 695, 415 A. 2d 830 (1980), the court had addressed, although only in dictum, the issue actually presented here. The fact that the Court of Appeals relied on the reasoning in the earliest *Tichnell* to dispose of Stebbing's claim does not diminish the possibility that certiorari was denied in the last *Tichnell* because this issue was not addressed in that opinion. But, in any event, it is axiomatic that denials of writs of certiorari have no precedential value. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U. S. 363, 366, n. 1 (1973); *Maryland v. Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (1950) (Frankfurter, J.). The fact that we might have made a mistake in *Tichnell* should not compel us to make a mistake here too.

sentence, Tichnell wanted to convince it that the mitigating circumstances outweighed the aggravating circumstances." *Tichnell v. State*, 290 Md. 43, 61, 427 A. 2d 991, 1000 (1981); see also *id.*, at 62, 427 A. 2d, at 1000. It thus seems clear that the court has in no respect required that the statutory order of the two words be reversed, or that the sentencer expressly be informed that the prosecution bears the burden of proof on the point. The jury or court is left on its own to guess at the burden of proof on the ultimate question.

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III

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman v. Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). But even if I did not, I would dissent from denial of certiorari in this case. A statute that poses any one of the issues sketched above would, to my mind, warrant review by this Court because of its inconsistency with our precedent. When a single capital sentencing scheme raises the number of serious questions that this one does, and when it so threatens to undermine the very reliability that this Court has identified as the keystone to the constitutionality of the death penalty, it seriously suggests that the State is arbitrarily sentencing defendants to death. To avoid that result, I would grant the petition. I respectfully dissent from the Court's refusal to do so.

No. 84-5303. WAYE v. MORRIS, SUPERINTENDENT, MECKLENBURG CORRECTIONAL CENTER. Sup. Ct. Va. Certiorari denied.

JUSTICE BRENNAN, dissenting.

Adhering 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), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I

In state habeas corpus proceedings, petitioner argued that he was denied effective assistance of trial counsel as evidenced by that counsel's failure to object to an instruction that was inconsistent with the decision this Court announced, one year after petitioner's trial, in *Sandstrom v. Montana*, 442 U. S. 510 (1979). Petitioner's sole defense at his capital trial for murder was lack of premeditation. The evidence at trial showed that petitioner had consumed a number of beers on the evening of the crime and that, immediately after killing the victim, he telephoned police to report that he "had killed somebody." Petitioner accompanied sheriff's

deputies to the victim's house, where he showed them the body. Petitioner was convicted of capital murder on April 7, 1978, and sentenced to death.

The instruction at issue, evidently taken from the Virginia form book of jury instructions, was as follows:

"The Court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequences [*sic*] of his act."

As the State now concedes, there is no doubt that this instruction violates the Constitution, for in *Sandstrom* we held that a virtually identical instruction violated due process and the principles against burden shifting we had set forth in *Mullaney v. Wilbur*, 421 U. S. 684 (1975), and *Patterson v. New York*, 432 U. S. 197 (1977). *Sandstrom*, however, was decided by this Court on June 18, 1979, a little over a year after petitioner's trial. The question presented by this petition is thus whether the failure of petitioner's counsel, in a capital case in which premeditation was the only issue, to make the very same objection that *Sandstrom*'s trial counsel had made several years earlier indicates that petitioner was denied his Sixth Amendment right to effective counsel.

This question presents the Court with an important opportunity to give content to the generalized standards for constitutionally effective counsel announced last Term in *Strickland v. Washington*, 466 U. S. 668 (1984). With respect to the prejudice prong of *Strickland*, the fact that the Court has already seen fit to grant a petition for certiorari on the question whether *Sandstrom* error can ever be harmless indicates that the prejudice issue is worthy of the Court's attention. *Franklin v. Francis*, 720 F. 2d 1206 (CA11 1983) and 723 F. 2d 770, cert. granted, 467 U. S. 1225 (1984);¹ see also *Connecticut v. Johnson*, 460 U. S. 73 (1983) (four-Justice plurality holding that *Sandstrom* error is never harmless). And with respect to the ineffectiveness component of *Strickland*—the requirement that counsel's performance not fall below the "range of competence demanded of attorneys in criminal cases," *Strickland*, *supra*, at 687—petitioner has marshaled a strong case.

¹To the extent there is any question as to whether petitioner was prejudiced by the defective instruction, the petition ought at least to be held for our decision in *Francis*, in which we will address the effect of *Sandstrom* error.

Petitioner's trial took place in April 1979. Nearly two years earlier, in Deer Lodge County, Mont., David Sandstrom's counsel had realized that decisions from this Court made it virtually certain that the instruction used at petitioner's trial was inconsistent with the Constitution, a contention with which we eventually and unanimously agreed. Our decision in *Sandstrom*, we stated, was a logical outgrowth of *Mullaney v. Wilbur*, *supra*—in which the Court invalidated an instruction that malice was to be implied unless the defendant rebutted this presumption—and *Patterson v. New York*, *supra*, at 215—in which we reaffirmed that “a State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant” by means of any presumption. Both of these decisions, of course, were available to petitioner's counsel at the time of trial.

Mullaney, in particular, should have put petitioner's counsel on notice to make the objection. As petitioner informed the state habeas court, in the wake of *Mullaney* a spate of Virginia publications, including ones oriented to practitioners, had suggested that the Virginia instruction on implied malice used at petitioner's trial was constitutionally defective. See, *e. g.*, Comment, Has the Burger Court Dealt a Death Blow to the Presumption of Malice in Virginia, 10 U. Rich. L. Rev. 687 (1976); Friend, The Law of Evidence in Virginia §§ 89–93 (1977); see also Note, Reforming the Law of Homicide, 59 Va. L. Rev. 1270 (1973). In addition, a criminal lawyer of long experience in Virginia testified in petitioner's state habeas proceedings that, after *Mullaney* and as of 1978, every competent attorney in a Virginia case in which premeditation was at issue would have viewed it as mandatory to object to the burden-shifting instruction. As the attorney said: “[I]f the Commonwealth requests an instruction that says presumption, if that word presumption is in there, the red flag goes up and the defendant ought to be prepared to object to it. *Mullaney* is one of the grounds.” Pet. for Cert. 10.

This is therefore not a case in which “defense counsel [failed to] recognize and raise every conceivable constitutional claim.” *Engle v. Isaac*, 456 U. S. 107, 134 (1982). Nor is it a case in which either “the defendant's own statements or actions” or an arguably “tactical decision” of counsel can even plausibly justify the failings of petitioner's counsel. Instead, trial counsel in a

capital case "simply did not think"² to make an objection that every competent attorney in Virginia allegedly would have made and that David Sandstrom's counsel had thought to make a full two years earlier.

The way in which the state courts have treated petitioner's ineffectiveness claim suggests that, at the least, this Court ought to vacate the judgment below and remand for reconsideration in light of *Strickland*. The Virginia Supreme Court denied a petition for appeal on the issue, stating simply in one sentence that there was no reversible error in the judgment of the State Circuit Court that had considered the merits of petitioner's claim. To the extent it is possible to decipher the Circuit Court's judgment, however, it seems primarily based on the conclusion that "[i]nstructions given at Petitioner's trial were both adequate and appropriate, and therefore Petitioner's counsel was not ineffective in failing to ask for instructions which Petitioner now claims should have been requested" and the holding that "[a]s a matter of law, no evidence of prejudice has been shown" App. to Pet. for Cert. 7, 6. The former is an impermissible conclusion under *Sandstrom* and indicates that the court simply did not understand the nature of the *Sandstrom* claim. The latter conclusion, to the extent it is in fact a holding of law, also violates *Sandstrom*; to the extent the conclusion instead is an evidentiary one based on review of the record as a whole, the decision should still be vacated and remanded once this Court decides *Francis*, *supra*, and outlines the standard by which the prejudice prong of *Strickland* applies to *Sandstrom* claims.³

In light of the substantiality of petitioner's claim and the shoddy treatment it and our precedents have received in the Virginia courts, I would grant the petition and address the application of *Strickland* to this case.⁴ At a minimum, however, the petition

²Pet. for Cert. 3 (citing testimony at plenary hearing on state habeas petition).

³Again, to assure that similarly situated capital defendants are treated similarly, the Court should also consider holding this petition pending decision in *Francis*.

⁴I note also that, if petitioner's counsel cannot be considered ineffective for failing to have raised this objection, it can only be because the claim was not sufficiently apparent at the time of trial that all reasonably competent attorneys would have raised it. In that case, under our decision last Term in *Reed*

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should be granted and the judgment below vacated so that the state courts can start this time from the correct premise that a *Sandstrom* error was committed and then begin to consider petitioner's ineffectiveness claim in light of that error and against the backdrop of our decision in *Strickland*.

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 petition and vacate the death sentence. In this particular case, I would also grant the petition to address on the merits the questions of whether petitioner's counsel performed with reasonable competence when he failed to object to a constitutionally defective instruction and whether petitioner was sufficiently prejudiced by this failure to warrant a new trial.

Rehearing Denied

No. 83-436. REGAN, SECRETARY OF THE TREASURY, ET AL. v. WALD ET AL., 468 U. S. 222. Petition for rehearing denied.

No. 83-297. ARMCO INC. v. HARDESTY, TAX COMMISSIONER OF WEST VIRGINIA, 467 U. S. 638. Petition for rehearing denied. JUSTICE POWELL would grant this petition.

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Dismissal Under Rule 53

No. 84-428. KEMPER v. IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 742 F. 2d 1462.

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Miscellaneous Order

No. A-253. BRILEY v. BOOKER, WARDEN. Application for stay of execution, which is scheduled for 11 p.m. on Friday, Octo-

v. *Ross*, 468 U. S. 1 (1984), petitioner and his counsel would have had cause for the failure to raise it, and the federal habeas court would then be required to consider whether the failure to give the instruction sufficiently prejudiced petitioner as to require that court to consider the merits of petitioner's challenge. *Wainwright v. Sykes*, 433 U. S. 72 (1977). That issue, of course, must be left in the first instance to the federal habeas court.

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ber 12, 1984, presented to THE CHIEF JUSTICE, 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 and a petition for writ of certiorari and would vacate the death sentence in this case.

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Appeal Dismissed

No. 83-461. CLUB MEDITERRANEE, S.A. *v.* DORIN ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 93 App. Div. 2d 1007, 462 N. Y. S. 2d 524.

Certiorari Granted—Vacated and Remanded

No. 83-396. UNITED STATES *v.* MORENO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Segura v. United States*, 468 U. S. 796 (1984). JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE STEVENS dissent. Reported below: 701 F. 2d 815.

Miscellaneous Orders

No. — — —. BENNETT *v.* CITY OF SLIDELL ET AL. Motion of petitioner to direct the Clerk to file a petition for writ of certiorari with an appendix that does not comply with the Rules of this Court denied.

No. — — —. LEWIS *v.* FROSCH, ADMINISTRATOR OF NASA. Motion to dispense with printing the petition for writ of certiorari denied. JUSTICE STEVENS would grant the motion.

No. — — —. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL. *v.* DANIEL ET AL. Motion of appellants to file an appendix to a jurisdictional statement that does not comply with the Rules of this Court denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR would grant the motion and require the appellants to file 40 copies of the appendix.

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No. A-225. HERBERT SCHMIDT & CO., AKA WAFFENFABRIK SCHMIDT GMBH *v.* LATHAM ET AL. 18th Jud. Dist. Ct. Tex., Somerville County. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D-422. IN RE DISBARMENT OF HARDEN. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D-424. IN RE DISBARMENT OF STEWART. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D-428. IN RE DISBARMENT OF QUELLO. Disbarment entered. [For earlier order herein, see 466 U. S. 969.]

No. D-430. IN RE DISBARMENT OF LEVINSON. Disbarment entered. [For earlier order herein, see 467 U. S. 1202.]

No. D-432. IN RE DISBARMENT OF GRAFFAGNINO. Disbarment entered. [For earlier order herein, see 467 U. S. 1203.]

No. D-440. IN RE DISBARMENT OF WORK. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D-441. IN RE DISBARMENT OF MUSHKIN. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D-442. IN RE DISBARMENT OF SWEENEY. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D-455. IN RE DISBARMENT OF PHILLIPS. It is ordered that Monte Charles Phillips, of Kansas City, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-456. IN RE DISBARMENT OF O'BRIEN. It is ordered that Francis Edward O'Brien, of Deer Park, 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-457. IN RE DISBARMENT OF SHAPIRO. It is ordered that Alfred Bruce Shapiro, of Alexandria, La., 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.

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No. D-458. IN RE DISBARMENT OF REY. It is ordered that Joseph J. Rey, Sr., of Odessa, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-459. IN RE DISBARMENT OF STACHURSKI. It is ordered that Kenneth M. Stachurski, of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-460. IN RE DISBARMENT OF HINES. It is ordered that Eugene Patrick Hines, of McLean, Va., 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. 82-1922. SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL. *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 467 U. S. 1240.] Motion of National Small Shipments Traffic Conference et al. for leave to file a brief as *amici curiae* granted.

No. 84-177. ILLINOIS *v.* HAMMOCK. App. Ct. Ill., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 84-5450. IN RE HARRIS. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 83-1935. TONY AND SUSAN ALAMO FOUNDATION ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari granted. Reported below: 722 F. 2d 397.

No. 84-127. RICHARDSON-MERRELL INC. *v.* KOLLER, AN INFANT, BY AND THROUGH KOLLER ET UX., HER NATURAL GUARDIANS, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 237 U. S. App. D. C. 333, 737 F. 2d 1038.

No. 84-277. BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE ET AL. *v.* MCCREARY ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 739 F. 2d 716.

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No. 83-1569. MITSUBISHI MOTORS CORP. *v.* SOLER CHRYSLER-PLYMOUTH, INC.; and

No. 83-1733. SOLER CHRYSLER-PLYMOUTH, INC. *v.* MITSUBISHI MOTORS CORP. C. A. 1st Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 723 F. 2d 155.

Certiorari Denied. (See also No. 83-461, *supra.*)

No. 83-1739. LOCAL UNION No. 1020, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO *v.* MC-NAUGHTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 1042 and 722 F. 2d 1459.

No. 83-1778. MONTGOMERY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 446 So. 2d 697.

No. 83-1958. ROGERS *v.* LOCKHEED-GEORGIA CO. ET AL.; and

No. 83-6760. SANDERS *v.* GRAND UNION CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1247.

No. 83-1967. MURRAY *v.* BRANCH MOTOR EXPRESS CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 1146.

No. 83-2075. RANZONI ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 555.

No. 83-6468. ASKEW *v.* F & W EXPRESS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 723 F. 2d 624.

No. 83-6757. OSSEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 446 So. 2d 280.

No. 83-6800. AMOS *v.* CARROLL, SUPERINTENDENT, CALIFORNIA INSTITUTION FOR MEN. C. A. 9th Cir. Certiorari denied.

No. 83-6849. DENNISON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 730 F. 2d 1086.

No. 83-6868. SCHWARTZBAUER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 9.

No. 83-6900. TILLIS *v.* WILLIAMS, DIRECTOR OF ALABAMA PAROLE BOARD, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

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No. 84-10. CITY OF BETHANY, ILLINOIS, ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 234 U. S. App. D. C. 32, 727 F. 2d 1131.

No. 84-109. STICH ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 730 F. 2d 115.

No. 84-133. HOLLIDAY *v.* XEROX CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 548.

No. 84-139. CLARENCE R. YEAGER DISTRIBUTING, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1109.

No. 84-274. KNAPP STREET REALTY CORP. *v.* WISCONSIN INSURANCE PLAN ET AL. Ct. App. Wis. Certiorari denied.

No. 84-283. SEATS ET UX. *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 121 Ill. App. 3d 637, 460 N. E. 2d 110.

No. 84-291. CALL ET UX. *v.* CALIFORNIA TAHOE REGIONAL PLANNING AGENCY. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84-295. UNITED MEXICAN STATES *v.* OLSEN, A MINOR, BY SHELDON, MATERNAL GRANDMOTHER AND GUARDIAN AD LITEM, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 729 F. 2d 641.

No. 84-296. BRIGGS TRANSPORTATION CO. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 341.

No. 84-297. KIRBY *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-298. SALIBRA *v.* SUPREME COURT OF OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 730 F. 2d 1059.

No. 84-303. GREEN ET AL. *v.* SANTA FE INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1434.

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No. 84-304. *GRANN ET AL. v. CITY OF MADISON*. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 786.

No. 84-305. *KELLY v. IDAHO*. Ct. App. Idaho. Certiorari denied. Reported below: 106 Idaho 268, 678 P. 2d 60.

No. 84-306. *DEPARTMENT OF REVENUE OF ILLINOIS ET AL. v. CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL.* Sup. Ct. Ill. Certiorari denied. Reported below: 102 Ill. 2d 210, 464 N. E. 2d 1064.

No. 84-308. *PAAR v. FINNERTY, SHERIFF, ET AL.* C. A. 2d Cir. Certiorari denied.

No. 84-309. *CANTON TEXTILE MILLS, INC., ET AL. v. LATHEM*. Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. 102, 317 S. E. 2d 189.

No. 84-313. *SIMPSON v. SIMPSON*. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 451 So. 2d 865.

No. 84-323. *LEATHERBY INSURANCE CO., AKA WESTERN EMPLOYERS INSURANCE CO. v. MERIT INSURANCE CO.* C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 580.

No. 84-327. *FINNELL v. NEW MEXICO*. Sup. Ct. N. M. Certiorari denied. Reported below: 101 N. M. 732, 688 P. 2d 769.

No. 84-383. *ARGITAKOS v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 784.

No. 84-396. *JONES v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 785.

No. 84-419. *MALENO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 426.

No. 84-423. *DAMSKY v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 134.

No. 84-5093. *WALKER v. NAVAJO-HOPI INDIAN RELOCATION COMMISSION*. C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 2d 1276.

No. 84-5235. *KREJCI v. UNITED STATES ARMY MATERIAL DEVELOPMENT READINESS COMMAND ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 733 F. 2d 1278.

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No. 84-5300. ROYSTER *v.* ADAMS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 431.

No. 84-5309. MANNING-EL *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 321.

No. 84-5315. LEACH *v.* CARRASQUILLO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 142.

No. 84-5316. BRYANT *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84-5318. BELL *v.* DEROBERTIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 18.

No. 84-5324. BROWN *v.* NEWSOME, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5327. YOUNG *v.* DUCHARME, SUPERINTENDENT, WASHINGTON STATE REFORMATORY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 84-5335. DAVIS *v.* BUTLER, SHERIFF, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84-5347. RUBEN-MORELL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 890.

No. 84-5361. BORJA *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 733.

No. 84-5376. HERALD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 84-5387. DANIELSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1143.

No. 84-5388. KNUTTI ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 677.

No. 84-5402. MAJESTIC *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 426.

No. 84-5403. PARSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

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No. 84-5404. *PERRY v. LOCKHART*, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied.

No. 84-5409. *STEVENSON v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 84-5413. *MCCOLLUM v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 1419.

No. 84-5416. *McFADDEN v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 739 F. 2d 149.

No. 83-1517. *MCCARTHY, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. v. BRUNO*. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 721 F. 2d 1193.

No. 83-2144. *GARRISON, WARDEN, ET AL. v. HUDSON*. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 732 F. 2d 150.

No. 83-6898. *CAMPBELL v. TENNESSEE*. Sup. Ct. Tenn.;

No. 84-5238. *MCCORQUODALE v. KEMP, WARDEN*. Super. Ct. Ga., Butts County; and

No. 84-5249. *STEWART v. ILLINOIS*. Sup. Ct. Ill. Certiorari denied. Reported below: No. 83-6898, 664 S. W. 2d 281; No. 84-5249, 101 Ill. 2d 470, 463 N. E. 2d 677.

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. 83-6994. *HEINEY v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: 447 So. 2d 210.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman v.*

Georgia, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). I therefore dissent from the Court's denial of the petition and would vacate the death sentence here.

I

I must also write, however, to point out an aspect of the trial judge's sentencing decision that violates indispensable principles contained in the prevailing death penalty jurisprudence of this Court. The trial judge in this case overturned a jury recommendation of life and sentenced the defendant to die, in part out of a belief as to the law that is wholly inconsistent with the constitutional principles of *Eddings v. Oklahoma*, 455 U. S. 104 (1982), and *Lockett v. Ohio*, 438 U. S. 586 (1978).

In reviewing the jury recommendation against death, the sentencing judge explained that he saw no mitigating circumstances, and that he believed the jury had based its recommendation on an "invalid" mitigating circumstance stemming from residual feelings of doubt as to guilt. Because he saw this as a legally improper mitigating circumstance he felt little hesitancy in putting their recommendation to the side. Since the sentencing here, the Florida Supreme Court seems to have added its voice in support of the proposition that lingering doubts as to guilt cannot be a ground for mitigating a death sentence.

"A convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." *Buford v. State*, 403 So. 2d 943, 953 (1981), cert. denied, 454 U. S. 1164 (1982).

The error of the sentencing judge in this case thus seems to have been enshrined in Florida law.

This Court, in *Lockett* and then more decisively in *Eddings*, held that *any* aspect of the case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is certainly nothing irrational—indeed, there is nothing novel—about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such

an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.

The wisdom behind mitigating death sentences in the face of doubts as to guilt led the drafters of the Model Penal Code to include that factor in their model death penalty statute as a mitigating factor so strong that its presence would exclude the possibility of death as a matter of law.

"Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [*i. e.*, a noncapital offense] if it is satisfied that:

"(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt."

ALI, Model Penal Code § 210.6(1), p. 107 (Off. Draft, 1980).

In its explanatory comments the authors made their intentions clear:

"This provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal." § 210.6(1), Comment 5, p. 134.

The Fifth Circuit has also acknowledged the validity of the mitigating factor:

"The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained *any* doubt whatsoever. There may be no *reasonable* doubt—doubt based upon reason—and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real.

"The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the

defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death." *Smith v. Balkcom*, 660 F. 2d 573, 580-581 (1981), cert. denied, 459 U. S. 882 (1982).

Once again, the factor was presented as a valid one in JUSTICE STEVENS' partial dissent in *Spaziano v. Florida*, 468 U. S. 447, 467 (1984). The dissent noted that the *Spaziano* jury "may well [have been] sufficiently convinced of [Spaziano's] guilt to convict him, but nevertheless also sufficiently troubled by the possibility that an irrevocable mistake might be made . . . that [it] concluded that a sentence of death could not be morally justified in this case." *Id.*, at 488, n. 34. We did not then realize, however, that Florida seems to have denigrated this wholly proper mitigating factor as a matter of law.

Standing in sharp contradistinction to the *Eddings* and *Lockett* holdings, the refusal by Florida courts to consider this valid factor should be reviewed.

II

Although this legal issue might arise in a sentencing scheme that respected the finality of a jury decision against death, it is not necessarily an accident that this case came from Florida's system, where judges may override jury decisions for life. In *Spaziano*, which upheld the Florida system, the dissent cited data showing that judges are usually more likely to impose death than are juries. 468 U. S., at 488, n. 34. Where fully informed and rational juries decide that death is inappropriate, a judge's override rarely if ever shows that, in spite of the jury, there was really no reasonable doubt but that death was appropriate. It is far more likely that the override decision simply fails to account for the more intangible or less traditionally "legal" elements of mitigation that informed a jury's decision. This case seems a clear illustration. Indeed, the *Spaziano* dissent correctly suspected that a system of death sentencing by judges—"trained to distinguish proof of guilt from questions concerning sentencing"—would be less likely to recognize this valid mitigating circumstance. *Ibid.*

Eddings and *Lockett* entitle a defendant to a sentencer who can consider *all* mitigating circumstances, whether or not they conform to traditional legal categories. The weight assigned to any element can only be a function of the values of the community, for certainly there is no "objective" formula. Once a mitigating

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circumstance is considered, assigned weight, and determined to be sufficient to preclude death, the Constitution should allow no "superior" authority to remove that circumstance from the equation and impose death. To allow a judge to override a jury decision for life—as this Court did in *Spaziano*—not only places the defendant in the fundamentally unfair position of having to repetitively justify the appropriateness of one's continued life, it also facilitates the denigration of a variety of mitigating circumstances.

Only a narrow reliance on legal formalism could lead one to question whether doubts as to guilt can be insufficient to preclude acquittal but sufficient to preclude death. The judge here concluded that the jury confronted the horror of sending to his death a defendant who might be innocent. But rather than accept that this was weighty logic in favor of life, he assumed that it was a form of logic that should be declared invalid by Florida courts. I dissent from the denial of the petition in this case.

No. 84-271. ILLINOIS ET AL. *v.* ASSOCIATED MILK PRODUCERS, INC., ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 730 F. 2d 528.

No. 84-294. ENVIROTECH CORP. ET AL. *v.* AMSTAR CORP. C. A. Fed. Cir. Motion of Simmons Fastener Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 730 F. 2d 1476.

No. 84-5213. PALMER *v.* DEROBERTIS, WARDEN. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 738 F. 2d 168.

No. 84-5566 (A-241). KNIGHTON *v.* LOUISIANA. C. A. 5th Cir. Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 740 F. 2d 1344.

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 and the petition for writ of certiorari and would vacate the death sentence in this case.

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Dismissal Under Rule 53

No. 84-275. GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 735 F. 2d 69.

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Appeals Dismissed

No. 83-6904. COLLIER *v.* TEXAS. Appeal from Ct. App. Tex., 3d Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-319. FALK *v.* STATE BAR OF MICHIGAN. Appeal from Sup. Ct. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 418 Mich. 270, 342 N. W. 2d 504.

No. 84-408. CLEAR-VIEW CABLE T. V., INC. *v.* TOWN OF NARROWS. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 227 Va. 272, 315 S. E. 2d 835.

No. 84-5379. MEDLIN *v.* POULSON ET AL. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-5380. SUMMA *v.* HASSON ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 751 F. 2d 371.

No. 84-131. INTAKE WATER CO. *v.* YELLOWSTONE RIVER COMPACT COMMISSION ET AL. Appeal from D. C. Mont. dismissed for want of jurisdiction. Reported below: 590 F. Supp. 293.

No. 84-196. FURMAN, DBA NORTHSIDE SECRETARIAL SERVICE *v.* THE FLORIDA BAR. Appeal from Sup. Ct. Fla. dismissed

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for want of substantial federal question. Reported below: 451 So. 2d 808.

No. 84-342. FIRESIDE CHRYSLER-PLYMOUTH, MAZDA, INC., ET AL. v. EDGAR, SECRETARY OF STATE OF ILLINOIS, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 102 Ill. 2d 1, 464 N. E. 2d 275.

No. 84-361. KEMPNER v. DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL & PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO, ET AL. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 126 Mich. App. 452, 337 N. W. 2d 354.

No. 84-5421. THOMPSON v. ARKANSAS SOCIAL SERVICES. Appeal from Sup. Ct. Ark. dismissed for want of substantial federal question. Reported below: 282 Ark. 369, 669 S. W. 2d 878.

No. 84-315. LEVERSON v. CONWAY, COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES. Appeal from Sup. Ct. Vt. dismissed for want of substantial federal question. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 144 Vt. 523, 481 A. 2d 1029.

Certiorari Granted—Vacated and Remanded

No. 83-2082. CROOKER v. UNITED STATES PAROLE COMMISSION. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Solicitor General's present interpretation of Fed. Rule Crim. Proc. 32 asserted in his brief filed October 3, 1984, on behalf of the Parole Commission. Reported below: 730 F. 2d 1.

No. 84-346. MINTZES, WARDEN v. WILSON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Strickland v. Washington*, 466 U. S. 668 (1984). Reported below: 733 F. 2d 424.

Miscellaneous Orders

No. — — —. TRANSIT CASUALTY CO. v. CAMP;

No. — — —. WAKEFIELD v. HILTON ET AL.; and

No. — — —. YACABUCCI v. YACABUCCI. Motions to direct the Clerk to file the petitions for writs of certiorari out of time denied.

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No. A-1. *BECTON v. UNITED STATES*. Application for bail pending appeal, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-215. *WINSLOW ET UX. v. FOOTE, JUDGE*. Sup. Ct. Colo. Application for stay and order to show cause, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A-316. *BARCELO, GOVERNOR OF PUERTO RICO v. HERNANDEZ AGOSTO, PRESIDENT OF PUERTO RICO SENATE*. Application to stay issuance of the writ of mandamus granted by the United States Court of Appeals for the First Circuit, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. A-342. *KNIGHTON v. BLACKBURN, WARDEN*. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, 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 and a petition for writ of certiorari and would vacate the death sentence in this case.

No. 9, Orig. *UNITED STATES v. LOUISIANA ET AL.* Motion of Alabama for divided argument granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, *ante*, p. 808.]

No. D-446. *IN RE DISBARMENT OF WINNER*. David Lee Winner, of Wooster, 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 September 18, 1984 [468 U. S. 1248], is hereby discharged.

No. 82-1260. *COPPERWELD CORP. ET AL. v. INDEPENDENCE TUBE CORP.*, 467 U. S. 752. Motion of respondent for Court to enter order providing for nonretroactive application of judgment and other relief denied. JUSTICE WHITE took no part in the consideration or decision of this motion.

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No. 83-1329. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION *v.* REAL. Sup. Ct. Jud. Mass. [Certiorari granted, *ante*, p. 814.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 83-1894. PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the parties to dispense with printing the joint appendix granted.

No. 83-2165. JONES ET AL. *v.* PETIT, COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84-231. HOOPER ET AL. *v.* BERNALILLO COUNTY ASSESSOR. Ct. App. N. M. [Probable jurisdiction noted, *ante*, p. 878.] Motion of the parties to dispense with printing the joint appendix granted.

No. 84-5004. BALL *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 816.] Motion for appointment of counsel granted, and it is ordered that Jo S. Widener, of Bristol, Va., be appointed to serve as counsel for petitioner in this case.

No. 84-5495. WEEMS *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 19, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84-479. IN RE MOBIL OIL CORP. ET AL. Petition for writ of mandamus denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

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Probable Jurisdiction Noted

No. 84-325. METROPOLITAN LIFE INSURANCE CO. *v.* MASSACHUSETTS; and

No. 84-356. TRAVELERS INSURANCE CO. *v.* MASSACHUSETTS. Appeals from Sup. Jud. Ct. Mass. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 391 Mass. 730, 463 N. E. 2d 548.

Certiorari Granted

No. 83-2136. CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 731 F. 2d 1052.

No. 83-2143. TENNESSEE *v.* STREET. Ct. Crim. App. Tenn. Certiorari granted. Reported below: 674 S. W. 2d 741.

No. 84-55. EMPLOYERS NATIONAL INSURANCE CO. *v.* OCHOA. C. A. 5th Cir. Certiorari granted. Reported below: 724 F. 2d 1171.

No. 84-194. UNITED STATES *v.* SHEARER, INDIVIDUALLY, AND AS ADMINISTRATRIX FOR THE ESTATE OF SHEARER. C. A. 3d Cir. Certiorari granted. Reported below: 723 F. 2d 1102 and 729 F. 2d 266.

No. 84-261. COMMODITY FUTURES TRADING COMMISSION *v.* WEINTRAUB ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 722 F. 2d 338.

No. 84-312. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL. C. A. D. C. Cir. Motion of United Black Fund of America et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion and this petition. Reported below: 234 U. S. App. D. C. 148, 727 F. 2d 1247.

No. 84-335. MITCHELL *v.* FORSYTH. C. A. 3d Cir. Certiorari granted. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 729 F. 2d 267.

No. 84-5059. RAMIREZ *v.* INDIANA. Ct. App. Ind. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 455 N. E. 2d 609.

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No. 84-5108. *LIPAROTA v. UNITED STATES*. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 735 F. 2d 1044.

Certiorari Denied. (See also Nos. 83-6904, 84-319, 84-408, 84-5379, and 84-5380, *supra*.)

No. 83-1702. *CHARLESTON TOWN CENTER PARKING ET AL. v. TRI-STATE STEEL ERECTORS, INC.* Sup. Ct. App. W. Va. Certiorari denied.

No. 83-1754. *MASSEY v. EMERGENCY ASSISTANCE, INC., ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 724 F. 2d 690.

No. 83-2022. *GRIBBLE v. BUCKNER, JUDGE, GENERAL SESSIONS COURT OF RUTHERFORD COUNTY, TENNESSEE, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 909.

No. 83-2057. *MARTIN v. CALIFORNIA*. Sup. Ct. Cal. Certiorari denied.

No. 83-2062. *MARTIN v. CALIFORNIA*. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 150 Cal. App. 3d 148, 197 Cal. Rptr. 655.

No. 83-2083. *LYONS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 243.

No. 83-2114. *KEARNEY v. EHRICHS ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1170.

No. 83-2117. *AMERICAN TRUCKING ASSNS., INC., ET AL. v. INTERSTATE COMMERCE COMMISSION ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 1243.

No. 83-6407. *ROBINSON v. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS*. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1112.

No. 83-6540. *BREWER v. ILLINOIS*. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 118 Ill. App. 3d 189, 454 N. E. 2d 1023.

No. 83-6786. *MILLS v. SOUTH CAROLINA*. Sup. Ct. S. C. Certiorari denied. Reported below: 281 S. C. 60, 314 S. E. 2d 324.

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No. 83-6798. *GARY v. CALIFORNIA*. Sup. Ct. Cal. Certiorari denied.

No. 83-6815. *SHERER v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 470 A. 2d 732.

No. 83-6838. *PAULSON v. BLACK, WARDEN*. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1164.

No. 83-6840. *SHANNON v. DEROBERTIS, WARDEN, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1465.

No. 83-6852. *WHITE v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 119 Ill. App. 3d 1165, 471 N. E. 2d 251.

No. 83-6917. *BOSTONE v. NEW YORK*. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 97 App. Div. 2d 681, 468 N. Y. S. 2d 289.

No. 83-6918. *CHAPMAN v. MUSICH ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 726 F. 2d 405.

No. 83-6966. *MACKEY v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 942.

No. 83-7006. *WHITE LANCE v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 162.

No. 83-7019. *MELMUKA v. WELLBORN, WARDEN*. C. A. 7th Cir. Certiorari denied.

No. 83-7029. *ROSE v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 731 F. 2d 1337.

No. 84-62. *ATLAS MACHINE & IRON WORKS, INC. v. TENNESSEE VALLEY AUTHORITY*. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 12.

No. 84-74. *BAILEY v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 296.

No. 84-170. *IMPRO PRODUCTS, INC. v. BLOCK, SECRETARY OF AGRICULTURE*. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 359, 722 F. 2d 845.

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No. 84-193. *WOLFSON v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 733 F. 2d 441.

No. 84-210. *MCDONALD v. BRANIFF AIRWAYS, INC., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 315.

No. 84-217. *INTERMOUNTAIN RURAL ELECTRIC ASSN. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 10th Cir. Certiorari denied. Reported below: 732 F. 2d 754.

No. 84-225. *MALIZIA v. NEW YORK*. Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 755, 465 N. E. 2d 364.

No. 84-270. *GHIDONI v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 814.

No. 84-273. *RIDGE ET AL. v. PENNSYLVANIA STATE EMPLOYEES' RETIREMENT BOARD ET AL.* Sup. Ct. Pa. Certiorari denied.

No. 84-281. *SCHULIST FARMS, INC., ET AL. v. ITT CONSUMER FINANCE CORP. ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1367.

No. 84-314. *GIGLIO v. DUNN ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 1133.

No. 84-317. *WRIGHT v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 84-330. *GAYNOR-STAFFORD INDUSTRIES, INC. v. WATER POLLUTION CONTROL AUTHORITY OF THE TOWN OF STAFFORD ET AL.* Sup. Ct. Conn. Certiorari denied. Reported below: 192 Conn. 638, 474 A. 2d 752.

No. 84-334. *PEAT, MARWICK, MITCHELL & CO. v. MOSESIAN*. C. A. 9th Cir. Certiorari denied. Reported below: 727 F. 2d 873.

No. 84-341. *ROSENFELD v. COHN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 625.

No. 84-343. *GABRIEL v. INTERSTATE COMMERCE COMMISSION ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1349.

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No. 84-344. *YOUNGS v. BROOME COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL.* Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 838, 466 N. E. 2d 150.

No. 84-345. *BARKER v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1280.

No. 84-350. *INDEPENDENT SCHOOL DISTRICT No. 196, ROSEMOUNT-APPLE VALLEY, MINNESOTA, ET AL. v. CYBYSKE.* Sup. Ct. Minn. Certiorari denied. Reported below: 347 N. W. 2d 256.

No. 84-353. *HOWELL, DBA HOWELL ELECTRIC CO. v. STATE BOARD OF EQUALIZATION OF CALIFORNIA.* C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 2d 624.

No. 84-354. *LENGYEL v. BOARD OF REGENTS OF NORTHERN KENTUCKY UNIVERSITY ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 15.

No. 84-359. *SAGAN v. HARVEY ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 424.

No. 84-369. *LEAK v. ST. JOSEPH HOSPITAL OF JOLIET ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 18.

No. 84-370. *WHITE v. VATHALLY ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 732 F. 2d 1037.

No. 84-373. *JUARBE, DIRECTOR, BUREAU OF SPECIAL INVESTIGATIONS OF THE PUERTO RICO DEPARTMENT OF JUSTICE v. PEREZ, CHAIRMAN, JUDICIARY COMMITTEE OF THE PUERTO RICO SENATE, ET AL.* Sup. Ct. P. R. Certiorari denied.

No. 84-375. *LEVIN v. REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS.* Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 535, 463 N. E. 2d 715.

No. 84-381. *SEAFLITE, INC. v. DIRECTOR, DEPARTMENT OF TRANSPORTATION OF HAWAII, ET AL.* Sup. Ct. Haw. Certiorari denied.

No. 84-394. *KENNGOTT v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1136.

No. 84-398. *KIMBLE v. WORTH COUNTY R-III BOARD OF EDUCATION.* Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 669 S. W. 2d 949.

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No. 84-399. *BREATH, DBA THE ROACH COACH v. CRONVICH ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1006 and 734 F. 2d 225.

No. 84-422. *PALUMBO v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 2d 1095.

No. 84-424. *KARAPINKA v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 150.

No. 84-434. *POTAMITIS v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 784.

No. 84-448. *VILATO v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84-462. *BALTER, ASSISTANT PUBLIC DEFENDER OF MONROE COUNTY v. REGAN, JUDGE OF THE CITY COURT OF ROCHESTER, NEW YORK.* Ct. App. N. Y. Certiorari denied. Reported below: 63 N. Y. 2d 630, 468 N. E. 2d 688.

No. 84-487. *LUMBER & MILL EMPLOYERS ASSN. v. NATIONAL LABOR RELATIONS BOARD.* C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 507.

No. 84-5013. *PERKINS v. MINTZES, WARDEN.* C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 15.

No. 84-5057. *BETHEA v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84-5120. *BYERS v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 568.

No. 84-5126. *FORRESTER v. INTERNAL REVENUE SERVICE.* C. A. 9th Cir. Certiorari denied.

No. 84-5157. *MORGAN v. ARMONTROUT, WARDEN.* C. A. 8th Cir. Certiorari denied.

No. 84-5167. *BOOTH v. UNITED STATES; and*

No. 84-5176. *KESSLER v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 1342.

No. 84-5204. *FLYNN v. BARKER.* Ct. App. Ind. Certiorari denied. Reported below: 450 N. E. 2d 1008.

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No. 84-5245. *KING v. COOMBE*, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1432.

No. 84-5331. *MARTIN v. ILLINOIS*. Sup. Ct. Ill. Certiorari denied. Reported below: 102 Ill. 2d 412, 466 N. E. 2d 228.

No. 84-5338. *BLOODGOOD v. GARRAGHTY*, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 428.

No. 84-5342. *HURD v. HURD*. Sup. Ct. Cal. Certiorari denied.

No. 84-5353. *PAXTON v. JARVIS*, SHERIFF, DEKALB COUNTY. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1306.

No. 84-5354. *THOMAS v. BROWN*, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84-5356. *NOVEL v. BEACON OPERATING CORP.* C. A. 2d Cir. Certiorari denied.

No. 84-5357. *FRIEND v. REES*, SUPERINTENDENT, KENTUCKY STATE REFORMATORY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 439.

No. 84-5359. *HALL v. CHESSIE SYSTEMS ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 439.

No. 84-5360. *JESKE v. CITY OF MILWAUKEE ET AL.* Sup. Ct. Wis. Certiorari denied. Reported below: 118 Wis. 2d 830, 352 N. W. 2d 213.

No. 84-5366. *HAYES v. BROTHERHOOD OF RAILWAY & AIRLINE CLERKS, ALLIED SERVICES DIVISION.* C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1383 and 734 F. 2d 219.

No. 84-5368. *CUNNINGHAM v. NEVADA*. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 396, 683 P. 2d 500.

No. 84-5384. *MORGAN v. PROCUNIER*, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1477.

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No. 84-5385. *RYAN v. SMITH ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 84-5386. *EVANS v. EVANS.* Ct. App. D. C. Certiorari denied.

No. 84-5392. *TRUJILLO v. WINANS, WARDEN.* C. A. 10th Cir. Certiorari denied.

No. 84-5394. *SAULSBERRY v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS.* C. A. 11th Cir. Certiorari denied.

No. 84-5395. *NALLY v. STEPHENS ET AL.* Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. XXVI.

No. 84-5400. *PERRY v. BROWN ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5405. *BROWN v. NAIL ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5415. *CARTER v. DEPARTMENT OF THE AIR FORCE ET AL.* C. A. D. C. Cir. Certiorari denied.

No. 84-5427. *ELLERBE v. UNITED STATES.* Ct. App. D. C. Certiorari denied.

No. 84-5429. *LOCKLEAR v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84-5431. *DUKES v. MARYLAND.* C. A. 4th Cir. Certiorari denied.

No. 84-5434. *NEIL v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 785.

No. 84-5437. *PEELER v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 246.

No. 84-5438. *PEARSON v. UNITED STATES.* C. A. 11th Cir. Certiorari denied.

No. 84-5445. *WOE, BY HIS MOTHER AND GUARDIAN, WOE v. CUOMO, GOVERNOR OF NEW YORK, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 96.

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No. 84-5447. *SPEAR v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied.

No. 84-5453. *PATTERSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1359.

No. 84-5460. *BAIN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 736 F. 2d 1480.

No. 84-5465. *KORKOWSKI ET UX. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 445.

No. 84-5471. *RAMSEY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1465.

No. 84-5475. *FULLER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 432.

No. 84-5478. *WALSH v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 16.

No. 84-5483. *MCINTOSH v. UNITED STATES ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 370.

No. 84-5508. *DANIEL v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1449.

No. 84-5509. *BEATY v. PATTON ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 956.

No. 84-5512. *NELSON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 364.

No. 83-1643. *BORCHARDT v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 905.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The petitioner Ira Borchardt challenges a judgment of the Fifth Circuit affirming his felony conviction for violations of the currency laws. A federal jury sitting in the Northern District of Texas found that Borchardt smuggled large sums of currency out of the country in furtherance of an illegal scheme to purchase and import marihuana from Mexico. Borchardt contends that,

because he already had been convicted of conspiracy-to-import charges by a federal jury sitting in the Southern District of Texas, the Northern District prosecution and conviction for the currency offenses violated his right under the Fifth Amendment's Double Jeopardy Clause not to be tried successively for the same criminal acts. The Government responds that (1) there was no double jeopardy violation; and (2) in any event, Borchardt's Sixth Amendment venue rights precluded the joinder of all charges at a single trial.

I believe this case presents an important question whether the second prosecution and conviction impermissibly rest on criminal acts that formed the basis of Borchardt's first conviction. I also believe the case presents an important question whether the Government improperly has exploited Borchardt's venue rights to defeat his right otherwise to be secure from repetitious prosecutions for the same criminal acts. The venue issue, in particular, is a substantial federal question that is likely to recur with frequency. I therefore respectfully dissent from the Court's denial of certiorari.

I

Borchardt began to conspire with several other individuals in August 1980 to import marihuana from Mexico into the Dallas-Fort Worth area, which is in the Northern District of Texas. Twice that autumn, Borchardt and his co-conspirators surreptitiously flew a total of \$126,000 from the Dallas-Fort Worth Airport to Mexico City for the purpose of purchasing marihuana. Borchardt spent much of the next several months in Mexico making preparations to transport the purchases back into the Dallas-Fort Worth area. Between December 1980 and February 1981, he arranged for three airplane flights that carried a total of approximately 2,600 pounds of marihuana. The scheme began to unravel when, during the third flight on February 22, 1981, the airplane encountered bad weather, ran out of fuel, and crash-landed outside the town of Raymondville, which is in the Southern District of Texas. Borchardt, who had remained behind in Mexico, returned to this country and was arrested shortly thereafter.

The United States Attorney for the Southern District of Texas obtained an indictment in December 1981. Borchardt was charged with importing marihuana into the Southern District on February 22, 1981, and with constructively possessing marihuana on that date with the intent to distribute it. He also was charged with conspiring, "from on or about November 1, 1980, to on or

about February 26, 1981," to import, possess, and distribute marihuana. 1 Record 27. The conspiracy charges against Borchardt rested on his role in smuggling the currency into Mexico on the two occasions discussed above, his supervision of the shipments from Mexico, and his participation in various planning meetings and telephone conferences. The jury convicted Borchardt on all counts, and the District Court sentenced him to 10 years in prison. The Court of Appeals for the Fifth Circuit affirmed the conviction. *United States v. Borchardt*, 698 F. 2d 697 (1983).

In July 1982, shortly after Borchardt's conviction in the Southern District, the United States Attorney for the Northern District of Texas obtained a second indictment relating to the importation conspiracy. Borchardt was charged with two counts of violating the currency laws; these counts represented the two occasions he had smuggled currency into Mexico.¹ Specifically, the indictment charged that Borchardt on these two occasions had violated 31 U. S. C. § 1059 (1976 ed.), which proscribed the willful failure to file currency reports when taking money out of the country "where the violation is . . . committed in furtherance of the commission of any other violation of Federal law . . ." (emphasis added).² The Northern District indictment charged that

¹ Borchardt also was charged with two cocaine offenses, and the jury ultimately convicted him of one count of possessing cocaine. He received a 2-year sentence for this offense, to be served consecutively to the currency sentences discussed *infra*, at 940. The cocaine conviction is not infirm on double jeopardy grounds. Although Borchardt argues that the cocaine and marihuana offenses were but segments of an overarching continuing conspiracy to import drugs, and therefore should have been tried together, the Government's proof on the cocaine charge rested on entirely different overt acts from the marihuana and currency charges.

² Later in 1982, this provision was amended and recodified at 31 U. S. C. § 5322(b), which now prohibits the willful failure to file the required reports "while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than \$100,000 in a 12-month period . . ." Borchardt's duty to file a currency report arose from 31 U. S. C. § 1101(a)(1)(A) (1976 ed.), which provided that anyone who knowingly "transports or causes to be transported monetary instruments . . . from any place within the United States to or through any place outside the United States, . . . in an amount exceeding \$5,000 on any one occasion" must file a report thereof. This provision has been recodified without substantive change at 31 U. S. C. § 5316. See also 31 CFR § 103.25(b) (1984) (providing for the filing of such reports "with the Customs officer in charge at any Customs port of . . . departure").

Borchardt had violated the currency-reporting requirements "in furtherance of . . . the illegal importation of marijuana." 1 Record 10-11.

Borchardt moved to dismiss the second indictment. *Id.*, at 24; see also *id.*, at 294. He argued that his currency smuggling already had been used in the Southern District trial to obtain his conviction for conspiracy to import and distribute marihuana, that a second trial would require the same evidence concerning the same acts as had been elicited at the first, and that to obtain a conviction under § 1059 the Government would have to retry the underlying felonies that he had been convicted of only months before. The District court denied Borchardt's motion. 3 Record 26; 11 Record 3-4. The jury convicted Borchardt of both counts, and the court sentenced him to consecutive sentences of four years for each violation, to be served consecutively to the sentence he was serving for the conviction in the Southern District of Texas. The Fifth Circuit affirmed in an unpublished opinion, No. 82-1719 (Dec. 20, 1983), judgment order reported at 723 F. 2d 905, and denied panel rehearing and rehearing en banc.

II

This case does not implicate the acknowledged power of the Federal Government to seek, *at a single criminal trial*, separate and consecutive punishments for various aspects of a single criminal act. See, e. g., *Albernaz v. United States*, 450 U. S. 333 (1981). Rather, it presents the "entirely different constitutional issue" whether such multiple punishments may be obtained through "multiple prosecutions of the same offenses." *Abbate v. United States*, 359 U. S. 187, 198 (1959) (separate opinion of BRENNAN, J.) (emphasis added). I adhere to my view that the Double Jeopardy Clause of the Fifth Amendment requires that, except in extremely limited circumstances not present here, "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in one proceeding. *Ashe v. Swenson*, 397 U. S. 436, 453-454 (1970) (BRENNAN, J., concurring). See also *Thompson v. Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein.

In the instant case, the Federal Government in the Southern District marshaled an array of evidence to demonstrate that

Borchardt had twice smuggled currency out of the country, and it used these episodes along with evidence of other conspiratorial acts to obtain Borchardt's conviction for conspiring to violate, *inter alia*, 21 U. S. C. § 952(a) (importation of controlled substances). Thereafter, in the Northern District trial, the Government again marshaled its array of evidence to demonstrate again that Borchardt had participated in the two smuggling episodes and that he had done so for the purpose of violating 21 U. S. C. § 952(a). Thus the Government twice prosecuted Borchardt for the identical criminal acts, which in my view was in palpable violation of the Double Jeopardy Clause.³

³ A majority of the Court continues to apply the "same evidence" test in determining whether successive prosecutions are constitutional, tempered only by application of the collateral-estoppel doctrine. See, *e. g.*, *Ashe v. Swenson*, 397 U. S. 436 (1970). Under this approach, the inquiry "is whether each [statutory] provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U. S. 299, 304 (1932). The constitutionality of Borchardt's currency conviction is highly suspect even under this line of analysis. Borchardt was convicted in the Southern District of both importing and conspiring to import marihuana in violation of, *inter alia*, 21 U. S. C. § 952(a). He thereafter was convicted in the Northern District of violating 31 U. S. C. § 1059 (1976 ed.) on the basis of proof that he (1) willfully failed to file the required currency reports, in furtherance of (2) importing marihuana in violation of 21 U. S. C. § 952(a). The second conviction rested on an element not necessary to the first conviction (willful failure to file reports), but the first conviction did not rest on any elements that the Government did not also have to prove the second time around. "[A] person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *In re Nielsen*, 131 U. S. 176, 188 (1889). The reverse is of course also true: a person who has been tried for an offense consisting of certain elements cannot thereafter be tried for an offense consisting of the same elements plus others. See, *e. g.*, *Illinois v. Vitale*, 447 U. S. 410, 421 (1980); *Brown v. Ohio*, 432 U. S. 161 (1977).

The Government contends, however, that the "same evidence" test is not met here because the underlying felony required for conviction under 31 U. S. C. § 1059 (1976 ed.) could have been any one of numerous felonies other than the importation of marihuana. "The various elements of the marijuana charges . . . are completely unrelated to the currency reporting offense, which could be established if the related crime were arson, bribery, extortion, fraud, or any number of other crimes." Brief in Opposition 5. We rejected just such a facile construction of felony-murder statutes in *Harris v. Oklahoma*, 433 U. S. 682 (1977); see also *Illinois v. Vitale*, *supra*, at 420-421, and should do so here as well.

III

The Government appears to concede that the second prosecution would normally violate, at the very least, its *Petite* policy of trying all related offenses in a single trial. Brief in Opposition 4-5; see *Petite v. United States*, 361 U. S. 529 (1960).⁴ But it insists that such joinder was impossible here because neither the Southern District nor the Northern District had venue to try all the offenses. Specifically, the Government contends that the two substantive offenses of importation and possession with intent to distribute, which grew out of the presence of the marihuana on Southern District soil after the plane crash on February 22, had to be tried in the Southern District. On the other hand, because the currency offenses occurred at Borchardt's port of departure at the Dallas-Fort Worth Airport, see n. 2, *supra*, only the Northern District had venue to try these crimes. The Government concedes that Borchardt could have been tried on the all-embracing conspiracy charges in the Northern District, but because he already "necessarily faced two trials in separate districts," it contends, there was no logical reason why the conspiracy charges had to be tried with the currency charges rather than with the possession charges. Accepting *arguendo* the Government's contention that venue for the possession and currency offenses initially rested in separate districts,⁵ this analysis nevertheless fails for two reasons.

⁴The Government has long represented to the Court that it adheres to a policy that "several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *Petite v. United States*, 361 U. S., at 530.

⁵The Government suggests only that it is "doubtful" whether the importation and possession charges arising out of the plane crash could have been brought in the Northern District. Brief in Opposition 5. The record, however, appears to indicate otherwise. Borchardt did not accompany the plane from Mexico, so he never *actually* possessed marihuana in the Southern District. The Government's case rested instead on *constructive* possession and importation. As the Fifth Circuit summarized, "Borchardt's participation in the venture in loading the marijuana and the calls to him *and his activities after the crash* would permit the jury to infer that he had constructive possession of the marijuana." *United States v. Borchardt*, 698 F. 2d 697, 703 (1983) (emphasis added). The record shows that these postcrash activities occurred in the Northern District of Texas. See 1 Record 6. On the Government's

A

First, that Borchardt already faced trial in the Southern District on the substantive possession charges could not serve to justify separate trials on the conspiracy and currency charges. The Double Jeopardy Clause does not of course shield a defendant against separate trials for separate criminal acts, but only against separate trials growing out of the same criminal acts. Prosecution for the substantive possession charges alone would not have barred a subsequent prosecution on the currency charges, because the two crimes were based on different episodes. The former charges did not rest in any way on Borchardt's earlier smuggling of money out of the country, but rather on Borchardt's constructive possession of the marihuana on the crashed plane, *i. e.*, on evidence that Borchardt had loaded the plane and thereby intended to exercise dominion and control over its cargo. See n. 5, *supra*.

The conspiracy and currency prosecutions, on the other hand, were largely of a piece because they rested on the same criminal episodes. The Government's decision to prosecute Borchardt for conspiracy based in part on his acts of smuggling currency necessarily triggered Borchardt's Fifth Amendment right not to be put into jeopardy again, on whatever theory of liability, for his commission of those same acts. As the Government concedes, the conspiracy and currency charges easily could have been consolidated in the Northern District. Having made its decision to prosecute Borchardt's acts of smuggling currency to obtain the conspiracy conviction in the Southern District, however, the Government should not now be permitted to bootstrap its way around the Double Jeopardy Clause by pointing to the pendency of other charges in the Southern District that bore no double jeopardy relation to the currency charges.

Petite v. United States, *supra*, is squarely on point. There *Petite* had been convicted in the Eastern District of Pennsylvania

own evidence, Borchardt took steps to retain dominion and control over the marihuana while he was in the Northern District, so venue would appear to lie in that District for the continuing-offense possession and importation charges. See, *e. g.*, *United States v. Brantley*, 733 F. 2d 1429, 1433-1435 (CA11 1984); *United States v. Brunty*, 701 F. 2d 1375, 1382 (CA11), cert. denied, 464 U. S. 848 (1983). See also 18 U. S. C. § 3237(a) ("[A]ny offense . . . may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed").

for conspiring to make false statements to Government agencies on two occasions, once in Philadelphia and once in Baltimore. *Petite* subsequently was convicted in the District of Maryland on substantive charges growing out of the same Baltimore agency proceedings. We remanded the case to the Court of Appeals to vacate the judgment after the Government candidly conceded that the second trial violated the Government's own policy against repetitious prosecutions for crimes growing out of a single transaction. *Id.*, at 530-531. Although the Court avoided the constitutional issue, three of us went on to emphasize that "the Double Jeopardy Clause of the Fifth Amendment was an insurmountable barrier to this second prosecution." *Id.*, at 533 (BRENNAN, J., joined by Black and Douglas, JJ.).⁶

B

Even if the conspiracy charges could only have been brought in the Southern District, however, I believe that the Government fundamentally misperceives the relationship between a defendant's venue rights and his double jeopardy rights. The Sixth Amendment guarantees that an accused "shall enjoy the right to a

⁶ Of course, if the Government in *Petite* had tried the conspiracy charges in the District of Maryland and had relied on the Philadelphia false statements to obtain the conspiracy conviction, it could not thereafter have prosecuted *Petite* in the Eastern District of Pennsylvania for making the false Philadelphia statements. Similarly, if the Government in the instant case had prosecuted the conspiracy and currency offenses together in the Northern District of Texas and had relied on the February 22 importation and possession outside of Raymondville to obtain the conspiracy conviction, it could not thereafter have prosecuted Borchardt for the substantive offenses in the Southern District. It might be argued that these results unjustly prevent the Government from fully presenting all evidence of a conspiracy when venue problems preclude it from joining all underlying substantive offenses to the conspiracy prosecution; in such situations, it would be argued, the Government must choose between the equally unattractive options of (a) presenting evidence of all the underlying acts in the conspiracy prosecution, thereby forfeiting the opportunity to secure a subsequent conviction on the underlying substantive offense in a district with proper venue, or (b) withholding evidence of certain acts from the conspiracy prosecution, thereby preserving a subsequent prosecution for the underlying offense but risking a verdict of not guilty on the conspiracy charge for lack of sufficient evidence. The procedure outlined in Part III-B, *infra*, however, provides a full and efficient method for the Government to preserve its opportunity to prosecute for all offenses and to present its full array of evidence.

speedy and public trial . . . [in the] district wherein the crime shall have been committed." Because the venue provision was designed primarily to safeguard a defendant's rights,⁷ it is one that a defendant may waive in appropriate circumstances. See *Singer v. United States*, 380 U. S. 24, 35 (1965); see also Fed. Rule Crim. Proc. 21(b) ("For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district").

If the Government simultaneously had secured indictments against Borchardt in the Northern and Southern Districts, he could have waived venue in one of the districts pursuant to Rule 21(b), obtained a joinder of the two prosecutions, and thereby vindicated his right not to be tried twice for the same criminal episodes. Borchardt was not accorded this opportunity, however, because the United States Attorney for the Northern District of Texas waited until several months *after* Borchardt's conviction in the Southern District before bringing the currency charges. The Government has suggested no reason for this delay.⁸

The Double Jeopardy Clause guarantees that all charges arising out of the same criminal act will be brought *both* at the same time *and* in the same proceeding. In some situations the Sixth Amendment's venue safeguards will prevent the Government from bringing all charges in one district, but this should not serve to excuse the Government's obligation under the Fifth Amendment to bring the charges at the same time. The defendant at the very least is entitled to be "informed at one time of all the charges on which he will actually be tried," *Ashe v. Swenson*, 397 U. S., at 455, n. 11 (BRENNAN, J., concurring), so that he has a full opportunity to choose between his right to venue in separate districts and his right to a single trial on all related charges. The Government's alternative argument—that a federal prosecutor

⁷ "The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *United States v. Cores*, 356 U. S. 405, 407 (1958).

⁸ All of the evidence the Government relied upon in the second trial was available at the time of the first indictment, as witnessed by the Government's use of the currency episodes to prove the importation conspiracy. Thus this is not a case where, despite diligent efforts, the Government had not assembled the evidence necessary to prove its second case at the time the first was initiated. See, e. g., *Diaz v. United States*, 223 U. S. 442, 448-449 (1912).

may in his own discretion choose to use a defendant's venue rights to defeat the double jeopardy safeguard—lacks any principled foundation. For whether a defendant is tried successively for the same acts in the same judicial district or in separate districts, “[r]epetitive harassment in such a manner goes to the heart of the Fifth Amendment protection.” *Abbate v. United States*, 359 U. S., at 200 (separate opinion of BRENNAN, J.). Whether they occur in one district or in several districts, repetitious prosecutions for the same acts enable the Government to “wear the accused out by a multitude of cases with accumulated trials.” *Palko v. Connecticut*, 302 U. S. 319, 328 (1937). Both sorts of prosecutions enable the Government “with all its resources and power . . . to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . .” *Green v. United States*, 355 U. S. 184, 187 (1957). Both should be subject to equal condemnation under the Double Jeopardy Clause.

It might be argued that the Southern District of Texas and the Northern District of Texas are separate judicial districts, and that the Double Jeopardy Clause should not extend to require coordination among federal prosecutors acting independently in separate districts. This objection, grounded on notions of bureaucratic autonomy, is thoroughly unpersuasive. The federal districts are not separate sovereign entities, but merely adjuncts of one federal sovereign. We repeatedly have held that a sovereign government may not structure its judicial and prosecutorial systems so as otherwise to defeat the safeguard against double jeopardy. See, e. g., *Robinson v. Neil*, 409 U. S. 505 (1973) (rejecting “dual sovereignty” doctrine with respect to separate state and municipal prosecutions); *Waller v. Florida*, 397 U. S. 387 (1970) (same); *Grafton v. United States*, 206 U. S. 333 (1907) (same with respect to separate federal and territorial prosecutions). Similarly, where different prosecutions grow out of the same criminal act and would therefore otherwise be subject to the Double Jeopardy Clause, a sovereign should not be able to regulate the *timing* of those prosecutions in different districts so as to defeat a defendant's right to seek a single consolidated trial.

Such a rule would not impose undue hardship on federal prosecutors. It would merely require that the Government coordinate its prosecutions of individuals in different districts in such

a way that the individuals were not forced to travel from district to district defending against "[r]epetitive harassment," *Abbate v. United States, supra*, at 200 (separate opinion of BRENNAN, J.), for the same criminal acts. Whether it results from an intent to harass, simple caprice, or a breakdown in communications among federal prosecutors, the Government's failure to coordinate its caseload cannot be allowed to undermine a defendant's ability to avoid double jeopardy.

Accordingly, this case presents the question whether we should hold that where multiple charges would otherwise be required to be brought in a single proceeding but for problems of venue among the judicial districts of one sovereign government, the Double Jeopardy Clause nevertheless requires the sovereign to bring all such charges within a reasonable time of each other.⁹ In this way, the defendant would be able to seek to transfer the proceedings against him and to consolidate all charges for one trial, thereby vindicating his right under the Double Jeopardy Clause to be secure from successive prosecutions for the same criminal conduct.¹⁰

⁹ It is of course difficult for the Government to coordinate the bringing of charges in different districts with chronometric precision. Delays might result, for example, from backlog, from the differing schedules of grand juries in separate districts, and so forth. Even after two prosecutions are brought, further delays might sometimes be encountered in transferring and consolidating the cases for trial. Some room for reasonable flexibility should therefore be accorded the Government, and in instances of such reasonable delay a defendant might have to postpone his exercise of speedy-trial rights to accommodate the joinder of all offenses against him in a single proceeding. Requiring such accommodation is reasonable. Under the federal Speedy Trial Act, for example, courts may exclude in computing the time within which a trial must commence any delay resulting from, *inter alia*, "any proceeding relating to the transfer of a case . . . from another district under the Federal Rules of Criminal Procedure" and any "continuance granted by any judge . . . at the request of the defendant or his counsel." 18 U. S. C. §§ 3161(h)(1)(G), 3161(h)(8)(A). In all instances the inquiry must be whether the delay is reasonable and whether the Government has so coordinated its interdistrict prosecutions as to permit the defendant meaningfully to exercise his right to seek a transfer and joinder of charges in one proceeding.

¹⁰ Federal Rule of Criminal Procedure 21(b) gives the district court discretion whether to permit a transfer to another district. Where a defendant seeks a transfer to protect against double jeopardy, his interest in securing a transfer would approach its zenith and the district court's discretion accordingly would be narrowly circumscribed. There is no need here to decide

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In the instant case, Ira Borchardt was prosecuted in one District for conspiracy to import marihuana, largely on the basis of his efforts to smuggle money out of the country to facilitate the purchase and importation of the substance. Immediately thereafter he was prosecuted again, this time for currency violations. Once again, Borchardt's conviction was grounded on his efforts to smuggle currency out of the country in furtherance of the conspiracy. But for asserted problems of venue, the Government should have been required to bring these charges in a single indictment. See Part II, *supra*. For whatever reason, the Government instead timed its interdistrict prosecutions of Borchardt so as to deny him his right to seek a consolidation of these charges under Rule 21(b), thereby stripping him of the only effective means to invoke his rights under the Double Jeopardy Clause and to seek to have all charges arising out of the currency smuggling resolved in a single trial.

Accordingly, I would grant the petition for certiorari.

No. 83-2139. ROCKEFELLER, GOVERNOR OF WEST VIRGINIA *v.* BEVER ET AL.; and

No. 84-25. GILBERTSON ET AL. *v.* BEVER ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE POWELL would grant certiorari. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 724 F. 2d 1083.

No. 83-6759. MORAN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner was convicted by an Ohio jury of the murder of her husband Willie Moran. She asserted at trial that she had acted in self-defense, as a result of the repeated and brutal beatings she had suffered at her husband's hands. She seeks certiorari to

whether the "interests of justice" could ever lead a court in the reasonable exercise of its discretion to deny a transfer in such circumstances. Even where there is room for discretion, however, it is important in the context of the Double Jeopardy Clause that "the decision on whether charges are to be tried jointly or separately . . . rest with the judge rather than the prosecutor." *Ashe v. Swenson*, 397 U. S., at 455, n. 11 (BRENNAN, J., concurring) (*re* discretionary exercise of Rule 14 authority).

review the state appellate court's holding that the jury properly was instructed that she had the burden of proving self-defense by a preponderance of the evidence. According to petitioner, the Due Process Clause forbids the State to punish her for murder when the jury that convicted her may well have thought it as likely as not that she acted in self-defense. I would grant certiorari to consider the substantial constitutional question raised by this petition—a question that this Court has labeled as “colorable” and “plausible” in previous decisions and that has for years divided state courts and lower federal courts.

I

A

There was substantial testimony at petitioner's trial that her husband—a man of violent temperament who virtually always carried firearms and owned a collection of pistols, rifles, and shot-guns—had repeatedly beaten and brutalized her. For example, in one incident, Willie Moran “had her by the neck, by the throat, and he was hitting” her with a gun. In another incident, Willie Moran “hit her and knocked her off the chair and, then, kicked her.” Petitioner's mother testified that earlier in the very week in which the murder occurred she saw Willie Moran “hit [petitioner] and knocked her on the floor, and I seen him take his feet and was kicking her.”

On May 15, 1981, petitioner and Willie Moran had their last fight. According to petitioner's testimony, Willie Moran had told her that he wanted some money that he thought she had saved. He threatened that if petitioner did not have the money for him by the time he woke up from a nap, he would “blow [her] damn brains out.” Petitioner, who did not have the money, unsuccessfully called a friend for help. Then, realizing that she had no way of raising the necessary funds, she entered the camper where Willie Moran was sleeping, picked up his gun, and fatally shot him.

B

At trial, petitioner pleaded not guilty, asserting that the killing was done in self-defense.¹ Petitioner's theory at trial was that

¹ Under Ohio law, a murder defendant asserting self-defense must prove “(1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such

she was a victim of battered woman's syndrome. See, e. g., L. Walker, *The Battered Woman* (1979). Descriptions of this syndrome emphasize the husband's repeated and violent beatings and the wife's dependency—economic and emotional—that make it practically impossible for her to leave. When faced with an immediate threat, victims may be driven to take the lives of their mates as the only possible method of escaping the threat. Although traditional self-defense theory may seem to fit the situation only imperfectly, see Eber, *The Battered Wife's Dilemma: To Kill or to be Killed*, 32 *Hastings L. J.* 895, 917–931 (1981); Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 *Stan. L. Rev.* 615 (1982), the battered woman's syndrome as a self-defense theory has gained increasing support over recent years.²

The jury at petitioner's trial was instructed: "[T]he burden of proving the defense of self-defense is upon the defendant. She must establish such defense by a preponderance of the evidence." Petitioner made a timely objection to the instructions on the ground that they unconstitutionally placed the burden of proof on her, rather than on the State.³ The trial court overruled the

danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger." *State v. Robbins*, 58 Ohio St. 2d 74, 388 N. E. 2d 755 (1979).

²Since the attempt to use battered woman's syndrome as a self-defense theory ordinarily raises only the issue whether the defendant has successfully made out the elements of self-defense in a given jurisdiction, the theory has not been addressed in a great many appellate opinions. But see, e. g., *Ibn-Tamas v. United States*, 407 A. 2d 626 (D. C. 1979) (discussing admissibility of expert testimony on battered woman syndrome); *People v. Powell*, 102 Misc. 2d 775, 424 N. Y. S. 2d 626 (1980) (same), *aff'd*, 83 App. Div. 2d 719, 442 N. Y. S. 2d 645 (1981); cf. *State v. Wanrow*, 88 Wash. 2d 221, 234–241, 559 P. 2d 548, 555–559 (1977).

³The instructions were given in accordance with Ohio Rev. Code Ann. § 2901.05(A) (1982) ("The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused"). As this statute indicates, the concept of "burden of proof" has two components—burden of production and risk of nonpersuasion. Petitioner's claim here is that the State misallocated the risk of nonpersuasion. There is no doubt that she introduced sufficient evidence to meet whatever burden of production she may have had under state law to come forward with evidence on the issue of self-defense. The issue in this case—and the only issue with which this opinion is concerned—is whether the State may constitutionally place on the defendant the risk of nonpersuasion with respect to self-defense. Cf. *Mullaney v. Wilbur*, 421 U. S. 684, 701, n. 28, 702, n. 30 (1975).

objection and the jury returned a verdict of guilty of aggravated murder. The Court of Appeals of the County of Cuyahoga affirmed the conviction and the Ohio Supreme Court dismissed the appeal "for the reason that no substantial constitutional question exists." Petitioner seeks a writ of certiorari to vindicate her Fourteenth Amendment right to have the State bear the burden of proof in a criminal prosecution.

II

A

This Court held in *In re Winship*, 397 U. S. 358 (1970), that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. We noted that this standard "plays a vital role in the American scheme of criminal procedure" and that "[t]he standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id.*, at 363 (quoting *Coffin v. United States*, 156 U. S. 432, 453 (1895)).

Several years later, we applied the teachings of *Winship* in *Mullaney v. Wilbur*, 421 U. S. 684 (1975). In *Mullaney*, the defendant had been convicted in a Maine state court of murder despite his defense of provocation. Under Maine law, as we explained in the opinion:

"[A]bsent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder—*i. e.*, by life-imprisonment—unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter—*i. e.*, by a fine not to exceed \$1,000 or by imprisonment not to exceed 20 years." *Id.*, at 691–692.

The *Mullaney* trial judge instructed the jury that "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." *Id.*, at 686. We held that this instruction was constitutionally infirm under the

Due Process Clause and our holding in *Winship*: once evidence tending to show provocation was introduced, the State—not the defendant—had to bear the burden of proving beyond a reasonable doubt the absence of provocation.

Two years later, in *Patterson v. New York*, 432 U. S. 197 (1977), we applied these principles to the New York murder statutes. The defendant in *Patterson* had claimed that he had committed the murder under the influence of “extreme emotional disturbance” and was therefore entitled to a verdict of manslaughter. The jury found him guilty of murder. New York law provided that the State had to prove only “[t]he death, the intent to kill, and causation” in order to convict a defendant of murder. *Id.*, at 205. If the State met its burden, the defendant could reduce the conviction to manslaughter by proving by a preponderance of the evidence that he had acted under the influence of extreme emotional disturbance for which there was a reasonable explanation. We held that—contrary to the situation in *Mullaney*—shifting the burden to the defendant on the issue of extreme emotional disturbance did not violate the Due Process Clause.

Nothing in *Patterson* questions the validity of the *Winship* holding that the burden of proof is on the State to prove beyond a reasonable doubt all of the elements that constitute the crime. Nor is there any doubt that the States have wide discretion in allocating the burden of proof between the prosecution and defense on issues that are *not* elements of the crime. Thus, in order to determine whether a State may allocate the burden of proof on an issue in a criminal prosecution to the defendant, it must first be determined what elements constitute the crime in question; this was the problem in *Mullaney* and *Patterson*. Yet the resolution of those cases left the solution to this problem in some doubt and the lower courts in considerable disarray.⁴ The difficulty can be

⁴ The Sixth Circuit, for instance, has recently noted the “confusion” in this area in a case dealing with the same claim as that asserted by petitioner. See *Cherry v. Marshall*, 722 F. 2d 1296, 1298 (1983), cert. denied, 467 U. S. 1244 (1984); see also *Engle v. Isaac*, 456 U. S. 107, 122, n. 23, and 132–133, n. 40 (1982) (citing cases); *Melchior v. Jago*, 723 F. 2d 486, 492–493 (CA6 1983) (characterizing identical issue to that of petitioner as “open question”), cert. denied, 466 U. S. 952 (1984); *Thomas v. Leeke*, 725 F. 2d 246, 249–251 (CA4 1984) (similar problem under South Carolina law); *Holloway v. McElroy*, 632 F. 2d 605 (CA5 1980) (holding that Constitution requires State of Georgia in

seen by contrasting *Mullaney*'s insistence that "*Winship* is concerned with substance rather than . . . formalism," 421 U. S., at 699, with the statement in *Patterson* that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition* of the offense of which the defendant is charged." 432 U. S., at 210 (emphasis added). That the Due Process Clause permits the States considerable discretion in defining criminal offenses (and in allocating burdens of proof on matters outside the defined elements of its crimes) is clear. But the *Patterson* opinion did not purport to overrule *Mullaney* and itself recognized that "there are obviously constitutional limits beyond which the States may not go in this regard." 432 U. S., at 210. This case presents the opportunity for us to define those limits.

B

Petitioner did not seek to defend herself on the ground of provocation (as in *Mullaney*) or extreme emotional disturbance (as in *Patterson*). Rather, she relied on self-defense as a justification for her action. She asserts that, given the central place of self-defense in Anglo-American jurisprudence and the crucial role it can play in justifying—not merely mitigating—what would otherwise have been a criminal act,⁵ the *Winship* doctrine applies with full force to Ohio's allocation of the burden of proof on the issue: the State must prove beyond a reasonable doubt the absence of self-defense in any case in which it is an issue.

Under its most restrictive interpretation, *Patterson* established that the State's definition of an offense within the "four corners"

state murder prosecution to prove absence of self-defense), cert. denied, 451 U. S. 1028 (1981); *State v. McCullum*, 98 Wash. 2d 484, 656 P. 2d 1064 (1983) (same with respect to State of Washington); *Commonwealth v. Hilbert*, 476 Pa. 288, 382 A. 2d 724 (1978) (same with respect to State of Pennsylvania); Note, The Constitutionality of Affirmative Defenses After *Patterson v. New York*, 78 Colum. L. Rev. 655, 672 (1978) (self-defense is "major remaining area of uncertainty after *Patterson*"). Of course, the defense of provocation recognized by Maine law in *Mullaney* is but an ancestor of the broader defense of extreme emotional distress recognized by New York law in *Patterson*. See *Patterson*, 432 U. S., at 207. Given this close relationship between the two defenses, courts and commentators have had difficulty discerning the outlines of the Constitution's commands in this area.

⁵ See Note, Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why, 34 Stan. L. Rev. 615, 630-634 (1982).

of its murder statute is dispositive on the question of how it may allocate the burden of proof. Even under this reading, it is not clear whether Ohio's practice of placing the burden of proof on the defendant asserting self-defense is constitutional. The Ohio aggravated murder statute states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another." Ohio Rev. Code § 2903.01(A) (1982). Under Ohio law, an assertion of self-defense requires proof, *inter alia*, that the defendant "was in *imminent* danger of death or great bodily harm." *State v. Robbins*, 58 Ohio St. 2d 74, 388 N. E. 2d 755 (1979) (emphasis added). To place the burden of proof on the defendant asserting self-defense therefore seems to require the defendant to prove he acted when in imminent danger of great bodily harm, and thus to negate the prosecution's burden of proving that the defendant acted "purposely, and with prior calculation and design."

On a slightly broader reading of *Patterson*, sources of Ohio law outside its murder statute may be relevant in determining what elements constitute the crime of aggravated murder in that State. In *Engle v. Isaac*, 456 U. S. 107 (1982), respondents sought to review the denial of their habeas petitions, in which they raised virtually the identical claim raised by petitioner here.⁶ Respondents had been convicted under Ohio's murder statutes, despite their attempt to show self-defense. The Court disposed of the case on the ground that respondents' failure to raise this claim at trial was a bar to their habeas petitions under *Wainwright v. Sykes*, 433 U. S. 72 (1977). Nonetheless, the *Engle* opinion noted that both judicial decisions and the Ohio Criminal Code itself

⁶ One respondent in *Engle* had been convicted of voluntary manslaughter, another had been convicted of murder, and a third had been convicted of aggravated assault. All had based their defenses at trial on self-defense. In addition to *Engle*, this Court has brushed with a similar issue in *Hankerson v. North Carolina*, 432 U. S. 233 (1977), decided the same day as *Patterson*. The North Carolina Supreme Court had held that the state law placing the burden of proving self-defense upon the defendant was invalid under *Mullaney*; the North Carolina court nonetheless refused to reverse the conviction because it held that *Mullaney* did not apply retroactively. We reversed on the retroactivity issue, but we did not reach the issue whether "it is constitutionally permissible for a State to treat self-defense as an affirmative defense that the prosecution need not negative by proof beyond a reasonable doubt." 432 U. S., at 240, n. 6.

indicate that the State only punishes actions that are voluntary, unlawful, and accompanied by the appropriate *mens rea*. See *Engle, supra*, at 121. Self-defense negates these elements of criminal behavior. In the course of proving guilt, the State therefore should be required to disprove the defendant's assertion of self-defense. We characterized this claim as "colorable" and "plausible" in *Engle*. 456 U. S., at 122.

These arguments concern the constitutionality of requiring the defendant to prove self-defense within the statutory scheme enacted by the Ohio Legislature and interpreted by the Ohio courts. However, lurking in the background is the still more vexing question concerning the scope of the independent constitutional limitations on how the Ohio Legislature and courts may define the elements of criminal offenses. Cf. *Patterson*, 432 U. S., at 210 (noting that "there are obviously constitutional limits beyond which the States may not go in this regard"). To assert (as the Ohio appellate court here did) that self-defense is not an element of the crime of aggravated murder is to assert that the State may punish a defendant with life imprisonment (the penalty faced by petitioner) for that offense even if the killing was done in the purest self-defense. Yet both the Due Process Clause and the Eighth Amendment may restrict the State's ability to so punish a defendant whose "crime," for example, consisted in an immediate response to a murderous attack upon him. See *Patterson, supra*, at 210; *Solem v. Helm*, 463 U. S. 277 (1983). If either of these constitutional provisions do so restrict the State, it is difficult to resist the conclusion that absence of self-defense is an element of every aggravated murder charge—an element required by the Constitution even if not by the State's enacted or decisional law. See *Engle, supra*, at 122, n. 22; Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L. J. 1327, 1366-1379 (1979). Of course, the scope of any such constitutional constraints may never require precise definition, for they find their source in the same notions of fundamental fairness that are at the heart of Anglo-American law and that independently influence the construction and application of Ohio's criminal code. Nonetheless, these constraints must be kept in mind in evaluating the state appellate court's decision that petitioner properly bore the burden of proof on self-defense in this case.

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III

Petitioner's claim places squarely before the Court the constitutionality of the Ohio allocation of burden of proof on self-defense. It is undisputed that petitioner introduced evidence tending to prove self-defense at trial. She then interposed a timely objection to the jury instruction allocating to her the burden of proof on the issue.⁷ In *Engle v. Isaac*, this Court noted the "colorable" and "plausible" nature of claims identical to those of petitioner; claims like hers are certainly sufficiently meritorious to have troubled the courts of appeals and the state courts. I would grant certiorari to address petitioner's "colorable" and "plausible" constitutional claims.

No. 83-6807. *ALVORD v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 1282.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This petition asks us to consider whether an attorney renders effective assistance of counsel when he forgoes all investigation into his client's only plausible line of defense and defers to his client's wishes on defense strategy, without any regard for the client's knowledge of, or ability to understand, the law, the facts, or the ramifications of the decision.

The question could scarcely be more starkly posed. The petitioner here had previously been adjudicated insane at a criminal trial, and his reasoning faculties were therefore highly suspect. Yet appointed counsel accepted his client's initial refusal to rely on the insanity defense, made no independent investigation of his

⁷ Given some of the problems of fitting petitioner's battered woman theory within traditional self-defense doctrine, the jury may well have faced a close question as to whether the elements of self-defense were proved. It is precisely in these circumstances that allocation of the burden of proof can be most significant. Cf. *Winship*, 397 U. S., at 372 (Harlan, J., concurring) (discussing "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"); *Speiser v. Randall*, 357 U. S. 513, 525-526 (1958) ("There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt").

client's mental or criminal history, learned no facts that would enable him to persuade his client to change his mind, and instead permitted his client to rely on an unsupported alibi that all acknowledged to have been, at best, weak. The lower court approved this course of conduct on the ground that the client was found competent to stand trial and therefore was entitled to have his wishes followed. Because I believe the lower court decision seriously misconstrues the constitutional role of a criminal defense lawyer, I would grant certiorari to review the decision.

I

The record demonstrates unequivocally that Gary Alvord has a long history of mental illness. He first entered a mental hospital at age 13. In 1967, he was charged in Michigan with rape and murder; he spent two years in a mental hospital and was then declared competent to stand trial. At a bench trial, he was found not guilty by reason of insanity and was committed to the custody of the Michigan Department of Mental Health. After escaping from the Ionia State Hospital in Michigan, he traveled to Florida, where he committed the three murders for which he received the death sentence in Florida.

Counsel, a part-time public defender, was appointed to represent Alvord after his indictment in 1973. Alvord refused to talk to the lawyer; instead, it was the prosecutor who told counsel that Alvord had been adjudicated not guilty by reason of insanity in Michigan. Counsel moved for a mental examination, and two psychiatrists were directed to conduct the examination. Ultimately, the trial judge ruled that Alvord was competent to stand trial.¹

Appointed counsel saw Alvord for about 15 minutes after Alvord was indicted. Counsel's subsequent pretrial contact with his client was primarily at court hearings. According to the Court of Appeals, Alvord's counsel conducted no independent

¹ Alvord declined to talk to the two psychiatrists unless his lawyer was present. His lawyer did not attend the meetings, and the psychiatrists were unable to give an opinion on his mental state. Thereafter, the State brought in one of the psychiatrists who had known Alvord in Michigan. Alvord spoke with him, and the psychiatrist concluded that Alvord was competent to stand trial. The two other psychiatrists then sought to interview Alvord again. One of them concluded that he was competent to stand trial. The other declined to draw a conclusion. The trial judge then determined that Alvord was competent to stand trial.

investigation into Alvord's history of mental illness. He did not contact doctors, other than one brought in by the State to interview Alvord, see n. 1, *supra*, at the Michigan hospital where Alvord had spent considerable time, and he only obtained a small portion of Alvord's medical record. He made no effort to have that portion of the medical record examined and interpreted by a psychiatrist. He did not offer to the court any document or testimony indicating that Alvord had previously been adjudicated incompetent, even after the trial judge observed that no such evidence was presented. *Nor did he raise at trial the presumption of insanity afforded Alvord under Florida law, because of his prior adjudication of insanity, the effect of which would have been to place the burden of proof on the prosecution to prove sanity beyond a reasonable doubt.*² Nor, apparently, did counsel even inform Alvord of this legal principle and its potential consequences. Finally, counsel apparently did not contact the attorney who represented Alvord during the Michigan prosecution, who would have told him that Alvord initially had been disinclined to assist in his best defense there as well, until he had come to trust counsel.³ "In short, [counsel] undertook virtually no investigation of the one defense [counsel himself] considered viable in Alvord's case, choosing instead to comply with Alvord's request that he put petitioner on the stand and proceed with an alibi defense." 564 F. Supp. 459, 471 (MD Fla. 1983). The lower court opinions and findings establish that counsel made absolutely no effort to pursue the possibility of an insanity defense, after his unstable client's

² See *Livingston v. State*, 383 So. 2d 947 (Fla. App. 1980) (Florida presumes insanity, once one has been adjudged insane, until it is shown that sanity has returned); *Hixon v. State*, 165 So. 2d 436, 439 (Fla. App. 1964) (reversing conviction for failure of prosecutor to overcome defendant's presumption of insanity, which had been established in a prior Ohio adjudication).

³ At the federal habeas hearing, one of Alvord's Michigan psychiatrists testified:

"Now, as his lawyer, at that time, Mr. Richey, was a very competent individual. Mr. Alvord would not cooperate and initially we were feeling very much we were going to again have to find him incompetent, but we had a sixty day period during this, worked with him, and I think it was after about a month we finally got sufficient work done to cooperate, but this took a lot of work on Mr. Richey's part in terms of seeing him, letting him know what was going on, letting him feel that he really was being represented, and I worked with him during this period also. *But, there was a built in core of feeling about lawyers and the same thing was seen here, so that the similarity was certainly a warning.*" Pet. for Cert. 14 (emphasis added).

uneducated objection to the possibility, but instead unquestioningly accepted his client's direction to pursue a frivolous alibi defense.

The federal habeas court rejected Alvord's claim on the ground that counsel acted reasonably in deciding that it would be useless to pursue an insanity defense because Alvord would not cooperate. *Id.*, at 473-474. This argument wholly misses the mark. The question is whether counsel had a duty to investigate his client's case and make a minimal effort to persuade him to follow the only plausible defense. The question is not whether counsel has a duty to override his client's wishes, or pursue fruitless investigations, thereafter. The Court of Appeals adopted the District Court's reasoning and also observed that Alvord had been found competent to stand trial—in part because counsel had failed to present to the court evidence of the prior insanity adjudication—and that counsel "was ethically bound to follow his client's wishes" as a result. 725 F. 2d 1282, 1289 (CA11 1984). This holding is the crux of the decision. With this ruling, the Eleventh Circuit has loudly and clearly signalled that counsel need not question a client's decisions on crucial trial issues as long as the client is found competent to stand trial, even if counsel's professional judgment suggests to him that an alternative decision would be in the client's best interests.

II

It is crucial to recognize precisely what is at issue here. The lower courts in this case have interpreted our decisions to hold that counsel has absolutely no obligation to investigate, at all, the only plausible defense a defendant might have, and no obligation to provide advice on that issue, once the defendant indicates a desire not to pursue that defense, even when the client's reasoning faculties are highly suspect. The decision establishes that absolute deference to the uninformed reaction of a defendant is acceptable, and that counsel's decision not to pursue the issue and make an attempt to persuade his client is reasonable.

This result renders meaningless defense counsel's vital function as an adviser. Counsel must ensure that the client has access to information relevant to the pretrial and trial decisions that the accused must make himself, such as whether to testify on his own behalf, to waive a jury trial, or to plead guilty.⁴ Each of these

⁴The lower court ruling is therefore premised on a significant misunderstanding of the division of responsibility between counsel and client at trial,

decisions involves the waiver of a constitutional right and must be made by the accused, but with the advice of counsel. Counsel's role is to provide advice that will assure not only that the waiver is voluntary and intelligent, but also that the accused is reasonably well informed. See *McMann v. Richardson*, 397 U. S. 759, 769-770 (1970). Thus, if pursuit of an insanity defense is a decision to be made by the accused, it must be done on the advice of a well-informed attorney who has assured that his client has based his decision on relevant information.⁵

and of the obligation of counsel to inform himself and advise his client, as set out in the ethical standards of the American Bar Association. As this Court recognized last Term, those standards act as guides in determining the reasonableness of counsel's assistance. See *Strickland v. Washington*, 466 U. S. 668 (1984). The ABA's Standards of Criminal Justice, Part V, entitled Control and Direction of Litigation, are especially relevant. That section provides:

"Standard 4-5.1. Advising the defendant

"(a) After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

"Standard 4-5.2. Control and direction of the case

"(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:

"(i) what plea to enter;

"(ii) whether to waive jury trial; and

"(iii) whether to testify in his or her own behalf.

"(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client." ABA Standards for Criminal Justice 4-5.1, 4-5.2 (2d ed. 1980 and Supp. 1982).

⁵ Ethical Consideration 7-7 of the American Bar Association Code of Professional Responsibility suggests that the decision on an insanity defense might ultimately be one for the client, but that it must be made after the lawyer has fully informed himself and his client on the issue. The section reads in pertinent part:

"A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken."

Ethical Consideration 7-8 provides that "[a] lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." ABA/BNA Lawyers' Manual on

Of course the need for assistance of counsel extends well beyond assistance in deciding whether to waive constitutional rights. The Sixth and Fourteenth Amendments embody "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U. S. 458, 462-463 (1938). Thus, counsel is authorized to make certain choices for his client, after consultation with the client, during which counsel, who is fully informed of the facts, discusses the options with his client. As this Court has noted, "[w]ith the exception of [the three] specified fundamental decisions [involving waiver of constitutional rights], an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Jones v. Barnes*, 463 U. S. 745, 753, n. 6 (1983). When counsel is obliged to make the decision himself, blind deference to a client's wishes, without any investigation, is unquestionably inappropriate and constitutionally ineffective.

Thus, regardless of whether the ultimate decision on an insanity defense is that of the attorney or his client, counsel must fully inform himself of the facts and law, make a reasonable investigation into the only plausible line of defense, and share his conclusions with his client. This is the essence of effective assistance of counsel. This conclusion, which I would have thought to have been well ingrained in our Sixth Amendment jurisprudence, is wholly at odds with the view that a lawyer reasonably may assume that his client—no matter what his training or mental capacity—has based his decision on sufficient information and knowledge as to render the lawyer's further effort unnecessary. To my mind, such total deference is only proper, if at all, when counsel has good reason to assume that his client's decisions are based on an intelligent and informed understanding of his situation.

Moreover, the analysis and result below are inconsistent not only with fundamental principles of the role of counsel, but also with a decision in another Circuit, thereby rendering this case

Professional Conduct 01:332-01:333 (1984). Under the lower court ruling, however, once a presumptively insane client has made a decision that is obviously prejudicial, the attorney has no obligation to try to persuade his client otherwise by informing him of relevant considerations.

particularly appropriate for certiorari. In contrast to the Eleventh Circuit, the Fourth Circuit has affirmed the grant of a habeas petition when counsel had totally failed to develop the only conceivable defense at the defendant's state trial, and had neglected to advise the defendant properly as to his legal alternatives. See *Brennan v. Blankenship*, 472 F. Supp. 149 (WD Va. 1979), *aff'd*, 624 F. 2d 1093 (1980). In *Brennan*, counsel had permitted himself to be guided by the defendant's aversion to insanity pleas. The court applied the "normal level of competence" test and found that under any professional standard, it was improper for counsel to rely blindly on the statement of a criminal client whose reasoning abilities are highly suspect, and that counsel at least had a duty to investigate and try to persuade his client. As the court wrote, "[g]iven the attorneys' reasonable conclusion that there was no other factual defense or factors in mitigation, it is almost incredible that the attorneys did not press Brennan on the point." 472 F. Supp., at 156. Neither the Court of Appeals, nor any papers filed here, come even close to distinguishing this case.

III

In this case, defense counsel avoided all responsibility to investigate his client's only plausible defense, to inform his client of the legal ramifications of an insanity plea (of which it is far from certain counsel was even aware), to assure that the decision was not based on a lack of information, to talk with psychiatrists to determine whether his client understood the ramifications of his decision, to talk with prior counsel to discover that Alvord had in the past hesitated to trust counsel until he was made to feel he was being properly represented, to consider whether the insanity defense was a strong one, or to find out that Florida law would have shifted the burden of proof on insanity because of Alvord's prior insanity adjudication. Prior to trial, he met with his client—the client who was facing trial for three capital murders—for only 15 minutes outside of court. During this time, his client was in jail, under suicide watch, with no lights in his cell, no furniture except a mattress, no blanket, and no clothing. Also during this time, Alvord refused to talk with psychiatrists unless his lawyer was present, yet his lawyer never visited him in jail, nor attended the interview sessions. It is difficult to imagine how the trial would have differed had Alvord had no counsel at

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all. There can be little doubt that under almost any standard other than that recognized by the lower courts, counsel's assistance here would be considered constitutionally ineffective.

IV

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman v. Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). But even if I did not so believe, I would grant certiorari in this case. The lower court has countenanced a view of counsel's constitutional duty that is blind to the ability of the individual defendant to understand his situation and usefully to assist in his defense. The result is to deny to the persons who are most in need of it the educated counsel of an attorney. To avoid that result, I would grant the petition. I dissent from the Court's refusal to do so.

No. 83-6851. COX v. ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 121 Ill. App. 3d 118, 459 N. E. 2d 269.

No. 83-6919. FREY v. PENNSYLVANIA. Sup. Ct. Pa.;

No. 83-6946. STOYKO v. PENNSYLVANIA. Sup. Ct. Pa.;

No. 84-5045. COLLINS v. FRANCIS, WARDEN. C. A. 11th Cir.;

No. 84-5170. OWENS v. ILLINOIS. Sup. Ct. Ill.;

No. 84-5175. OWENS v. ILLINOIS. Sup. Ct. Ill.;

No. 84-5180. PRUETT v. ARKANSAS. Sup. Ct. Ark.;

No. 84-5205. CABALLERO v. ILLINOIS. Sup. Ct. Ill.;

No. 84-5298. KELLY v. TEXAS. Ct. Crim. App. Tex.;

No. 84-5334. MAYNARD v. NORTH CAROLINA. Sup. Ct. N. C.;

No. 84-5349. RICKMAN v. TENNESSEE. Ct. Crim. App. Tenn.; and

No. 84-5351. WHITE v. KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: No. 83-6919, 504 Pa. 428, 475 A. 2d 700; No. 83-6946, 504 Pa. 455, 475 A. 2d 714; No. 84-5045, 728 F. 2d 1322; No. 84-5170, 102 Ill. 2d 145, 464 N. E. 2d 252; No. 84-5175, 102 Ill. 2d 88, 464 N. E. 2d 261; No. 84-5180, 282

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Ark. 304, 669 S. W. 2d 186; No. 84-5205, 102 Ill. 2d 23, 464 N. E. 2d 223; No. 84-5298, 667 S. W. 2d 720; No. 84-5334, 311 N. C. 1, 316 S. E. 2d 197; No. 84-5351, 671 S. W. 2d 241.

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. 83-6943. *WILKES v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari and summarily affirm the judgment of the Court of Appeals. Reported below: 732 F. 2d 1154.

JUSTICE WHITE, dissenting.

Posing as a Social Security Administration employee, petitioner Warren Wilkes told a benefit recipient that Social Security overpayments had been made. Wilkes demanded a return of the overpayments, and in this manner repeatedly obtained money. As a result, Wilkes was charged with violating the second clause of 18 U. S. C. § 912, which prohibits demanding or obtaining anything of value while impersonating an officer or employee of a United States agency or department.*

At the end of the prosecution's case, Wilkes moved to dismiss the indictment for failure to charge intent to defraud in any of the counts. The District Court denied the motion. The judge found that although the indictment did not specifically allege an intent to defraud, it did charge, in the exact terminology of the statute, that petitioner pretended to be an employee of the United States acting under the authority thereof, and that acting as such and in such pretended character he demanded and obtained money from the victim in violation of the law. The jury found Wilkes guilty on all counts. The Third Circuit affirmed, holding that since the intent to defraud language was deleted from the statute in a 1948 revision, such an intent need not be specifically pleaded and

*Title 18 U. S. C. § 912 provides:

"Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and [clause one] acts as such, or [clause two] in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than \$1,000 or imprisoned not more than three years."

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proved. 732 F. 2d 1154 (1984). This rule is consistent with the approach of six other Circuits. See *United States v. Cord*, 654 F. 2d 490 (CA7 1981); *United States v. Robbins*, 613 F. 2d 688 (CA8 1979); *United States v. Rosser*, 174 U. S. App. D. C. 79, 528 F. 2d 652 (1976); *United States v. Rose*, 500 F. 2d 12 (CA2 1974), vacated on other grounds, 422 U. S. 1031 (1975); *United States v. Mitman*, 459 F. 2d 451 (CA9), cert. denied, 409 U. S. 863 (1972); *United States v. Guthrie*, 387 F. 2d 569 (CA4 1967).

The rule in the Fifth Circuit, however, is otherwise. See *United States v. Cohen*, 631 F. 2d 1223 (1980); *United States v. Randolph*, 460 F. 2d 367 (1972); *Honea v. United States*, 344 F. 2d 798 (1965). The Fifth Circuit views congressional deletion of the intent to defraud language as merely an attempt to make statutory wording conform to authoritative judicial construction. As the Fifth Circuit sees it, the legislative history indicates that Congress labored under a misconception over what the prevailing judicial interpretation required. *Id.*, at 802. Thus, intent to defraud is still an element of the offense and must be specifically alleged in the indictment.

The statute at issue defines a federal crime, and it should be applied uniformly throughout the United States. Yet, because of conflicting interpretations, defendants in some parts of this country may be punished for violations without proof or pleading of an element required in another judicial circuit. Criminal culpability for violation of federal statutes should turn on uniform law, not geography. I would grant certiorari to resolve the conflict among the Circuits.

No. 84-6. *KENNEDY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 546.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Because the decision of the Court of Appeals in this case conflicts with the decision of the Court of Appeals for the First Circuit in *United States v. Canus*, 595 F. 2d 73 (1979), I would grant certiorari.

No. 84-265. *CALIFORNIA v. HARRIS*. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 36 Cal. 3d 36, 679 P. 2d 433.

No. 84-290. *ORTHO PHARMACEUTICAL CORP. v. WOODERSON*. Sup. Ct. Kan. Motion of Pharmaceutical Manufacturers Associa-

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tion for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this motion and this petition. Reported below: 235 Kan. 387, 681 P. 2d 1038.

No. 84-331. ENRIGHT ET AL. *v.* BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE ET AL. Sup. Ct. Wis. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would deny the petition for writ of certiorari for want of jurisdiction. Reported below: 118 Wis. 2d 236, 346 N. W. 2d 771.

No. 84-365. PEREZ, ADMINISTRATRIX OF THE ESTATE OF MANAS Y PINEIRO *v.* CHASE MANHATTAN BANK, N. A. Ct. App. N. Y. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 61 N. Y. 2d 460, 463 N. E. 2d 5.

No. 84-382. FLEMING *v.* MOORE. Sup. Ct. Va. Motion of respondent for award of attorney's fees denied. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this motion and this petition.

No. 84-5247. RAULERSON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 803.

JUSTICE BRENNAN, dissenting.

Adhering 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), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

In *Faretta v. California*, 422 U. S. 806 (1975), this Court held that a defendant in a state criminal trial has a right under the Sixth and Fourteenth Amendments to proceed without counsel if he clearly and unequivocally asks to do so. In this case, the petitioner made a motion to represent himself in which he cited *Faretta*. According to *Faretta*, when such a motion is made, the court must assure that the petitioner understands the dangers of his decision, and that the decision is knowing and voluntary, and then rule on the motion. The state trial court, however, did not make such an inquiry and effectively denied the motion. Reviewing the District Court's denial of a petition for habeas corpus, the

Federal Court of Appeals held that the state trial court had not committed reversible error because events *subsequent* to petitioner's assertion of the right demonstrated that petitioner's initial request was ambiguous. 732 F. 2d 803 (CA11 1984). The analysis of the Court of Appeals reflects a fundamental misunderstanding of the nature of the right guaranteed by *Faretta*. I, therefore, dissent.

I

The facts of this case are not in dispute. Petitioner James David Raulerson was convicted of first-degree murder and sentenced to death. His death sentence was stayed by a Federal District Court, 508 F. Supp. 381 (MD Fla. 1980), and a second sentencing hearing was scheduled to be held in state court. Before the second sentencing hearing, petitioner expressed considerable dissatisfaction with his attorney, and the attorney asked the court's permission to withdraw. The court denied the motion. Thereafter, on July 15, 1980, three weeks prior to the second sentencing hearing, Raulerson asked the trial court to permit him to act as co-counsel with his attorney. The court denied his motion. Next, on July 18, petitioner wrote a letter to the trial judge specifically requesting permission to appear *pro se*:

"Upon calling [court-appointed counsel] Mr. Busch today I am met with cold indifference. . . .

"With these things to your attention I wish to make motions to:

"1. appear *pro se* (*Faretta vs. California*) 95 S. Ct. 2525. . . . I cannot persist being no part of my defense. . . ." Pet. for Cert. 9.

The state court provided a copy of the letter to counsel and did nothing more. At the start of the sentencing hearing, the trial judge told Raulerson that under Florida law he could appear as co-counsel and that if he "continues to wish to participate in the representation of himself," *id.*, at 6, he would allow him to participate as co-counsel. In other words, the trial judge instructed Raulerson precisely to the contrary of what the law is, indicating that he could not proceed on his own but could proceed as co-counsel. Later in the hearing, the trial judge reversed himself and held that Raulerson could not even participate as co-counsel. Also at the sentencing hearing, counsel asked for a continuance and informed the court that he was not prepared to proceed; at

the end of the hearing, counsel stated that he was too exhausted and unprepared to give a closing argument. Raulerson, of course, had been denied the right to act as his own counsel. *As a result, no argument against the death penalty was presented on Raulerson's behalf.*

The court sentenced petitioner to death. About six months later, in February 1981, the court held a hearing to consider petitioner's desire to discharge counsel for refusal to pursue the *Faretta* issue on appeal. At that time, the court began an inquiry such as that required by *Faretta*. In the course of the hearing, Raulerson walked out.

On the basis of the foregoing, when the Court of Appeals for the Eleventh Circuit reviewed the denial of Raulerson's habeas petition, it concluded that Raulerson failed to make an unequivocal assertion of a right to relinquish counsel prior to February 1981. 732 F. 2d, at 808. The court noted that Raulerson did not "diligently" pursue his initial motion after it was filed, and that he did not renew his request. On this point, the court did not consider the effect of the trial judge's ruling, in response to Raulerson's *Faretta* motion, that *at best* Raulerson might have a right to proceed as co-counsel. Finally, the Court of Appeals observed in passing that even if the assertion of the right to self-representation was unequivocal it was waived when Raulerson proceeded with counsel. Again, the Court of Appeals did not acknowledge that the state trial judge had told petitioner that at most he could participate as co-counsel, and that even that ruling later was reversed. Nor did the appeals court suggest what other course petitioner might have followed at that time, after he was told that he could, at most, act as co-counsel.

A dissenting member of the panel concluded that "the failure of the trial court to respond affirmatively to [Raulerson's] demand for the right to represent himself as required in *Faretta* was an absolute and final denial of that right which was not waived by his subsequent conduct." *Id.*, at 814 (Tuttle, J.). Judge Tuttle further pointed out that it was not reasonable to characterize the petitioner's position as ambiguous when "[w]hatever vacillation appears in the record as it now stands was . . . the fault of the trial judge, whose vacillation could hardly be expected to have been treated by a non-lawyer defendant any differently than it was." *Ibid.* Moreover, as the dissent reasoned, "[u]nless we can assume that Raulerson would have acted the same way if the trial court, in response to his first demand, had undertaken in a proper manner to acquaint him with the problems he faced, then it seems

to me that the trial court's failure to hold such a hearing could not be deemed as being ratified because six months after the sentencing hearing, he acted in the manner in which he did." *Ibid.*

To my mind, there can be no dispute that Raulerson clearly and unequivocally asserted his right to proceed *pro se* before the sentencing hearing and was denied that right. The majority's *post hoc* rationalization for the trial court's failure to engage in a *Faretta* inquiry at that point makes a mockery of the right recognized by this Court.

II

The exercise of the right recognized in *Faretta* entails a concomitant waiver of the right to counsel expressly guaranteed by the Sixth Amendment. Accordingly, we indicated in *Faretta* that defendants should be permitted to exercise their right of self-representation only if they execute a valid waiver of their right to counsel, which is to say, only if they "knowingly and intelligently" forgo [the] relinquished benefits" of counsel. 422 U. S., at 835 (citing *Johnson v. Zerbst*, 304 U. S. 458, 464-465 (1938)). Further, we held, judges are to assure that defendants are made aware of the "dangers and disadvantages of self-representation," 422 U. S., at 835, before permitting them to relinquish counsel. In other words, since a defendant must act affirmatively to relinquish the right to counsel, it follows that the right of self-representation must affirmatively be asserted as well. We thus have emphasized that courts should not bend over backward to hold that a defendant, who merely hints that he might be better off representing himself, has waived his right to counsel. Cf. *Brewer v. Williams*, 430 U. S. 387 (1977) (mere failure to request counsel does not result in waiver of right to counsel).

These precautions, which are so necessary to protect the right to counsel, may not be permitted to eviscerate the right of self-representation. Just as we must be watchful not to find a waiver of the right to counsel where none was intended, so must we be cautious not to overlook an asserted right to proceed *pro se* in our well-meant effort to protect the right to counsel. Accordingly, in *Faretta* we indicated that a defendant's clear and unequivocal assertion of a desire to represent himself must be followed by a hearing,¹ in which he is "made aware of the dangers and disad-

¹ This rule of course would not apply mechanically to repetitive motions, motions designed to obstruct, or motions that are made at inappropriate times. The issue does not arise here, since petitioner filed his motion well

vantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U. S., at 835. A *Faretta* hearing offers a court ample opportunity to assure that a defendant understands and accepts the consequences of his decision, and to create a record to support its finding of a knowing waiver. As a result, once a defendant affirmatively states his desire to proceed *pro se*, a court should cease other business and make the required inquiry. It is through this hearing that the right to counsel is protected.

The foregoing makes clear, then, that if a trial court judge holds a *Faretta* hearing when the accused clearly asserts his desire to proceed *pro se*, the result will not do harm to the right to counsel. At the same time, the *failure* to hold a *Faretta* inquiry at this time *will* do injury to the right recognized in *Faretta*. Delay in holding a hearing after the right is unequivocally asserted undermines that right by forcing the accused to proceed with counsel in whom he has no confidence and whom he may distrust. For that reason, a *post hoc* effort to construe as subsequently ambiguous a clear assertion of a desire to proceed on one's own, such as that undertaken by the Court of Appeals in this case, contravenes the right. It encourages courts to leave a *Faretta* motion pending, in the hope that the request will eventually be construed as ambiguous. It therefore follows that sufficient protection of the *Faretta* right may only be achieved if the trial court is required to hold a hearing when the right is asserted. On review, a court need look only to the character of the assertion, and not beyond, to assure no error was committed.²

Lower courts generally have agreed that the character of the assertion itself, and not subsequent developments, determines whether there has been a sufficiently clear request to proceed *pro se*. See, e. g., *Brown v. Wainwright*, 665 F. 2d 607, 611 (CA5 1982) (en banc). If a request is ambiguous, the trial judge need not respond, because there has been no clear indication of a desire

before the sentencing hearing began, and there is no suggestion that he acted for any inappropriate reason.

²The State points out in its opposition to the petition that courts have found waiver of the right to proceed *pro se* on the basis of subsequent occurrences. In those cases, however, the reviewing courts found an assertion of the right followed by a waiver; they did not find that the right was never asserted.

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to waive a right to counsel. If the request is clear, however, a *Faretta* hearing must follow, to assure that the defendant is not required to proceed with the unwanted assistance of counsel. Viewed on its own, Raulerson's original request to proceed *pro se* was as unambiguous as such a request can be. Under the analysis of these other courts, he therefore was denied the right of self-representation. Thus, the Court of Appeals' *post hoc* rationalization of the trial court's failure to engage in a *Faretta* inquiry is not only at odds with the holding and spirit of *Faretta*, but also with lower court opinions construing *Faretta*. I therefore dissent from the Court's decision not to review the judgment of the Court of Appeals.

III

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman v. Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). But even if I accepted the prevailing view that the death penalty may be constitutionally imposed under certain circumstances, I would grant this petition for the reasons set out above.

No. 84-5350. MAXWELL v. PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 505 Pa. 152, 477 A. 2d 1309.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I would grant certiorari to consider the constitutionality of the Pennsylvania death penalty statute, under which the jury must impose a death sentence upon a finding of one aggravating circumstance and no mitigating circumstances. Such a scheme precludes any individualized consideration that "death is the appropriate punishment in a specific case," *Lockett v. Ohio*, 438 U. S. 586, 601 (1978) (plurality opinion), quoting *Woodson v. North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), virtually eliminates the possibility of a mercy verdict, and absolves the jury from the obligation of taking moral responsibility for its actions.

I

Maxwell was convicted of first-degree murder, a crime punishable by death in Pennsylvania. At the sentencing hearing, the

State presented evidence of two aggravating circumstances. Maxwell did not present any evidence of mitigating circumstances, and the jury failed to find mitigating circumstances. 505 Pa. 152, 477 A. 2d 1309 (1984). Maxwell's counsel, however, made a plea for mercy.

Under the Pennsylvania death penalty statute, "the verdict *must* be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance" 42 Pa. Cons. Stat. § 9711(c)(1)(iv) (1980) (emphasis added). The trial judge's instruction to the jury paraphrased the language of the statute.

In construing the statute, the Pennsylvania Supreme Court has stated that where no mitigating circumstances are found, "one aggravating circumstance alone *requires* a verdict of death." *Commonwealth v. Beasley*, 504 Pa. 485, 500, n. 3, 475 A. 2d 730, 738, n. 3 (1984) (emphasis added). Indeed, in considering Maxwell's appeal, that court stated that because Maxwell "did not introduce any evidence of mitigating circumstances, it became unnecessary to 'weigh' opposing circumstances." 505 Pa., at 168, 477 A. 2d, at 1317-1318.

II

I am troubled by Pennsylvania's mechanical imposition of the death penalty. Under the Pennsylvania death penalty statute, once the jury fails to find mitigating circumstances, it is precluded from making any further inquiry. At that point, in returning its verdict—the most serious judgment that our society can render—the jury acts in a merely ministerial capacity. The legislature and the courts have barred independent decisionmaking.

The Pennsylvania statute, as interpreted by the State's courts, raises two substantial questions that are worthy of this Court's attention. The first is whether placing such severe constraints on the jury is consistent with the requirement of individualized punishment in capital cases. See *Lockett v. Ohio*, *supra*, at 601. The problem posed by the "mandatory" aspect of death penalty schemes in which the jury must return a death sentence without considering the appropriateness of such a sentence was discussed by JUSTICE STEVENS in *Smith v. North Carolina*, 459 U. S. 1056 (1982) (respecting denial of certiorari). In *Smith*, the jury was required to make three findings:

"(1) that one or more aggravating circumstances existed; (2) that the aggravating circumstances were sufficiently substantial to call for the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances." *Ibid.*

JUSTICE STEVENS' concern was that a North Carolina jury might answer the second and third questions in the affirmative and yet be in doubt about the proper penalty. Under the Pennsylvania statute at issue here, the jury not only makes no determination on the propriety of the death sentence but is also denied the opportunity to rule on the second question, since the legislature has already made that decision. Thus, the jury's findings here are even further removed from the question whether death is the appropriate punishment.

More importantly, this issue is squarely presented in this case, whereas it was not in *Smith*. In *Smith*, the jury instructions could have been read "as merely requiring that the death penalty be imposed whenever the aggravating circumstances, discounted by whatever mitigating factors exist, are sufficiently serious to warrant the extreme penalty." *Id.*, at 1056-1057. Under this reading, of course, the instructions would have complied with the *Lockett* requirement of an individualized determination of the appropriateness of the death penalty. JUSTICE STEVENS thus concluded that the Court should not examine the constitutionality of the statute until this statute had been authoritatively construed by the North Carolina courts. Here, in contrast, the Pennsylvania Supreme Court has expressly foreclosed any reading that would make the statute consistent with *Lockett*.

These severe limitations on the role of the jury take on crucial significance in light of the fact that Maxwell's sole strategy at his sentencing hearing was to present a plea for mercy. This Court has stated that it is constitutionally permissible for the jury "to dispense mercy on the basis of factors too intangible to write into a statute." *Gregg v. Georgia*, 428 U. S. 153, 222 (1976) (WHITE, J., concurring in judgment); see *Zant v. Stephens*, 462 U. S. 862, 875-876, n. 13 (1983). And *Lockett v. Ohio* suggests that the possibility of a mercy verdict—a verdict based on unarticulated and perhaps unarticulable reasons—cannot be constitutionally foreclosed, for otherwise there would be no assurance that the death penalty was not imposed "in spite of factors which may call for a

less severe penalty." 438 U. S., at 605. But here, the jury was expressly not given any opportunity to consider whether death was proper. Thus, in order to consider Maxwell's mercy plea the jury would have had to categorize it as one of eight mitigating circumstances. It seems to me that even the broadest mitigating circumstance in the Pennsylvania statute—"the character and record of the defendant and the circumstances of his offense," 42 Pa. Cons. Stat. §9711(e)(8) (1980)—is too restrictive to allow proper consideration of intangible factors.

This problem is magnified here because the absence of mitigating circumstances ended the jury's inquiry. Had the jury balanced aggravating against mitigating circumstances, it would have had another opportunity to take intangibles into account. In addition, at that stage the jury would have been engaged in a more subjective assessment, an assessment perhaps somewhat conducive to the consideration of factors that a juror is persuaded by but cannot articulate. Maxwell's jury never performed this inquiry. For this reason too, the problem here is more serious than that at stake in *Smith*.

III

My second, related concern is whether Maxwell's streamlined sentencing hearing gave the jury the opportunity to reflect on the magnitude of the decision it was about to make, and to assume moral responsibility for that decision. As far back as in *McGautha v. California*, 402 U. S. 183, 207–208 (1971), this Court stressed the importance that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." Here, all that the jurors actually did was to consider whether aggravating and mitigating circumstances had been proved. The finding that there was at least one aggravating circumstance and no mitigating circumstances precluded any further inquiry. But findings on questions such as "[t]he age of the defendant at the time of the crime," 42 Pa. Cons. Stat. §9711(e)(4) (1980), are far removed from what really is at stake in a capital case. I have little faith that a jury told that it is restricted to deciding peripheral issues will ever be aware of, or focus on, the serious consequences of its decision.

The problem here, however, goes beyond a concern that the jury may not take its role seriously enough. Mercy—which I have already identified as a necessary component of capital deci-

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sionmaking—cannot be dispensed in a vacuum. It is unlikely that a jury whose inquiry is limited to peripheral factors, far removed from the ultimate question of life or death, will ever turn its attention to whether the exercise of mercy is warranted.

IV

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, *supra*, at 231 (MARSHALL, J., dissenting); *Furman v. Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). The issue in this case, however, is such that I would grant review of the sentence even if I accepted the prevailing view that the death penalty may be constitutionally imposed under certain circumstances. I believe that this Court should consider whether the death penalty may constitutionally be mandated merely upon a finding of the existence of at least one aggravating circumstance and the lack of mitigating circumstances. For that reason, I respectfully dissent.

No. 84-5362. HUMPHREY *v.* SOUTHERN CONTINENTAL BELL TELEPHONE CO. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 84-5377. SKEETER *v.* CITY OF SUFFOLK, VIRGINIA. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 735 F. 2d 1358.

No. 84-5648 (A-327). BAREFOOT *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. 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 and the petition for writ of certiorari and would vacate the death sentence in this case.

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Rehearing Denied

No. 83-6916. JOHNSON *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 846;

No. 83-7016. LANDES *v.* SMITH, ATTORNEY GENERAL, ET AL., *ante*, p. 850; and

No. 84-5203. MCLAINE *v.* AGNEW ET AL., *ante*, p. 867. Petitions for rehearing denied.

No. 83-623. JAMES ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL., 467 U. S. 1209. Motion for leave to file petition for rehearing denied.

No. 83-6829 (A-308). PALMES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 873. Applications to suspend the effect of the order denying the petition for writ of certiorari and for stay of execution of sentence of death denied. Petition for rehearing 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 applications and the petition for rehearing, vacate the order denying certiorari, and would grant the petition for writ of certiorari and vacate the death sentence in this case.

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Dismissal Under Rule 53

No. 84-374. THILLENS, INC. *v.* WALL ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 729 F. 2d 1128.

Appeals Dismissed

No. 84-243. MARENGO COUNTY COMMISSION ET AL. *v.* UNITED STATES. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 731 F. 2d 1546.

No. 84-412. HOME BUILDERS & CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., ET AL. *v.* BOARD OF COUNTY

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COMMISSIONERS OF PALM BEACH COUNTY ET AL. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of substantial federal question. Reported below: 446 So. 2d 140.

Certiorari Granted—Vacated and Remanded

No. 83-1593. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* KUEHNER ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeals to be remanded to the United States District Court for the Eastern District of Pennsylvania with instructions to: (1) remand the cases of the named respondents to the Secretary for review pursuant to § 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984; (2) make any necessary clarifications in the definition and scope of the class; (3) remand the cases of the unnamed class members to the Secretary for proceedings pursuant to § 2(d)(3) of that Act; and (4) take other actions appropriate in light of that Act. Reported below: 717 F. 2d 813.

Miscellaneous Orders

No. A-272. HOPFMANN *v.* UNITED STATES FEDERAL ELECTION COMMISSION ET AL. D. C. D. C. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A-277. THE DAILY PANTAGRAPH ET AL. *v.* BANER, JUDGE, CIRCUIT COURT OF WOODFORD COUNTY, ILLINOIS, ET AL. Application for stay of a juvenile court order, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

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

The applicants seek an immediate stay of an order restraining the publication of the identities and location of two juveniles charged in a juvenile delinquency proceeding. The trial court found that the names of these individuals, as well as their former location while in custody, previously had been lawfully released to the public. I would grant the stay with respect to that information. I would also grant the application with respect to any other information that the trial court, after a hearing, finds to have been made public. *New York Times Co. v. United States*, 403 U. S. 713, 725-727 (1971) (BRENNAN, J., concurring); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931).

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No. A-279. SCHUCHMAN ET UX. *v.* UNITED STATES. D. C. S. D. Ill. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D-443. IN RE DISBARMENT OF DIZAK. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D-457. IN RE DISBARMENT OF SHAPIRO. Disbarment entered. [For earlier order herein, see *ante*, p. 914.]

No. D-461. IN RE DISBARMENT OF POWERS. It is ordered that Marvin J. Powers, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 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 respondents for leave to file a supplemental brief after argument granted.

No. 83-1748. ALLIS-CHALMERS CORP. *v.* LUECK. Sup. Ct. Wis. [Certiorari granted, *ante*, p. 815.] Motion for appointment of counsel granted, and it is ordered that Gerald S. Boisits, Esquire, of Milwaukee, Wis., be appointed to serve as counsel for respondent in this case.

No. 83-1950. MCALLISTER ET AL. *v.* GULF FEDERAL SAVINGS & LOAN ASSN., *ante*, p. 827. Motion of respondents for taxation of costs and attorney's fees denied.

No. 83-6881. BRADFORD *v.* BRADFORD, *ante*, p. 812. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 84-129. REAVIS & MCGRATH *v.* ANTINORE ET AL. C. A. 8th Cir. Motion of respondents Jones et al. to direct the Clerk to file an application for extension of time to file a cross-petition for writ of certiorari and that such cross-petition be considered irrespective of disposition of the opening petition for writ of certiorari denied.

No. 84-321. ALABAMA *v.* STURDIVANT. Sup. Ct. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted.

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No. 84-5092. *BOOKER v. MISSISSIPPI*, ante, p. 873. Respondent is requested to file a response to the petition for rehearing within 30 days.

No. 84-5407. *GEMELLI v. PENNSYLVANIA*. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 26, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Certiorari Granted

No. 83-2126. *OKLAHOMA v. CASTLEBERRY ET AL.* Ct. Crim. App. Okla. Certiorari granted. Reported below: 678 P. 2d 720.

No. 84-205. *VIRGINIA EX REL. DEPARTMENT OF CONSERVATION AND ECONOMIC DEVELOPMENT ET AL. v. CLARK, SECRETARY OF THE INTERIOR, ET AL.* C. A. 4th Cir. Certiorari granted. Reported below: 741 F. 2d 37.

Certiorari Denied. (See also No. 84-243, *supra*.)

No. 83-1924. *CITY OF EL SEGUNDO ET AL. v. THORNE*. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 459.

No. 83-1931. *GUSTAFSON v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1078.

No. 83-1982. *SARMIENTO-PEREZ v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 898.

No. 83-2014. *FREZZO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 8.

No. 83-2065. *JONES v. DEPARTMENT OF HUMAN RESOURCES OF GEORGIA ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 622.

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No. 83-2104. *HOMENS v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 739.

No. 83-2120. *EVANS v. LOCKHEED-GEORGIA CO.* C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 821.

No. 83-2124. *RUTTER ET AL. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 5th Cir. Certiorari denied.

No. 83-2163. *GARTER-BARE CO. ET AL. v. MUNSINGWEAR, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 707.

No. 83-6633. *GREEN v. OKLAHOMA*. Ct. Crim. App. Okla. Certiorari denied.

No. 83-6674. *GRAY v. KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 1199.

No. 83-6685. *VICCARONE v. BUCKLEY ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1111.

No. 83-6697. *ESSEX v. GARRAGHTY, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 727 F. 2d 1102.

No. 83-6732. *GREGG v. MICHIGAN*. Sup. Ct. Mich. Certiorari denied. Reported below: 418 Mich. 973.

No. 83-6746. *WILLIAMS v. ARKANSAS*. Sup. Ct. Ark. Certiorari denied. Reported below: 281 Ark. 91, 663 S. W. 2d 700.

No. 83-6768. *CRAIG v. SOUTH CAROLINA*. Sup. Ct. S. C. Certiorari denied.

No. 83-6788. *STOLLE v. PENNSYLVANIA*. Super. Ct. Pa. Certiorari denied. Reported below: 316 Pa. Super. 601, 465 A. 2d 46.

No. 83-6795. *BRACEWELL v. ALABAMA*. Sup. Ct. Ala. Certiorari denied. Reported below: 447 So. 2d 827.

No. 83-6797. *JOHNSON v. MARYLAND*. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 675.

No. 83-6813. *ROSADO v. LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY*. C. A. 2d Cir. Certiorari denied.

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No. 83-6906. *WILLIAMS v. COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1446.

No. 83-6954. *BECK v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1329.

No. 83-6989. *YATES v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 781.

No. 83-6996. *SMITH v. UNION MUTUAL LIFE INSURANCE CO.* C. A. 8th Cir. Certiorari denied. Reported below: 726 F. 2d 437.

No. 84-70. *CROWDER ET AL. v. ORR.* Sup. Ct. App. W. Va. Certiorari denied. Reported below: — W. Va. —, 315 S. E. 2d 593.

No. 84-116. *VAKAS v. RODRIQUEZ ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 728 F. 2d 1293.

No. 84-160. *BEAUFORT GAZETTE v. DELOACH.* Sup. Ct. S. C. Certiorari denied. Reported below: 281 S. C. 474, 316 S. E. 2d 139.

No. 84-254. *HUTCHINSON v. UNITED STATES.* Ct. Mil. App. Certiorari denied. Reported below: 18 M. J. 281.

No. 84-279. *JAMES MARINE SERVICE, INC. v. RYAN WALSH STEVEDORING CO., INC., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1457.

No. 84-386. *HOLLOWAY v. ALABAMA.* Ct. Crim. App. Ala. Certiorari denied. Reported below: 453 So. 2d 7.

No. 84-388. *MARSHALL v. MCMAHAN.* Sup. Ct. Tenn. Certiorari denied. Reported below: 670 S. W. 2d 215.

No. 84-391. *LYON ET AL. v. ALABAMA STATE BAR.* Sup. Ct. Ala. Certiorari denied. Reported below: 451 So. 2d 1367.

No. 84-401. *ROSEBROUGH MONUMENT CO. v. MEMORIAL PARK CEMETERY ASSN. ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 736 F. 2d 441.

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No. 84-403. *ALTMAN v. HURST, CHIEF OF POLICE OF CITY OF HICKORY HILLS, ILLINOIS, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 1240.

No. 84-411. *UNIVERSITY OF TEXAS AT EL PASO v. DUKE.* C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 994.

No. 84-414. *MEAD JOHNSON & CO. v. LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 683.

No. 84-415. *CASE v. BASF WYANDOTTE ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: 737 F. 2d 1034.

No. 84-417. *MOODY, DEBTOR-IN-POSSESSION v. AMOCO OIL Co.* C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 1200.

No. 84-431. *MID-AMERICA MACHINERY Co. v. NATIONAL LABOR RELATIONS BOARD.* C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 1104.

No. 84-442. *INTELICENSE CORP., S.A. v. UNITED STATES OLYMPIC COMMITTEE ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 737 F. 2d 263.

No. 84-463. *SPIEGEL, INC. v. ALDON ACCESSORIES, LTD.* C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 548.

No. 84-481. *QUANSAH v. ALL AMERICAN COPY INC. ET AL.* C. A. 9th Cir. Certiorari denied.

No. 84-485. *EHM v. NATIONAL RAILROAD PASSENGER CORPORATION.* C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 2d 1250.

No. 84-488. *BULKLEY v. UNITED STATES.* C. A. 10th Cir. Certiorari denied.

No. 84-509. *TICKEL v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84-513. *MILLER v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 84-514. *MUELBL v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1175.

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No. 84-555. *FRITZIE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84-5024. *WOUNDED EYE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 22.

No. 84-5041. *HOLMAN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 728 F. 2d 809.

No. 84-5208. *DEMPSEY v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 733 F. 2d 392.

No. 84-5264. *TEST v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 84-5320. *HUMPHREY v. BOSTITCH CO. ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5390. *PORTER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 622.

No. 84-5406. *JACKSON v. OREGON*. Ct. App. Ore. Certiorari denied. Reported below: 68 Ore. App. 506, 683 P. 2d 120.

No. 84-5414. *SHAW v. REED ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 432.

No. 84-5419. *WEISMAN v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 736 F. 2d 421.

No. 84-5422. *FORRESTER v. UNITED STATES GOVERNMENT*. C. A. 2d Cir. Certiorari denied.

No. 84-5433. *ROBINSON v. WYRICK, WARDEN*. C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 2d 1091.

No. 84-5436. *JERMOSEN v. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84-5442. *TYLER v. HARPER ET AL.* Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 670 S. W. 2d 14.

No. 84-5448. *LANCE v. SOUTH CAROLINA HIGHWAY DEPARTMENT ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1356.

No. 84-5455. *STAPLES v. YOUNG ET AL.* C. A. 7th Cir. Certiorari denied.

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No. 84-5470. *LEDEZMA-HERNANDEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 887.

No. 84-5474. *FORSHEE v. UNITED STATES*; and
No. 84-5514. *RAINEY v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84-5477. *HARRIATT v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 84-5485. *FRAZIER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 83-6816. *FORD v. KENTUCKY*. Sup. Ct. Ky. Certiorari denied. Reported below: 665 S. W. 2d 304.

JUSTICE MARSHALL, dissenting.

Petitioner is a Negro male who was 51 at the time he was indicted for murder in Franklin County, Ky. He challenged the composition of the grand jury that indicted him on the grounds, *inter alia*, that women and young adults were substantially and systematically underrepresented on grand juries in Franklin County. Testimony from a statistician concluded that this underrepresentation was statistically significant. Evidence was also presented that the selection system was not facially neutral, for the voter registration list from which grand jurors are selected in the county contains information on the gender, race, and date of birth of the prospective grand jurors.¹

Despite petitioner's assertion and his substantiating evidence, the Kentucky Supreme Court refused to consider the merits of this challenge. 665 S. W. 2d 304 (1984). Instead, that court held that, because petitioner was a 51-year-old Negro male, he had no standing to challenge the exclusion of women or young adults from grand juries in Franklin County. The court rested its conclusion on the view that challenges to the composition of a grand jury must be rooted in the Equal Protection Clause of the Fourteenth Amendment rather than in that Amendment's due process component. Thus, the court below concluded that petitioner himself

¹The voter lists themselves were fairly representative of women, although there was no evidence of their representativeness with respect to young adults.

had no recourse for challenging the imbalance of the grand jury that indicted him.²

The conclusion of the Kentucky Supreme Court is flatly at odds with the opinion announcing this Court's judgment in *Peters v. Kiff*, 407 U. S. 493 (1972). That opinion, joined by three Justices, stated: "[W]hen a *grand* or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances [*i. e.*, the standing] of the person making the claim. . . . [A] State cannot, consistent with due process, subject a defendant to *indictment* or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States." *Id.*, at 498, 502 (emphasis added). This three-Justice opinion therefore concluded that a white male had standing under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment to bring a racial-discrimination challenge to the state system used to select his grand and petit juries.³

The standing question is particularly important in light of the fact that, as of 1977, at least 22 States had some sort of discretionary system for the selection of grand jurors. J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*, Appendix B, pp. 264-270 (1977). Because the opinion announcing the judgment in *Peters* was joined by only

²The court did hold, as our precedents command, that petitioner had standing to challenge the exclusion of Negroes from the grand jury. However, the court rejected this claim on the merits by relying in part on the faulty premise that a study establishing a statistically significant violation of the fair-cross-section requirement did not create a *prima facie* case of underrepresentation when the violation was shown to exist only over a 2-year period; apparently, the court below believed a far longer period of underrepresentation had to be proved to establish a *prima facie* case. Our cases have never imposed such a stringent requirement; indeed, in *Duren v. Missouri*, 439 U. S. 357, 366 (1979), we held that a demonstration of significant underrepresentation in every jury venire "for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized." That same requirement would seem to apply here, for grand juries in Kentucky generally sit for 20-day periods. See Ky. Rev. Stat. § 29A.210 (3) (1980).

³Three other Justices reached the same result, but based their decision on the conclusion that standing was available in *Peters* to "implement the strong statutory policy" of 18 U. S. C. § 243, which prohibits States from disqualifying state grand jurors on account of race. 407 U. S., at 505 (WHITE, J., joined by BRENNAN and POWELL, JJ., concurring in judgment).

three Justices, *Peters* did not definitively resolve the standing question raised in this petition for certiorari. The Court also declined in *Alexander v. Louisiana*, 405 U. S. 625, 633-634 (1972), to decide whether males could challenge the statutory exemption of women from state grand jury service, although Justice Douglas would have reached the question and invalidated the statute on federal due process grounds. *Id.*, at 634 (Douglas, J., concurring). At the same time, individual Members of the Court have expressed the view that, because the Fifth Amendment right to a grand jury does not apply to state prosecutions, *Hurtado v. California*, 110 U. S. 516 (1884), "a state defendant has no right to a grand jury that reflects a fair cross-section of the community." *Castaneda v. Partida*, 430 U. S. 482, 509 (1977) (POWELL, J., dissenting).

These conflicting pronouncements from the Court and our failure to speak definitively to the issue have spawned the sort of confusion in the lower courts that calls for the exercise of this Court's certiorari jurisdiction. In contrast to the views of the Kentucky Supreme Court, which are shared by the Supreme Court of Tennessee, see *State v. Coe*, 655 S. W. 2d 903 (1983), at least two Federal Courts of Appeals have stated that a male defendant does have a due process right not to have women systematically underrepresented on the state grand jury that indicts him. *Gibson v. Zant*, 705 F. 2d 1543 (CA11 1983); *Folston v. Allsbrook*, 691 F. 2d 184, 186, n. 3 (CA4 1982), cert. denied, 461 U. S. 939 (1983). In addition to this conflict, and perhaps more importantly, I believe that certiorari is warranted because the decision below, as well as the statements of my colleagues that would support it, misconceives the nature of due process guarantees in the state grand jury context.

The fact that a State has no constitutional obligation to provide a grand jury for state criminal defendants simply does not entail the conclusion that a defendant has no right to an impartial and representative grand jury once the State *does* choose to make use of grand juries. On the contrary, the insertion of a grand jury into the process culminating in trial is of major consequence to the criminal defendant. In Kentucky, as in most jurisdictions, the grand jury both investigates alleged crimes and returns indictments when it believes sufficient evidence of a crime has been established. See Ky. Rev. Stat. §§ 29A.210, 29A.220 (1980); see also *Turk v. Martin*, 23 S. W. 2d 937 (Ky. 1930). In both roles, a grand jury that is biased by virtue of its unrepresentativeness has

significant power to influence the fairness of the ensuing trial; the scope and breadth of the preindictment investigation certainly affects the ability of the State to mount a convincing case at trial, and the fact that a body of the petit jury's peers has seen fit to return an indictment may be a powerful sign to the petit jury that the charges are well founded.

Given the potential power of the grand jury over the criminal defendant, there can be no question that due process requires state grand juries to be unbiased and impartial. See, *e. g.*, *Goldberg v. Kelly*, 397 U. S. 254, 271 (1970) (once State chooses to bestow administrative benefits, due process requires that administrative decisionmakers be unbiased); *Moore v. Dempsey*, 261 U. S. 86 (1923) (holding, many years before Constitution was held to require state jury trials, that state jury must be unbiased). The real question posed by this petition is whether the way to ensure that impartiality is to require that grand juries be fairly representative of the community in which they sit.

For two reasons already articulated in our cases, I believe the answer to that question should be yes. First, a grand jury is a collective decisionmaker designed both to find facts and to express the community's moral sense on the important questions presented to it. With respect to such a body, the exclusion of any large and identifiable segment of the community removes from the jury room "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, *supra*, at 503. The exclusion of such a group deprives the grand jury of a perspective on human events that may have unquantifiable but fully legitimate significance with respect to the issues presented. See *Ballard v. United States*, 329 U. S. 187, 193-194 (1946) ("The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded").

Second, once a State chooses to employ grand juries, those grand juries become integral elements in the system of criminal justice in that State. Law is not a process by which a society actually arrives at objective truth, but rather a means for structuring the truth-seeking process so that the answers it yields will be accepted as morally legitimate by the community; it is this

acceptance that enables the verdicts of the jury system to be treated as "true." Imperative to the integrity of that system and to its perceived legitimacy is the perception that any biases from whatever source, including divergent cultural and historical experiences, be minimized. As we have said in an analogous context:

"Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. . . . 'The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'" *Rose v. Mitchell*, 443 U. S. 545, 555-556 (1979) (quoting *Ballard*, *supra*, at 195) (emphasis added).

The allegation that, at this time in our history, women are being excluded from grand jury service in some counties of Kentucky—and that potential defendants are being investigated and indicted by such grand juries—surely calls into question the legitimacy of the system of justice in those counties. To sweep this allegation aside with the syllogism that, because there is no right to a state grand jury, there is no right to a fairly representative one, is to elide the practical and symbolic importance of state grand juries.

Finally, I note two of the serious incoherencies that would result from a decision that the Due Process Clause does not give petitioner standing to raise his grand-jury composition challenge. First, there is no dispute that a defendant has long had the right to challenge the composition of a state grand jury with respect to a cognizable group of which he himself is a member. See, e. g., *Strauder v. West Virginia*, 100 U. S. 303, 309 (1880). Although the Court has traditionally discussed this right in equal protection terms, it makes little sense to conceive of the right as solely an equal protection one, for the defendant in these cases is not asking to sit on the grand jury but rather to be fairly treated by it. Yet once this is recognized as the fundament of the right at stake, there is no logically defensible or analytically coherent way of arguing that the defendant is not also harmed when any "distinctive" group in the community is underrepresented on his grand jury, see *Duren v. Missouri*, 439 U. S. 357, 364 (1979). As *Tay-*

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lor v. Louisiana, 419 U. S. 522, 531 (1975), makes clear, women are such a group.⁴ Second, in most States, as is true in Kentucky, see Ky. Rev. Stat. § 29A.060 (Supp. 1984), the same statutory procedures are used for selecting both grand jurors and the petit jury venire; it is irrational and a little unseemly to say that, with respect to the same defendant, the very same procedures (indeed, the very same jury wheels) are both constitutionally valid and invalid—valid when the grand jury is being picked but invalid when used to pick the petit jury venire.

The opinion of the court below, which complains that “federal decisions have enshrined the statistician on the throne of expertise,” 665 S. W. 2d, at 306, makes clear that some lower courts refuse to take seriously the principle that state grand juries must be impartially constituted.⁵ Language from some of our opinions, and statements of individual Members of the Court, may encourage this response. Yet neither precedent nor logic suggests such a result. Accordingly, I believe the petition should be granted, and I respectfully dissent from the Court’s failure to do so.

No. 83–6921. *HERRING v. FLORIDA*. Sup. Ct. Fla.;

No. 83–6991. *HERNANDEZ v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir.; and

No. 84–5451. *CARD v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83–6921, 446 So. 2d 1049; No. 84–5451, 453 So. 2d 17.

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. 84–252. *SHIVERS v. WALTER E. HELLER & Co.* C. A. 5th Cir. Motion of respondent for damages denied. Certiorari denied. Reported below: 732 F. 2d 939.

⁴To resolve the standing question presented by this petition, we therefore need not address the issue of whether young adults constitute a “cognizable group” under the *Duren* standard.

⁵This refusal is further illustrated in the Kentucky Supreme Court’s cursory treatment on the merits of petitioner’s claim that Negroes were systematically underrepresented on grand juries. See n. 1, *supra*. Indeed, the Kentucky court’s disregard for the methodological principles laid down in *Duren* provides an independent reason in my mind for granting certiorari.

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No. 84-392. THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS *v.* REDDIX. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 728 F. 2d 705 and 732 F. 2d 494.

No. 84-474. CONNECTICUT *v.* COHANE. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 193 Conn. 474, 479 A. 2d 763.

No. 84-406. NATIONAL FOOTBALL LEAGUE ET AL. *v.* OAKLAND RAIDERS, LTD., ET AL.; and

No. 84-418. OAKLAND-ALAMEDA COUNTY COLISEUM, INC. *v.* OAKLAND RAIDERS, LTD., ET AL. C. A. 9th Cir. Motion of National Basketball Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 726 F. 2d 1381.

No. 84-430. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BISMARCK *v.* HULM ET AL. C. A. 8th Cir. Motions of respondents Theodore George Hulm and Tom A. Brigham for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 738 F. 2d 323.

No. 84-5191. JAMES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 141 Ariz. 141, 685 P. 2d 1293.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering 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), I would grant certiorari and vacate the death sentence in this case. Even if I felt otherwise, however, I would grant certiorari in this case because the underlying conviction raises grave constitutional issues.

I

At stake in this case are the limits the Fifth Amendment places on official custodial interrogation of an accused who has invoked the right to assistance of counsel. See *Solem v. Stumes*, 465 U. S. 638 (1984); *Oregon v. Bradshaw*, 462 U. S. 1039 (1983); *Edwards v. Arizona*, 451 U. S. 477 (1981). Admitting certain incriminating evidence against petitioner James in this case, the

Arizona trial court ignored the principles of *Edwards* and its progeny. To affirm the trial court, the Arizona Supreme Court applied *Edwards* and *Bradshaw* in a way that departs substantially from our intendment in those cases and merits plenary review. Because Arizona plans to execute James if this constitutionally infirm conviction stands, our responsibility to undertake review is clear.

II

On November 19, 1981, Phoenix police officers arrested James for the murder of Juan Maya. Shortly after the arrest, Officer Davis of the Phoenix force escorted James to a small, windowless room and began an interrogation. Officer Davis read James his *Miranda* rights and then informed him that he would be charged with first-degree murder. Tr. 5-7 (Aug. 27, 1982). About 19 minutes into the interrogation, James asked Davis what would happen with respect to the murder charge. Davis responded that if James was found guilty the result would be up to the court. James appears to have perceived this statement as an intimation that capital punishment was possible, because at this point he made his first request for an attorney. *Id.*, at 9-10 (Sept. 3, 1982). Instead of terminating the interrogation, the officer continued to press James to make some kind of a statement; Davis told James he was "only trying to get the facts of the case and giving [James] the opportunity to tell his side of it too." *Id.*, at 8-10. According to the subsequent testimony of Officer Davis, James' response was hesitant and uncertain. He first suggested he might be willing to proceed without an attorney but then reversed himself and requested an attorney once again. *Ibid.* This second request for an attorney prompted Officer Davis to pick up his papers, stand and open the door. As he opened the door he encountered Sergeant Midkiff, the officer supervising this investigation, who was standing just outside. *Id.*, at 10-11. As soon as he saw Officer Davis, Midkiff asked "is he going to show us where the body is?" *Id.*, at 44 (Aug. 27, 1982). Midkiff later testified that he stood close to James when asking this question. Midkiff also testified that James "might have assumed" the question was intended for him. *Id.*, at 52-53. Officer Davis and James responded to Midkiff's inquiry simultaneously. As Davis told Midkiff that James had invoked his right to counsel, James said "I'll show you where the body is." *Id.*, at 44-45. Midkiff immediately asked James where the body was and James

responded that it was approximately 100 miles from Phoenix. *Id.*, at 44-47. Neither officer made any effort to remind James of his right to counsel and neither sought an express oral or written waiver of that right.

Instead of providing James with an attorney, the officers readied a police car for a trip to the site of Juan Maya's body. Sergeant Midkiff instructed all officers to refrain from questioning James while the car was being readied. *Id.*, at 57. Midkiff also phoned a prosecutor for advice on whether, in light of James' request for an attorney, the officers should proceed with the proposed journey. The prosecutor told Midkiff to proceed. Davis then escorted James to the patrol car and requested directions to the site of the body. *Id.*, at 55-56. James obliged and led Davis to an abandoned mine shaft about 100 miles from Phoenix. At the base of the shaft the officers found the body of Juan Maya. *Id.*, at 53-55.

At his trial for capital murder James sought to suppress the incriminating statements but the trial court held the statements admissible. James was convicted and sentenced to death. The Arizona Supreme Court affirmed the conviction and sentence. 141 Ariz. 141, 685 P. 2d 1293 (1984). James then petitioned this Court for certiorari. While the petition was under consideration, the State of Arizona set James' execution date for October 3, 1984. The Arizona Supreme Court denied a stay of execution pending this Court's disposition of the petition for certiorari. JUSTICE REHNQUIST granted a stay of execution to permit consideration of the petition.

III

When an accused in custody requests the assistance of counsel the Fifth Amendment requires that all "interrogation must cease until an attorney is present." *Miranda v. Arizona*, 384 U. S. 436, 474 (1966). To ensure that officials scrupulously honor this right, we have established in *Edwards v. Arizona*, *supra*, and *Oregon v. Bradshaw*, *supra*, the stringent rule that an accused who has invoked his Fifth Amendment right to assistance of counsel cannot be subject to official custodial interrogation unless and until the accused (1) "initiates" further discussions relating to the investigation, and (2) makes a knowing and intelligent waiver of the right to counsel under the standard of *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938), and its progeny. See *Solem v. Stumes*, 465

U. S. 638 (1984). Under this approach, an accused's initiating statement is admissible if it is voluntary and not made in response to interrogation, *Edwards*, 451 U. S., at 485-486, but the accused's subsequent responses to interrogation are admissible only if the accused has, after the initiation, made a knowing and intelligent waiver of the right to counsel.

In this case James twice invoked his right to counsel during the course of interrogation; James "expressed his own view" that he was "not competent to deal with the authorities without legal advice." *Michigan v. Mosley*, 423 U. S. 96, 110, n. 2 (1975) (WHITE, J., concurring). The statement he made only a few seconds after requesting counsel for the second time—"I'll show you where the body is"—was therefore properly admitted into evidence only if it was a voluntary initiation of new discussions. The followup colloquy that led to discovery of the body was properly admitted into evidence only if that statement was an initiation and if, prior to further official questions and James' responses to those questions, James knowingly and intelligently waived his previously invoked right to counsel.

1. "Initiation." Under the strict rule of *Edwards* and *Bradshaw* once an accused has invoked the right to counsel no further interrogation is permitted until the accused initiates a new dialogue with the authorities. *Solem v. Stumes*, *supra*, at 646. Sergeant Midkiff's query "[i]s he going to show us where the body is," though directed at Officer Davis, indisputably triggered James' statement "I'll show you where the body is." That James made the statement in response to Midkiff's inquiry is not, however, determinative of the "initiation" question. If Midkiff's inquiry is not viewed as interrogation for Fifth Amendment purposes, then James' response might be a voluntary initiation of dialogue. Some official statements made within earshot of an accused in custody are not "interrogation" even if they prompt a response. In *Rhode Island v. Innis*, 446 U. S. 291 (1980), the Court held:

"[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the

police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.*, at 300-301 (footnotes omitted).

The *Innis* approach "focuses primarily upon the perceptions of the suspect," *id.*, at 301, and mandates inquiry into whether the words or actions of the authorities bring to bear any coercive pressure "above and beyond that inherent in custody itself." *Id.*, at 300. Consonant with the approach in *Miranda*, this inquiry "vest[s the] suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." 446 U. S., at 301. This perspective is tempered, *Innis* makes clear, to the extent that the police ought not be "held accountable for the *unforeseeable* results of their words or actions." *Id.*, at 302 (emphasis added). In general, though, *Innis* defines interrogation broadly and flexibly in recognition of the enhanced coercive pressures that official words or conduct may impose on an accused in the "interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner." *Miranda*, *supra*, at 457.

At the suppression hearing, the state trial court made no findings as to whether James' statement was an "initiation" under *Edwards* or a response to interrogation as defined in *Innis*. The court merely concluded without explanation that James had "knowingly, willingly, and voluntarily made" the statement." 141 Ariz., at 145, 685 P. 2d, at 1297 (quoting unpublished trial court minute order). Under *Edwards*, of course, a statement could be made knowingly, willingly, and voluntarily and yet be inadmissible because the statement was obtained in response to interrogation occurring after an accused had invoked the right to counsel and absent any initiation of new dialogue by the accused. *Edwards*, *supra*, at 485 ("[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel"). Thus the trial court finding is of no relevance to the "initiation" inquiry that *Edwards* and *Bradshaw* mandate.

The Arizona Supreme Court endeavored to paper over this deficiency. Acknowledging the trial court's failure to make the requisite finding of initiation—and subsidiary failure to determine whether Midkiff's question was "interrogation" under *Innis*—the court held that such a finding was nonetheless "implicit" in the

lower court decision. 141 Ariz., at 145, 685 P. 2d, at 1297. The following four assertions encompass the entirety of the State Supreme Court's justification for this divination of the "implicit" finding:

"[1] There was uncontradicted testimony that James understood his rights. [2] There was uncontradicted testimony that Midkiff's question was meant solely for Davis. [3] Although the [trial] court did not employ all of the proper 'buzz words,' the record indicates that James made a decision to cooperate with the police without benefit of counsel, and [4] his statement fits either definition of 'initiate' in *Bradshaw*." *Ibid*.

Three of these stated reasons have no bearing on the determinative question whether James spoke the first incriminating words on his own initiative or in response to interrogation. That James knew his rights has no relevance to whether Midkiff's inquiry should be viewed as interrogation. That James "made a decision to cooperate" is similarly irrelevant: if his "decision to cooperate" was prompted by interrogation occurring after he invoked his right to counsel, and absent an intervening "initiation," any cooperative statements he made are inadmissible under *Edwards*. The court's claim that James' statement was initiation "under either definition of the term in *Bradshaw*" is also inapposite to the "interrogation" aspect of the initiation analysis. In *Bradshaw* the plurality and dissent disagreed over how related to the subject of the investigation the initiating statement need be to justify resumption of official interrogation. The plurality suggested an expansive view of what might qualify as initiation, 462 U. S., at 1045, and the dissent proposed a much more circumscribed view. *Id.*, at 1053-1054 (MARSHALL, J., dissenting). The statement in this case was sufficiently related under either view expressed in *Bradshaw* but this fact has nothing to do with whether the statement was made in response to interrogation.

The *only* potentially relevant reason the state court gave for perceiving an implicit finding of "initiation" was the purportedly uncontradicted testimony that Sergeant Midkiff directed his inquiry at Officer Davis and not at James. This assertion, even if valid, provides little support for the conclusion that James' statement was an independent "initiation." The proper inquiry under *Innis* is whether the official should know that the statement is reasonably likely to elicit an incriminating response from the

suspect. *Innis*, 446 U. S., at 301. A bare finding that Midkiff directed his question to Davis and not to James is but the beginning of the *Innis* inquiry; had the officer directed the question to James, "interrogation" *vel non* would not be an issue. The question that must be answered under *Innis* is whether Midkiff's statement, though not aimed at James, should be viewed as the "functional equivalent" of interrogation in these circumstances because Midkiff should have known that the statement was reasonably likely to elicit an incriminating response from the accused. *Id.*, at 302. Relying only on the fact that Midkiff spoke to Davis and not James, the Arizona Supreme Court has done little more than restate the question under *Innis*.

That the Arizona Supreme Court could not salvage a plausible finding of "initiation" is perhaps not surprising. The facts demonstrate that from James' perspective Midkiff's question created significant coercive pressure over and above that inherent in custody itself. When Sergeant Midkiff asked his question he stood only a few feet from James in the interrogation room. Midkiff admitted at the suppression hearing that James "might have assumed" the question was meant for him, Tr. 52-53 (Aug. 27, 1982), as well he might because the question sought information for which he had to have been the original source. Like many of the interrogation techniques deplored in *Miranda* for their tendency to overbear the will of an accused in custody, Midkiff's question presumed guilt and suggested to James that the purpose of the interrogation was simply to force him to accede to the inevitable. See *Miranda*, 384 U. S., at 450-451; *Innis*, *supra*, at 299. Projecting an air of confidence in the suspect's guilt is a recommended interrogation tactic precisely because of the enhanced coercive pressure it brings to bear on a suspect. See F. Inbau & J. Reid, *Criminal Interrogation and Confessions* 26 (2d ed. 1967).

The timing of Midkiff's question exacerbated its coercive impact. Occurring only seconds after Davis had completed his direct questioning, the Midkiff inquiry must have seemed to James simply one more question in the intensive interrogation to which he had been subjected up until a few seconds before. The enhanced coercive pressures of the direct questioning in the interrogation room were not likely to have dissipated in the few seconds between Davis' final question and Midkiff's question. Because James' first request for an attorney had not succeeded in cutting

off interrogation, James would have had no reason to think that his second request would be any more effective. Under these circumstances the statement "I'll show you where the body is" must be viewed as the product of compulsion produced by coercive pressures that were at least the functional equivalent of direct questioning.

Under *Innis*, only if Sergeant Midkiff could not reasonably have foreseen that his question would prompt an incriminating response should the response be found to be a voluntary "initiation." The preceding discussion should make clear that the response of James was entirely foreseeable under the coercive circumstances then present. Nor is this a case like *Innis* in the sense that the authorities would have had no reason to foresee that their "few off-hand remarks" would touch a peculiar psychological susceptibility in the accused and thereby evoke an incriminating response. *Innis, supra*, at 302-303. Midkiff should reasonably have foreseen that under the coercive circumstances then present, his question to Davis was likely to evoke an incriminating response from even a veteran of the interrogation room.

At bottom, the "initiation" aspect of the *Edwards* test is meant to protect the Fifth Amendment rights of a suspect who has decided that he or she is not competent to handle the coercive pressures of custodial interrogation without a lawyer. The requirement of an "initiation" ensures that an accused has independently changed his or her mind about the need for a lawyer, and has not had his or her mind changed by the coercive pressure of continued direct questioning or its functional equivalent. In no sense can James be said to have made such an independent judgment.

2. "Waiver." Even if one accepts, *arguendo*, that James initiated the conversation about the location of the body, such a conclusion permits introduction at trial of only the initiating statement. *Edwards*, 451 U. S., at 485-486. Immediately after James made the first incriminating statement, Midkiff directly asked James where the body was. Whatever the status of Midkiff's first question to Davis, this question to James and the follow-up questions as to the exact location of the body are interrogation under any definition. James' incriminating responses and their evidentiary fruits were properly admitted at trial only if James made a knowing and intelligent waiver of his previously

invoked right to counsel. *Oregon v. Bradshaw*, 462 U. S. 1039 (1983). The test is that of *Johnson v. Zerbst*: indulging every reasonable presumption against waiver, was there a knowing and intelligent waiver in light of the "particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused?" 304 U. S., at 464.

The state trial court failed to apply the proper legal standard in evaluating whether the incriminating statements should be admitted. The court merely found that James "'knowingly, willingly, and voluntarily made' the statement," 141 Ariz., at 145, 685 P. 2d, at 1297 (quoting unpublished trial court minute order) (emphasis added), and did not find that James knowingly and intentionally relinquished his right to counsel. Though the trial court's finding might suffice under the "voluntariness" standard of *Schneekloth v. Bustamonte*, 412 U. S. 218, 226, 227 (1973), it falls short under the more exacting test of *Johnson v. Zerbst*.

The Arizona Supreme Court's efforts to rehabilitate the trial court on this issue are no more availing than were its similar efforts on the initiation question. The State Supreme Court held that a constitutionally sufficient finding of waiver was implicit in the trial court opinion. See 141 Ariz., at 144-145, 685 P. 2d, at 1296-1297. Though the analysis that led the court to this conclusion is not crystalline, the court appears to have found waiver because James knew his rights (he twice invoked them), was not subject to threats or promises, and made a conscious decision to cooperate, expressed in his *initiation* of dialogue with the authorities. *Ibid.* The opinion makes clear that the court found waiver implicit in the *initial* incriminating statement and not in anything James did or said subsequent to that initial statement. *Id.*, at 145, 685 P. 2d, at 1297.

This analysis cannot pass muster under *Edwards*. In every *Edwards* case that reaches the waiver stage of the analysis, the accused will have necessarily invoked the right to counsel and subsequently initiated a dialogue. If these two facts alone support an affirmative finding of knowing and intelligent waiver of the right to counsel, then the further requirement in *Edwards* and *Bradshaw* of an explicit finding of subsequent waiver becomes superfluous. *Bradshaw* made clear that "even if a conversation . . . is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that *subsequent*

events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." 462 U. S., at 1044 (emphasis added). The court here pointed to no subsequent events in which James affirmatively indicated an intention to waive his right to counsel.

No fair reading of the facts of this case will support a finding of waiver. See *Fare v. Michael C.*, 442 U. S. 707, 726-727 (1979). This Court indulges a strong presumption against finding a waiver of the right to counsel, especially when the accused has not made such a waiver explicit. See *Miranda v. Arizona*, 384 U. S., at 475; *Johnson v. Zerbst*, 304 U. S., at 464. That presumption should apply with particular force in this case because James was never reminded of his right to counsel after he allegedly initiated new discussions with Officer Davis and Sergeant Midkiff. This important circumstance distinguishes the present case from recent cases in which the Court has found a valid waiver of a previously invoked right to counsel. In both *Oregon v. Bradshaw*, *supra*, and *Wyrick v. Fields*, 459 U. S. 42 (1982), the police gave the accused a thorough reminder of his right to counsel prior to official reinterrogation after an initiation. See *United States v. Montgomery*, 714 F. 2d 201 (CA1 1983). While a prophylactic rule requiring such reminders in every case might be an appropriate safeguard of this core right, cf. *North Carolina v. Butler*, 441 U. S. 369, 377 (1979) (BRENNAN, J., dissenting), at the very least an especially strong presumption against finding waiver should apply absent such a reminder.

Because James never specifically indicated a waiver of his rights, a finding of waiver must be based on inference. If waiver is to be inferred on these facts it would have to be inferred solely from James' decision to respond to the questions that Midkiff and Davis put to him after he invoked his right to counsel. His first response to a direct question—Midkiff's inquiry about the location of the body—occurred only seconds after James had invoked his right to counsel and only a split second after he had purportedly "initiated" a new dialogue. Tr. 44-46 (Aug. 27, 1982). Inferring waiver from the bare fact that an accused responded to interrogation is under any circumstances extremely dubious. *Edwards*, 451 U. S., at 484; *Miranda v. Arizona*, *supra*, at 474; *Carnley v. Cochran*, 369 U. S. 506, 516 (1962). And the instant circum-

stances simply will not support such an inference of a split-second change of mind in the coercive interrogation environment.*

Absent any specific affirmative signal of waiver, any thorough reminder to petitioner of his rights after initiation, and with only inferences from the fact that James responded to interrogation, I do not see how this Court can sanction a finding of waiver under these circumstances, particularly in a capital case. Declining review of so substantial a departure from *Johnson v. Zerbst* and its progeny, this Court shirks its primary role in reviewing the decisions of state courts "to make sure that persons who seek to vindicate federal rights have been fairly heard." *Florida v. Meyers*, 466 U. S. 380, 385 (1984) (STEVENS, J., dissenting) (quoting *Michigan v. Long*, 463 U. S. 1032, 1068 (1983) (dissenting opinion) (emphasis in original)). When a petitioner seeking vindication of a federal right risks execution if that right is not vindicated the responsibility to review is one this Court must accept.

IV

Perhaps the Court is disinclined to review this case on the mistaken view that the case involves only the application of settled constitutional principle to the instant facts. I have made plain that I think clarification is needed with respect to the application of *Johnson v. Zerbst*, *supra*, to custodial waiver of the previously invoked right to counsel. More importantly, in the realm of constitutional protections of the accused the sensitivity to factual nuance that marks so many of our current doctrines requires this Court in the proper case to exercise its powers of review to correct egregious departures from the intendment of our precedents. Incessant reliance on the precept that review is unnecessary when a case involves no more than application of settled principles to fact risks draining our constitutional protections of all protective vitality. The present case illustrates the point. If the instant facts support a finding of initiation and waiver under *Edwards v. Arizona*, *supra*, then the protections set forth in that case are illusory. Only by granting review in aberrant cases such as this can the Court make clear that the tests set forth for deciding the

*Midkiff and Davis certainly did not perceive James as having waived his rights under the circumstances. Midkiff instructed all officers not to question James, and Davis testified that he deliberately avoided interrogating James because he thought he had a legal obligation to refrain. Tr. 50-51 (Aug. 27, 1982).

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bounds of the Constitution's protections of individual rights are meant not as manipulable technicalities in the service of empty slogans but as bulwarks of our most precious liberties.

Rehearing Denied

No. 83-2001. PASCHALL ET AL. *v.* KANSAS CITY STAR CO., *ante*, p. 872;

No. 83-6455. MURLEY ET AL. *v.* HARKIN ET AL., *ante*, p. 836;

No. 83-6581. BRYAN *v.* U. S. OFFICE OF PERSONNEL MANAGEMENT ET AL., *ante*, p. 837;

No. 83-6693. TYLER *v.* WYRICK, WARDEN, *ante*, p. 838;

No. 83-6923. BELGARDE *v.* UNITED STATES, *ante*, p. 846;

No. 84-302. HASTINGS *v.* INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT ET AL., *ante*, p. 884;

No. 84-5021. IN RE CARTER, *ante*, p. 813;

No. 84-5071. KINNELL *v.* RAYL, DIRECTOR, KANSAS STATE PENITENTIARY, ET AL., *ante*, p. 862;

No. 84-5087. DINGLE *v.* SIMPKINS, ADMINISTRATOR OF THE ESTATE OF DINGLE, *ante*, p. 863;

No. 84-5102. AGRESTI *v.* UNITED STATES, *ante*, p. 863; and

No. 84-5207. HOYETT *v.* ALABAMA, *ante*, p. 867. Petitions for rehearing denied.

NOVEMBER 7, 1984

Miscellaneous Order

No. A-360. PALMES *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, 231 (1976), we would grant the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

NOVEMBER 8, 1984

Miscellaneous Order

No. A-356 (84-5717). MOORE *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of

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death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the final disposition of the petition for writ of certiorari. JUSTICE WHITE and JUSTICE REHNQUIST dissent.

NOVEMBER 12, 1984

Certiorari Denied

No. 84-5687 (A-345). WILLIE *v.* MAGGIO, 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. Reported below: 737 F. 2d 1372.

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 and the petition for writ of certiorari and would vacate the death sentence in this case.

NOVEMBER 13, 1984

Affirmed on Appeal

No. 83-1722. MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE *v.* BROOKS ET AL.;

No. 83-1865. BROOKS ET AL. *v.* ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 83-2053. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL. *v.* BROOKS ET AL. Affirmed on appeals from D. C. N. D. Miss. Reported below: 604 F. Supp. 807.

JUSTICE STEVENS, concurring.

Although I agree that a summary affirmance of the judgment of the District Court is entirely appropriate in these cases, what has been written in dissent prompts me to make two important points.

First, there is little, if any, resemblance between the argument advanced in the dissenting opinion and the specific questions presented in the parties' jurisdictional statements. This Court has determined that summary affirmances "reject the specific challenges presented in the statement of jurisdiction." *Mandel v. Bradley*, 432 U. S. 173, 176 (1977). The only questions presented

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STEVENS, J., concurring

in the jurisdictional statement that the Mississippi Republican Executive Committee filed in case No. 83-1722 read as follows:

"1. Whether Section 5 and Section 2 as amended apply to redistricting decisions.

"2. Whether the amendment to Section 2 or any other portion of the Voting Rights Amendments of 1982 has any bearing upon litigation under Section 5.

"3. Whether Section 2 as amended prohibits only those electoral schemes intentionally designed or maintained to discriminate on the basis of race.

"4. Whether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." Juris. Statement in No. 83-1722, p. i.¹

Second, the dissent does not fairly characterize the opinion of the District Court. That opinion does not "in effect" construe the recent amendment to § 2 of the Voting Rights Act of 1965, 96 Stat. 134, 42 U. S. C. § 1973, as entitling "minority plaintiffs, in a State where there exist present effects from past discrimination, to have a state redistricting plan invalidated if it fails to provide at least one district in which the 'minority' is a majority of the eligible voters." *Post*, at 1005. The dissent buttresses this incorrect impression by attributing the following statement to the District Court:

"The District Court felt it was obligated, under the 1982 amendments to the Voting Rights Act, to redraw the district map so that the redefined Second District would have a 'clear black voting age population majority of 52.83 percent.'" *Post*, at 1008.

¹The jurisdictional statement that William A. Allain and others filed in No. 83-2053 presents two questions that are similar to those presented in No. 83-1722 and also presents the question whether the District Court erroneously found as a fact that black persons in Mississippi—and especially in the Delta generally—have less education, lower incomes, and more menial occupations than white persons, and that there has been racially polarized voting in Mississippi. See n. 2, *infra*. Nothing in the dissenting opinion indicates that it believes these questions merit full briefing and argument. In my judgment the jurisdictional statement in No. 83-1865 raises a more serious question, but I do not understand that the dissenting opinion favors review of that question.

What the District Court actually said was this:

"In the opinion of this court, after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections." App. to Motion to Dismiss or Affirm in No. 83-1722, p. 14a.

The District Court's conclusion that its remedy was required was not based on any notion that the law gives every minority group an entitlement to some form of proportional representation. Its conclusion was quite the contrary. It rested on specific findings of fact describing the impairment—or "dilution" if you will—of the voting strength of the black minority in Mississippi. Those factual findings reveal that Mississippi has a long history of *de jure* and *de facto* race discrimination,² that racial bloc voting is

²Regarding past discrimination, the District Court carefully found that Mississippi had often used poll taxes, literacy tests, residency requirements, white primaries, and violence to intimidate black persons from registering to vote. More importantly, the court found "that the effects of the historical official discrimination in Mississippi presently impede black voter registration and turnout." App. to Motion to Dismiss or Affirm in No. 83-1722, p. 9a. Additionally, the court wrote:

"Black registration in the Delta area is still disproportionately lower than white registration. No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Blacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties.

"The evidence of socio-economic disparities between blacks and whites in the Delta area and the state as a whole is also probative of minorities' unequal access to the political process in Mississippi. Blacks in Mississippi, especially in the Delta region, generally have less education, lower incomes, and more menial occupations than whites. The State of Mississippi has a history of segregated school systems that provided inferior education to blacks. . . . Census statistics indicate lingering effects of past discrimination: the median family income in the Delta region (Second District) for whites is \$17,467, compared to \$7,447 for blacks; more than half of the adult blacks in the Second District have attained only 0 to 8 years of schooling, while the majority of white adults in this District have completed four years of high school; the unemployment rate for blacks is two to three times that for whites; and blacks generally live in inferior housing." *Id.*, at 9a-10a (footnote omitted).

common in Mississippi, and that political processes have not been equally open to blacks.³

Because I find no merit in any of the specific challenges presented in the parties' jurisdictional statements,⁴ and because the record supports the District Court's findings of fact, as the dissent notes, *post*, at 1011-1012, I join the Court's summary affirmance.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The District Court's ruling in these cases presents important questions concerning the construction of the recent amendment to § 2 of the Voting Rights Act of 1965, 96 Stat. 134, 42 U. S. C. § 1973. The District Court in effect has construed the amendment to entitle minority plaintiffs, in a State where there exist present effects from past discrimination, to have a state redistricting plan invalidated if it fails to provide at least one district in which the "minority" is a majority of the eligible voters. This is so even though the challenged redistricting plan is constitutional, is not the product of discriminatory intent, and indeed was intended by the

³ The court also found that there existed "persuasive evidence" that Mississippi's political processes have not recently been open to black persons. In addition, the court particularly noted the following message accompanying a campaign television commercial:

"You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations." *Id.*, at 12a, n. 8.

The commercial opened and closed with a view of Confederate monuments; the candidate that ran the commercial used "He's one of us" as his campaign slogan. *Ibid.*

⁴ Indeed, it should be noted that the District Court's plan would be an acceptable remedy for the violations even if it did not regard the Simpson plan itself as a violation of § 2 of the Voting Rights Act as amended. For after our remand, the District Court could have appropriately decided that the policy of that Act, coupled with the findings of fact concerning the effects of historic discrimination, particularly in the Delta area, required a remedy that established at least one district in which black persons represented an effective majority of the eligible voters.

court which adopted it to "deal fairly with [the State's] black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength."

In 1982, the District Court in these cases adopted a redistricting plan for Mississippi's congressional districts in order to remedy district population disparities, revealed by the 1980 census, of up to 17%. In choosing from among several plans offered by the litigants, it sought a plan that would "satisfy the one person, one vote rule and avoid any dilution of minority voting strength." *Jordan v. Winter*, 541 F. Supp. 1135, 1142 (ND Miss. 1982) (*Jordan I*). The court further observed that "[w]hat is required is that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength." *Id.*, at 1143. The court chose the so-called "Simpson" plan because it satisfied most of the State's policy considerations in districting, created two districts with 40% or better black population, and included a district where nearly 54% of the population was black.

On appeal to this Court, the judgment of the District Court was vacated and the case remanded for reconsideration in the light of the 1982 amendments to the Voting Rights Act. *Brooks v. Winter*, 461 U. S. 921 (1983). On remand, the District Court found that the very plan which it had approved and adopted in 1982 was unlawful under the amended § 2 of the Voting Rights Act because "the structure of the Second Congressional District in particular unlawfully diluted black voting strength." *Jordan v. Winter*, No. GC82-80-WK-0 (ND Miss., Apr. 16, 1984) (*Jordan II*). I think the rather remarkable conclusion that the 1982 amendments to the Voting Rights Act made unlawful a plan adopted by the District Court, which plan the District Court had adopted with a view to the requirement that "the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength," 541 F. Supp., at 1143, should receive plenary review by this Court.

After being presented with the census data revealing the previously mentioned population disparities between existing congressional districts, the Mississippi Legislature in 1981 enacted a new redistricting plan. The Attorney General of the United States refused preclearance, however, and the legislature adjourned without enacting a new plan. A three-judge District Court was convened to hear actions filed by two groups of Mississippi voters

seeking a court-ordered interim plan for the 1982 congressional elections. That court refused to place in effect the legislative plan which had not been precleared, and held the existing districting statute unconstitutional because of the population disparities. It then adopted the "Simpson" plan from among several plans submitted to it by the litigants. *Jordan I, supra*.

In choosing the "Simpson" plan, the court followed the teaching of *Upham v. Seamon*, 456 U. S. 37 (1982), which requires courts to fashion interim plans that adhere to a State's political policies. The court identified Mississippi's political districting policies as follows: (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. The court specifically rejected two plans proposed by a group of black plaintiffs. These plans would have kept the predominantly black northwest or "Delta" portion of Mississippi intact, and would have combined that area with predominantly black portions of Hinds County and the city of Jackson. Each of these plans would have resulted in one congressional district with a black population of approximately 65%. The "Simpson" plan, on the other hand, combined 15 Delta or partially Delta counties with six predominantly white eastern rural counties, and resulted in a congressional district with a 53% black population, but a 48% black voting population. The District Court found the "Simpson" plan most nearly in accord with the State's policies articulated above. The rejected plans would have resulted in only one district with greater than 40% black population; this was contrary to the reasonable state policy established to assure that blacks would have an effective voice in choosing representatives in more than one district. In addition, the court noted that the black plaintiffs had managed to place a high percentage of black voters in a single congressional district only through obvious and unseemly racial gerrymanders.

When this Court subsequently vacated the District Court's judgment for reconsideration in the light of the 1982 amendment the District Court held further evidentiary hearings, and concluded that its own plan violated the amended section. This violation occurred, in the opinion of the District Court, because "the structure of the Second Congressional District in particular unlawfully diluted black voting strength." Under the plan adopted by the District Court in 1982, the Second District had a

black population of 53.77%, but blacks comprised only 48.09% of the voting age population. The District Court felt it was obligated, under the 1982 amendments to the Voting Rights Act, to redraw the district map so that the redefined Second District would have a "clear black voting age population majority of 52.83 percent." In doing so, the District Court "recognize[d] that the creation of a Delta District with a majority black voting age population implicates difficult issues concerning the fair allocation of political power." *Jordan II, supra*.

Any statute that would lead a District Court to reject a plan which it had previously found fair to all concerned in favor of one including an obligatory district with a majority black voting age population deserves careful attention, and so I turn to the language of the Voting Rights Act as amended in 1982. The District Court in its most recent opinion set out the statutory provisions toward the beginning of its opinion, but scarcely mentioned that language again, and instead went on to quote extensively from the Senate Report of the 1982 amendments. The applicable statutory language is this:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 96 Stat. 134, 42 U. S. C. § 1973 (emphasis in original).

Applying the statutory language to the situation confronting the District Court after our remand, the "voting qualification or prerequisite to voting or standard, practice, or procedure" to which the amended statute is to be applied is obviously the 1982 plan adopted by the District Court. That court clearly thought so, and no other "qualification . . . standard, practice, or procedure" suggests itself. There has never been any suggestion that the plan adopted by the District Court in 1982 denied or abridged the right of any citizen to vote on account of race or color, so if that plan does violate the amended Act it is because it contravenes "the guarantees set forth . . . in subsection (b)."

Subsection (b), in turn, provides that a violation of subsection (a) is established if "it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)." The District Court read subsection (b) as if it were totally divorced from subsection (a), and proceeded to enumerate factors in the political history of Mississippi which it felt indicated that the plan it had adopted in 1982 "unlawfully dilutes minority voting strength." *Jordan II, supra*. The District Court did not state what it understood the term "unlawfully dilutes minority voting strength" to mean, and since that term is nowhere used in the statutory language one is left to infer that the court derived the necessary meaning for the language from the report of the Senate Judiciary Committee which it cited at some length. The District Court's understanding of what is required by §2 is highly questionable in light of the statute's language and legislative history. To fully evaluate the District Court's analysis it is necessary to review the events preceding the amendment of §2.¹

¹ JUSTICE STEVENS' concurrence suggests that my analysis is unwarranted because the problems I perceive with the District Court's opinion were not specifically raised by the "questions presented" in appellants' jurisdictional statements. I believe, however, that several of the "questions presented" "fairly include" the issues that I address. In particular, question 3, quoted *ante*, at 1003 (STEVENS, J., concurring), raises the question of the scope of activity Congress intended to proscribe under §2. I need not agree 100% with appellants' position—that §2 only proscribes intentionally discriminatory conduct—to reach the question whether the District Court misconstrued Congress' intent.

In *Mobile v. Bolden*, 446 U. S. 55 (1980), this Court wrestled with the question whether legislative "intent" to discriminate must exist in order to find that a particular legislative action violates the Voting Rights Act, or whether it was enough that the legislative action have a "discriminatory effect." In *Mobile* black plaintiffs had brought an action challenging the constitutionality of the city's at-large method of electing its commissioners. We produced six different opinions debating among ourselves whether discriminatory intent was required to find a violation of the Fifteenth Amendment, or whether "an invidious discriminatory purpose could be inferred from the totality of facts." *Id.*, at 95 (WHITE, J., dissenting). None of the opinions challenged the conclusion of the plurality that the Voting Rights Act as it then existed added "nothing to the appellee's Fifteenth Amendment claim." *Id.*, at 61 (opinion of Stewart, J.).

It is clear that the 1982 amendment was precipitated in large part by the holding of *Mobile*. But the language used in the amended statute is, to say the least, rather unclear. The legislative history indicates that Congress was well aware of the "intent effects" dichotomy, and of the problems with identifying actions with discriminatory "effects." The bill originally passed the House under a loose understanding that § 2 would prohibit all discriminatory "effects" of voting practices, and that intent would be "irrelevant." H. R. Rep. No. 97-227, p. 29 (1981). This version met stiff resistance in the Senate, however. Two Senate Subcommittees held extensive hearings, at which testimony was given concerning the tendency of a "results" approach to lead to requirements that minorities have proportional representation, or to devolve into essentially standardless and ad hoc judgments. See, e. g., Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H. R. 3112 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., 1309-1313, 1334-1338 (1982). The Subcommittees could not agree on the proposed amendment, and at that point Senator Dole stepped in with a proposed compromise. The compromise bill retained the "results" language but also incorporated language directly from this Court's opinion in *White v. Regester*, 412 U. S. 755 (1973), and strengthened the caveat against proportional representation. The debates on the compromise focused on whether the "results" language would nevertheless provide for proportional representation, or merely for equal "access" to the political process. Senator

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Dole took the position that "access" only was required by amended §2: "[T]he concept of identifiable groups having a right to be elected in proportion to their voting potential was repugnant to the democratic principles on which our society is based." 128 Cong. Rec. 14132 (1982) (remarks of Senator Dole). This position was adopted by many supporters of the compromise in the Senate, and the bill passed as written.

The District Court apparently felt obliged to reach a conclusion in tension with this legislative history because of language in the Senate Judiciary Committee Report on the 1982 amendment stating that the "results" language of §2(a) was meant to "restore the pre-*Mobile* [v. *Bolden*] legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote." S. Rep. No. 97-417, p. 27 (1982). The Report then enumerates the factors courts may consider in deciding whether plaintiffs have established a violation of §2, factors apparently derived from this Court's opinion in *White v. Regester*, *supra*.² Applying these "factors," the District Court found that Mississippi has a long history of *de jure* and *de facto* race discrimination, which has present effects in impeding black voter registration and turnout. It noted that although blacks constitute 35% of the State's population, no black has been elected to Congress since the Reconstruction period, and none has been elected

²Those factors are:

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction." S. Rep. No. 97-417, at 28-29.

to statewide office in this century. Furthermore, the court found socioeconomic disparities between blacks and whites in the Delta area, and finally, that voters in Mississippi have previously voted and continued to vote on the basis of the race of candidates for elective office. The District Court concluded from this that the adoption of a plan in which the Second District contained less than a majority of voters from a protected class "diluted" the class' voting strength.

Thus we have a statute whose meaning is by no means easy to determine, supplemented by legislative history which led the District Court in this case to conclude that only the inclusion within one congressional district of a majority black voting age population could satisfy the Act. I think it can be fairly argued from the legislative history, and from the express caveat that the section was not intended to establish a right to proportional representation, that in amending §2 Congress did not intend courts to supersede state voting laws for the sole purpose of improving the chance of minorities to elect members of their own class.

To best understand the meaning of the Senate Committee's references to our decisions in *Mobile* and *White v. Regester*, it is essential to remember that those cases dealt with challenges to *multimember legislative districts*. It is only in this context that phrases such as "vote dilution" make any sense, for the phrase itself suggests a norm with respect to which the fact of dilution may be ascertained. In the case of multimember districts, the norm available for at least theoretical purposes is the single-member district. But when we turn from attacks on multimember districts to attacks on the way lines are drawn in creating five single-member congressional districts, as in the cases at hand, phrases such as "vote dilution" and factors relied upon to determine discriminatory effect are all but useless as analytical tools. Neither *White v. Regester*, *Mobile v. Bolden*, nor *Zimmer v. McKeithen*, 485 F. 2d 1297 (CA5 1973), a case also dealing with challenges to multimember legislative districts, ever suggested that their analysis should be carried over to challenges addressed to single-member districts. And whichever of the views espoused in *Mobile* is found to have been adopted by the 1982 amendment, it would seem that a plan adopted by the District Court under the command "that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or

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effect of unnecessarily minimizing or fragmenting black voting strength" should be home free under either test.

Under this view, the District Court's most recent opinion and judgment seem to me to present virtually insuperable difficulties. Although we may regretfully concede that the District Court's findings were correct, it nevertheless seems a non sequitur to say that the past discrimination, and its present effects, have "resulted" in "dilution" of minority voting strength *through the adoption of this particular districting plan*. To the extent that fewer blacks vote due to past discrimination, that in itself diminishes minority voting strength. But this occurs regardless of any particular state voting practice or procedure. As the plurality opinion in *Mobile* recognized in another context, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Mobile*, 446 U. S., at 74. Here the only finding even remotely related to the boundaries of the Second Congressional District under the 1982 plan is what the District Court referred to as "socioeconomic disparities between blacks and whites in the Delta area." The findings as to the history of racial discrimination and bloc voting apparently obtained throughout the State. It is obvious that no plan adopted by the Mississippi Legislature or the District Court could possibly have mitigated or subtracted one jot or tittle from these findings of past discrimination. What we have, therefore, is in effect a declaration by the District Court that because of these past examples of racial discrimination throughout the State, any plan adopted either by the legislature or by a court which did not give blacks one of five congressional districts in which they had a majority of the voting age population violated the 1982 amendments to the Voting Rights Act. Under this analysis, cause and effect are entirely severed.

For these reasons, I think the judgment of the District Court presents substantial questions concerning the interpretation of a new amendment to the Voting Rights Act of 1965, and that the Court seriously misapprehends its obligation in such a case when it summarily affirms the judgment of the District Court.

Appeals Dismissed

No. 84-83. *TRAPF v. LOHR ET AL.* Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 666 So. 2d 414.

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No. 84-326. *CAIN v. NEW YORK*. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of substantial federal question. Reported below: 98 App. Div. 2d 803, 470 N. Y. S. 2d 335.

No. 84-198. *OLIVERO v. ILLINOIS*. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 122 Ill. App. 3d 629, 461 N. E. 2d 549.

Certiorari Granted—Reversed and Remanded. (See No. 83-1367, *ante*, p. 1.)

Miscellaneous Orders

No. — — —. *HORNE v. ADOLPH COORS CO. ET AL.* Application to declare notice of appeal as a petition for writ of certiorari and to file a supplemental petition for writ of certiorari denied.

No. A-278 (84-5506). *DINGLE v. SIMPKINS*. Sup. Ct. S. C. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A-302 (84-644). *NATIONAL RIFLE ASSOCIATION OF AMERICA ET AL. v. MINNESOTA STATE ETHICAL PRACTICES BOARD*. C. A. 8th Cir. Application for stay of mandate, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-346 (84-5350). *MAXWELL v. PENNSYLVANIA*, *ante*, p. 971. Application to suspend the effect of the order denying certiorari, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application.

No. 82-1832. *TOWN OF HALLIE ET AL. v. CITY OF EAU CLAIRE*. C. A. 7th Cir. [Certiorari granted, 467 U. S. 1240.] Motion of Illinois et al. for leave to participate in oral argument as *amici curiae* and for additional time for oral argument denied.

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 the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument as *amicus curiae, pro hac vice*, is granted.

No. 83-2146. *WILSON ET AL. v. GARCIA*. C. A. 10th Cir. [Certiorari granted, *ante*, p. 815.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

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No. 83-1032. FEDERAL ELECTION COMMISSION *v.* NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE ET AL.; and

No. 83-1122. DEMOCRATIC PARTY OF THE UNITED STATES ET AL. *v.* NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE ET AL. D. C. E. D. Pa. [Probable jurisdiction noted, 466 U. S. 935.] Motion of Democratic National Committee for divided argument granted to be divided as follows: Federal Election Commission, 20 minutes; and Democratic National Committee, 10 minutes.

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 to strike portions of the reply brief of Parker et al. denied.

No. 83-5954. LINDAHL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. [Certiorari granted, 467 U. S. 1251.] Motion of National Association of Retired Federal Employees for leave to participate in oral argument as *amicus curiae* denied.

No. 84-444. CONNOR ET AL. *v.* AEROVOX INC. ET AL. C. A. 1st Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84-5059. RAMIREZ *v.* INDIANA. Ct. App. Ind. [Certiorari granted, *ante*, p. 929.] Motion of petitioner for appointment of counsel granted, and it is ordered that Kenneth F. Ripple, Esquire, of South Bend, Ind., be appointed to serve as counsel for petitioner in this case.

No. 84-5268. GORDON *v.* DONOVAN, SECRETARY OF LABOR. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 4, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

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No. 84-468. CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 726 F. 2d 191 and 735 F. 2d 832.

No. 83-1961. LANDRETH TIMBER CO. *v.* LANDRETH ET AL. C. A. 9th Cir. Certiorari granted and case set for oral argument in tandem with No. 84-165, *Gould v. Ruefenacht, infra*. Reported below: 731 F. 2d 1348.

No. 84-48. UNITED STATES *v.* BAGLEY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 719 F. 2d 1462.

No. 84-165. GOULD *v.* RUEFENACHT ET AL. C. A. 3d Cir. Certiorari granted and case set for oral argument in tandem with No. 83-1961, *Landreth Timber Co. v. Landreth, supra*. Reported below: 737 F. 2d 320.

No. 84-438. SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT WALPOLE *v.* HILL ET AL. Sup. Jud. Ct. Mass. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 392 Mass. 198, 466 N. E. 2d 818.

Certiorari Denied. (See also No. 84-198, *supra*.)

No. 83-1908. SHELBY COUNTY SHERIFF'S DEPARTMENT *v.* RUIZ. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 388.

No. 83-1974. NORTH PLATTE BAPTIST CHURCH ET AL. *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 216 Neb. 684, 345 N. W. 2d 19.

No. 83-6668. DRAPER *v.* GUERRY, JUDGE, CIRCUIT COURT OF THE CITY OF NORFOLK. C. A. 4th Cir. Certiorari denied. Reported below: 727 F. 2d 1102.

No. 83-6715. FRANK *v.* REED. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 674.

No. 83-6758. MARCANO, AKA JERMOSEN *v.* KARABATSOS ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-6794. DIAZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 100 N. M. 524, 673 P. 2d 501.

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No. 83-6856. *BLAND v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 161.

No. 83-6875. *DELANEY v. MAGGIO, WARDEN, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 777.

No. 83-6899. *WIEDEMER v. RICKETTS ET AL.* C. A. 10th Cir. Certiorari denied.

No. 83-6935. *FERREIRA v. FAIR, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTIONS*. C. A. 1st Cir. Certiorari denied. Reported below: 732 F. 2d 245.

No. 83-6981. *CALDWELL v. GARRISON, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1451.

No. 83-6997. *WITHERSPOON, INDIVIDUALLY, AND AS MOTHER AND NEXT FRIEND OF GAINES ET AL. v. CORDIER ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1106.

No. 83-7024. *FOUCHA v. MAGGIO, WARDEN*. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1478.

No. 84-30. *COPELIN v. ALASKA*. Ct. App. Alaska. Certiorari denied. Reported below: 676 P. 2d 608.

No. 84-112. *ARONSON ET AL. v. SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT SHARING PLAN ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 730 F. 2d 12.

No. 84-141. *YARBROUGH ET AL. v. SMALL BUSINESS ADMINISTRATION*. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 9.

No. 84-145. *KRIEGER v. NEW JERSEY*. Sup. Ct. N. J. Certiorari denied. Reported below: 96 N. J. 256, 475 A. 2d 563.

No. 84-215. *MULTI-STATE COMMUNICATIONS, INC. v. FEDERAL COMMUNICATIONS COMMISSION ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 234 U. S. App. D. C. 285, 728 F. 2d 1519.

No. 84-232. *TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA v. SANSOM COMMITTEE* (three cases). C. A. 3d Cir. Certio-

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rari denied. Reported below: 735 F. 2d 1535 (first case); 738 F. 2d 424 (second case); 735 F. 2d 1552 (third case).

No. 84-258. *SCHAPANSKY v. DEPARTMENT OF TRANSPORTATION*; *ADAMS ET AL. v. DEPARTMENT OF TRANSPORTATION*; *MARTEL v. DEPARTMENT OF TRANSPORTATION*; *MOYLAN v. DEPARTMENT OF TRANSPORTATION*; *DORRANCE v. DEPARTMENT OF TRANSPORTATION*; *DiMASSO v. DEPARTMENT OF TRANSPORTATION*; and

No. 84-259. *ANDERSON ET AL. v. DEPARTMENT OF TRANSPORTATION ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: No. 84-258, 735 F. 2d 477 (first case), 735 F. 2d 488 (second case), 735 F. 2d 504 (third case), 735 F. 2d 524 (fourth case), 735 F. 2d 516 (fifth case), 735 F. 2d 526 (sixth case); No. 84-259, 735 F. 2d 537.

No. 84-260. *FAITH CENTER, INC. v. CITY OF HARTFORD ET AL.* Sup. Ct. Conn. Certiorari denied. Reported below: 192 Conn. 434, 472 A. 2d 16.

No. 84-287. *STEWART v. UNITED STATES ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 716 F. 2d 755.

No. 84-405. *JACK WALTERS & SONS CORP. v. MORTON BUILDINGS, INC.* C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 698.

No. 84-413. *HUGHES-BECHTOL, INC. v. WEST VIRGINIA BOARD OF REGENTS.* C. A. 6th Cir. Certiorari denied. Reported below: 737 F. 2d 540.

No. 84-420. *EITMANN v. NEW ORLEANS PUBLIC SERVICE, INC.* C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 359.

No. 84-426. *JOHNSON v. ALLYN & BACON.* C. A. 1st Cir. Certiorari denied. Reported below: 731 F. 2d 64.

No. 84-429. *INTERNATIONAL INDEMNITY CO. v. ENFINGER, BY AND THROUGH HIS NEXT FRIEND, ENFINGER*; and *INTERNATIONAL INDEMNITY CO. v. ODOM.* Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. 185, 317 S. E. 2d 816 (first case); 253 Ga. 210, 317 S. E. 2d 833 (second case).

No. 84-437. *EVENING NEWS ASSN. ET AL. v. LOCICCHIO ET AL.* Ct. App. Mich. Certiorari denied.

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No. 84-439. CALDWELL *v.* SOLUS OCEAN SYSTEMS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1121.

No. 84-440. COHEN ET UX. *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 736 F. 2d 81.

No. 84-441. AGRI-FEEDS, INC. *v.* HANSENS' INC., DBA CHAMPION INDUSTRIAL CONTRACTORS. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84-443. MORIAL ET AL. *v.* UNITED GAS PIPE LINE CO. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 2d 452.

No. 84-445. FIRST ASSEMBLY OF GOD CHURCH ET AL. *v.* CITY OF ALEXANDRIA, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 739 F. 2d 942.

No. 84-446. HYATT LEGAL SERVICES ET AL. *v.* HYATT CORP. C. A. 7th Cir. Certiorari denied. Reported below: 736 F. 2d 1153.

No. 84-447. METROPOLITAN PROPERTY & LIABILITY INSURANCE CO. *v.* LONGENECKER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 423.

No. 84-455. HAUSER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 447.

No. 84-456. SCOTT ET AL. *v.* BENSON. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 1181.

No. 84-457. MINSKY *v.* AUTO DRIVEAWAY CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 18.

No. 84-464. KLEMENS ET AL. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 491.

No. 84-471. NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA ET AL. *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 768.

No. 84-477. FELICE *v.* FOLEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1461.

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No. 84-486. SHEARSON/AMERICAN EXPRESS INC. ET AL. *v.* NEELY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 974.

No. 84-507. T. B. & Z. REALTY & MANAGEMENT CORP. ET AL. *v.* COTERIE SEVEN ENTERPRISES CORP. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 442.

No. 84-535. DAVIS *v.* DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT. C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 2d 1108.

No. 84-617. FLYNT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-5026. MAGHE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 84-5027. WILLIAMS ET AL. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1446.

No. 84-5070. BOLES *v.* MINTZES, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 13.

No. 84-5135. PEELER ET AL. *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 2d 378.

No. 84-5147. GONZALEZ *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 418.

No. 84-5161. LUCIEN *v.* SEIDENFELD ET AL. C. A. 7th Cir. Certiorari denied.

No. 84-5241. HUMPHREY *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5256. MUGERCIA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 625.

No. 84-5270. BURRELL *v.* BOWEN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84-5428. DANKERT *v.* WHARTON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 1537.

No. 84-5461. LEGRAND *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

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No. 84-5482. *WILSON, DBA HOLLY GROVE ESTATES v. WILSON ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 718 F. 2d 1114.

No. 84-5511. *GOLDEN v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 958.

No. 84-5513. *WATSON v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES.* C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 2d 434.

No. 84-5516. *ALBRECHT v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 977.

No. 84-5521. *GREER v. UNITED STATES.* C. A. 6th Cir. Certiorari denied.

No. 84-5522. *VICE v. SMITH, ATTORNEY GENERAL.* C. A. 7th Cir. Certiorari denied.

No. 84-5531. *GERWITZ ET AL. v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 750.

No. 84-5536. *HOLLOWAY v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 1373.

No. 84-5540. *GONZALES v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84-5542. *LEVY v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 741 F. 2d 915.

No. 84-5544. *HERNANDEZ v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 484.

No. 84-5546. *WINGFIELD v. UNITED STATES POSTAL SERVICE.* C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 454.

No. 84-5549. *DEL PRADO-MONTERO v. UNITED STATES.* C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 113.

No. 84-5550. *TORRES v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 965.

No. 83-967. *TERRITORY OF GUAM v. OKADA.* C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE REHNQUIST would grant certiorari, vacate the judgment, and remand the case

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for further consideration in light of Pub. L. 98-454. Reported below: 694 F. 2d 565 and 715 F. 2d 1347.

No. 83-1971. ILLINOIS *v.* WASHINGTON. Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 104, 461 N. E. 2d 393.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

In *Cuyler v. Sullivan*, 446 U. S. 335 (1980), this Court held that in order to establish a Sixth Amendment violation, a defendant challenging his attorney's representation of multiple clients must establish that the attorney's performance was affected by an actual conflict of interest, not merely a potential one. In the present case, the Illinois Supreme Court held that *Cuyler's* actual-conflict-of-interest standard was limited to multiple-representation situations. 101 Ill. 2d 104, 461 N. E. 2d 393 (1984). Because that holding is contrary to the results reached by at least six other courts, I dissent from the denial of certiorari.

On May 7, 1979, Nathan Bottley was murdered in Chicago. Chicago police suspected Charles Washington, a resident of Chicago Heights, and made inquiries to the Chicago Heights police. As a result of these inquiries, Chicago Heights police officers reinterviewed witnesses to a 1977 murder in Chicago Heights, in which Washington had been a suspect, and arrested Washington for that crime. While Washington was in custody, he was also charged by Chicago police for the Bottley murder.

After being indicted for the Bottley murder, Washington filed pretrial motions to quash arrest and suppress identification, contending that his arrest in Chicago Heights had been without probable cause. Washington's attorney at this hearing also served as the city attorney for Chicago Heights, a fact that the State's attorney brought to the attention of the trial court. The defense attorney responded that he had consulted with Washington about the possible conflict of interest inherent in this situation, but that he "anticipated no Chicago Heights Police Officers to be called" in connection with the Chicago murder. The court questioned Washington and ascertained that he had no objection to being represented by his defense counsel.

Contrary to defense counsel's expectation, the State called a Chicago Heights police officer to establish that there was probable cause for the defendant's arrest in Chicago Heights on the 1977 murder charge. Defense counsel cross-examined the officer and

then called another Chicago Heights officer as a rebuttal witness. The trial court denied Washington's motion to quash arrest, basing its holding primarily on the testimony of these two officers.

On appeal, Washington argued that he was denied effective assistance of counsel because of his attorney's conflicting interests. The Illinois Appellate Court reversed the conviction on this ground, 111 Ill. App. 3d 711, 444 N. E. 2d 753 (1982), and the Illinois Supreme Court agreed, 101 Ill. 2d 104, 461 N. E. 2d 393 (1984). The Illinois Supreme Court adhered to its longstanding view that as a matter of federal constitutional law even a potential conflict of interest required reversal, rejecting the State's contention that *Cuyler v. Sullivan* required Washington to show that his attorney's performance had been adversely affected by an actual conflict of interest. The State's argument, the court held, overlooked the fact that *Cuyler* involved multiple representation of defendants. The court focused on *Cuyler's* observation that "a possible conflict inheres in almost every instance of multiple representation," so that a presumption that even potential conflict resulted in ineffective assistance "would preclude multiple representation even in cases where '[a] common defense . . . gives strength against a common attack.'" 446 U. S., at 348, quoting *Glasser v. United States*, 315 U. S. 60, 92 (1942) (Frankfurter, J., dissenting).

Unlike the Illinois Supreme Court, numerous federal courts have failed to discern in *Cuyler* any limitation to cases involving multiple representation of defendants. See *Westbrook v. Zant*, 704 F. 2d 1487, 1498-1499 (CA11 1983); *United States v. Harris*, 701 F. 2d 1095, 1099 (CA4 1983); *United States v. Knight*, 680 F. 2d 470, 471 (CA6 1982) (*per curiam*), cert. denied, 459 U. S. 1102 (1983); *Ware v. King*, 694 F. 2d 89, 92 (CA5 1982) (*per curiam*), cert. denied, 461 U. S. 930 (1983); *Alexander v. Housewright*, 667 F. 2d 556, 558 (CA8 1981); *United States v. Hearst*, 638 F. 2d 1190, 1193 (CA9 1981). Most of these courts have simply applied *Cuyler* to non-multiple-representation situations without even considering the possibility that it did not apply. In *United States v. Hearst*, the Ninth Circuit observed that "Sullivan's lawyer's conflict was based on multiple representation, whereas Hearst's was based on private financial interests," but concluded, without discussion, that this difference, among others, was "immaterial." 638 F. 2d, at 1193. In *Theodore v. New Hampshire*, 614 F. 2d 817 (CA1 1980), a pre-*Cuyler* case, the court held that an actual-

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conflict standard applied when a defendant's attorney had represented a principal prosecution witness in an earlier trial arising out of the same incident. The court noted that "[b]ecause this is a case involving dual representation, not joint representation, the danger of conflict is not as great, hence judicial scrutiny need not be as deep." 614 F. 2d, at 822. This at least suggests an approach directly opposite to that taken by the Illinois Supreme Court, which reasoned that *greater* judicial scrutiny was called for where defense counsel merely represented a prosecution witness.

Because the decision below creates a conflict among the lower courts on an important and frequently recurring question of constitutional law, I would grant the petition for certiorari.

No. 83-6809. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 82.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Once again this Court is confronted with a challenge to the constitutionality of the Government's use of peremptory challenges to exclude potential jurors in a criminal trial because of their race. See *Swain v. Alabama*, 380 U. S. 202, 221 (1965) ("[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws").* The continued vitality of *Swain* is by now a "distressingly familiar" issue to this Court. *Williams v. Illinois*, decided with *Dixon v. Illinois* and *Yates v. Illinois*, 466 U. S. 981, 982 (1984) (MARSHALL, J., dissenting from denial of certiorari); see *McCray v. New York*, decided with *Miller v. Illinois* and *Perry v. Louisiana*, 461 U. S. 961, 963 (1983) (MARSHALL, J., dissenting from denial of certiorari); *Gilliard v. Mississippi*, 464 U. S. 867 (1983) (MARSHALL, J., dissenting from denial of certiorari). A majority of the Court has expressed the position that this question merits plenary review. See *McCray*, *supra*, at 961 (opinion of STEVENS, J., joined by

*Petitioner Thompson, convicted of federal counterfeiting charges, challenges his conviction on the ground that the Government used peremptory challenges to exclude five of seven Negro potential jurors. When defense counsel raised the objection at the close of *voir dire*, the Assistant United States Attorney stated on the record that she had used race as a criterion in excluding the five Negro jurors. The District Court rejected the challenge on the basis of *Swain v. Alabama*, 380 U. S. 202 (1965), and the Eighth Circuit affirmed with some reluctance. 730 F. 2d 82, 85 (1984).

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BRENNAN, J., dissenting

BLACKMUN and POWELL, JJ.); *id.*, at 963 (MARSHALL, J., joined by BRENNAN, J., dissenting from denial of certiorari). The call to reconsider *Swain*, from both courts and scholars, continues unabated. It is time for this Court to face up to the issue.

JUSTICE MARSHALL has written persuasively concerning the immediate need to reconsider *Swain* in light of *Duncan v. Louisiana*, 391 U. S. 145 (1968), and *Taylor v. Louisiana*, 419 U. S. 522 (1975), which found the Sixth Amendment's jury trial guarantees applicable to the States through the Fourteenth Amendment. See *McCray v. New York*, *supra*, at 963 (MARSHALL, J., dissenting from denial of certiorari); *Gilliard v. Mississippi*, *supra*, at 867 (MARSHALL, J., dissenting from denial of certiorari). I add my voice here simply to make two points. First, however plausible the rationale of *Swain* may have seemed two decades ago, the justification for shielding peremptory challenges from equal protection scrutiny has not withstood the test of time. *Swain* thus should be reconsidered for equal protection as well as Sixth Amendment reasons. Second, the admirable intent of three of my colleagues in acknowledging the import of the issue but deferring our review "to allow the various States to serve as laboratories in which the issue receives further study," see *McCray*, *supra*, at 963 (opinion of STEVENS, J., joined by BLACKMUN and POWELL, JJ.), has spawned confusion not clarification in the courts below.

I

Swain is an anomaly, a departure from two fundamental principles of constitutional law. The first is the basic equal protection notion that government officials cannot exclude persons from juries solely because of their race. "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection [a jury of peers] which others enjoy." *Strauder v. West Virginia*, 100 U. S. 303, 308-309 (1880). The second is the basic notion inherent in the "American tradition of trial by jury" that "[l]jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discrimination which are abhorrent to the democratic ideals of trial by jury." *Thiel v. Southern Pacific Co.*, 328 U. S. 217, 220 (1946). Notwithstanding the force of these principles,

five Members of the Court in *Swain* (of whom I was one) held that the prosecution's right to use peremptory challenges in any particular case involving a Negro defendant had to remain free of equal protection scrutiny. After acknowledging the impressive pedigree of the peremptory challenge, we held that such challenges are frequently

"exercised on grounds thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations. . . .

"With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." 380 U. S., at 220-221 (footnotes omitted).

With the hindsight that two decades affords, it is apparent to me that *Swain's* reasoning was misconceived. Stripped of its historical embellishments, *Swain* holds that the State may presume in exercising peremptory challenges that only white jurors will be sufficiently impartial to try a Negro defendant fairly. In other words, *Swain* authorizes the presumption that a Negro juror will be partial to a Negro defendant simply because both belong to the same race. Implicit in such a presumption is profound disrespect for the ability of individual Negro jurors to judge impartially. It is the race of the juror, and nothing more, that gives rise to the doubt in the mind of the prosecutor. Whatever the justification for permitting the idiosyncratic use of peremptory challenges in the run of cases, that justification ought not extend to permit the government to make use of an unfounded racial presumption that disparages Negroes in this way. Cf. *Palmore v. Sidoti*, 466 U. S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category").

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II

In *McCray v. New York*, 461 U. S. 961 (1983), five Members of the Court suggested that *Swain* should be reconsidered. Three of these five went on to suggest a preference for deferring review to permit experimentation in the state courts, presumably in a state constitutional law context, regarding how allegations of race-based use of peremptory challenges should be raised and considered. The decision to defer review has not produced the desired state-law experimentation in the state courts. See *Gilliard v. Mississippi*, 464 U. S., at 870-871 (MARSHALL, J., dissenting from denial of certiorari). Instead it has thrown the status of *Swain* as a matter of federal constitutional law into considerable doubt in the lower courts. Some courts appear to have read our opinions in *McCray* as an invitation to depart from *Swain* as a matter of federal law, e. g., *McCray v. Abrams*, 576 F. Supp. 1244 (EDNY 1983), while others have declined to depart from *Swain*, e. g., *King v. County of Nassau*, 581 F. Supp. 493 (EDNY 1984). Even the courts reaffirming *Swain* have felt compelled to reconsider it at length in light of this Court's *McCray* decision. *King v. County of Nassau*, *supra*; see also *People v. Charles*, 61 N. Y. 2d 321, 462 N. E. 2d 118 (1984). The piecemeal erosion of *Swain*—whose rule, if without other virtue, was at least clear—will continue until this Court acts to resolve the uncertainty.

III

The time is ripe to reconsider *Swain*. The erosion of *Swain*'s constitutional legitimacy and the dearth of creative state-law development counsel against further delay in resolving this important question. Declining to review this case, we let stand a conviction in which we know that the prosecuting attorney excluded individual potential jurors because they were Negroes. This official use of disparaging racial classification is so at odds with our most basic understandings of equal protection that we should not sanction it in this case or any other. I think we have a responsibility to resolve this important and recurring constitutional issue, and I respectfully dissent from this Court's refusal to do so.

No. 84-5173. ROBERTS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari.

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No. 84-267. *CLARK, SECRETARY OF THE INTERIOR, ET AL. v. SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC.* C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 720 F. 2d 1475.

No. 84-5330. *PAYNE v. ILLINOIS.* App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 125 Ill. App. 3d 1163, 481 N. E. 2d 362.

No. 84-5336. *GOSBERRY v. ILLINOIS.* App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 125 Ill. App. 3d 1161, 481 N. E. 2d 361.

No. 84-5271. *REEVES v. NEBRASKA.* Sup. Ct. Neb.; and

No. 84-5370. *MARTIN v. MAGGIO, WARDEN, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: No. 84-5271, 216 Neb. 206, 344 N. W. 2d 433; No. 84-5370, 711 F. 2d 1273 and 739 F. 2d 184.

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. 84-5498. *DEBARDELEBEN v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. JUSTICE WHITE, joined by JUSTICE BRENNAN, would grant certiorari to settle the conflict between the United States Court of Appeals for the Sixth Circuit and the United States Court of Appeals for the Ninth Circuit with respect to the proper resolution of the issue involved in this case. Reported below: 740 F. 2d 440.

No. 84-5515. *CURRAN v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 740 F. 2d 1419.

Rehearing Denied

No. 83-6688. *HUNTER v. NEW MEXICO*, *ante*, p. 838; and

No. 83-6876. *GELBER v. MARSH, SECRETARY OF THE ARMY*, *ante*, p. 880. Petitions for rehearing denied.

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No. 83-6915. BEAM *v.* ALABAMA, *ante*, p. 846;

No. 83-6998. BOLES *v.* GUILFORD TECHNICAL INSTITUTE, *ante*, p. 849;

No. 84-96. INLAND MARINE INDUSTRIES ET AL. *v.* HOUSTON, *ante*, p. 855;

No. 84-5022. BIRDEN *v.* CONAN ET AL., *ante*, p. 860;

No. 84-5099. BRADY *v.* SMITH, ATTORNEY GENERAL, *ante*, p. 863;

No. 84-5248. FERENC, AKA ROWE *v.* PAITE ET AL., *ante*, p. 885;

No. 84-5259. SHEMERDIAK *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA, *ante*, p. 886; and

No. 84-5294. IN RE COOPER, *ante*, p. 878. Petitions for rehearing denied.

No. 84-5061. CALDWELL *v.* A. H. ROBINS CO., *ante*, p. 862. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

NOVEMBER 19, 1984

Dismissals Under Rule 53

No. 83-1441. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* BLANKENSHIP ET AL.; and

No. 83-6542. BLANKENSHIP ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 722 F. 2d 1282.

NOVEMBER 20, 1984

Dismissal Under Rule 53

No. 84-218. IN RE COUNTY OF SUFFOLK ET AL. Petition for writ of prohibition dismissed under this Court's Rule 53.

NOVEMBER 26, 1984

Appeals Dismissed

No. 84-349. GIBNEY ET AL. *v.* TOLEDO FEDERATION OF TEACHERS ET AL. Appeal from Ct. App. Ohio, Lucas County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

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No. 84-640. GAUNCE *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 732 F. 2d 163.

No. 84-5506. DINGLE *v.* SIMPKINS. Appeal from Sup. Ct. S. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-366. RAY BELL OIL CO., INC. *v.* NEW MEXICO. Appeal from Ct. App. N. M. dismissed for want of jurisdiction. Reported below: 101 N. M. 368, 683 P. 2d 50.

No. 84-499. SASSO *v.* RAM PROPERTY MANAGEMENT ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 452 So. 2d 932.

No. 84-5459. J. E. W. *v.* ESTATE OF DOE. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of substantial federal question. Reported below: 443 So. 2d 249.

Certiorari Granted—Reversed and Remanded. (See No. 83-6775, *ante*, p. 17.)

Vacated and Remanded After Certiorari Granted. (See Nos. 83-1045 and 83-5878, *ante*, p. 14.)

Miscellaneous Orders

No. A-335. LOCKWOOD ET AL. *v.* UNITED STATES. C. A. 1st Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D-448. IN RE DISBARMENT OF HOLLOWAY. Disbarment entered. [For earlier order herein, see 468 U. S. 1248.]

No. D-462. IN RE DISBARMENT OF COLLIER. It is ordered that James C. Collier, of Orlando, Fla., 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.

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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 city respondents in No. 83-6392 for correction of caption and for divided argument denied.

No. 83-5954. LINDAHL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. [Certiorari granted, 467 U. S. 1251.] Motions of Willard Bronger et al. and Margaret Cheeseman et al. for leave to file briefs as *amici curiae* granted.

No. 83-6808. DALTON *v.* UNITED STATES ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 17, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84-28. BROCKETT *v.* SPOKANE ARCADES, INC., ET AL.; and

No. 84-143. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. *v.* J-R DISTRIBUTORS, INC., ET AL. C. A. 9th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motion of Citizens for Decency Through Law, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 84-248. PINO *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT'S CHILDREN'S COURT IN AND FOR THE COUNTY OF BERNALILLO. Appeal from Sup. Ct. N. M.; and

No. 84-627. CITY COUNCIL OF THE CITY OF CHICAGO *v.* KETCHUM ET AL. C. A. 7th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84-483. ARKANSAS PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 8th Cir. The

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Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of this order.

No. 84-494. NATIONAL LABOR RELATIONS BOARD *v.* MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, ET AL. C. A. 9th Cir. Motion of respondents Lapinski et al. to expedite consideration of this case and No. 84-528, *Lapinski v. Machinists Local 1327*, and to consolidate with No. 83-1894, *Pattern Makers' League of North America v. NLRB* [certiorari granted, *ante*, p. 814], denied.

No. 84-5029. PALENO *v.* QUINN, INSURANCE COMMISSIONER OF CALIFORNIA, *ante*, p. 812. Motion of appellant for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 84-5108. LIPAROTA *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, *ante*, p. 930.] Motion for appointment of counsel granted, and it is ordered that William T. Huyck, Esquire, of Chicago, Ill., be appointed to serve as counsel for petitioner in this case.

No. 84-478. IN RE EGLE. C. A. 5th Cir. Petition for writ of common-law certiorari denied. Reported below: 715 F. 2d 999.

Probable Jurisdiction Noted

No. 84-497. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* UNION CARBIDE AGRICULTURAL PRODUCTS CO. ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

Certiorari Granted

No. 84-476. McDONALD *v.* SMITH. C. A. 4th Cir. Certiorari granted. Reported below: 737 F. 2d 427.

No. 84-320. NATIONAL FARMERS UNION INSURANCE COS. ET AL. *v.* CROW TRIBE OF INDIANS ET AL. C. A. 9th Cir. Motion of respondents LeRoy Sage and Flora Not Afraid for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 736 F. 2d 1320.

No. 84-351. ATASCADERO STATE HOSPITAL ET AL. *v.* SCANLON. C. A. 9th Cir. Motion of respondent for leave to

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proceed *in forma pauperis* and certiorari granted. Reported below: 735 F. 2d 359.

No. 84-465. BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, ET AL. *v.* ROMANO. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 735 F. 2d 319.

No. 84-501. MINTZES, WARDEN *v.* BUCHANON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 734 F. 2d 274.

Certiorari Denied. (See also Nos. 84-349, 84-640, 84-5506, and 84-478, *supra.*)

No. 83-1903. MORRIS MECHANICAL ENTERPRISES, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 728 F. 2d 497.

No. 83-2081. SIGMOND *v.* UNITED STATES;

No. 83-6929. BARNES *v.* UNITED STATES; and

No. 83-6952. CASE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: Nos. 83-2081 and 83-6929, 734 F. 2d 8; No. 83-6952, 734 F. 2d 3.

No. 83-6774. SOONG *v.* HOFSTRA UNIVERSITY. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1433.

No. 83-6792. JONES *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 83-6874. GARRETT *v.* OKLAHOMA. Sup. Ct. Okla. Certiorari denied.

No. 83-6903. MADELEY *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 778.

No. 83-6953. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 379.

No. 83-6964. THROCKMORTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-7009. ZAVOLTA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1365.

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No. 83-7010. *DEPRIEST v. PUETT, COMMISSIONER, TENNESSEE DEPARTMENT OF HUMAN SERVICES, ET AL.* Ct. App. Tenn. Certiorari denied. Reported below: 669 S. W. 2d 669.

No. 83-7017. *GANN v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 714.

No. 83-7025. *LUCIEN v. MCGINNIS, WARDEN.* C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 442.

No. 83-7044. *MAYS v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied.

No. 83-7048. *SHABAZZ v. BROWN ET AL.* C. A. 10th Cir. Certiorari denied.

No. 84-104. *REDHOUSE v. COMMISSIONER OF INTERNAL REVENUE.* C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 2d 1249.

No. 84-113. *HEIGHTS COMMUNITY CONGRESS v. VETERANS ADMINISTRATION.* C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 526.

No. 84-114. *AMIDON ET AL. v. WEINBERGER, SECRETARY OF DEFENSE, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 730 F. 2d 949.

No. 84-140. *HOLLIDAY v. SECURITIES AND EXCHANGE COMMISSION.* C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 413.

No. 84-184. *WILLIAMS PIPE LINE Co. v. FARMERS UNION CENTRAL EXCHANGE, INC., ET AL.;*

No. 84-185. *TEXAS EASTERN TRANSMISSION CORP. v. FARMERS UNION CENTRAL EXCHANGE, INC., ET AL.;* and

No. 84-186. *ASSOCIATION OF OIL PIPE LINES v. FARMERS UNION CENTRAL EXCHANGE, INC., ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 203, 734 F. 2d 1486.

No. 84-195. *OHIO POWER Co. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1096.

No. 84-201. *URBAN EK ET AL. v. UNITED STATES.* C. A. Fed. Cir. Certiorari denied. Reported below: 731 F. 2d 870.

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No. 84-266. *VENNERI v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 736 F. 2d 995.

No. 84-268. *A-1 KING SIZE SANDWICHES, INC. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 872.

No. 84-272. *SCOTT v. SCOTT*. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 156 Cal. App. 3d 251, 202 Cal. Rptr. 716.

No. 84-285. *LAMPTON v. BOSSE*. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1367.

No. 84-289. *MENDIA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 2d 1412.

No. 84-347. *SHAW v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84-362. *GLASS PACKAGING INSTITUTE ET AL. v. REGAN, SECRETARY OF THE TREASURY, ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 237 U. S. App. D. C. 378, 737 F. 2d 1083.

No. 84-393. *WACHOVIA BANK & TRUST Co., N. A. v. BANISTER*. C. A. 2d Cir. Certiorari denied. Reported below: 737 F. 2d 225.

No. 84-395. *FIELD v. COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE*. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 418.

No. 84-454. *MORRISON ET UX. v. COUNTY OF SAN DIEGO*. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 153 Cal. App. 3d 233, 200 Cal. Rptr. 187.

No. 84-472. *WILSON v. DUGGER, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1376.

No. 84-475. *LAUGHLIN RECREATIONAL ENTERPRISES, INC. v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 84-484. *BERKOVITZ ET AL. v. ISLAMIC REPUBLIC OF IRAN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 329.

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No. 84-493. *S. E. JOHNSON CO. ET AL. v. ARTHUR S. LANGENDERFER, INC., ET AL.*; and

No. 84-508. *ARTHUR S. LANGENDERFER, INC., ET AL. v. S. E. JOHNSON CO. ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1050.

No. 84-511. *TRANSCON LINES v. MANCHESTER PRODUCTS CO.* C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 975.

No. 84-512. *DEHAVILLAND AIRCRAFT OF CANADA, LTD. v. MAUNDER ET AL.* Sup. Ct. Ill. Certiorari denied. Reported below: 102 Ill. 2d 342, 466 N. E. 2d 217.

No. 84-515. *SPAULDING ET AL. v. UNIVERSITY OF WASHINGTON.* C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 686.

No. 84-516. *DELMONACO v. CONNECTICUT.* Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 331, 481 A. 2d 40.

No. 84-521. *KRIEGESMANN v. BARRY-WEHMILLER CO.* C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 357.

No. 84-522. *DANTE ET AL. v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 2d 547.

No. 84-523. *JIZMEJIAN v. UNITED STATES.* C. A. Fed. Cir. Certiorari denied. Reported below: 746 F. 2d 1489.

No. 84-524. *UNITED STATES FIRE INSURANCE CO. v. CAVANAUGH ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 832.

No. 84-529. *JONES, CHAIRMAN, SUBCOMMITTEE ON SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES' COMMITTEE ON HOUSE ADMINISTRATION, ET AL. v. WALKER.* C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 92, 733 F. 2d 923.

No. 84-530. *WELYCZKO v. U. S. AIR, INC., ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 733 F. 2d 239.

No. 84-531. *MAHONEY v. TRABUCCO, COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF PUBLIC SAFETY, ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 738 F. 2d 35.

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No. 84-534. *QUIGLEY v. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF WINTER HAVEN*. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 445 So. 2d 1052.

No. 84-536. *LANDSBERG v. SCRABBLE CROSSWORD GAME PLAYERS, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 485.

No. 84-538. *SNYDER, EXECUTRIX OF THE ESTATE OF LIJEDAHL v. SMITH*. C. A. 7th Cir. Certiorari denied. Reported below: 736 F. 2d 409.

No. 84-539. *MOL, INC. v. PEOPLES REPUBLIC OF BANGLADESH*. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1326.

No. 84-541. *SMITH v. KENTUCKY BAR ASSN.* Sup. Ct. Ky. Certiorari denied.

No. 84-543. *SMITH v. CONTRA COSTA COUNTY SUPERIOR COURT ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1372.

No. 84-546. *MCGILL INC. v. JOHN ZINK CO.* C. A. Fed. Cir. Certiorari denied. Reported below: 736 F. 2d 666.

No. 84-547. *WARD v. SENTRY TITLE CO., INC.* C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 941 and 727 F. 2d 1368.

No. 84-551. *UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA ET AL. v. FIRST PRESBYTERIAN CHURCH OF SCHENECTADY ET AL.* Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 110, 464 N. E. 2d 454.

No. 84-552. *STANZIANI ET AL. v. COLEMAN ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 118.

No. 84-554. *M/V "ALBERT F" v. INDUSTRIA NACIONAL DEL PAPEL*, C. A. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 622.

No. 84-557. *AGROMAYOR v. COLBERG*. C. A. 1st Cir. Certiorari denied. Reported below: 738 F. 2d 55.

No. 84-558. *CLEM PERRIN MARINE TOWING, INC. v. PANAMA CANAL CO.* C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 186.

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No. 84-560. *PODROG ET AL. v. WARING, COX, JAMES, SKLAR & ALLEN*. Sup. Ct. Tenn. Certiorari denied. Reported below: 673 S. W. 2d 860.

No. 84-561. *G. M. SHUPE, INC. v. DRAVO CORP.* C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 974.

No. 84-562. *NICOLET INSTRUMENT CORP. v. BIO-RAD LABORATORIES, INC.* C. A. Fed. Cir. Certiorari denied. Reported below: 739 F. 2d 604.

No. 84-565. *MASSACHUSETTS v. DONOVAN*. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 392 Mass. 647, 467 N. E. 2d 198.

No. 84-574. *VARIO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 373.

No. 84-576. *KING v. CALIFORNIA*. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 84-580. *BRADLEY v. WEINBERGER, SECRETARY OF DEFENSE*. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 428.

No. 84-584. *LAND & LAKE TOURS, INC. v. DOLE, SECRETARY OF TRANSPORTATION, ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 961.

No. 84-596. *DISALVO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-597. *CHAPMAN v. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 238.

No. 84-609. *BRITT v. UNITED STATES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 973.

No. 84-611. *DOOLEY ET AL. v. REISS ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1392.

No. 84-614. *HUMMEL ET AL. v. MONT PELERIN CORP., N. V.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-615. *STRAWSER v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1226.

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No. 84-619. *McLAUGHLIN v. OFFICE OF PERSONNEL MANAGEMENT*. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 454.

No. 84-642. *KNEZEVICH v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84-655. *HANNA v. RAILROAD RETIREMENT BOARD*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 618.

No. 84-660. *CALERO ET AL. v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84-5008. *LEAHEY v. HANRAHAN ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 952.

No. 84-5018. *SOLINA v. UNITED STATES*; and

No. 84-5214. *BRUSCINO v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 733 F. 2d 1208.

No. 84-5036. *BOONE v. VALENTI, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1451.

No. 84-5051. *HOWELL v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 56 Md. App. 675, 468 A. 2d 688.

No. 84-5054. *RODRIGUEZ v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 463.

No. 84-5074. *LENTZ v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1458.

No. 84-5132. *MITCHELL v. UNITED STATES*; and

No. 84-5133. *MITCHELL v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 733 F. 2d 327.

No. 84-5164. *BRENDER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84-5227. *HOFFMAN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 596.

No. 84-5297. *DAVIS v. FULCOMER ET AL.* C. A. 3d Cir. Certiorari denied.

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No. 84-5329. *MINCEY v. ARIZONA*. Sup. Ct. Ariz. Certiorari denied. Reported below: 141 Ariz. 425, 687 P. 2d 1180.

No. 84-5375. *HICKS v. KENTUCKY*. Sup. Ct. Ky. Certiorari denied. Reported below: 670 S. W. 2d 837.

No. 84-5417. *THOMAS v. BROWN, WARDEN, ET AL.* C. A. 10th Cir. Certiorari denied.

No. 84-5432. *UDELL v. DISTRICT OF COLUMBIA COURT OF APPEALS COMMITTEE ON ADMISSIONS*. Ct. App. D. C. Certiorari denied.

No. 84-5439. *MALLOY v. MARTIN, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1461.

No. 84-5440. *WILLIAMS v. FULTON COUNTY JAIL ET AL.* C. A. 7th Cir. Certiorari denied.

No. 84-5446. *SEAGLE v. ALLSBROOK, SUPERINTENDENT, ODOM CORRECTIONAL FACILITY*. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 963.

No. 84-5452. *BOIVIN v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: 451 So. 2d 847.

No. 84-5456. *STAPLES v. TOWNE ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1459.

No. 84-5457. *FULSOM v. WHITE, SUPERINTENDENT, MOBERLY TRAINING CENTER FOR MEN*. C. A. 8th Cir. Certiorari denied.

No. 84-5462. *CHOW v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-5464. *TOMARCHIO v. EIGHTH JUDICIAL DISTRICT COURT OF NEVADA ET AL.* Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 823.

No. 84-5467. *BRADLEY v. DEROBERTIS, WARDEN*. C. A. 7th Cir. Certiorari denied.

No. 84-5468. *LEE v. NEW YORK CITY POLICE LABORATORY*. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 954.

No. 84-5469. *STANBEARY v. ILLINOIS PRISON REVIEW BOARD*. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1460.

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No. 84-5480. *SHABAZZ v. OKLAHOMA ET AL.* Ct. Crim. App. Okla. Certiorari denied.

No. 84-5487. *GRAVES v. TINNEY, WARDEN.* C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 11.

No. 84-5488. *GOMEZ v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1107.

No. 84-5489. *CLEVELAND v. DUGGER, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5490. *EL-TAYEB v. UNITED PROGRESS, INC.* C. A. 3d Cir. Certiorari denied.

No. 84-5496. *KENNEDY v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied.

No. 84-5499. *LARSEN v. OKLAHOMA ET AL.* Ct. Crim. App. Okla. Certiorari denied.

No. 84-5501. *JOHNSON v. YELLOW FREIGHT SYSTEM, INC.* C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 2d 1304.

No. 84-5503. *WORTHY v. NEW YORK.* App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 103 App. Div. 2d 1048, 479 N. Y. S. 2d 391.

No. 84-5517. *DACE v. SOLEM, WARDEN, ET AL.* C. A. 8th Cir. Certiorari denied.

No. 84-5519. *FOWLER v. ALABAMA.* Sup. Ct. Ala. Certiorari denied. Reported below: 459 So. 2d 1017.

No. 84-5528. *PIATKOWSKA v. INDUSTRIAL INDEMNITY CO.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-5532. *PHILLIPS v. OKLAHOMA.* Ct. Crim. App. Okla. Certiorari denied.

No. 84-5533. *STEPHENS v. SNEATH ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 911.

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No. 84-5534. *SMITH v. WELKER ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1457.

No. 84-5537. *STREET v. COLLINS, WARDEN.* C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 432.

No. 84-5539. *COLEMAN v. CORBIN, ATTORNEY GENERAL OF ARIZONA, ET AL.* C. A. 9th Cir. Certiorari denied.

No. 84-5541. *DUNLAP v. TENNESSEE.* C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 967.

No. 84-5557. *ROMANO v. BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES.* C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 2d 319.

No. 84-5558. *SMITH v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 484.

No. 84-5559. *SALAZAR LOBO v. UNITED STATES.* C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 113.

No. 84-5562. *MCFADDEN v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84-5570. *FRANKS v. STARCHER, JUDGE.* Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5571. *HONORE v. CALIFORNIA.* Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 150 Cal. App. 3d 999, 198 Cal. Rptr. 374.

No. 84-5573. *ESPENSHADE v. PENNSYLVANIA STATE UNIVERSITY ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1348.

No. 84-5574. *ELLSWORTH v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 333.

No. 84-5575. *BOONE v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 763.

No. 84-5577. *HENDERSON v. CALIFORNIA.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-5580. *ZEIGLER v. GRISWALD, WARDEN, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 737.

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No. 84-5587. *BRUMBACH v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84-5588. *IN RE BAKER*. Ct. App. Md. Certiorari denied. Reported below: 301 Md. 110, 482 A. 2d 155.

No. 84-5641. *DAVENPORT v. INDIANA*. Sup. Ct. Ind. Certiorari denied. Reported below: 464 N. E. 2d 1302.

No. 84-5651. *FINKE v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 56 Md. App. 450, 468 A. 2d 353.

No. 84-5657. *HARRIS v. TOMPKINS ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 745 F. 2d 70.

No. 83-1845. *STEPHENS v. KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER*. C. A. 11th Cir. The order entered December 13, 1983 [464 U. S. 1027], staying execution of sentence of death is vacated. Certiorari denied. Reported below: 721 F. 2d 1300 and 722 F. 2d 627.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The petitioner Alpha Otis O'Daniel Stephens has been condemned to death by electrocution. In this second petition for federal habeas relief, Stephens contends, *inter alia*, that he received the death penalty pursuant to a pattern and practice of racial discrimination in the administration of Georgia's capital sentencing system, in violation of the Eighth and Fourteenth Amendments. Specifically, he points to recently available statistical studies allegedly demonstrating a persistent and pronounced disparity in capital sentencing in Georgia based on the race of the defendant and the race of the victim. Stephens unsuccessfully has sought an evidentiary hearing to prove the accuracy and materiality of these data.

The courts below acknowledged that the Court of Appeals for the Eleventh Circuit has recently held in several cases that the *identical* evidence proffered by Stephens is sufficient to require an evidentiary hearing under 28 U. S. C. § 2254. The Eleventh Circuit in fact is currently considering en banc the very issues presented in Stephens' petition—whether the newly developed studies are reliable, and whether they are material to the constitutionality of Georgia's capital sentencing scheme. Stephens' petition has not been held pending the outcome of this en banc

consideration, however, because the courts below have concluded that Stephens has engaged in abuse of the writ. Specifically, they have determined that (1) although the new studies constitute "newly discovered evidence" for purposes of permitting relief on a first petition for habeas review, the identical studies do not constitute "newly discovered evidence" for purposes of securing relief on a second petition; and (2) Stephens in fact received an "evidentiary hearing" at which he failed to make an adequate "proffer" of the new studies.

Just last December, this Court stayed Stephens' execution pending the Eleventh Circuit's en banc resolution of the discrimination issue "or until further order of this Court." 464 U. S. 1027, 1028 (1983). In today's "further order," the Court inexplicably reverses course and decides that the execution may proceed notwithstanding the continued pendency of the discrimination issue before the Eleventh Circuit. To the extent this reversal purports to rest on deference to the lower courts' abuse-of-the-writ findings, I would respectfully submit that those findings fly in the face of the Fifth Amendment, 28 U. S. C. § 2254 and its attendant Rules, and well-settled precedent. Specifically, the record before us makes clear that (1) the proffered statistical studies are "newly discovered evidence" within the meaning of § 2254; and (2) Stephens did not receive the full and fair opportunity to introduce these studies to which he was entitled by law. At the very least, this case presents substantial questions concerning the abuse-of-the-writ doctrine that will recur with ever-increasing frequency. I therefore dissent from the Court's denial of certiorari and its vacation of the stay of execution.

I

Stephens filed his second petition for habeas relief on November 14, 1983, two days before his scheduled execution.¹ Anticipating

¹ The tortuous history of Stephens' first federal habeas action is summarized in the District Court's opinion below. 578 F. Supp. 103, 104-105 (MD Ga. 1983). That action was not finally terminated until September 19, 1983, when the Court of Appeals for the Eleventh Circuit on remand from this Court considered and rejected the remaining claims in Stephens' first habeas petition. Over the next six weeks, Stephens' counsel investigated possible claims to raise in a second habeas petition and drafted the appropriate papers. On November 1, 1983, the Superior Court of Bleckley County, Ga., set Stephens' execution date for November 16, 1983. Stephens filed his second state

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that the State of Georgia would plead abuse of the writ pursuant to 28 U. S. C. § 2254 Rule 9(b), Stephens explained that his discrimination claim was "based on factual evidence which Petitioner, as an indigent, did not have the independent means to develop and present." 1 Record 17. Stephens continued:

"In mid-1982, however, statistical evidence became available that demonstrates that racial factors play a real and persistent role in the imposition of capital punishment in the State of Georgia, even when statutory and nonstatutory aggravating and mitigating circumstances are held constant and where only those cases indicted and convicted of murder are considered. A two-week evidentiary hearing to consider this extensive new social scientific evidence began on August 8, 1983 in *McCleskey v. Zant*, [580 F. Supp. 338 (ND Ga.), hearing en banc granted, 729 F. 2d 1293 (CA11 1984)], before Honorable J. Owen Forester. Under these circumstances, Petitioner's assertion of this claim upon this newly available factual basis cannot be deemed an abuse of the writ." *Ibid.*

Stephens requested "a hearing at which proof may be offered concerning the allegations of this petition," *id.*, at 49, indicated that the *McCleskey* record would form the basis of his proffer at such a hearing, and stated that he wished to call as expert witnesses the three statisticians who recently had testified in *McCleskey*, *id.*, at 59-60.

Later on the afternoon of November 14, Stephens' counsel were notified by telephone that the District Court had scheduled an emergency oral argument for the next afternoon. According to an affidavit subsequently filed by one of the attorneys:

"[We] called Judge Wilbur Owens' law clerk to specifically ask what we needed to prepare for the argument. We indi-

habeas petition on November 7 in the Superior Court of Butts County. One week later, on November 14, those state proceedings were concluded when the Supreme Court of Georgia denied Stephens' application for a certificate of probable cause to appeal the lower state court's denial of his petition. Stephens filed his federal petition later that same afternoon. The Supreme Court of Georgia stayed the execution to permit Stephens to pursue his federal action, and the Superior Court of Bleckley County thereafter reset Stephens' execution for December 14, 1983. This Court issued an indefinite stay only hours before the scheduled execution. See *infra*, at 1049.

cated that on only one days notice it was almost impossible to produce witnesses at that time.

" . . . Judge Owen's [*sic*] law clerk responded that the Judge was interested in hearing argument on whether Mr. Stephens petition was an abuse of the writ. The law clerk further informed us that the Judge did not expect counsel to bring witnesses to Savannah." Affidavit of George B. Daniels, attached to Petition for Rehearing and Suggestion for Rehearing En Banc, Appeal No. 83-8844 (CA11).

The State of Georgia filed its response to Stephens' petition the next morning; as expected, the State alleged that Stephens was abusing the writ. Oral argument commenced at 3:30 that afternoon. The court announced that it had convened the session to hear argument whether "a successor petition should be entertained by this Court" and whether the execution should be stayed to permit further proceedings. 2 Record 3, 76.

Stephens' counsel described the nature and findings of the statistical studies that recently had been found sufficient to trigger an evidentiary hearing in *McCleskey*, and indicated that those studies would form the proffer if a hearing were granted in the instant case.² The court responded that "I am familiar with the circumstances" of the studies and that "[t]his has been discussed in other cases with me." *Id.*, at 33. When the court expressed skepticism that the studies could be characterized as "new" evidence,³ Stephens' counsel emphasized that the studies had become available only after Stephens' first habeas petition had been dismissed, that as an indigent Stephens could not have afforded the prohibitive cost of underwriting independent studies, and that because the studies could not reasonably have been produced in previous proceedings, they were properly characterized as "new" evidence within the meaning of Habeas Corpus Rule 9(b). *Id.*, at 31-32. When the court asked for more specific details concerning

² Counsel stated, for example, that "[t]he evidence is that there is a greater willingness by prosecutors to permit white defendants to plead to voluntary manslaughter in black victim cases; that there is a greater likelihood of a black receiving a conviction for murder in white victim cases; and, a sharply higher death sentencing rate for white victim cases among cases advancing to the penalty phase." 2 Record 41.

³ See, e. g., *id.*, at 31-32: "Are you telling me that nobody could have dug up that same evidence before? . . . [W]hat prevented them from doing it, is my question? Nothing, isn't that the truth?"

the studies, counsel responded that the methodology was "fairly complicated" and suggested that, if the court wished to review the data, counsel not later than the next morning could deliver the several file drawers of evidence adduced at the *McCleskey* hearing. *Id.*, at 42.

Much of the remaining argument was devoted to a discussion whether the court should hold an evidentiary hearing to probe the issues in further detail. In response to the court's question, "What kind of evidentiary hearing am I going to hold?", *id.*, at 68-69, Stephens' counsel reviewed the evidence they proposed to introduce and emphasized that "we are prepared to proceed immediately, just as soon as the Court will give us a hearing, with the trial to put on our evidence and to hold an evidentiary hearing." *Id.*, at 75.

In postargument motions filed shortly after the argument, Stephens again reviewed the evidence he proposed to introduce at an evidentiary hearing,⁴ moved for a reference of the discrimination issue to a magistrate,⁵ and called to the court's attention two recent cases in which the Eleventh Circuit had remanded habeas petitions for evidentiary hearings on the *identical* statistical evidence.⁶

On November 21, the District Court summarily dismissed Stephens' petition as an abuse of the writ and denied his applications for a stay of execution, for discovery, and for funds to retain experts. 578 F. Supp. 103, 108 (MD Ga. 1983). The court also specifically denied Stephens' requests for an evidentiary hearing. *Ibid.* With respect to the merits of the discrimination claims, the court stated:

⁴ Stephens stated that the *McCleskey* record on this issue "is in excess of 2,000 pages and contains over 150 exhibits, none of which is self-explanatory," and indicated that if the court had any remaining doubts Stephens was "prepared to proffer this record to show the evidence that would be introduced in this case showing discriminatory application of the death penalty." 1 Record 102.

⁵ The motion was made pursuant to 28 U. S. C. § 636 and 28 U. S. C. § 2254 Rule 8(b). Stephens urged that such a reference would permit a thorough evidentiary hearing on the accuracy and materiality of the "voluminous and complex scientific evidence" being proffered "without overburdening this Court." 1 Record 110.

⁶ *Id.*, at 102, citing *Ross v. Hopper*, 716 F. 2d 1528 (CA11 1983), rehearing en banc granted, 729 F. 2d 1293 (1984); and *Spencer v. Zant*, 715 F. 2d 1562 (CA11 1983), reconsideration en banc stayed, 729 F. 2d 1293 (1984).

"[I]t is the opinion of this trial judge that petitioner's excuse is insufficient to justify a consideration of them in this successive petition. The statistical evidence which petitioner desires to present to support his claims is not 'newly discovered.' Nothing prevented the compilation of this information prior to this late date. Accordingly, petitioner having no valid excuse for failing to raise these claims in his prior habeas petition, these claims constitute an abuse of the writ and must be DISMISSED." *Id.*, at 107.

The court endeavored in a footnote to distinguish Stephens' case from other Eleventh Circuit cases holding that the identical statistical surveys *are* newly discovered evidence and sufficient to trigger a right to an evidentiary hearing:

"Had petitioner raised these challenges to Georgia's capital sentencing statute in his prior habeas petition, this court would not have hesitated to hold an evidentiary hearing to ascertain the relevant *facts* upon which he relies in support of his claims.

"The court notes however that even if it were proper to consider the merits of petitioner's claims in this successive petition, at the November 16 [*sic*], 1983 hearing he was unable to present any *facts* in support of his claim. He chose instead to rely upon bare conclusions." *Id.*, at 107, n. 2 (emphasis in original).

Stephens filed emergency applications for a certificate of probable cause and for a stay of execution with the Eleventh Circuit. A panel of that court heard oral argument on December 7 and, on December 9, denied both of Stephens' applications. 721 F. 2d 1300 (1983). The panel did not address the District Court's conclusion that the statistical evidence was not newly discovered within the meaning of § 2254. Rather, it seized upon note 2 of the District Court's opinion to conclude that Stephens in fact had received the required evidentiary hearing and had failed to make a proper "proffer" of the statistical evidence.⁷

⁷The panel noted that Stephens' discrimination claim "relies on this court's recent decision in *Spencer v. Zant* In claiming that Georgia's death penalty statute is administered in an arbitrary and discriminatory manner in violation of his eighth and fourteenth amendment

Stephens filed a petition for rehearing and a suggestion for rehearing en banc on December 10, which was denied on December 13 in a 6-6 vote. 722 F. 2d 627 (1983). Five of the dissenting judges argued that (1) the statistical data were "newly discovered" within the meaning of § 2254; (2) Stephens had made an adequate proffer for purposes of the November 15 oral argument; and (3) the November 15 oral argument had not been an "evidentiary hearing." *Id.*, at 628-629. Judge Kravitch, who had joined in the earlier panel decision, now filed a separate dissenting opinion emphasizing that there was "a serious question concerning petitioner's opportunity to proffer evidence at the district court hearing, a factor crucial to the panel's holding." *Id.*, at 629.

Stephens filed an emergency application for a stay of execution with JUSTICE POWELL, which was referred by him to the entire Court and granted late in the evening of December 13. The Court issued an order staying Stephens' execution "pending the decision of the United States Court of Appeals for the Eleventh Circuit in *Spencer v. Zant*, [715 F. 2d 1562 (1983), reconsideration en banc stayed, 729 F. 2d 1293 (1984)], or until further order of this Court." 464 U. S. 1027, 1028 (1983). The Court subsequently denied the State's motion to vacate the stay of execution. 465 U. S. 1016 (1984). Today the Court reverses itself and decides, without explanation, that Stephens can be put to death notwithstanding the continued pendency of *Spencer* and the other cases consolidated for resolution by the Eleventh Circuit.

II

We need not decide whether Stephens' proffered statistical evidence is sound or whether, if sound, it sufficiently demonstrates

rights, petitioner must prove "some specific act or acts evidencing intentional or purposeful . . . discrimination against [the petitioner]" on the basis of race, sex or wealth.' . . . Petitioner alleges that a 1980 study by a Dr. David Baldus supports his claim. This is a similar contention to that made in *Spencer*. Here, however, the similarity ends. In *Spencer*, which involved a first petition for habeas corpus, the so-called Baldus study was proffered as evidence at the district court hearing. A panel of this court held that the evidence as proffered was material and should have been received. In the present case the issue arose at a hearing concerning abuse of the writ but no such proffer was made by petitioner. Indeed, no evidence of any kind was proffered that would either establish petitioner's claim or demonstrate that the claim was supported by intervening facts." 721 F. 2d, at 1303.

an invidious application of Georgia's capital sentencing scheme.⁸ At the time Stephens filed his second petition the law in the Eleventh Circuit was that the *identical* evidence was sufficient to trigger an evidentiary hearing, and the Eleventh Circuit en banc has now consolidated three cases to resolve issues concerning the accuracy and materiality of this evidence.⁹ The principled approach would be to stay Stephens' execution pending the outcome of these consolidated cases; that is what the Court initially ordered last December. 464 U. S. 1027 (1983). Today the Court has abandoned this course, apparently on the strength of two inexplicable findings by the courts below: (a) that Stephens' proffered evidence is not "newly discovered"; and (b) that Stephens in fact has already received the "evidentiary hearing" that he has requested.

A

The only ground raised by Georgia in its abuse-of-the-writ allegation concerning Stephens' discrimination claim is that Stephens unreasonably failed to assert this claim in his prior habeas petition, in violation of Habeas Corpus Rule 9(b). Congress has

⁸The Fourteenth Amendment condemns the racially discriminatory application of legislation that is neutral on its face. See, e. g., *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). Circumstantial or statistical evidence may sometimes demonstrate such "stark" racially disproportionate impact as to leave no room for any conclusion but that the legislation is being administered in an intentionally discriminatory manner. See, e. g., *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Members of this Court recurrently have noted that statistical evidence of disproportionate capital sentencing might demonstrate the constitutional infirmity of an otherwise neutral sentencing scheme. See, e. g., *Furman v. Georgia*, 408 U. S. 238, 389-390, n. 12 (1972) (BURGER, C. J., dissenting) ("While no statistical survey could be expected to bring forth absolute and irrefutable proof of a discriminatory pattern of imposition, a strong showing would have to be made, taking all relevant factors into account"); *id.*, at 449 (POWELL, J., dissenting) ("If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established").

⁹See, e. g., *Ross v. Hopper*, 716 F. 2d 1528 (CA11 1983), rehearing en banc granted, 729 F. 2d 1293 (1984); *Spencer v. Zant*, 715 F. 2d 1562 (CA11 1983), reconsideration en banc stayed, 729 F. 2d 1293 (1984); *McCleskey v. Zant*, 580 F. Supp. 338 (ND Ga.), hearing en banc granted, 729 F. 2d 1293 (CA11 1984). *Spencer* was argued en banc on January 17, 1984; *Ross* and *McCleskey* were argued en banc on June 12, 1984; and all three cases are pending decision by the Eleventh Circuit.

instructed the courts that a "petitioner's failure to assert a ground in a prior petition is excusable," and thus not an abuse of the writ, if the ground rests on "newly discovered evidence." Advisory Committee's Note to Habeas Corpus Rule 9, 28 U. S. C., p. 358. "Newly discovered evidence" has a well-settled meaning: it is "evidence which could not reasonably have been presented" by the petitioner in the earlier proceeding. *Townsend v. Sain*, 372 U. S. 293, 317 (1963).¹⁰

To reject Stephens' statistical evidence on the ground that "[n]othing prevented the compilation of this information prior to this late date," 578 F. Supp., at 107, would eviscerate Congress' instruction that newly discovered evidence be given fair consideration. For "newly discovered evidence" by definition always existed at an earlier time; the inquiry, rather, is whether the petitioner *reasonably* either did not know about it or could not have presented it at an earlier proceeding (as would be the case, for example, with the discovery of a hidden gun or a fugitive eyewitness). *Townsend v. Sain*, *supra*.

There is no question in the instant case that the pertinent statistical studies did not become available until long after Stephens filed his first habeas petition in February 1979. Indeed, work on these studies had barely commenced at that time. See also *Spencer v. Zant*, 715 F. 2d, at 1582 (noting that as late as May 1982 these studies were available only through oral testimony). As the Eleventh Circuit en banc dissenters noted, at the time of Stephens' first habeas petition the then extant social science evidence had been held inadequate as a matter of law to raise a colorable claim of discrimination in Georgia's capital sentencing system. 722 F. 2d, at 628, citing *Spinkellink v. Wainwright*, 578 F. 2d 582 (CA5 1978), cert. denied, 440 U. S. 976 (1979); and *Smith v. Balkcom*, 660 F. 2d 573 (CA5 1981), modified, 671 F. 2d 858, mandate recalled, 677 F. 2d 20, cert. denied, 459 U. S. 882 (1982). And no fair-minded person could suggest that indigent, uneducated, incarcerated petitioners like Stephens should be charged with inexcusable neglect for having failed themselves to

¹⁰ The "newly discovered evidence" standard was articulated in *Townsend v. Sain*, a case addressing first federal habeas petitions. The test is the same for successor petitions. See, e. g., *Sanders v. United States*, 373 U. S. 1, 18 (1963) (standards concerning foreclosure from federal collateral review "govern equally" in the context of a successor writ).

perform or to underwrite sophisticated statistical sampling surveys and complex regression analyses of racial bias.

Moreover, courts within the Eleventh Circuit have repeatedly held that the identical studies offered by Stephens are newly discovered evidence within the context of a first habeas petition and, therefore, that "cause" existed for failing to introduce them at trial. See n. 9, *supra*. The test for "newly discovered evidence" is the same whether the evidence is presented in a first habeas petition or in a successor petition. See n. 10, *supra*. Even if some Members of this Court for some reason disagreed with the Eleventh Circuit's determination that these studies represent "new" evidence, the proper course would be to resolve the issue on review of the Eleventh Circuit consolidated cases. It would be enough for present purposes to conclude that evidence characterized by the Eleventh Circuit as "new" for purposes of a first habeas petition must also be characterized as "new" for purposes of a second.

B

It is settled law that, once the State pleads abuse of the writ, the petitioner is entitled to an opportunity to rebut the allegation. *Sanders v. United States*, 373 U. S. 1, 20-21 (1963); *Price v. Johnston*, 334 U. S. 266, 292 (1948). "If the answer is inadequate, the court may dismiss the petition without further proceedings." *Ibid*. But unless it is "'conclusively show[n]" that the response is without merit, the petitioner must receive an *evidentiary* hearing on the abuse-of-the-writ issue. *Sanders v. United States*, *supra*, at 20, citing *Machibroda v. United States*, 368 U. S. 487, 495-496 (1962) (where petitioner makes "specific and detailed factual assertions," evidentiary hearing must be scheduled); see also *Price v. Johnston*, *supra*; 28 U. S. C. § 2254 Rule 8.

To be sure, courts may employ means short of a full-blown evidentiary hearing to determine whether such a hearing is required. For example, a court may call upon the petitioner to explain in writing why his successor petition is excusable. Congress has approved just such a form notice, appended to Habeas Corpus Rule 9, which admonishes the petitioner to include all the factual allegations necessary to support the response. Similarly, the Rules encourage courts to hold oral arguments and "prehearing conferences" when there is doubt concerning the necessity of an evidentiary hearing. Such arguments "'may limit the questions to be resolved, identify areas of agreement and dispute, and

explore evidentiary problems that may be expected to arise. . . . [S]uch conferences may also disclose that a hearing is unnecessary.'" Advisory Committee's Note to Habeas Corpus Rule 8, 28 U. S. C., p. 356 (citation omitted). This practice is common and uncontroversial. But whether the petitioner's response is elicited in writing or through oral argument, the governing standard is clear: if the response pleads facts that, if true, would entitle the petitioner to relief, an evidentiary hearing must be held to determine those facts. *Sanders v. United States*, *supra*, at 21-22.¹¹

In the instant case, the District Court held an oral argument the day after Stephens filed his habeas petition and the afternoon after the State had pleaded abuse of the writ. As discussed in Part I, *supra*, the purpose of this argument was to clarify whether (1) Stephens' execution should be stayed, and (2) whether and to what extent an evidentiary hearing was necessary to resolve the underlying merits of Stephens' petition and the State's allegation of abuse. For purposes of the oral argument, the discussion by Stephens' counsel of the discrimination claim was more than adequate to contest the State's allegation of abuse and to require an evidentiary hearing on the matter. Counsel explained the studies' findings and how they related to the constitutionality of the impending execution; noted that other courts had held that the studies required an evidentiary hearing; emphasized that the studies had not been available when Stephens filed his first habeas petition, and therefore constituted "newly discovered evidence"; and stressed that Stephens was prepared to proceed with an evidentiary hearing on the issue at the court's earliest convenience.¹²

¹¹ A court may of course also require the petitioner to submit the evidence he relies upon, so that the court may review that evidence to ensure that it fairly supports the petitioner's factual allegations and is sufficient to require an evidentiary hearing. This too is a common practice. Of course, the court must actually inform the petitioner that he must tender his evidence and must give him a reasonable opportunity to do so. If the petitioner after such reasonable opportunity has neither submitted his evidence nor offered a reasonable explanation for failing to do so, the court may dismiss the petition. See, e. g., *Smith v. Balkcom*, 660 F. 2d 573, 575, n. 2, 585, n. 33 (CA5 1981), modified, 671 F. 2d 858, mandate recalled, 677 F. 2d 20, cert. denied, 459 U. S. 882 (1982).

¹² The Eleventh Circuit en banc dissenters emphasized that this was a sufficient proffer for purposes of the oral argument:

"Counsel for Stephens proffered evidence based on newly available studies, (referring by name to the Baldus Study relied on in *Spencer*), summarized

The court responded that it was fully "familiar with the circumstances" of the studies. 2 Record 33.

Incredibly, the District Court and the Eleventh Circuit both appear to have concluded that this oral argument, unbeknownst to Stephens or his counsel, in fact constituted the "evidentiary hearing" Stephens and his counsel were seeking to obtain, and that counsel's failure physically to present the several file drawers of statistical data or the testimony of Stephens' three designated witnesses at that time waived any right to further consideration of the issue.¹³ With all respect, I submit this is a shockingly unprincipled basis on which to send Stephens to the electric chair. Counsel have sworn that they were instructed by Judge Owens' law clerk *not* to bring witnesses to the oral argument, and there is nothing in this record to suggest to the contrary. Indeed, the entire tenor of the November 15 session demonstrates that it was the sort of nonevidentiary oral argument held hundreds of times every day in federal courthouses across the country. Five of the Eleventh Circuit en banc dissenters had no difficulty in concluding that "[t]he hearing held by the district court on November 15, 1983, was not an evidentiary hearing," 722 F. 2d, at 628, n. 3, and repeatedly so emphasized, see also *id.*, at 628, n. 1. Judge Kravitch, who initially had joined the panel judgment, stressed in a separate dissent that, at the very least, there was "a serious question concerning petitioner's opportunity to proffer evidence at the district court hearing." *Id.*, at 629.

If counsel were expected physically to proffer the evidence they had described in the petition and to appear in court with Stephens' designated expert witnesses, they should have been so informed. They were not. Stephens' petition for certiorari therefore raises

briefly the conclusions of the studies indicating a racially disproportionate imposition of the death penalty in Georgia, and when pressed for specifics stated that there would be presented the same evidence presented in the August, 1983 case of *McCleskey v. Zant*, . . . and that the evidence would be presented tomorrow if the court pleased." 722 F. 2d, at 628, n. 1.

¹³ The Eleventh Circuit clearly construed the November 15 argument as having been an evidentiary hearing, see *supra*, at 1048, and n. 7, as does the State, see Brief in Opposition ii, 8, 9, n. 2, 12, 14-16, 18. If the District Court meant in the cryptic second footnote of its opinion to suggest instead that Stephens had failed to allege sufficient facts to require any further inquiry at all, that conclusion was clearly erroneous for the reasons discussed in the immediately preceding paragraph in text.

substantial questions implicating what I had thought until today were settled and fundamental principles under the Fifth Amendment, the habeas statutes, and the Habeas Corpus Rules.

First. Until today there was "no doubt" that the Due Process Clause requires at a minimum that adjudications affecting an individual's life, liberty, or property be preceded by (1) notice "reasonably calculated, under all the circumstances," to inform the aggrieved party of the pendency and nature of the proceedings against him; and (2) a meaningful hearing "'appropriate to the nature of the case.'" *Armstrong v. Manzo*, 380 U. S. 545, 550 (1965), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). "Due process of law . . . does not allow a hearing to be held . . . without giving [petitioners] timely notice, in advance of the hearing, of the specific issues that they must meet." *In re Gault*, 387 U. S. 1, 33-34 (1967). Particularly where a human life hangs in the balance, I had thought this principle axiomatically required fair notice of the nature of the hearing and whether evidence must be tendered at that time.

Second. The habeas statutes themselves require federal courts to follow minimum procedural safeguards in resolving petitioners' claims. To be sure, courts may "summarily hear and determine the facts," 28 U. S. C. § 2243, and habeas petitioners should therefore expect expedited processing of their claims. But Congress has instructed us to ensure that such expedited resolution be accomplished "as law and justice require." *Ibid.* Accordingly, the procedures surrounding an evidentiary hearing must "allow development, for purposes of the hearing, of the facts relevant to disposition of a habeas corpus petition," and habeas petitioners must receive a "full opportunity for presentation of the relevant facts." *Harris v. Nelson*, 394 U. S. 286, 298 (1969) (emphasis added). At Congress' direction, "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Id.*, at 300. The ultimate question must always be whether the hearing accorded a defendant was in fact a "fair and meaningful evidentiary hearing." *Ibid.* (emphasis added).

This Court is not unfamiliar with the inherent tensions between expedited resolution of habeas petitions in capital cases and the need for fundamentally fair procedures. Just two Terms ago, for example, the Court decided in *Barefoot v. Estelle*, 463 U. S. 880, 894 (1983), that a court of appeals may expedite briefing and hearing on the merits of a capital case where the petitioner has

requested a stay of execution for consideration of his claims. The Court emphasized, however, that such expedited scheduling is permissible *only* "provided that counsel has adequate opportunity to address the merits *and knows that he is expected to do so.*" *Ibid.* (emphasis added). In the absence of such "appropriate notice," a court may not proceed to deny the stay. *Ibid.*

I would have thought that a similar conclusion must surely follow here. Where a habeas petitioner has designated with precision the documentary evidence and witnesses he would produce at an evidentiary hearing, the court may be entitled to schedule an expedited evidentiary hearing.¹⁴ But counsel must be given notice that he is expected to produce the exhibits and the witnesses at the hearing. Where counsel reasonably believes that the scheduled session will consist merely of oral argument on the facial merits of the petition—the sort of preliminary argument that frequently is held in this sort of situation, see *supra*, at 1052–1053—and has received no notice suggesting to the contrary, the oral argument cannot later be characterized as an "evidentiary hearing" at which the petitioner unknowingly had and lost his only chance to avoid execution. I would have thought this principle applied with even greater force where, as here, there is uncontradicted record evidence that counsel in fact were affirmatively advised *not* to bring their witnesses to the argument.

Third. The Court's action also flies in the face of the Habeas Corpus Rules approved by Congress. Rule 8(c), for example, provides that an evidentiary hearing "shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation." The Advisory Committee's Note to Rule 8 stresses that courts are

¹⁴To comply with Habeas Corpus Rule 8, however, such expediting is permissible only if the petitioner's counsel has had "adequate time for investigation and preparation." In scheduling the evidentiary hearing, the court must "take account of the complexity of the case, the availability of important materials, the workload of the attorney general, and the time required by appointed counsel to prepare." Advisory Committee's Note to Habeas Corpus Rule 8, 28 U. S. C., p. 356. See also *Barefoot v. Estelle*, 463 U. S. 880, 915 (1983) (MARSHALL, J., dissenting) ("In view of the irreversible nature of the death penalty and the extraordinary number of death sentences that have been found to suffer from some constitutional infirmity, it would be grossly improper for a court . . . to establish special summary procedures for capital cases").

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to follow those procedures necessary to ensure that counsel can "prepare *adequately* for an evidentiary hearing." 28 U. S. C., p. 356 (emphasis added). I would have thought it elementary that a necessary component of such procedures is adequate notice that counsel will be expected to produce the documentary evidence and witness testimony on which the petition rests.

Similarly, Habeas Corpus Rule 11 commands the federal courts to apply the Federal Rules of Civil Procedure "to the extent that they are not inconsistent with these rules." The notion of fair and adequate notice permeates the Civil Rules. Rule 12(c), for example, provides that if a court considers matters outside the pleadings in determining whether to enter judgment, the motion shall be considered as one for summary judgment "and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion." Similarly, Rule 56 has consistently been interpreted to require both (1) "fair notice" to the nonmovant that he is expected to present controverting evidence, so as to avoid "unfair surprise" in the summary resolution of the dispute; and (2) a "reasonable opportunity" to present such evidence. *Macklin v. Butler*, 553 F. 2d 525, 528-529 (CA7 1977); see also *Plante v. Shivar*, 540 F. 2d 1233, 1234-1235 (CA4 1976) (*per curiam*); *Dale v. Hahn*, 440 F. 2d 633, 638 (CA2 1971). Notwithstanding the expedited scheduling of habeas petitions in capital cases, these requirements are not "inconsistent" with the Habeas Rules. Indeed, they are a basic prerequisite to ensuring that the habeas remedy is administered "as law and justice require." 28 U. S. C. § 2243.

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 certiorari and vacate the death sentence in this case. But even if I believed otherwise, I would at the very least continue the stay of execution pending the Eleventh Circuit's en banc resolution of the underlying discrimination issue.

Stephens' petition presents questions that cut to the very heart of the Court's professed desire to ensure the fair administration of § 2254, particularly where the petitioner has been condemned to death. One need not reach the underlying merits of Stephens' discrimination claim to conclude that, on the basis of the record

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before us, there is at the very least a substantial question whether his fate should be governed by the outcome of the consolidated cases that are now pending before the Eleventh Circuit en banc—cases that present the *identical* issues and turn on the *identical* evidence. Instead, Stephens will go to the electric chair on the strength of a finding that the evidentiary hearing he so fervently has sought has, in fact, already been held. This resolution does not comport with the administration of the Great Writ “as law and justice require.” 28 U. S. C. § 2243. Rather, it is at best an example of result-orientation carried to its most cynical extreme.

I dissent from the Court’s denial of certiorari and its vacation of the stay of execution.

JUSTICE STEVENS, dissenting.

In my opinion the Court should not act on the petition for writ of certiorari, and should not vacate its stay, until after the Court of Appeals for the Eleventh Circuit has decided the consolidated cases of *Ross v. Hopper*, 716 F. 2d 1528 (1983), rehearing en banc granted, 729 F. 2d 1293 (1984), *Spencer v. Zant*, 715 F. 2d 1562 (1983), reconsideration en banc stayed, 729 F. 2d 1293 (1984), and *McCleskey v. Zant*, 580 F. Supp. 338 (ND Ga.), hearing en banc granted, 729 F. 2d 1293 (1984).

No. 83–6866. *MEANS v. UNITED STATES*. C. A. 6th Cir.; and

No. 84–605. *ROTH v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: No. 83–6866, 729 F. 2d 1462; No. 84–605, 736 F. 2d 1222.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

These cases raise three recurring issues regarding the administration of the co-conspirator exception to the hearsay rule.¹ Federal Rule of Evidence 801(d)(2)(E) provides that “a statement by a coconspirator of a party during the course and in furtherance of

¹The petitions do not raise a fourth issue that has split the Courts of Appeals, viz., whether a co-conspirator’s statement that is admissible under the Federal Rules automatically satisfies the requirements of the Confrontation Clause of the Constitution. See *Sanson v. United States*, 467 U. S. 1264, 1265 (1984) (WHITE, J., dissenting from denial of certiorari); see generally *United States v. Ammar*, 714 F. 2d 238, 254–257 (CA3), cert. denied *sub nom. Stillman v. United States*, 464 U. S. 936 (1983).

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the conspiracy," when offered against that party, is not hearsay. The Rule has given rise to confusion among the lower courts with regard to when, by what standard of proof, and in light of what evidence the trial court should determine whether the necessary conspiracy existed.

In No. 83-6866, a critical prosecution witness testified to incriminating statements made to him by petitioner's co-conspirator. The Sixth Circuit held that these statements were properly introduced pursuant to Rule 801(d)(2)(E). 729 F. 2d 1462 (1984). It concluded that the independent evidence, "when viewed in conjunction with the [hearsay] statements made by Blotske concerning [petitioner's] participation," established the existence of a conspiracy by a preponderance of the evidence. Pet. for Cert. 9. Thus, the Court of Appeals relied on the challenged statements to support the existence of the conspiracy pursuant to which those statements were introduced.

This approach was first adopted by the Sixth Circuit in *United States v. Vinson*, 606 F. 2d 149, 153 (1979), cert. denied, 444 U. S. 1074 and *sub nom. Thompson v. United States*, 445 U. S. 904 (1980), and has been approved en banc, *United States v. Piccolo*, 723 F. 2d 1234, 1240, and n. 1 (1983) (en banc), cert. denied, 466 U. S. 970 (1984). Though not entirely without support,² it is inconsistent with the stated position of every other Federal Court of Appeals. See *United States v. Jackson*, 201 U. S. App. D. C. 212, 228-229, 627 F. 2d 1198, 1214-1215 (1980); *United States v. Nardi*, 633 F. 2d 972, 974 (CA1 1980); *United States v. Alvarez-Porras*, 643 F. 2d 54, 56-57 (CA2), cert. denied *sub nom. Garcia-Perez v. United States*, 454 U. S. 839 (1981); *Government of the Virgin Islands v. Dowling*, 633 F. 2d 660, 665 (CA3), cert. denied, 449 U. S. 960 (1980); *United States v. Gresko*, 632 F. 2d 1128, 1131-1132 (CA4 1980); *United States v. James*, 590 F. 2d 575, 580-581 (CA5) (en banc), cert. denied, 442 U. S. 917 (1979); *United States v. Regilio*, 669 F. 2d 1169, 1174 (CA7 1981), cert. denied, 457 U. S. 1133 (1982); *United States v. Bell*, 573 F. 2d 1040, 1043-1044 (CA8 1978); *United States v. Miranda-Uriarte*, 649 F. 2d 1345, 1349 (CA9 1981); *United States v. Andrews*, 585

²See *United States v. Martorano*, 561 F. 2d 406, 408 (CA1 1977), cert. denied, 435 U. S. 922 (1978); *United States v. Cryan*, 490 F. Supp. 1234, 1241 (NJ), aff'd, 636 F. 2d 1211 (CA3 1980); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 104[05], p. 104-44 (1982).

F. 2d 961, 964-967 (CA10 1978); *United States v. Monaco*, 702 F. 2d 860, 876-880 (CA11 1983). I have noted this conflict before, see *Arnott v. United States*, 464 U. S. 948 (1983) (WHITE, J., dissenting from denial of certiorari), and remain convinced that this Court should resolve it.

Whether the Eighth Circuit belongs in the above list is in some doubt in light of the second of these petitions. The petitioner in No. 84-605 was convicted of extortion. The critical evidence was testimony by the victim about threatening phone calls he received from petitioner's co-conspirator. The District Court first admitted the statements conditionally, then, after the close of evidence, ruled that they were admissible. The Court of Appeals found that the statements were properly admitted. 736 F. 2d 1222 (1984). The court stated that the existence of a conspiracy must be established by independent evidence. Yet it relied on one of the threatening phone calls, this one from an uncertain source, to establish the date that the conspiracy had begun. *Id.*, at 1229. Petitioner argues, with some force, that this use of the hearsay statement is inconsistent with the prevailing requirement of independent evidence.

The petitioner also raises two other issues as to which there is some division among the lower courts. First, he objects to the timing of the ruling on admissibility, arguing that admissibility should be established at a pretrial hearing rather than at the close of evidence. Second, he notes the existence of a conflict as to the standard of proof by which the conspiracy must be established. The majority position requires a preponderance of the evidence. See *United States v. Ammar*, 714 F. 2d 238, 249-251 (CA3), cert. denied *sub nom. Stillman v. United States*, 464 U. S. 936 (1983); *United States v. Petersen*, 611 F. 2d 1313, 1327 (CA10 1979), cert. denied, 447 U. S. 905 (1980); *United States v. Jefferson*, 714 F. 2d 689, 696 (CA7 1983); *United States v. Bell*, *supra*, at 1044; *United States v. Arnott*, 704 F. 2d 322, 325 (CA6 1982), cert. denied, 464 U. S. 948 (1983). Other courts require only substantial evidence, *United States v. Jackson*, *supra*, at 233-234, 627 F. 2d, at 1219-1220; *United States v. James*, *supra*, at 580-581; *United States v. Monaco*, *supra*, at 876-880; or a prima facie case, *United States v. Dixon*, 562 F. 2d 1138, 1141 (CA9 1977), cert. denied, 435 U. S. 927 (1978); *United States v. Metz*, 608 F. 2d 147, 153-154 (CA5 1979), cert. denied, 449 U. S. 821 (1980).

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The timing issue does not merit our review.³ The question of the standard of proof does, but neither of these cases would be an appropriate vehicle as in each the Court of Appeals applied the most stringent alternative.⁴ These cases are nonetheless reminders of the continuing confusion about the administration of the co-conspirator exception—a confusion that, I think, we will eventually have to settle.

The critical question is whether a court may rely on challenged hearsay statements to determine whether the factual predicate for their admission exists. This Court has consistently denied certiorari in cases from the Sixth Circuit raising this issue. *Vinson v. United States*, 444 U. S. 1074 (1980); *Arnott v. United States*, *supra*; *Shoun v. United States*, 465 U. S. 1012 (1984); *Piccolo v. United States*, 466 U. S. 970 (1984). The conflict shows no sign of disappearing, and I remain convinced that this Court should resolve it.

I dissent from the Court's denial of certiorari in these two cases.

No. 84-328. COOPER ET AL. *v.* UNITED STATES;

No. 84-5163. MCCULLOCH *v.* UNITED STATES;

No. 84-5219. MCKINNEY *v.* UNITED STATES; and

No. 84-5319. LOCKAMY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 733 F. 2d 1503.

No. 84-470. WEYERHAEUSER CO. *v.* WESTERN SEAS SHIPPING CO. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 743 F. 2d 635.

No. 84-390. WOLK *v.* SUPREME COURT OF NEW JERSEY. Sup. Ct. N. J. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Motion of petitioner for reinstatement to the Bar of this Court denied. Certiorari denied.

³Though some courts have indicated a preference for pretrial hearings, see, e. g., *United States v. James*, 590 F. 2d 575, 581-582 (CA5) (en banc), cert. denied, 442 U. S. 917 (1979), none has required them. There is general agreement that the district court has the discretion to admit co-conspirator's statements conditionally prior to proof of the existence of a conspiracy. See Annot., 44 A. L. R. Fed. 627, § 7 (1979).

⁴But see Weinstein & Berger, *supra*, at 104-44 (suggesting standard of proof beyond a reasonable doubt, or by clear and convincing evidence, on the basis of both hearsay and nonhearsay).

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No. 84-427. *MOORE v. SHULTZ, SECRETARY OF STATE, ET AL.* C. A. D. C. Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 84-453. *CALIFORNIA v. MCCOVEY ET AL.* Sup. Ct. Cal. Motion of respondent Walter J. McCovey, Jr., for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 36 Cal. 3d 517, 685 P. 2d 687.

No. 84-466. *OHIO v. BURKHOLDER.* Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 12 Ohio St. 3d 205, 466 N. E. 2d 176.

No. 84-491. *CHEVRON CHEMICAL CO. v. FEREBEE 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: 237 U. S. App. D. C. 164, 736 F. 2d 1529.

No. 84-503. *ADAMS ET AL. v. UNION CARBIDE CORP.* C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 737 F. 2d 1453.

No. 84-5134. *SERITT v. ALABAMA.* C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 731 F. 2d 728.

No. 84-5389. *JACOBS v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS.* Sup. Ct. Fla. Certiorari denied. Reported below: 450 So. 2d 200.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This Court has unequivocally stated that a sentencer in a capital case must be permitted to consider, as evidence of mitigation, any aspect of a defendant's character or record, and any circumstances of the offense, that the defendant offers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U. S. 586, 604 (1978). The issue squarely presented is whether, when a trial judge has prevented the jury from hearing indisputably relevant mitigating evidence, that error creates such an unacceptable risk that the death penalty was inappropriately imposed as to require a reviewing

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court to remand for resentencing, even if the error was not properly preserved in the trial court. To hold that the fundamental error may be ignored is to penalize a defendant, possibly with his life, for the shortcomings of his attorney. I do not believe such a result comports with the most elemental principles underlying the Eighth and Fourteenth Amendments. I therefore dissent.

I

The relevant facts of this case are quite straightforward. The defendant took the stand at the sentencing phase of his trial and testified about certain statutory mitigating factors. Trial counsel then asked: "Do you know anything else that you wish to tell this jury in mitigation of this offense of which you have been convicted?" The prosecutor objected to this question, arguing that it was too broad because "it must follow the statute." Trial counsel tried to phrase the question differently, and again the objection was sustained. The trial court accepted the prosecution argument that the Florida death penalty statute permitted only evidence of statutory mitigating factors. Since, under this view, *all* evidence of *nonstatutory* mitigating factors was inadmissible, the trial judge did not permit the defendant to describe to the jury the mitigating circumstances of his background, and of the offense.

There is no dispute that the trial judge violated the mandate of *Lockett v. Ohio* when he ruled that evidence of nonstatutory mitigating factors was not admissible. However, defendant's trial counsel, who continued as appellate counsel, did not raise this issue either on direct appeal in the state courts, or in the first petition for certiorari filed with this Court.

Thereafter the defendant obtained new counsel, who filed a petition for habeas corpus in the Florida Supreme Court, which has original jurisdiction to address claims of ineffective assistance of counsel before that court. In a terse paragraph, the court dismissed the argument that appellate counsel was ineffective. The court ruled that appellate counsel could not be considered incompetent for failure to raise the claim on appeal because he was procedurally precluded from raising it. Under Florida law, the court explained, counsel was required to make a proffer of the attempted testimony after the trial judge excluded it. Thus, the court effectively ruled, there could have been no prejudice from the failure to raise the issue on appeal, since the court would not have addressed it anyway. Two justices dissented on the

grounds that the nature of the excluded evidence was apparent, that the court should have addressed the claim, and that appellate counsel was ineffective in his failure to raise the issue. The defendant then filed this petition for certiorari, challenging the State Supreme Court's ruling that the reviewing court would have had no obligation to address the *Lockett* claim on the merits.

II

Because of the basic difference between the death penalty and all other punishments, this Court often has recognized that there is a corresponding difference in the need for reliability in determining whether the death sentence is appropriately imposed in a particular case. Thus, we have recognized that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine," *Jurek v. Texas*, 428 U. S. 262, 276 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), and we have steadfastly insisted that the sentencer in capital cases must be permitted to consider any relevant mitigating factor. *Eddings v. Oklahoma*, 455 U. S. 104, 112 (1982).

The premise of this unfolding doctrine is that a sentence imposed without evidence of facts and circumstances offered in mitigation creates a risk that the death penalty will be imposed in spite of factors that call for a different penalty. As THE CHIEF JUSTICE has written: "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, *supra*, at 605. Yet, when a court closes its eyes to clear *Lockett* error, as the state court did in this case, and instead rests on technical procedural rules, it accepts the risk to which THE CHIEF JUSTICE refers and comes down on the side of death.

Nor does THE CHIEF JUSTICE stand alone in his recognition that a sentencing body's failure to consider all mitigating evidence seriously and unacceptably raises the possibility that a person will die in error. Infusing many opinions from this Court is the sense that *Lockett* is so fundamental, and the result of an improper exclusion of mitigating evidence potentially of such great magnitude, that such errors simply must be corrected. Thus, writing in *Eddings v. Oklahoma*, JUSTICE O'CONNOR observed: "Because the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation

of *Lockett*, it is our duty to remand this case for resentencing." 455 U. S., at 117, n. (concurring opinion). Indeed, in *Eddings* five Members of this Court reversed a death sentence as a consequence of a *Lockett* violation, even though certiorari had been granted on a separate issue, and even though the claim was presented neither to the state court nor to this Court. Similarly, writing in *Strickland v. Washington*, 466 U. S. 668 (1984), JUSTICE BRENNAN echoed this sentiment when he observed that "a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the 'interests of justice' may impose on reviewing courts 'a duty to remand [the] case for resentencing.'" *Id.*, at 705 (concurring in part and dissenting in part). To my mind, the concerns expressed in these opinions all point toward one irrefutable conclusion: that regardless of procedural obstacles, where the trial court's commission of clear *Lockett* error leads to the exclusion of relevant mitigating evidence, the reviewing court must address the issue and remand for resentencing.

The court reviewing the defendant's sentence would have had precisely such a duty to remand this case for resentencing, had counsel either raised the *Lockett* issue before that court, or had the court noted it of its own account. Indeed, the need to consider the claim, and remand, is particularly compelling when the trial court has blocked the defendant's submission of *all* nonstatutory mitigating factors. The State Supreme Court's willingness to blink at such potentially profound and consequential error, as evidenced by its cursory dismissal of the ineffective-assistance claim on the ground that the error would not have been addressed anyway, jeopardizes what I believe to be the foundation on which this Court's current death penalty jurisprudence rests. And, as I have noted, this concern is especially palpable under the facts of this case. The defendant has indicated that if he had been permitted to testify, he would have told the jury that his co-participants were not sentenced to death; that the victim drew a gun on him; and that he came from a background of extreme poverty, had worked steadily since childhood, and had a long history of concern for family and friends. Such testimony is paradigmatic of the evidence whose admission is fostered and protected by *Lockett* and *Eddings*, and yet it was excluded here.

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This case therefore offers a compelling opportunity to consider whether a reviewing court, confronted with the erroneous exclusion of undeniably relevant mitigating evidence, must consider the claim regardless of procedural rules permitting the court to avoid the merits. It offers an opportunity to consider whether the shortcomings of an attorney, appointed to handle a case both at trial and on appeal, will be permitted to take their toll on the life of a defendant. I cannot imagine that the Constitution countenances such an inhumane result. Accordingly, I dissent.

III

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman v. Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). Even if I did not believe that the death penalty is in all cases unconstitutional, however, I would grant certiorari in this case for the reasons set out above.

No. 84-5425. FISHER *v.* ARIZONA. Sup. Ct. Ariz.;

No. 84-5491. MELSON *v.* TENNESSEE. Ct. Crim. App. Tenn.;
and

No. 84-5530. GROSECLOSE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: No. 84-5425, 141 Ariz. 227, 686 P. 2d 750.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 83-1715. GAJEWSKI *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 818;

No. 83-1755. BROTHERHOOD OF TEAMSTERS, LOCAL NO. 70 *v.* CALIFORNIA CONSOLIDATORS, INC., *ante*, p. 887;

No. 83-1832. ALEXANDER *v.* LOS ANGELES COUNTY ET AL., *ante*, p. 822; and

No. 83-1950. MCALLISTER ET AL. *v.* GULF FEDERAL SAVINGS & LOAN ASSN., *ante*, p. 827. Petitions for rehearing denied.

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No. 83-2003. HEMINGWAY, ADMINISTRATRIX OF THE ESTATE OF HEMINGWAY *v.* OCHSNER CLINIC ET AL., *ante*, p. 829;

No. 83-2008. PHINNEY *v.* FIRST AMERICAN NATIONAL BANK, *ante*, p. 829;

No. 83-2019. ZOLLA *v.* UNITED STATES, *ante*, p. 830;

No. 83-2028. BUTLER *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION, *ante*, p. 830;

No. 83-2040. WASHBURN *v.* WASHBURN, *ante*, p. 831;

No. 83-2109. DOMINEY *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY Co., *ante*, p. 834;

No. 83-2164. ANGLETON ET AL. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., *ante*, p. 880;

No. 83-6580. SKILLERN *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 873;

No. 83-6670. ROY ET AL. *v.* CITY OF MIDDLETOWN, *ante*, p. 804;

No. 83-6778. THOMAS *v.* GERBER PRODUCTIONS ET AL., *ante*, p. 841;

No. 83-6811. SILAGY *v.* ILLINOIS, *ante*, p. 873;

No. 83-6827. WESSON *v.* COUGHLIN, *ante*, p. 843;

No. 83-6833. JONES *v.* FRANCIS, WARDEN, *ante*, p. 873;

No. 83-6873. BAIG *v.* UNITED STATES, *ante*, p. 844;

No. 83-6882. ROBERTS *v.* GEORGIA, *ante*, p. 873;

No. 83-6910. FAISON *v.* FLORIDA ET AL., *ante*, p. 845;

No. 83-6939. BROWN *v.* FLURE ET AL., *ante*, p. 846;

No. 83-6947. NOVEL *v.* PICARIELLO ET AL., *ante*, p. 847;

No. 83-7002. POLIN ET UX. *v.* JEWS FOR JESUS ET AL., *ante*, p. 850;

No. 83-7008. PERRY *v.* DISTRICT OF COLUMBIA, *ante*, p. 805;

No. 83-7027. SMITH *v.* CHATTANOOGA-HAMILTON COUNTY HOSPITAL ET AL., *ante*, p. 805;

No. 84-11. STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL., *ante*, p. 852;

No. 84-85. FELKER *v.* GEORGIA, *ante*, p. 873;

No. 84-208. CAITO *v.* INDIANA, *ante*, p. 805;

No. 84-247. CHETISTER *v.* CHETISTER, *ante*, p. 805;

No. 84-5046. INGRAM *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL., *ante*, p. 861;

No. 84-5049. SHAW *v.* MARTIN, WARDEN, *ante*, p. 873; and

No. 84-5062. GUMZ ET AL. *v.* PIONEER NURSING HOME ET AL., *ante*, p. 862. Petitions for rehearing denied.

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No. 84-5080. *McKee v. AMAF INDUSTRIES, INC.*, *ante*, p. 862;

No. 84-5089. *Baig v. UNITED STATES*, *ante*, p. 863;

No. 84-5093. *Walker v. NAVAJO-HOPI INDIAN RELOCATION COMMISSION*, *ante*, p. 918;

No. 84-5095. *Harris v. DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES*, *ante*, p. 863;

No. 84-5217. *Robinson v. THOMPSON, GOVERNOR OF ILLINOIS, ET AL.*, *ante*, p. 876;

No. 84-5284. *Fuentes v. ROSS ET AL.*, *ante*, p. 886;

No. 84-5296. *Cooper v. DAVIS, WARDEN*, *ante*, p. 887;

No. 84-5300. *Royster v. ADAMS ET AL.*, *ante*, p. 919;

No. 84-5382. *IN RE THAPER*, *ante*, p. 878; and

No. 84-5404. *Perry v. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS*, *ante*, p. 920. Petitions for rehearing denied.

No. 83-1916. *Jarboe-Lackey Feedlots, Inc. v. UNITED STATES*, *ante*, p. 825. Motion of petitioner to withdraw the petition for rehearing denied. Petition for rehearing denied.

No. 83-2005. *Zweibon et al. v. Mitchell*, *ante*, p. 880. Petition for rehearing denied. Justice Rehnquist took no part in the consideration or decision of this petition.

No. 84-5287. *David v. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL.*, *ante*, p. 900. Petition for rehearing denied. Justice O'Connor took no part in the consideration or decision of this petition.

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Appeal Dismissed

No. 84-717. *Lussy v. Davidson et al.* Appeal from Sup. Ct. Mont. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — Mont. —, 683 P. 2d 915.

Certiorari Granted—Vacated and Remanded

No. 83-7034. *Vicarone v. Drug Enforcement Administration et al.* C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for reconsideration in light of § 2(c) of

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the Central Intelligence Agency Information Act, Pub. L. 98-477, 98 Stat. 2209, and for such further proceedings as are indicated. See *Shapiro v. Drug Enforcement Administration*, ante, p. 14.

Miscellaneous Orders

No. A-326. *SAWYER v. UNITED STATES*. Application for release pending appeal, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D-463. *IN RE DISBARMENT OF HOPT*. It is ordered that Larry W. Hopt, of Seattle, Wash., 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-464. *IN RE DISBARMENT OF MCDANIEL*. It is ordered that Marlin K. McDaniel, of Richmond, Ind., 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-465. *IN RE DISBARMENT OF PELLE*. It is ordered that Michael A. Pelle, of North Miami Beach, Fla., 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. 83-1545. *WESTERN AIR LINES, INC. v. CRISWELL ET AL.* C. A. 9th Cir. [Certiorari granted, ante, p. 815.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-1748. *ALLIS-CHALMERS CORP. v. LUECK*. Sup. Ct. Wis. [Certiorari granted, ante, p. 815.] Motions of Chamber of Commerce of the United States and American Federation of Labor and Congress of Industrial Organizations for leave to file briefs as *amici curiae* granted.

No. 83-1785. *AIR FRANCE v. SAKS*. C. A. 9th Cir. [Certiorari granted, ante, p. 815.] Motions of International Air Transport Association and the Republic of France for leave to file briefs as *amici curiae* granted.

No. 83-2146. *WILSON ET AL. v. GARCIA*. C. A. 10th Cir. [Certiorari granted, ante, p. 815.] Motion for appointment of

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counsel granted, and it is ordered that Steven G. Farber, Esquire, of Santa Fe, N. M., be appointed to serve as counsel for respondent in this case.

No. 83-2166. *ZAUDERER v. OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO*. Sup. Ct. Ohio. [Probable jurisdiction noted, *ante*, p. 813.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 83-5424. *AKE v. OKLAHOMA*. Ct. Crim. App. Okla. [Certiorari granted, 465 U. S. 1099.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 84-4. *WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. v. HAMILTON BANK OF JOHNSON CITY*. C. A. 6th Cir. [Certiorari granted, *ante*, p. 815.] Motion of National Association of Counties et al. for leave to file a brief as *amici curiae* granted.

No. 84-28. *BROCKETT v. SPOKANE ARCADES, INC., ET AL.*; and

No. 84-143. *EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. v. J-R DISTRIBUTORS, INC., ET AL.* C. A. 9th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motion of Morality in Media, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84-205. *VIRGINIA EX REL. DEPARTMENT OF CONSERVATION AND ECONOMIC DEVELOPMENT ET AL. v. CLARK, SECRETARY OF THE INTERIOR, ET AL.* C. A. 4th Cir. [Certiorari granted, *ante*, p. 979.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 84-480. *P. I. A. ASHEVILLE, INC., ET AL. v. NORTH CAROLINA EX REL. EDMISTEN, ATTORNEY GENERAL*. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84-5350. *MAXWELL v. PENNSYLVANIA*, *ante*, p. 971. Respondent is invited to file a response to the petition for rehearing within 30 days.

No. 84-5564. *DANO v. SZOMBATHY*. Super. Ct. N. J., App. Div.; and

No. 84-5605. *MOHAMED v. UNITED STATES*. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis*

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denied. Petitioners are allowed until December 24, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

Certiorari Granted

No. 83-2032. IMMIGRATION AND NATURALIZATION SERVICE *v.* RIOS-PINEDA ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 720 F. 2d 529.

No. 84-510. ASPEN SKIING CO. *v.* ASPEN HIGHLANDS SKIING CORP. C. A. 10th Cir. Certiorari granted. Reported below: 738 F. 2d 1509.

No. 83-1624. UNITED STATES *v.* ALBERTINI. C. A. 9th Cir. Certiorari granted. In addition to the question presented in the petition, the parties are requested to address the following question: Whether the respondent's attendance at the "open house" at Hickam Air Force Base on May 16, 1981, was the kind of re-entry that Congress intended to prohibit in 18 U. S. C. § 1382? Reported below: 710 F. 2d 1410.

No. 84-433. SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, ET AL. *v.* DEPARTMENT OF EDUCATION OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari granted limited to Questions I and V presented by the petition. Reported below: 736 F. 2d 773.

No. 84-5240. JEAN ET AL. *v.* NELSON, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 11th Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 727 F. 2d 957.

Certiorari Denied. (See also No. 84-717, *supra*.)

No. 83-1836. BURTON *v.* BOARD ON PROFESSIONAL RESPONSIBILITY OF THE DISTRICT OF COLUMBIA COURT OF APPEALS.

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Ct. App. D. C. Certiorari denied. Reported below: 472 A. 2d 831.

No. 83-1986. *HAIMOWITZ v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 1561.

No. 83-2073. *FERGUSON v. WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATION*. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 871.

No. 83-6990. *LAUCHLI v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 1279.

No. 84-223. *TRIPLE "A" MACHINE SHOP, INC. v. SOUTHWEST MARINE, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 744.

No. 84-236. *ALBERICI v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 84-241. *GARVEY v. PENNSYLVANIA*. Super. Ct. Pa. Certiorari denied. Reported below: 323 Pa. Super. 577, 470 A. 2d 1018.

No. 84-324. *GAMBLE v. VAN DER EYKEN*. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-332. *AGENCY HOLDING CORP. ET AL. v. MALLEY-DUFF & ASSOCIATES, INC.; and*

No. 84-340. *CROWN LIFE INSURANCE CO. ET AL. v. MALLEY-DUFF & ASSOCIATES, INC., ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 133.

No. 84-338. *A & P STEEL, INC. v. ROSEBUD SIOUX TRIBE*. C. A. 8th Cir. Certiorari denied. Reported below: 733 F. 2d 509.

No. 84-352. *CODY ET AL. v. DONOVAN, SECRETARY OF LABOR, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 744 F. 2d 270.

No. 84-358. *LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSN. v. NATIONAL LABOR RELATIONS BOARD ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 353, 735 F. 2d 1384.

No. 84-404. *BEALE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1289.

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No. 84-407. *HOSKINS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1048.

No. 84-460. *GREENE v. NEW YORK CITY HEALTH & HOSPITAL CORP.* C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 954.

No. 84-492. *ARRINGTON v. MISSISSIPPI*. Sup. Ct. Miss. Certiorari denied. Reported below: 451 So. 2d 694.

No. 84-563. *CENTURY AIR FREIGHT, INC. v. AMERICAN AIRLINES, INC.* C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 418.

No. 84-567. *NORD v. ARKANSAS*. Ct. App. Ark. Certiorari denied. Reported below: 12 Ark. App. xxi.

No. 84-568. *ARMSTRONG, TRUSTEE OF THE ESTATES OF LINDBERG ET AL. v. LINDBERG ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 2d 1087.

No. 84-569. *PENNZOIL Co. v. PUBLIC SERVICE COMMISSION OF WEST VIRGINIA*. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-570. *VUYANICH ET AL. v. REPUBLIC NATIONAL BANK OF DALLAS*. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 1195 and 736 F. 2d 160.

No. 84-582. *KOLLIAS v. BAY TANKERS, INC., ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 84-583. *WILLIAMS v. MELTON ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 1492.

No. 84-602. *CITY OF ALAMEDA v. PREMIER COMMUNICATIONS NETWORK, INC.* Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 156 Cal. App. 3d 148, 202 Cal. Rptr. 684.

No. 84-613. *EMI LTD. v. BENNETT ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 994.

No. 84-618. *BRATTON, ADMINISTRATOR OF THE ESTATE OF BRATTON v. SAFEWAY STORES, INC.* C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 444.

No. 84-622. *EDDIE STEAMSHIP CO. LTD. v. P. T. KARANA LINE*. C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 37.

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No. 84-624. *MANETAS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1457.

No. 84-625. *TAYLOR v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD (SAN DIEGO STATE UNIVERSITY, REAL PARTY IN INTEREST)*. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-674. *NAPOLI v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84-704. *TROPIGAS, S.A. v. ANDERSON ET AL.* Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 447 So. 2d 338.

No. 84-705. *TAPIA v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 978.

No. 84-726. *BRADY v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1445.

No. 84-737. *GINDES ET AL. v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 740 F. 2d 947.

No. 84-5260. *SHAW v. DIXON ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1357.

No. 84-5282. *LAYTON v. FLORIDA PAROLE AND PROBATION COMMISSION ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5314. *KULIK v. CALIFORNIA*. Sup. Ct. Cal. Certiorari denied.

No. 84-5473. *BOLLIN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1083.

No. 84-5551. *WINCHESTER v. CALIFORNIA*. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-5552. *PETROFSKY v. INTERMOUNTAIN RESEARCH & ENGINEERING CO.* C. A. 10th Cir. Certiorari denied.

No. 84-5561. *BARROWS ET AL. v. IDAHO ET AL.* Sup. Ct. Idaho. Certiorari denied. Reported below: 106 Idaho 901, 684 P. 2d 303.

No. 84-5563. *TARRANT v. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL.* C. A. 1st Cir. Certiorari denied.

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No. 84-5565. *TELEPO v. DIANA, JUDGE, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-5567. *MOORE v. RICE, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1472.

No. 84-5569. *WILLIAMS v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 875.

No. 84-5576. *GARCIA v. NEW YORK.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 103 App. Div. 2d 753, 477 N. Y. S. 2d 223.

No. 84-5578. *ROTHSCHILD v. CARROLL ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5579. *JOHNPOLL v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 702.

No. 84-5581. *WILSON v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 730 F. 2d 143.

No. 84-5583. *SCHIRRIPA v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-5584. *VLASIC v. LIPPMAN, WARDEN.* C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-5586. *BENNETT v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 923.

No. 84-5589. *BELDIN ET AL. v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 450.

No. 84-5590. *JOHNSON v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 741 F. 2d 854.

No. 84-5600. *WEBB v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1458.

No. 84-5603. *ORTIZ v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 712.

No. 84-5604. *MARTIN-TRIGONA v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 441.

No. 84-5615. *MILLER v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

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No. 84-5617. *REED v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 68.

No. 84-5619. *RUBLE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 978.

No. 84-5620. *LONG v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 84-5621. *GALLEGOS v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 738 F. 2d 378.

No. 84-5629. *SMITH v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1196.

No. 84-5633. *SANDO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 750.

No. 84-5638. *LABADIE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 741 F. 2d 865.

No. 84-5639. *FOSTER v. CLIFFORD, CLERK OF THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI*. C. A. 8th Cir. Certiorari denied.

No. 84-5643. *PARKER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 127.

No. 84-5645. *WOLFF v. UNITED STATES ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 737 F. 2d 877.

No. 84-5646. *STANLEY v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 84-5647. *MAZAK v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 442.

No. 84-5652. *HIRSCH v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 2d 1542.

No. 84-5653. *GREENE v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 83-2089. *BURDGICK v. FLORIDA*. Dist. Ct. App. Fla., 4th Dist. Motion of respondent to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 449 So. 2d 275.

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No. 84-188. ENERGY RESERVES GROUP, INC., ET AL. *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 744 F. 2d 98.

No. 84-594. SMITH *v.* HONEYWELL, INC., ET AL. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 735 F. 2d 1067.

No. 84-608. WESTINGHOUSE ELECTRIC CORP. ET AL. *v.* S/S LESLIE LYKES ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 734 F. 2d 199.

No. 84-5606. ENGBERG *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 686 P. 2d 541.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 83-6468. ASKEW *v.* F & W EXPRESS, INC., ET AL., *ante*, p. 916;

No. 83-6832. EDDMONDS *v.* ILLINOIS, *ante*, p. 894;

No. 84-5002. WILLIS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 859;

No. 84-5073. MACK *v.* W. R. GRACE & CO. ET AL., *ante*, p. 805;

No. 84-5206. ALBANESE *v.* ILLINOIS, *ante*, p. 892;

No. 84-5244. ATTWELL ET UX. *v.* U. S. POSTAL SERVICE ET AL., *ante*, p. 868; and

No. 84-5249. STEWART *v.* ILLINOIS, *ante*, p. 920. Petitions for rehearing denied.

No. 83-6862. MACK *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL., *ante*, p. 871. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

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Dismissal Under Rule 53

No. 84-644. NATIONAL RIFLE ASSOCIATION OF AMERICA ET AL. *v.* MINNESOTA STATE ETHICAL PRACTICES BOARD. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 53.

Appeals Dismissed

No. 83-6673. RODRIGUES *v.* HAWAII. Appeal from Sup. Ct. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 67 Haw. 70, 679 P. 2d 615.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

There are two facts of consequence in this case: first, at the time the case arose, Hawaii permitted the issue of insanity to be tried by a judge prior to the empaneling of a jury, and second, the defendant, who availed himself of this procedure, was acquitted. These facts raise an issue of substantial importance: may the State, consistent with the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment, appeal an acquittal based upon insanity entered prior to the empaneling of a jury.

I

Rodrigo Rodrigues, a 23-year-old Marine, was indicted on three counts of sodomy and one count of rape. Prior to the empaneling of a jury, Rodrigues' attorney raised the defense of mental disease. Pursuant to Haw. Rev. Stat. § 704-408 (1976), the trial court suspended preliminary proceedings, appointed a panel of three psychiatrists to examine the defendant, and proceeded to try the issue of insanity.¹ Over the course of 10 days, both the

¹ Hawaii Rev. Stat. § 704-408 (1976): "Determination of irresponsibility. If the report of the examiners filed pursuant to section 704-404 states that the defendant at the time of the conduct alleged suffered from a physical or mental disease, disorder, or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, and the court, after a hearing if a hearing is requested, is satisfied that such impairment was sufficient to exclude responsibility, the court, on motion of the defendant, shall enter judgment of acquittal on the

defendant and the State adduced extensive testimony as to the defendant's sanity. Five experts, two of whom served on the panel appointed by the court, testified that the defendant was afflicted with multiple-personality syndrome, a dissociative disorder in which an individual's personality separates into complicated and autonomous subpersonalities. The judge concluded that the defendant was insane and entered an acquittal. The State appealed. The Supreme Court of Hawaii, in a divided opinion, reversed and remanded on the ground that the trial court erred in weighing the evidence as to insanity.²

II

This Court has repeatedly stated that a fundamental purpose of the Double Jeopardy Clause is to protect acquittals based upon the resolution of the *factual* elements of an offense.³

"An acquittal is accorded special weight. 'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,' for the 'public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' See *Fong Foo v. United States*, 369 U. S. 141, 143. If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair. *Arizona v. Washington*, 434 U. S., at 503. The law 'attaches particular significance to an acquittal.' *United States v. Scott*, 437 U. S., at 91."⁴

The Court has also stated that because an acquittal based upon a finding of insanity constitutes such a resolution, it may not be appealed.⁵ The rationale behind the principle according acquittals

ground of physical or mental disease, disorder, or defect excluding responsibility." This section was amended in 1980. Given the frequency with which the issue in this case arises and the existing conflict between the Courts of Appeals (see *infra*, at 1081), the amendment of the section is of no bearing on the decision to grant the petition for certiorari.

² 67 Haw. 70, 78-79, 679 P. 2d 615, 621 (1984).

³ *United States v. DiFrancesco*, 449 U. S. 117, 129-130 (1980); *United States v. Scott*, 437 U. S. 82, 97 (1978); *Burks v. United States*, 437 U. S. 1, 16 (1978); *United States v. Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977).

⁴ *United States v. DiFrancesco*, *supra*, at 129.

⁵ *United States v. Scott*, *supra*, at 97-98.

special weight is that an appeal or retrial following an acquittal would produce "an unacceptably high risk that the Government, with its superior resources, would wear down a defendant, thereby 'enhancing the possibility that even though innocent he may be found guilty.'"⁶

The question presented is whether these principles apply with equal force to the period prior to the formal commencement of a trial. In other words, does jeopardy attach if the judge has tried an element of the crime prior to the empaneling of a jury?

Conceding that in this case the judge sat as a "trier of fact" on the issue of insanity, the Supreme Court of Hawaii nonetheless held that jeopardy had not attached at the time of the acquittal.⁷ The court relied upon *Serfass v. United States*, 420 U. S. 377 (1975), in holding that the Double Jeopardy Clause is irrelevant to those acquittals issued prior to the empaneling of a jury or the calling of the first witness.

The court's reliance upon *Serfass* is misplaced. The indictment in *Serfass* was dismissed for reasons wholly unrelated to a resolution of the factual elements of the crime. The defendant, who had been refused status as a conscientious objector, was subsequently indicted for failure to report for or submit to induction.⁸ Prior to trial, the defendant moved to dismiss on the ground that the Government had inadequately set forth its reasons for initially refusing his request for classification as a conscientious objector. The District Court agreed, and the case was dismissed for the Government's failure to provide due process, not because the indictment was defective nor because the defendant was tried and found innocent as to the elements of the crime.

The issue in the instant case—an issue neither discussed nor addressed in *Serfass*—is whether jeopardy attaches to an acquittal based upon a resolution of a *factual* element of the crime that occurred prior to the empaneling of a jury or the calling of the first witness. The principles summarized in the above quotation from *DiFrancesco* strongly suggest that jeopardy does attach to such acquittals and that it is of no consequence that the defendant's acquittal occurred before the formal commencement of trial. The question posed by this case has engendered division amongst

⁶ *United States v. DiFrancesco*, *supra*, at 130.

⁷ 67 Haw., at 79, 679 P. 2d, at 621.

⁸ *Serfass v. United States*, 420 U. S., at 379.

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the commentators⁹ as well as a conflict among the Courts of Appeals.¹⁰ Because we have not addressed the question and because it is of some importance, I believe that plenary consideration is appropriate.

I therefore dissent from the denial of the petition for certiorari.

No. 84-603. *FREEMAN v. WASHINGTON*. Appeal from Ct. App. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 36 Wash. App. 1067.

No. 84-658. *FRONTIER PROPERTIES ET AL. v. ELLIOTT ET AL.*; and *ROSS v. STANDING COMMITTEE ON DISCIPLINE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA*. Appeals from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as a petition for writ of certiorari, certiorari denied. Reported below: 735 F. 2d 1168 (second case).

Vacated and Remanded on Appeal

No. 84-150. *WISCONSIN ELECTIONS BOARD ET AL. v. REPUBLICAN PARTY OF WISCONSIN ET AL.* Appeal from D. C. E. D. Wis. Judgment vacated and case remanded with instructions to dismiss the complaint. Reported below: 585 F. Supp. 603.

Certiorari Granted—Reversed and Remanded. (See No. 84-5332, *ante*, p. 91.)

Certiorari Granted—Vacated and Remanded

No. 84-97. *ROBINSON, FORMER COMMISSIONER OF BUREAU OF CORRECTIONS OF PENNSYLVANIA, ET AL. v. STORY ET AL.*

⁹ Compare 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3919, p. 673 (1976) (stating that jeopardy attaches); Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 Texas L. Rev. 303, 337-338 (1974) (same), with 1 W. LaFave & J. Israel, *Criminal Procedure* § 24.3, pp. 82-83 (1984) (stating that jeopardy does not attach); Caruso, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 Colum. J. L. & Soc. Prob. 295, 325-328 (1976) (same).

¹⁰ Compare *United States v. Patrick*, 532 F. 2d 142, 145-147 (CA9 1976) (holding that jeopardy attaches); *United States v. Southern R. Co.*, 485 F. 2d 309, 312 (CA4 1973) (same); *United States v. Hill*, 473 F. 2d 759, 761-763 (CA9 1972) (same); *United States v. Oppenheimer*, 242 U. S. 85, 87-88 (1916) (same), with *United States v. Pecora*, 484 F. 2d 1289, 1293-1294 (CA3 1973) (holding that jeopardy does not attach).

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(two cases). C. A. 3d Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Pennhurst State School & Hosp. v. Halderman*, 465 U. S. 89 (1984). JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS dissent. Reported below: 734 F. 2d 8.

No. 84-115. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* LOPEZ ET AL. C. A. 9th Cir. Motion of respondents Mario Lopez et al. for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeals to be remanded to the United States District Court for the Central District of California with instructions to: (1) remand the cases of the named respondents to the Secretary for review pursuant to § 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984; (2) make any necessary clarifications in the definition and scope of the class; (3) remand the cases of the unnamed class members to the Secretary for proceedings pursuant to § 2(d)(3) of that Act; and (4) take other actions appropriate in light of that Act. Reported below: 725 F. 2d 1489.

No. 84-5412. LINDSEY *v.* UNITED STATES BUREAU OF PRISONS ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the Solicitor General's present interpretation of Fed. Rule Crim. Proc. 32 asserted in his brief filed November 14, 1984, on behalf of respondents. Reported below: 736 F. 2d 1462.

Vacated and Remanded After Certiorari Granted

No. 84-55. EMPLOYERS NATIONAL INSURANCE CO. *v.* OCHOA. C. A. 5th Cir. [Certiorari granted, *ante*, p. 929.] Judgment vacated and case remanded for further consideration in light of Pub. L. 98-426.

Miscellaneous Orders

No. A-370 (84-5662). WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A-415 (84-851). MOBIL OIL CORP. ET AL. *v.* DOW JONES & CO., INC., ET AL. C. A. 9th Cir. Application for stay or temporary injunctive relief, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE MARSHALL, JUSTICE

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

No. A-417. NICHOLS *v.* UNITED STATES. C. A. 5th Cir. Application to recall and stay the mandate, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D-456. IN RE DISBARMENT OF O'BRIEN. Disbarment entered. [For earlier order herein, see *ante*, p. 914.]

No. D-466. IN RE DISBARMENT OF HILL. It is ordered that Bobby L. Hill, of Savannah, Ga., 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-467. IN RE DISBARMENT OF MCGLOSSON. It is ordered that Howard Allen McGlasson, Jr., of Savannah, Ga., 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-468. IN RE DISBARMENT OF DIANGELUS. It is ordered that Lawrence James DiAngelus, of Media, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 79, Orig. OKLAHOMA *v.* ARKANSAS. Motion of plaintiff to dismiss the bill of complaint denied. [For earlier order herein, see, *e. g.*, p. 808.]

No. 94, Orig. SOUTH CAROLINA *v.* REGAN, SECRETARY OF THE TREASURY. Report of the Special Master on motion of the National Governors' Association for leave to intervene is received and ordered filed. [For earlier order herein, see, *e. g.*, 466 U. S. 948.]

No. 83-1368. NORTHWEST WHOLESALE STATIONERS, INC. *v.* PACIFIC STATIONERY & PRINTING CO. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-1492. NATIONAL RAILROAD PASSENGER CORPORATION *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 7th Cir. [Probable jurisdiction noted, *ante*, p. 813]; and

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No. 83-1633. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 7th Cir. [Probable jurisdiction postponed, *ante*, p. 813.] Motion of the Solicitor General for divided argument granted.

No. 83-1673. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NUTT ET AL. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 83-2161. MONTANA ET AL. *v.* BLACKFEET TRIBE OF INDIANS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-4. WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. *v.* HAMILTON BANK OF JOHNSON CITY. C. A. 6th Cir. [Certiorari granted, *ante*, p. 815.] Motion of California et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-48. UNITED STATES *v.* BAGLEY. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1016.] Motion for appointment of counsel granted, and it is ordered that Thomas W. Hillier II, Esquire, of Seattle, Wash., be appointed to serve as counsel for respondent in this case.

No. 84-68. KERR-MCGEE CORP. *v.* NAVAJO TRIBE OF INDIANS ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 879.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-262. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. *v.* PUEBLO OF SANTA ANA. C. A. 10th Cir. [Certiorari granted, *ante*, p. 879.] Motion of Public Service Company of New Mexico for leave to file a brief as *amicus curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 84-438. SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT WALPOLE *v.* HILL ET AL. Sup. Jud. Ct. Mass. [Certiorari granted, *ante*, p. 1016.] Motion for appointment of counsel granted, and it is ordered that Jamie Ann Sabino,

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of Wellesley, Mass., be appointed to serve as counsel for respondents in this case.

No. 84-465. BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, ET AL. *v.* ROMANO. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1033.] Motion for appointment of counsel granted, and it is ordered that Jordan B. Cherrick, Esquire, of St. Louis, Mo., be appointed to serve as counsel for respondent in this case.

Probable Jurisdiction Noted

No. 84-571. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. *v.* NATIONAL ASSOCIATION OF RADIATION SURVIVORS ET AL. Appeal from D. C. N. D. Cal. Probable jurisdiction noted. Reported below: 589 F. Supp. 1302.

No. 84-592. WILLIAMS ET AL. *v.* VERMONT ET AL. Appeal from Sup. Ct. Vt. Probable jurisdiction noted. Reported below: 144 Vt. 649, 478 A. 2d 993.

Certiorari Granted

No. 84-5743. BALDWIN *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 456 So. 2d 129.

Certiorari Denied. (See also Nos. 83-6673, 84-603, and 84-658, *supra*.)

No. 83-2060. CLAPPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 1148.

No. 83-2160. ELLIOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 83-6481. DICKINSON *v.* PEEPLES. C. A. 11th Cir. Certiorari denied.

No. 83-6908. NICHOLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 731 F. 2d 545.

No. 84-82. PARKER *v.* TEXAS. Ct. App. Tex., 6th Sup. Jud. Dist. Certiorari denied. Reported below: 667 S. W. 2d 185.

No. 84-87. HANES *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1113.

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No. 84-168. *EVEN v. NATIONAL GUARD BUREAU ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 154.

No. 84-311. *DEANGELIS v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1365.

No. 84-348. *BALLARD v. BLOUNT ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84-367. *TOBER SAIFER SHOE CO. v. ALLMAN ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 863.

No. 84-368. *PATINO'S, INC. v. POSTON ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 866.

No. 84-379. *CLARK OIL & REFINING CORP. v. ALPINE SHIPPING CO. ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1430.

No. 84-410. *O'CONNELL MACHINERY Co., INC. v. M.V. "AMERICANA" ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 734 F. 2d 115.

No. 84-451. *JEFFERSON COUNTY COMMUNITY CENTER FOR DEVELOPMENTAL DISABILITIES, INC. v. NATIONAL LABOR RELATIONS BOARD.* C. A. 10th Cir. Certiorari denied. Reported below: 732 F. 2d 122.

No. 84-459. *NELMS v. TENNESSEE.* Ct. Crim. App. Tenn. Certiorari denied.

No. 84-461. *PISCATAWAY TOWNSHIP BOARD OF EDUCATION v. T. G. ET UX., INDIVIDUALLY, AND ON BEHALF OF THEIR INFANT CHILD, D. G., ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-467. *CARTER-GLOGAU LABORATORIES, INC. v. NATIONAL LABOR RELATIONS BOARD.* C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 767.

No. 84-469. *WILLIAMS v. VIRGINIA NATIONAL BANK.* Ct. App. Wash. Certiorari denied.

No. 84-593. *BEESON v. HUDSON ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 62.

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No. 84-599. *VINTERO CORP. v. CORPORACION VENEZOLANA DE FOMENTO*. C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 740.

No. 84-601. *WHEELING PITTSBURGH STEEL CORP. v. DUFFY*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 1393.

No. 84-607. *LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO v. PETRAMALE ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 736 F. 2d 13.

No. 84-639. *GATHERCOLE v. GLOBAL ASSOCIATES*. C. A. 9th Cir. Certiorari denied. Reported below: 727 F. 2d 1485.

No. 84-665. *MASSARO ET AL. v. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.* Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 594 F. Supp. 762.

No. 84-669. *PORTER v. BUTTERICK, COMMISSIONER FOR THE BOROUGH OF BEACH HAVEN, NEW JERSEY, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1350.

No. 84-671. *RYE ET UX. v. SEATTLE TIMES CO. ET AL.* Ct. App. Wash. Certiorari denied. Reported below: 37 Wash. App. 45, 678 P. 2d 1282.

No. 84-676. *BARNETT v. UNITED AIR LINES, INC., ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 738 F. 2d 358.

No. 84-686. *FIZER CORP., T/A THE GO GO RAMA v. VASSALLO, DIRECTOR, NEW JERSEY DIVISION OF ALCOHOLIC BEVERAGE CONTROL*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 422.

No. 84-729. *PORTER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1450.

No. 84-758. *CACI v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84-759. *WAGMAN v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84-771. *LEISNER v. BAHOU, PRESIDENT OF THE NEW YORK STATE CIVIL SERVICE COMMISSION, ET AL.* Ct. App.

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N. Y. Certiorari denied. Reported below: 61 N. Y. 2d 985, 463 N. E. 2d 623.

No. 84-781. *IOWA EXPRESS DISTRIBUTION, INC. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 1305.

No. 84-5063. *WEATHERLESS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 179.

No. 84-5081. *KINZHUMA v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 84-5085. *CURRY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1114.

No. 84-5104. *CHAMPION v. ALABAMA*. Ct. Crim. App. Ala. Certiorari denied.

No. 84-5116. *BRODINE v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1353.

No. 84-5257. *SMITH ET AL. v. KANSAS ET AL.* Sup. Ct. Kan. Certiorari denied.

No. 84-5262. *BARNES v. OHIO*. Ct. App. Ohio, Van Wert County. Certiorari denied.

No. 84-5321. *FULLER v. OSBORNE, SHERIFF OF TAZEWELL COUNTY*. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1355.

No. 84-5322. *LEMERON v. POWERS ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 430.

No. 84-5430. *FORRESTER v. CHASE MANHATTAN BANK*. C. A. D. C. Cir. Certiorari denied.

No. 84-5441. *MYSLIWIEC v. DONOVAN, SECRETARY OF LABOR*. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 7.

No. 84-5466. *ROBERTS v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 955.

No. 84-5553. *VEGA-BARVO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1341.

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No. 84-5591. *COOLEY v. NIX, WARDEN*. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 345.

No. 84-5592. *FERENC v. FLORIDA*. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 455 So. 2d 432.

No. 84-5593. *BURTON v. AMERICAN DISTRICT TELEGRAPH CO.* C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 967.

No. 84-5595. *FOSTER v. LOUISIANA*. Sup. Ct. La. Certiorari denied. Reported below: 452 So. 2d 700.

No. 84-5596. *CUNNINGHAM v. HOLLAND, WARDEN*. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5611. *DREW v. BRICE ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 66.

No. 84-5612. *LARSEN v. MAGGIO, WARDEN*. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 215.

No. 84-5654. *McKINNEY v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 84-5658. *CULP v. UNITED STATES PAROLE COMMISSION*. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1455.

No. 84-5667. *DEBORDEZ v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 2d 182.

No. 84-5669. *BERRIEL-OCHOA ET AL. v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 883.

No. 84-5671. *HATTAWAY v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 1419.

No. 84-5674. *BROWN v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 744 F. 2d 905.

No. 84-5686. *GAYNOR v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84-5693. *BLACK v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1457.

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No. 84-5694. *LAWRENCE v. COMMISSIONER OF INTERNAL REVENUE ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1455.

No. 84-5697. *ZALDIVAR v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 95.

No. 84-5698. *VIGIL v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Reported below: 743 F. 2d 751.

No. 84-5705. *STEAD v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 740 F. 2d 657.

No. 84-5708. *ROWELL v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 746 F. 2d 814.

No. 84-5709. *ROBINSON v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 95.

No. 84-5711. *JONES v. UNITED STATES.* Ct. App. D. C. Certiorari denied.

No. 84-5715. *D'ARCO v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 84-169. *BROWN, WARDEN v. CHANEY.* C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 730 F. 2d 1334.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

In this case, the Court of Appeals vacated respondent's death sentence because it found that the state prosecutor withheld information that might have been material to the jury's sentencing decision. I would grant certiorari because I believe this case raises two important issues worthy of this Court's attention—how to distinguish a specific from a general request for exculpatory information, and how to determine whether withheld information was material to a sentencing decision.

I

Kendal Ashmore was a horse breeder. On the morning of March 17, 1977, Mrs. Ashmore and her assistant, Kathy Brown, went to meet a man who had expressed an interest in Morgan horses. Phillip Ashmore returned home from work that evening to find that his wife had not returned. He soon received a tele-

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phone call in which the caller told him that he had abducted Mrs. Ashmore and Brown. The caller demanded \$½ million in \$100 bills, and warned Mr. Ashmore not to tell anyone about the call. Mr. Ashmore called his attorney, who contacted the Federal Bureau of Investigation.

The next day, Mr. Ashmore gathered the ransom money. The caller again telephoned, and told Mr. Ashmore to leave the money at a specified location at a local rodeo arena or his wife would be "dead." The caller also told Mr. Ashmore that the Ashmores' truck was at 91st Street and Memorial Avenue in Tulsa. This call was traced to respondent's home phone.

Mr. Ashmore delivered the money to the predetermined spot at the rodeo grounds. Later that same day, he received a call telling him that the money had not been left in the proper place, that he should pick up the money, and try again the next day. The caller also told Mr. Ashmore that if he did not do exactly as he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail" This call was traced to a service station phone booth; the respondent's palm print was taken from the receiver handle on the telephone.

After the second call, the police set up surveillance of the respondent's home, which was about two miles from the rodeo grounds where the money was to be left. At about 3:20 a. m., the police arrested the respondent and searched his house. The bodies of Mrs. Ashmore and Brown were later found in a shallow grave on property rented by the respondent.

The respondent was indicted and tried for the murder of Mrs. Ashmore. Prior to trial, the respondent made several requests for exculpatory evidence. Only the following four were considered by the court below:

"1. Statements of all persons who have been interviewed by . . . any . . . governmental agency in connection with the subject matter of this case

"2. Stenographic recordings or transcriptions of any oral statement made by any person to . . . a member of any . . . governmental agency in connection with the subject matter of the case.

"4. The names and addresses of all persons who may have some knowledge of the facts involved in the instant case.

"13. Any and all oral statements made to . . . any . . . law enforcement official."¹

Four FBI records were not disclosed pursuant to this request that arguably should have been. None of the withheld documents bear on the guilt or innocence of the respondent. None suggest that he was not involved in the kidnaping, and none are relevant to rebut an inference that he intended that the victims be killed.

The first, and the one considered most critical by the Tenth Circuit, is a statement made to the FBI by Ms. Poppy Weaver. Ms. Weaver said that at 4:10 on the afternoon of March 17, 1977, she was in a store parking lot in Jenks, Okla. She glanced from a distance of about eight or nine parking spaces at a blue-and-white pickup she identified as belonging to the victim. The FBI report indicates that Ms. Weaver stated that she saw Mrs. Ashmore sitting in the driver's seat, with an unidentified man and woman also in the truck. The FBI statement does not reflect the fact that Ms. Weaver later stated that she was never able to identify Mrs. Ashmore as having been in the truck.²

The second is a statement made to the FBI by J. C. Hamilton. Mr. Hamilton said that he saw a man get out of the Ashmore pickup truck at 91st Street and Memorial Avenue in Tulsa between 8 a. m. and 8:30 a. m. on March 18, 1977. Mr. Hamilton said he saw the man then get into a black car that was waiting there.³

The third is a statement by a Jenks public school student, Kyle West. The youth told the police that he saw a "shiny red" pickup truck parked at 91st Street and Memorial Avenue on the afternoon of March 17. His report said nothing about any other vehicles.⁴

¹730 F. 2d 1334, 1340 (CA10 1984) (emphasis deleted).

²Chaney's own attorney stated at the federal habeas hearing that Ms. Weaver told him that "she in fact did not make those statements, was not sure, and was not sure at this time, which was April of '81, nor was she sure in March of 1977 when Agent McLain talked with her." *Id.*, at 1355, n. 27. In the course of the federal habeas proceeding, the District Court stated that both the District Attorney and Chaney's counsel had indicated that Ms. Weaver had stated that she could not testify that the woman she saw on March 17 was the victim.

³The Tulsa County District Attorney, S. M. Fallis, testified that this information was not exculpatory because the truck was already in police custody at the time of this sighting. Fallis testified that the individual seen leaving the truck was an employee of Mr. Ashmore's. *Id.*, at 1348.

⁴Mr. Fallis explained that this statement was not exculpatory because there was no known connection between any red pickup truck and the facts of this case. *Ibid.*

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The fourth is a transcription of a statement made by the victim's husband. During the first phone call from the kidnapers, Mr. Ashmore told the FBI, the caller told him: "There are four of us. We're not kidding. If your wife tries anything like that Honky that works for you, we'll do her the same way."⁵

At trial, respondent was convicted of murder and sentenced to death.⁶ Although his counsel argued that unnamed accomplices might have been the actual killers, no testimony was introduced to support this claim. On appeal, the Oklahoma Court of Criminal Appeals affirmed, *Chaney v. State*, 612 P. 2d 269 (1980), and this Court denied the petition for a writ of certiorari. *Chaney v. Oklahoma*, 450 U. S. 1025 (1981).

After Chaney's direct appeals were exhausted, the four withheld documents at issue here surfaced. After two unsuccessful state-court applications for postconviction relief, Chaney sought a writ of habeas corpus from the Federal District Court, arguing that the prosecutor wrongfully withheld the requested documents. The District Court refused to grant the writ, finding that Chaney's counsel had made only a general request for exculpatory evidence, and, under the due process standard applicable to such

⁵ Mr. Fallis testified that tapes of the other phone calls, in which the caller stated that more than one person was involved, were played to the jury. Even if exculpatory, this evidence was thus cumulative.

⁶ The jury found all four aggravating circumstances argued by the State:

"(1) the defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.

"(2) The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort \$500,000 from the family of Kendal Inez Ashmore.

"(3) The murder was especially heinous, atrocious and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.

"(4) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against defendant for the kidnapping charge." *Id.*, at 1352, n. 24.

At least the first two aggravating circumstances would be unaffected by a finding that Chaney was not present at the killings, so long as he intended that the victims die. The Court of Appeals did not consider Chaney's intent.

requests, the withheld evidence did not create a reasonable doubt as to Chaney's conviction or death sentence.

The Tenth Circuit reversed, and vacated the death sentence. 730 F. 2d 1334 (1984). It found that the requests for information were "as specific as possible" because Chaney did not know the names of the withheld witnesses. It then found that while the withheld evidence was not material to Chaney's conviction, it was material to the imposition of the death penalty because the withheld reports "might well have made the jurors, or one of them" doubt the prosecutor's claim that Chaney had no accomplices. *Id.*, at 1357. It found that the possibility that others were involved in the kidnaping and the killings bore on the establishment of aggravating circumstances, and constituted "important mitigating evidence."

II

It is well settled that in certain circumstances a prosecutor is required to disclose exculpatory evidence to a defendant. *Brady v. Maryland*, 373 U. S. 83 (1963); *Moore v. Illinois*, 408 U. S. 786 (1972). In *United States v. Agurs*, 427 U. S. 97 (1976), this Court recognized that withholding of exculpatory testimony could arise in three different situations. The Court held that the knowing use of perjured testimony requires that the conviction be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*, at 103. The second situation involves a "specific request"—a request that gives "the prosecutor notice of exactly what the defense desire[s]"—for information in the prosecution files. *Id.*, at 106. In the face of such a request, the information should be provided either to the defense or the court if "the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists" *Ibid.* The third situation arises when only a general request or no request at all has been made, perhaps because "exculpatory information in the possession of the prosecutor" is "unknown to defense counsel." *Ibid.* In this situation, all "obviously exculpatory" evidence should be provided to the defense; if it is not, and the omitted evidence "creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.*, at 112. The Court recognized that the prosecutor was not obligated to disclose "any information that might affect the jury's verdict," *id.*, at 108, because the Constitution "surely does

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not demand" complete discovery of prosecution files as a routine practice. *Id.*, at 109.

In the context of *Agurs*, the distinction between "specific" and "general" requests seems self-explanatory. The paradigmatic "specific" request is one for statements made to police by a named accomplice. *Id.*, at 104. The paradigmatic "general" request seeks "anything exculpatory" or "all *Brady* material." *Id.*, at 106-107.

Since *Agurs*, however, courts and prosecutors have struggled to distinguish "specific" from "general" requests. Part of the problem arises because not all requests fall into obvious "specific" or "general" categories. Part of the problem arises from a tension inherent in *Agurs*' formulation: the defense must give the prosecutor notice of what is desired, but notice alone—such as notice that the defense desires every document in the prosecution's files—is not enough to overcome the prosecutor's interest in avoiding premature or excessive discovery.

Some courts have resolved this tension in a common-sense manner. They have found "specific" only those requests that give notice "of the defendant[s] interest in a *particular* piece of evidence." *Commonwealth v. Jackson*, 388 Mass. 98, 110, 445 N. E. 2d 1033, 1040 (1983) (emphasis added). Nor is it a "specific" request to seek statements of all persons who have been interviewed by the State but who are not expected to be called as witnesses. *Thompson v. Missouri*, 724 F. 2d 1314 (CA8 1984). Similarly, a request for written statements taken from any witnesses subsequent to the murder is "general." *United States ex rel. Moore v. Brierton*, 560 F. 2d 288 (CA7 1977).

The Court of Appeals' holding below conflicts sharply with this body of cases. It treats as "specific" those requests which seek in a blanket fashion all reports prepared by all investigatory agencies. See also *United States v. Warhop*, 732 F. 2d 775, 778 (CA10 1984) (request for any "F. B. I. interview statements" was "more than sufficient" to be specific) (citing opinion below). It justifies this broad right of discovery by focusing on what heretofore has been an imponderable—the defendant's ability to phrase the request more precisely.

This Court has suggested that the critical distinction does not derive from the defendant's ability to frame a more detailed request; the Court in *Agurs* understood that "exculpatory information in the possession of the prosecutor may be unknown to defense counsel." *Agurs, supra*, at 106. The Court addressed

this dilemma by requiring some information to be released when there was only a general request or no request at all. In *Agurs*, it did not matter whether the withheld information was available elsewhere; this would suggest that neither does it matter whether the request was "as specific as possible."

The opinion of the Court of Appeals conflicts squarely with those courts that have held that sweeping requests for all information in the government's files are not "specific." It conflicts fundamentally with *Agurs* by relying on the state of the defendant's knowledge; its holding has already been followed within its Circuit. The conflict at issue here deserves the attention of this Court.

III

Even if we were to agree with the Court of Appeals that the requests for information here were "specific," a substantial question still would arise as to whether the withheld information justifies setting aside the jury's sentencing decision. This Court has never applied *Brady* or *Agurs* to a sentencing decision.⁷ The question of what constitutes "material" information in the context of the sentencing decision merits our attention.⁸

To decide whether the withheld information was material to the sentencing decision raises a host of questions that have never been considered by this Court. *Brady* and *Agurs* in terms do not deal with evidence on mitigating circumstances. Do the standards for reversible error that apply in the guilt phase apply unchanged in the sentencing phase, or must new standards be crafted? Should the court look to the sentence imposed in light of all the evidence, or should it look only to whether a violation occurred? Do they apply only to sentences imposed by juries, or also to sentences imposed by judges? Do *Brady* and *Agurs* apply only to capital sentencing decisions, or to all sentencing decisions?

⁷ In *Brady*, this Court stated in dicta that withheld evidence must be produced when it is material to either guilt or punishment, but did not actually need to reach the issue because the right to a resentencing hearing was not before the Court. The Court has never commented on what would constitute "materiality" in the sentencing context.

⁸ One obvious difference distinguishes the application of the "materiality" test to the sentencing phase of the trial. In the guilt phase, some evidence is not relevant to the elements of the substantive offense. In the sentencing phase, virtually all credible evidence is relevant.

In addressing these issues, the Court of Appeals held that the death penalty should be set aside because the withheld evidence "might have affected" one juror's assessment of whether mitigating circumstances existed but did not consider the overwhelming evidence that the respondent intended that the victim would be killed.⁹

The approach taken by the court below significantly alters the balance struck in *Agurs* between a prosecutor's duty to reveal exculpatory evidence and his interest in avoiding premature or excessive discovery of his files. Evidence material to mitigation is not always self-evident; here, at most, the mitigating evidence shows only that other people were involved with the respondent in a scheme to kidnap and murder two women. A prosecutor cannot

⁹ The evidence is overwhelming both that Chaney intended that the victims would die, and that he was the actual killer. The evidence indicates that he was the caller who warned that Mrs. Ashmore would be "dead" or pieces of her body returned in a box if the ransom request was not complied with—one call was traced to his home phone; his palm print was found on the phone from which the other call was made. Other physical evidence—the contents of the victim's stomach, the length of the hair on her legs, the sharpness of the crease in her pants, the amount of makeup on her face, the condition of the gravesite—all supported an inference that she was killed within a short time of her abduction, before Chaney's arrest. Still more evidence—the theft of towels like those used in the murder from the hotel room he stayed in, his sighting near the burial scene at about the alleged time of the killing and burial, with dirt on his pants up to the knees—all constitute powerful evidence that he was involved in the actual killing.

Moreover, some of the withheld evidence supports an inference that Chaney, and not any supposed confederate, was the actual killer. Ms. Weaver reportedly told the FBI that she saw the Ashmore's pickup truck about 100 miles from the burial site on the afternoon of the kidnaping, at about the time the prosecution argued that the murder occurred. She saw three people in the truck; she ultimately could identify none of those persons as Mrs. Ashmore. At about this time, Chaney was seen near the burial site. One logical conclusion is that any supposed confederates were far from the burial site in Mrs. Ashmore's truck but without Mrs. Ashmore at the most likely time of the killings, while Chaney was near the grave. This supports, rather than contradicts, a finding that Chaney himself was the killer.

The court below did not take this evidence into account. Cf. *Strickland v. Washington*, 466 U. S. 668, 695 (1984) (When sentence challenged for lack of effective assistance of counsel, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death").

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fairly be presumed to recognize the utility of such information to the defense. The only way a prudent prosecutor could ensure sustaining a conviction under the rule applied below is to open to the defense all files—including those files that deal with ongoing investigations into alleged accomplices. In *Agurs*, this Court explicitly held that this was not constitutionally required.

IV

The Court of Appeals opinion highlights a conflict in the courts, and raises broad issues worthy of this Court's attention. I would grant the petition for a writ of certiorari.

No. 84-5399. *NEAL v. MISSISSIPPI*. Sup. Ct. Miss.;

No. 84-5609. *GREEN v. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER*. C. A. 11th Cir.;

No. 84-5613. *HILL v. ALABAMA*. Sup. Ct. Ala.;

No. 84-5642. *ROOK v. NORTH CAROLINA*. Gen. Ct. Justice, Super. Ct. Div., Wake County, N.C.; and

No. 84-5672. *JAMES v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: No. 84-5399, 451 So. 2d 743; No. 84-5609, 738 F. 2d 1529; No. 84-5613, 455 So. 2d 938; No. 84-5672, 453 So. 2d 786.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 84-5324. *BROWN v. NEWSOME, WARDEN, ET AL.*, *ante*, p. 919; and

No. 84-5450. *IN RE HARRIS*, *ante*, p. 915. Petitions for rehearing denied.

DECEMBER 11, 1984

Miscellaneous Order

No. A-445. *STEPHENS v. KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER*. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE BLACKMUN

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and JUSTICE STEVENS dissent and would grant the application for stay of execution pending the ultimate resolution of the cases now pending in the United States Court of Appeals for the Eleventh Circuit and cited in JUSTICE BRENNAN's dissent, immediately *post*.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering 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), I would grant the application and vacate the death sentence in this case. But even if I believed otherwise, I would at the very least stay this impending execution indefinitely. As I argued in my dissent from the Court's earlier vacation of its stay in this case, a person should not be executed while the constitutionality of his sentence is in doubt. *Ante*, p. 1043. Accordingly, I would stay Stephens' execution pending the ultimate resolution of *Ross v. Hopper*, 716 F. 2d 1528 (CA11 1983), rehearing en banc granted, 729 F. 2d 1293 (1984); *Spencer v. Zant*, 715 F. 2d 1562 (CA11 1983), reconsideration en banc stayed, 729 F. 2d 1293 (1984); and *McCleskey v. Zant*, 580 F. Supp. 338 (ND Ga.), hearing en banc granted, 729 F. 2d 1293 (CA11 1984).

Certiorari denied

No. 84-5411. *WILSON v. UNITED STATES*. C. A. 5th Cir. *Certiorari denied*. Reported below: 732 F. 2d 404.

Rehearing Denied

No. 83-1845 (A-455). *STEPHENS v. KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER*, *ante*, p. 1043. Petition for rehearing denied. Supplementary application for stay of execution of sentence of death denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the supplementary application for stay of execution pending the ultimate resolution of the cases now pending in the United States Court of Appeals for the Eleventh Circuit and cited in JUSTICE BRENNAN's earlier dissent, *ante*, this page.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

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and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the supplementary application for stay of execution. But even if I believed otherwise, I would grant the supplementary application for the reasons set forth in my earlier dissents in this case. See *ante*, p. 1043; *ante*, p. 1099.

DECEMBER 21, 1984

Dismissal Under Rule 53

No. 84-851. MOBIL OIL CORP. ET AL. *v.* DOW JONES & Co., INC., ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53.

DECEMBER 29, 1984

Dismissal Under Rule 53

No. 84-628. McDONNELL DOUGLAS CORP. *v.* FISHER, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53.

JANUARY 7, 1985

Affirmed on Appeal

No. 84-450. CENTRAL JERSEY INDUSTRIES, INC., ET AL. *v.* UNITED STATES RAILWAY ASSN. ET AL. Affirmed on appeal from Sp. Ct. R. R. R. A.

No. 84-720. DEUKMEJIAN, GOVERNOR OF CALIFORNIA, ET AL. *v.* NATIONAL MEAT ASSN. ET AL. Affirmed on appeal from C. A. 9th Cir. Reported below: 743 F. 2d 656.

Appeals Dismissed

No. 84-695. KING *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. (INTEGRITY HOME LOAN CO., INC., ET AL., REAL PARTIES IN INTEREST). Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-766. JAMASON ET AL. *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers

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whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 455 So. 2d 380.

No. 84-733. *ROGERS v. NORTH CAROLINA*. Appeal from Ct. App. N. C. dismissed for want of substantial federal question. Reported below: 68 N. C. App. 358, 315 S. E. 2d 492.

No. 84-828. *NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL. v. SOUTH CAROLINA EX REL. DANIEL, LIEUTENANT GOVERNOR OF SOUTH CAROLINA, ET AL.* Appeal from D. C. S. C. dismissed for want of jurisdiction.

Certiorari Granted—Reversed in Part and Remanded. (See No. 83-1947, *ante*, p. 105.)

Certiorari Granted—Vacated and Remanded

No. 83-1554. *UNITED STATES v. DIMATTEO ET AL.* C. A. 11th Cir. Motion of respondent Morris Kessler for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Luce v. United States*, *ante*, p. 38. JUSTICE POWELL took no part in the consideration or decision of this motion and this case. Reported below: 716 F. 2d 1361.

Miscellaneous Orders

No. — — —. *BONIN v. AMERICAN AIRLINES, INC., ET AL.* Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the Rules of this Court denied.

No. — — —. *CALIFORNIA ET AL. v. FEDERAL COMMUNICATIONS COMMISSION ET AL.* Motion to direct the Clerk to file a petition for writ of certiorari out of time denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. A-423. *GOLD v. UNITED STATES*. C. A. 11th Cir. Application for stay and/or bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-457 (84-5424). *HERSHIPS v. REES*. Sup. Ct. Cal. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. 79, Orig. *OKLAHOMA v. ARKANSAS*. Report of the Special Master is adopted. It is ordered that the parties are directed to submit a proposed decree to the Special Master for his approval

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and submission, together with any recommendations, to this Court. [For earlier order herein, see, *e. g.*, *ante*, p. 1083.]

No. D-447. *IN RE DISBARMENT OF THORNELL*. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D-450. *IN RE DISBARMENT OF REISCH*. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D-460. *IN RE DISBARMENT OF HINES*. Disbarment entered. [For earlier order herein, see *ante*, p. 915.]

No. D-469. *IN RE DISBARMENT OF UTERMÄHLEN*. It is ordered that Warren Douglas Utermahlen, of Milford, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-470. *IN RE DISBARMENT OF HAYES*. It is ordered that Frank Alan Hayes, of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 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 appellants in No. 83-929 for leave to file a supplemental brief after argument granted.

No. 83-1329. *PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION v. REAL*. Sup. Jud. Ct. Mass. [Certiorari granted, *ante*, p. 814.] Motion of Barbara A. H. Smith to permit Martin E. Levin, Esquire, to present oral argument *pro hac vice* on behalf of petitioner granted.

No. 83-1569. *MITSUBISHI MOTORS CORP. v. SOLER CHRYSLER-PLYMOUTH, INC.*; and

No. 83-1733. *SOLER CHRYSLER-PLYMOUTH, INC. v. MITSUBISHI MOTORS CORP.* C. A. 1st Cir. [Certiorari granted, *ante*, p. 916.] Motion of International Chamber of Commerce for leave to file a brief as *amicus curiae* granted. Motion of American Arbitration Association for leave to file a brief as *amicus curiae* in No. 83-1569 granted.

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No. 83-1673. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NUTT ET AL. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General to permit Charles A. Rothfeld, Esquire, to present oral argument *pro hac vice* granted.

No. 83-1750. UNITED STATES *v.* MILLER. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Jerrold M. Ladar, Esquire, of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 83-1785. AIR FRANCE *v.* SAKS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Republic of France for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-2143. TENNESSEE *v.* STREET. Ct. Crim. App. Tenn. [Certiorari granted, *ante*, p. 929.] Motion for appointment of counsel granted, and it is ordered that George Stuart Hampton, Esquire, of Elizabethtown, Tenn., be appointed to serve as counsel for respondent in this case.

No. 84-28. BROCKETT *v.* SPOKANE ARCADES, INC., ET AL.; and

No. 84-143. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. *v.* J-R DISTRIBUTORS, INC., ET AL. C. A. 9th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motion of Mississippi Citizens for Decency through Law for leave to file a brief as *amicus curiae* granted.

No. 84-261. COMMODITY FUTURES TRADING COMMISSION *v.* WEINTRAUB ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 929.] Motion of John K. Notz, Jr., Trustee for the Chicago Discount Commodity Brokers, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84-267. CLARK, SECRETARY OF THE INTERIOR, ET AL. *v.* SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC., *ante*, p. 1028. Motion of respondent for attorney's fees denied.

No. 84-315. LEVERSON *v.* CONWAY, COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES, *ante*, p. 926. Appellee is directed to file a response to the petition for rehearing within 30 days.

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No. 84-320. NATIONAL FARMERS UNION INSURANCE COS. ET AL. *v.* CROW TRIBE OF INDIANS ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1032.] Motion for appointment of counsel granted, and it is ordered that Clarence T. Belue, Esquire, of Hardin, Mont., be appointed to serve as counsel for respondents Leroy Sage and Flora Not Afraid in this case. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 84-634. CHEVRON U. S. A., INC., ET AL. *v.* HAMMOND, GOVERNOR OF ALASKA, ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of this order.

No. 84-5004. BALL *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 816.] Motion of the Solicitor General to permit Andrew J. Pincus, Esquire, to present oral argument *pro hac vice* granted.

No. 84-5266. CHAMBERS *v.* AMERICAN GREETINGS CORP. C. A. 8th Cir. Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the order of this Court entered October 9, 1984 [*ante*, p. 878], denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 84-5706. PALENO ET VIR *v.* COUNTY OF LAKE ET AL. Appeal from Ct. App. Cal., 1st App. Dist. Motion of appellants for leave to proceed *in forma pauperis* denied. Appellants are allowed until January 28, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeal for want of jurisdiction and, treating the papers whereon the appeal would be taken as a petition for writ of certiorari, we would deny certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84-5824. IN RE SOLIS. Petition for writ of habeas corpus denied.

No. 84-5782. IN RE AYERS. Petition for writ of mandamus denied.

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Certiorari Granted

No. 84-498. UNITED STATES *v.* NATIONAL BANK OF COMMERCE. C. A. 8th Cir. Certiorari granted. Reported below: 726 F. 2d 1292.

No. 84-679. BATEMAN EICHLER, HILL RICHARDS, INC. *v.* BERNER ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 730 F. 2d 1319.

No. 84-363. NORTHEAST BANCORP, INC., ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. Motion of Chase Manhattan Corp. for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 740 F. 2d 203.

Certiorari Denied. (See also Nos. 84-695 and 84-766, *supra.*)

No. 83-1751. ROBINSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 443 So. 2d 850.

No. 83-2012. HEYWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 297.

No. 83-2051. ETLIN *v.* ETLIN. Sup. Ct. Va. Certiorari denied.

No. 83-2112. GOUVEIA, TRUSTEE *v.* HAMMOND CLINIC ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 951.

No. 83-2130. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 353.

No. 83-6846. ALERTE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 120 Ill. App. 3d 962, 458 N. E. 2d 1106.

No. 83-6891. ALVAREZ *v.* UNITED STATES;

No. 83-6911. LLANEZ-DIAZ *v.* UNITED STATES; and

No. 83-6925. NUNEZ-VARELA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 1200.

No. 83-6951. CROUCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 2d 621.

No. 83-6965. BAGWELL *v.* BRANNON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1114.

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No. 84-276. *TEXAS FARM BUREAU v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 307 and 732 F. 2d 437.

No. 84-318. *PEREZ ET AL. v. MEDINA ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 733 F. 2d 170.

No. 84-329. *BANK OF NOVA SCOTIA v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 817.

No. 84-333. *RICHARDS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 2d 1307.

No. 84-339. *SCARPELLI v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 441.

No. 84-357. *WRIGHT v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 1048.

No. 84-364. *GIBBS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 739 F. 2d 838.

No. 84-387. *BARRE' ET AL. v. CIVIL SERVICE COMMISSION OF THE CITY OF NEW ORLEANS*. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 904.

No. 84-389. *MOORE, U. S. REPRESENTATIVE, SIXTH DISTRICT, LOUISIANA, ET AL. v. UNITED STATES HOUSE OF REPRESENTATIVES ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 115, 733 F. 2d 946.

No. 84-400. *WINNETT v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 84-416. *SWISHER v. TENNESSEE*. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 676 S. W. 2d 576.

No. 84-458. *HENDRIX v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84-505. *PERCY ET AL. v. CAMEO CONVALESCENT CENTER, INC., ET AL.*; and

No. 84-680. *CAMEO CONVALESCENT CENTER, INC. v. SENN ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 836.

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No. 84-506. METROPOLITAN HOSPITAL *v.* PROVIDER REIMBURSEMENT REVIEW BOARD OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1350.

No. 84-517. PARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 736 F. 2d 1527.

No. 84-527. SECURITY BANK & TRUST COMPANY OF LAWTON, OKLAHOMA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 731 F. 2d 861.

No. 84-540. TOWNSHIP OF WINSLOW ET AL. *v.* BOOTH ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 193 N. J. Super. 637, 475 A. 2d 644.

No. 84-548. NATIONAL TRANSIENT DIVISION, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO, ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 2d 618.

No. 84-556. AMERICAN SECURITY COUNCIL *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 84-566. O'LEARY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 739 F. 2d 135.

No. 84-606. KROMNICK ET AL. *v.* SCHOOL DISTRICT OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 739 F. 2d 894.

No. 84-620. NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH ET AL. *v.* NEW JERSEY STATE BOARD OF HIGHER EDUCATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 957.

No. 84-630. MCINNES *v.* YAMAHA MOTOR CORP., U. S. A. Sup. Ct. Tex. Certiorari denied. Reported below: 673 S. W. 2d 185.

No. 84-645. HUSTLER MAGAZINE, INC. *v.* WOOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1084.

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No. 84-649. *BLINDER, ROBINSON & CO., INC., ET AL. v. SECURITIES AND EXCHANGE COMMISSION*. C. A. 10th Cir. Certiorari denied.

No. 84-653. *SCHLEIFER v. CHILDREN'S MEMORIAL HOSPITAL*. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-670. *SCHMERTZ ET AL. v. NASSAU COUNTY BOARD OF SUPERVISORS ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 737 F. 2d 155.

No. 84-672. *ISLAMIC REPUBLIC OF IRAN v. PAHLAVI ET AL.* Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 474, 467 N. E. 2d 245.

No. 84-673. *PERWIN v. WILENTZ, CHIEF JUSTICE, SUPREME COURT OF NEW JERSEY, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 958.

No. 84-675. *STATE FARM FIRE & CASUALTY CO. v. PERRY*. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1441.

No. 84-678. *WOLF v. BANCO NACIONAL DE MEXICO, S.A.* C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 1458.

No. 84-687. *BROWN ET AL. v. PUGET SOUND ELECTRICAL APPRENTICESHIP & TRAINING TRUST ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 726.

No. 84-688. *VOSCH, EXECUTRIX OF THE LAST WILL OF LOWRY, ET AL. v. WERNER CONTINENTAL, INC.* C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 149.

No. 84-689. *POOLAW v. CITY OF ANADARKO, OKLAHOMA, ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 738 F. 2d 364.

No. 84-692. *HAWKINS v. ALEX. BROWN & SONS ET AL.* Ct. App. D. C. Certiorari denied.

No. 84-697. *NGUYEN v. NGUYEN*. Ct. App. Colo. Certiorari denied. Reported below: 684 P. 2d 258.

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No. 84-709. *BUXBOM v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 473.

No. 84-712. *AYERS ET AL. v. SPARTAN GRAIN & MILL CO.* C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1284.

No. 84-725. *SNAPPER POWER EQUIPMENT DIVISION OF FUQUA INDUSTRIES, INC. v. WOOD.* C. A. 10th Cir. Certiorari denied.

No. 84-727. *KOONCE v. INDIANA.* Ct. App. Ind. Certiorari denied. Reported below: 461 N. E. 2d 1173.

No. 84-728. *ALDOUS v. ALDOUS.* App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 99 App. Div. 2d 197, 473 N. Y. S. 2d 60.

No. 84-734. *SMITH v. HARMSSEN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1462.

No. 84-740. *MOORE v. REYNOLDS METALS COMPANY RETIREMENT PROGRAM FOR SALARIED EMPLOYEES.* C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 454.

No. 84-742. *CRANE ET AL. v. EDWARD HINES LUMBER CO. ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1464.

No. 84-745. *DEMAISE v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84-752. *BEARD v. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA.* C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1465.

No. 84-775. *BUTTERWORTH, SHERIFF, ET AL. v. SANDSTROM.* C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1200.

No. 84-784. *TRACEY v. UNITED STATES.* C. A. 1st Cir. Certiorari denied. Reported below: 739 F. 2d 679.

No. 84-785. *FERLITO v. NEW YORK.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 101 App. Div. 2d 1030, 475 N. Y. S. 2d 306.

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No. 84-811. *GIBSON ET AL. v. BOEING CO. ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 20.

No. 84-819. *CLEMENTS v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 2d 1213.

No. 84-829. *PRYOR v. COMMISSIONER OF INTERNAL REVENUE.* C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 708.

No. 84-831. *DEROSA v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84-5077. *TORNIERO v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 725.

No. 84-5110. *NEAL v. NEBRASKA.* Sup. Ct. Neb. Certiorari denied. Reported below: 216 Neb. 709, 346 N. W. 2d 218.

No. 84-5119. *JACKSON v. PULLEY, WARDEN.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1370.

No. 84-5154. *KAMYAN v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 84-5210. *TYLER v. BLACK ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 378.

No. 84-5224. *JOHNSTON v. PITTMAN, ATTORNEY GENERAL OF MISSISSIPPI, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 1231.

No. 84-5251. *BAMMAN ET AL. v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 2d 413.

No. 84-5254. *SALAZAR v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Reported below: 720 F. 2d 1482.

No. 84-5258. *MAYBUSHER v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 366.

No. 84-5288. *CALDWELL ET AL. v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1302.

No. 84-5304. *RASHED v. DELAWARE COUNTY, PENNSYLVANIA, ET AL.* C. A. 3d Cir. Certiorari denied.

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No. 84-5317. *BUTLER v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84-5323. *EARNEST v. VANNICE ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1369.

No. 84-5346. *VOLANTY v. TEXAS.* Ct. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 663 S. W. 2d 897.

No. 84-5363. *BRYMER v. ROSE, WARDEN, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 153.

No. 84-5372. *JACKSON ET AL. v. KENTUCKY.* Sup. Ct. Ky. Certiorari denied. Reported below: 670 S. W. 2d 828.

No. 84-5408. *ALLEN v. CALIFORNIA.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-5410. *SANS v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 1521.

No. 84-5420. *POLLARD v. WHITE ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1124.

No. 84-5435. *PRINCE v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS.* C. A. 11th Cir. Certiorari denied. Reported below: 736 F. 2d 1527.

No. 84-5443. *SHIELDS v. HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY.* C. A. 2d Cir. Certiorari denied.

No. 84-5492. *REYNOSA v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 1338.

No. 84-5500. *SILVERSTEIN ET AL. v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 1338.

No. 84-5523. *YOUNG v. NEW JERSEY.* Super. Ct. N. J., App. Div. Certiorari denied.

No. 84-5527. *RICHARDS v. LEHMAN, SECRETARY OF THE NAVY, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 975.

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No. 84-5601. *WALKER v. MAGGIO, WARDEN*. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 2d 714.

No. 84-5608. *BRASWELL v. CONNECTICUT*. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 297, 481 A. 2d 413.

No. 84-5623. *HOWELL v. TRUMPOWER, WARDEN*. C. A. 4th Cir. Certiorari denied.

No. 84-5624. *CREEL v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied.

No. 84-5627. *FULFORD v. MAGGIO, WARDEN, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84-5628. *ALLSBERRY v. TRUMPOWER, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 960.

No. 84-5631. *SEIFERT v. MINNESOTA*. Sup. Ct. Minn. Certiorari denied. Reported below: 354 N. W. 2d 432.

No. 84-5655. *COTNER v. MUSEMAN ET AL.* C. A. 10th Cir. Certiorari denied.

No. 84-5656. *HOWELL v. COLE, JUDGE, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1448.

No. 84-5660. *MELTON v. RISON, WARDEN*. C. A. 11th Cir. Certiorari denied.

No. 84-5661. *RIDLEY v. WALKER*. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1459.

No. 84-5663. *COLON-RIVERA v. PUERTO RICO DEPARTMENT OF SOCIAL SERVICES ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 736 F. 2d 804.

No. 84-5664. *VAN SANT v. RUSSELL*. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84-5665. *MILLER v. ALLSBROOK*. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 430.

No. 84-5666. *GLENN v. JEFFES, COMMISSIONER, BUREAU OF CORRECTION OF PENNSYLVANIA, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 956.

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No. 84-5670. *PAUL v. CONTINENTAL GROUP, INC., ET AL.* (two cases). C. A. 2d Cir. Certiorari denied.

No. 84-5673. *JACKSON v. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY.* C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 954.

No. 84-5676. *HALL v. MEDICAL COLLEGE OF OHIO AT TOLEDO ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 299.

No. 84-5677. *CODY v. POOLE ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 445.

No. 84-5678. *DYER v. OKLAHOMA.* Ct. Crim. App. Okla. Certiorari denied.

No. 84-5680. *JURGINS v. CALIGUIRI ET AL.* C. A. 3d Cir. Certiorari denied.

No. 84-5682. *HAYES v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied.

No. 84-5684. *BOLES v. BAKER ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 428.

No. 84-5685. *LAGRANGE v. BUTLER ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84-5688. *OBERSKI v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1034.

No. 84-5691. *RODRIGUEZ v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS.* C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 884.

No. 84-5695. *GERSON v. BYRNE ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1436.

No. 84-5701. *HENDRIX v. DUCKWORTH, WARDEN, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 442.

No. 84-5703. *WOOD v. ALLIS-CHALMERS CORP.* C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84-5704. *SMITH v. MISSISSIPPI.* Cir. Ct. Miss., Sunflower County. Certiorari denied.

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No. 84-5712. *GOLDEN v. NEWSOME, WARDEN*. C. A. 11th Cir. Certiorari denied.

No. 84-5713. *LEWIS v. FROSC, ADMINISTRATOR OF NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 154.

No. 84-5718. *HUBBARD v. WADE, DISTRICT ATTORNEY, DALLAS COUNTY, TEXAS, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 741 F. 2d 1379.

No. 84-5729. *GOLDEN v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 84-5733. *VALDOVINOS-VALDOVINOS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 1436.

No. 84-5734. *WILLIAMS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84-5737. *PALUMBO v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 742 F. 2d 656.

No. 84-5740. *AHMAD v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1487.

No. 84-5750. *DINGUS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 58.

No. 84-5755. *THIBODEAUX v. THIBODEAUX ET AL.* Sup. Ct. La. Certiorari denied. Reported below: 454 So. 2d 813.

No. 84-5756. *RASCO v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 58.

No. 84-5763. *VICCARONE ET AL. v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-5764. *THAPER v. NEW JERSEY DEPARTMENT OF EDUCATION ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-5767. *BOYER v. COMMISSIONER OF INTERNAL REVENUE*. C. A. D. C. Cir. Certiorari denied. Reported below: 235 U. S. App. D. C. 305, 732 F. 2d 191.

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No. 84-5771. *STUART v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 59.

No. 84-5775. *ILLSLEY v. STOREY, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 56.

No. 84-5784. *HARLAN v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 753 F. 2d 1067.

No. 83-2025. *MORDAUNT ET AL. v. INCOMCO ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 815.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE BRENNAN join, dissenting.

Responding to a magazine advertisement, petitioners entered into discretionary commodities futures contracts with respondents. Petitioners gave respondents over \$45,000 to invest in the commodities futures market. Investment decisions were left entirely to respondents, who received a commission for each transaction they conducted. The accounts were soon worth far less than \$45,000, and petitioners canceled the agreements. They then brought the present action in Federal District Court, alleging violations of federal and state securities laws. The District Court entered judgment for petitioners, concluding that the advertisement had been false and misleading and that the accounts constituted "investment contracts" within the meaning of the federal securities laws. See 15 U. S. C. § 77b. The Court of Appeals reversed. 686 F. 2d 815 (1982). It held that because respondents' prosperity did not hinge on the success or failure of petitioners' investments—respondents earned \$20,000 in commissions while petitioners were losing \$27,000—the required "common enterprise" was lacking.

Section 2(1) of the Securities Act of 1933 defines "security" to include an "investment contract." 48 Stat. 74, as amended, 15 U. S. C. § 77b(1). Almost 40 years ago this Court held that an "investment contract" is a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party" *SEC v. Howey Co.*, 328 U. S. 293, 298-299 (1946). The lower courts have disagreed over whether a trading account like that involved here satisfies the requirement of a "common enterprise." Some require a pooling of investments—horizontal commonality. See *Curran v. Merrill Lynch, Pierce,*

Fenner & Smith, Inc., 622 F. 2d 216 (CA6 1980), aff'd on other grounds, 456 U. S. 353 (1982); *Hirk v. Agri-Research Council, Inc.*, 561 F. 2d 96 (CA7 1977); *Wasnowic v. Chicago Board of Trade*, 352 F. Supp. 1066 (MD Pa. 1972), aff'd, 491 F. 2d 752 (CA3 1973), cert. denied, 416 U. S. 994 (1974). Under this approach, discretionary futures contracts do not qualify as securities. Other courts require only the existence of a relationship between an investor and a broker—vertical commonality—and reach the opposite result. *SEC v. Continental Commodities Corp.*, 497 F. 2d 516 (CA5 1974); cf. *Commercial Iron & Metal Co. v. Bache & Co.*, 478 F. 2d 39 (CA10 1973); *Booth v. Peavey Co. Commodities Services*, 430 F. 2d 132 (CA8 1970). The SEC in the past seems to have taken the position that discretionary commodities futures contracts are securities. *In re Carlson*, 46 S. E. C. 1125 (1977) (horizontal pooling promised but not implemented); see also *SEC v. Continental Commodities Corp.*, *supra*, at 520.

Like the Fifth Circuit, the Ninth Circuit has rejected the horizontal commonality requirement. *E. g.*, *Meyer v. Thomson & McKinnon Auchincloss Kohlmeyer, Inc.*, 686 F. 2d 818 (1982), cert. denied, 460 U. S. 1023 (1983); *Brodt v. Bache & Co.*, 595 F. 2d 459, 461 (1978). However, its conception of vertical commonality is more stringent. The Fifth Circuit has stated that the "critical inquiry" is whether there is "promoter dominance," that is, "whether the fortuity of the investments collectively is essentially dependent upon promoter expertise." *SEC v. Continental Commodities Corp.*, *supra*, at 522, and n. 12; see also *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 671 (ND Ga. 1983). Under the Ninth Circuit's rule it is not enough that the promoter has control of the investments. "Vertical commonality" also requires a correlation between the success of the promoter and that of the accounts themselves. See 686 F. 2d, at 817; *Brodt v. Bache & Co.*, *supra*, at 462.

The importance of this conflict is not limited to the classification of discretionary commodities futures contracts. In related areas the lower courts are similarly divided as to whether *Howey* requires vertical or horizontal commonality. For example, the Ninth Circuit relied on its decision in this case in concluding that vertical commonality rendered a sale/leaseback transaction a security. *United States v. Jones*, 712 F. 2d 1316, cert. denied *sub nom. Webber v. United States*, 464 U. S. 986 (1983). In con-

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trast, the Sixth Circuit has relied on *Curran, supra*, in applying a horizontal commonality test to a loan participation agreement. *Union Planters National Bank of Memphis v. Commercial Credit Business Loans, Inc.*, 651 F. 2d 1174, cert. denied, 454 U. S. 1124 (1981).

In light of the clear and significant split in the Circuits, I would grant certiorari.

No. 83-6824. *WILLIAMS v. MISSISSIPPI*. Sup. Ct. Miss. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 445 So. 2d 798.

No. 84-336. *BUSHEY ET AL. v. NEW YORK STATE CIVIL SERVICE COMMISSION ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 733 F. 2d 220.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

In *Steelworkers v. Weber*, 443 U. S. 193 (1979), this Court held that a private employer does not violate Title VII of the 1964 Civil Rights Act when it voluntarily undertakes "affirmative action," as long as that action is taken "to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.*, at 209. But the *Weber* Court began its analysis by stating:

"We emphasize at the outset the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.*, at 200.

I believe that this case squarely presents the question left open in *Weber*.

The controversy here centers on a written examination required of all applicants seeking the position of "Correction Captain" in the New York State prison correctional system. The exam results are combined with credit for seniority and Armed Forces service to arrive at a ranking list, which list is used to fill positions as they become open. The specific test in issue was administered to 275 candidates on January 30, 1982. Thirty-two of these were minority candidates, and 243 were nonminority. The test was an

objective test consisting of 103 questions. Of the minority candidates, eight, or 25%, passed the examination by scoring 70% or higher. Forty-eight percent of the nonminorities passed.

The State reviewed these results in light of a rule of the Equal Employment Opportunity Commission, which states that evidence that an employer selects minority candidates for employment positions at a rate that is less than 80% of the selection rate for nonminorities "will generally be regarded . . . as evidence of adverse impact," see 29 CFR §1607.4(D) (1984). It concluded that the test's minority selection rate of approximately 50% demonstrated an adverse impact on minority candidates. Given this statistical disparity, the fact that the State had been sued by minorities with respect to two prior examinations for correctional officer positions,¹ and the lack of any indication that minorities would not perform equally well in the position of Correction Captain, the State unilaterally decided to raise the scores of minority candidates by establishing a separate normalization curve for minority candidates and equating the mean of that curve with the mean for nonminorities. The upshot of this action was that eight more minority candidates passed the test; although no non-minority candidates were taken off the list the scores of all minority candidates were increased, and the highest scoring minority candidate became the highest scoring of all the candidates.

Petitioners are several nonminority candidates who claim they were injured by the State's action because they were "bumped" down the ranking list by minority candidates whose scores were increased. They brought suit claiming that the State's unilateral adoption of race-conscious employment policies violated Title VII and the Fourteenth Amendment. The District Court agreed that the State's action violated Title VII² for three reasons: first, it did not believe that the evidence supplied by the State established a *prima facie* case of discrimination; second, it did not believe in

¹ See *Kirkland v. New York State Dept. of Correctional Services*, 711 F. 2d 1117 (CA2 1983), cert. denied, 465 U. S. 1005 (1984); *Kirkland v. New York State Dept. of Correctional Services*, 520 F. 2d 420 (CA2 1975), cert. denied, 429 U. S. 823 (1976), on remand, 628 F. 2d 796 (CA2 1980), cert. denied, 450 U. S. 980 (1981).

² The court dismissed petitioners' claim under 42 U. S. C. § 1983, and that decision was not appealed.

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any event that the State could take race-conscious action when it had not attempted or considered rebutting a prima facie case with proof that the employment decisions were based on legitimate job-related criteria—in this case a professionally developed job-related examination; and third, it thought the remedy adopted by the State was “fundamentally flawed.” 571 F. Supp. 1562 (1983).

The Court of Appeals for the Second Circuit reversed. 733 F. 2d 220 (1984). It held that the State had properly determined that a prima facie case was made out by reference to the EEOC guidelines. It then reasoned that the State was not required to rebut this case before taking the affirmative race-conscious steps taken here. The court suggested that the District Court’s analysis was contrary to Title VII’s policy favoring voluntary compliance because it only permitted the State to take race-conscious actions after there had been a judicial determination that the Act had been violated. Such a rule would actually promote litigation, and would only result in the State’s waiting to be sued and then settling. The court relied on its prior opinion in *Kirkland v. New York State Dept. of Correctional Services*, 711 F. 2d 1117 (1983), cert. denied, 465 U. S. 1005 (1984), in which it had approved a settlement with respect to the results of the written examination for Correction Lieutenant. The court also relied on *Weber*, *supra*, noting that in *Weber* this Court had approved voluntary affirmative action even in the absence of a determination that the employer had discriminated. In a footnote, the opinion refused to distinguish *Weber* on the ground that this case involved a public employer. 733 F. 2d, at 227, n. 8. Finally, the court rejected the District Court’s characterization of the “remedy” as “fundamentally flawed,” noting that the score adjustment did not displace nonminority candidates from the list or bar their advancement. It nevertheless remanded the case for determination of whether the remedy “unnecessarily trammell[ed] the interests” of nonminority employees, as that standard was set in *Weber*.

I believe that the Court of Appeals’ opinion reaches questionable conclusions on difficult and important questions, and that certiorari should therefore be granted. Principal among these decisions is the court’s unexplained extension of *Weber* to allow voluntary affirmative action by state employers. This Court has never taken the position that, consistent with the restraints of the Fourteenth Amendment, a state agency may establish preferential

classifications on the basis of race in the absence of rulings by an appropriate body that constitutional or statutory violations have occurred. See *University of California Regents v. Bakke*, 438 U. S. 265, 302-310 (1978) (opinion of POWELL, J.). Cf. *Firefighters v. Stotts*, 467 U. S. 561, 583 (1984) (again reserving the question of a public employer's ability to adopt voluntary affirmative-action plans).³ Certainly the express reservation of the question in *Weber* suggests that a public employer may fare differently in this regard from a private employer, and no decision of this Court subsequent to *Weber* holds that it is consistent with the Fourteenth Amendment for a state agency unilaterally to decide to use race-based criteria to favor minorities in employment decisions. The States are not granted the enforcement power under § 5 of the Fourteenth Amendment that many Members of this Court found important in upholding the congressional Act in *Fullilove v. Klutznick*, 448 U. S. 448, 472 (1980) (opinion of BURGER, C. J.); *id.*, at 500 (POWELL, J., concurring). Nor is there even a hint in the opinions below that the State Correction Department has violated the Fourteenth Amendment, either in utilizing this particular test or otherwise, by purposefully discriminating against minority employees. The test itself has been deemed irrelevant to this litigation. All that has happened here is that the State has perceived a statistical disparity in the test results of minority and nonminority applicants, and, at least in part because it fears a lawsuit by minority applicants, it has chosen to do away with that disparity by discriminating against similarly situated nonminority applicants.

I find unpersuasive the Court of Appeals' argument that requiring a judicial determination of discrimination in these cases will undermine Title VII's policy favoring voluntary compliance. Although voluntary compliance is a laudable goal, Members of this Court have recognized on other occasions that "affirmative action" plans must be policed to prevent the practice of discrimination for discrimination's sake, see *Bakke*, *supra*, at 307-310 (opinion of POWELL, J.); cf. *Fullilove*, *supra*, at 480 (opinion of BURGER, C. J.); and to protect the interests of innocent third parties, see

³That this question is both important and unsettled is reflected in the several diverse opinions of the judges of the Court of Appeals for the Fifth Circuit, sitting en banc in *Williams v. City of New Orleans*, 729 F. 2d 1554 (1984).

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Weber, 443 U. S., at 208–209. These interests will not be sufficiently protected if agencies charged with discrimination may simply cave in to the allegations without even considering justifications for, or attempting to justify, their original employment decisions, particularly where the allegations are based only upon disparate impact. I therefore disagree with the Court of Appeals' suggestion that it would in any event be sufficient for the State to wait until it is sued and then settle; in these situations the state employer is in a difficult position; it has a duty to act nondiscriminatorily toward both minority and nonminority applicants and its employment decisions must be justified to both sides. States should not be allowed to practice racial discrimination anew under the guise of atoning for past discrimination or because of the difficulties with mounting an otherwise legitimate defense to a lawsuit.

Thus, even if it were clear that state agencies may engage in this sort of "affirmative action" in the absence of a finding of discrimination, review here is still warranted to address the circumstances under which this type of "affirmative action" would be permissible.

Petitioners did not press their Fourteenth Amendment claim on appeal, and it may be that the Court sees this fact as an adequate basis for denying certiorari. But I do not think that review of these issues is thereby foreclosed. Petitioners may be precluded from arguing directly that the state action here violated the Fourteenth Amendment, but I think that when a state employer claims that arguably discriminatory conduct on its part is nonetheless authorized by Title VII, the claim of such statutory authorization must be considered in the light of the prohibitions of the Fourteenth Amendment. I doubt that when Congress amended Title VII in 1972 to bring state agencies within its mandate it intended to allow those agencies to claim that their actions were shielded under Title VII even if the actions would violate the Fourteenth Amendment. The issue is one of statutory construction, but as always the statute must be read with the presumption that Congress did not intend to authorize conduct that is prohibited by the Constitution. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 500–501 (1979).

I think this Court should grant certiorari in this case to decide the question left open in *Weber*, and to address the other difficult questions presented by the decision of the Court of Appeals.

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No. 84-384. GOULD, INC., ET AL. v. ADAMS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 739 F. 2d 858.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE POWELL join, dissenting.

Petitioner Gould, Inc. (Gould), discontinued its operations at the Wilkening plant, where it had employed respondents. Under a pension plan negotiated with respondents' union, assets were to be used first to pay pensions to "current retirees"—beneficiaries who had already retired. If any assets then remained, they were to go to employees with vested rights to benefits, as they reached retirement age. When the plant closed, however, the pension fund's relevant assets were insufficient to pay even the current retirees.

Respondents' union brought a grievance under the collective-bargaining agreement, seeking to force Gould to fund pension benefits for the beneficiary former employees in full. The grievance proceeded to arbitration, and although the arbitrator held that Gould did not have to fund the plan in full, he found that Gould improperly changed its actuarial assumptions to reduce its contributions at the time it began to consider closing the plant. The arbitrator ordered the parties to determine by negotiations the amount by which Gould's contributions were less than they would have been if proper actuarial assumptions had been used, and he directed Gould to pay that amount into the pension fund. After negotiations, Gould and respondents' union agreed that the undercontribution amount was \$570,600. However, without notice to respondents, Gould and the union then negotiated a settlement. Under the settlement, Gould agreed to guarantee full pension rights for the current retirees through a supplemental annuity, but Gould was absolved of the responsibility to deposit \$570,600 with the plan's trustee, petitioner First Trust Co. Vested employees were not entitled to any benefits under the settlement.

Respondents, all vested employees, brought suit. In their amended complaint, respondents for the first time alleged that Gould's failure to place the \$570,600 in the trust violated the arbitrator's award, and thus the collective-bargaining agreement; and that in negotiating the settlement, their union breached its duty of fair representation. See *Vaca v. Sipes*, 386 U. S. 171 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976).

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The Court of Appeals found that this amendment was timely despite our recent decision in *DelCostello v. Teamsters*, 462 U. S. 151 (1983), where we held that the uniform national 6-month statute of limitations found in § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b), was applicable by analogy in *Vaca v. Sipes* cases. 739 F. 2d 858 (1984). Instead, the Court of Appeals borrowed the 3-year statute of limitations in the Employee Retirement Income Security Act (ERISA), 29 U. S. C. § 1113(a)(2),* as "arguably more appropriate." 739 F. 2d, at 866. The Court of Appeals reasoned that while speed and finality are paramount in most *Vaca v. Sipes* situations, these policies are less relevant in pension disputes because the effect of the dispute on day-to-day management of the business is slight. The absence of an immediate effect on any employees except those currently retired also makes it likely that employees will not be aware of their grievance immediately. In the end, the Court of Appeals concluded that this was a pension matter governed by the ERISA limitations period, not an ordinary *Vaca v. Sipes* claim covered by the rule we announced in *DelCostello*.

The rule adopted below departs from the policy we recently announced in *DelCostello* of having a single statute of limitations for fair representation suits. Petitioners argue that the effect of this decision will be to reintroduce much of the uncertainty and lack of uniformity which marked the pre-*DelCostello* period. If the limitations period for a union's resolution of a wide variety of disputes turns on the nature of the issue, rather than the nature of the union's discharge of its duty of representation, petitioners assert that the *DelCostello* decision will have been rendered largely meaningless.

I would grant certiorari to decide this important question involving the reach and application of the rule we announced in *DelCostello*.

No. 84-385. HONDA MOTOR CO., LTD. v. COONS; and

No. 84-591. COONS v. HONDA MOTOR CO., LTD. Sup. Ct. N. J. Certiorari denied. Reported below: 94 N. J. 307, 463 A. 2d 921, and 96 N. J. 419, 476 A. 2d 763.

*In relevant part, that Act provides for a 3-year statute of limitations dating from "the earliest date (A) on which the plaintiff had actual knowledge of the breach." 29 U. S. C. § 1113(a)(2).

JUSTICE REHNQUIST, dissenting.

In his cross-petition for certiorari Walter P. Coons seeks review of the New Jersey Supreme Court's holding that the New Jersey tolling statute, N. J. Stat. Ann. §2A:14-22 (West 1952), violates the Commerce Clause of the United States Constitution because it tolls the statute of limitations for claims against corporations not represented in New Jersey. *Coons v. American Honda Motor Co.*, 94 N. J. 307, 463 A. 2d 921 (1983). We upheld the constitutionality of this statute against equal protection and due process challenges in *G. D. Searle & Co. v. Cohn*, 455 U. S. 404 (1982). We expressly reserved the Commerce Clause question in *Searle* because the applicable New Jersey law was unclear. *Id.*, at 413-414. We also vacated the judgment below and remanded to New Jersey courts a previous appeal arising out of Coons' lawsuit, for reconsideration in light of *Searle*. *Honda Motor Co. v. Coons*, 455 U. S. 996 (1982). That remand resulted in the New Jersey Supreme Court holding here, which Coons claims misapplies the Commerce Clause. Coons' suit has clarified the New Jersey law on the subject, and in striking down the New Jersey statute I think that the Supreme Court of New Jersey has gone beyond any of our Commerce Clause decisions. I would grant certiorari to review its decision.

Coons was burned badly when the fuel filler cap on his Honda motorcycle malfunctioned during a collision. New Jersey provides a 2-year statute of limitations for the type of injury suffered by Coons. N. J. Stat. Ann. §2A:14-2 (West 1952). Coons waited four years, however, and brought suit in state court against Honda Motor Co. (American Honda) and its parent Honda Motor Co. of Japan (Honda of Japan). American Honda had a certificate to do business in New Jersey, as required by N. J. Stat. Ann. §14A:13-4 (West 1969); Honda of Japan had no certificate. Because Honda of Japan had no certificate it was not "represented" in New Jersey under N. J. Stat. Ann. §2A:14-22 (West 1952), and that statute therefore tolled the 2-year limitations period for all unrepresented corporations.¹ Thus American Honda

¹ New Jersey Stat. Ann. §2A:14-22 (West 1952), has now been amended. See 1984 N. J. Laws, ch. 131. At the time of this lawsuit the statute stated in part:

"[I]f any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any

successfully asserted a statute of limitations defense to Coons' complaint, but Honda of Japan could not.

A divided New Jersey Supreme Court held that interstate commerce was unconstitutionally burdened by § 14-22's requirement that a foreign corporation must qualify to do business in New Jersey before it could avail itself of the statute of limitations provided in N. J. Stat. Ann. § 2A:14-2 (West 1952). The court relied on, *inter alia*, our holdings in *Allenberg Cotton Co. v. Pittman*, 419 U. S. 20 (1974), and *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914), to describe the tolling statute as a "forced-licensure provision," which when placed on corporations engaged in interstate commerce amounted to a "*per se*" violation of the Commerce Clause. 94 N. J., at 316-319, 463 A. 2d, at 926-927. Although both *Allenberg Cotton* and *Sioux Remedy* involved States which closed their courts entirely to foreign corporations, the New Jersey Supreme Court held that the rationale of those cases extended to the mere tolling of a statute of limitations against corporations unrepresented in the State.

I am not so sure that *Allenberg Cotton* and *Sioux Remedy* can be taken so far. The States involved in those cases totally barred foreign corporations from the state courts. Thus out-of-state corporations which entered into contracts in-state had no forum in which to enforce those contracts, and out-of-state competition was effectively precluded. New Jersey, however, provides greater protection to the contractual and legal interests of foreign corporations. For example, N. J. Stat. Ann. § 14A:13-11 (West 1969), states in part:

"(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and

person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person . . . is not residing within this state or such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by this section. . . ."

According to the New Jersey Supreme Court, a corporation cannot be "represented" in New Jersey for purposes of the above statute until it has received a certificate of authority to do business. See *Coons v. American Honda Motor Co.*, 94 N. J. 307, 312-316, 463 A. 2d 921, 924-925 (1983).

shall not prevent such corporation from defending any action or proceeding in any court of this State."

See also *Materials Research Corp. v. Metron, Inc.*, 64 N. J. 74, 312 A. 2d 147 (1973).

The contested New Jersey statute simply tolls the statute of limitations for most civil suits. As the Court noted in *Searle*, the tolling statute attempts to preserve a cause of action against absent defendants who may be difficult to find and difficult to serve. 455 U. S., at 410. Moreover, the enactment of the New Jersey long-arm statute has not fully relieved the difficulty facing residents injured by absent defendants. See *ibid.*

The statute does not place an insuperable burden on a foreign corporation because the corporation may always plead laches as a defense to a plaintiff whose tardiness impairs the corporation's ability to defend itself. See *id.*, at 411. All the corporation need do to commence running of the limitations period is to become represented in New Jersey. As we stated in *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314 (1945), and reiterated in *Searle, supra*, at 408, statutes of limitations represent a public policy decision about the privilege to litigate. Their shelter has never been a fundamental or natural right, but is provided only by legislative grace, subject to a relatively large degree of legislative control.

In drafting the contested statute the New Jersey Legislature sought to balance reasonable protection of its citizens from foreign tortfeasors against the requirement for unimpeded interstate commerce. The impact on interstate commerce here is fairly negligible. The New Jersey Supreme Court provided little discussion of why interstate commerce would actually be impeded by tolling a statute of limitations, subject to a laches defense, against an absent defendant not represented in the State. The existence of the tolling provision certainly did not dissuade Honda of Japan from selling motorcycles in New Jersey.

As we stated in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970):

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

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See also *Sioux Remedy*, *supra*, at 201. The tolling provision of N. J. Stat. Ann. § 2A:14-22 (West 1952), does not so scarcely benefit local interests and so clearly burden interstate commerce that we should decline the opportunity to review this constitutional issue of first impression. The Court should grant certiorari review for Nos. 84-385 and 84-591.²

No. 84-421. ROWLAND ET AL. *v.* DEMERY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 735 F. 2d 1139.

No. 84-533. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* ARANGO. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 716 F. 2d 1353 and 739 F. 2d 529.

No. 84-714. DISTRICT OF COLUMBIA BOARD OF PAROLE ET AL. *v.* BRANDON. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 236 U. S. App. D. C. 155, 734 F. 2d 56.

No. 84-736. FLORIDA *v.* JAMISON. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 455 So. 2d 1112.

No. 84-629. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* MCCOLLUM ET AL. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 666 S. W. 2d 604.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

This petition presents the question whether § 3 of the Federal Arbitration Act, 9 U. S. C. § 3, bars a court from issuing a tempo-

² Honda of Japan brought the main petition in this case, No. 84-385, complaining of the New Jersey Supreme Court's decision, on rehearing, to apply its Commerce Clause holding prospectively. See *Coons v. Honda Motor Co.*, 96 N. J. 419, 476 A. 2d 763 (1984). The cross-petition, No. 84-591, was filed under this Court's Rule 19.5, and this Court should grant both the main petition and cross-petitions in order to reach the latter. See this Court's Rules 19.5, 20.5. If we were to reverse the New Jersey Supreme Court's Commerce Clause holding, there would be no need to address the issue presented in the main petition.

rary injunction pending arbitration of a contractual dispute.¹ Respondent McCollum (hereafter respondent) is a former employee of petitioner Merrill Lynch, Pierce, Fenner and Smith, Inc. The employment contract signed by Merrill Lynch and respondent provided that in the event that respondent's employment with Merrill Lynch was terminated, respondent would not be allowed to remove client lists from the premises of Merrill Lynch nor to solicit any of Merrill Lynch's clients for a period of one year from the date of termination. The contract also provided that "any controversy between [respondent] and Merrill Lynch arising out of [respondent's] employment, or the termination of [respondent's] employment with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either party"

Respondent left petitioner and obtained a position with one of petitioner's competitors. Alleging that respondent had violated the terms of his contract by absconding with petitioner's client lists and soliciting petitioner's clients, petitioner sued respondent for damages and injunctive relief in the District Court for Harris County, Texas. After entering a temporary restraining order enjoining respondent from any actions in violation of the contract, the District Court concluded that the dispute was arbitrable and that the court therefore lacked authority to adjudicate it. Accordingly, although the court was of the opinion that petitioner would have been entitled to injunctive relief but for the arbitration clause, the court dissolved its restraining order, denied petitioner's motion for a temporary injunction, and stayed all further proceedings in the action pending arbitration of the underlying dispute.

Petitioner appealed the District Court's order to the Texas Court of Appeals. Petitioner attacked the trial court's finding that the dispute was arbitrable, the denial of preliminary injunc-

¹Section 3 provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

tive relief, and the order compelling arbitration. The Court of Appeals affirmed the lower court on all three issues. 666 S. W. 2d 604 (1984). In upholding the denial of the preliminary injunctive relief pending arbitration, the Court of Appeals interpreted § 3 of the Federal Arbitration Act (applicable, in the court's view, to state as well as federal courts) to command an immediate halt to judicial proceedings once a court determines that the dispute underlying an action is arbitrable. Judicial resolution of the issues involved in a motion for injunctive relief, the court held, would be inconsistent with the Act's command that the merits of the dispute be determined by the arbitrator. Thus, the court concluded that § 3 of the Arbitration Act precludes a court from entering a preliminary injunction to maintain the status quo pending arbitration in any arbitrable dispute.

The Supreme Court of Texas denied petitioner's application for a writ of error to review the judgment of the Court of Appeals, and petitioner filed this timely petition for certiorari.

The question presented by this case—whether the Arbitration Act bars a court from issuing a preliminary injunction in a case subject to arbitration—is one that has divided the state and federal courts.² In adopting the position that preliminary injunctive relief is unavailable, the Texas Court of Appeals followed recent rulings of the Federal Courts of Appeals for the Eighth and Tenth Circuits, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F. 2d 1286, 1291 (CA8 1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott*, No. 83-1480 (CA10, May 12, 1983) (unpublished order). However, the Second and Seventh Circuits, apparently untroubled by § 3 of the Arbitration Act, have routinely held that preliminary injunctions are available to maintain the status quo pending arbitration even in actions subject to the Arbitration

² Petitioner contends not only that the Texas Court of Appeals misconstrued § 3 of the Arbitration Act, but also that § 3 is inapplicable in state-court proceedings. Although this Court, in holding that state courts must apply § 2 of the Act, has reserved the question whether § 3 applies to the state courts, see *Southland Corp. v. Keating*, 465 U. S. 1, 16, n. 10 (1984), petitioner cites no authority for the proposition that § 3 does not apply, and there appears to be no substantial disagreement among the state courts over § 3's applicability. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1, 26, n. 34 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed*, 405 So. 2d 790 (Fla. App. 1981).

Act's command that the court compel arbitration rather than adjudicating the underlying dispute. See *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F. 2d 348 (CA7 1983); *Connecticut Resources Recovery Auth. v. Occidental Petroleum Corp.*, 705 F. 2d 31 (CA2 1983); *Guinness-Harp Corp. v. Joseph Schlitz Brewing Co.*, 613 F. 2d 468 (CA2 1980); *Erving v. Virginia Squires Basketball Club*, 468 F. 2d 1064 (CA2 1972). The Supreme Court of Colorado has also recently held (without any discussion of the Arbitration Act) that a preliminary injunction to maintain the status quo is available in an action in which a court is otherwise obligated to stay its proceedings and compel arbitration. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court of Denver*, 672 P. 2d 1015 (1983).

The importance of resolving the question of the availability of preliminary injunctive relief in cases subject to arbitration is underscored by the confusion over the issue among the Federal District Courts—courts whose decisions on the issuance of preliminary relief are often effectively final, given that the imminence of arbitration may sharply limit a party's incentives to appeal an adverse decision. In an opinion written in 1951, Judge Weinfeld of the Southern District of New York concluded that the power to issue a preliminary injunction pending arbitration follows from the court's power to compel arbitration, for "[i]t would be an oddity in the law if the Court, after compelling a party to live up to his undertaking to arbitrate, had to stand idly by during the pendency of the arbitration which it has just directed and permit him to assert his 'right to breach a contract and to substitute payment of damages for nonperformance.'" *Albatross S.S. Co. v. Manning Bros., Inc.*, 95 F. Supp. 459, 463 (1920) (quoting O. Holmes, *Collected Legal Papers* 175). Judge Weinfeld's reasoning was adopted by the District Court for the Eastern District of New York in *Janmort Leasing, Inc. v. Econo-Car International, Inc.*, 475 F. Supp. 1282 (1979). In other recent cases, however, District Courts have concluded that they lack the power to issue a preliminary injunction in cases subject to §3 of the Arbitration Act. See, e. g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro*, 577 F. Supp. 616 (WD Mo. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shubert*, 577 F. Supp. 406 (MD Fla. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thompson*, 575 F. Supp. 978 (ND Fla. 1983); *Smith v. Merrill Lynch, Pierce,*

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Fenner & Smith, Inc., 575 F. Supp. 904 (ND Tex. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thomson*, 574 F. Supp. 1472 (ED Mo. 1983). But cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. De Liniere*, 572 F. Supp. 246 (ND Ga. 1983), in which the court, in a case governed by §3, apparently assumed it had the power to grant a preliminary injunction but denied the injunction on the merits.

Whether the Arbitration Act bars the issuance of a preliminary injunction pending arbitration appears to be a frequently litigated question of considerable importance to the parties to arbitration agreements. The issue is one well worth definitive resolution by this Court. The most obvious obstacle to review of this particular case is that the arbitration proceedings will likely have begun and ended—mooting the issue of relief pending arbitration—by the time this Court has the opportunity to resolve the issue. This obstacle, however, is more apparent than real. The Court has recognized an exception to its general mootness doctrine for cases presenting issues that are “capable of repetition, yet evading review.” See, e. g., *Sosna v. Iowa*, 419 U. S. 393 (1975); *Dunn v. Blumstein*, 405 U. S. 330 (1972). In *Weinstein v. Bradford*, 423 U. S. 147 (1975), we held that “the ‘capable of repetition, yet evading review’ doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.” *Id.*, at 149. Both criteria are satisfied in this case. It would be the rare case indeed in which an arbitration proceeding compelled under the Arbitration Act would not have commenced before the issue of the propriety of injunctive relief pending arbitration found its way to this Court. Thus, unless the Court is willing to apply the “capable of repetition, yet evading review” doctrine, it is likely that the issue will never be conclusively resolved here. Moreover, the likelihood that petitioner will again find itself in the position of seeking injunctive relief pending arbitration of a contractual dispute with a former employee seems substantial: in fact, several of the courts that have so far examined the issue have done so in proceedings initiated by petitioner. The question, then, is one that is “capable of repetition, yet evading review”; and in view of its importance, I would grant certiorari to resolve it.

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No. 84-646. PEAT, MARWICK, MITCHELL & CO. *v.* LIPTON ET AL.; and

No. 84-651. DOCUMATION, INC., ET AL. *v.* LIPTON ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 734 F. 2d 740.

No. 84-654. CHEVRON CORP. ET AL. *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 738 F. 2d 1021.

No. 84-668. WESTERN AIRLINES, INC. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Motion of Air Transport Association of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 155 Cal. App. 3d 597, 202 Cal. Rptr. 237.

No. 84-694. ARKANSAS POWER & LIGHT CO. ET AL. *v.* UNION OF CONCERNED SCIENTISTS ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 237 U. S. App. D. C. 1, 735 F. 2d 1437.

No. 84-707. DUNN *v.* UNITED STATES ET AL. C. A. 11th Cir. Motion of petitioner to secure Rule 28.2 affidavit denied. Certiorari denied.

No. 84-711. RONWIN *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 84-731. SHUMATE *v.* DOUTHAT, SUBSTITUTE TRUSTEE, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 740 F. 2d 963.

No. 84-5333. SPICER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 740 F. 2d 969.

No. 84-5545. SPIVEY *v.* GEORGIA. Sup. Ct. Ga.;

No. 84-5689. BURRIS *v.* INDIANA. Sup. Ct. Ind.; and

No. 84-5808. JULIUS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 84-5545, 253 Ga. 187, 319 S. E. 2d 420; No. 84-5689, 465 N. E. 2d 171; No. 84-5808, 455 So. 2d 984.

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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. 84-5690. *SONGER v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 788.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner Carl Songer was sentenced to death in 1974. At the sentencing hearing, Songer's attorney did not offer available character evidence in mitigation, not because he had none, or as a strategic maneuver, but because he reasonably concluded that Florida law did not permit admission of such evidence. We have consistently held, however, that in capital cases "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record." *Lockett v. Ohio*, 438 U. S. 586, 604 (1978) (opinion of BURGER, C. J.). We have applied this rule not only when the preclusion of mitigating evidence results under the plain terms of a statute, as in *Lockett*, but also where a non-statutory application of state law violates the rule. *Eddings v. Oklahoma*, 455 U. S. 104 (1982). In Songer's case, the District Court ruled that Florida's capital sentencing statute was, in 1974, reasonably understood to preclude introduction of mitigating evidence unless the evidence fit into certain statutorily defined categories. Because that understanding, and Songer's consequent death sentence, violated clear principles expressed in *Lockett* and *Eddings*, this Court should vacate Songer's sentence and remand the case for a proper proceeding.

I

Songer was convicted in February 1974 of the first-degree murder of a Florida highway patrolman. The evidence at trial showed that Songer was asleep in the back seat of a car lawfully stopped off the highway when the investigating patrolman reached

into the car with his pistol in a ready position. Suddenly thus awakened, Songer grabbed his own gun, and both Songer and the patrolman fired multiple shots. The patrolman died from the injuries he received.

After returning a verdict of guilty, the jury separately heard evidence under Florida's recently enacted capital sentencing statute. Fla. Stat. § 921.141 (1973).¹ At the time, that statute listed eight aggravating circumstances and seven mitigating circumstances. §§ 921.141(6) and (7).² Although Songer informed his attorney that members of his family and friends were willing and available to testify to his general good character and normally nonviolent personality, Songer's counsel called no witnesses other than Songer and offered no other mitigating evidence for the jury to consider. The jury recommended death, and the judge imposed that sentence.

In 1980, Songer filed a motion to vacate sentence in his Florida trial court.³ He raised his *Lockett* claim as part of a broad challenge to his trial attorney's effective assistance and to the jury instructions used at sentencing.⁴ At the evidentiary hearing held

¹ Florida enacted this statute in 1972, following our decision in *Furman v. Georgia*, 408 U. S. 238 (1972).

² See 3 1972 Fla. Laws 20-22, ch. 72-724, § 9 (amending § 921.141, effective December 8, 1972); *State v. Dixon*, 283 So. 2d 1, 4-6 (Fla. 1973) (quoting statute in full as it existed prior to October 1974 amendment). The statute subsequently has been amended and its sections renumbered. See Fla. Stat. Ann. §§ 921.141(5) and (6) (West Supp. 1984).

³ This motion was not filed until 1980 because on direct appeal this Court had vacated Songer's sentence and remanded for resentencing in light of *Gardner v. Florida*, 430 U. S. 349 (1977). *Songer v. Florida*, 430 U. S. 952 (1977). After a hearing limited to the presentation of the presentence report to Songer's attorney, the trial court reimposed Songer's death sentence and the Florida Supreme Court affirmed. See *Songer v. State*, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U. S. 956 (1979). In due course thereafter, Songer's motion to vacate the judgment and death sentence was filed pursuant to Florida Rule of Criminal Procedure 3.850.

⁴ In his motion to vacate, Songer challenged (1) his trial counsel's failure to present "available evidence as to Defendant's passive nature . . . or to any other salient factors in Defendant's character," and (2) the "specific application of the [Florida capital sentencing] statute in this case," citing *Lockett*, because "the court instructed the jury to limit its consideration of mitigating circumstances to those" specified in the statute. Record Volume (hereinafter R.) VI, Exhibit E.

on this motion, Songer's trial counsel explained that he had not offered character or other evidence in mitigation because he had believed that only evidence relevant to the statutory mitigating circumstances was allowed:

"The only recollection I have is that was a new statute at that time, . . . going over the statutory grounds with him for aggravating circumstances and mitigating circumstances, and what would be available to us under the statutory language and what would be against us under the statutory language. . . . [I examined] all the factors we had available to us." R. II, at 379.⁵

Without discussing whether Songer's sentencing may have violated *Lockett*, the trial court ruled that Songer's counsel had not been ineffective and denied the motion to vacate. The Florida Supreme Court affirmed, *Songer v. State*, 419 So. 2d 1044 (1982), also without mention of *Lockett*.⁶

After the Florida Supreme Court again denied Songer's claim without discussion when he filed a state habeas corpus petition, *Songer v. State*, 423 So. 2d 355 (1982), Songer filed this federal petition under 28 U. S.C. § 2254. The District Court first concluded that Songer's attorney had not been ineffective at the penalty stage. 571 F. Supp. 1384, 1393-1397 (MD Fla. 1983). The court found that the attorney had examined "the possibility of using particular character witnesses during the penalty stage," and that "[h]is motivation for rejecting that [possibility] is unclear." *Id.*, at 1394. Then, based on the attorney's testimony at the motion

⁵ Songer's counsel also testified that Songer's trial was the first case he had tried under Florida's new capital sentencing statute. R. II, at 398.

⁶ The court stated that "[a]ppellant's claim that the trial court failed to properly instruct the jury on the scope of mitigating circumstances . . . has already been considered by this Court," and cited its decision rendered after Songer's sentencing remand. 419 So. 2d, at 1046 (citing 365 So. 2d, at 700). See n. 3, *supra*. The resentencing opinion, however, had addressed only the facial validity of Florida's capital sentencing statute in light of the recent *Lockett* decision. See n. 9, *infra*. At no point in that decision had the Florida Supreme Court explicitly addressed the particular facts of Songer's sentencing proceeding. See 365 So. 2d, at 700. Thus the later refusal to discuss Songer's arguments on this point was based on a premise that seems clearly erroneous. It nonetheless constitutes a decision on the merits of the claim.

to vacate hearing quoted above, the court concluded that "it is quite possible that [the attorney] may have been laboring under the *reasonable*, but mistaken, belief that he could not introduce any nonstatutory mitigating factors." *Id.*, at 1395 (emphasis added).⁷ Despite this conclusion that Florida law in 1974 reasonably operated to preclude Songer's attorney from introducing relevant and available mitigating evidence, the District Court failed to make any connection with our *Lockett* and *Eddings* holdings.

A few pages later, the District Court addressed Songer's second claim: that the jury instructions concerning mitigating circumstances had violated *Lockett*. Without reference to its earlier conclusion that Songer's attorney had reasonably concluded that Florida law precluded him from introducing nonstatutory mitigating evidence, the court stated that Songer "was not prevented from proffering any evidence in mitigation." 571 F. Supp., at 1398. After discussing the scant mitigating evidence which the attorney had succeeded in eliciting from Songer's own testimony at the sentencing hearing, and noting that the Florida Supreme Court had already rejected the "identical challenge" (as if that could ever be dispositive), the District Court dismissed the claim without further comment.

On appeal, the Eleventh Circuit affirmed the District Court's factual findings. 733 F. 2d 788 (1984). These included (1) that Songer's "[c]ounsel did discuss character witnesses with the defendant, but counsel rejected their use," and (2) that the "character mitigating evidence would have been a general affirmation of good behavior as a child and young adult offered by family and friends." *Id.*, at 791, n. 2. Next, without specifically discussing the attorney's performance at sentencing, the court ruled that Songer had not adequately made out an ineffective assistance claim. The court then disposed of Songer's attack on the jury instructions concerning mitigating circumstances. See n. 14,

⁷Just prior to stating this conclusion, the District Court also suggested that because the attorney's motivations "do not appear from his testimony at the [motion to vacate] hearing, . . . this court may also presume . . . that counsel's decision not to call character witnesses was strategic." 571 F. Supp., at 1394-1395. This "presumption" is obviously not a factual finding. Moreover it is contradicted by the record of the attorney's testimony at the state court hearing as well as by the District Court's own conclusion quoted in the text. Finally, it is a legal presumption that this Court has never expressly approved. It thus carries no dispositive weight here.

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BRENNAN, J., dissenting

infra. *Lockett* and *Eddings* were not even cited in the Court of Appeals' opinion.

II

The plain error of the courts below is that, although they perceived some vague tension between *Songer's* sentencing and the principles expressed in *Lockett* and *Eddings*, they failed to consider precisely the impact of Florida law as understood and applied when *Songer* was sentenced in 1974. At that time, as Florida decisional law indicates, the Florida capital sentencing statute operated to preclude consideration of mitigating evidence outside the statutory categories. The District Court explained this forthrightly:

"[A]t the time of petitioner's trial in 1974, it was by no means clear that a defense attorney should introduce mitigating character evidence during the penalty stage. 'Florida's capital sentencing statute was barely a year old at the time of appellant's trial, and the only Florida Supreme Court case addressing its constitutionality supported an interpretation of the statute as limiting the mitigating evidence that could be considered to that falling within the seven statutory factors.'" 571 F. Supp., at 1395 (quoting *Proffitt v. Wainwright*, 685 F. 2d 1227, 1248 (CA11 1982)).

The conclusion that it was "by no means clear" in 1974 that nonstatutory mitigating evidence was admissible under Florida's capital sentencing law is, to say the least, an understatement. The law had become effective in December 1972. In *State v. Dixon*, 283 So. 2d 1 (1973), the Florida Supreme Court had described the new statute as "a system whereby the possible aggravating and mitigating circumstances are defined" and only "the weighing process" is left to the jury and judge. *Id.*, at 7 (emphasis added). Thus, *Dixon* stated, the statutory list of aggravating and mitigating circumstances "must be determinative of the sentence imposed." *Id.*, at 8 (emphasis added). If "one or more of the prescribed aggravating factors is found, death is presumed to be the proper sentence unless it or they are overriden by one or more of the mitigating circumstances provided in Fla. Stat. § 921.141(7)." *Id.*, at 9 (emphasis added).⁸

⁸Judge Ervin's dissent in *Dixon* indicated that this interpretation of Florida's capital sentencing statute was unanimous. See 283 So. 2d, at 17.

Three years later, in *Cooper v. State*, 336 So. 2d 1133 (1976), the Florida Supreme Court unambiguously reaffirmed this interpretation:

"The sole issue in a sentencing hearing under § 921.141 . . . is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding. . . ." Id., at 1139 (emphasis added).

Cooper concluded: "[T]he Legislature chose to list the mitigating circumstances which it judged to be reliable . . . , and we are not free to expand the list." *Ibid.*; see also *id.*, at 1139, n. 7.

Moreover, even if the general interpretation of § 921.141 in Florida in 1974 had been the same as today—and it obviously was not⁹—that fact would be irrelevant in light of the record of this

⁹Not until this Court examined Florida's capital sentencing statute in *Proffitt v. Florida*, 428 U. S. 242 (1976), was there any suggestion that Florida's law might permit nonstatutory mitigating evidence. Without citing *Dixon*, the only Florida case on point at the time, the Court speculated in *Proffitt* that it "seems unlikely" that Florida's statute would be interpreted to bar consideration of nonstatutory mitigating evidence. 428 U. S., at 250, n. 8 (opinion of Stewart, POWELL, and STEVENS, JJ.); accord, *id.*, at 260 (opinion of WHITE, J.); see also *Lockett*, 438 U. S., at 606 ("[T]his Court assumed in *Proffitt* . . . that the range of mitigating factors listed in the [Florida] statute was not exclusive"). *Proffitt* was handed down on July 2, 1976; Florida's decision in *Cooper* was issued just six days later on July 8, 1976. It seems certain that the Florida Supreme Court was not aware of the details in *Proffitt*'s footnotes at the time. Thus each court interpreted Florida's statute in 1976 with no clear understanding of how the other contemporaneously viewed the law.

Once *Lockett* was decided in 1978, however, Florida necessarily accepted the suggestion that its statutory language was not exclusive in order to save the statute's constitutionality. Thus, when Songer raised this issue in a petition for rehearing after this Court's sentencing remand in 1978, see n. 3, *supra*, the Florida Supreme Court simply dismissed its prior language in *Cooper* as "not apropos," and claimed that "[o]bviously, our construction of Section 921.141(6) has been that all relevant circumstances may be considered in mitigation." *Songer v. State*, 365 So. 2d, at 700. The Florida cases cited in support of this position, however, do not "obviously" state it. Most relied expressly on the 1973 *Dixon* decision which, as shown above, suggests a contrary conclusion, and a number simply tracked the unilluminating statutory language. None stated explicitly that nonstatutory mitigating evidence would be admitted under § 921.141. More significant, however, is the fact that the *earliest* decision cited was decided in December 1975, almost two

particular case. At the penalty stage of Songer's trial, the judge informed the jury that it was to decide whether or not to impose the death penalty "based upon . . . whether sufficient mitigating circumstances exist, *as hereafter enumerated. . .*" R. VI, at 445. The judge then stated that "[m]itigating circumstances by statute are . . .," and read the statutory list verbatim. *Id.*, at 446. Thus Songer's jury was instructed to base its decision only on the statutory list of mitigating circumstances, as enumerated by the judge.

In addition, Songer's jury was provided a verdict form on which it could indicate its sentence. The preprinted introductory sentence on the form began with the words "We, the Jury, having heard the evidence . . . as to whether . . . sufficient mitigating circumstances [*as defined in the Court's charge*] exist]. . . ." *Id.*, at 447-448. This form, which accompanied the jury into the jury room, could only have reinforced the jury's impression that it was limited to considering only the factors enumerated in the statute. These facts are unnecessary to Songer's central claim: that Florida law operated to preclude his attorney from introducing relevant mitigating evidence. But they do add further support to the conclusion that all the relevant actors in Songer's 1974 trial—attorney, judge and jury—were operating on the assumption that mitigating evidence in capital cases was limited to evidence relevant to the factors listed in § 921.141(7).¹⁰ Such an assumption would be unconstitutionally erroneous today. In light of *Lockett* and *Eddings*, it must also render Songer's 1974 death sentence invalid as imposed.¹¹

years after Songer was sentenced. The relevance of these later decisions to Songer's case, therefore, is attenuated at best.

¹⁰ Indeed, the view that mitigating circumstances were limited to those listed in the statute was applied on direct review of Songer's conviction. Expressly relying on *Dixon*, the Florida Supreme Court examined only "the *statutorily enumerated* mitigating circumstances," and found that they were outweighed in Songer's case. *Songer v. State*, 322 So. 2d 481, 484 (1975) (emphasis added).

¹¹ Florida's statute expressly provides for resentencing in a capital case that is remanded. Section 921.141(1) states that if the original trial jury "is unable to reconvene for a hearing on the issue of penalty, . . . the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty." Fla. Stat. Ann. § 921.141(1) (West Supp. 1984).

III

The courts that have examined Songer's claims heretofore as going solely to ineffective assistance or faulty jury instructions have been misguided, primarily because they failed to recognize the independent significance of *Lockett* and *Eddings* in the area of capital sentencing.¹² A first principle apparent from those decisions is that mitigating evidence takes on constitutional significance in the Eighth Amendment context of capital sentencing. Thus the absence of such evidence, if the result of state law, can never be held "unlikely to make a difference" as the Eleventh Circuit suggested. 733 F. 2d, at 791, n. 2(h).¹³

Moreover, the courts below consistently failed to recognize that the jury instruction issue is, in this case, largely irrelevant. The point here is that Florida law in 1974 operated to lead Songer's attorney to conclude, *reasonably*, that nonstatutory mitigating evidence was precluded at sentencing. Once this decision was made, the constitutional damage was done. The jury instructions, which I believe were faulty in any case,¹⁴ did not matter;

¹² Songer has squarely challenged the failure to introduce available mitigating character evidence since his original motion to vacate, citing *Lockett* throughout, see n. 4, *supra*, and the facts relevant to his claim were developed in the Florida trial court. Thus, in an even more specific sense than was the case in *Eddings*, "the question of whether the decisions below were consistent with our decision in *Lockett* is properly before us." 455 U. S., at 113-114, n. 9.

¹³ See *Eddings*, 455 U. S., at 119 (O'CONNOR, J., concurring): "I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. . . . [W]e may not speculate as to whether the [sentencer] . . . considered all of the mitigating factors and found them insufficient. . . . *Woodson* [v. *North Carolina*, 428 U. S. 280 (1976)] and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court."

¹⁴ Contrary to the Court of Appeals' assumption in this case, 733 F. 2d, at 792, the instructions given to Songer's sentencing jury were significantly different from those upheld in *Ford v. Strickland*, 696 F. 2d 804 (CA11), cert. denied, 464 U. S. 865 (1983). In *Ford*, the jury was told to consider "only the following" aggravating factors, and to consider "the following" mitigating factors. The Eleventh Circuit found that the latter omission of the word "only" saved the instructions. 696 F. 2d, at 812. In Songer's case, however, the jury was told to base its decision on consideration of mitigating circumstances "as hereafter enumerated"; the judge then read the statutory list. See *supra*, at 1138-1139. Thus the significant message of limitation omitted in *Ford* was clearly communicated here.

even if properly instructed, the jury did not have before it the nonstatutory mitigating evidence that Songer had discussed with his attorney. Thus the error of constitutional significance here arose before the jury was instructed—it was, however, no less the product of state law.¹⁵

Florida's only counter to Songer's petition in this Court is to repeat that various courts have ruled, since *Lockett*, that the Florida statute does not impermissibly limit mitigating evidence to the factors listed in the statute. This unenlightening restatement of

Interestingly, Florida has omitted this significantly different portion of Songer's jury instructions from its opposition to Songer's petition for certiorari, and apparently failed to include the statement in its response to Songer's petition for habeas corpus in the District Court. See R. II, at 274-284.

The Court of Appeals also ruled that Songer had not demonstrated "cause and prejudice" for his attorney's failure to object to the sentencing jury instructions. But when the District Court found that the trial attorney's decision regarding the admissibility of nonstatutory mitigating evidence was a "reasonable" one under Florida law in 1974, it necessarily found that he had "cause" for failing to object. See *Reed v. Ross*, 468 U. S. 1, 14-15 (1984). As for prejudice, *Lockett* and *Eddings* require that a state-created preclusion of mitigating evidence must be held to fulfill this requirement. In any case, the Florida courts have ruled on Songer's claim without noting any failure to object. The merits are therefore properly before us. *County Court of Ulster County v. Allen*, 442 U. S. 140 (1979).

¹⁵ The District Court also relied on the decision of the Court of Appeals for the Fifth Circuit in *Spinkellink v. Wainwright*, 578 F. 2d 582 (1978), cert. denied, 440 U. S. 976 (1979), to dismiss Songer's claim. 571 F. Supp., at 1398. But *Spinkellink* clearly indicates that Songer's sentence should be vacated. Like Songer, *Spinkellink* was sentenced to death in Florida soon after § 921.141 was enacted. In addressing *Spinkellink*'s general *Lockett* challenge to his sentencing, the Fifth Circuit recognized that the post-1976 understanding of Florida's capital sentencing statute did not provide an answer to the claim. Instead, the panel conducted an independent review of the record, and found that *Spinkellink* "was afforded, and exercised, without limitation, every opportunity to set forth any and all mitigating factors in his favor," including a number outside the statutory list. 578 F. 2d, at 621. The record in this case is significantly different. Unlike *Spinkellink*, Songer was not afforded "every opportunity" to offer nonstatutory mitigating evidence. Instead, Songer's attorney reasonably relied on the language of the statute and the Florida Supreme Court's statements in *Dixon* effectively to deny Songer his opportunity to introduce mitigating character evidence that Songer expressly wanted the jury to consider. The effect on the outcome was the same as that in *Eddings*: "it was as if the trial judge had instructed a jury to disregard the mitigating evidence." 455 U. S., at 114.

the obvious, see n. 9, *supra*, completely fails to address the significant facts of this case: that at the time of Songer's trial, the reasonable and accepted understanding of § 921.141 was to the contrary, and that Songer's attorney relied on that interpretation in deciding to put on no character evidence in mitigation. The current interpretation of § 921.141 simply has no bearing on whether these facts violated constitutional principles in 1974.

IV

Because I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg v. Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would vote to grant the petition for certiorari and vacate Songer's sentence in any event. But even if I believed otherwise, I would vote to vacate the sentence in this case. This petition requires simply a straightforward application of *Lockett* and *Eddings* to the unusual facts of this case. Unlike other possible cases in which a pre-*Lockett* sentencing challenge might be raised, the record here plainly indicates that Songer's attorney decided that, as a matter of law, he was precluded from offering mitigating evidence outside the categories listed in § 921.141(7). Cf. *Eddings*, 455 U. S., at 113 (trial judge found "as a matter of law" that he was unable to consider certain mitigating evidence).¹⁶ Because this accepted and reasonable interpretation of Florida law in 1974 operated to preclude Songer from presenting relevant character evidence in mitigation, it follows *a fortiori* that a *Lockett* violation occurred.¹⁷

¹⁶ Like this case, *Eddings* involved an application of *Lockett* to a sentencing that occurred before *Lockett* was decided. See *Eddings v. State*, 616 P. 2d 1159, 1164 (Okla. 1980).

¹⁷ This Court has never accepted reasonableness as a defense to constitutional error in the *Lockett* analysis of capital sentencing. Thus the Court struck down Ohio's capital sentencing statute in *Lockett* despite the recognition that the statute might have been a reasonable response to the "confusion" generated by the Court's earlier decision in *Furman v. Georgia*, 408 U. S. 238 (1972). See 438 U. S., at 599, and n. 7. Similarly in *Eddings*, the Court did not inquire whether the sentencing judge's erroneous legal conclusion was "reasonable"—once the constitutional *Lockett* error was found, the Court simply vacated the sentence and remanded. No less is required in this case. If Florida law in 1974 operated—by way of court ruling, reasonable legal interpretation, or any other mechanism—to deny Songer his constitutionally required opportunity to offer nonstatutory mitigating evidence, then his sentence cannot stand.

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In any event, these facts raise serious questions of constitutional principle sufficient to warrant the Court's plenary review. I therefore dissent from the denial of the petition for certiorari.

Rehearing Denied

No. 83-1710. COUSSENS ET AL. *v.* CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, ET AL., *ante*, p. 818;

No. 83-1908. SHELBY COUNTY SHERIFF'S DEPARTMENT *v.* RUIZ, *ante*, p. 1016;

No. 83-2039. KAVANAGH *v.* MCSHEA, *ante*, p. 831;

No. 83-6633. GREEN *v.* OKLAHOMA, *ante*, p. 980;

No. 83-6777. RONSON *v.* COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK, *ante*, p. 841;

No. 83-6840. SHANNON *v.* DEROBERTIS, WARDEN, ET AL., *ante*, p. 931;

No. 83-6996. SMITH *v.* UNION MUTUAL LIFE INSURANCE CO., *ante*, p. 981;

No. 84-175. SCHREIBER *v.* GENCORP, INC., ET AL., *ante*, p. 858;

No. 84-343. GABRIEL *v.* INTERSTATE COMMERCE COMMISSION ET AL., *ante*, p. 932;

No. 84-408. CLEAR-VIEW CABLE T. V., INC. *v.* TOWN OF NARROWS, *ante*, p. 925;

No. 84-5045. COLLINS *v.* FRANCIS, WARDEN, *ante*, p. 963;

No. 84-5170. OWENS *v.* ILLINOIS, *ante*, p. 963;

No. 84-5175. OWENS *v.* ILLINOIS, *ante*, p. 963; and

No. 84-5292. HATCH *v.* MASON ET AL., *ante*, p. 886. Petitions for rehearing denied.

No. 83-2017. CHIN NIEN TSANG *v.* BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, *ante*, p. 830. Petition for writ of mandamus and petition for rehearing denied.

No. 83-6886. VELILLA *v.* UTC/HAMILTON STANDARD DIVISION ET AL., *ante*, p. 805. Motion for leave to file petition for rehearing denied.

No. 84-5609 (A-503). GREEN *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 1098. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Petition for rehearing denied. JUSTICE BLACKMUN and JUSTICE STEVENS dissent and would grant the application for stay

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of execution pending the ultimate resolution of the cases now pending in the United States Court of Appeals for the Eleventh Circuit and cited in JUSTICE BRENNAN's dissent, immediately *post*. JUSTICE POWELL took no part in the consideration or decision of this application and petition.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering 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), I would grant the application for a stay of execution. But even if I believed otherwise, I would at the very least stay this impending execution pending the outcome of related cases now before the Court of Appeals for the Eleventh Circuit.

In his petitions for state and federal habeas relief, the applicant Roosevelt Green, Jr., has unsuccessfully requested evidentiary hearings to substantiate his allegation that he received the death penalty pursuant to a pattern and practice of racial discrimination in the administration of Georgia's capital sentencing system. The Eleventh Circuit en banc is currently considering three cases that present the *identical* issue and turn on the *identical* statistical evidence. See, *e. g.*, *Ross v. Hopper*, 716 F. 2d 1528 (1983), rehearing en banc granted, 729 F. 2d 1293 (1984); *Spencer v. Zant*, 715 F. 2d 1562 (1983), reconsideration en banc stayed, 729 F. 2d 1293 (1984); *McCleskey v. Zant*, 580 F. Supp. 338 (ND Ga.), hearing en banc granted, 729 F. 2d 1293 (1984). As I argued in November in my dissent in *Stephens v. Kemp*, *ante*, at 1058—a case that also hinged on the claims and evidence instantly at issue—“there is at the very least a substantial question whether [the petitioner's] fate should be governed by the outcome of the consolidated cases that are now pending before the Eleventh Circuit en banc” Because “a person should not be executed while the constitutionality of his sentence is in doubt,” *Stephens v. Kemp*, *ante*, at 1099 (BRENNAN, J., dissenting), I would accordingly stay Green's execution pending the ultimate resolution of *Ross*, *Spencer*, and *McCleskey*.

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JANUARY 11, 1985

Dismissal Under Rule 53

No. 84-573. CITY OF CONNERSVILLE, INDIANA, ET AL. v. PARRETT. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 737 F. 2d 690.

JANUARY 14, 1985*

Appeals Dismissed

No. 84-581. LASKY v. VAN LINDT ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 97 App. Div. 2d 986, 469 N.Y. S. 2d 830.

No. 84-632. WILK ET AL. v. CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Los Angeles, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-753. OGROD v. TOMLINSON COURT APARTMENTS. Appeal from Ct. Common Pleas, Philadelphia County, Pa., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-5696. NEAL v. ALABAMA. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 453 So. 2d 1350.

No. 84-5762. RAWLINSON v. MERIT OIL CO. ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-739. PASILLAS v. AGRICULTURAL LABOR RELATIONS BOARD OF CALIFORNIA; and

No. 84-746. NAVARRO v. AGRICULTURAL LABOR RELATIONS BOARD OF CALIFORNIA ET AL. Appeals from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Reported below: 156 Cal. App. 3d 312, 202 Cal. Rptr. 739.

*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

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No. 84-768. ALLSTATE INSURANCE CO. ET AL. *v.* BAKSALARY ET AL. Appeal from D. C. E. D. Pa. Motion of appellees for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. JUSTICE BRENNAN and JUSTICE STEVENS would affirm the judgment. Reported below: 579 F. Supp. 218 and 591 F. Supp. 1279.

No. 84-5060. WRIGHT *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 96 N. J. 170, 475 A. 2d 38.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The appellant Charles Wright was convicted of possessing an "exacto" knife. Under New Jersey law, possession of this sort of object is entirely legal in most circumstances; possession becomes unlawful only "under circumstances *not manifestly appropriate* for such lawful uses as it may have." N. J. Stat. Ann. § 2C:39-5d (West 1982) (emphasis added).¹ As construed by the state courts, although this statute requires proof that the defendant "knowingly" possessed the object in question, there is no requirement that he have done so with any unlawful purpose.

The Supreme Court of New Jersey affirmed the constitutionality of § 2C:39-5d in this and a companion case, see *State v. Wright*, 96 N. J. 170, 475 A. 2d 38 (1984); *State v. Lee*, 96 N. J. 156, 475

¹ This section provides in its entirety: "Any person who knowingly has in his possession any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree."

New Jersey Stat. Ann. § 2C:39-1r (West 1982) in turn defines "weapon" as "anything readily capable of lethal use or of inflicting serious bodily injury. The term includes, but is not limited to, all (1) firearms, even though not loaded or lacking a clip or other component to render them immediately operable; (2) components which can be readily assembled into a weapon; and (3) gravity knives, switchblade knives, daggers, dirks, stilettos, or other dangerous knives, billies, blackjacks, bludgeons, metal knuckles, sandclubs, slingshots, cestus or similar leather bands studded with metal filings or razor blades imbedded in wood; and any weapon or other device which projects, releases, or emits tear gas or any other substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispensed in the air."

A. 2d 31 (1984), with one justice arguing in dissent that the operative standard "not manifestly appropriate" is "so lacking in any precise meaning as to defy definition," *State v. Lee, supra*, at 168, 475 A. 2d, at 37 (Clifford, J., dissenting). I believe this appeal presents the substantial question whether § 2C:39-5d is impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment. Accordingly, I respectfully dissent from the Court's dismissal of the appeal for want of a substantial federal question.

I

Wright, the subject of several outstanding arrest warrants, was apprehended while conversing with a friend on a street corner in Teaneck, New Jersey. The arresting officers searched Wright at police headquarters, where they found the exacto knife in question concealed inside one of his socks. The instant prosecution for violation of § 2C:39-5d followed.

At trial, Wright contended that he had not intended to use the knife against person or property and that the statute is unconstitutionally vague. The trial court rejected these arguments. With respect to the question of Wright's intent, the court instructed the jury that it was "not necessary that the State prove that [the] defendant possessed the weapon with a purpose to use it unlawfully against the person or property of another." Juris. Statement 4. As for the definition of the "not manifestly appropriate" standard, which Wright contended was meaningless, the court instructed: "If you . . . find that the circumstances under which the weapon was possessed *could not be easily understood or recognized as being appropriate* to a lawful use of the instrument in question here then possession of the weapon . . . is prohibited." *State v. Wright, supra*, at 172, 475 A. 2d, at 39 (emphasis added). Wright was convicted as charged and sentenced to 200 days in the Bergen County jail.

The Superior Court of New Jersey, Appellate Division, reversed Wright's conviction, reasoning that the legislature could not have intended to impose criminal sanctions on one whose conduct merely "was not 'easily understood or recognized' from the circumstances." 187 N. J. Super. 160, 164, 453 A. 2d 1352, 1354 (1982). The Supreme Court of New Jersey reversed the Appellate Division, however, and concluded that the trial court's interpretation properly reflected the legislature's intent in enacting

§2C:39-5d. 96 N. J., at 173, 475 A. 2d, at 40.² The court rejected Wright's vagueness challenge for the reasons set forth in its companion decision in *State v. Lee*, where it had concluded that the "not manifestly appropriate" standard carries "sufficient warning so that an ordinary person 'is apprised with a reasonable degree of certainty of that which is proscribed'" and so that law enforcement officials have sufficient notice of what conduct is prohibited to guard against arbitrary or discriminatory enforcement. 96 N. J., at 166, 475 A. 2d, at 36 (citation omitted). This appeal pursuant to 28 U. S. C. § 1257(2) followed.

II

The standards for evaluating whether a statute is unconstitutionally vague are well settled:

"Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A

² In its companion decision in *State v. Lee*, the court summarized the legislature's purpose as follows:

"[The statute addresses] the situation in which someone who has not yet formed an intent to use an object as a weapon possesses it under circumstances in which it is likely to be so used. The obvious intent of the Legislature was to address a serious societal problem, the threat of harm to others from the possession of objects that can be used as weapons under circumstances not manifestly appropriate for such lawful uses as those objects may have. Some objects that may be used as weapons also have more innocent purposes. For example, a machete can be a lethal weapon or a useful device for deep sea fishing. . . . A steak knife is appropriate at the dinner table, but sinister when concealed in a car with a BB gun. . . .

"The underlying problem is protecting citizens from the threat of harm while permitting the use of objects such as knives in a manner consistent with a free and civilized society. The statute addresses the problem by outlawing the possession of various weapons in circumstances where they pose a likely threat of harm to others. In striking a balance, the Legislature recognized that an otherwise innocent object can become such a threat." 96 N. J., at 161-162, 475 A. 2d, at 33-34.

vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U. S. 104, 108-109 (1972) (footnotes omitted).

As construed by the New Jersey courts, §2C:39-5d authorizes arrest and conviction whenever an individual possesses any object capable of inflicting serious injury in circumstances "not . . . easily understood or recognized as being appropriate" by the authorities and a jury, even though the individual may have had no intent whatsoever to possess or use the object for unlawful purposes. *State v. Wright*, 96 N. J., at 172, 475 A. 2d, at 39. I believe there is a substantial question whether such an amorphous crime is unconstitutionally vague.

First. I agree with the dissent below that there is a serious question whether the "not manifestly appropriate" standard gives fair notice of the conduct that is prohibited or is instead "so lacking in any precise meaning as to defy definition." *State v. Lee, supra*, at 168, 475 A. 2d, at 37 (Clifford, J., dissenting).³ "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U. S. 385, 391 (1926). See also *Smith v.*

³ As Judge Antell, dissenting from the judgment of the Appellate Division in *State v. Lee*, argued:

"If read literally, the statutory language would encompass countless situations which the Legislature could not have intended as the subject of prosecution. The workman carrying home a linoleum knife earlier used in his work; the paring knife inadvertently left on an automobile floor after being used for a lawful purpose; a stevedore's hook or a fisherman's gaff thrown into a vehicle and forgotten. A 'weapon' could include a brick, a baseball bat, a hammer, a broken bottle, a fishing knife, barbed wire, a knitting needle, a sharpened pencil, a riding crop, a jagged can, rope, a screwdriver, an ice pick, a tire iron, garden shears, a pitch fork, a shovel, a length of chain, a penknife, a fork, metal pipe, a stick, etc. The foregoing only illustrate the variety of lawful objects which are often innocently possessed without wrongful intent, but under circumstances which are clearly not 'manifestly appropriate' for their lawful use.

"Possession of a fork is manifestly appropriate only at the dinner table, of a bat on the athletic field, of a shovel in the garden." 188 N. J. Super. 432, 437, 457 A. 2d 1184, 1187 (1982).

Goguen, 415 U. S. 566, 574 (1974); *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939). To impose criminal sanctions for the possession of objects simply because the authorities and a jury subsequently decide that the circumstances were not "easily understood or recognized as being appropriate," *State v. Wright*, *supra*, at 172, 475 A. 2d, at 39, "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against," *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921). The enforcement of such a standardless proscription would appear to be "the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *Ibid.*

Second. Even more disturbing questions arise with respect to "the more important aspect of the vagueness doctrine . . . —'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U. S. 352, 358 (1983) (citation omitted) (striking down criminal sanctions against persons who fail to provide "credible and reliable" identification).⁴ Where a statute and the judicial decisions which interpret it provide inadequate standards to govern its application, the statute "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis v. City of New Orleans*, 415 U. S. 130, 135 (1974) (POWELL, J., concurring in result). The result obviously is to create a scheme that "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou v. City of Jacksonville*, 405 U. S. 156, 170 (1972) (citation omitted).

As interpreted by the New Jersey courts, §2C:39-5d does *not* require the State to prove beyond a reasonable doubt that the

⁴The Court has long emphasized the importance of providing minimal guidance. See, e. g., *United States v. Reese*, 92 U. S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government"). See also *Gregory v. Chicago*, 394 U. S. 111, 120 (1969) (Black, J., concurring) ("[U]nder our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat").

defendant's possession could not have been pursuant to a legitimate purpose, but merely that the circumstances were "not . . . easily understood or recognized as being appropriate." *State v. Wright, supra*, at 172, 475 A. 2d, at 39. Can there be any question that this sweeping standard places "unfettered discretion" in the hands of police, judges, and juries to carry out "arbitrary and erratic arrests and convictions"? *Papachristou v. City of Jacksonville, supra*, at 162, 168. Surely this law is unlikely to touch upon the "pillars of the community," 405 U. S., at 163, who are spotted with any of the multitude of potentially dangerous objects in circumstances that are not "easily understood" or "recognized" as "appropriate." See n. 3, *supra*. Rather, there appears to be a grave danger that enforcement of the law will focus on the groups that historically have been the targets of vague legislation such as this—the poor, the minorities, the politically unpopular, and others who happen to be viewed with suspicion by the community's majority.

The absence from §2C:39-5d of any requirement that the defendant *intend* to use the object in an unlawful manner accentuates the dangers discussed above. We have "long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." *Colautti v. Franklin*, 439 U. S. 379, 395 (1979). See generally *United States v. United States Gypsum Co.*, 438 U. S. 422, 434-446 (1978).⁵ The Supreme Court of New Jersey believed, however, that the "not manifestly appropriate" standard functions as a legitimate proxy for *anticipatory* intent: the challenged statute "address[es] the situation in which someone *who has not yet formed an intent* to use an object as a weapon possesses it under circumstances in which it is *likely* to be so used." *State v. Lee*, 96 N. J., at 161, 475 A. 2d, at 33 (emphasis added). See generally n. 2, *supra*. We have emphasized the constitu-

⁵ A statute that requires scienter "mitigate[s]" the vagueness of its other terms by helping to ensure that the defendant had adequate notice and by guarding against capricious enforcement through the requirement that he actually have intended the conduct which the statute seeks to guard against. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499 (1982); see also *Grayned v. City of Rockford*, 408 U. S. 104, 111, 114 (1972). The absence of such a requirement, on the other hand, enhances the risks of unfair notice and arbitrary enforcement. See, e. g., *Screws v. United States*, 325 U. S. 91, 101-102 (1945) (plurality opinion).

tional invalidity of such presumptions. Punishing someone whose conduct "could not be easily understood," *State v. Wright*, 96 N. J., at 172, 475 A. 2d, at 39, on the ground that he was "likely" to form a criminal intent in the future

"is too precarious for a rule of law. The implicit presumption in these generalized . . . standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. [Under such a presumption,] the scales of justice are so tipped that even-handed administration of the law is not possible." *Papachristou v. City of Jacksonville*, *supra*, at 171.

The Supreme Court of New Jersey in *State v. Lee* advanced two arguments that might be invoked to suggest that Wright's challenge in the instant case is improper. 96 N. J., at 167, 475 A. 2d, at 36. First, it has frequently been stated that a criminal statute will not be struck down unless it is "impermissibly vague in all its applications." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 495 (1982). A related doctrine stresses that a statute that might be impermissibly vague with respect to some conduct may not be challenged by one whose conduct quite clearly is prohibited by its terms. *Id.*, at 495, n. 7; *Parker v. Levy*, 417 U. S. 733, 756 (1974).

For two reasons, these doctrines do not bar Wright's challenge. First, we have emphasized that where a statute imposes criminal penalties the required standard of certainty is high, and a statute that does not satisfy this requirement may be invalidated on its face "even where it could conceivably have . . . some valid application." *Kolender v. Lawson*, 461 U. S., at 358-359, n. 8. See also *Colautti v. Franklin*, *supra*, at 394-401; *Lanzetta v. New Jersey*, 306 U. S. 451 (1939).⁶ Second, the challenged statute must prescribe some coherent, ascertainable standard in the first instance. Where the provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all," it is unconstitutional. *Coates v. City of Cincinnati*, 402 U. S. 611, 614 (1971) (striking down statute

⁶ This requirement of heightened certainty has particular force in the arbitrary enforcement context. See, e. g., *Kolender v. Lawson*, 461 U. S., at 358-359, n. 8.

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proscribing public conduct "annoying to persons passing by").⁷ As interpreted by the state courts, § 2C:39-5d would seem surely to suffer from this fatal defect: it "simply has no core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause." *Smith v. Goguen*, 415 U. S., at 578 (emphasis in original).

III

"[T]his is not a case where further precision in the statutory language is either impossible or impractical." *Kolender v. Lawson*, *supra*, at 361. First, the legislature may proscribe altogether the possession of certain items or the possession of such items in specified circumstances. This it has done in other contexts. See, e. g., N. J. Stat. Ann. § 2C:39-3 (West 1982). Second, it may prohibit the possession of any item capable of use as a weapon where the possession is actually for the purpose of unlawful use. This, too, it has done. See, e. g., § 2C:39-4d ("Any person who has in his possession any weapon . . . with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the third degree").⁸ And it may of course prescribe the full "range of nonpenal alternatives to . . . criminal sanctions." *United States v. United States Gypsum Co.*, 438 U. S., at 442.

There is no question that the New Jersey Legislature and the courts below have been motivated in the enactment and construction of § 2C:39-5d by the necessity vigorously to combat crime. See n. 2, *supra*. As important as this goal is, however, "it cannot justify legislation that would otherwise fail to meet constitutional

⁷ See also *Smith v. Goguen*, 415 U. S. 566 (1974) (same with respect to statute punishing anyone who "treats contemptuously" the flag); *Lanzetta v. New Jersey*, 306 U. S. 451 (1939) (same with respect to statute punishing anyone for being, *inter alia*, "a member of any gang consisting of two or more persons"); *United States v. L. Cohen Grocery Co.*, 255 U. S. 81 (1921) (same with respect to statute proscribing the charging of "unjust or unreasonable" prices for staple goods).

⁸ As Judge Antell observed in his dissent in *State v. Lee*, the manner and circumstances of a defendant's possession of certain objects frequently will suffice "to support a finding of intent to use them as a weapon." 188 N. J. Super., at 439, 457 A. 2d, at 1188. Perhaps the circumstances of Wright's possession would alone be sufficient to prove culpable intent. However, "the jury was not instructed that such a finding must be made as a condition to arriving at a guilty verdict," *ibid.*, and it is not for this Court to make that factual judgment in the first instance.

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standards for definiteness and clarity." *Kolender v. Lawson*, *supra*, at 361. Because I believe there is a serious question whether the imposition of criminal liability for conduct that "could not be easily understood or recognized as being appropriate" intolerably crosses the constitutional line, I respectfully dissent from the Court's dismissal of this appeal.

Certiorari Granted—Vacated and Remanded

No. 83-1963. *TOAN, DIRECTOR, MISSOURI DEPARTMENT OF SOCIAL SERVICES, ET AL. v. CUNNINGHAM*. C. A. 8th Cir. Motion of respondent Lucinda Cunningham for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Deficit Reduction Act of 1984, Pub. L. 98-369. Reported below: 728 F. 2d 1101.

No. 84-681. *PRUDENTIAL FEDERAL SAVINGS & LOAN ASSN. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION*. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Trans World Airlines, Inc. v. Thurston*, *ante*, p. 111. Reported below: 741 F. 2d 1225.

Miscellaneous Orders

No. — — —. *IN RE SHAPIRO*. Application of Stanley Charles Shapiro for readmission to the Bar of this Court denied.

No. A-440 (84-1074). *STROOM v. CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL.* C. A. 3d Cir. Application for injunction, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied.

No. D-449. *IN RE DISBARMENT OF HOCHSTEIN*. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D-451. *IN RE DISBARMENT OF JONES*. Disbarment entered. [For earlier order herein, see 468 U. S. 1248.]

No. D-471. *IN RE DISBARMENT OF BRAULT*. It is ordered that Cletus H. Brault, Jr., of Crown Point, Ind., 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. 83-1368. *NORTHWEST WHOLESALE STATIONERS, INC. v. PACIFIC STATIONERY & PRINTING Co.* C. A. 9th Cir. [Certio-

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rari granted, *ante*, p. 814.] Motion of Indian Head Inc. for leave to file a brief as *amicus curiae* granted.

No. 83-1569. MITSUBISHI MOTORS CORP. *v.* SOLER CHRYSLER-PLYMOUTH, INC.; and

No. 83-1733. SOLER CHRYSLER-PLYMOUTH, INC. *v.* MITSUBISHI MOTORS CORP. C. A. 1st Cir. [Certiorari granted, *ante*, p. 916.] Motion of American Arbitration Association for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-231. HOOPER ET AL. *v.* BERNALILLO COUNTY ASSESSOR. Ct. App. N. M. [Probable jurisdiction noted, *ante*, p. 878.] Motion of American Legion et al. for leave to file a brief as *amici curiae* granted.

No. 84-325. METROPOLITAN LIFE INSURANCE CO. *v.* MASSACHUSETTS; and

No. 84-356. TRAVELERS INSURANCE CO. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. [Probable jurisdiction noted, *ante*, p. 929.] Motion of American Chiropractic Association for leave to participate in oral argument as *amicus curiae* in No. 84-325, for divided argument, and for additional time for oral argument denied. Motion of appellants for divided argument granted.

No. 84-468. CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1016.] 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 denied. Motion of Federation of Greater Baton Rouge Civic Associations Inc. for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 84-761. DATA GENERAL CORP. *v.* DIGIDYNE CORP. ET AL. C. A. 9th Cir. Motions of Control Data Corp., Mercedes-Benz of North America, and Computer Automation, Inc., et al. for leave to file briefs as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84-780. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* ROY ET AL. Appeal from D. C. M. D. Pa.

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Motion of appellees for leave to proceed *in forma pauperis* granted.

No. 84-782. SOUTH CAROLINA ET AL. *v.* CATAWBA INDIAN TRIBE, INC. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84-5873. DAVIS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until February 4, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Probable Jurisdiction Noted

No. 83-1925. HILLSBOROUGH COUNTY, FLORIDA, ET AL. *v.* AUTOMATED MEDICAL LABORATORIES, INC. Appeal from C. A. 11th Cir. Probable jurisdiction noted. Reported below: 722 F. 2d 1526.

Certiorari Granted

No. 84-778. MARYLAND *v.* MACON. Ct. Sp. App. Md. Certiorari granted. Reported below: 57 Md. App. 705, 471 A. 2d 1090.

No. 84-849. KENTUCKY, DBA BUREAU OF STATE POLICE *v.* GRAHAM ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 742 F. 2d 1455.

No. 84-310. IN RE SNYDER. C. A. 8th Cir. Motion of Ohio State Bar Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 734 F. 2d 334.

No. 84-518. JOHNSON ET AL. *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.; and

No. 84-710. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 731 F. 2d 209.

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No. 84-589. *DOWLING v. UNITED STATES*. C. A. 9th Cir. Certiorari granted limited to Question I presented by the petition. Reported below: 739 F. 2d 1445.

No. 84-648. *SEDIMA, S. P. R. L. v. IMREX CO., INC., ET AL.* C. A. 2d Cir. Certiorari granted and case set for oral argument in tandem with No. 84-822, *American National Bank v. Haroco, Inc.*, immediately *infra*. Reported below: 741 F. 2d 482.

No. 84-822. *AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. v. HAROCO, INC., ET AL.* C. A. 7th Cir. Certiorari granted and case set for oral argument in tandem with No. 84-648, *Sedima, S. P. R. L. v. Imrex Co.*, immediately *supra*. Reported below: 747 F. 2d 384.

No. 84-835. *NEW JERSEY DEPARTMENT OF CORRECTIONS v. NASH*; and

No. 84-776. *CARCHMAN, MERCER COUNTY PROSECUTOR v. NASH*. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari in No. 84-835 is granted. Certiorari in No. 84-776 is granted limited to Question 1 presented by the petition. Cases are consolidated and a total of one hour is allotted for oral argument. Reported below: 739 F. 2d 878.

Certiorari Denied. (See also Nos. 84-632, 84-753, 84-5696, and 84-5762, *supra*.)

No. 83-1999. *EISENBERG v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 914.

No. 83-2011. *NISHIBAYASHI v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 83-6884. *VISTOSO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 84-15. *SIGLER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1457.

No. 84-17. *LAHODNY ET AL. v. NUNEZ ET AL.* C. A. 9th Cir. Certiorari denied.

No. 84-197. *SUTTON v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 732 F. 2d 1483.

No. 84-269. *BLOOM v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 2d 939.

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No. 84-371. *RISKO v. PENNSYLVANIA*. Super. Ct. Pa. Certiorari denied. Reported below: 325 Pa. Super. 563, 473 A. 2d 651.

No. 84-380. *OSTICCO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 426.

No. 84-397. *WEISSER ET AL. v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 737 F. 2d 729.

No. 84-402. *BARSHOV ET AL. v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 842.

No. 84-432. *MIRABILE v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84-449. *SWIFT v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 878.

No. 84-490. *TEXAS OIL & GAS CORP. v. ARKLA EXPLORATION CO. ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 2d 347.

No. 84-496. *EXPEDIENT SERVICES, INC., ET AL. v. BEGGS, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84-500. *162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, MISSISSIPPI, ET AL. v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 377.

No. 84-519. *CLARK OIL & REFINING CORP. v. LEHMAN BROTHERS KUHN LOEB, INC., ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 1313.

No. 84-526. *PENNELL v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 737 F. 2d 521.

No. 84-549. *DROBNY v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1023.

No. 84-564. *GERMANTOWN HOSPITAL & MEDICAL CENTER ET AL. v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 631.

No. 84-575. *OAK BEACH INN CORP. ET AL. v. BABYLON BEACON, INC., DBA BABYLON BEACON NEWSPAPER, ET AL.* Ct.

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App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 158, 464 N. E. 2d 967.

No. 84-598. BURLINGTON NORTHERN RAILROAD CO., SUCCESSOR IN INTEREST BY MERGER TO ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* FRAVEL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 671 S. W. 2d 339.

No. 84-616. MULROY, DBA MULROY DAIRY FARMS *v.* BLOCK, SECRETARY OF AGRICULTURE. C. A. 2d Cir. Certiorari denied. Reported below: 736 F. 2d 56.

No. 84-652. CHAS. S. TANNER CO. ET AL. *v.* AIR PRODUCTS & CHEMICALS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 454.

No. 84-715. ALABAMA ET AL. *v.* PRUITT. C. A. 11th Cir. Certiorari before judgment denied.

No. 84-719. WAYNE ET UX. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 392.

No. 84-747. LLOYD ET UX. *v.* PROFESSIONAL REALTY SERVICES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1428.

No. 84-749. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84-760. ROSE HALL LTD. *v.* CHASE MANHATTAN OVERSEAS BANKING CORP. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 958.

No. 84-772. GANNETT CO., INC., ET AL. *v.* DEROBURT. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 701.

No. 84-777. ARLINGTON COUNTY ET AL. *v.* BISCOE ET UX. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 206, 738 F. 2d 1352.

No. 84-779. LORETTE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 454.

No. 84-788. LANDERS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 737 F. 2d 741.

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No. 84-789. *SMITH v. CALIFORNIA*. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 155 Cal. App. 3d 1103, 203 Cal. Rptr. 196.

No. 84-791. *GALLAHER ET AL. v. ROMAN CATHOLIC ARCH-BISHOP OF SAN FRANCISCO ET AL.* Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84-793. *ADJUSTERS REPLACE-A-CAR, INC., ET AL. v. AGENCY RENT-A-CAR, INC.* C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 884.

No. 84-794. *MID-AMERICA NATIONAL BANK OF CHICAGO, TRUSTEE, ET AL. v. FIRST SAVINGS & LOAN ASSOCIATION OF SOUTH HOLLAND ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 638.

No. 84-795. *HOWARD v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 727.

No. 84-796. *TRACE X CHEMICAL, INC., ET AL. v. CANADIAN INDUSTRIES, LTD., ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 261.

No. 84-799. *M. FRENVILLE CO., INC., ET AL. v. AVELLINO & BIENES*. C. A. 3d Cir. Certiorari denied. Reported below: 744 F. 2d 332.

No. 84-800. *AMERICAN FUNDAMENTALIST CHURCH v. COUNTY OF HENNEPIN*. Sup. Ct. Minn. Certiorari denied.

No. 84-802. *SPENCER v. MISSOURI PACIFIC RAILROAD CO.* C. A. 8th Cir. Certiorari denied. Reported below: 743 F. 2d 627.

No. 84-804. *ROYAL DRUG CO., INC., ET AL. v. GROUP LIFE & HEALTH INSURANCE CO. ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 1433.

No. 84-859. *JOHNSON v. CONSOLIDATED RAIL CORPORATION*. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 60.

No. 84-860. *PATTON v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 28.

No. 84-864. *MILLER BREWING CO. v. BREWERY WORKERS LOCAL UNION No. 9, AFL-CIO*. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1159.

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No. 84-891. *YARRINGTON v. UNITED STATES DEPARTMENT OF JUSTICE ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84-947. *WILLIAMS v. DEPARTMENT OF THE ARMY.* C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 59.

No. 84-5019. *COUSER v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 1207.

No. 84-5025. *TEAGUE v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 2d 378.

No. 84-5174. *AGUIRRE v. CALIFORNIA.* Sup. Ct. Cal. Certiorari denied.

No. 84-5197. *CRUTCHFIELD v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS.* C. A. 11th Cir. Certiorari denied.

No. 84-5201. *HART v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Reported below: 729 F. 2d 662.

No. 84-5220. *SOURCES v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 736 F. 2d 87.

No. 84-5237. *ZIGMONT v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 440.

No. 84-5274. *MEADOWS v. UNITED STATES;* and

No. 84-5463. *MEADOWS v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 439.

No. 84-5276. *EDLER v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 45.

No. 84-5291. *CARTER v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Reported below: 733 F. 2d 735.

No. 84-5348. *ANTONELLI v. SAMUELS ET AL.* App. Ct. Ill., 1st Dist. Certiorari denied.

No. 84-5364. *BUTLER v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1376.

No. 84-5371. *ARROYO-ZAVALA v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

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No. 84-5398. *EARNHART v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1524.

No. 84-5401. *MURIETTA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84-5444. *WRIGHT v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-5454. *STAPLES v. TOWNE ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 972.

No. 84-5535. *MORGAN v. ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION*. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1033.

No. 84-5572. *BATES v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 741 F. 2d 680.

No. 84-5616. *OUELLETTE v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 1st Cir. Certiorari denied. Reported below: 745 F. 2d 43.

No. 84-5622. *JOOST v. MACMAHON* C. A. 2d Cir. Certiorari denied.

No. 84-5640. *BRAY v. HOWARD UNIVERSITY ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 59, 737 F. 2d 1206.

No. 84-5644. *VANDROSS v. PALMETTO SAVINGS & LOAN ASSN.* Ct. Common Pleas, Marion County, S. C. Certiorari denied.

No. 84-5650. *PIHLBLAD v. STARKE COUNTY WELFARE DEPARTMENT*. Sup. Ct. Ohio. Certiorari denied. Reported below: 12 Ohio St. 3d 194, 465 N. E. 2d 1312.

No. 84-5675. *HANKERSON v. REASBECK ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5707. *O'BRIEN v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1139.

No. 84-5721. *DRAPER v. MEDICAL DEPARTMENT, JAMES RIVER CORRECTIONAL CENTER, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1448.

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No. 84-5722. *MILLS v. DORSEY*. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1357.

No. 84-5723. *EDWARDS v. CETA SERVICES*. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 131.

No. 84-5724. *EDWARDS v. HOME IMPROVERS*. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 943.

No. 84-5725. *EDWARDS v. RESERVE LIFE INSURANCE CO.* C. A. 11th Cir. Certiorari denied. Reported below: 741 F. 2d 1383.

No. 84-5726. *FORDHAM ET AL. v. NATIONAL BANK OF BOYERTOWN*. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1466.

No. 84-5730. *FORDHAM v. MILLER ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1466.

No. 84-5732. *WOODS v. OHIO*. Ct. App. Ohio, Butler County. Certiorari denied.

No. 84-5738. *VAUGHN v. BRITTON, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 833.

No. 84-5741. *HOOKS v. BRANIFF, JUDGE, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 93.

No. 84-5744. *HELM v. WYRICK, WARDEN*. C. A. 8th Cir. Certiorari denied.

No. 84-5746. *COHORST v. UNITED STATES STEEL & CARNEGIE PENSION FUND*. C. A. 11th Cir. Certiorari denied. Reported below: 745 F. 2d 70.

No. 84-5747. *FOSTER v. LITZ, JUDGE, CIRCUIT COURT FOR ST. LOUIS COUNTY, MISSOURI*. Sup. Ct. Mo. Certiorari denied.

No. 84-5749. *BRIDGES ET AL. v. PHILLIPS PETROLEUM CO.* C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 1153.

No. 84-5751. *FRANKS v. HOLLAND, WARDEN*. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5752. *DAVIS v. WHITE, WARDEN, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 745 F. 2d 70.

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No. 84-5754. *HAYNES v. GAINES ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-5758. *MCMILLAN v. CONTIGULIA.* C. A. 2d Cir. Certiorari denied.

No. 84-5759. *MELTON v. RISON, WARDEN.* C. A. 11th Cir. Certiorari denied.

No. 84-5760. *MILLER v. OKLAHOMA.* Ct. Crim. App. Okla. Certiorari denied.

No. 84-5761. *SMITH v. MAGGIO, WARDEN.* C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 965.

No. 84-5765. *ROBERTSON v. ROBERTSON.* Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 84-5766. *NORMAN v. BENNING, SUPERINTENDENT, OREGON STATE HOSPITAL.* Sup. Ct. Ore. Certiorari denied.

No. 84-5768. *SPREACKER v. HOLLAND, WARDEN.* Cir. Ct. W. Va., Putman County. Certiorari denied.

No. 84-5769. *ROGERS v. DUCKWORTH, WARDEN, ET AL.* C. A. 7th Cir. Certiorari denied.

No. 84-5777. *COBB v. NEW YORK.* App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 906, 470 N. Y. S. 2d 930.

No. 84-5779. *HARIG v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 737 F. 2d 971.

No. 84-5785. *DAVID v. UNITED STATES PAROLE COMMISSION.* C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 429.

No. 84-5790. *ORTEGA v. BURN ET AL.* C. A. 10th Cir. Certiorari denied.

No. 84-5793. *CONDO v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 741 F. 2d 238.

No. 84-5800. *HURTADO-MICOLTA v. UNITED STATES.* C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 113.

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No. 84-5803. *ANTONELLI v. UNITED STATES*. C. A. 7th Cir. Certiorari denied.

No. 84-5805. *DUNCAN v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 725.

No. 84-5812. *COLLINS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1487.

No. 84-5818. *DEBARDELEBAN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84-5826. *RUSSELL v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 84-5836. *MEANS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 28.

No. 84-5840. *PATTON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84-5842. *PHILLIPS, AKA FUNN v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 27.

No. 84-5846. *NORRIS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1365.

No. 84-5849. *RODRIGUEZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 685.

No. 84-5853. *PLUNKETT v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 811.

No. 84-5855. *MERRILL v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 458.

No. 84-5859. *BERTIN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 976.

No. 84-5861. *AMES v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 743 F. 2d 46.

No. 84-5867. *PRESLEY v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 58.

No. 84-5876. *BENEDETTO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 28.

No. 84-5882. *JONES v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

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No. 84-5885. ALONSO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 862.

No. 83-6865. VINCENT *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 679.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

"There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Harris v. Nelson*, 394 U. S. 286, 292 (1969). Because the proceedings in this case have fallen intolerably short of fulfilling this duty, and because this Court must be vigilant in ensuring that lower courts do not improperly cut corners in administering the Great Writ, I respectfully dissent from the Court's denial of certiorari.

I

The petitioner Harold Vincent was convicted in 1974 of armed robbery and second-degree murder by a jury in Vernon Parish, Louisiana. Vincent's trial had been delayed for over two years while he underwent evaluation and treatment for schizophrenia. This mental illness was so severe that psychiatrists at the Louisiana State Penitentiary General Hospital had certified that Vincent did not meet the constitutional standard of triability in that he could neither "realiz[e] the nature of the charges against him" nor properly "assist his attorney." 1 Record 17, 18. After intensive treatment with psychotropic drugs, particularly Thorazine, these psychiatrists notified the trial court that, so long as Vincent remained on his regulated dosage, he would have the mental capacity to proceed with trial. *Id.*, at 18. They emphasized at Vincent's pretrial sanity hearing that Vincent was dependent on Thorazine and that it was "almost a sure thing" that he would revert to episodes of psychosis if he stopped taking the medication. *Id.*, at 64; see also *id.*, at 20-23.

According to Vincent's subsequent habeas petition, which Vincent prepared with the assistance of an inmate paralegal:

"On July 6, 1974, petitioner was transferred from the Louisiana State Penitentiary to Vernon Parish without any of his

medication. Petitioner immediately inquired with Vernon Parish officials about his medication, but no one seemed to know anything about it. Consequently, on the morning trial was scheduled to commence, petitioner intentionally cut his leg to get to the hospital to see someone about receiving some Thorazine [*sic*]. When he appeared in court with his pants leg rolled up and a rag wrapped around his lower leg, petitioner's mother and sisters became upset and rushed to talk with him. After petitioner told them the reason he cut his leg, they talked with petitioner's trial attorneys, William E. Tilley and Chris Smith, III, concerning the likelihood of petitioner receiving some Thorazine [*sic*]. Petitioner's attorneys brought the matter to the attention of the trial court, and after a few preliminary motions were argued, Judge Terrell ordered Vernon Parish officials to bring petitioner to the hospital.

"Petitioner was taken to the Leesville General Hospital where his leg was bandaged and he was given a shot. Petitioner explained his condition to the doctor that treated him, but was informed that it was against hospital regulations to prescribe Thorazine [*sic*] to him. Petitioner was returned to the courthouse for continuation of the proceedings against him. Throughout his trial . . . petitioner was without his prescribed medication, Thorazine [*sic*]. He was convicted as charged and . . . sentenced to a term of life imprisonment." *Id.*, at 9-10.

Vincent claimed that, as a result of this alleged deprivation of Thorazine, he was "mentally incompetent" during the trial in that he was unable "to maintain his ability to consult with his attorney and understand the proceedings against him." *Id.*, at 10.

After Vincent filed his federal habeas petition, the District Court ordered the State to submit a response. Ten months passed before the State, prompted by the court's threat summarily to grant the petition, see *id.*, at 36, finally filed an answer. The State denied Vincent's material allegations and, in the alternative, asserted that "[a]ssuming the facts to be as alleged by the defendant he knew exactly what he was doing in an attempt to get the medication that he desired" and thereby manifested his competence. *Id.*, at 44-45, 57.

Without holding an evidentiary hearing or otherwise inquiring into the merits of Vincent's allegations beyond reviewing the trial

record, the District Court summarily dismissed the petition. *Id.*, at 64-65. The court reasoned that "[t]he alleged lack of Thorazine, the alleged self mutilation, and the alleged trip to the hospital were occurrences [*sic*] that were never brought to the trial Judge's attention and are not reflected in the transcript record"; that the medical testimony concerning Vincent's likely relapse in the absence of his medication pertained "to the time of the offense and not at the time of the trial"; and that Vincent's counsel had not raised the issue at trial or on direct review. *Ibid.* "In short, there is nothing in the record, beyond the defendant's assertion, of any lack of medication or the adverse effects from the lack therefrom." *Id.*, at 64. The Court of Appeals for the Fifth Circuit affirmed in a brief unpublished order, reasoning that Vincent's "proof" did not "reach the level required" to secure habeas relief. *Id.*, at 86.

II

There can be no doubt that, if Vincent was in fact deprived of his Thorazine during trial and this deprivation rendered him incompetent to stand trial, he is entitled to have his conviction vacated. "[T]he conviction of an accused person while he is legally incompetent violates due process," *Pate v. Robinson*, 383 U. S. 375, 378 (1966), and a petitioner is not barred from raising this issue by his failure to have challenged his competence at trial, *id.*, at 384.¹ See also *Drope v. Missouri*, 420 U. S. 162 (1975); *Dusky v. United States*, 362 U. S. 402 (1960); *Bishop v. United States*, 350 U. S. 961 (1956). Yet the Court today refuses to disturb the lower courts' summary dismissal of Vincent's petition for failure of proof even though Vincent has never been accorded an opportunity to adduce evidence in support of his allegations. This result is squarely at odds with our precedents, with 28 U. S. C. § 2254, and with the Rules Governing Section 2254 Cases in the United States District Courts.

Where a habeas petition sets forth "specific and detailed factual assertions" that, if true, would entitle the petitioner to relief, the court must ensure the full development of the relevant facts. *Machibroda v. United States*, 368 U. S. 487, 496 (1962); see also

¹ "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right" to stand trial only while competent. 383 U. S., at 384.

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Harris v. Nelson, 394 U. S., at 300. "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." *Townsend v. Sain*, 372 U. S. 293, 312 (1963). See also 28 U. S. C. § 2254(d). This duty requires "careful consideration and plenary processing of [habeas] claims including full opportunity for presentation of the relevant facts." *Harris v. Nelson*, *supra*, at 298. Particular care is of course required where the habeas petitioner, as here, appears *pro se* or through the help of a fellow prisoner rather than with the assistance of an attorney.

Although a well-pleaded habeas petition frequently will require an evidentiary hearing, we have long recognized that federal courts may employ intermediate factfinding procedures in determining whether a full hearing is necessary. See, *e. g.*, *Machibroda v. United States*, *supra*, at 495. Thus the Habeas Corpus Rules provide that the court may order limited discovery, 28 U. S. C. § 2254 Rule 6; "direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition," Rule 7(a);² or arrange for informal conferences to inquire further into the merits of the petition, Advisory Committee's Note to Habeas Corpus Rule 8, 28 U. S. C., p. 356. See also 28 U. S. C. §§ 2246, 2247. Similarly, the court may direct the petitioner, on pain of dismissal, to specify the witnesses and evidence he relies upon. See, *e. g.*, *Smith v. Balkcom*, 660 F. 2d 573, 575, n. 2, 585, n. 33 (CA5 1981), modified, 671 F. 2d 858, mandate recalled, 677 F. 2d 20, cert. denied, 459 U. S. 882 (1982). Although the particular procedures must necessarily vary with the circumstances of each case, the underlying concern is consistent: "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of

² "The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record." Rule 7(b).

the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, *supra*, at 300.

Vincent's claims have never even been addressed through a state evidentiary hearing, and the duty of the District Court to give full and fair consideration to them was therefore particularly clear. See, *e. g.*, *Townsend v. Sain*, *supra*, at 313-314. None of the justifications proffered by the court or the State can excuse the court's summary dismissal of Vincent's petition. The court asserted, for example, that there is nothing in the transcript record suggesting that Vincent had acted irrationally or had otherwise been incompetent during trial. 1 Record 65. However, we have consistently rejected the notion that the absence of such evidence in the transcript can *alone* obviate the need for an evidentiary hearing on the issue of the petitioner's mental capacity at trial. See, *e. g.*, *Drope v. Missouri*, *supra*, at 179; *Pate v. Robinson*, *supra*, at 386 ("While [petitioner's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue"). Similarly, the court emphasized that Vincent's attorneys had failed to raise the issue of his possible incompetence at trial. 1 Record 64. Again, however, while this failure might well be evidence indicating that Vincent was not incompetent, it could just as well reflect his attorneys' unfamiliarity with the gravity of the situation or the ineffectiveness of their assistance; the ultimate truth cannot be determined in the absence of further inquiry.

The heart of the court's summary rejection of Vincent's petition appears to be that there is "nothing in the trial transcript" proving that Vincent was without his Thorazine during trial, mutilated himself in an attempt to obtain Thorazine, or would have reverted to his former incompetence if in fact he really were deprived of Thorazine. *Ibid.* Yet the alleged incidents occurred before the trial actually began, and the absence of supporting evidence in the transcript therefore obviously does not disprove Vincent's claim. Indeed, one of the fundamental purposes of federal habeas fact-finding is to determine the truth of "purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light." *Machibroda v. United States*, *supra*, at 494-495. See also *Hawk v. Olson*, 326 U. S. 271, 274 (1945). In the proper exercise of its responsibilities under the Habeas Corpus Rules, the District Court easily could have sought independent verification of

Vincent's allegations from prison and hospital records, and from inquiries directed to Vincent's former attorneys, prison officials, and Vincent's family.³ Moreover, if the court had doubts about the effect of Thorazine deprivation on Vincent's capacity to stand trial, it should have directed Vincent's doctors to address the issue.⁴ These procedures might well have demonstrated that Vincent's petition was without merit. If such discovery revealed substance in Vincent's allegations, however, then an evidentiary hearing would be essential to determine whether his conviction was unconstitutionally procured.

The District Court emphasized that, under pertinent Fifth Circuit precedent, a habeas petitioner alleging that he was incompetent to stand trial must demonstrate facts that "positively, unequivocally, and clearly generate the real, substantial, and legitimate doubt" as to his mental capacity to assist in his defense. 1 Record 65, quoting *Bruce v. Estelle*, 483 F. 2d 1031, 1043 (CA5 1973). Although this standard may be perfectly appropriate, § 2254 and its attendant Rules forbid the invocation of the standard *before* a petitioner has been given the opportunity to present his supporting evidence.⁵ Where, as here, there is undis-

³ As summarized in Vincent's petition for certiorari, "[t]he facts alleged by Vincent that would be corroborated by outside sources include:

"1. Thorazine not being sent with Vincent from Angola. Verification: Prison Records.

"2. Vincent cut his leg to get to hospital to request thorazine. Verification: Leesville General Hospital records; Police Jury payment records; William E. Tilley, Chris Smith, III, Della Vincent, Brenda Carlin.

"3. Vincent made requests of jail officials, his attorneys and family for thorazine. Verification: Vernon Parish police officers, William E. Tilley, Chris Smith, III., Della Vincent, Brenda Carlin. . . ." Pet. for Cert. 7.

⁴ The District Court acknowledged that prison psychiatrists had testified at Vincent's sanity hearing that it was "almost a sure thing" that Vincent would revert to episodes of psychosis if deprived of Thorazine. 1 Record 64. Incredibly, the court dismissed the relevance of this testimony by observing that the psychiatrists' discussion related to Vincent's condition at the time of the offense "and not at the time of the trial." *Ibid.* We have long recognized the probity of prior medical opinion on issues of trial competence, see, e. g., *Drope v. Missouri*, 420 U. S. 162, 180 (1975), and the psychiatrists' predictions in this case made further inquiries imperative.

⁵ *Bruce v. Estelle*, relied on by the District Court below, itself illustrates this principle. After finding that Bruce had demonstrated "a history of men-

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puted evidence that a habeas petitioner suffered from longstanding and severe mental illness, had previously been found unfit to stand trial as a result of his disorders, and would "almost [as] a sure thing" suffer a relapse if deprived of his medication, 1 Record 64, a court may not dismiss his claim that he was so deprived without inquiring into the merits or warning him that his petition would be dismissed if further substantiating evidence was not presented.⁶ "The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." *Walker v. Johnston*, 312 U. S. 275, 287 (1941).

I dissent.

No. 84-49. SWEAT ET AL. *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 11 Ark. App. xix.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

After the State of Arkansas had initiated formal criminal proceedings against the petitioners Russell and Richard ("Bud") Sweat, a state undercover agent contacted the Sweats and, in a series of telephone conversations and face-to-face meetings, deliberately elicited incriminating statements from them. Because the Sweats' right to counsel had accrued when formal criminal proceedings were begun, the prosecution's introduction at trial of these subsequent statements clearly violated the Sixth and Fourteenth Amendments. See, *e. g.*, *United States v. Henry*, 447

tal illness" and "substantial evidence of mental incompetence at or near the time of trial," the Fifth Circuit concluded that an evidentiary hearing was required to resolve Bruce's claim of incompetence at trial. 483 F. 2d, at 1043. "We would thus be remiss in our duty if we turned a deaf ear to petitioner's contentions since the record in this case evidences proceedings which did not adequately permit him to fairly present his serious allegations." *Ibid.*

⁶The District Court never notified Vincent that his petition was subject to dismissal for want of sufficient evidence. Yet the Habeas Corpus Rules require such fair warning. Rule 11 commands the federal courts to apply the Federal Rules of Civil Procedure "to the extent that they are not inconsistent with these rules." Federal Rule of Civil Procedure 12(c) in turn provides that, if the court considers entering judgment for reasons beyond the bare sufficiency of the pleadings, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion." See generally *Stephens v. Kemp*, *ante*, at 1057 (BRENNAN, J., dissenting).

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U. S. 264 (1980); *Brewer v. Williams*, 430 U. S. 387 (1977); *Massiah v. United States*, 377 U. S. 201 (1964). The Arkansas Court of Appeals held, however, that the Sweats' right to counsel had not yet attached at the time the undercover agent elicited their statements on the ground that, since they had not "been arrested or deprived of [their] freedom in any significant way," they were not entitled to notification of their rights pursuant to *Miranda v. Arizona*, 384 U. S. 436 (1966). 5 Ark. App. 284, 288, 635 S. W. 2d 296, 299 (1982), subsequent appeal, 11 Ark. App. xix (1984).

This reasoning is clearly erroneous. We have made clear time and again that *Miranda* and concepts of "custody" have nothing to do with the accrual of a defendant's Sixth and Fourteenth Amendment right to counsel. See, e. g., *United States v. Henry*, *supra*, at 273, n. 11; *Massiah v. United States*, *supra*, at 206. Accordingly, I respectfully dissent from the Court's failure to correct a state court's clear disregard of controlling federal constitutional precedent.

I

During an undercover investigation in Blytheville, Arkansas, Sergeant John Chappelle of the Arkansas State Police Criminal Investigation Division learned that Bud Sweat and his son, Russell, might be engaged in marihuana trafficking. Chappelle had an unwitting intermediary introduce him to the Sweats, and he proposed to sell them several hundred pounds of marihuana. Chappelle and the Sweats had several meetings and telephone conversations from early February through late March 1980, and they ultimately agreed that Chappelle would deliver 500 pounds of marihuana to Blytheville in exchange for \$150,000. Chappelle surreptitiously taped these meetings and conversations.

When he felt that he had obtained enough evidence to prosecute the Sweats, Chappelle met on March 27 with David Burnett, Prosecuting Attorney for the Second Judicial District of the State of Arkansas. Burnett reviewed the evidence with Chappelle and decided to file a felony information against the Sweats charging them with criminal conspiracy in violation of Ark. Stat. Ann. § 41-707 (1977).¹ Chappelle was present while Burnett prepared

¹ The felony information charged that the Sweats "did unlawfully and feloniously commit the offense of criminal conspiracy with the purpose of promoting

and signed the felony information. Record of First Trial in CR-80-63 and CR-80-63A (Cir. Ct., Crim. Div., Chickasawba Dist. of Miss. Cty., Ark.), p. 591 (hereinafter First Trial Record). Adversary judicial criminal proceedings were formally begun at 4:30 that afternoon when Burnett filed the felony information in the Circuit Court for the Chickasawba District of Mississippi County and obtained bench warrants for the Sweats' arrest. Second Trial Record 4-6.²

Instead of arresting the Sweats, however, Chappelle decided that he would like to elicit additional incriminating evidence from them. Accordingly, he called them on the telephone that evening and urged them to continue with the deal. First Trial Record 388-389. In subsequent calls and meetings which followed from his initiation, Chappelle probed the Sweats for details about their financial resources, their plans for the marihuana, and their knowledge of each others' activities. See generally *id.*, at 390-426. When the Sweats informed Chappelle that they could not proceed with the purchase, he outlined an alternative "recommendation" for the delivery of "good faith" money and pressed them to "let's get something going." *Id.*, at 402, 407.³ Only

or facilitating the commission of the criminal offense of sale and delivery or possession with intent to sell or deliver a controlled substance, to wit: marijuana" Record of Second Trial in CR-80-63 and CR-80-63A (Cir. Ct., Crim. Div., Chickasawba Dist. of Miss. Cty., Ark.), p. 4 (hereinafter Second Trial Record).

²The warrants directed the authorities: "You are commanded forthwith to arrest [Russell and Bud Sweat] and bring [them] before the Mississippi County Circuit Court, Chickasawba District, to answer an indictment in that Court against [them] for the offense of Criminal Conspiracy . . . or if the Court be adjourned for the Term, that you deliver [them] to the Jailer of Mississippi County." *Id.*, at 5-6.

³Specifically, Chappelle instructed Bud Sweat: "You go down to the office and you find, you gather up all you can gather and you call me back and you let me know how much. I ain't leaving here without something, understand? . . . We can do each other a lot of good. . . . But, go get me what you can as a measure of good faith and I'll take Russell's word on it and in turn I'll take your word on it. But, listen, don't jack me around, all right, cause I'm not going to do you all—." First Trial Record 400-402. In a later telephone conversation with Russell, Chappelle reiterated: "Russell, listen, I don't want to—I don't want to leave here without something. . . . Now, let's get something going. . . . I made a recommendation that your dad seemed to like and I'm sitting here waiting on an answer to that." *Id.*, at 406-409.

after Chappelle had succeeded in eliciting these further statements from the Sweats and in persuading them to give him what little money they could gather did he choose to execute the bench warrants. *Id.*, at 422-426.

Chappelle surreptitiously taped all of these telephone conversations and meetings, and the State sought to introduce the recordings at trial as evidence of the Sweats' statements and overt acts in furtherance of the charged conspiracy.⁴ The Sweats moved to suppress the recordings of and testimony pertaining to these statements, relying on *Massiah v. United States*, 377 U. S. 201 (1964), in support of their argument that Chappelle's deliberate elicitation of these statements after the felony information had been filed violated the Sixth and Fourteenth Amendments. Second Trial Record 35-40. The trial court, however, admitted the evidence on the ground that *Massiah* had been "further elaborated and explained" by *Miranda v. Arizona*, *supra*, so that the Sixth Amendment right to counsel is now implicated only when a defendant is actually in custody. First Trial Record 57. On appeal, the Arkansas Court of Appeals agreed with this reasoning:

"[W]e note that one is not entitled to notification of his rights when the person has not been arrested or deprived of his freedom in any significant way. *Miranda v. Arizona*, 384 U. S. 436 (1966); *Parker v. State*, 258 Ark. 880, 529 S. W. 2d 860 (1975). Since no interrogation of appellants took place and they were not coerced or tricked into saying anything against their will, it was not error for the trial judge to refuse to suppress appellants' statements. See *Hoffa v. United States*, 385 U. S. 293 (1966)." 5 Ark. App., at 288, 635 S. W. 2d, at 299.

The Court of Appeals reversed the Sweats' convictions on other grounds, however, and remanded for a new trial.⁵ Over renewed

⁴ The State also amended its felony information to include as substantiating details the statements and actions elicited by Chappelle after the filing of the original information. See Second Trial Record 16-17.

⁵ The Sweats had argued at trial that Chappelle entrapped them, and they unsuccessfully had sought to introduce recordings of Chappelle's conversations with an informant in support of this defense. Finding that some of Chappelle's recorded statements were material to the entrapment issue, the

objection, Chappelle once again testified about his conversations with the Sweats subsequent to the initiation of formal proceedings and once again played the challenged recordings for the jury. Second Trial Record 260-286. The Sweats again were convicted of criminal conspiracy, and once again the Arkansas Court of Appeals rejected their Sixth and Fourteenth Amendment claim for the reasons stated in its earlier opinion. 11 Ark. App. xix (1984). The Arkansas Supreme Court denied the motion to review.

II

The Sixth Amendment, applied to the States through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." This right to counsel accrues when "adversary judicial criminal proceedings" are initiated—"whether by way of formal charge, preliminary hearing, indictment, *information*, or arraignment." *Kirby v. Illinois*, 406 U. S. 682, 689 (1972) (emphasis added). Thereafter, the authorities may not deliberately elicit incriminating statements from the defendant absent the presence of his counsel or a knowing and voluntary waiver of his right to counsel. This prohibition applies both to express interrogation, see, *e. g.*, *Brewer v. Williams*, 430 U. S., at 398-401, and to surreptitious efforts by the authorities deliberately to elicit incriminating information, see, *e. g.*, *United States v. Henry*, 447 U. S., at 269-275 (use of jailhouse informant to elicit admissions from incarcerated defendant); *Massiah v. United States*, *supra*, at 206-207 (use of informant to elicit admissions from defendant who was free on bail). This touchstone requirement of our constitutional scheme embodies the recognition that, once the government has "committed itself to prosecute" and the defendant thereby is "faced with the prosecutorial forces of organized society," *Kirby v. Illinois*, *supra*, at 689, any official effort to interrogate the defendant without the protections afforded by counsel "'contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.'" *Massiah v. United States*, *supra*, at 205 (citation omitted). See also *Spano v. New York*, 360 U. S. 315, 325 (1959) (Douglas, J., concurring); *id.*, at 327 (Stewart, J., concurring).

Court of Appeals held that the trial court's refusal to admit this evidence was reversible error. 5 Ark. App. 284, 286-287, 635 S. W. 2d 296, 298 (1982).

Applying these principles to the circumstances of this case, it is clear that the State's introduction of the challenged recordings at trial violated the petitioners' Sixth and Fourteenth Amendment right to counsel.

First. Adversary judicial criminal proceedings began in this case with the filing of the felony information and the issuance of bench warrants at 4:30 p. m. on March 27. *Kirby v. Illinois, supra*, at 689. Although the State now attempts to minimize the fact that the felony information "evidently" had been filed before Sergeant Chappelle contacted the Sweats and elicited the challenged statements from them, Brief in Opposition 6-7, there is thus no question that at the time of these contacts the Sweats' Sixth and Fourteenth Amendment right to the assistance of counsel already had accrued.

Second. The State contends that Sergeant Chappelle merely "continued with the operation and allowed the Petitioners to attempt to complete the proposed deal," and that "the Petitioners were in fact arrested before there was any questioning." *Id.*, at 7. To the extent the State suggests that the Sixth and Fourteenth Amendments were implicated only by the "formal" questioning that occurred after the Sweats' arrest, we have repeatedly rejected such arguments. The right to counsel must "apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." *Massiah v. United States, supra*, at 206 (citation omitted). See also *United States v. Henry, supra*, at 272-273. The relevant inquiry has been stated variously as whether the authorities "deliberately elicited" incriminating statements from the defendant, *Massiah v. United States, supra*, at 206; or "deliberately and designedly set out to elicit information" from the defendant, *Brewer v. Williams, supra*, at 399; or "intentionally creat[ed] a situation likely to induce [the defendant] to make incriminating statements," *United States v. Henry, supra*, at 274.

There has occasionally been disagreement as to the precise formulation of the relevant standard and its application to the sometimes-ambiguous facts in cases before us. See, e. g., *United States v. Henry, supra*, at 275 (POWELL, J., concurring); *id.*, at 277 (BLACKMUN, J., dissenting). Under even the most lenient application of the standard, however, there can be no question from the unambiguous facts of *this* case that Sergeant Chappelle "intentionally," "deliberately," and "designedly" elicited devastat-

ing admissions from the Sweats after formal judicial proceedings had begun. See *supra*, at 1174–1175, and n. 3. The Arkansas Court of Appeals itself conceded that the Sweats' statements had been "elicited" by Chappelle. 5 Ark. App., at 288, 635 S. W. 2d, at 299.

Third. The State contends, however, that it is constitutionally significant that the Sweats had not yet "retained counsel or requested the assistance of counsel" when Chappelle elicited their admissions. Brief in Opposition 7. Although *Massiah* and *Williams* both involved situations in which the defendant had indeed already obtained the assistance of counsel, that factor was irrelevant to the outcome. "[T]he right to counsel . . . means at least that a person is *entitled* to the help of a lawyer at or after the time that judicial proceedings have been initiated against him" *Brewer v. Williams*, *supra*, at 398 (emphasis added). Thus we have specifically applied *Massiah* to cases in which the defendant was under indictment but where he was not represented by, nor had he even requested, counsel. See, e. g., *McLeod v. Ohio*, 381 U. S. 356 (1965) (*per curiam*), summarily rev'g 1 Ohio St. 2d 60, 203 N. E. 2d 349 (1964). Cf. *Edwards v. Arizona*, 451 U. S. 477, 484, n. 8 (1981) (discussing *McLeod*). And in *Henry*, the jailhouse informant was "contacted" by the Government six days *before* Henry obtained counsel. 447 U. S., at 266.

Fourth. The Arkansas Court of Appeals apparently believed that *Miranda* somehow modified the *Massiah* line of cases, because it viewed as dispositive the fact that, since the Sweats had not been arrested, they were not entitled to notification of their rights. 5 Ark. App., at 288, 635 S. W. 2d, at 299. The Fifth Amendment concerns embodied in *Miranda* and the Sixth Amendment right to counsel enunciated in *Massiah* are, however, obviously distinct. *Miranda* is directed at custodial interrogation and is therefore limited to those situations in which a suspect is "taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U. S., at 444. The Sixth and Fourteenth Amendment right to counsel, on the other hand, accrues upon initiation of formal judicial proceedings and continues whether or not the accused is at any given time in custody—as witnessed, of course, by the fact that *Massiah* himself was out on bail and engaged in a conversation with a friend who, "quite without the petitioner's knowledge," had become an undercover informant. 377 U. S., at 202. Thus we have repeatedly rejected arguments of this sort which "see[k] to infuse Fifth Amendment concerns

against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel." *United States v. Henry*, 447 U. S., at 273.

In a similar vein, the court below contended that the Sweats "were not coerced or tricked into saying anything against their will." 5 Ark. App., at 288, 635 S. W. 2d, at 299. Although the Sweats were not "coerced" in the Fifth Amendment sense, here again the court impermissibly injected Fifth Amendment concerns into the Sixth and Fourteenth Amendment domain. We have "pointedly observed" on repeated occasions that an accused in such circumstances "was *more* seriously imposed upon because he did not know that [the person asking him questions] was a Government agent," and accordingly have rejected suggestions that we "apply a less rigorous standard under the Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers." *United States v. Henry*, *supra*, at 272-273 (emphasis added). See also *Massiah v. United States*, 377 U. S., at 206. Thus the Sweats were indeed "tricked" in the sense that "[c]onversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents." *United States v. Henry*, *supra*, at 273.

Finally. The State relies heavily on *Hoffa v. United States*, 385 U. S. 293 (1966), as support for its argument that it was entitled to proceed with its undercover sting operation until it decided to arrest the Sweats, notwithstanding that formal judicial proceedings already had been initiated. In that case, the Government arranged for an informant to monitor Hoffa's activities while Hoffa was on trial for alleged violations of the Taft-Hartley Act, a trial that ultimately ended with a hung jury. On the basis of the informant's discoveries, Hoffa subsequently was indicted for and convicted of attempting to bribe members of the first jury. Hoffa contended that the bribery charges could have been brought long before they finally were, that if they had been timely filed the informant's continued presence would have been barred under *Massiah*, and that the Government's failure to bring charges earlier therefore violated his Sixth Amendment right to counsel. The Court rejected this argument out of hand:

"There is no constitutional right to be arrested. . . . Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the

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minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." 385 U. S., at 310.

Once again the State relies on precedent that is not relevant to the issue at hand. As we have previously emphasized, *Hoffa* has no bearing in cases where, as here, formal criminal proceedings actually have been initiated and the authorities deliberately elicit incriminating statements for use in *those* proceedings. *United States v. Henry*, *supra*, at 272. Thus while *Hoffa* stands for the proposition that the Sixth Amendment does not control the *timing* of the initiation of adversarial proceedings, it is "not relevant to the inquiry under the Sixth Amendment" *once such proceedings have commenced* and the right to counsel has attached, as it clearly had here. 447 U. S., at 272.

The State correctly notes that an investigation of criminal activities need not terminate upon the initiation of formal criminal proceedings. We have previously so emphasized. *Massiah v. United States*, 377 U. S., at 207. All that we have previously held, and all that the Court should have held today, "is that the defendant's own incriminating statements, obtained by [state] agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial." *Ibid.* (emphasis in original).

III

The press of our docket may well have led the Court to dismiss this petition for direct review as involving nothing more than an obviously aberrant failure by a state court to apply settled constitutional principles. Lest the fundamental right to counsel be blurred and then gradually eroded by the tremendous pressures put on those charged with enforcing the criminal law, however, I believe we have a duty rigorously to correct such obvious aberrations. For "it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all." *Brewer v. Williams*, 430 U. S., at 406.

Accordingly, I respectfully dissent from the Court's denial of the petition for a writ of certiorari.

No. 84-764. IN RE NEW ORLEANS PUBLIC SERVICE, INC.
C. A. 5th Cir. Petition for writ of certiorari and/or mandamus denied.

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No. 84-825. *NORTHWEST AIRLINES, INC. v. LAFFEY ET AL.* C. A. D. C. Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition.* Reported below: 238 U. S. App. D. C. 400, 740 F. 2d 1071.

No. 84-906. *CARSON v. AMERICAN TELEPHONE & TELEGRAPH TECHNOLOGIES, INC.* C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.* Reported below: 740 F. 2d 967.

No. 84-5369. *WOODWARD v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 668 S. W. 2d 337.

No. 84-5538. *WATSON v. LOUISIANA.* Sup. Ct. La.;
No. 84-5625. *SOLOMON v. KEMP, WARDEN.* C. A. 11th Cir.;
No. 84-5632. *MANN v. FLORIDA.* Sup. Ct. Fla.;
No. 84-5659. *BLANCO v. FLORIDA.* Sup. Ct. Fla.; and
No. 84-5776. *GORHAM v. FLORIDA.* Sup. Ct. Fla. Certiorari denied. Reported below: No. 84-5538, 449 So. 2d 1321; No. 84-5625, 735 F. 2d 395; No. 84-5632, 453 So. 2d 784; No. 84-5659, 452 So. 2d 520; No. 84-5776, 454 So. 2d 556.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 83-1971. *ILLINOIS v. WASHINGTON*, *ante*, p. 1022;
No. 83-2065. *JONES v. DEPARTMENT OF HUMAN RESOURCES OF GEORGIA ET AL.*, *ante*, p. 979;

No. 83-6997. *WITHERSPOON, INDIVIDUALLY, AND AS MOTHER AND NEXT FRIEND OF GAINES ET AL. v. CORDIER ET AL.*, *ante*, p. 1017; and

No. 83-7010. *DEPRIEST v. PUETT, COMMISSIONER, TENNESSEE DEPARTMENT OF HUMAN SERVICES, ET AL.*, *ante*, p. 1034. Petitions for rehearing denied.

*See also note, *supra*, p. 1145.

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- No. 84-191. *EISENBERG v. SCHWALBE*, *ante*, p. 858;
No. 84-274. *KNAPP STREET REALTY CORP. v. WISCONSIN INSURANCE PLAN ET AL.*, *ante*, p. 917;
No. 84-5010. *NOE v. NEAVES, WARDEN, ET AL.*, *ante*, p. 860;
No. 84-5051. *HOWELL v. MARYLAND*, *ante*, p. 1039;
No. 84-5314. *KULIK v. CALIFORNIA*, *ante*, p. 1074;
No. 84-5380. *SUMMA v. HASSON ET AL.*, *ante*, p. 925;
No. 84-5432. *UDELL v. DISTRICT OF COLUMBIA COURT OF APPEALS COMMITTEE ON ADMISSIONS*, *ante*, p. 1040;
No. 84-5457. *FULSOM v. WHITE, SUPERINTENDENT, MOBERLY TRAINING CENTER FOR MEN*, *ante*, p. 1040;
No. 84-5506. *DINGLE v. SIMPKINS*, *ante*, p. 1030;
No. 84-5528. *PIATKOWSKA v. INDUSTRIAL INDEMNITY CO.*, *ante*, p. 1041; and
No. 84-5533. *STEPHENS v. SNEATH ET AL.*, *ante*, p. 1041.
Petitions for rehearing denied.

No. 83-826. *HAMED & SALEM, INC. v. UNITED STATES*, 465 U. S. 1023;

No. 83-6770. *HARRIS v. UNITED STATES*, *ante*, p. 840; and

No. 84-5366. *HAYES v. BROTHERHOOD OF RAILWAY & AIRLINE CLERKS, ALLIED SERVICES DIVISION*, *ante*, p. 935. Motions for leave to file petitions for rehearing denied.

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Miscellaneous Order

No. A-541. *SKILLERN v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL.* Application for stay of execution of sentence of death scheduled for Wednesday, January 16, 1985, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE POWELL took no part in the consideration or decision of this application.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg v. Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the application for a stay of execution.

II

Even if I believed otherwise, however, I would stay the applicant's execution pending this Court's resolution of *Heckler v. Chaney*, No. 83-1878, cert. granted, 467 U. S. 1251 (1984), which has been argued to this Court and currently awaits decision. I cannot participate in the cruel irony visited on this applicant by the Court today.

Doyle Edward Skillern is one of the eight plaintiffs in *Chaney*. Those plaintiffs allege that lethal drugs used to carry out death sentences in Texas and Oklahoma cause "agonizingly slow and painful deaths" and consequently are not "safe and effective" for their intended use in executions, as allegedly is required under the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. § 301 *et seq.* The Court of Appeals for the District of Columbia Circuit agreed that the Food and Drug Administration has a statutory duty to investigate this claim, and indicated that it was prepared to "compel" the FDA to take action against the lethal drugs. *Chaney v. Heckler*, 231 U. S. App. D. C. 136, 153, 718 F. 2d 1174, 1191 (1983).

The merits of the Court of Appeals' action and order in *Chaney* are not before us on this application. In March 1984, the Solicitor General of the United States filed an application for stay of the Court of Appeals' mandate in *Chaney*, arguing that the decision was "likely to interfere with state enforcement of capital punishment statutes" Application in *Heckler v. Chaney*, No. 83-1878, p. 6. "[I]f the mandate is not stayed, the FDA will in all likelihood be required . . . to regulate the method of capital punishment used in several states," including Texas. *Id.*, at 10. THE CHIEF JUSTICE granted the motion for stay of the mandate based on this understanding of the effect of the judgment.

Thus the Government and this Court have proceeded in the *Chaney* case on the assumption that success by the plaintiffs will delay and perhaps ultimately preclude their execution by lethal injection. Yet today the Court decides to send one of those plaintiffs to his death by the very method challenged in *Chaney*. The Court obviously considers the issues in *Chaney* substantial enough to warrant plenary consideration. But despite our assertion of jurisdiction over applicant and his claim in *Chaney*, Texas subsequently has determined to execute applicant by lethal injection tomorrow morning. I am aware of no precedent that has permitted

irreparable injury to a party in a case receiving plenary consideration from this Court when the subject matter of the case is so intimately related to the threatened harm. The same question would arise if *Chaney* raised a question of bankruptcy enforcement law and Texas were threatening to foreclose on applicant's home despite this Court's pending consideration of the legality of the method. It is only mere chance that this applicant has seven coplaintiffs in his case; were he the only plaintiff, surely his execution would moot any decision we might render in *Chaney*. The fortuity of multiple plaintiffs should not skew the Court's analysis.

The applicant argued in his 42 U. S. C. § 1983 action below that, by executing him and thereby mooting his opportunity to litigate his case regarding the very method of execution at issue, Texas will deprive the applicant of his right to have his claim considered by the federal courts. The Courts of Appeals are unanimous in their discussion of the elements requiring consideration to obtain a stay under § 1983:

"(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *Ruiz v. Estelle*, 666 F. 2d 854, 856 (5th Cir. 1982). . . . While 'the movant need not *always* show a "probability" of success on the merits,' he must 'present a substantial case on the merits when a serious legal question is involved and show that *the balance of the equities*, [i. e. the other three factors] *weighs heavily in the favor of granting the stay.*'" *O'Bryan v. McKaskle*, 729 F. 2d 991, 993 (CA5 1984) (emphasis in original).

Accord, *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 182 U. S. App. D. C. 220, 223, 559 F. 2d 841, 843 (1977); *Providence Journal Co. v. FBI*, 595 F. 2d 889 (CA1 1979).

The balance of equities in this case runs entirely in the applicant's favor; indeed, respondents do not even attempt to argue that any of the last three factors favor the Texas Department of Corrections. Irreparability of the injury is obvious. No possible harm can result to the Department if applicant's execution is stayed pending our decision in *Chaney*. And certainly the public interest is not

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served if a party to a case receiving plenary consideration before the highest Court in the land is compelled to undergo the very injury whose legality his case challenges. Any interest in finality or execution of the State's death penalty law will, at worst, simply be delayed but not denied if the decision in *Chaney* is adverse to the applicant. And if that decision were to go in the applicant's favor, then a stay will have prevented a harm the legality of which will be open to serious question under federal law.

Respondents' only argument against a stay is that applicant's likelihood of success on the merits is slim. That may be so in the Fifth Circuit, which rejected a claim similar to applicant's in *O'Bryan*, *supra* (although, interestingly, the *O'Bryan* court did not discuss the three equitable factors required by its own precedents). But the argument loses any force before this Court, which is currently giving plenary consideration to a split between the Court of Appeals for the Fifth Circuit and the Court of Appeals that decided *Chaney* on the very issue applicant presents. Even the Solicitor General has advised us that if applicant succeeds in *Chaney*, his execution will likely be "interfere[d]" with. Application in *Heckler v. Chaney*, No. 83-1878, p. 6. Our grant of the writ of certiorari in *Chaney* provides all the answer required to the question whether there is a "serious legal question involved" in applicant's claim, see *Autry v. Estelle*, 464 U. S. 1301, 1302 (1983) (WHITE, J., granting application for stay in chambers) ("[I]n view of our decision to give the case plenary consideration, I cannot say that the issue lacks substance"), unless the Court is prepared to hold that litigants that will be affected by our decisions may nevertheless take irreparable steps to oust us of our jurisdiction.

For these reasons, I dissent from the decision to deny this application for a stay of execution pending our decision in *Chaney*. The irony of the Court's contrary action will not be lost on the public, when we ultimately issue a decision to a plaintiff no longer able to receive it.

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Dismissal Under Rule 53

No. 83-6808. DALTON *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 733 F. 2d 710.

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Appeals Dismissed

No. 84-807. *BOEHRINGER MANNHEIM DIAGNOSTICS, INC., FORMERLY KNOWN AS HYCEL, INC. v. PAN AMERICAN WORLD AIRWAYS, INC.* Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 737 F. 2d 456.

No. 84-846. *KLEIN v. FLORIDA.* Appeal from Cir. Ct. Fla., 12th Jud. Cir., Sarasota County, dismissed for want of substantial federal question.

No. 84-5481. *VEGA v. NEW YORK.* Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 62 N. Y. 2d 205, 465 N. E. 2d 12.

No. 84-5875. *NEAL v. AMERICAN TELEPHONE & TELEGRAPH CO.; and NEAL v. CITY OF HUNTSVILLE.* Appeals from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these cases.[†] Reported below: 454 So. 2d 975 (first case); 459 So. 2d 1017 (second case).

Miscellaneous Orders

No. A-485. *CARELLA v. COOPER ET AL.* C. A. 9th Cir. Application to recall and stay the mandate, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D-458. *IN RE DISBARMENT OF REY.* Disbarment entered. [For earlier order herein, see *ante*, p. 915.]

No. D-472. *IN RE DISBARMENT OF MILLER.* It is ordered that Alan Manning Miller, of Garden City, 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.

*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

[†]See also note, immediately *supra*.

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No. 83-1935. TONY AND SUSAN ALAMO FOUNDATION ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 8th Cir. [Certiorari granted, *ante*, p. 915.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 83-1961. LANDRETH TIMBER CO. *v.* LANDRETH ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1016.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 84-165. GOULD *v.* RUEFENACHT ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 1016.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 83-2143. TENNESSEE *v.* STREET. Ct. Crim. App. Tenn. [Certiorari granted, *ante*, p. 929.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-28. BROCKETT *v.* SPOKANE ARCADES, INC., ET AL.; and

No. 84-143. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. *v.* J-R DISTRIBUTORS, INC., ET AL. C. A. 9th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motion of American Booksellers Association, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 84-465. BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, ET AL. *v.* ROMANO. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1033.] Motion of the Attorney General of Missouri to permit David C. Mason, Esquire, of Jefferson City, Mo., to argue *pro hac vice* granted.

No. 84-718. MENDENHALL *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion of Wayne Winters, Editor and Publisher of Western Prospector and Miner, for leave to file a brief as *amicus curiae* granted.

No. 84-5343. HUX *v.* MURPHY, WARDEN, ET AL. C. A. 10th Cir. Motion of petitioner to consolidate this case with No. 83-1590, *Francis v. Franklin* [certiorari granted, 467 U. S. 1225], denied.

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No. 84-5802. IN RE ELY. Petition for writ of mandamus denied.

Certiorari Granted

No. 84-755. UNITED STATES *v.* MONTOYA DE HERNANDEZ. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 731 F. 2d 1369.

No. 84-823. UNITED STATES *v.* DOE No. 462. C. A. 4th Cir. Certiorari granted. Reported below: 745 F. 2d 834.

No. 84-861. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL-CIO, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 734 F. 2d 966.

Certiorari Denied. (See also Nos. 84-807 and 84-5875, *supra*.)

No. 83-1038. DORING, EXECUTRIX OF THE ESTATE OF KERBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 717 F. 2d 454.

No. 83-1647. LINDY PEN CO., INC., ET AL. *v.* BIC PEN CORP. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 1240.

No. 83-1864. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* NELSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 147.

No. 83-1988. MASI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 83-6713. RANKINS *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied.

No. 83-6885. WEST *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 731 F. 2d 90.

No. 83-6962. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 2d 138.

No. 84-67. LINDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1368.

No. 84-372. FRIEDRICH *v.* UNITED STATES; and

No. 84-409. BEASLEY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 2d 571.

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No. 84-452. *TODD v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 146.

No. 84-482. *GUSTAFSON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1447.

No. 84-525. *BAYLOR UNIVERSITY MEDICAL CENTER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1039.

No. 84-537. *AUSTIN v. PENNSYLVANIA*. Super. Ct. Pa. Certiorari denied. Reported below: 325 Pa. Super. 588, 473 A. 2d 665.

No. 84-544. *ASSOCIATION OF CALIFORNIA WATER AGENCIES ET AL. v. UNITED STATES ET AL.*; and

No. 84-553. *COUNTY OF DEL NORTE, CALIFORNIA, ET AL. v. UNITED STATES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 1462.

No. 84-577. *GOODRICH v. DEPARTMENT OF THE NAVY*. C. A. Fed. Cir. Certiorari denied. Reported below: 733 F. 2d 1578.

No. 84-579. *SCHUSTER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 424.

No. 84-595. *JAMPOL ET AL. v. SOUTHERN CALIFORNIA RETAIL CLERKS UNION AND DRUG EMPLOYER PENSION AND TRUST FUND*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1133.

No. 84-610. *M/V TORVANGER ET AL. v. QUAKER OATS Co.* C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 238.

No. 84-612. *YARBRO ET AL. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 479.

No. 84-637. *PETERSON v. MERIT SYSTEMS PROTECTION BOARD*. C. A. Fed. Cir. Certiorari denied. Reported below: 737 F. 2d 1021.

No. 84-650. *BRISTOL-MYERS Co. v. FEDERAL TRADE COMMISSION*. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 554.

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No. 84-682. *MONAGLE v. BOLGER, POSTMASTER GENERAL OF THE UNITED STATES*. C. A. 1st Cir. Certiorari denied.

No. 84-743. *ROSEN v. CHRYSLER PLASTIC PRODUCTS CORP. ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1457.

No. 84-751. *LEWIS v. JOSEPH MAGNIN CO., INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 447.

No. 84-765. *HILLIER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HILLIER v. SOUTHERN TOWING CO. ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 583.

No. 84-787. *LAUDERBACK v. AMERICAN BROADCASTING COS., INC.* C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 2d 193.

No. 84-792. *FOERING v. STRATTON ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1466.

No. 84-803. *MICHIGAN v. BURBANK*. Ct. App. Mich. Certiorari denied. Reported below: 137 Mich. App. 266, 358 N. W. 2d 348.

No. 84-810. *SCHNEIER v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 375.

No. 84-813. *MURVINE v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 2d 511.

No. 84-817. *FOX ET AL. v. CONSOLIDATED RAIL CORPORATION*. C. A. 3d Cir. Certiorari denied. Reported below: 739 F. 2d 929.

No. 84-820. *POLYAK v. HULEN ET AL.* Ct. App. Tenn. Certiorari denied.

No. 84-830. *ETHICON, INC. v. HANDGARDS, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 1282.

No. 84-837. *JACOBS v. CONNECTICUT*. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 119, 479 A. 2d 226.

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No. 84-838. *GEORGE v. CONNECTICUT*. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 361, 481 A. 2d 1068.

No. 84-840. *KASHETTA v. KASHETTA*. Super. Ct. Pa. Certiorari denied. Reported below: 318 Pa. Super. 632, 466 A. 2d 705.

No. 84-841. *KASHETTA v. KASHETTA*. Super. Ct. Pa. Certiorari denied. Reported below: 326 Pa. Super. 298, 473 A. 2d 1100.

No. 84-844. *HOME PLACEMENT SERVICE, INC. v. PROVIDENCE JOURNAL Co.* C. A. 1st Cir. Certiorari denied. Reported below: 739 F. 2d 671.

No. 84-845. *ARVANIS, DBA INDUSTRIAL CONTRACTORS, ET AL. v. NOSLO ENGINEERING CONSULTANTS, INC., ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1287.

No. 84-847. *GREEN v. CONNECTICUT*. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 258, 480 A. 2d 526.

No. 84-857. *NATIONAL LOSS CONTROL SERVICE CORP. v. CANIPE*. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1055.

No. 84-862. *WEISS v. GILL ET AL.* C. A. 9th Cir. Certiorari before judgment denied.

No. 84-863. *GRIFFITH ET UX. v. MONTGOMERY COUNTY, MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 57 Md. App. 472, 470 A. 2d 840.

No. 84-865. *GERO v. PIRES ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 78.

No. 84-868. *PUERTO RICO AQUEDUCT AND SEWER AUTHORITY v. PAUL N. HOWARD Co. ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 744 F. 2d 880.

No. 84-872. *AVCO CORP. v. PRECISION AIR PARTS, INC.* C. A. 11th Cir. Certiorari denied. Reported below: 736 F. 2d 1499.

No. 84-876. *BATISTE, AKA WILLIAMS v. GEORGIA*. Ct. App. Ga. Certiorari denied. Reported below: 171 Ga. App. 807, 321 S. E. 2d 386.

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No. 84-882. *BAUMANN v. TYPOGRAPHIC INNOVATIONS, INC.* C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 367.

No. 84-886. *SULLIVAN ET UX. v. FIRST PEOPLES BANK OF NEW JERSEY ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1468.

No. 84-887. *CONNECTICUT v. COUTURE.* Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 530, 482 A. 2d 300.

No. 84-892. *BRYANT v. TENNESSEE.* Ct. Crim. App. Tenn. Certiorari denied. Reported below: 678 S. W. 2d 480.

No. 84-893. *OMEGA CORPORATION OF CHESTERFIELD v. MALLOY ET AL.* Sup. Ct. Va. Certiorari denied. Reported below: 228 Va. 12, 319 S. E. 2d 728.

No. 84-907. *FRED LAVERY PORSCHE AUDI CO. ET AL. v. KEARNS.* C. A. Fed. Cir. Certiorari denied. Reported below: 745 F. 2d 600.

No. 84-913. *FLEISHMAN v. ELI LILLY & CO. ET AL.* Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 888, 467 N. E. 2d 517.

No. 84-927. *GEORGE v. GEORGE.* Ct. App. D. C. Certiorari denied.

No. 84-938. *BUSS v. WESTERN AIRLINES, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 1053.

No. 84-968. *CAUSEY v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 919.

No. 84-5178. *VEREEN v. UNITED STATES; and*

No. 84-5179. *TUTTLE v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1325.

No. 84-5423. *IGNACIO v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1524.

No. 84-5449. *FULLER ET AL. v. LEE, SOLICITOR GENERAL OF THE UNITED STATES, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 429.

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No. 84-5476. *SPAINHOWER v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 762.

No. 84-5502. *CAMPBELL v. CLARK, SECRETARY OF THE INTERIOR*. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 163.

No. 84-5518. *FLEMING v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 739 F. 2d 945.

No. 84-5520. *CHARLES v. FOLTZ, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 741 F. 2d 834.

No. 84-5525. *OWEN v. TENNESSEE*. Ct. Crim. App. Tenn. Certiorari denied.

No. 84-5526. *ROBERTS v. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY*. C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 2d 1126.

No. 84-5529. *WARD v. KNOBLOCK, HURON COUNTY CIRCUIT JUDGE, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 134.

No. 84-5560. *STROGER v. NEW JERSEY*. Sup. Ct. N. J. Certiorari denied. Reported below: 97 N. J. 391, 478 A. 2d 1175.

No. 84-5582. *MABERY v. KNIGHT ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1472.

No. 84-5618. *MILLER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84-5637. *FREEMAN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 927.

No. 84-5753. *NUNLEY v. ALFORD, WARDEN, ET AL.* C. A. 10th Cir. Certiorari denied.

No. 84-5773. *SUMERLIN v. MASSACHUSETTS*. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 393 Mass. 127, 469 N. E. 2d 826.

No. 84-5778. *FOSTER v. DEROBERTIS, WARDEN*. C. A. 7th Cir. Certiorari denied. Reported below: 741 F. 2d 1007.

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No. 84-5780. *GADOMSKI v. HECKLER*, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 46.

No. 84-5787. *VERTIN v. KOEHLER*, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 440.

No. 84-5788. *ROSS v. DELAWARE*. Sup. Ct. Del. Certiorari denied. Reported below: 482 A. 2d 727.

No. 84-5789. *SELLNER v. HANDGUN PERMIT REVIEW BOARD*. Ct. Sp. App. Md. Certiorari denied. Reported below: 56 Md. App. 722.

No. 84-5791. *BANKS v. MCGINNIS*, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1482.

No. 84-5798. *DEMORAN v. CALIFORNIA*. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-5799. *KRUPP v. O'LONE*, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 26.

No. 84-5806. *DAY v. SUPREME COURT OF TEXAS ET AL.* Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 84-5807. *KANE v. BAER*, CHAIRMAN, UNITED STATES PAROLE COMMISSION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 56.

No. 84-5809. *BAIRD v. PETERSON ET AL.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-5810. *BROWN v. YOUNG ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 438.

No. 84-5813. *CREWS v. DISTRICT ATTORNEY OF COMMON PLEAS COURT FOR WASHINGTON COUNTY, PENNSYLVANIA, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 84-5815. *MAHLER v. WARD ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 974.

No. 84-5823. *WOOD v. GARLAND ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1450.

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No. 84-5828. *ROCCO v. CENTRAL MUNICIPAL COURT, COUNTY OF ORANGE*. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-5830. *FORDHAM v. NATIONAL BANK OF BOYERTOWN*. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 375.

No. 84-5831. *LAGRANGE v. JONES, JUDGE, ET AL.* C. A. 5th Cir. Certiorari denied.

No. 84-5832. *POZWORSKI v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 123 Ill. App. 3d 1154, 479 N. E. 2d 1244.

No. 84-5833. *CARR v. HOLLAND, WARDEN*. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5839. *ROOKS v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 732.

No. 84-5847. *MOORE v. ILLINOIS*. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1175, 481 N. E. 2d 368.

No. 84-5858. *JORDAN v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1150, 480 N. E. 2d 878.

No. 84-5888. *WHITEHURST v. VIRGINIA STATE BAR ET AL.* Sup. Ct. Va. Certiorari denied.

No. 84-5891. *SLATER v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84-5895. *COOPER v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 84-5897. *HOSKINS v. ILLINOIS*. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 121 Ill. App. 3d 1161, 472 N. E. 2d 1245.

No. 84-5906. *HOSSMAN v. INDIANA*. Sup. Ct. Ind. Certiorari denied. Reported below: 467 N. E. 2d 416.

No. 84-5913. *HERSOM v. UNITED STATES ARMY*. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

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No. 84-5916. *MOREJON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 708.

No. 84-5917. *WITHERSPOON v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 373.

No. 84-5919. *OTTO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 742 F. 2d 104.

No. 84-5923. *SALVADOR v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 752.

No. 84-5926. *SAUNDERS v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 662.

No. 84-5928. *DUFFY v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84-5937. *POLSELLI v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 356.

No. 84-5947. *LAWSON v. O'LONE ET AL.* C. A. 3d Cir. Certiorari denied.

No. 84-5949. *TRAVIESO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 753 F. 2d 1069.

No. 84-21. *SCOTT v. CITY OF HAMMOND, INDIANA, ET AL.*; and

No. 84-38. *ILLINOIS ET AL. v. CITY OF MILWAUKEE ET AL.* C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 731 F. 2d 403.

No. 84-288. *THE SACRAMENTO BEE v. MUNICIPAL COURT OF CALIFORNIA, SACRAMENTO COUNTY (MOZINGO, REAL PARTY IN INTEREST)*. Ct. App. Cal., 3d App. Dist. Motion of respondent Mazingo for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 84-842. *JACK FAUCETT ASSOCIATES, INC., ET AL. v. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL.* C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the

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consideration or decision of this petition.* Reported below: 240 U. S. App. D. C. 103, 744 F. 2d 118.

No. 84-880. SHAMROCK FOODS CO. *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.* Reported below: 729 F. 2d 1208.

No. 84-5817. CARUTHERS *v.* TENNESSEE. Sup. Ct. Tenn.; and

No. 84-5864. KENNEDY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 84-5817, 676 S. W. 2d 935; No. 84-5864, 455 So. 2d 351.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 83-6775. THOMPSON *v.* LOUISIANA, *ante*, p. 17;
No. 84-5579. JOHN POLL *v.* UNITED STATES, *ante*, p. 1075;
No. 84-5647. MAZAK *v.* UNITED STATES, *ante*, p. 1076; and
No. 84-5715. D'ARCO *v.* UNITED STATES, *ante*, p. 1090. Petitions for rehearing denied.

No. 84-5483. MCINTOSH *v.* UNITED STATES ET AL., *ante*, p. 937. Motion for leave to file petition for rehearing and all other relief denied.

JANUARY 23, 1985

Dismissal Under Rule 53

No. 84-662. GREENVILLE SHIPPING CORP. ET AL. *v.* OLLESTAD. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 738 F. 2d 1049.

*See also note *, *supra*, p. 1186.

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JANUARY 26, 1985

Dismissal Under Rule 53

No. 84-205. VIRGINIA EX REL. DEPARTMENT OF CONSERVATION AND ECONOMIC DEVELOPMENT ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 979.] Writ of certiorari dismissed under this Court's Rule 53.

JANUARY 29, 1985

Miscellaneous Order

No. A-584. RAULERSON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death scheduled for Wednesday, January 30, 1985, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. JUSTICE POWELL took no part in the consideration or decision of this application.

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 and a petition for writ of certiorari and would vacate the death sentence in this case.

FEBRUARY 4, 1985

Dismissal Under Rule 53

No. 84-774. UNITED AIR LINES, INC. *v.* HIGMAN ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 736 F. 2d 394.

FEBRUARY 5, 1985

Miscellaneous Order

No. A-603. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* SONGER. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. JUSTICE REHNQUIST dissents. THE CHIEF JUSTICE,

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

FEBRUARY 6, 1985

Dismissals Under Rule 53

No. 84-1072. PEAT, MARWICK, MITCHELL & CO. *v.* WEST, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, ET AL. C. A. 10th Cir. Petition for writ of certiorari and other relief dismissed under this Court's Rule 53. Reported below: 748 F. 2d 540.

No. 84-5976. IN RE MAGEE. Petition for writ of habeas corpus dismissed under this Court's Rule 53.

FEBRUARY 7, 1985

Dismissal Under Rule 53

No. 84-873. MONTES ET AL. *v.* AGOSTO, PRESIDENT OF THE SENATE OF PUERTO RICO. Sup. Ct. P. R. Certiorari dismissed under this Court's Rule 53. Reported below: 115 D. P. R. 564.

FEBRUARY 8, 1985

Miscellaneous Order

No. A-597. CELESTINE *v.* BLACKBURN, WARDEN, LOUISIANA STATE PENITENTIARY. Application for stay of execution of sentence of death scheduled for Saturday, February 9, 1985, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would deny the application. JUSTICE POWELL took no part in the consideration or decision of this application.

FEBRUARY 12, 1985

Dismissals Under Rule 53

No. 84-572. MARKGRAF ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 736 F. 2d 1179.

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No. 84-915. BURLINGTON NORTHERN RAILROAD CO. *v.* KANSAS POWER & LIGHT CO. ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 740 F. 2d 780.

FEBRUARY 14, 1985

Dismissals Under Rule 53

No. 84-1220. G. HEILEMAN BREWING CO., INC., ET AL. *v.* CHRISTIAN SCHMIDT BREWING CO. ET AL. C. A. 6th Cir. Petition for writ of certiorari and motion to expedite consideration of the petition dismissed under this Court's Rule 53. Reported below: 753 F. 2d 1354.

No. 84-935. H. S. CROCKER CO., INC. *v.* OSTROFE. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 740 F. 2d 739.

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Affirmed on Appeal

No. 84-827. WESTHAFFER, JUDGE, CIRCUIT COURT OF DECATUR COUNTY, INDIANA, ET AL. *v.* WORRELL NEWSPAPERS OF INDIANA, INC., DBA GREENSBURG DAILY NEWS, ET AL. Affirmed on appeal from C. A. 7th Cir. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 739 F. 2d 1219.

Appeals Dismissed

No. 84-833. BEAN DREDGING CORP. *v.* ALABAMA. Appeal from Ct. Civ. App. Ala. dismissed for want of substantial federal question. Reported below: 454 So. 2d 1009.

No. 84-918. UNION CENTRAL LIFE INSURANCE CO. *v.* LIMBACH, TAX COMMISSIONER OF OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 12 Ohio St. 3d 80, 465 N. E. 2d 440.

No. 84-952. GERZOF *v.* GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of substantial federal

*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

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question. Reported below: 101 App. Div. 2d 451, 476 N. Y. S. 2d 21.

No. 84-1040. CAZALAS, DATIVE TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF CAZALAS *v.* GRIOT, DATIVE TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF CAZALAS. Appeal from Ct. App. La., 4th Cir., dismissed for want of substantial federal question. Reported below: 452 So. 2d 768.

No. 84-911. KOKER ET UX. *v.* SAGE ET AL. Appeal from Super. Ct. Wash., King County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-937. BELL, INDIVIDUALLY AND DBA WES OUTDOOR ADVERTISING CO. *v.* NEW JERSEY ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 738 F. 2d 420.

No. 84-5860. DINGLE *v.* SIMPKINS. Appeal from Sup. Ct. S. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-5974. NEAL *v.* ALABAMA ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-1027. BERMAN & SONS, INC., ET AL. *v.* SCOFIELD ET AL. Appeal from Sup. Jud. Ct. Mass. Motion of appellees for award of damages and double costs denied. Appeal dismissed for want of substantial federal question. Reported below: 393 Mass. 95, 469 N. E. 2d 805.

No. 84-1031. COMMUNICATIONS SATELLITE CORP. *v.* FRANCHISE TAX BOARD. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 156 Cal. App. 3d 726, 203 Cal. Rptr. 779.

No. 84-5610. BECK *v.* KANSAS. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 235 Kan. 1042.

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Certiorari Granted—Vacated and Remanded

No. 83-1613. *WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS v. DARDEN*. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wainwright v. Witt*, *ante*, p. 412. Reported below: 725 F. 2d 1526.

No. 84-578. *AVTEX FIBERS, INC. v. MCDOWELL*. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Trans World Airlines, Inc. v. Thurston*, *ante*, p. 111. Reported below: 740 F. 2d 214.

Miscellaneous Orders

No. A-557. *EITEL v. BALDWIN*. Sup. Ct. Alaska. Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A-576. *SEDIMA, S. P. R. L. v. IMREX CO., INC., ET AL.* (No. 84-648) C. A. 2d Cir. [certiorari granted, *ante*, p. 1157]; and *AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. v. HAROCO, INC., ET AL.* (No. 84-822) C. A. 7th Cir. [certiorari granted, *ante*, p. 1157]. Application of the Attorney General of Arizona for leave to file a consolidated brief as *amicus curiae* in excess of the page limitation, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D-463. *IN RE DISBARMENT OF HOPT*. Disbarment entered. [For earlier order herein, see *ante*, p. 1069.]

No. D-466. *IN RE DISBARMENT OF HILL*. Disbarment entered. [For earlier order herein, see *ante*, p. 1083.]

No. D-473. *IN RE DISBARMENT OF HUTCHINS*. It is ordered that Robert White Hutchins, of Columbia, 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. D-474. *IN RE DISBARMENT OF KOZEL*. It is ordered that William Thomas Kozel, of San Luis Obispo, Cal., 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.

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No. D-475. *IN RE DISBARMENT OF PADELL*. It is ordered that Bert Padell, 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-476. *IN RE DISBARMENT OF WHITTINGTON*. It is ordered that Ronald Paul Whittington, of Destrehan, La., 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-477. *IN RE DISBARMENT OF KENNEDY*. It is ordered that John B. Kennedy, of Wilmington, Del., 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. 99, Orig. *KOSTADINOV v. SMITH, ATTORNEY GENERAL OF THE UNITED STATES*. Motion for leave to file bill of complaint 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 leave to file a supplemental brief after argument granted.

No. 83-1919. *CITY OF OKLAHOMA CITY v. TUTTLE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF TUTTLE*. C. A. 10th Cir. [Certiorari granted, *ante*, p. 814.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 83-2030. *BOARD OF EDUCATION OF OKLAHOMA CITY v. NATIONAL GAY TASK FORCE*. C. A. 10th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motion of appellee for leave to file a supplemental brief after argument granted.

No. 84-165. *GOULD v. RUEFENACHT ET AL.* C. A. 3d Cir. [Certiorari granted, *ante*, p. 1016.] Renewed motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-312. *DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT v. NAACP LEGAL DEFENSE AND EDUCATIONAL*

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FUND, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 929.] Motion of respondents to file appendix that does not comply with the Rules of this Court denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant this motion. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

No. 84-320. NATIONAL FARMERS UNION INSURANCE COS. ET AL. *v.* CROW TRIBE OF INDIANS ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1032.] Motion of Salt River Project Agricultural Improvement and Power District et al. for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Montana for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-433. SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, ET AL. *v.* DEPARTMENT OF EDUCATION OF MASSACHUSETTS ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 1071.] Motion of respondents for divided argument granted.

No. 84-468. CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1016.] Motion of Texas et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. Motions of Disabled Peoples' International et al., American Association on Mental Deficiency et al., National Conference of Catholic Charities et al., Disability Rights Education & Defense Fund, and American Civil Liberties Union Foundation et al. for leave to file briefs as *amici curiae* granted.

No. 84-510. ASPEN SKIING CO. *v.* ASPEN HIGHLANDS SKIING CORP. C. A. 10th Cir. [Certiorari granted, *ante*, p. 1071.] Motion of American Airlines, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84-755. UNITED STATES *v.* MONTOKA DE HERNANDEZ. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1188.] Motion for

*See also note, *supra*, p. 1200.

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appointment of counsel granted, and it is ordered that Peter M. Horstman, Esquire, of Los Angeles, Cal., be appointed to serve as counsel for respondent in this case.

No. 84-951. GULF COAST CABLE TELEVISION CO. *v.* AFFILIATED CAPITAL CORP. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84-1222. KAHN *v.* ALEXANDER GRANT & CO. C. A. 8th Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied.

No. 84-1226. BADHAM ET AL. *v.* SECRETARY OF STATE OF CALIFORNIA ET AL. C. A. 9th Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 84-1244. DAVIS ET AL. *v.* BANDEMER ET AL. Appeal from D. C. S. D. Ind. Motion of appellants to expedite consideration of the appeal denied.

No. 84-5909. ADAMS *v.* FULCOMER ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 12, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84-5918. ROWLAND *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 12, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari

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without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84-6044. DAY *v.* DEANDA, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari or in the alternative issue a temporary restraining order denied.

No. 84-896. IN RE ANDERSON;

No. 84-964. IN RE EGLE;

No. 84-5848. IN RE TYLER; and

No. 84-5977. IN RE RAY. Petitions for writs of mandamus denied.

Certiorari Granted

No. 84-435. RUSSELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. Reported below: 738 F. 2d 825.

No. 84-489. PENNSYLVANIA BUREAU OF CORRECTION *v.* UNITED STATES MARSHALS SERVICE ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 737 F. 2d 1283.

No. 84-732. CLEAVINGER ET AL. *v.* SAXNER ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 727 F. 2d 669.

No. 84-701. UNITED STATES *v.* RIVERSIDE BAYVIEW HOMES, INC., ET AL. C. A. 6th Cir. Motion of National Wildlife Federation et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 729 F. 2d 391.

No. 84-744. UNITED STATES *v.* LANE ET AL.; and

No. 84-963. LANE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 735 F. 2d 799.

No. 84-773. BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. Motion of National Association of Secondary School Principals for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 741 F. 2d 538.

No. 84-786. MAINE *v.* MOULTON. Sup. Jud. Ct. Me. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 481 A. 2d 155.

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No. 84-1023. UNITED STATES *v.* ROJAS-CONTRERAS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 730 F. 2d 771.

No. 84-801. MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; and

No. 84-805. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* CITY OF NEW YORK ET AL.; and O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 84-801 and No. 84-805 (second case), 739 F. 2d 927; No. 84-805 (first case), 739 F. 2d 912.

No. 84-5872. DANIELS *v.* WILLIAMS. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 748 F. 2d 229.

Certiorari Denied. (See also Nos. 84-911, 84-937, 84-5860, and 84-5974, *supra.*)

No. 83-1796. ALABAMA *v.* GANNAWAY. Sup. Ct. Ala. Certiorari denied. Reported below: 448 So. 2d 413.

No. 83-7028. BEAM *v.* HAHALYAK. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1347.

No. 84-56. CAZALAS *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 280.

No. 84-129. REAVIS & MCGRATH *v.* ANTINORE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1128.

No. 84-307. SOUTHERN BANCORPORATION, INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 374.

No. 84-316. KALISH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 194.

No. 84-425. MARYLAND *v.* MOON. Ct. App. Md. Certiorari denied. Reported below: 300 Md. 354, 478 A. 2d 695.

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No. 84-502. *WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS v. DOUGLAS*; and

No. 84-661. *DOUGLAS v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 2d 531.

No. 84-520. *GREGORY ET UX. v. UNITED STATES*; and

No. 84-542. *SPURLOCK v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 692.

No. 84-586. *ANGEL ET AL. v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 741 F. 2d 662.

No. 84-588. *INSURANCE FINANCIAL SERVICES, INC. v. SOUTH CAROLINA INSURANCE CO.* Sup. Ct. S. C. Certiorari denied. Reported below: 282 S. C. 144, 318 S. E. 2d 10.

No. 84-621. *KANSAS CITY SOUTHERN RAILWAY CO. ET AL. v. UNITED STATES ET AL.*;

No. 84-633. *WHEELER v. INTERSTATE COMMERCE COMMISSION ET AL.*; and

No. 84-641. *BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES ET AL. v. UNITED STATES ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 237 U. S. App. D. C. 99, 736 F. 2d 708.

No. 84-631. *ATTERBERRY v. JORDAN, POLICE COMMISSIONER OF THE CITY OF BOSTON.* Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 392 Mass. 550, 467 N. E. 2d 150.

No. 84-635. *WOOLERY v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 818 and 740 F. 2d 359.

No. 84-638. *PRICE v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 966.

No. 84-647. *VAN DORN PLASTIC MACHINERY CO. v. NATIONAL LABOR RELATIONS BOARD.* C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 2d 343.

No. 84-656. *MEYER v. LEHMAN, SECRETARY OF THE NAVY.* C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

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No. 84-664. *WILDER ET AL. v. MOSSINGHOFF, COMMISSIONER OF PATENTS AND TRADEMARKS, ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: 736 F. 2d 1516.

No. 84-666. *ATTORNEY GENERAL OF GUAM ET AL. v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 1017.

No. 84-698. *SAIZAN v. DONOVAN, SECRETARY OF LABOR, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1524.

No. 84-699. *NATIONAL MOTOR FREIGHT TRAFFIC ASSN., INC., ET AL. v. UNITED STATES ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 59, 737 F. 2d 1206.

No. 84-702. *OHIO v. CAPONI.* Sup. Ct. Ohio. Certiorari denied. Reported below: 12 Ohio St. 3d 302, 466 N. E. 2d 551.

No. 84-703. *RAINERI v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 972.

No. 84-713. *DISTRICT LODGE No. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO v. TWA SERVICES, INC., ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 711.

No. 84-718. *MENDENHALL v. UNITED STATES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1371.

No. 84-721. *PAPPALARDI v. NEW YORK.* App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 102 App. Div. 2d 1016, 479 N. Y. S. 2d 391.

No. 84-730. *GETTY OIL Co. v. DEPARTMENT OF ENERGY ET AL.* Temp. Emerg. Ct. App. Certiorari denied. Reported below: 749 F. 2d 734.

No. 84-735. *HOUSE OF PRIME RIB v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1369.

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No. 84-738. *MOORE v. MORROW, SECRETARY OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 431.

No. 84-741. *CASSILIANO v. NEW YORK.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 103 App. Div. 2d 806, 477 N. Y. S. 2d 435.

No. 84-757. *CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. v. KOCH, MAYOR OF THE CITY OF NEW YORK, ET AL.; and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. v. GOLDSTEIN ET AL.* Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 548, 468 N. E. 2d 1 (first case); 62 N. Y. 2d 936, 468 N. E. 2d 51 (second case).

No. 84-769. *FERN ET AL. v. TURMAN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1367.

No. 84-814. *CITY OF OCEANSIDE v. FEDERAL EMERGENCY MANAGEMENT AGENCY ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 446.

No. 84-815. *BLACKMON ET AL. v. UNITED STATES ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 445.

No. 84-843. *DURAND ET AL. v. SIMON PRODUCTIONS No. 2, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1369.

No. 84-848. *CALLARI v. CONNECTICUT.* Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 18, 478 A. 2d 592.

No. 84-854. *ECOS ELECTRONICS CORP. v. UNDERWRITERS LABORATORIES, INC.* C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 2d 498.

No. 84-874. *PITTSBURGH BUILDING CONSTRUCTION INDUSTRY ADMINISTRATIVE COMMITTEE FOR RESEARCH, EDUCATION & TRAINING, INC. v. UNITED STATES DEPARTMENT OF LABOR.* C. A. Fed. Cir. Certiorari denied. Reported below: 746 F. 2d 1490.

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No. 84-878. *DRAGNA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 457.

No. 84-879. *SOUTHMOST MACHINERY CORP. ET AL. v. SEVILLE INDUSTRIAL MACHINERY CORP.* C. A. 3d Cir. Certiorari denied. Reported below: 742 F. 2d 786.

No. 84-883. *KOLLSMAN ET AL., SPECIAL ADMINISTRATORS OF THE ESTATE OF KOLLSMAN v. CITY OF LOS ANGELES*. C. A. 9th Cir. Certiorari denied. Reported below: 737 F. 2d 830.

No. 84-895. *EVANS v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 634, 464 N. E. 2d 1083.

No. 84-897. *TESCH, SHERIFF OF CASS COUNTY, NEBRASKA, ET AL. v. MCCURRY ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 271.

No. 84-898. *DYBCZAK v. TUSKEGEE INSTITUTE*. C. A. 11th Cir. Certiorari denied. Reported below: 737 F. 2d 1524.

No. 84-903. *JOHNSON v. JOHN F. BEASLEY CONSTRUCTION CO.* C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1054.

No. 84-905. *TEXAS AMERICAN BANK ET AL., AS INDEPENDENT CO-EXECUTORS OF THE WILL OF MITCHELL v. SAYERS*. Ct. App. Ky. Certiorari denied. Reported below: 674 S. W. 2d 36.

No. 84-908. *CHURCH OF SCIENTOLOGY OF CALIFORNIA ET AL. v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES*. C. A. 9th Cir. Certiorari denied.

No. 84-910. *BUFFALO BROADCASTING CO., INC., ET AL. v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 744 F. 2d 917.

No. 84-912. *MOORE ET UX. v. SOUTHWESTERN ELECTRIC POWER CO.* C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 496.

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No. 84-925. GENERAL MARINE TRANSPORT CORP. *v.* O'HARE ET AL., AS TRUSTEES OF THE NEW YORK MARINE TOWING & TRANSPORTATION INDUSTRY PENSION FUND & INSURANCE FUND. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 160.

No. 84-928. ABBEY NURSING HOME, INC., ET AL. *v.* ESTATE OF RICHARDSON (BENTLEY, ADMINISTRATRIX). Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84-931. GUENTHER *v.* HOLMGREEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 879.

No. 84-933. HECHENBERGER ET AL. *v.* WESTERN ELECTRIC CO., INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 742 F. 2d 453.

No. 84-934. BERGERON *v.* LOEB, EXECUTRIX OF THE ESTATE OF LOEB. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 54, 675 P. 2d 397.

No. 84-936. BANKS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 67 N. C. App. 358, 314 S. E. 2d 146.

No. 84-940. ABBETT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 326 Pa. Super. 608, 475 A. 2d 159.

No. 84-945. A. W. JONES CO. ET AL. *v.* JEFFERIES & Co., INC. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 63.

No. 84-946. MANNEL *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 142 Ariz. 153, 688 P. 2d 1045.

No. 84-956. SHAW *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. 382, 320 S. E. 2d 371.

No. 84-957. COLLINS *v.* UNIVERSITY OF CINCINNATI ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied.

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No. 84-960. MENDEL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 746 F. 2d 155.

No. 84-962. WETZEL *v.* STATE BAR OF ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 143 Ariz. 35, 691 P. 2d 1063.

No. 84-965. AIRWELD, INC. *v.* AIRCO, INC. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1184.

No. 84-966. SEABOARD SYSTEM RAILROAD, INC. *v.* BROTHERHOOD OF RAILROAD SIGNALMEN. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1460.

No. 84-967. MORGAN GUARANTY INTERNATIONAL BANK ET AL. *v.* CITY OF HOUSTON ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 666 S. W. 2d 524.

No. 84-969. POURNARAS *v.* POURNARAS. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84-970. BERGER *v.* SPELLACY, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1475.

No. 84-972. BARTON *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 122 Ill. App. 3d 1079, 462 N. E. 2d 538.

No. 84-973. ROTHENBERGER *v.* DOUGLAS COUNTY. C. A. 8th Cir. Certiorari denied. Reported below: 736 F. 2d 1240.

No. 84-977. SAGONA *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 451 So. 2d 1171.

No. 84-980. FUENTES-COBA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1191.

No. 84-981. CALLY *v.* HOFFMAN, UNITED STATES DISTRICT JUDGE. C. A. 11th Cir. Certiorari denied.

No. 84-983. TODARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 744 F. 2d 5.

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No. 84-985. *NICHOLS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 741 F. 2d 767.

No. 84-986. *CAPOBIANCO ET AL. v. HOWE ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 953.

No. 84-993. *GENERAL PUBLIC UTILITIES CORP. ET AL. v. STIBITZ ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 993.

No. 84-994. *LINDSAY v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84-1000. *GREAVES ET AL. v. BEE*. C. A. 10th Cir. Certiorari denied. Reported below: 744 F. 2d 1387.

No. 84-1001. *RUTH v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84-1005. *ESCHWEILER v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 435.

No. 84-1006. *WILLIAMS ET UX. v. TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY ET AL.* Ct. App. Ariz. Certiorari denied.

No. 84-1008. *DEAN ET AL. v. DUCKWORTH, WARDEN*. C. A. 7th Cir. Certiorari denied. Reported below: 748 F. 2d 367.

No. 84-1014. *LYNNE, EXECUTOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF LYNNE, ET AL. v. AUSTRALIAN GOVERNMENT AIRCRAFT FACTORIES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 672.

No. 84-1021. *PASHA ET AL. v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 377.

No. 84-1022. *YOUNG v. ILLINOIS*. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 120 Ill. App. 3d 1172, 471 N. E. 2d 1085.

No. 84-1024. *CALAIARO, TRUSTEE v. PITTSBURGH NATIONAL BANK ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1465.

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No. 84-1025. *GREENFIELD v. HEUBLEIN, INC., ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 742 F. 2d 751.

No. 84-1026. *SCHMIDT v. CITY OF FAYETTEVILLE.* C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 431.

No. 84-1029. *INOSENCIO ET AL. v. JOHNSON ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 743 F. 2d 408.

No. 84-1030. *SCHEPP v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 746 F. 2d 406.

No. 84-1034. *FINCH ET AL. v. HUGHES AIRCRAFT CO.* Ct. Sp. App. Md. Certiorari denied. Reported below: 57 Md. App. 190, 469 A. 2d 867.

No. 84-1035. *MICHELIN TIRE CORP. v. ITCO CORP. ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 170.

No. 84-1037. *HENDERSON v. SPERDUTO, SPECTOR & VANACORE (FORMERLY SPERDUTO, PRISKIE, SPECTOR & VANACORE).* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 100 App. Div. 2d 749, 473 N. Y. S. 2d 295.

No. 84-1042. *SAFIR v. LYKES BROTHERS STEAMSHIP CO., INC.* C. A. D. C. Cir. Certiorari denied.

No. 84-1043. *SHIMMAN v. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18.* C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 1226.

No. 84-1045. *MINNESOTA ASSOCIATION OF HEALTH CARE FACILITIES, INC., ET AL. v. MINNESOTA DEPARTMENT OF PUBLIC WELFARE ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 742 F. 2d 442.

No. 84-1046. *PARK v. METRO-GOLDWYN-MAYER/UNITED ARTISTS CORP.* C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 447.

No. 84-1048. *CASHIN v. NEW JERSEY.* Super. Ct. N. J., App. Div. Certiorari denied.

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No. 84-1049. *GOVERN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1447.

No. 84-1052. *FISHMAN v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84-1056. *ZEROVNIK v. E. F. HUTTON & Co., INC., ET AL.* Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84-1059. *FENNESSY ET AL. v. INTERNATIONAL DAIRY QUEEN, INC., ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84-1064. *MCNABB v. OREGONIAN PUBLISHING CO.* Ct. App. Ore. Certiorari denied. Reported below: 69 Ore. App. 136, 685 P. 2d 458.

No. 84-1066. *WALLACE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 370.

No. 84-1071. *BRACK v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 2d 1142.

No. 84-1074. *STROOM v. CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 84-1075. *ST. LOUIS COUNTY, MISSOURI v. CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT*. C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 2d 1087.

No. 84-1081. *MORRISSEY v. WILLIAM MORROW & CO. ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 739 F. 2d 962.

No. 84-1088. *MILLER v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1279.

No. 84-1091. *CARVER v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1475.

No. 84-1096. *NICKS ET AL. v. FORD*. C. A. 6th Cir. Certiorari denied. Reported below: 741 F. 2d 858.

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No. 84-1100. STAMBAUGH'S AIR SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 423.

No. 84-1113. MACRI *v.* GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 102 App. Div. 2d 53, 476 N. Y. S. 2d 359.

No. 84-1121. SIR SPEEDY, INC. *v.* SPEEDY PRINTING CENTERS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1479.

No. 84-1122. HARMON *v.* UNITED STATES; and

No. 84-1126. SAGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 743 F. 2d 1261.

No. 84-1125. GOLD *v.* UNITED STATES; and

No. 84-6057. WARREN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 743 F. 2d 800.

No. 84-1152. GASPARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 438.

No. 84-1153. OTTO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 748 F. 2d 689.

No. 84-1188. CARTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 749 F. 2d 993.

No. 84-1191. PULITZER *v.* PULITZER. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 449 So. 2d 370.

No. 84-1194. O'HARE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 744 F. 2d 360.

No. 84-5123. JENKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 1322.

No. 84-5268. GORDON *v.* DONOVAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1004.

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No. 84-5307. *THETFORD v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 680.

No. 84-5308. *O'CONNOR v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 737 F. 2d 814.

No. 84-5352. *SMITH v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 60, 737 F. 2d 1207.

No. 84-5367. *GIBSON v. UNITED STATES*;

No. 84-5472. *HASTING v. UNITED STATES*;

No. 84-5493. *WILLIAMS v. UNITED STATES*;

No. 84-5497. *ANDERSON v. UNITED STATES*; and

No. 84-5510. *STEWART v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1269.

No. 84-5373. *HOLECEK v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 331.

No. 84-5374. *HOMER v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-5397. *LIPPERT v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 457.

No. 84-5418. *SMITH v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 470 A. 2d 315.

No. 84-5424. *HERSHIPS v. REES*. Sup. Ct. Cal. Certiorari denied.

No. 84-5458. *LUCAS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-5479. *MCDONALD v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied.

No. 84-5486. *BARHAM v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 84-5494. *COLE v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied.

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No. 84-5507. *LAVONTE v. WALTER ET AL.* Ct. App. Ore. Certiorari denied. Reported below: 66 Ore. App. 752, 675 P. 2d 519.

No. 84-5556. *CASTANEDA-CASTANEDA ET AL. v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1360.

No. 84-5564. *DANO v. SZOMBATHY.* Super. Ct. N. J., App. Div. Certiorari denied.

No. 84-5568. *POWELL v. UNITED STATES;* and

No. 84-5598. *POURROY v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 976.

No. 84-5585. *BISHOP v. WYOMING.* Sup. Ct. Wyo. Certiorari denied. Reported below: 687 P. 2d 242.

No. 84-5602. *RUSSELL v. WYRICK, WARDEN.* C. A. 8th Cir. Certiorari denied. Reported below: 736 F. 2d 462.

No. 84-5634. *CAMPBELL v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 977.

No. 84-5635. *QUEZADA v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84-5649. *REAGLE v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 266.

No. 84-5699. *YOUNG v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 970.

No. 84-5757. *OCCEAN v. IMMIGRATION AND NATURALIZATION SERVICE.* C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 958.

No. 84-5781. *WILSON v. YORK.* Sup. Ct. Ala. Certiorari denied.

No. 84-5804. *JONES v. ARKANSAS.* Sup. Ct. Ark. Certiorari denied. Reported below: 283 Ark. 363, 676 S. W. 2d 738.

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No. 84-5820. *BELLMAN ET AL. v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 2d 1116.

No. 84-5821. *HOLMAN v. ILLINOIS*. Sup. Ct. Ill. Certiorari denied. Reported below: 103 Ill. 2d 133, 469 N. E. 2d 119.

No. 84-5825. *PORTER ET AL. v. LOUISIANA*. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 454 So. 2d 220.

No. 84-5834. *COOK v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 745 F. 2d 1311.

No. 84-5835. *BERNARD v. POLLARD, JUDGE, PETERSBURG CIRCUIT COURT, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 50.

No. 84-5838. *TESSIER v. ILLINOIS*. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 123 Ill. App. 3d 984, 463 N. E. 2d 1006.

No. 84-5841. *IRONS v. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS*. C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 2d 207.

No. 84-5851. *ORTEGA v. ILLINOIS*. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1181, 481 N. E. 2d 371.

No. 84-5852. *WILSON v. SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS*. C. A. 4th Cir. Certiorari denied. Reported below: 747 F. 2d 251.

No. 84-5862. *P. L. R., A CHILD v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: 455 So. 2d 363.

No. 84-5863. *SOUTHERS v. TENNESSEE*. Sup. Ct. Tenn. Certiorari denied.

No. 84-5865. *STUDLEY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 84-5866. *SMITH v. JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION*. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1479.

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No. 84-5871. *BROWN v. PROCUNIER*, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84-5874. *GAERTTNER v. ROBISON ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 375.

No. 84-5883. *DAVIS v. PENNSYLVANIA*. Sup. Ct. Pa. Certiorari denied.

No. 84-5884. *REED v. TOLEDO AREA AFFIRMATIVE ACTION PROGRAM FOR THE CONSTRUCTION INDUSTRY ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 715 F. 2d 253.

No. 84-5886. *HUTCHISON v. MARSHALL*. C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 44.

No. 84-5887. *MURPHY v. KENTUCKY*. Ct. App. Ky. Certiorari denied.

No. 84-5890. *YOUNIE v. MARYLAND*. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1474.

No. 84-5893. *VAN SANT v. SOLOMON ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84-5894. *MCCOY v. GARRISON, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1356.

No. 84-5896. *GASTON v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 7, 465 N. E. 2d 631.

No. 84-5899. *BROWN v. KING*, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84-5900. *CANNADAY v. MISSISSIPPI*. Sup. Ct. Miss. Certiorari denied. Reported below: 455 So. 2d 713.

No. 84-5901. *CHANEY v. NATIONAL RAILROAD PASSENGER CORPORATION*. C. A. 3d Cir. Certiorari denied.

No. 84-5903. *HUDSON v. GARLAND, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 962.

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No. 84-5907. *DAVIS v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. D. C. Cir. Certiorari denied. Reported below: 240 U. S. App. D. C. 254, 744 F. 2d 878.

No. 84-5908. *REDDING v. BENSON ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 1360.

No. 84-5910. *BROWN v. MAGGIO, WARDEN*. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 93.

No. 84-5915. *DODSON v. ZIMMERMAN ET AL.* C. A. 3d Cir. Certiorari denied.

No. 84-5920. *TREVINO v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied.

No. 84-5921. *WILLIAMS v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 811.

No. 84-5924. *STARCHER v. OHIO*. Ct. App. Ohio, Lorain County. Certiorari denied. Reported below: 21 Ohio App. 3d 94, 487 N. E. 2d 319.

No. 84-5927. *DAVIDSON v. SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1440.

No. 84-5929. *BALICH v. STANLEY*. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 441.

No. 84-5930. *ANTONELLI v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 122 Ill. App. 3d 1154, 475 N. E. 2d 296.

No. 84-5931. *J. G. ET AL. v. TAUKE, GUARDIAN AD LITEM, ET AL.* Sup. Ct. Iowa. Certiorari denied. Reported below: 349 N. W. 2d 487.

No. 84-5932. *CALLOWAY v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

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No. 84-5935. *MITCHELL v. BARR ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 965.

No. 84-5936. *POWELL v. WYRICK, WARDEN.* C. A. 8th Cir. Certiorari denied. Reported below: 744 F. 2d 632.

No. 84-5939. *WILLIAMS v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 93.

No. 84-5940. *BUSCHARD v. GEORGE, JUDGE, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 55.

No. 84-5942. *THOMAS v. MISSOURI.* Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 674 S. W. 2d 131.

No. 84-5945. *WATKINS v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES.* C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1473.

No. 84-5946. *GALLO v. HOLLAND, WARDEN.* Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5948. *BEARDON v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied.

No. 84-5952. *MESSINA v. OHIO.* Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84-5956. *BLANKENSHIP, AKA BROWN v. CABINET FOR HUMAN RESOURCES ET AL.* Sup. Ct. Ky. Certiorari denied.

No. 84-5957. *HAILI v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 68.

No. 84-5961. *HEARN v. R. R. DONNELLEY & SONS CO.* C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 304.

No. 84-5962. *MOORE v. BLACK, WARDEN.* C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 63.

No. 84-5965. *WEIR v. WILSON ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 532.

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No. 84-5967. *GARRETT v. B-J-C HOSPITAL & NURSING HOME ET AL.* Sup. Ct. Ga. Certiorari denied.

No. 84-5970. *JENKINS v. UNITED STATES.* Ct. App. D. C. Certiorari denied. Reported below: 483 A. 2d 660.

No. 84-5971. *SMALL v. WYOMING.* Sup. Ct. Wyo. Certiorari denied. Reported below: 689 P. 2d 420.

No. 84-5973. *GARRETT v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84-5975. *WEISS v. MISSOURI DEPARTMENT OF MENTAL HEALTH ET AL.* C. A. 8th Cir. Certiorari denied.

No. 84-5978. *PRICE v. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES* (two cases). C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1371 (first case); 733 F. 2d 699 (second case).

No. 84-5980. *OLIVER v. ZIMMERMAN ET AL.* C. A. 3d Cir. Certiorari denied.

No. 84-5981. *MARCINSKI v. UNITED STATES.* Ct. App. D. C. Certiorari denied. Reported below: 479 A. 2d 856.

No. 84-5982. *VALENTINE v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84-5983. *SKREZYNA v. CASH ET AL.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1150, 480 N. E. 2d 879.

No. 84-5985. *SLAPPY v. CALIFORNIA.* Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84-5986. *MONDAINE v. WYRICK, WARDEN.* C. A. 9th Cir. Certiorari denied.

No. 84-5987. *FIELDS v. UNITED STATES.* Ct. App. D. C. Certiorari denied.

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No. 84-5988. *MINER v. ARKANSAS*. Sup. Ct. Ark. Certiorari denied.

No. 84-5989. *FAYOMI v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 955.

No. 84-5990. *OWENS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 84-5992. *EZEODO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 748 F. 2d 97.

No. 84-5994. *BROWN v. WEINBERGER, SECRETARY OF DEFENSE*. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1482.

No. 84-5995. *SALTERS v. GREENVILLE HOUSING AUTHORITY OF THE CITY OF GREENVILLE*. Ct. App. S. C. Certiorari denied. Reported below: 281 S. C. 604, 316 S. E. 2d 718.

No. 84-5996. *POWERS v. HOLLAND, WARDEN*. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5998. *MASON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1463.

No. 84-6002. *GUESS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1286.

No. 84-6003. *SCHAFFER v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1483.

No. 84-6007. *MUNNINGS v. WINEBRENNER, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1449.

No. 84-6012. *CARTER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84-6013. *FLAKE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 535.

No. 84-6014. *BASS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

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No. 84-6015. *BEACHBOARD v. EGGER, COMMISSIONER OF INTERNAL REVENUE*. C. A. D. C. Cir. Certiorari denied.

No. 84-6017. *ANDERSON v. INDIANA*. Sup. Ct. Ind. Certiorari denied. Reported below: 469 N. E. 2d 1166.

No. 84-6019. *TORREY v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1459.

No. 84-6027. *GARLAND v. UNITED STATES PAROLE COMMISSION ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84-6029. *LAMAR v. BANKS, WARDEN*. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1467.

No. 84-6032. *CRISP v. DUCKWORTH, WARDEN*. C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 2d 580.

No. 84-6039. *MORENO v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 482 A. 2d 1233.

No. 84-6040. *STOTTS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1463.

No. 84-6045. *PICKETT ET AL. v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1129.

No. 84-6048. *WEBB v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 278.

No. 84-6052. *CARTER v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 475 A. 2d 1118.

No. 84-6061. *SEALS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1449.

No. 84-6065. *FORRESTER v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 84-6068. *COMES FLYING v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 377.

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No. 84-6070. *SIMANONOK v. COSTLE ET AL.* C. A. 11th Cir. Certiorari denied.

No. 84-6077. *ROGERS v. UNITED STATES.* Ct. App. D. C. Certiorari denied. Reported below: 483 A. 2d 277.

No. 84-6095. *TRICKEY v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 388.

No. 84-6096. *STREETER v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 59.

No. 83-6323. *JONES v. EAST BATON ROUGE PARISH SCHOOL BOARD ET AL.* C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.* Reported below: 719 F. 2d 403.

No. 84-95. *NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS v. FEDERAL COMMUNICATIONS COMMISSION ET AL.;*

No. 84-504. *NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ET AL. v. FEDERAL COMMUNICATIONS COMMISSION ET AL.;*

No. 84-816. *PUBLIC SERVICE COMMISSION OF WISCONSIN ET AL. v. FEDERAL COMMUNICATIONS COMMISSION ET AL.;*

No. 84-824. *FLORIDA PUBLIC SERVICE COMMISSION v. FEDERAL COMMUNICATIONS COMMISSION ET AL.;* and

No. 84-856. *NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE v. FEDERAL COMMUNICATIONS COMMISSION ET AL.* C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.* Reported below: 237 U. S. App. D. C. 390, 737 F. 2d 1095.

No. 84-355. *NEW YORK v. SMITH.* Ct. App. N. Y. Motion of Attorney General of New York for leave to intervene granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari. Reported below: 63 N. Y. 2d 41, 468 N. E. 2d 879.

*See also note, *supra*, p. 1200.

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No. 84-659. *DiPASQUALE ET AL. v. UNITED STATES*;
No. 84-683. *SERUBO ET AL. v. UNITED STATES*;
No. 84-5524. *REDDING v. UNITED STATES*; and
No. 84-5816. *SZWANKI v. UNITED STATES*. C. A. 3d Cir.
Certiorari denied. JUSTICE WHITE would grant certiorari. Re-
ported below: 740 F. 2d 1282.

No. 84-716. *ARKANSAS LOUISIANA GAS CO., A DIVISION OF
ARKLA, INC. v. FEDERAL ENERGY REGULATORY COMMISSION ET
AL.* C. A. D. C. Cir. Motion of Interstate Natural Gas Associa-
tion of America for leave to file a brief as *amicus curiae* granted.
Certiorari denied. Reported below: 238 U. S. App. D. C. 59, 737
F. 2d 1206.

No. 84-790. *GENERAL PUBLIC UTILITIES CORP. ET AL. v.
UNITED STATES*. C. A. 3d Cir. Certiorari denied. JUSTICE
MARSHALL took no part in the consideration or decision of this
petition.* Reported below: 745 F. 2d 239.

No. 84-818. *RUDI v. ILLINOIS*. Sup. Ct. Ill. Certiorari
denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant
certiorari. Reported below: 103 Ill. 2d 216, 469 N. E. 2d 580.

No. 84-888. *MCDANIEL ET AL. v. GEORGIA ASSOCIATION OF
RETARDED CITIZENS ET AL.*; and

No. 84-899. *BOARD OF PUBLIC EDUCATION FOR THE CITY OF
SAVANNAH AND THE COUNTY OF CHATHAM ET AL. v. GEORGIA
ASSOCIATION OF RETARDED CITIZENS*. C. A. 11th Cir. Motion
of National School Boards Association et al. for leave to file a
brief as *amici curiae* in No. 84-888 granted. Certiorari denied.
Reported below: 740 F. 2d 902.

No. 84-909. *MUNUSAMY ET AL. v. MCCLELLAND ENGINEERS
ET AL.* C. A. 5th Cir. Certiorari and all other relief denied.
Reported below: 742 F. 2d 837.

No. 84-920. *ROBINSON ET AL. v. NEW JERSEY ET AL.* C. A.
3d Cir. Motion of Legal Foundation of America for leave to file a
brief as *amicus curiae* granted. Certiorari denied. Reported
below: 741 F. 2d 598.

*See also note, *supra*, p. 1200.

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No. 84-942. *MISSISSIPPI v. CANNADAY*. Sup. Ct. Miss. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 455 So. 2d 713.

No. 84-949. *CALIFORNIA v. GARCIA*. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 36 Cal. 3d 539, 684 P. 2d 826.

No. 84-959. *INDIANA v. MOORE*. Sup. Ct. Ind. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 467 N. E. 2d 710.

No. 84-987. *DUCKWORTH, WARDEN, ET AL. v. WILLIAMS, AKA SHERRARD*. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 738 F. 2d 828.

No. 84-991. *MCINTOSH v. INTERNATIONAL BUSINESS MACHINES CORP. ET AL.* C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.* Reported below: 742 F. 2d 1433.

No. 84-998. *GIBSON ET AL. v. FIRESTONE, SECRETARY OF STATE OF FLORIDA*. C. A. 11th Cir. Motions of Joseph W. Little and Voting Rights Committee et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 741 F. 2d 1268.

No. 84-1010. *CHAMPION ET AL. v. DEUKMEJIAN, GOVERNOR OF CALIFORNIA, ET AL.* C. A. 9th Cir. Motions of Legal Foundation of America, H. Paul Lillebo, and Public Service Research Council for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 738 F. 2d 1082.

No. 84-1038. *DE MODENA, DBA SIXTH AVENUE PHARMACY, ET AL. v. KAISER FOUNDATION HEALTH PLAN, INC., ET AL.* C. A. 9th Cir. Motions of Alabama Pharmaceutical Association et al., California Pharmacists Association, and American Pharmaceutical Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 743 F. 2d 1388.

*See also note, *supra*, p. 1200.

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- No. 84-5626. *DUFOUR v. MISSISSIPPI*. Sup. Ct. Miss.;
No. 84-5727. *STRINGER v. MISSISSIPPI*. Sup. Ct. Miss.;
No. 84-5735. *TRIMBLE v. MARYLAND*. Ct. App. Md.;
No. 84-5783. *BILLIOT v. MISSISSIPPI*. Sup. Ct. Miss.;
No. 84-5792. *GARDNER v. NORTH CAROLINA*. Sup. Ct. N. C.;
No. 84-5845. *NOLAND v. NORTH CAROLINA*. Sup. Ct. N. C.;
No. 84-5880. *CLOZZA v. VIRGINIA*. Sup. Ct. Va.;
No. 84-5881. *BYRD v. MISSOURI*. Sup. Ct. Mo.;
No. 84-5960. *LEMON v. FLORIDA*. Sup. Ct. Fla.; and
No. 84-5964. *VILLAFUERTE v. ARIZONA*. Sup. Ct. Ariz.
Certiorari denied. Reported below: No. 84-5626, 453 So. 2d 337;
No. 84-5727, 454 So. 2d 468; No. 84-5735, 300 Md. 387, 478 A. 2d 1143; No. 84-5783, 454 So. 2d 445; No. 84-5792, 311 N. C. 489, 319 S. E. 2d 591; No. 84-5845, 312 N. C. 1, 320 S. E. 2d 642; No. 84-5880, 228 Va. 124, 321 S. E. 2d 273; No. 84-5881, 676 S. W. 2d 494; No. 84-5960, 456 So. 2d 885; No. 84-5964, 142 Ariz. 323, 690 P. 2d 42.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

- No. 83-6061. *GARCIA ET AL. v. UNITED STATES*, *ante*, p. 70;
No. 84-141. *YARBROUGH ET AL. v. SMALL BUSINESS ADMINISTRATION*, *ante*, p. 1017;
No. 84-618. *BRATTON, ADMINISTRATOR OF THE ESTATE OF BRATTON v. SAFEWAY STORES, INC.*, *ante*, p. 1073;
No. 84-726. *BRADY v. COMMISSIONER OF INTERNAL REVENUE*, *ante*, p. 1074;
No. 84-5363. *BRYMER v. ROSE, WARDEN, ET AL.*, *ante*, p. 1111;
No. 84-5441. *MYSLIWIEC v. DONOVAN, SECRETARY OF LABOR*, *ante*, p. 1088; and
No. 84-5552. *PETROFSKY v. INTERMOUNTAIN RESEARCH & ENGINEERING CO.*, *ante*, p. 1074. Petitions for rehearing denied.

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No. 84-5623. HOWELL *v.* TRUMPOWER, WARDEN, *ante*, p. 1112;

No. 84-5625. SOLOMON *v.* KEMP, WARDEN, *ante*, p. 1181;

No. 84-5642. ROOK *v.* NORTH CAROLINA, *ante*, p. 1098;

No. 84-5695. GERSON *v.* BYRNE ET AL., *ante*, p. 1113; and

No. 84-5718. HUBBARD *v.* WADE, DISTRICT ATTORNEY, DALLAS COUNTY, TEXAS, ET AL., *ante*, p. 1114. Petitions for rehearing denied.

No. 83-5210. EDWARDS *v.* DAVIS ET AL., 464 U. S. 860. Motion of petitioner for leave to file petition for rehearing denied.

THE HISTORY OF THE CITY OF BOSTON

1790

The history of the city of Boston is a subject of great interest and importance. It is a city of many centuries, and its history is a record of the growth and development of one of the most important cities in the world. The city has been the seat of many great events, and its history is a record of the progress of the human race. The city has been the home of many great men, and its history is a record of the achievements of the human mind. The city has been the center of many great movements, and its history is a record of the struggles of the human spirit. The city has been the birthplace of many great ideas, and its history is a record of the progress of the human race. The city has been the home of many great men, and its history is a record of the achievements of the human mind. The city has been the center of many great movements, and its history is a record of the struggles of the human spirit. The city has been the birthplace of many great ideas, and its history is a record of the progress of the human race.

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REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1231 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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