ORDERS FROM FEBRUARY 23 THROUGH MARCH 25, 1985

FEBRUARY 23, 1985

Miscellaneous Order

No. A–641. MATTHESON *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS. Application for stay of execution of sentence of death scheduled for Monday, February 25, 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 and JUSTICE REHNQUIST would deny the application. JUSTICE POWELL took no part in the consideration or decision of this application.

FEBRUARY 25, 1985*

Appeals Dismissed

No. 84–1079. BETHUNE PLAZA, INC. *v.* BERNARDI, DIRECTOR OF LABOR OF ILLINOIS. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 124 Ill. App. 3d 791, 464 N. E. 2d 1116.

No. 84–1092. ZIMMERMAN *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 4th 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: 101 App. Div. 2d 691, 476 N. Y. S. 2d 29.

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*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

No. 84–5912. CALLOWAY *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: 456 So. 2d 308.

Certiorari Granted—Vacated and Remanded

No. 84–5396. JENNINGS *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Shea* v. *Louisiana*, *ante*, p. 51, and *Smith* v. *Illinois*, 469 U. S. 91 (1984). JUSTICE REHNQUIST dissents. Reported below: 453 So. 2d 1109.

Miscellaneous Orders

No. A–608. CARELLA ET AL. *v.* MUNICIPAL COURT OF LOS ANGELES ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–632 (84–1282). IN RE MURGO. D. C. M. D. Fla. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–459. IN RE DISBARMENT OF STACHURSKI. Disbarment entered. [For earlier order herein, see 469 U. S. 915.]

No. D–464. IN RE DISBARMENT OF MCDANIEL. Disbarment entered. [For earlier order herein, see 469 U. S. 1069.]

No. D–465. IN RE DISBARMENT OF PELLE. Disbarment entered. [For earlier order herein, see 469 U. S. 1069.]

No. 83–1961. LANDRETH TIMBER CO. *v.* LANDRETH ET AL. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1016.] Motion of Advance Ross Corp. for leave to file a brief as *amicus curiae* granted.

No. 84–4. WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. *v.* HAMILTON BANK OF JOHNSON CITY. C. A. 6th Cir. [Certiorari granted, 469 U. S. 815.] Motion of petitioners for leave to file reply brief out of time granted.

No. 84–468. CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL. C. A. 5th Cir. [Certiorari granted, 469 U. S. 1016.] Motions of Association for Retarded Citizens of the United States et al. and National Association for

Rights Protection and Advocacy et al. for leave to file briefs as *amici curiae* granted.

No. 84–861. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 4th Cir. [Certiorari granted, 469 U. S. 1188.] Motion of respondents New York Shipping Association, Inc., et al. for divided argument granted. Motion of the Solicitor General for divided argument granted.

No. 84–978. EXXON CORP. ET AL. *v.* HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, ET AL. Appeal from Sup. Ct. N. J. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Certiorari Granted

No. 84–5636. ALCORN *v.* SMITH, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 740 F. 2d 3.

Certiorari Denied. (See also Nos. 84–1092 and 84–5912, *supra.*)

No. 83–1747. TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE *v.* ROSE. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 1277.

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. Certiorari denied. Reported below: 233 U. S. App. D. C. 384, 726 F. 2d 774.

No. 84–177. ILLINOIS *v.* HAMMOCK. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 121 Ill. App. 3d 874, 460 N. E. 2d 378.

No. 84–256. WILLIAMS *v.* UNITED STATES;
No. 84–292. O'MALLEY ET AL. *v.* UNITED STATES; and
No. 84–585. LOMBARDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 594.

No. 84–587. D'ANTIGNAC *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 2d 634.

No. 84–590. RED STAR MARINE SERVICES, INC. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 774.

No. 84–685. RUSH ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 738 F. 2d 497.

No. 84–834. BARTH ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 745 F. 2d 184.

No. 84–877. HILDMANN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1149, 480 N. E. 2d 878.

No. 84–890. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 963.

No. 84–904. MCQUISTON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 746 F. 2d 1489.

No. 84–916. MONROE ET AL. *v.* UNITED AIR LINES, INC., ET AL.; and

No. 84–958. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* HIGMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 736 F. 2d 394.

No. 84–919. NEW YORK UNIVERSITY MEDICAL CENTER *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 370.

No. 84–923. CARNIVAL CRUISE LINES, INC. *v.* KORNBERG ET UX. C. A. 11th Cir. Certiorari denied. Reported below: 741 F. 2d 1332.

No. 84–975. DEERE & CO. *v.* KINZENBAW ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 741 F. 2d 383.

No. 84–1032. ALCON LABORATORIES, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 745 F. 2d 105.

No. 84–1055. DRURY *v.* LOUISIANA STATE BAR ASSN. Sup. Ct. La. Certiorari denied. Reported below: 455 So. 2d 1387.

No. 84–1057. HUTCHERSON ET AL. *v.* BOARD OF SUPERVISORS OF FRANKLIN COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 142.

No. 84–1060. AUKAMP *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 59 Md. App. 727.

No. 84–1061. MERCHENT ET AL. *v.* CUBBAGE. C. A. 9th Cir. Certiorari denied. Reported below: 744 F. 2d 665.

No. 84–1073. FITZPATRICK *v.* VILLANOVA UNIVERSITY. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 375.

No. 84–1078. CARSON *v.* INDIANA ET AL. Ct. App. Ind. Certiorari denied. Reported below: 456 N. E. 2d 444.

No. 84–1080. SOUTHERN PACIFIC COMMUNICATIONS CO. ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 309, 740 F. 2d 980.

No. 84–1087. DAVIS ET AL. *v.* AVCO FINANCIAL SERVICES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 739 F. 2d 1057.

No. 84–1094. FORNASH *v.* KENTUCKY. Cir. Ct. Ky., Campbell County. Certiorari denied.

No. 84–1095. FITZPATRICK *v.* DIMARTINO, JUDGE, SUPERIOR COURT, LAW DIVISION, GLOUCESTER COUNTY, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1466.

No. 84–1111. SUSSMAN *v.* NEWS JOURNAL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1466.

No. 84–1117. WINSLOW MANUFACTURING, INC., ET AL. *v.* KAIN, DBA BROCK-KAIN. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 2d 606.

No. 84–1130. DEMPSTER ET AL. *v.* TURNER. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 1301.

No. 84–1138. GARMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 748 F. 2d 218.

No. 84–1169. PEEBLES *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 662.

No. 84–1189. GRIER *v.* BOARD OF COMMISSIONERS FOR MOORE COUNTY ET AL. C. A. 4th Cir. Certiorari denied.

No. 84–1206. FOOLADI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 1027.

No. 84–1215. HENDRICKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 653.

No. 84–1241. KNOBELOCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 746 F. 2d 1366.

No. 84–5344. LEWIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 916.

No. 84–5594. BRANTLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 1429.

No. 84–5679. ANTONELLI *v.* LUTHER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 84–5681. CHASE *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 903.

No. 84–5700. ZOGAIB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 373.

No. 84–5728. CLARK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 623.

No. 84–5731. SAYLOR *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 84–5822. LEWIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 103 Ill. 2d 111, 468 N. E. 2d 1222.

No. 84–5868. WELCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 745 F. 2d 614.

No. 84–5869. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–5898. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 123 Ill. App. 3d 523, 462 N. E. 2d 1268.

No. 84–5911. JANSSEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1150, 480 N. E. 2d 878.

No. 84–5925. NUEY *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 102 App. Div. 2d 275, 477 N. Y. S. 2d 10.

No. 84–5953. HORTON *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 84–5984. MARK *v.* ATHMANN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 67.

No. 84–5991. BICKLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1449.

No. 84–5999. MCMINN *v.* D. V. RAMANI, M. D. & ASSOCIATES, INC. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: 20 Ohio App. 3d 167, 485 N. E. 2d 258.

No. 84–6000. D'AGOSTINO *v.* COUNTY OF MADISON ET AL. C. A. 2d Cir. Certiorari denied.

No. 84–6001. ALBERTON *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 37 Cal. 3d 1, 686 P. 2d 1177.

No. 84–6004. REED *v.* JOSEPH ET AL. Sup. Ct. Ore. Certiorari denied.

No. 84–6008. SLEDGE *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 84–6009. MOORE *v.* RICE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1472.

No. 84–6010. AUSTIN *v.* MORAN, DIRECTOR, DEPARTMENT OF CORRECTIONS OF RHODE ISLAND. C. A. 1st Cir. Certiorari denied. Reported below: 753 F. 2d 1067.

No. 84–6016. GENTSCH *v.* LOWE, CLERK, TEXAS COURT OF CRIMINAL APPEALS. C. A. 5th Cir. Certiorari denied.

No. 84–6020. MONTGOMERY *v.* NATIONAL MULTIPLE SCLEROSIS SOCIETY. C. A. D. C. Cir. Certiorari denied.

No. 84–6025. ASH *v.* CVETKOV ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 493.

No. 84–6026. CHAMBERLAIN *v.* ERICKSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 744 F. 2d 628.

No. 84–6028. ERICKSON *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 120 Wis. 2d 677, 356 N. W. 2d 495.

No. 84–6053. HARRIS *v.* FRIEDLINE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 51.

No. 84–6071. MCKINNEY *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 31.

No. 84–6082. ATTWELL ET AL. *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–6085. HOUSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 745 F. 2d 333.

No. 84–6100. HAWTHORNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 391.

No. 84–6103. GIGLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 377.

No. 84–6114. PANTOJA-SOTO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 2d 1520.

No. 84–6119. OKOT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 68.

No. 84–6120. GORGEI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 732.

No. 84–6121. MENIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–6129. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 378.

No. 84–6130. RIECK *v.* WOOD, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 84–6136. MARINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 377.

No. 83–654. TEXAS *v.* WILKERSON. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 657 S. W. 2d 784.

No. 84–723. GARRAGHTY, WARDEN, ET AL. *v.* HINTON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 740 F. 2d 962.

No. 83–6646. YOUNG *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir.;

No. 84–5504. YBARRA *v.* NEVADA. Sup. Ct. Nev.;

No. 84–5683. LAMB *v.* TEXAS. Ct. Crim. App. Tex.;

No. 84–5794. CLISBY *v.* ALABAMA. Sup. Ct. Ala.; and

No. 84–6011. COLEMAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: No. 83–6646, 727 F. 2d 1489; No. 84–5504, 100 Nev. 167, 679 P. 2d 797; No. 84–5683, 680 S. W. 2d 11; No. 84–5794, 456 So. 2d 105.

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. 84–532. ROWLAND *v.* MAD RIVER LOCAL SCHOOL DISTRICT, MONTGOMERY COUNTY, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 730 F. 2d 444.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

This case raises important constitutional questions regarding the rights of public employees to maintain and express their private sexual preferences. Petitioner, a public high school employee, "was fired because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason." 730 F. 2d 444, 454 (CA6 1984) (Edwards, J., dissenting). Because determination of the appropriate constitutional analysis to apply in such a case continues to puzzle lower courts and because this Court has never addressed the issues presented, I would grant certiorari and set this case for oral argument.

I

In December 1974, petitioner was suspended from her nontenured position as a high school guidance counselor. In April

1975, the respondent School District acting through its School Board decided not to renew petitioner's contract. A jury later made unchallenged findings that petitioner was suspended and not rehired solely because she was bisexual and had told her secretary and some fellow teachers that she was bisexual, and not for "any other reason." See *id.*, at 460 (Special Verdict VIII). The jury also found that petitioner's mention of her bisexuality did not "in any way interfere with the proper performance of [her or other school staff members'] duties or with the regular operation of the school generally." *Id.*, at 456–458 (Special Verdicts I, II, and III). The jury concluded that petitioner had suffered damages as a result of the decisions to suspend and not rehire her in the form of personal humiliation, mental anguish, and lost earnings.

The trial judge ruled that these findings supported petitioner's claims for violation of her constitutional right to free speech under *Pickering* v. *Board of Education*, 391 U. S. 563 (1968), and to equal protection of the laws under the Fourteenth Amendment.[1] He therefore entered a judgment for damages for petitioner.

The Court of Appeals for the Sixth Circuit reversed. The court first ruled that in light of our intervening decision in *Connick* v. *Myers*, 461 U. S. 138 (1983), the decision to discharge petitioner based on her workplace statements was unobjectionable under the First Amendment because petitioner's speech was not about "a matter of public concern." 730 F. 2d, at 451. While accepting the jury's finding that petitioner's mention of her bisexuality had not interfered "in any way" with the "regular operation of the school," the court concluded that it was constitutionally permissible to dismiss petitioner "for talking about it." *Id.*, at 450. Second, the court held that no equal protection claim could possibly have been made out, because there was presented "no evidence of how other employees with different sexual preferences were treated." *Ibid.* Without citation to any precedent, the court characterized the judgment for petitioner in the absence of such comparative evidence as "plain error."[2]

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[1] United States Magistrate Robert A. Steinberg, presiding by agreement of the parties pursuant to 28 U. S. C. § 636. His opinion is reprinted at 1 App. to Record (Rec. App.) 97–111.

[2] This ruling overturned the jury's clear finding to the contrary that when the school Principal and Superintendent had suspended petitioner and recommended to the School Board that she not be rehired, they had "treated [petitioner] differently than similarly situated employees, because she was

II

This case starkly presents issues of individual constitutional rights that have, as the dissent below noted, "swirled nationwide for many years." *Id.*, at 453 (Edwards, J., dissenting). Petitioner did not lose her job because she disrupted the school environment or failed to perform her job. She was discharged merely because she is bisexual and revealed this fact to acquaintances at her workplace. These facts are rendered completely unambiguous by the jury's findings. Yet after a jury and the trial court who heard and evaluated the evidence rendered verdicts for petitioner, the court below reversed based on a crabbed reading of our precedents and unexplained disregard of the jury and judge's factual findings. Because they are so patently erroneous, these maneuvers suggest only a desire to evade the central question: may a State dismiss a public employee based on her bisexual status alone? I respectfully dissent from the Court's decision not to give its plenary attention to this issue.

A

That petitioner was discharged for her nondisruptive mention of her sexual preferences raises a substantial claim under the First Amendment. "For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." 461 U. S., at 142.[3] Nevertheless, *Connick* held

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homosexual/bisexual." 730 F. 2d, at 458–459 (Special Verdict V). The Court of Appeals also criticized the trial judge for "ignor[ing]" an additional finding that petitioner had not properly performed her job on one occasion when she had identified two homosexual students that she was counseling to her secretary. *Id.*, at 450; see *id.*, at 459 (Special Verdict V, question 9); 2 Rec. App. 96–99. Of course, because the jury had determined that the one incident of poor performance was not a motivating factor in the decision to fire petitioner, it was entirely correct for the trial judge not to consider the incident in entering judgment for petitioner. Cf. *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977) (plaintiff must show that constitutionally protected conduct was "motivating factor" in hiring decision, and that school board would not have reached same decision absent that conduct).

[3] In *Pickering* v. *Board of Education*, 391 U. S. 563, 574 (1968), we unanimously held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." Our subsequent decisions demonstrate that decisions not to rehire nontenured public employees may be challenged under the *Pickering* First

that if "employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," disciplinary measures taken in response to such expression cannot be challenged under the First Amendment "absent the most unusual circumstances." *Id.*, at 146, 147. The court below ruled that *Connick* requires the conclusion that a bisexual public employee constitutionally may be dismissed for "talking about it." This conclusion does not result inevitably from *Connick*, and may be questioned on at least two grounds: first, because petitioner's speech did indeed "touch upon" a matter of public concern, see *id.*, at 149, and second, because speech even if characterized as private is entitled to constitutional protection when it does not in any way interfere with the employer's business.

Connick recognized that some issues are "inherently of public concern," citing "racial discrimination" as one example. *Id.*, at 148, n. 8. I think it impossible not to note that a similar public debate is currently ongoing regarding the rights of homosexuals. The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate.[4] Speech that "touches upon" this explosive issue is no less deserving of constitutional attention than speech relating to more widely condemned forms of discrimination.

Connick's reference to "matters of public concern" does not suggest a strict rule that an employee's first statement related to a volatile issue of public concern must go unprotected, simply because it is the first statement in the public debate. Such a rule would reduce public employees to second-class speakers, for they would be prohibited from speaking until and unless others first bring an issue to public attention. Cf. *Egger* v. *Phillips*, 710 F. 2d 292, 317 (CA7 1983) (en banc) ("[T]he unpopularity of the issue surely does not mean that a voice crying out in the wilderness is entitled to less protection than a voice with a large, receptive audience"). It is the *topic* of the speech at issue, and not whether

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Amendment rationale. See, *e. g.*, *Mt. Healthy City Board of Ed.* v. *Doyle*, *supra*; *Perry* v. *Sindermann*, 408 U. S. 593 (1972).

[4] As the dissent below noted, once petitioner's bisexuality became known through her mention of it, "it [became] an important matter of public concern" in southern Ohio. 730 F. 2d, at 453.

a debate on that topic is yet ongoing, that *Connick* directed federal courts to examine.[5]

Moreover, even if petitioner's speech did not so obviously touch upon a matter of public concern, there remains a substantial constitutional question, reserved in *Connick*, whether it lies "totally beyond the protection of the First Amendment" given its nondisruptive character. See 461 U. S., at 147.[6] The recognized goal of the *Pickering-Connick* rationale is to seek a "balance" between the interest of public employees in speaking freely and that of public employers in operating their workplaces without disruption. See 461 U. S., at 142, 154; *Pickering*, 391 U. S., at 568–569. As the jury below found, however, the latter interest simply is not implicated in this case. In such circumstances, *Connick* does not require that the former interest still receive no constitutional protection. *Connick*, and, indeed, all our precedents in this area, addressed discipline taken against employees for statements that arguably had some disruptive effect in the workplace. See, *e. g.*, 461 U. S., at 151 ("mini-insurrection"); *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 285 (1977) ("dramatic and perhaps abrasive incident"); *Pickering*, *supra*, at 569 ("critical statements"). This case, however, involves no critical statements, but rather an entirely harmless mention of a fact about petitioner that apparently triggered certain prejudices held by her supervisors. Cf. *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949). The Court carefully noted in *Connick* that it did "not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." 461 U. S., at 154. This case poses the open question whether nondisruptive speech

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[5] See *Van Ooteghem* v. *Gray*, 654 F. 2d 304 (CA5 1981) (en banc) *(per curiam)* (termination of a public employee because he reveals homosexuality and intention to speak publicly on that topic "clearly" constitutes *Pickering* violation).

[6] Many courts have noted that the disruptive potential of speech remains a vital component of First Amendment analysis in any public employment context after *Connick*. See, *e. g.*, *Curl* v. *Reavis*, 740 F. 2d 1323, 1329, n. 5 (CA4 1984); *Agromayor* v. *Colberg*, 738 F. 2d 55, 61 (CA1 1984); *McBee* v. *Jim Hogg County, Texas*, 730 F. 2d 1009, 1017 (CA5 1984) (en banc); *Berry* v. *Bailey*, 726 F. 2d 670, 676 (CA11 1984); *McGee* v. *South Pemiscot School District*, 712 F. 2d 339, 342–343, n. 4 (CA8 1983); *Egger* v. *Phillips*, 710 F. 2d 292, 320, nn. 29, 30 (CA7 1983) (en banc); *McKinley* v. *City of Eloy*, 705 F. 2d 1110, 1115 (CA9 1983).

ever can constitutionally serve as the basis for termination under the First Amendment.

B

Apart from the First Amendment, we have held that "[a] State cannot exclude a person from . . . any . . . occupation . . . for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238–239 (1957). And in applying the Equal Protection Clause, "we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler* v. *Doe*, 457 U. S. 202, 216–217 (1982) (footnote omitted); see also *id.*, at 245 (BURGER, C. J., dissenting) ("The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility"). Under this rubric, discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis.

First, homosexuals constitute a significant and insular minority of this country's population.[7] Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect deep-seated prejudice rather than . . . rationality." *Id.*, at 216, n. 14. State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.[8]

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[7] Judge Edwards' dissent cited evidence indicating that homosexuals may constitute from 8–15% of the average population. 730 F. 2d, at 455–456 (citing J. Marmor, Homosexual Behavior: A Modern Reappraisal (1980)). He concluded that nonheterosexual preference, like minority race status, "evoke[s] deeply felt prejudices and fears on the part of many people." 730 F. 2d, at 453.

[8] See, *e. g.*, *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 723–724 (1982) (discrimination based on gender); *Trimble* v. *Gordon*, 430 U. S. 762, 767 (1977) (discrimination based on illegitimacy); *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967) (discrimination based on race); *Korematsu* v. *United States*,

Second, discrimination based on sexual preference has been found by many courts to infringe various fundamental constitutional rights, such as the rights to privacy or freedom of expression.[9] Infringement of such rights found to be "explicitly or implicitly guaranteed by the Constitution," *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 33–34 (1973), likewise requires the State to demonstrate some compelling interest to survive strict judicial scrutiny. *Plyler*, *supra*, at 217. I have previously noted that a multitude of our precedents supports the view that public employees maintain, no less than all other citizens, a fundamental constitutional right to make "private choices involving family life and personal autonomy." *Whisenhunt* v. *Spradlin*, 464 U. S. 965, 971 (1983) (dissenting from denial of certiorari). Whether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important

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323 U. S. 214, 216 (1944) (discrimination based on national origin); see also *Plyler* v. *Doe*, 457 U. S. 202, 218–223 (1982) (suggesting heightened scrutiny for discrimination against alien children).

[9] See, *e. g.*, *Gay Alliance of Students* v. *Matthews*, 544 F. 2d 162, 167 (CA4 1976) (refusal to allow homosexual student group equal access to state university facilities invalidated because infringement of First Amendment rights to expression and association not supported by any "substantial governmental interest"); *benShalom* v. *Secretary of the Army*, 489 F. Supp. 964, 969, 973–977 (ED Wis. 1980) (regulation requiring discharge based on homosexual "tendencies, desire, or interest, but . . . without overt homosexual acts" held unconstitutional as violative of First and Ninth Amendment rights and right to privacy); *New York* v. *Onofre*, 51 N. Y. 2d 476, 487–488, 492, n. 6, 415 N. E. 2d 936, 940, 942, n. 6 (1980) (criminal statute prohibiting private homosexual conduct found to infringe constitutional rights to privacy and equal protection under "compelling state interest" test), cert. denied, 451 U. S. 987 (1981). See also *Rich* v. *Secretary of the Army*, 735 F. 2d 1220, 1227, n. 7, 1228–1229 (CA10 1984) (noting "significant split of authority as to whether some private consensual homosexual behavior may have constitutional protection" but finding military's "compelling interest" in regulating homosexual conduct sufficient to uphold discharge based on false denial of homosexuality); *Beller* v. *Middendorf*, 632 F. 2d 788, 809–810 (CA9 1980) (same), cert. denied *sub nom. Beller* v. *Lehman*, 452 U. S. 905 (1981); but see *Dronenburg* v. *Zech*, 239 U. S. App. D. C. 229, 236–239, 741 F. 2d 1388, 1395–1398 (1984) (naval discharge for homosexual conduct upheld as "rationally related" to permissible goals of the military; no constitutional right of privacy implicated). See generally Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 682–686 (1980); Symposium: Sexual Preference and Gender Identity, 30 Hastings L. J. 799–1181 (1979).

questions that this Court has never addressed, and which have left the lower courts in some disarray. See n. 9, *supra;* cf. *Carey* v. *Population Services International,* 431 U. S. 678, 688, n. 5, 694, n. 17 (1977).[10]

Finally, even if adverse state action based on homosexual *conduct* were held valid under application of traditional equal protection principles, such approval would not answer the question, posed here, whether the mere nondisruptive *expression* of homosexual preference can pass muster even under a minimal rationality standard as the basis for discharge from public employment. This record plainly demonstrates that petitioner did not proselytize regarding her bisexuality, but rather that it became known simply in the course of her normal workday conversations.[11]

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[10] In this case, the School District has not even attempted to posit some legitimate interest that was advanced by terminating petitioner for her *nondisruptive* mention of her sexual preference. The School District had a full and fair opportunity to persuade a jury that petitioner's bisexuality or her mention of it interfered with some aspect of school administration, but the jury found to the contrary.

[11] Petitioner's first mention of her bisexuality at school apparently came in response to friendly but repeated questions from her secretary as to why petitioner seemed in a particularly "good mood" one day. When petitioner eventually responded that she was in love with a woman, the secretary apparently was upset by the unexpected answer, and reported it to petitioner's Principal. 2 Rec. App. 101–102. On another occasion, petitioner was confronted by an angry mother who wanted to know why petitioner was counseling her to accept her son's expressed homosexuality when such conduct was "against the Bible." Petitioner did not inform the mother of her own preferences, but did inform her Vice Principal, because she was "uneasy" that if the mother complained her own "job would be at stake." *Id.,* at 105–107. Finally, petitioner mentioned her bisexuality to some of her fellow teachers, first simply in the course of her friendships with them and later to enlist their support when it became clear that she would be disciplined for her bisexuality. *Id.,* at 102–104, 113.

This evidence indicates that petitioner's "speech" perhaps is better evaluated as no more than a natural consequence of her sexual orientation, in the same way that co-workers generally know whom their fellow employees are dating or to whom they are married. Under this view, petitioner's First Amendment and equal protection claims may be seen to converge, because it is realistically impossible to separate her spoken statements from her status. The suggestion below that it was error not to separate the claims precisely for the jury's benefit, and reliance on that suggestion to avoid discussion of the merits of petitioner's claim, see 730 F. 2d, at 450, again simply exposes the Court of Appeals' reluctance to confront forthrightly the difficult issues posed

The School District agreed to submit the issue of disruption to the jury, and the jury found that knowledge of petitioner's non-heterosexual status did not interfere with the school's operation "in any way." I have serious doubt in light of that finding whether the result below can be upheld under any standard of equal protection review.[12]

III

The issues in this case are clearly presented.[13] By reversing the jury's verdict, the Court of Appeals necessarily held that adverse state action taken against a public employee based solely

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by petitioner's case. The jury's role was to find the facts, which it did in detail. It is the court's proper role to analyze, not avoid, those facts in light of the applicable legal principles.

[12] Cf. *Gay Alliance of Students*, *supra*, at 166 (a statute criminalizing mere "status" of being homosexual would be unconstitutional) (dictum); *benShalom*, *supra*, at 969, 973–977 (regulation requiring discharge based on homosexual "interest" without evidence of conduct held unconstitutional absent showing that soldier's "sexual preferences interfered with her abilities as a soldier or adversely affected other members of the Service").

[13] The Court of Appeals' argument that petitioner's claim should not be considered because there was no evidence in the record of how "similarly situated" heterosexual teachers were treated is mere makeweight. We have recognized that, "[a]s in any lawsuit," a discrimination plaintiff "may prove his case by direct or circumstantial evidence." *U. S. Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 714, n. 3 (1983). This record is replete with direct evidence that petitioner's superiors discriminated against her because of her sexual preference. A jury is entitled to make rational inferences and apply its common-sense knowledge of the world, which includes the knowledge that most teachers are openly heterosexual and yet go undisciplined for that sexual preference. The jury's finding to that effect is reflected in its Special Verdict V. See n. 2, *supra*. The Court of Appeals' substitution of its own evaluation of the evidence for that of the factfinder's, on this and other questions, see nn. 2, 10, 11, *supra*, is simply impermissible. See *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 109–110 (1959). This is especially so where, as here (see 1 Rec. App. 149–150), the defendant made no motion for a directed verdict prior to submission to the jury. See, *e. g.*, *Wells* v. *Hico Independent School Dist.*, 736 F. 2d 243, 249 (CA5 1984). As the dissent below lucidly explained:

"The jury clearly did not believe that the above actions would have been taken against [petitioner] if she had not admitted a sexual preference which [the school Superintendent, Principal] and, ultimately, the School Board disapproved of. The question was one of credibility and logical inference which the jury was uniquely positioned to resolve." 730 F. 2d, at 454.

on his or her expressed sexual preference is constitutional. Nothing in our precedents requires that result; indeed, we have never addressed the topic. Because petitioner's case raises serious and unsettled constitutional questions relating to this issue of national importance, an issue that cannot any longer be ignored, I respectfully dissent from the decision to deny this petition for a writ of certiorari.[14]

No. 84–5720. GREGORY *v.* TOWN OF PITTSFIELD ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 479 A. 2d 1304.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This petition raises important and unresolved issues concerning the protection afforded by the Due Process Clause of the Fourteenth Amendment to applicants for general assistance. Because the decision below relies on a questionable reading of this Court's precedent to hold that such applicants are entitled to no procedural safeguards whatsoever and, alternatively, that state law remedies provide sufficient due process, I would grant certiorari.

Petitioner Cindy Gregory and her husband on April 13, 1982, filed an application with respondent town of Pittsfield, Maine, seeking general assistance in order to pay their rent. The Town Manager, respondent Gene Moyers, denied this request on the grounds that Mrs. Gregory had quit her job and had spent an Aid to Families with Dependent Children check to obtain her husband's release from jail. Contrary to the requirements of state law, Moyers did not provide a written notice of this decision

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[14] The District Court based its judgment against the School District for petitioner's damages on two factual findings. First, the court found that the School Board itself had violated petitioner's rights by acting not to renew her contract for the same impermissible reasons that had motivated the administrators' actions. Second, although the court ruled that the school administrators had taken their actions against petitioner in good faith, it found that the Superintendent had acted as "a policymaker or decisionmaker" for the School District. 1 Rec. App. 106. See *Owen* v. *City of Independence*, 445 U. S. 622, 656 (1980). The Court of Appeals, however, concluded that petitioner could not recover her damages from the School District. In light of the trial judge's factual findings on this point, the latter decision was so clearly erroneous that I would reverse the decision as to liability without argument and limit oral argument to the *Connick* and equal protection questions discussed above.

informing Mrs. Gregory of her right to an administrative hearing.[1] Mrs. Gregory unsuccessfully requested assistance again on April 16. On the morning of April 23, she filed an action in the Superior Court of Somerset County, State of Maine, requesting a temporary restraining order against the town's denial of general assistance. The court directed Mrs. Gregory to exhaust the administrative hearing procedure established by Me. Rev. Stat. Ann., Tit. 22, § 4507 (1980), and instructed the town's hearing authority to follow the decision of the Maine Supreme Court in *Page* v. *City of Auburn*, 440 A. 2d 363 (1982), which held that voluntary termination of employment is not a valid ground for denying general assistance. On the afternoon of April 23, Mrs. Gregory went to the Pittsfield Municipal Office and filed written requests for general assistance and for an administrative hearing on the denial of her April 13 application. The request for assistance was denied, and the town again failed to provide Mrs. Gregory with written notice of the decision. On April 29, 1983, the town's hearing authority upheld the denial of benefits requested on April 13 and refused to review the denial of the April 23 application.

Thwarted in her efforts to obtain assistance, Mrs. Gregory then filed an action in Superior Court requesting review of the hearing authority's decision pursuant to state law and also seeking relief under 42 U. S. C. § 1983 for alleged constitutional deprivations. The Superior Court held that Mrs. Gregory was entitled to an award of assistance based on the April 13 application and that the town's hearing authority had violated statutory requirements by refusing to hold a hearing on her April 23 application. Moreover, the court found that the town's policy was not to provide applicants with a written decision unless the applicant went to the Municipal Office and submitted a request. This policy, along with

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[1] The general assistance statute in effect at the time required that a decision concerning an applicant's eligibility be made within 24 hours after an application was submitted. Me. Rev. Stat. Ann., Tit. 22, § 4504(3)(C) (1980). Furthermore, the statute required that an applicant be provided written notice explaining the reasons for the decision and the right to an administrative hearing. § 4505. The administrative hearing was to be held within seven days of receipt of a written request for a hearing. § 4507.

Maine has since replaced its previous general assistance statute. 1983 Me. Acts, ch. 577, § 1. See Me. Rev. Stat. Ann., Tit. 22, §§ 4301–4324 (Supp. 1984–1985). The new provisions also contain requirements for written notice of a right to hearing. See §§ 4321, 4322.

the refusal to hold a hearing on the April 23 application, "flagrantly violated the statutory procedures for the administration of the general assistance program." App. 2 to Pet. for Cert. 6 (footnote omitted). The Superior Court further found that the town's failure to provide Mrs. Gregory written notice of her right to a hearing to review the denial of benefits and the subsequent refusal to conduct such a hearing constituted a denial of due process in violation of the Fourteenth Amendment. Before damages were determined with respect to the due process claim, the Superior Court amended its earlier decision in light of *Jackson* v. *Inhabitants of Town of Searsport*, 456 A. 2d 852 (Me.), cert. denied *sub nom. Jackson* v. *Handley*, 464 U. S. 825 (1983), to hold that petitioner did not have a cognizable claim of a denial of due process. Consequently, the court dismissed with prejudice Mrs. Gregory's § 1983 claim.

The Maine Supreme Judicial Court affirmed the dismissal of the § 1983 claim on alternative grounds. 479 A. 2d 1304 (1984). First, the state court noted that under state law, general assistance grants are made on the basis of a specific determination of need. Recipients are not eligible for continued payments simply on the basis of prior benefits, but instead must make a *de novo* showing of eligibility to obtain each particular grant. Me. Rev. Stat. Ann., Tit. 22, § 4450(2) (1980). This fact, the Supreme Judicial Court concluded, implies that an applicant for general assistance does not have a property interest in benefits until he or she is found eligible to receive such assistance. "Without this determination, an applicant, no matter what his financial status, has no more than an abstract expectancy of benefits, which in no case can rise to the level of a constitutionally protected property right." 479 A. 2d, at 1308. In the alternative, the Supreme Judicial Court held that even if Mrs. Gregory was entitled to the protections of due process, *Parratt* v. *Taylor*, 451 U. S. 527 (1981), indicated that state procedures afforded all the process due. 479 A. 2d, at 1308–1309. Under state law, unsuccessful applicants for assistance are entitled to an administrative hearing and judicial review. Pursuant to those provisions, after the Superior Court issued its first decision in February 1983, the town awarded Mrs. Gregory the assistance that it had denied the previous April. See *id.*, at 1306, n. 2. Relying on its decision in *Jackson* v. *Town of Searsport*, *supra*, the Supreme Judicial Court concluded that state law remedies were adequate to compensate petitioner and her

husband for any loss and thereby satisfied the requirements of due process. 479 A. 2d, at 1308.

The conclusion of the Supreme Judicial Court that an applicant for general assistance does not have an interest protected by the Due Process Clause is unsettling in its implication that less fortunate persons in our society may arbitrarily be denied benefits that a State has granted as a matter of right. There is no dispute that Mrs. Gregory was entitled under Maine law to the general assistance benefits denied to her in April 1982. We have held that state statutes or regulations prescribing the substantive predicates for state action may create liberty interests protected by due process. *Hewitt* v. *Helms*, 459 U. S. 460, 470–472 (1983) (finding that prisoner had protected liberty interest in remaining in general prison population). One would think that where state law creates an entitlement to general assistance based on certain substantive conditions, there similarly results a property interest that warrants at least some procedural safeguards. Cf. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 12 (1979) (finding parole applicant's expectancy of release entitled to some measure of constitutional protection). Although this Court has never addressed the issue whether applicants for general assistance have a protected property interest, see *Peer* v. *Griffeth*, 445 U. S. 970 (1980) (REHNQUIST, J., dissenting from denial of certiorari), the weight of authority among lower courts is contrary to the conclusion of the Supreme Judicial Court. See, *e. g.*, *Daniels* v. *Woodbury County, Iowa*, 742 F. 2d 1128, 1132–1133 (CA8 1984); *Griffeth* v. *Detrich*, 603 F. 2d 118, 120–121 (CA9 1979), cert. denied *sub nom. Peer* v. *Griffeth, supra; White* v. *Roughton*, 530 F. 2d 750, 755 (CA7 1976); *Johnston* v. *Shaw*, 556 F. Supp. 406, 412–413 (ND Tex. 1982). But see *Zobriscky* v. *Los Angeles County*, 28 Cal. App. 3d 930, 105 Cal. Rptr. 121 (1972).

Assuming that applicants for general assistance are entitled to some procedural safeguards, the Supreme Judicial Court further held that the statutory procedures afforded by state law provide sufficient process. This conclusion rests on a reading of *Parratt* v. *Taylor* that is more expansive than this Court previously has endorsed. *Parratt* held that a postdeprivation state tort action afforded all the process that was due to remedy a "tortious loss of . . . property as a result of a random and unauthorized act by a state employee." 451 U. S., at 541. See also *Hudson* v. *Palmer*, 468 U. S. 517, 533 (1984) (applying *Parratt* to unau-

thorized, intentional deprivation of property by a state employee). The present case is far removed from the facts of *Parratt*, where prison employees negligently lost an inmate's mail-order hobby kit. In contrast, here the town of Pittsfield had a policy, contrary to the requirements of state law, not to provide written notice to applicants denied general assistance. If we assume, *arguendo*, that due process requires the provision of such notice, it is questionable whether *Parratt* suggests that a municipal policy denying those procedures comports with the Constitution so long as state law makes some remedy available. Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 435–436 (1982) (postdeprivation remedies do not satisfy due process where deprivation is caused by established state procedures).

Parratt reasoned that postdeprivation procedures may satisfy the requirements of due process in circumstances in which predeprivation process is impracticable. 451 U. S., at 539–541. In the context of unauthorized deprivations by individual state employees, the State cannot possibly provide a meaningful predeprivation hearing, and therefore adequate postdeprivation state remedies may satisfy the procedural requirements of the Due Process Clause. *Id.*, at 541–542; see also *Hudson* v. *Palmer*, *supra*, at 533. This reasoning cannot readily be extended to the facts of the present case. First, the deprivation involved here did not result from the unauthorized conduct of individual employees, but instead reflected the town's policy. Second, the alleged denial of due process was not the town's failure to provide a hearing prior to denying the application for general assistance. Instead, petitioner complains of the town's refusal to provide her with notice explaining the decision and informing her of a statutory right to a hearing. It does not seem impracticable to insist that the town afford these minimal procedural protections.[2]

Even if the reasoning of *Parratt* applies in circumstances in which a municipal policy causes deprivations of protected property interests, it is by no means clear that the state law remedies available in the instant case are adequate. The state procedures did allow Mrs. Gregory to obtain grants of general assistance nearly

[2] Indeed, the Superior Court noted that the town had previously entered into a consent decree related to its refusal to follow the procedural requirements of Maine's general assistance statute. *Grass* v. *Commissioner of Dept. of Human Services*, Civ. Action No. 79–31–SD (Me., Mar. 31, 1980), App. 2 to Pet. for Cert. 6–7, n. 3.

one year after her application was improperly denied. Those procedures, however, made no provision for the recovery of damages resulting from the town's failure to provide her with notice or a prompt hearing. Mrs. Gregory's complaint alleged that as a result of the town's actions, she and her children were forced to leave their home and to move to another town. Any state tort action against the town or responsible employees apparently would be barred by the immunity provisions of the Maine Tort Claims Act, Me. Rev. Stat. Ann., Tit. 14, §§ 8103, 8111 (1980). Although *Parratt* acknowledged that state remedies may be adequate even though they may not provide a plaintiff with as large a recovery as he might receive in a § 1983 action, 451 U. S., at 544, it would be a novel extension of that proposition to infer that eventual restoration of a property interest, no matter how belated, constitutes an adequate remedy for the intervening deprivation and any consequent damages. Cf. *ibid.* (noting that available state remedies could fully compensate for property loss).

By suggesting that an applicant for general assistance may arbitrarily be denied benefits, the holding below adopts a proposition not endorsed previously by this Court and in conflict with the decisions of several other courts. Moreover, our previous decisions do not easily support the conclusion below that if applicants are entitled to some procedural safeguards, postdeprivation procedures are sufficient to remedy a municipal policy of denying unsuccessful applicants a required written notice explaining their right to an administrative hearing. The reasoning of the Supreme Judicial Court is troubling in its general implications as well as its application in this case. Consequently, I respectfully dissent from the denial of certiorari.

No. 84–5829. MCKINLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 103 Ill. 2d 111, 468 N. E. 2d 1222.

No. 84–5969. LINDSEY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 456 So. 2d 393.

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.

Rehearing Denied

No. 84–336. BUSHEY ET AL. *v.* NEW YORK STATE CIVIL SERVICE COMMISSION ET AL., 469 U. S. 1117;

No. 84–629. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* MCCOLLUM ET AL., 469 U. S. 1127;

No. 84–653. SCHLEIFER *v.* CHILDREN'S MEMORIAL HOSPITAL, 469 U. S. 1108;

No. 84–692. HAWKINS *v.* ALEX. BROWN & SONS ET AL., 469 U. S. 1108;

No. 84–707. DUNN *v.* UNITED STATES ET AL., 469 U. S. 1132;

No. 84–781. IOWA EXPRESS DISTRIBUTION, INC. *v.* NATIONAL LABOR RELATIONS BOARD, 469 U. S. 1088;

No. 84–784. TRACEY *v.* UNITED STATES, 469 U. S. 1109;

No. 84–5502. CAMPBELL *v.* CLARK, SECRETARY OF THE INTERIOR, 469 U. S. 1193;

No. 84–5545. SPIVEY *v.* GEORGIA, 469 U. S. 1132;

No. 84–5684. BOLES *v.* BAKER ET AL., 469 U. S. 1113;

No. 84–5810. BROWN *v.* YOUNG ET AL., 469 U. S. 1194; and

No. 84–5926. SAUNDERS *v.* UNITED STATES, 469 U. S. 1196. Petitions for rehearing denied.

No. 83–6350. MCCORQUODALE *v.* BALKCOM, WARDEN, ET AL., 466 U. S. 954. The orders entered May 21, 1984 [467 U. S. 1202], suspending the effect of the order denying the petition for writ of certiorari and staying execution of sentence of death are vacated. 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 dissent from the Court's order vacating the stay of execution in this case.

MARCH 1, 1985

Dismissal Under Rule 53

No. 75–6990. BALL *v.* DUNLAP, CHAIRMAN, RHODE ISLAND STATE PILOTAGE COMMISSION, ET AL. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 532 F. 2d 767.

MARCH 4, 1985*

Appeals Dismissed

No. 84–1214. CHARLES *v.* KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of substantial federal question.

No. 84–6049. RAPHAEL-JOHNSON *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.

Certiorari Granted—Vacated and Remanded

No. 83–613. UNITED STATES *v.* ROBINSON. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Young*, *ante*, p. 1. JUSTICE BRENNAN would deny certiorari. Reported below: 716 F. 2d 1095.

Certiorari Granted—Reversed. (See No. 84–914, *ante*, p. 409.)

Miscellaneous Orders

No. A–642. BROWNLEE *v.* UNITED STATES. D. C. Del. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. D–479. IN RE DISBARMENT OF GOFFEN. It is ordered that William Goffen, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–480. IN RE DISBARMENT OF BLACK. It is ordered that Warren J. Black, of New York 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.

No. D–481. IN RE DISBARMENT OF GOLD. It is ordered that Eugene Gold, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

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*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

No. 84–261. COMMODITY FUTURES TRADING COMMISSION *v.* WEINTRAUB ET AL. C. A. 7th Cir. [Certiorari granted, 469 U. S. 929.] Motion of the Solicitor General to permit Bruce N. Kuhlik, Esquire, to present oral argument *pro hac vice* granted.

No. 84–363. NORTHEAST BANCORP, INC., ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. [Certiorari granted, 469 U. S. 1105.] Motions of David F. Bolger Revocable Trust, Bank of New York Co., Inc., New York State Bankers Association, and Alphonse M. D'Amato et al. for leave to file briefs as *amici curiae* 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, 469 U. S. 1071.] Motion of Developmental Disabilities Law Center et al. for leave to file a brief as *amici curiae* granted.

No. 84–679. BATEMAN EICHLER, HILL RICHARDS, INC. *v.* BERNER ET AL. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1105.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

No. 84–870. LOUISIANA PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTH CENTRAL BELL TELEPHONE CO. Appeal from C. A. 5th Cir.; and

No. 84–900. NEW ENGLAND TELEPHONE & TELEGRAPH CO. *v.* PUBLIC UTILITIES COMMISSION OF MAINE ET AL. C. A. 1st Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

Certiorari Granted

No. 84–836. VASQUEZ, WARDEN *v.* HILLERY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 733 F. 2d 644.

No. 84–5555. HEATH *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Cer-

*See also note, *supra*, p. 1025.

tiorari granted limited to Question II. In addition, the parties are requested to address the following question: "What is the applicability, if any, of the dual sovereignty doctrine to successive prosecutions by two different states?" Reported below: 455 So. 2d 905.

No. 84–5630. THOMAS *v.* ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 728 F. 2d 813.

Certiorari Denied. (See also No. 84–6049, *supra.*)

No. 82–1974. CITY OF MACON *v.* JOINER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 699 F. 2d 1060.

No. 83–257. CITY COUNCIL OF AUGUSTA, GEORGIA *v.* ALEWINE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 699 F. 2d 1060.

No. 84–321. ALABAMA *v.* STURDIVANT. Sup. Ct. Ala. Certiorari denied. Reported below: 460 So. 2d 1210.

No. 84–693. HARRELL *v.* UNITED STATES; and
No. 84–5748. HAWKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 737 F. 2d 971.

No. 84–700. WEST MICHIGAN BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 335, 735 F. 2d 601.

No. 84–924. SMITH *v.* RUSSELL. Sup. Ct. Fla. Certiorari denied. Reported below: 456 So. 2d 462.

No. 84–955. BELL *v.* BELL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 393 Mass. 20, 468 N. E. 2d 859.

No. 84–961. VANCE ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 1418.

No. 84–974. BATTIPAGLIA ET AL. *v.* NEW YORK STATE LIQUOR AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 745 F. 2d 166.

No. 84–984. NATIONAL BROADCASTING CO., INC. *v.* HERMAN ET AL.; and

No. 84–1133. HERMAN ET AL. *v.* NATIONAL BROADCASTING CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 744 F. 2d 604.

No. 84–1012. HANEY, ADMINISTRATOR OF THE ESTATE OF MAYES *v.* CITY OF LOUISVILE, KENTUCKY, ET AL. Ct. App. Ky. Certiorari denied.

No. 84–1085. METROPOLITAN LIFE INSURANCE CO. *v.* KELLEY. C. A. 9th Cir. Certiorari denied.

No. 84–1090. LOSTAL ET AL. *v.* MANVILLE CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84–1106. NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS ET AL. *v.* FREDERICK MEISWINKEL, INC. C. A. 9th Cir. Certiorari denied. Reported below: 744 F. 2d 1374.

No. 84–1114. BLAIR *v.* COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 327 S. E. 2d 671.

No. 84–1115. LEGAL SERVICES CORPORATION ET AL. *v.* EAST ARKANSAS LEGAL SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 239 U. S. App. D. C. 319, 742 F. 2d 1472.

No. 84–1118. ATKINS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 681 S. W. 2d 571.

No. 84–1119. GOLDBERG *v.* SITOMER, SITOMER & PORGES ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 63 N. Y. 2d 831, 472 N. E. 2d 44.

No. 84–1123. ARMOUR & CO. *v.* HOLSEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 743 F. 2d 199.

No. 84–1124. PARA TRANSIT CORP. ET AL. *v.* COUNTY OF MONROE ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 79 Pa. Commw. 104, 468 A. 2d 548.

No. 84–1129. CONTI ET AL. *v.* FORD MOTOR CO. C. A. 3d Cir. Certiorari denied. Reported below: 743 F. 2d 195.

No. 84–1158. SINGER ET AL. *v.* WADMAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 745 F. 2d 606.

No. 84–1162. BURLINGTON NORTHERN RAILROAD CO. *v.* CLAY. C. A. 10th Cir. Certiorari denied.

No. 84–1196. CERTAIN-TEED CORP. *v.* CONTRACTOR UTILITY SALES CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 748 F. 2d 1151.

No. 84–1203. FISCHBACH & MOORE, INC. *v.* UNITED STATES;
No. 84–1218. LORD ELECTRIC CO., INC. *v.* UNITED STATES; and
No. 84–1229. ARBOGAST *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 750 F. 2d 1183.

No. 84–1247. AZARIAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1465.

No. 84–1272. CAREY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 228.

No. 84–5692. COVINGTON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 737.

No. 84–5710. BUTLER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 481 A. 2d 431.

No. 84–5719. COKER *v.* WILLIAMS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 648.

No. 84–5745. LITTLE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 674 S. W. 2d 541.

No. 84–5772. SMALL *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 120 Wis. 2d 675, 355 N. W. 2d 254.

No. 84–5796. PETERSON, BY CHANCE, NEXT FRIEND *v.* CITY OF AURORA, COLORADO. Dist. Ct. Colo., Arapahoe County. Certiorari denied.

No. 84–5889. NEAL *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 84–5902. CLAY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 675 S. W. 2d 765.

No. 84–6022. WILLIAMS *v.* PARKE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 741 F. 2d 847.

No. 84–6023. SHIVERS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1176, 481 N. E. 2d 368.

No. 84–6024. BROWN *v.* WAINWRIGHT, DIRECTOR, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 1466.

No. 84–6031. KRUG *v.* ABEL. C. A. 7th Cir. Certiorari denied.

No. 84–6035. BALLENGEE *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84–6037. FAISON *v.* DAVIS, JUDGE, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–6038. STEWART *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 262.

No. 84–6042. BRADLEY *v.* REES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 384.

No. 84–6044. DAY *v.* DEANDA, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 84–6046. MOORE *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 965.

No. 84–6047. NORRIS *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 746 F. 2d 814.

No. 84–6056. MINNEMAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 466 N. E. 2d 438.

No. 84–6058. PALLETT *v.* MALHEUR COUNTY CIRCUIT COURT. Sup. Ct. Ore. Certiorari denied.

No. 84–6066. COOPER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 736.

No. 84–6072. WESTFALL *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84–6126. COMBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 387.

No. 84–6137. STEAD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 355.

No. 84–6140. ACHAWAMETHEKUL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 924.

No. 84–6142. DAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84–6162. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 387.

No. 84–6163. CHUA HAN MOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 1308.

No. 84–6169. LEVINE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84–6177. SILVA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 840.

No. 84–6178. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–6184. BARNARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 391.

No. 84–6185. GREER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 380.

No. 84–559. PERALTA SHIPPING CORP. *v.* SMITH & JOHNSON (SHIPPING) CORP. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 739 F. 2d 798.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

The admiralty jurisdiction of the federal courts extends generally to a transaction that "'relates to ships and vessels, masters and mariners, as the agents of commerce.'" *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 736 (1961), quoting 1 E. Benedict, Admiralty 131 (6th ed. 1940). Notwithstanding the broad sweep of the admiralty jurisdiction, this Court, since the time of its single-page opinion in *Minturn* v. *Maynard*, 17 How. 477 (1855), has refused to extend admiralty jurisdiction to disputes involving general agency contracts that call for "husbanding" a vessel, that is, arranging for the performance of the various services that are preliminary to maritime movement. This case presents an opportunity to address the continued vitality of this much-criticized exception to admiralty jurisdiction, an exception that has been

applied inconsistently and that has created unnecessary confusion in the federal courts.

Petitioner Peralta is the general agent in the United States for an operator of several oceangoing cargo vessels. In 1979, it executed a sub-agency agreement with respondent Smith & Johnson whereby it appointed respondent as "Gulf agents" responsible for arranging services for the principal's vessels calling on ports between Brownsville, Tex., and Tampa, Fla. Under the agreement, respondent promised to act as the "husbanding agen[t]" by providing for services such as

> "arranging for entrance and clearance of vessels at the Custom House, execution of all Custom House documents incidental thereto, arranging for fuel, water, provisions, emergency repairs, port charges and other similar matters, and for stevedoring, storage and other cargo handling; arranging for tugs,"

and a number of other services directly involved with the operation of vessels while at port preparing for departure. See 739 F. 2d 798, 799 (CA2 1984).

Two years after the agreement was signed, petitioner commenced this action in the United States District Court for the Southern District of New York. Relying on the court's admiralty jurisdiction, petitioner alleged that respondent had breached the agency agreement. It sought an accounting and recovery of money said to have been wrongfully retained by respondent. In particular, Peralta sought to recover freight collected on vessels and not turned over to it, and money advanced by petitioner to pay suppliers but diverted by respondent. Addressing cross-motions for summary judgment, the District Court on its own questioned its subject-matter jurisdiction. It concluded that the sub-agency "husbanding" contract under which respondent acted as local port agent for the principal was not a maritime contract within the court's admiralty jurisdiction. It therefore dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(h)(3).

The Court of Appeals affirmed, 739 F. 2d 798 (CA2 1984), holding that it was constrained by *Minturn*, *supra*, and those Second Circuit cases that had faithfully adhered to the rule established in *Minturn* that admiralty jurisdiction does not extend to general agency or sub-agency "husbanding" contracts. 739 F. 2d, at

802–803. The court declined to narrow the scope of *Minturn* by finding an exception for husbanding sub-agency contracts that provide services necessary for the continuing voyage, rather than services preliminary to the voyage, though it recognized that the Ninth Circuit had taken this approach in *Hinkins Steamship Agency* v. *Freighters, Inc.*, 351 F. Supp. 373 (ND Cal. 1972), aff'd, 498 F. 2d 411 (1974). See 739 F. 2d, at 803–804. Finally, the court recognized that the *Minturn* rule made little sense in light of the policy concerns underlying the grant of admiralty jurisdiction—the federal interest in promoting and protecting the maritime industry. See 739 F. 2d, at 804. Though it "would welcome" a decision from this Court overruling *Minturn*, because agency and sub-agency agreements are clearly an integral part of maritime commerce, and thus should be included within the admiralty jurisdiction, it recognized that it was without authority to issue such a decision, and that "'only the Supreme Court should do it,'" quoting *Admiral Oriental Line* v. *Atlantic Gulf & Oriental S.S. Co.*, 88 F. 2d 26, 27 (CA2 1937). See 739 F. 2d, at 804.

"The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw." *Kossick* v. *United Fruit Co.*, 365 U. S., at 735. Generally, however, contract actions that relate to maritime service or maritime transactions have been understood to fall within the admiralty jurisdiction of the federal courts. Though the need for bright-line rules in this area is evident, the line drawn in *Minturn* has been criticized widely and severely because it excludes so much that obviously concerns maritime transactions. Thus G. Gilmore & C. Black, Law of Admiralty 28, and n. 94b (2d ed. 1975), regard the rule as one of "dubious defensibility," and have predicted that, when this Court reaches the issue, it will hold that general agency and other vessel-management agreements fall within the admiralty jurisdiction, and will overrule *Minturn* and its progeny. See also 7A J. Moore & A. Pelaez, Moore's Federal Practice ¶.250, p. 3006 (1983) ("Quite clearly, such agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district courts").

Not only is the *Minturn* rule of dubious validity, but in efforts to narrow its application, the Courts of Appeals have developed a number of equally questionable exceptions to the rule that have

created confusion and disagreement. Thus, for purposes of determining admiralty jurisdiction, the Ninth Circuit would distinguish among maritime agency contracts based on a series of factors, including the degree of importance of the services rendered by the agent, the extent of supervision of performance, and the existence of a continuing relationship between agent and principal. *Hinkins, supra.* The Fifth Circuit appears to have taken the position that *Minturn* applies only to an action for an accounting. See *Hadjipateras* v. *Pacifica, S.A.*, 290 F. 2d 697, 704, and n. 15 (1961).* The Second Circuit in the present case recognized that its decision was in conflict with these decisions of the Fifth and Ninth Circuits. See 739 F. 2d, at 803, and n. 4.

The conflict between the approaches to this question taken by the Courts of Appeals is reason enough to grant this petition, for uniformity and predictability in the maritime industry were the ends sought in the Constitution when federal-court maritime jurisdiction was created in the first instance. A substantial argument has been advanced that the rule established in *Minturn* improperly excludes from federal maritime juridiction disputes that directly concern the business of maritime commerce. In light of the strength of that argument, of the confusion and conflict in the courts, and of the need for a uniform rule, I would grant this petition.

I therefore dissent.

No. 84–748. GREEN *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84–5774. WILCHER *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 84–5856. GRANDISON *v.* MARYLAND. Ct. App. Md.;
No. 84–5877. KNAPP *v.* ARIZONA. Super. Ct. Ariz., Maricopa County;
No. 84–6041. SAMPLE *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 84–6093. MCKAY *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 84–6043. JACKSON *v.* ALABAMA. Sup. Ct. Ala.; and
No. 84–6091. JOHNS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 84–748, 682 S. W. 2d 271;

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*"[T]he distinctions made by the courts in dealing with agreements with brokers and agents seem contrived and not based upon sound reason or policy." 7A J. Moore & A. Pelaez, Moore's Federal Practice ¶ .250, p. 3003 (1983).

No. 84–5774, 455 So. 2d 727; No. 84–5856, 301 Md. 45, 481 A. 2d 1135; Nos. 84–6041 and 84–6093, 680 S. W. 2d 447; No. 84–6043, 459 So. 2d 969; No. 84–6091, 679 S. W. 2d 253.

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. 84–762. REED ET AL. *v.* SLAKAN. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 737 F. 2d 368.

No. 84–1178. FLORIDA *v.* FASENMYER. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 457 So. 2d 1361.

No. 84–763. SAN FILIPPO *v.* UNITED STATES TRUST COMPANY OF NEW YORK ET AL.; and

No. 84–1018. UNITED STATES TRUST COMPANY OF NEW YORK ET AL. *v.* SAN FILIPPO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 737 F. 2d 246.

JUSTICE WHITE, dissenting.

Augustin San Filippo sued United States Trust Company and two of its officers under 42 U. S. C. § 1983 for malicious prosecution. San Filippo alleged that the U. S. Trust officers had conspired with a New York County Assistant District Attorney to present false testimony to a grand jury that was investigating San Filippo's alleged fraud in obtaining loans from U. S. Trust for two of his clients. Although the grand jury had returned an indictment against San Filippo, a jury had subsequently acquitted him of all charges.

The defendants asserted several affirmative defenses in the United States District Court for the Southern District of New York, including their absolute immunity from § 1983 liability for their grand jury testimony or prior discussions with the prosecutor. Partly on the basis of this claimed immunity, they sought a protective order against further discovery and also moved for dismissal or summary judgment. These motions were denied by the

District Court, and the defendants appealed. The United States Court of Appeals for the Second Circuit held that the denials of these motions were properly before it under the "collateral final order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949), at least insofar as they were premised on a rejection of the defendants' absolute immunity defense. 737 F. 2d 246, 254 (1984). On the merits, the court reasoned that the defendants were entitled to absolute immunity for their actual testimony before the grand jury, citing *Briscoe* v. *LaHue*, 460 U. S. 325 (1983), but not for any extrajudicial conspiracy between themselves and the prosecutor leading to the giving of the allegedly false testimony. The court then went on, however, to hold that San Filippo's "completely unsubstantiated allegations of conspiracy" were insufficient to state a valid claim for relief under § 1983. Recognizing that this ground for relief did not "in its own right merit interlocutory review under *Cohen*," the court held that it had jurisdiction to consider the issue "under the doctrine of pendent appellate jurisdiction," and determined to exercise that jurisdiction in this case in view of "the waste of judicial resources" were the suit to go forward on remand. 737 F. 2d, at 255–256.

In reaching that holding, the Court of Appeals failed to mention our decision in *Abney* v. *United States*, 431 U. S. 651 (1977). In that case, we held that a court of appeals may exercise jurisdiction under *Cohen* over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds. We further concluded, however, that this jurisdiction did not extend to "other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss." *Id.*, at 663. We specifically cautioned that "such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule." Any other rule, we reasoned, would encourage the assertion of frivolous but appealable claims in order to obtain premature appellate review of otherwise unappealable "pendent" claims.

The decision below is clearly in tension with our rationale in *Abney*. Moreover, it is in direct conflict with the holding of the Court of Appeals for the Third Circuit in *Akerly* v. *Red Barn System, Inc.*, 551 F. 2d 539, 542–543 (1977). In *Akerly*—like this, a civil case—the Third Circuit concluded that a District Court's refusal to disqualify counsel was a "collateral order" under 28 U. S. C. § 1291, and that it therefore had appellate jurisdiction

to rule on the issue. The court refused, however, to extend its jurisdiction to the District Court's denial of a motion to dismiss. Recognizing that it would have asserted jurisdiction over this separate issue if the appeal had arisen under 28 U. S. C. § 1292(b), the Third Circuit reasoned that the governing principle behind the collateral-order doctrine was not judicial efficiency, but the separability of the order from the remainder of the case. Furthermore, the collateral-order doctrine was to be sparingly applied. 551 F. 2d, at 543. See also *Forsyth* v. *Kleindienst*, 599 F. 2d 1203, 1209 (CA3 1979). But see *Metlin* v. *Palastra*, 729 F. 2d 353 (CA5 1984); *Dellums* v. *Powell*, 212 U. S. App. D. C. 403, 405, n. 6, 660 F. 2d 802, 804, n. 6 (1981).

These cases betray confusion among the lower courts concerning the proper application of *Abney* to appeals arising under the *Cohen* doctrine. I would grant certiorari to clarify the law concerning this important and frequently recurring question.*

No. 84–812. GRAND TRUNK WESTERN RAILROAD *v.* MULAY PLASTICS, INC. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 742 F. 2d 369.

No. 84–1128. DIGILIO *v.* NEW JERSEY. Super. Ct. N. J., Chancery Div. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.†

No. 84–5811. GACY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 103 Ill. 2d 1, 468 N. E. 2d 1171.

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.

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*United States Trust and its officers have filed a conditional cross-petition, No. 84–1018. I would also grant certiorari on the cross-petition, limited to the first question presented—the only question actually resolved by the Court of Appeals. That question is whether the courts below erred in rejecting absolute immunity for the defendants for their off-the-stand contacts with the Assistant District Attorney, leading to their allegedly false testimony before the grand jury.

†See also note, *supra*, p. 1025.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Illinois insofar as that judgment leaves petitioner's death sentence undisturbed. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

The petitioner challenges two aspects of the Illinois capital sentencing scheme, each of which poses a serious constitutional question. First, after a sentencing jury has found one or more aggravating factors, the statute imposes on the defendant the burden of adducing mitigating evidence "sufficient to preclude the imposition" of the death penalty. Ill. Rev. Stat., ch. 38, ¶9–1(g) (Supp. 1984). The statute thereby places on the defendant the burden of proving that death is not appropriate in his particular case. As I have stated before in reference to this statute, I do not read our precedents as permitting a defendant to bear the risk of persuading a jury that his life should be spared. See *Jones* v. *Illinois*, 464 U. S. 920 (1983) (MARSHALL, J., dissenting from denial of certiorari).

Second, the Illinois statute places the decision on whether to convene a death hearing solely in the hands of the individual Illinois prosecutor. Ill. Rev. Stat., ch. 38, ¶9–1(d) (Supp. 1984). As a result, it vests in the prosecutor the unlimited and unguided discretion to select, among potential capital defendants, those who may be subject to the death penalty. The statute thereby introduces into the sentencing phase of trial—a phase in which our precedents require that discretion be carefully guided—an element of completely unbridled discretion, and it invites irrational and arbitrary decisionmaking. See *Eddmonds* v. *Illinois*, 469 U. S. 894, 895 (1984) (MARSHALL, J., dissenting from denial of certiorari). Because I continue to believe that this Court should consider both of these issues, I respectfully dissent from the Court's denial of certiorari in this case.

No. 84–5966. SUMMIT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 454 So. 2d 1100.

Rehearing Denied

No. 83–6865. VINCENT *v.* LOUISIANA, 469 U. S. 1166;

No. 84–269. BLOOM *v.* UNITED STATES, 469 U. S. 1157;

No. 84–788. LANDERS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL., 469 U. S. 1159;

No. 84–5454. STAPLES *v.* TOWNE ET AL., 469 U. S. 1162;

No. 84–5749. BRIDGES ET AL. *v.* PHILLIPS PETROLEUM CO., 469 U. S. 1163;

No. 84–5806. DAY *v.* SUPREME COURT OF TEXAS ET AL., 469 U. S. 1194;

No. 84–5828. ROCCO *v.* CENTRAL MUNICIPAL COURT, COUNTY OF ORANGE, 469 U. S. 1195; and

No. 84–5891. SLATER *v.* UNITED STATES, 469 U. S. 1195. Petitions for rehearing denied.

MARCH 5, 1985

Certiorari Denied

No. 84–6325 (A–666). WITT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application. JUSTICE POWELL took no part in the consideration or decision of this application and this petition. Reported below: 755 F. 2d 1396.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN 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, 231 (1976) (MARSHALL, J., dissenting), I would grant Witt's application for a stay of execution. But even if I thought otherwise, I would stay this execution because Witt's petition raises an issue—crucial to the administration of capital punishment in this country—on which there exists a split of authority among the Courts of Appeals. This Court is certain to grant certiorari in the immediate future to resolve this issue, and our resolution will govern the question whether Witt's death sentence is constitutional. Under these circumstances, a denial of Witt's application for a stay is manifestly unjust.

I

Witt was convicted of murder and sentenced to death. After exhausting Florida's postconviction remedies, he sought federal habeas corpus relief. The United States Court of Appeals for the Eleventh Circuit upheld Witt's conviction but reversed his sentence on the basis of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). *Witt* v. *Wainwright*, 714 F. 2d 1069 (1983). This Court reversed and remanded. *Wainwright* v. *Witt*, 469 U. S. 412 (1985). A second federal habeas petition was filed in Federal District Court on February 26, 1985, while Witt was simultaneously exhausting state remedies. On March 1, 1985, the District Court denied habeas relief and an application for stay of execution pending appeal. On March 4, the Court of Appeals affirmed the denial of habeas relief and denied an application for a stay of execution pending disposition of a petition for certiorari to this Court. On the same day Witt petitioned this Court for certiorari and applied for a stay of execution pending disposition of that petition. Barring a stay by this Court, Witt will be executed at 7 a. m. on March 6, 1985.

Witt alleges that his Sixth and Fourteenth Amendment rights were violated when the State submitted the general venire to a process of "death-qualification." The crux of Witt's argument is that the currently permissible, but constitutionally circumscribed, *voir dire* process in capital cases of excluding jurors opposed to the death penalty, see *Wainwright* v. *Witt*, *supra*, has the unconstitutional effect of rendering juries more predisposed to find a defendant guilty than would a jury from which those opposed to the death penalty had not been excused. This argument implicates both the right to an impartial jury and the right to a jury from which an identifiable segment of the community has not been excluded. See, *e. g.*, *Taylor* v. *Louisiana*, 419 U. S. 522, 538 (1975).

Witherspoon explicitly left open the question that Witt raises. The Court declined to address the question primarily because the empirical data then available were too fragmentary to permit conclusive resolution of the question whether "death-qualified" juries are unconstitutionally prone to convict. We made quite clear, however, that a sufficient empirical showing to that effect would raise grave constitutional questions:

> "[T]he question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the

> defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment." 391 U. S., at 520, n. 18.

See also *Bumper* v. *North Carolina*, 391 U. S. 543, 545 (1968). Our recent decision in *Wainwright* v. *Witt*, *supra*, in no way forecloses this issue, and may have made its immediate resolution imperative. See *id.*, at 460, n. 11 (BRENNAN, J., dissenting).

The District Court in this case ruled on the merits of Witt's claim and rejected the argument that the "death-qualified" jury is unconstitutionally prone to convict. Tr. 17. In doing so, the court followed a recent en banc ruling of the the Eleventh Circuit rejecting the identical claim. See *McCleskey* v. *Kemp*, 753 F. 2d 877 (1985). To support rejection of the claim the Eleventh Circuit in *McCleskey* specifically relied on *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 583–596 (CA5 1978), cert. denied, 440 U. S. 976 (1979). In *Spinkellink*, the Fifth Circuit had held that, irrespective of empirical data showing that "death-qualified" juries are biased in favor of the prosecution, the process of "death-qualification" of capital jurors violates no constitutional rights of a capital defendant because the proposition that "a death-qualified jury is more likely to convict than a nondeath-qualified jury does not demonstrate *which* jury is impartial. It indicates only that a death-qualified jury might favor the prosecution and that a nondeath-qualified jury might favor the defendant." 578 F. 2d, at 593–594 (emphasis added). The Fourth Circuit has in recent months also relied on the Fifth Circuit's analysis in *Spinkellink* to reject a challenge identical to the one presented in this case. See *Keeten* v. *Garrison*, 742 F. 2d 129 (1984).

A recent en banc decision of the Eighth Circuit directly conflicts with this established Fourth, Fifth, and Eleventh Circuit law. See *Grigsby* v. *Mabry*, 758 F. 2d 226 (1985). After carefully scrutinizing a large body of empirical evidence on which the District Court had relied in making the factual finding that "death-qualified" juries are more prone to convict, the Eighth Circuit ruled that a conviction rendered by such a jury violates the capital defendant's Sixth and Fourteenth Amendment rights to an impartial jury. *Id.*, at 241–242 ("The issue is not whether a jury would be biased one way or the other, but whether an impartial jury

can exist when a distinct group in the community is excluded by systematically challenging them for cause"). In reaching this conclusion, the Eighth Circuit acknowledged and explained its rejection of the analysis that led the Fifth Circuit in *Spinkellink*, the Fourth Circuit in *Keeten*, and the Eleventh Circuit in *McCleskey* to a contrary result. *Grigsby* v. *Mabry*, *supra*, at 238–242.

This Court will certainly grant certiorari to resolve this issue in the immediate future because it presents a clear split in the Courts of Appeals on an issue of constitutional law whose importance to the administration of the States' criminal justice systems is undoubted. In light of the certainty that this Court will soon address the issue and the uncertainty as to its proper resolution, the State of Florida's effort to execute Witt should be stayed pending our disposition of the issue.

II

Despite the overwhelming public importance of this issue, the State of Florida, raising a procedural barrier to Witt's claim, would allow Witt to die with the issue still hanging in the balance. The State argues that Witt should not be allowed to have the issue aired because he did not present it in an earlier federal habeas petition; on the basis of this argument, the Eleventh Circuit closed its doors to Witt's substantial constitutional claim. Abuse of the writ was found because in Witt's first federal habeas petition, filed on May 5, 1980, he did not raise his death-qualified jury claim—a claim accepted for the first time by any court on August 5, 1983. See *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (ED Ark 1983), aff'd, 758 F. 2d 226 (CA8 1985) (en banc). Witt's claim raises questions going to the heart of the jury system by which he was convicted, and to bar him from raising it merely because his counsel either did not know of the claim in 1980 or recognized the futility of raising it at that time would cast serious doubt on the willingness of this Court to ensure that executions are carried out in compliance with the Constitution.

This Court has had little occasion to address the abuse-of-the-writ principles now codified in 28 U. S. C. § 2244(b) and in 28 U. S. C. § 2254 Rule 9. In 1948, shortly before § 2244(b) was passed, the Court in *Price* v. *Johnston*, 334 U. S. 266, 291 (1948), overturned a District Court's dismissal without a hearing of a fourth habeas petition that presented issues not previously adjudicated. Discussing general equitable principles governing issuance of the

writ, the Court noted that "[t]he primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned," and that the mere fact that petitioner had filed three previous petitions was no reason to refuse to reach the merits of his claim. In *Sanders* v. *United States*, 373 U. S. 1 (1963), the Court undertook its only full explication of abuse-of-the-writ principles. Citing the deliberate bypass standard of *Fay* v. *Noia*, 372 U. S. 391 (1963), the Court in *Sanders* emphasized that previously unadjudicated claims must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing "needless piecemeal litigation," or the claims are raised only to "vex, harass, or delay." 373 U. S., at 18. To illustrate the proper application of this principle, the Court discussed *Wong Doo* v. *United States*, 265 U. S. 239 (1924), in which the petitioner had raised two claims in a first petition but offered no evidence on one of those claims. An attempt to reassert that claim in a second petition was held an abuse of the writ, for the petitioner was found to have deliberately abandoned the claim in the earlier proceeding.

Other than these isolated instances, the Court has had little occasion in full opinions to elaborate upon the contours of the abuse-of-the-writ doctrine. Instead, the doctrine develops *sub rosa* when this Court refuses to stay executions or to consider substantive claims raised in certiorari petitions that arise from second or later habeas petitions. That alone should be reason to pause before declining, without plenary consideration, to reach the merits of the major issue in current death-penalty law that this stay application and certiorari petition raise; lower courts, as well as the public, are entitled to guidance as to what standards this Court is employing when it refuses to reach the merits of what are clearly substantial issues in the administration of the death penalty. Surely the mere fact that this is a second habeas petition is not in and of itself enough to bar consideration of the merits of Witt's claim. See *Woodard* v. *Hutchins*, 464 U. S. 377, 383 (1984) (WHITE and STEVENS, JJ., dissenting).

Moreover, while the Court has abandoned *Fay*'s deliberate bypass standard in some contexts and required petitioners to show cause and prejudice for their delay in presenting issues, see *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), it is clear that the deliberate bypass standard of *Sanders* still governs dismissal of successive

habeas petitions. First, in enacting Rule 9(b), Congress explicitly adopted the abuse-of-the-writ standard announced in *Sanders*. See *Rose* v. *Lundy*, 455 U. S. 509, 521 (1982). Second, Congress explicitly rejected a "cause and prejudice" test in this context; although a proposed draft of the Rule would have allowed dismissal when the failure to raise a claim earlier was "not excusable," see H. R. Rep. No. 94–1471, p. 8 (1976), Congress amended the proposed Rule for fear that "the 'not excusable' language created a new and undefined standard *that gave a judge too broad a discretion to dismiss a second or successive petition.*" *Id.*, at 5 (emphasis added). Instead, a less stringent standard—that of *Sanders*—was adopted. Under that standard, dismissal is allowed only when a second petition "constitute[s] an abuse of the writ." *Id.*, at 5, 8.

Thus, a successive petitioner is not required to demonstrate that he was *unable* to raise the claim earlier. Instead, the petitioner need show only that the claim was not deliberately withheld for the purpose of abusing the process in some way. Witt cannot be accused of such abuse. First, unlike *Wong Doo*, Witt did not present this claim in his first petition and then abandon it. See also *Antone* v. *Dugger*, 465 U. S. 200 (1984). Second, Witt can hardly be said to be engaging in "*needless* piecemeal litigation," *Sanders*, *supra*, at 18 (emphasis added); his only failing was to raise his claim at a time when it was clear that it was foreclosed in Florida, see, *e. g.*, *Riley* v. *State*, 366 So. 2d 19 (Fla. 1978), and in the Eleventh Circuit, see *Spinkellink* v. *Wainwright*, 578 F. 2d 582 (CA5 1978), cert. denied, 440 U. S. 976 (1979), and when this Court had refused to entertain the claim many times. Were the rule otherwise, as it seems to be becoming, defense counsel in every criminal case would have to include in a first federal habeas petition a laundry list of potentially meritorious but clearly rejected constitutional claims in order to preserve them should the law later change. Rather than promoting efficiency, such a rule would further clog the courts and confound lower court judges. Third, Witt's petition is not one "whose only purpose is to vex, harass, or delay." 373 U. S., at 18. Witt has raised a substantial claim going to the validity of his conviction. Finally, it is clear that, were this Court upon plenary consideration to invalidate death-qualified juries, such a holding would constitute an intervening change in law sufficient to allow Witt then to have his claim adjudicated on the merits. Surely Witt's fate should not

rest on the fortuity of his execution having been scheduled before, rather than after, this Court's consideration of the Eighth Circuit's decision.

Perhaps of even greater importance, *Sanders* left no doubt that a claim raised for the first time in a second or later habeas petition could be considered if "the ends of justice" would thereby be served. See *id.*, at 17. "Even as to [a successive] application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits." *Id.*, at 18–19. Yet I fail to see how this standard can be applied in any meaningful way before we address the merits of the underlying death-qualified juror claim that the Court must soon face. Witt's claim strikes at the heart of every premise upon which the legitimacy of his conviction rests. A great deal of empirical work has been devoted to exploring this claim, and the evidence supporting it is strong enough to have convinced the en banc Eighth Circuit, and two District Courts, that the claim is sound. Until we have the issue before us for plenary consideration, examine the underlying evidence, and reach some decision on both the merits of the claim and the nature and scope of any constitutional defect that might exist, I simply cannot understand how the "ends of justice" test can be applied to determine whether Witt's claim should be procedurally barred. "The availability of habeas corpus relief should depend primarily on the character of the alleged constitutional violation and not on the procedural history underlying the claim." *Rose* v. *Lundy*, *supra*, at 547–548 (STEVENS, J., dissenting). To apply the procedural bar in advance of full consideration of this central issue is to turn the Great Writ on its head.

III

Witt will not be the first person whose execution this Court has sanctioned notwithstanding a claim that his conviction by a "death-qualified" jury violated the Sixth and Fourteenth Amendments. See, *e. g.*, *Knighton* v. *Maggio*, 468 U. S. 1229 (1984) (BRENNAN, J., dissenting); *Woodard* v. *Hutchins*, *supra*, at 382 (BRENNAN, J., dissenting). Nor will he be the first person whose execution this Court has sanctioned "while the constitutionality of his sentence is in doubt." See, *e. g.*, *Stephens* v. *Kemp*, 469 U. S. 1098, 1099 (1984) (BRENNAN, J., dissenting); *Green* v. *Zant*, 469 U. S. 1143, 1144 (1985) (BRENNAN, J., dissenting). The responsibility to decide profoundly difficult and divisive legal questions is not

a comfortable one. All too often, judges seek to avoid this responsibility by hiding behind unexplained and unexplainable procedural "rules" that purport to allow cases to be disposed of without confronting their merits. Every Member of this Court knows that certiorari must be granted in the immediate future to resolve the issue that Witt has raised in his petition for certiorari. Our refusal to grant his stay application pending resolution of the issue unmasks the hollowness of this Court's purported commitment to unique procedural safeguards against arbitrariness "'on a matter so grave as the determination of whether a human life should be taken or spared.'" *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976)); see also *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (BURGER, C. J.).

I dissent.

Rehearing Denied

No. 84–6325 (A–666). WITT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., immediately *supra*. Petition for rehearing of denial of certiorari and of the order denying a stay of execution of sentence of death denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

MARCH 18, 1985*

Appeals Dismissed

No. 84–1168. NASH *v.* CITY OF SANTA MONICA ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 37 Cal. 3d 97, 688 P. 2d 894.

No. 84–6081. JOHNSON *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 99 N. J. 166, 491 A. 2d 676.

No. 84–6227. MANKO *v.* UNITED STATES. Appeal from C. A. 8th 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: 754 F. 2d 378.

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*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

Certiorari Granted—Vacated and Remanded

No. 84–1089. NOVICKY *v.* SYNTEX OPHTHALMICS, INC., ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Marrese* v. *American Academy of Orthopaedic Surgeons*, *ante*, p. 373. Reported below: 745 F. 2d 1423.

Certiorari Granted—Reversed. (See No. 84–690, *ante*, p. 522.)

Miscellaneous Orders

No. — – ——. LIFE FOR GOD'S STRAY ANIMALS, INC., ET AL. *v.* NEW NORTH ROCKDALE COUNTY HOMEOWNERS ASSN., INC., ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. D–478. IN RE DISBARMENT OF HAILEY. It is ordered that Anna Cotton Hailey, of Elwood, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–482. IN RE DISBARMENT OF BRUNWIN. It is ordered that Thomas Miles Brunwin, of Arcadia, 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.

No. D–483. IN RE DISBARMENT OF BOND. It is ordered that Clifford Jackson Bond III, of Winston-Salem, 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. 83–1925. HILLSBOROUGH COUNTY, FLORIDA, ET AL. *v.* AUTOMATED MEDICAL LABORATORIES, INC. C. A. 11th Cir. [Probable jurisdiction noted, 469 U. S. 1156.] Motion of American Blood Resources Association for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–363. NORTHEAST BANCORP, INC., ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. [Certiorari granted, 469 U. S. 1105.] Motion of Frank L.

Morsani for leave to file a brief as *amicus curiae* granted. Motion of respondents Bank of New England Corp. et al. for divided argument granted. Motion of petitioners Northeast Bancorp, Inc., et al. for divided argument denied.

No. 84–822. AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. *v.* HAROCO, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 469 U. S. 1157.] Motion of American Bankers Association for leave to file a brief as *amicus curiae* granted.

No. 84–835. NEW JERSEY DEPARTMENT OF CORRECTIONS *v.* NASH; and

No. 84–776. CARCHMAN, MERCER COUNTY PROSECUTOR *v.* NASH. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1157.] Motion of petitioners for divided argument denied.

No. 84–849. KENTUCKY, DBA BUREAU OF STATE POLICE *v.* GRAHAM ET AL. C. A. 6th Cir. [Certiorari granted, 469 U. S. 1156.] Motion of National League of Cities et al. for leave to file a brief as *amici curiae* granted.

No. 84–861. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 4th Cir. [Certiorari granted, 469 U. S. 1188.] Motions of Delta Steamship Lines, Inc., and Chamber of Commerce of the United States of America for leave to file briefs as *amici curiae* granted.

No. 84–902. WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE;

No. 84–921. NORTHEASTERN INTERNATIONAL AIRWAYS, INC., ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE;

No. 84–922. LINEAS AEREAS COSTARRICENSES, S.A., ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE;

No. 84–926. EASTERN AIRLINES INC. *v.* FLORIDA DEPARTMENT OF REVENUE;

No. 84–929. DELTA AIR LINES, INC. *v.* FLORIDA DEPARTMENT OF REVENUE; and

No. 84–1041. AIR JAMAICA LTD. ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeals from Sup. Ct. Fla. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84–1023. UNITED STATES *v.* ROJAS-CONTRERAS. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1207.] Motion for ap-

pointment of counsel granted, and it is ordered that Judy Clare Clarke, of San Diego, Cal., be appointed to serve as counsel for respondent in this case.

No. 84–5108. LIPAROTA *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 469 U. S. 930.] Motion of the Solicitor General to permit Charles Rothfeld to present oral argument *pro hac vice* granted.

No. 84–6158. FERRARA *v.* BECTON, DICKINSON & CO. ET AL. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 8, 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*.

No. 84–5543. IN RE JOHNSON. C. A. 3d Cir. Petition for writ of common-law certiorari denied.

No. 84–1282. IN RE MURGO. Petition for writ of mandamus and/or prohibition denied.

No. 84–1312. IN RE KACZMAREK. Petition for writ of prohibition denied.

Certiorari Granted

No. 84–1103. HILL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari granted. Reported below: 764 F. 2d 1279.

Certiorari Denied. (See also Nos. 84–6081, 84–6227, and 84–5543, *supra*.)

No. 83–2125. MCMAHON, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF CALIFORNIA *v.* VAESSEN ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 35 Cal. 3d 749, 677 P. 2d 1183.

No. 83–2165. JONES ET AL. *v.* PETIT, COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 473 A. 2d 879.

No. 83–6168. JAMES *v.* COHEN, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. C. A. 3d Cir. Certiorari denied. Reported below: 715 F. 2d 794.

No. 83–6269. BELL *v.* MASSINGA, SECRETARY, MARYLAND DEPARTMENT OF HUMAN RESOURCES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 721 F. 2d 131.

No. 83–6769. DICKENSON ET AL. *v.* PETIT, COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 728 F. 2d 23.

No. 83–6870. MATLOCK *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 731 F. 2d 1236.

No. 84–444. CONNOR ET AL. *v.* AEROVOX INC. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 730 F. 2d 835.

No. 84–626. MCGAFFIN *v.* ROBERTS. Sup. Ct. Conn. Certiorari denied. Reported below: 193 Conn. 393, 479 A. 2d 176.

No. 84–770. SAVE MART OF MODESTO, INC. *v.* UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 126. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 68.

No. 84–783. MURRAY *v.* GARDNER, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 239 U. S. App. D. C. 212, 741 F. 2d 434.

No. 84–798. MCLEAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 2d 655.

No. 84–850. VITELLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 745 F. 2d 44.

No. 84–852. ERNST & WHINNEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1296.

No. 84–853. ASHERMAN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 193 Conn. 695, 478 A. 2d 227.

No. 84–855. BASHAM ET AL. *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 675 S. W. 2d 376.

No. 84–858. TARTER ET AL. *v.* RAYBUCK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 977.

No. 84–917. HANSEN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF HANSEN *v.* JOHNS-MANVILLE SALES CORP. ET AL.; and

No. 84–1131. JOHNS-MANVILLE SALES CORP. ET AL. *v.* HANSEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1036.

No. 84–941. OKLAHOMA *v.* EDDINGS. Ct. Crim. App. Okla. Certiorari denied. Reported below: 688 P. 2d 342.

No. 84–979. CROSS *v.* UNITED STATES PARCEL SERVICE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 733 F. 2d 1327.

No. 84–989. NEWSPAPER DRIVERS & HANDLERS, LOCAL NO. 372, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 969.

No. 84–990. TOLEDO, PEORIA & WESTERN RAILROAD CO. *v.* ILLINOIS DEPARTMENT OF TRANSPORTATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 744 F. 2d 1296.

No. 84–992. ASOCIACION DE RECLAMANTES ET AL. *v.* UNITED MEXICAN STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 237 U. S. App. D. C. 81, 735 F. 2d 1517.

No. 84–997. LAHODNY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84–1004. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCALS 329 AND 851, AFL–CIO, ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 810.

No. 84–1050. JOLLEY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 312 N. C. 296, 321 S. E. 2d 883.

No. 84–1051. MCCOLGAN ET AL. *v.* UNITED MINE WORKERS OF AMERICA ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 825, 464 N. E. 2d 1166.

No. 84–1065. KRAVITZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 102.

No. 84–1102. PHILIBOSIAN, DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES, ET AL. *v.* FEMINIST WOMEN'S HEALTH CENTER, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 157 Cal. App. 3d 1076, 203 Cal. Rptr. 918.

No. 84–1132. EASTWAY WOMEN'S CLINIC, INC. *v.* EASTWAY GENERAL HOSPITAL, LTD. C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 503.

No. 84–1137. INDIANAPOLIS COLTS *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 741 F. 2d 954.

No. 84–1146. PRAVDA *v.* HALL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84–1149. LITCHFIELD *v.* SPIELBERG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1352.

No. 84–1154. QUINN *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. C. A. 10th Cir. Certiorari denied.

No. 84–1156. COX ENTERPRISES, INC., DBA AUSTIN AMERICAN-STATESMAN *v.* HARDY, JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS; and

No. 84–1186. HOUSTON CHRONICLE PUBLISHING CO. *v.* HARDY, JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 84–1159. JENSEN, ADMINISTRATRIX OF THE ESTATES OF BROWN ET AL. *v.* CONRAD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 747 F. 2d 185.

No. 84–1161. CAMPBELL *v.* PIERCE COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 741 F. 2d 1342.

No. 84–1163. AGUILAR *v.* TEXAS. Ct. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 84–1170. 20TH CENTURY WEAR, INC. *v.* SANMARK-STARDUST, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 747 F. 2d 81.

No. 84–1172. GRESS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 84–1174. MONZELLO *v.* AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1462.

No. 84–1175. NELSON *v.* TEXAS. Ct. App. Tex., 12th Sup. Jud. Dist. Certiorari denied.

No. 84–1182. BOEING CO. ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 464.

No. 84–1183. SELF *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 459 So. 2d 978.

No. 84–1184. CITY OF MONTGOMERY ET AL. *v.* WILLIAMS. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 586.

No. 84–1195. NESTIER CORP. *v.* MENASHA CORP. (LEWISYSTEMS DIVISION). C. A. Fed. Cir. Certiorari denied. Reported below: 739 F. 2d 1576.

No. 84–1197. DEAK-PERERA HAWAII, INC. *v.* DEPARTMENT OF TRANSPORTATION OF HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1281.

No. 84–1199. MOORE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 457 So. 2d 981.

No. 84–1201. TEICHNER *v.* ADMINISTRATOR OF THE ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY SYSTEM. Sup. Ct. Ill. Certiorari denied. Reported below: 104 Ill. 2d 150, 470 N. E. 2d 972.

No. 84–1202. RIG HAMMERS, INC. *v.* ODECO DRILLING, INC. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 1174.

No. 84–1205. INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 3–261 *v.* KUHN, PERSONAL REPRESENTATIVE OF THE ESTATE OF KUHN. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1462.

No. 84–1211. NORMINTON ET AL. *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 158 Cal. App. 3d 997, 205 Cal. Rptr. 532.

No. 84–1213. CAR CARRIERS, INC., ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 1101.

No. 84–1232. JACKSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 453 So. 2d 7.

No. 84–1242. PUCKETT *v.* CITY OF EMMETT, IDAHO. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1487.

No. 84–1243. RODGERS *v.* FISHER BODY DIVISION, GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 739 F. 2d 1102.

No. 84–1245. BURKE ET AL. *v.* ATLANTIC RESEARCH CORP. ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 393 Mass. 1103, 471 N. E. 2d 1354.

No. 84–1264. NOVA UNIVERSITY *v.* EDUCATIONAL INSTITUTION LICENSURE COMMISSION. Ct. App. D. C. Certiorari denied. Reported below: 483 A. 2d 1172.

No. 84–1269. DEWITT *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 747 F. 2d 1442.

No. 84–1286. CROSSON *v.* CONLEE, EXECUTOR OF THE ESTATE OF VIA. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 896.

No. 84–1323. PERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 854 and 746 F. 2d 713.

No. 84–1334. SNYDER *v.* OHIO STATE MEDICAL BOARD. Ct. App. Ohio, Summit County. Certiorari denied.

No. 84–5426. HATCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1457.

No. 84–5599. MCQUEEN *v.* MASSEY, SUPERINTENDENT, UNION CORRECTIONAL INSTITUTION. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 84–5607. LISK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84–5614. SCRIBER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 58.

No. 84–5668. CLARK *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 471.

No. 84–5702. ZARINSKY *v.* FENTON, SUPERINTENDENT, RAHWAY STATE PRISON. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1469.

No. 84–5739. PHELPS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 84–5801. AUSTIN *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, WAUPUN, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1460.

No. 84–5837. DEVINCENT *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1471.

No. 84–5879. BROWN *v.* BALKCOM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–5914. HENRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 708.

No. 84–5922. SLATER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1473.

No. 84–6055. HANSON *v.* RUTHERFORD ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 297 Ore. 546, 685 P. 2d 997.

No. 84–6060. ROSS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1217.

No. 84–6062. GEIDEL *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6063. LEE *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1472.

No. 84–6078. WILKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 84–6083. BOUTA *v.* AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES. C. A. 8th Cir. Certiorari denied. Reported below: 746 F. 2d 453.

No. 84–6084. COVINGTON *v.* WINGER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1475.

No. 84–6087. LANKFORD *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA. Sup. Ct. Cal. Certiorari denied.

No. 84–6088. BRANCH *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 533.

No. 84–6092. BERKSON *v.* DEL MONTE CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 743 F. 2d 53.

No. 84–6094. TRYON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 679 S. W. 2d 268.

No. 84–6097. MITCHELL *v.* SCULLY, SUPERINTENDENT, GREENHAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 746 F. 2d 951.

No. 84–6101. BEST *v.* HOLBROOK, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 753 F. 2d 1067.

No. 84–6105. COSTELLO *v.* HOLMES ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 84–6107. HOWELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 61 Md. App. 726.

No. 84–6109. GEIDEL *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6110. GARDNER *v.* CITY OF DETROIT POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 385.

No. 84–6111. HOLSEY *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 84–6112. HOLSEY *v.* WARD ET AL. Ct. App. Md. Certiorari denied.

No. 84–6115. TURNER *v.* BOSSE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–6116. TYLER *v.* HARPER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 744 F. 2d 653.

No. 84–6117. ZANI *v.* SIXTH SUPREME JUDICIAL DISTRICT COURT OF APPEALS OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied.

No. 84–6118. ZANI *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 67.

No. 84–6124. KUANG HUNG HU *v.* MORGAN ET AL. C. A. 4th Cir. Certiorari denied.

No. 84–6125. BORGES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 597, 469 N. E. 2d 321.

No. 84–6133. HAYES *v.* ROADWAY EXPRESS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1476.

No. 84–6138. MILBY *v.* NORTH CAROLINA DEPARTMENT OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 430.

No. 84–6141. BARRON *v.* AIKEN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1470.

No. 84–6143. GREENE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 460 So. 2d 317.

No. 84–6148. JAMAL *v.* GREER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1483.

No. 84–6149. ESTRADA *v.* PHELPS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1081.

No. 84–6152. FRIEDMAN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1476.

No. 84–6192. BERTULFO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 663.

No. 84–6197. LEE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 220 U. S. App. D. C. 86, 679 F. 2d 263.

No. 84–6200. ROBERTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 404.

No. 84–6202. COPELAND *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 662.

No. 84–6203. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1473.

No. 84–6204. RAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 272.

No. 84–6209. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 84–6214. BUSH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 1227.

No. 84–6215. BONNETTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 2d 1159.

No. 84–6217. MARTELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84–6218. BUCHWALD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 477.

No. 84–6219. GATES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 481 A. 2d 120.

No. 84–6220. BANKS *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 84–6228. SCHAFLANDER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 714.

No. 84–6229. NORTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 627.

No. 84–6232. JARDINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 945.

No. 84–6237. MALONE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 84–6247. KIMBERLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 811.

No. 84–6248. VICKERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 933.

No. 84–6260. BUIDE-GOMEZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 781.

No. 84–6273. MULLINS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 83–6493. IRVING *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 84–6051. ALLEN *v.* GEORGIA. Sup. Ct. Ga.; and
No. 84–6170. GILLIES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 83–6493, 441 So. 2d 846; No. 84–6051, 253 Ga. 390, 321 S. E. 2d 710; No. 84–6170, 142 Ariz. 564, 691 P. 2d 655.

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. 84–826. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* BOYKINS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 737 F. 2d 1539.

No. 84–839. KEMP, WARDEN *v.* SPRAGGINS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 720 F. 2d 1190.

No. 84–875. ARIZONA PUBLIC SERVICE CO. ET AL. *v.* SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.* Reported below: 745 F. 2d 67.

No. 84–939. JAPAN AIR LINES CO., LTD. *v.* ABRAMSON. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 739 F. 2d 130.

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*See also note, *supra*, p. 1046.

No. 84–1002. UNITED TELECOMMUNICATIONS, INC., ET AL. *v.* SAFFELS, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF KANSAS. C. A. 10th Cir. Motion of Chamber of Commerce of the United States of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 741 F. 2d 312.

No. 84–1166. WEISS *v.* YORK HOSPITAL ET AL.; and

No. 84–1187. MEDICAL AND DENTAL STAFF OF YORK HOSPITAL *v.* WEISS. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.* Reported below: 745 F. 2d 786.

No. 84–5548. SMITH *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE BRENNAN join, dissenting.

Despite his claim that he was in Florida at the time of the crime, extensive evidence linked petitioner Smith to a rape he was charged with committing in Ohio. Pursuant to Rule 16(C) of the Ohio Rules of Criminal Procedure, the State requested reciprocal discovery from the defense, and the trial court ordered petitioner to provide full discovery by October 30, 1981. On November 11, 1981, shortly after petitioner was returned from another prison to the jail of the county where he was to be tried, petitioner met with his defense attorney to discuss his case, which would be heard the next day. Petitioner then told his attorney that there were three alibi witnesses he wished to call at the trial, and the attorney orally informed the prosecutor's office of the name of one of these witnesses. The day of trial, petitioner formally filed discovery listing all three witnesses. The trial court allowed the testimony of the first witness, a convicted felon who testified that petitioner was in Florida, not Ohio, shortly before and after the rape. But the trial judge excluded the testimony of the other two witnesses because of petitioner's failure to inform the prosecutors of their testimony earlier. According to the proffer of testimony, the excluded witnesses would testify that petitioner had called

*See also note, *supra*, p. 1046.

them repeatedly from Florida, where he was living during the month the rape occurred, and that the telephone calls could be substantiated by phone company records.

Petitioner was convicted of rape, and he subsequently filed a petition for a writ of habeas corpus in federal court. Habeas relief was denied by the District Court, and the Court of Appeals for the Sixth Circuit affirmed, 740 F. 2d 969 (1984), finding that the trial court's exclusion of the alibi witnesses' testimony was a constitutionally permissible sanction for petitioner's failure to timely comply with the reciprocal discovery request.

The exclusion of defense witnesses because a defendant failed to produce their names before a procedural deadline raises a substantial question implicating the Sixth Amendment right of the accused to present witnesses on his own behalf. We have twice left this question open, *Wardius* v. *Oregon*, 412 U. S. 470, 472, n. 4 (1973); *Williams* v. *Florida*, 399 U. S. 78, 83, n. 14 (1970), and there are those who have found arguable constitutional infirmity in such exclusionary sanctions. See, *e. g.*, 2 ABA Standards for Criminal Justice 11–4.7(a) and accompanying commentary (2d ed. 1980); Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 711, 838–839 (1976); Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 137–139 (1974); Note, 81 Yale L. J. 1342 (1972). Another Federal Court of Appeals has explicitly ruled that "the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." *United States* v. *Davis*, 639 F. 2d 239, 243 (CA5 1981). Accord, *Hackett* v. *Mulcahy*, 493 F. Supp. 1329 (NJ 1980). See also *Ronson* v. *Commissioner of Correction of State of N. Y.*, 604 F. 2d 176 (CA2 1979). Similar provisions allowing the sanction of testimony exclusion for failure to comply with a discovery request exist in many, if not most, other States. See *Taliaferro* v. *State*, 295 Md. 376, 387, 456 A. 2d 29, 35, cert. denied, 461 U. S. 948 (1983).

This case thus presents a constitutional issue of widespread importance, one we have left unresolved, and one over which the Courts of Appeals are divided. I would grant certiorari and resolve this issue, which will surely not disappear of its own accord.

No. 84–5716. LINELL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 283 Ark. 162, 671 S. W. 2d 741.

No. 84–5736. WHITE *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 300 Md. 719, 481 A. 2d 201.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Court of Appeals of Maryland insofar as it leaves undisturbed the death sentence imposed in this case. 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). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

The petitioner was sentenced pursuant to a statute that *requires* that a death sentence be imposed *whenever* the mitigating circumstances do not outweigh the aggravating circumstances. Md. Ann. Code, Art. 27, § 413(h) (1982). The statute leaves no room for the jury to consider whether death is the appropriate punishment in a specific case. For the reasons I stated earlier this Term in *Stebbing* v. *Maryland*, 469 U. S. 900 (1984) (dissenting from denial of certiorari), I believe that such a statute is unconstitutional. The question presented here, which is also presented by other state statutes, is clearly worthy of this Court's attention. See, *e. g.*, *Maxwell* v. *Pennsylvania*, 469 U. S. 971 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Smith* v. *North Carolina*, 459 U. S. 1056 (1982) (STEVENS, J., respecting denial of certiorari). I therefore dissent from the Court's refusal to hear this case.

No. 84–5770. STULL *v.* UNITED STATES. C. A. 6th Cir. Certiorari and other relief denied. Reported below: 743 F. 2d 439.

No. 84–6089. JONES *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 456 So. 2d 380.

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). I also continue to believe that the death penalty's cruel and unusual nature is made all the more arbitrary and freakish when it is imposed by a judge in the face of a jury determination that death is an inappropriate punishment. See *Spaziano* v. *Florida*, 468 U. S. 447, 467 (1984) (STEVENS, J., dissenting); cf. *Heiney* v. *Florida*, 469 U. S. 920 (1984) (MARSHALL, J., dissenting from denial of certiorari).

In *Spaziano* v. *Florida*, this Court upheld the constitutionality of a state sentencing scheme under which, if the judge could make certain specified findings, he was given authority to override a jury decision for life imprisonment. This case, however, presents the problem of a State's decision to give its judges unguided discretion to overturn such jury decisions. I see this as an important issue of capital sentencing law, and so would grant the petition.

In *Spaziano*, as in this case, after a full hearing, a jury determined that death was not the appropriate punishment. Nevertheless, as in this case, the trial judge overrode that determination and sentenced the defendant to die. In rejecting Spaziano's argument that his death sentence had been meted out in an unconstitutionally arbitrary manner, this Court noted that, under Florida law, the trial judge could not exercise free-wheeling discretion. To the contrary, Florida had forbidden its trial judges to reject such jury decisions unless the evidence favoring death was "so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975). This Court rejected Spaziano's allegation of arbitrariness and emphasized "the significant safeguard the *Tedder* standard affords a capital defendant." *Spaziano*, 468 U. S., at 465. "We are satisfied," the Court declared, "that the Florida Supreme Court takes that standard seriously." *Ibid.*

In the opinion below, 456 So. 2d 380 (1984), however, the Alabama Supreme Court has made clear that under that State's system a trial judge need make no finding with respect to a jury

verdict of life comparable to that which *Tedder* requires of Florida judges. The Alabama trial judge must simply "consider" the jury's "advisory" sentence. Ala. Code § 13A–5–47(e) (1982). This duty to "consider" may apparently add up to little more than the authority to reject a jury sentence when a judge disagrees with it. Such simple disagreement is illustrated by this case, where the trial judge independently reviewed the evidence, made findings, weighed aggravating and mitigating circumstances (all of which had previously been done by the jury), and then determined that the jury had simply been wrong—for in the judge's view death was appropriate "beyond a reasonable doubt and to a moral certainty." 456 So. 2d 366, 379 (Ala. Crim. App. 1983). But the jury was not criticized for irresponsibility or irrationality; to the contrary, the trial judge explicitly stated that it was "not chastising or inferring that the jury was lax in their responsibility." *Ibid.* The judge simply stated that "society must be protected and that an example must be set forth and made apparent so that our citizens may be secure in their homes and businesses." *Ibid.* Most glaring is the fact that the judge made absolutely no effort to ascertain on what basis the jury reached the contrary conclusion. Rather, the judge wrote that "the Court must follow the dictates of its own conscience." *Ibid.*

This system is quite different from a system where there is no jury, for here there has been a life sentence determination by a properly selected and instructed jury which has been witness to all the evidence and arguments. Where such a determination has been made, it must at least account for something. Under Florida's *Tedder* rule, a judge must at least engage in the awesome task of determining whether he can say, in spite of a jury's rejection of death, that death was so clearly appropriate that the jury determination was virtually beyond reason. Under Alabama's approach, however, the judge is called on to decide little more than whether he agrees with the jury determination. Alabama asks the trial judge to make an inquiry no different than the one it asks of each juror, and like any "juror," he may express his views of the case. But, under the statute, he plays the role of a "juror" with the exclusive power of decision, so the views of the real jurors become legally irrelevant once he reaches his conclusion. Although he must "consider" the jury's determination, he can reject it without explanation, on no more basis than "considered"

disagreement. It approaches the most literal sense of the word "arbitrary" to put one to death in the face of a contrary jury determination where it is accepted that the jury had indeed responsibly carried out its task.

The Eighth Amendment at least mandates that an execution only be the consequence of a "process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (O'CONNOR, J., concurring). Here, the judge based the death sentence on his understanding of the evidence and his evaluation of aggravating and mitigating circumstances. But the jury had previously examined the same facts, made findings, evaluated all aggravating and mitigating factors, and reached a determination that death would be inappropriate. Where such a jury finding has been made, the Eighth Amendment requires more than that the trial judge declare that he has considered but disagrees with the conclusion of that admittedly responsible and informed jury.

No. 84–6316 (A–654). DE LA ROSA *v.* TEXAS. 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: 743 F. 2d 299.

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.

Rehearing Denied

No. 83–1153. MILLS MUSIC, INC. *v.* SNYDER ET AL., 469 U. S. 153;

No. 83–1378. EVITTS, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX, ET AL. *v.* LUCEY, 469 U. S. 387;

No. 84–452. TODD *v.* UNITED STATES, 469 U. S. 1189;

No. 84–820. POLYAK *v.* HULEN ET AL., 469 U. S. 1190;

No. 84–5798. DEMORAN *v.* CALIFORNIA, 469 U. S. 1194; and

No. 84–5848. IN RE TYLER, 469 U. S. 1206. Petitions for rehearing denied.

No. 84–5921. WILLIAMS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 469 U. S. 1222. Petition for rehearing denied.

MARCH 19, 1985

Miscellaneous Order

No. A–705. YOUNG *v.* KEMP, WARDEN. Application for stay of execution of sentence of death scheduled for Wednesday, March 20, 1985, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. JUSTICE STEVENS would grant the application. JUSTICE POWELL took no part in the consideration or decision of this application.

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 Young's application for a stay of execution. But even if I believed otherwise, I would stay this execution. When Young's jury was selected, jurors opposed to the death penalty were excluded in accordance with the currently permissible *voir dire* process in capital cases. See *Wainwright* v. *Witt*, 469 U. S. 412 (1985). Young claims that this exclusion rendered the resulting jury biased in favor of conviction, thus violating his right to an impartial jury and his right to a jury from which an identifiable segment of the community has not been excluded. Although the Eleventh Circuit has rejected this claim, *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 583–596 (1978), cert. denied, 440 U. S. 976 (1979), the Eighth Circuit sitting en banc has recently held in identical circumstances that the defendant's Sixth and Fourteenth Amendment rights to an impartial jury were violated. *Grigsby* v. *Mabry*, 758 F. 2d 226 (1985). This Court is certain to grant certiorari in the immediate future to resolve the conflict between the Circuits.

Young alleged that his jury was conviction-prone in his first petition for habeas corpus in 1982. Relying on Eleventh Circuit precedent, the District Court denied the claim, and Young did not press the issue before the Eleventh Circuit. This habeas peti-

tion was fully litigated prior to the Eighth Circuit's decision in *Grigsby*. Young now pleads in his second federal habeas petition that the jury at his trial was "stacked" against him in precisely the way condemned by the en banc Eighth Circuit in *Grigsby*. For the reasons stated by JUSTICE MARSHALL in *Witt* v. *Wainwright*, *ante*, p. 1039 (MARSHALL, J., dissenting), Young's argument that a stay should be granted is compelling. *Sanders* v. *United States*, 373 U. S. 1, 17 (1963), left no doubt that a claim raised for the first time in a second or later habeas petition should receive full consideration if "the ends of justice" demand. There is no justice in sending Young to his death without the benefit of the full consideration of his claim that will surely come when this Court grants certiorari to decide the *Grigsby* issue.

MARCH 25, 1985*

Affirmed on Appeal

No. 83–1868. WHITE *v.* DOUGHERTY COUNTY BOARD OF EDUCATION ET AL. Affirmed on appeal from D. C. M. D. Ga. JUSTICE BLACKMUN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 579 F. Supp. 1480.

Appeals Dismissed

No. 84–18. TALAMINI, ADMINISTRATRIX OF THE ESTATE OF TALAMINI *v.* ALLSTATE INSURANCE CO. 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. JUSTICE WHITE, believing that there is no final judgment to review, would dismiss for want of jurisdiction.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring.

Appellant filed a two-count complaint against appellee seeking to recover damages under two Pennsylvania statutes.[1] The Dis-

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*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date, with the exception of No. 84–18, *Talamini, Administratrix of the Estate of Talamini* v. *Allstate Insurance Co.*, *infra*, this page.

[1] Count I sought recovery under Pennsylvania's No-fault Motor Vehicle Insurance Act, Pa. Stat. Ann., Tit. 40, §§ 1009.101–1009.701 (Purdon Supp. 1984–1985) (repealed 1984). Count II sought recovery under Pennsylvania's

trict Court granted a motion to dismiss Count II and appellant tried to appeal from that order under 28 U. S. C. § 1291. The Court of Appeals for the Third Circuit dismissed the appeal, presumably because the District Court's dismissal of only one count of the complaint was not a final order. Appellant has invoked our appellate jurisdiction under 28 U. S. C. § 1254, arguing that Pennsylvania courts would treat the District Court's dismissal as a final order and that the federal courts should also treat the dismissal as final under the collateral-order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). I find no merit to that argument and agree that the appeal should be dismissed; treating it as a petition for a writ of certiorari, the petition should be denied.

Appellee filed a nine-page motion to dismiss or affirm in which it correctly pointed out that a court of appeals does not have jurisdiction over an appeal from a district court order dismissing less than all of the claims alleged in a complaint unless the district court has made the express determination that Rule 54(b) of the Federal Rules of Civil Procedure requires.[2] In the concluding section of its printed motion, appellee requests the Court to award it "double costs and attorneys fees incurred."[3] Because three Members of the Court have expressed the opinion that the request should be treated as a formal motion and that it should be granted

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Unfair Insurance Practices Act, Pa. Stat. Ann., Tit. 40, §§ 1171.1–1171.15, and Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann., Tit. 73, § 201–9.2 (Purdon Supp. 1984–1985). The complaint was originally filed in the state court and removed by appellee to the Federal District Court because of the parties' diverse citizenship.

[2] Rule 54(b), entitled "JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES," provides:

"When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

[3] Motion to Dismiss or Affirm 9.

"to the extent of awarding appellee $1,000 against Bruce Martin Ginsburg, Esq., appellant's counsel, pursuant to this Court's Rule 49.2," *post*, at 1073, it is appropriate to explain briefly why the request should be denied.[4]

Appellee is entirely correct in pointing to the jurisdictional defect in this appeal. Moreover, it is a defect that competent counsel should readily recognize. Nevertheless, this procedural error is one that has been frequently overlooked by a large number of experienced attorneys and judges in other cases.[5] It is not the kind of egregious error that may properly provide the basis for sanctions against an attorney. There are, moreover, two additional reasons why it would be unwise judicial administration to grant a motion of this kind.

Because of the large number of applications for review that are regularly filed in this Court, the public interest in the efficient administration of our docket requires that we minimize the time devoted to the disposition of applications that are plainly without merit.[6] Any evenhanded attempt to determine which of the unmeritorious applications should give rise to sanctions, and which should merely be denied summarily, would be a time-consuming and unrewarding task. It would require us either to adopt a procedure for assessing a fair compensatory damages award in par-

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[4] The desire for similar action has been expressed in several cases in recent years. See, *e. g.*, *Potamkin Cadillac Corp.* v. *United States*, 462 U. S. 1144 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR, JJ.); *Escofil* v. *Pennsylvania*, 462 U. S. 1117 (1983) (REHNQUIST and O'CONNOR, JJ.); *In re Rush*, 462 U. S. 1117 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR, JJ.); *Garcia* v. *United States*, 462 U. S. 1116 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR, JJ.); *Gullo* v. *McGill*, 462 U. S. 1101 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR, JJ.).

[5] See, *e. g.*, *Burney* v. *Pawtucket*, 728 F. 2d 547, 549 (CA1 1984) *(per curiam); Wolf* v. *Banco Nacional de Mexico, S. A.*, 721 F. 2d 660, 661–662 (CA9 1983); *Liskey* v. *Oppenheimer & Co.*, 717 F. 2d 314, 321 (CA6 1983); *Sandoz* v. *Crain Brothers, Inc.*, 694 F. 2d 88, 89 (CA5 1982) *(per curiam);* cf. 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2657, pp. 60–61 (1983) ("Unfortunately, it is not always easy to tell whether a case involves multiple claims (to which Rule 54(b) is applicable) or a single claim supported by multiple grounds (to which Rule 54(b) is not applicable). The line between deciding one of several claims and deciding only part of a single claim is sometimes very obscure") (footnote omitted).

[6] Cf. *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 757, n. 4 (1980) ("The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law").

ticular cases, or to impose a somewhat arbitrary penalty whenever such a motion is granted. Unless there has been a gross abuse of the judicial process, or demonstrable and significant harm to a litigant, such action is unwarranted.[7]

Of greater importance than the practical problems associated with the processing of motions of this kind is the symbolic significance of the action that THE CHIEF JUSTICE proposes. Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation.[8] The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts

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[7] The earliest version of this Court's Rule 49.2, enacted in 1803, provided: "In all cases where a writ of error shall delay the proceedings on the judgment of the circuit court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of *ten per centum per annum*, on the amount of the judgment." Rules and Orders of the Supreme Court of the United States, 1 Cranch xvi, xviii (1803) (Rule XVII) (emphasis in original). Since that time the Rule has been revised and renumbered numerous times. See Rules of the Supreme Court of the United States, Revised and Corrected at December Term, 1858, 21 How. v, XIII (1858) (Rule 23.3); Rules of the Supreme Court Announced January 7, 1884, 108 U. S. 573, 586 (1884) (Rule 23.2); Revised Rules of the Supreme Court of the United States, 266 U. S. 653, 674 (1925) (Rule 28.2); Revised Rules of the Supreme Court of the United States, 275 U. S. 595, 617 (1928) (Rule 30.2); Revised Rules of the Supreme Court of the United States, 346 U. S. 951, 1006 (1954) (Rules 56.2 and 56.4). However, despite the 182-year existence of Rule 49.2 and its predecessors, it appears that they have rarely been invoked. See, *e. g.*, *Tatum* v. *Regents of University of Nebraska*, 462 U. S. 1117 (1983); *Bohn* v. *Bohn*, 316 U. S. 646, 647 (1942) *(per curiam)* ("it appearing that the appeal was frivolous and taken merely for delay"); *Roe* v. *Kansas*, 278 U. S. 191, 193 (1929); *Slaker* v. *O'Connor*, 278 U. S. 188, 190 (1929); *Wagner Electric Mfg. Co.* v. *Lyndon*, 262 U. S. 226, 232 (1923) ("We are asked by counsel for appellees to impose a penalty on the appellant for delay. The history of the case and the conduct of the Wagner Company leave no doubt that the litigation in the federal jurisdiction and the successive appeals have been prosecuted solely for delay"); *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 106 (1912) ("That the unsubstantial and frivolous character of the only Federal question relied upon of necessity embraces the conclusion that the writ was prosecuted for delay is in our opinion indubitable"); cf. *Gibbs* v. *Diekma*, 131 U. S. App. clxxxvi, clxxxvii (1880) ("[I]t is so apparent the appeal was vexatious and for delay only, that we adjudge to the appellees five hundred dollars as just damages for their delay").

[8] See, *e. g.*, *Abney* v. *United States*, 431 U. S. 651 (1977); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means.[9] This Court, above all, should uphold the principle of open access.

This is not, of course, to suggest that courts should tolerate gross abuses of the judicial process. If there is reason to believe that counsel have pursued unmeritorious litigation merely in order to generate fees for themselves, for example, judges should bring the matter to the attention of the appropriate disciplinary authorities.[10] Or if it appears that unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success, an award of double costs and damages occasioned by the delay may be appropriate.[11] But the strong presumption is

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[9] Justice Field eloquently penned this point on the occasion of the announcement of his retirement:

"As I look back over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a Republican government. But it is the most Democratic of all. Senators represent their States, and Representatives their constituents, but this court stands for the whole country, and as such it is truly 'of the people, by the people, and for the people.' It has indeed no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. *But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government . . . .*" Letter of Resignation of Justice Stephen J. Field, 168 U. S. App. 716 (1897) (emphasis added).

[10] See Model Rules of Professional Conduct and Code of Judicial Conduct, Rule 1.5 (1983) ("A lawyer's fee shall be reasonable").

[11] This Court's Rule 49.2 provides:

"When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

This Court's Rule 50.7 states that "[i]n an appropriate instance, the Court may adjudge double costs." Cf. Model Rules of Professional Conduct and Code of Judicial Conduct, Rule 3.2 (1983) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of his client"). The comment following this rule states:

"Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the

against the imposition of sanctions for invoking the processes of the law.

If the Court has treated appellee's request as a motion under our Rule 49.2, the Court has correctly denied the motion.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join.

I agree that we should dismiss this appeal, but I would go beyond that. This appeal is an attempt to invoke the Court's jurisdiction on an utterly frivolous claim. Such efforts should subject the attorney who filed the jurisdictional statement to the sanction of Rule 49.2 of this Court,* at least where, as here, the appellee has moved for an award of costs and fees.

Appellant, the administratrix of her husband's estate, filed a complaint in state court seeking insurance benefits from appellee. Count I of the complaint sought benefits under Pennsylvania's No-fault Motor Vehicle Insurance Act, Pa. Stat. Ann., Tit. 40, §§ 1009.101–.701 (Purdon Supp. 1984–1985) (repealed 1984). Count II alleged that appellee had violated Pennsylvania's Unfair Insurance Practices Act, *id.*, § 1171.1 *et seq.*, and sought statutory

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purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."

See also *id.*, Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"). The comment to that rule, in pertinent part, states:

"[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change. . . . [An] action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."

*Rule 49.2 provides: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

penalties under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann., Tit. 73, § 201–9.2 (Purdon Supp. 1984–1985).

Appellee removed the suit to Federal District Court based on the parties' diversity of citizenship. On appellee's motion, the District Court dismissed Count II for failure to state a claim upon which relief could be granted, holding that the Pennsylvania laws upon which appellant relied do not provide any private right of action. Appellant immediately appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals granted appellee's motion to dismiss on the grounds that the District Court decision was not a final judgment and that the Court of Appeals thus lacked jurisdiction. Appellant then filed a jurisdictional statement with this Court, asserting that the Court of Appeals' dismissal of her appeal was erroneous and a violation of due process.

The Court of Appeals' action was unquestionably correct. See 28 U. S. C. § 1291; Fed. Rule Civ. Proc. 54(b). Not only is appellant's appeal to this Court completely frivolous on the merits, but also her attempt to bring the case here by way of appeal is totally improper; appellate jurisdiction is plainly lacking. See 28 U. S. C. § 1254(2).

Appellee has moved for an award of costs and fees for its expense in responding to this frivolous appeal. We afforded appellant the opportunity to respond to this motion; appellant's response provided nothing to meet the claim that the appeal is demonstrably frivolous. I would grant the motion to the extent of awarding appellee $1,000 against Bruce Martin Ginsburg, Esq., appellant's counsel, pursuant to this Court's Rule 49.2.

It is suggested that two objectives justify the Court's refusal to apply Rule 49.2 in this and similar cases: (a) efficient use of the Court's time, and (b) affirmance of the principle of free access to the courts. Both objectives unquestionably are commendable, but the perspective is too narrow. Judicious use of the sanction of Rule 49.2 in egregious cases—and this is an egregious case—should discourage many of the patently meritless applications that are filed here each year. In the long run, this is the more effective way to "minimize the time devoted to the disposition of applications that are plainly without merit," *ante*, at 1069; after all, that is the whole purpose of Rule 49.2. Further, while freedom of access to the courts is indeed a cherished value, every misuse of any court's time impinges on the right of other litigants with valid

or at least arguable claims to gain access to the judicial process. The time this Court expends examining and processing frivolous applications is very substantial, and it is time that could be devoted to considering claims which merit consideration.

Rule 49.2 has a purpose which has too long been ignored; it is time we applied it. I would apply it here.

No. 84–337. CRUMPACKER *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question.

CHIEF JUSTICE BURGER.

I agree that we should dismiss this appeal for want of a substantial federal question, but I would go beyond that. This effort to invoke the Court's jurisdiction on an utterly frivolous claim should subject the attorney who filed the jurisdictional statement to the sanction of Rule 49.2 of this Court.

Appellant Owen W. Crumpacker, formerly a licensed attorney in a Hammond, Indiana, law firm was disbarred by order of the Indiana Supreme Court on November 29, 1978. *In re Crumpacker*, 269 Ind. 630, 383 N. E. 2d 36 (1978), cert. denied, 444 U. S. 979 (1979). Appellant continued to practice law despite his disbarment. On February 11, 1982, following a hearing, the Indiana Supreme Court held appellant in contempt for defying the 1978 disbarment order; appellant was also held in contempt as a result of his disruptive behavior during the hearing and served a 90-day sentence for the contempt. *In re Crumpacker*, 431 N. E. 2d 91. His appeal was dismissed for want of a substantial federal question, 459 U. S. 803 (1982).

On release, appellant continued to ignore the Indiana Supreme Court's disbarment order. On July 25, 1983, the Indiana Supreme Court Disciplinary Commission filed another complaint against appellant, alleging that he was again practicing law without a license. After appellant failed to appear at the hearing scheduled for November 15, 1983, despite being duly notified, the Indiana Supreme Court ordered that a warrant issue for appellant's arrest. Appellant was apprehended on April 4, 1984, and brought before the Indiana Supreme Court to show cause why he should not be found in contempt for his failure to appear. After a hearing, in which appellant offered no reasonable explanation for his failure to abide by the disbarment order, the Indiana Supreme Court once again

found appellant in contempt and ordered him confined to 30 days in prison.

Appellant's jurisdictional statement filed in this Court launches an utterly frivolous constitutional attack on the Indiana Supreme Court's power to hold him in contempt for ignoring its orders and for disbarring him in 1978. The Indiana Supreme Court's authority over unauthorized practitioners of law is beyond dispute. See, *e. g.*, Ind. Code §§ 33–2—3–1 and 34–4—7–3 (1982). On this record there is no conceivable basis for raising any challenge to the order of the Indiana Supreme Court holding appellant in contempt for failing to appear at the November 15 hearing.

I would award appellee $1,000 against Andrew G. Kohlan, Esq., appellant's attorney, pursuant to this Court's Rule 49.2.*

No. 84–1155. WESTINGHOUSE ELECTRIC CORP. *v.* KING, COMMISSIONER OF REVENUE OF TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 678 S. W. 2d 19.

No. 84–1303. CADDO PARISH SCHOOL BOARD *v.* BRYAN ET AL. Appeal from Ct. App. La., 2d Cir., dismissed for want of substantial federal question. Reported below: 455 So. 2d 699.

No. 84–6164. RIDER *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 3d Dist., dismissed for want of substantial federal question. Reported below: 449 So. 2d 903.

No. 84–1176. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK ET AL. Appeal from Ct. App. N. Y. Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted. Request of counsel for appellant to delete Brooklyn Union Gas Co. as a party to this proceeding denied. Appeal dismissed for want of substantial federal question. Reported below: 63 N. Y. 2d 424, 472 N. E. 2d 981.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, 92 Stat. 3117 (PURPA), is part of a broad congressional

*Rule 49.2 provides: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or respondent appropriate damages."

response to the energy crisis. One of its provisions, § 210 of Title II, 16 U. S. C. § 824a–3, is designed to promote the development of alternative energy resources by overcoming the historical reluctance of electric utilities to purchase power from nontraditional facilities. *FERC* v. *Mississippi*, 456 U. S. 742, 750 (1982). Section 210(a) authorizes the Federal Energy Regulatory Commission (FERC) to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to purchase electricity from qualifying small power production facilities. Section 210(b) requires that the rates for such purchases be "just and reasonable" and nondiscriminatory, and that no FERC rule "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy."

Pursuant to § 210(a), FERC requires utilities to purchase electricity from qualifying facilities. See 18 CFR § 292.303(a)(1984). In an apparent effort to encourage decentralized power production as much as possible, FERC adopted the maximum rate allowed by the statute—the incremental, or "full avoided cost," standard—for such purchases. See § 292.304(b)(2); see also 45 Fed. Reg. 12214, 12222 (1980). We upheld its choice in *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U. S. 402 (1983).

Though PURPA is a federal statute whose administration lies with FERC, "implementation" of the statute is left in large measure to the States. See § 210(f), 16 U. S. C. § 824a–3(f); 18 CFR § 292.401(1984). Thus, a State can, under certain circumstances, set rates that are lower than full avoided costs, 18 CFR § 292.304(b)(3)(1984); a qualifying facility and a utility can negotiate for lower rates, § 292.301(b)(1); and the state regulatory authority or any nonregulated utility may apply to FERC for a waiver, § 292.403. The question in the present case is just how far a State can go in the other direction. In particular, the question is whether a State can require utilities to pay more than the full avoided cost rate for their mandatory purchases.

New York has set a minimum rate of six cents per kilowatt hour for utility purchases from qualifying facilities. N. Y. Pub. Serv. Law § 66–c (McKinney Supp. 1984–1985). Appellant challenged the law, arguing that it could not be required to pay six cents per kilowatt hour for the times when its avoided costs fell below that amount. The Appellate Division of the New York Supreme

Court agreed. 98 App. Div. 2d 377, 471 N. Y. S. 2d 684 (1983). It held the six cent per kilowatt hour minimum invalid to the extent it exceeded the federally mandated avoided cost rate. In its view, PURPA, coupled with the Federal Power Act, occupied the field of energy regulation, and FERC had exclusive ratesetting jurisdiction. It also relied on the statute's "just and reasonable" provision, which requires "consideration of potential rate savings to consumers," *American Paper Institute, supra,* at 415, n. 9, and on a statement in the legislative history that incremental cost was to be "an upper limit on the price at which utilities can be required under this section to purchase electric energy," H. R. Conf. Rep. No. 95–1750, p. 98 (1978).

The New York Court of Appeals reversed, 63 N. Y. 2d 424, 472 N. E. 2d 981 (1984), viewing the state and federal laws as complementary rather than conflicting. The court read both the statute and the legislative history to intend a cap only on rates set by FERC, and noted that the New York statute was consistent with the federal Act's overall purpose. It also pointed out that FERC, in explaining its regulations, had said that "the States are free under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies," and that only state rates *below* the federal rate would have to "yield to federal law." 45 Fed. Reg., at 12221.*

In upholding the New York statute, the Court of Appeals reached a conclusion in conflict with the Kansas Supreme Court. See *Kansas City Power & Light Co.* v. *Kansas Corporation Comm'n,* 234 Kan. 1052, 676 P. 2d 764 (1984). Relying on the statement in *American Paper Institute* that the avoided cost rate "applies in the absence of a waiver or a specific contractual agreement," 461 U. S., at 416, the Kansas court held that the state regulatory commission could not set rates for purchases from cogenerators that were higher than avoided cost.

There is no reconciling the decisions of these two state courts of last resort. Both rest on plausible arguments. The question over which they are divided, and which, in the posture of this case, falls

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*Commentators have relied on these statements to conclude that the States can set higher rates. *E. g.*, Lornell, A PURPA Primer, 3 Solar L. Rep. 31, 53 (1981); Lock, Statewide Purchase Rates Under Section 210 of PURPA, 3 Solar L. Rep. 419, 445–450 (1981).

within our mandatory jurisdiction, is substantial. Moreover, it has arisen in other proceedings, see Lock, Statewide Purchase Rates Under Section 210 of PURPA, 3 Solar L. Rep. 419, 445 (1981), and should be expected to recur. Appellant points to 10 other States besides New York that have authorized or required payments to qualifying facilities in excess of avoided cost. Juris. Statement 12, n. Oregon, for example, has established a rate said to be "well in excess of avoided costs" on the theory that the statutory ceiling applies only to FERC. Hagler, Utility Purchases of Decentralized Power: The PURPA Scheme, 5 Stan. Envtl. L. Ann. 154, 163 (1983). Overall, the States have taken a variety of approaches to ratesetting under PURPA. See generally Lock & Van Kuiken, Cogeneration and Small Power Production: State Implementation of Section 210 of PURPA, 3 Solar L. Rep. 659 (1981). The effective, orderly, and consistent administration of PURPA requires that the extent of their authority to do so be settled.

The federal question here is thus "substantial" in two senses—it is both open to debate and important. I dissent from the Court's conclusion to the contrary.

No. 84–1293. KELLEY *v.* TEXAS REAL ESTATE COMMISSION. Appeal from Ct. App. Tex., 14th Sup. Jud. Dist., dismissed for want of jurisdiction. Reported below: 671 S. W. 2d 936.

Vacated and Remanded on Appeal

No. 84–1082. OPPENHEIMER & CO., INC. *v.* YOUNG. Appeal from Sup. Ct. Fla. Judgment vacated and case remanded for further consideration in light of *Dean Witter Reynolds Inc.* v. *Byrd*, *ante*, p. 213. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 456 So. 2d 1175.

Certiorari Granted—Vacated and Remanded

No. 83–2101. DANIEL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lindahl* v. *Office of Personnel Management*, *ante*, p. 768. Reported below: 732 F. 2d 167.

No. 83–6034. SWANSON *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. C. A. Fed. 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

Lindahl v. *Office of Personnel Management*, *ante*, p. 768. Reported below: 723 F. 2d 69.

No. 83–6093. GATES *v.* U. S. POSTAL SERVICE. C. A. Fed. 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 *Lindahl* v. *Office of Personnel Management*, *ante*, p. 768. Reported below: 727 F. 2d 1117.

No. 83–6440. SMITH *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. 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 *Lindahl* v. *Office of Personnel Management*, *ante*, p. 768. Reported below: 727 F. 2d 1117.

No. 83–7032. BOWDEN *v.* FRANCIS, WARDEN. 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 *Ake* v. *Oklahoma*, *ante*, p. 68. Reported below: 733 F. 2d 740.

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

By its action today, the Court vacates the judgment of the Court of Appeals and remands this case for reconsideration in light of *Ake* v. *Oklahoma*, *ante*, p. 68. Because I believe that *Ake* is not applicable to the present case, I respectfully dissent.

Petitioner was convicted of murder and sentenced to death. Before trial, defense counsel filed a special plea of insanity and requested the appointment of a psychiatrist to examine petitioner. The trial court, after a hearing, found that the evidence suggesting petitioner's incompetency was insufficient to warrant a psychiatric examination. The court then advised defense counsel that it would proceed to summon a jury to try petitioner on the issue of competence to stand trial if petitioner wished to litigate his special plea of insanity. Counsel rejected the offer and withdrew the special plea. Petitioner subsequently took the stand at trial and testified coherently in his own behalf. After his conviction and sentence were affirmed on direct appeal, petitioner sought federal habeas relief arguing that the trial court should have granted the

requested psychiatric examination to determine his competency and that he also should have received the assistance of a psychiatrist to gather mitigating evidence.

The Court of Appeals affirmed the District Court's denial of habeas relief. 733 F. 2d 740 (CA11 1984). With respect to the trial court's refusal to order a pretrial examination, the Court of Appeals agreed with the Federal District Court and the state courts that petitioner had failed to present evidence raising a bona fide doubt as to his competency. As to psychiatric assistance to gather mitigating evidence, the Court of Appeals found no constitutional error because petitioner had not requested the state trial court to appoint a psychiatrist for that purpose. The petition before this Court renews the contentions that the trial court erred in not ordering a pretrial psychiatric examination and that petitioner was entitled to the assistance of a psychiatrist to present mitigating evidence. The Court of Appeals will be understandably confused by the Court's action in vacating the judgment and remanding for reconsideration in light of *Ake*. Because *Ake* does not suggest that the Court of Appeals erred in its disposition of this case, I would deny the petition for certiorari.

No. 84–244. FLORIDA *v.* NEASE, AKA COLWELL. Dist. Ct. App. Fla., 4th Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida* v. *Rodriguez*, 469 U. S. 1 (1984). Reported below: 442 So. 2d 325.

Miscellaneous Orders

No. — – ——. LYNN *v.* ILLINOIS. Motion to direct the Clerk to file a petition for writ of certiorari without the affidavit of indigency executed by petitioner denied.

No. A–695. DRAPE *v.* UNITED STATES. C. A. 8th Cir. Application to recall and stay pending timely filing of a petition for writ of certiorari, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–452. IN RE DISBARMENT OF SHANKMAN. Disbarment entered. [For earlier order herein, see 469 U. S. 808.]

No. D–454. IN RE DISBARMENT OF WEST. Disbarment entered. [For earlier order herein, see 469 U. S. 808.]

No. D–461. IN RE DISBARMENT OF POWERS. Disbarment entered. [For earlier order herein, see 469 U. S. 978.]

No. D–468. IN RE DISBARMENT OF DIANGELUS. Disbarment entered. [For earlier order herein, see 469 U. S. 1083.]

No. D–469. IN RE DISBARMENT OF UTERMAHLEN. Disbarment entered. [For earlier order herein, see 469 U. S. 1102.]

No. D–484. IN RE DISBARMENT OF WOLLRAB. It is ordered that James Edward Wollrab, of St. Louis, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–485. IN RE DISBARMENT OF LOGAN. It is ordered that Alex Gerhart Logan III, of Tustin, 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.

No. D–486. IN RE DISBARMENT OF DELK. It is ordered that Leonard Adolph Delk, of San Diego, 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.

No. D–487. IN RE DISBARMENT OF TABMAN. It is ordered that Irving Tabman, of Island 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. 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, 469 U. S. 814];

No. 83–2161. MONTANA ET AL. *v.* BLACKFEET TRIBE OF INDIANS. C. A. 9th Cir. [Certiorari granted, 469 U. S. 815]; and

No. 84–9. MASSACHUSETTS MUTUAL LIFE INSURANCE CO. ET AL. *v.* RUSSELL. C. A. 9th Cir. [Certiorari granted, 469 U. S. 816.] Cases restored to calendar for reargument.

No. 84–435. RUSSELL *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 469 U. S. 1206.] Motion of the Solicitor General to permit Christopher J. Wright, Esquire, to present oral argument *pro hac vice* granted.

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, 469 U. S. 1156.] Motion of the Solicitor General for divided argument granted.

No. 84–786. MAINE *v.* MOULTON. Sup. Jud. Ct. Me. [Certiorari granted, 469 U. S. 1206.] Motion for appointment of counsel granted, and it is ordered that Anthony Whitcomb Beardsley, Esquire, of Ellsworth, Me., be appointed to serve as counsel for respondent in this case.

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, 469 U. S. 1207.] Motion of the parties to dispense with printing the joint appendix granted.

No. 84–822. AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. *v.* HAROCO, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 469 U. S. 1157.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 84–5636. ALCORN *v.* SMITH, WARDEN. C. A. 6th Cir. [Certiorari granted, *ante*, p. 1003.] Motion for appointment of counsel granted, and it is ordered that Mary Gail Robinson, of Frankfort, Ky., be appointed to serve as counsel for petitioner in this case.

No. 84–6315. IN RE MCDONALD. Petition for writ of habeas corpus denied.

No. 84–6168. IN RE CARTER; and

No. 84–6179. IN RE STRAGER. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 84–1044. PACIFIC GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Appeal from Sup. Ct. Cal. Probable jurisdiction noted. JUSTICE BLACKMUN took no part in the consideration or decision of this case.*

No. 84–1076. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL. Appeal from Sup. Ct. Miss. Probable jurisdiction noted. Reported below: 457 So. 2d 1298.

No. 84–1244. DAVIS ET AL. *v.* BANDEMER ET AL. Appeal from D. C. S. D. Ind. Motion of appellees to strike the brief of Members of the California Democratic Congressional Delegation as *amicus curiae* denied. Probable jurisdiction noted. Reported below: 603 F. Supp. 1479.

Certiorari Granted

No. 84–1240. LAKE COAL CO., INC. *v.* ROBERTS & SCHAEFER CO. C. A. 6th Cir. Certiorari granted. Reported below: 751 F. 2d 386.

No. 84–1273. REGENTS OF THE UNIVERSITY OF MICHIGAN *v.* EWING. C. A. 6th Cir. Certiorari granted. Reported below: 742 F. 2d 913.

Certiorari Denied. (See also No. 84–18, *supra.*)

No. 83–1275. OREGON DEPARTMENT OF COMMERCE *v.* PAYNE. Ct. App. Ore. Certiorari denied. Reported below: 61 Ore. App. 165, 656 P. 2d 361, and 62 Ore. App. 433, 661 P. 2d 119.

No. 83–1629. MILLER *v.* MERCY HOSPITAL. C. A. 4th Cir. Certiorari denied. Reported below: 720 F. 2d 356.

No. 84–808. NEVADA ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 741 F. 2d 257.

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*See also note *, *supra*, p. 1067.

No. 84–944. HEIMBACH, COUNTY EXECUTIVE OF ORANGE COUNTY *v.* CHU, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 744 F. 2d 11.

No. 84–950. MYERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 745 F. 2d 733.

No. 84–988. CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC) *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 240 U. S. App. D. C. 203, 744 F. 2d 827.

No. 84–1058. OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* BOWMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 1207.

No. 84–1139. BRENNAN ET AL. *v.* HOBSON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 237 U. S. App. D. C. 219, 737 F. 2d 1.

No. 84–1204. MIMS *v.* INTERNAL REVENUE SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 51.

No. 84–1217. STERLING DRUG INC. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 741 F. 2d 1146.

No. 84–1219. KLIMEK *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 84–1221. ROLLFORM INC. ET AL. *v.* WEINAR ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 744 F. 2d 797.

No. 84–1226. BADHAM ET AL. *v.* SECRETARY OF STATE OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 36.

No. 84–1228. HOLMES ET AL. *v.* ROSS, INDEPENDENT EXECUTOR OF THE ESTATE OF ROSS. Ct. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 672 S. W. 2d 315.

No. 84–1246. DAHLBERG *v.* BECKER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 748 F. 2d 85.

No. 84–1251. OHIO *v.* LUCK. Sup. Ct. Ohio. Certiorari denied. Reported below: 15 Ohio St. 3d 150, 472 N. E. 2d 1097.

No. 84–1254. LOCAL UNION NO. 2812, LUMBER, PRODUCTION & INDUSTRIAL WORKERS *v.* MISSOULA WHITE PINE SASH CO. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 1384.

No. 84–1315. CAPPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 372.

No. 84–1318. PIPELINE LOCAL UNION NO. 38, AFFILIATED WITH THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 1001.

No. 84–1327. SOTO ET AL. *v.* DICKEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 744 F. 2d 1260.

No. 84–1331. RODGERS *v.* UNITED STATES; and
No. 84–1342. SARGENT ELECTRIC CO. ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 750 F. 2d 1183.

No. 84–1333. CUTAIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 373.

No. 84–1335. SHNURMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 1466.

No. 84–1337. MANDALAY SHORES COOPERATIVE HOUSING ASSN., INC., ET AL. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 746 F. 2d 813.

No. 84–5195. BERNA *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 282 Ark. 563, 670 S. W. 2d 434.

No. 84–5597. MONAGHAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 239 U. S. App. D. C. 275, 741 F. 2d 1434.

No. 84–5662. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1450.

No. 84–5742. GALLOWAY *v.* ALLSBROOK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1471.

No. 84–5904. BALLARD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 228 Va. 213, 321 S. E. 2d 284.

No. 84–5951. NEAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 743 F. 2d 1441.

No. 84–5955. GOETZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–6067. JAMES *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 679 S. W. 2d 238.

No. 84–6144. DAY *v.* AMOCO CHEMICALS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1462.

No. 84–6147. MCNEAIR *v.* SUBURBAN HOSPITAL ASSN., INC. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 31.

No. 84–6155. HILL *v.* STATE BAR OF GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. 422, 321 S. E. 2d 731.

No. 84–6157. MOORE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 84–6172. COKER *v.* WILLIAMS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 648.

No. 84–6173. DINGLE *v.* SIMPKINS, ADMINISTRATOR OF THE ESTATE OF DINGLE. Sup. Ct. S. C. Certiorari denied.

No. 84–6175. SIBIGA ET UX. *v.* HETTLEMAN ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 59 Md. App. 739.

No. 84–6180. CURRIE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 84–6188. FLORES *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 745 F. 2d 338.

No. 84–6193. KLAYER *v.* AVERY FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 13.

No. 84–6201. BRODIS *v.* DETROIT BOARD OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 384.

No. 84–6206. STUCKEY *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 84–6207. SOLOMON *v.* HARRIS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 749 F. 2d 1.

No. 84–6208. WILLIAMS *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH CO. C. A. 11th Cir. Certiorari denied.

No. 84–6225. PROVOW *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 84–6243. BETKA *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied.

No. 84–6281. LOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 717.

No. 84–6282. GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84–6291. RODRIGUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 751 F. 2d 875.

No. 84–6323. FABIAN *v.* RYAN. C. A. 11th Cir. Certiorari denied.

No. 84–6330. JAQUES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84–6334. KARABINAS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 63 N. Y. 2d 871, 472 N. E. 2d 321.

No. 84–1047. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* SMITH. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 741 F. 2d 1248.

No. 84–1099. SOUTHWEST SECURITY EQUIPMENT CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Motion of National Right to Work Legal Defense Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 736 F. 2d 1332.

No. 84–1110. 40 EASTCO *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.* Reported below: 746 F. 2d 135.

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*See also note *, *supra*, p. 1067.

No. 84–5870. FINNEY *v.* GEORGIA. Sup. Ct. Ga.;

No. 84–6139. SMITH *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;

No. 84–6153. PARKER *v.* FLORIDA. Sup. Ct. Fla.;

No. 84–6255. BRILEY *v.* BASS, WARDEN. C. A. 4th Cir.; and

No. 84–6275. WELCOME *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: No. 84–5870, 253 Ga. 346, 320 S. E. 2d 147; No. 84–6139, 741 F. 2d 1248; No. 84–6153, 458 So. 2d 750; No. 84–6255, 750 F. 2d 1238; No. 84–6275, 458 So. 2d 1235.

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. 84–5943. THOMAS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 301 Md. 294, 483 A. 2d 6.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Maryland Court of Appeals insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

To my mind, the Constitution requires that the State bear the burden of proving that a death sentence is appropriate in a given case. In two ways, the Maryland statute precludes this allocation of the burden of proof. First, it places on the defendant the burden of convincing the sentencer that mitigating evidence outweighs aggravating evidence, and it *requires* that a death sentence be imposed whenever aggravating factors are not outweighed. Md. Ann. Code, Art. 27, § 413(h)(1982). The statute thereby places on the defendant the burden of proving that which is, under the existing statute, the ultimate question.

Second, by requiring that death be the sentence whenever aggravating factors are not outweighed, the statute prevents the sentencer from making what to my mind must be the ultimate inquiry: whether death is the appropriate sentence in a given defendant's case. For the reasons I stated earlier this Term in *Stebbing* v. *Maryland*, 469 U. S. 900 (1984) (dissenting from denial of certiorari), I believe that such a statute is unconstitutional, and I therefore dissent from the Court's refusal to hear this case.

No. 84–6174. MITCHELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Certiorari denied. Reported below: 105 Ill. 2d 1, 473 N. E. 2d 1270.

Rehearing Denied

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), 469 U. S. 1100;

No. 84–5783. BILLIOT *v.* MISSISSIPPI, 469 U. S. 1230; and

No. 84–5901. CHANEY *v.* NATIONAL RAILROAD PASSENGER CORPORATION, 469 U. S. 1221. Petitions for rehearing denied.